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Contents

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LexisNexis Butterworths

General Editor's note

Karen Lee *LEGAL-KNOW-HOW*

Welcome to another issue of the *Financial Services Newsletter*.

Did you know how deficiencies in a financial institution's systems or processes can give rise to a claim for misleading or deceptive conduct? And did you know what financial institutions can do to mitigate the risk of such a claim? In his article "Examining defective systems through the lens of the law relating to misleading and deceptive conduct", **Brendon Clarke** (Corrs Chambers Westgarth) answers these and other questions for us. I would like to welcome Brendon to our author community. I look forward to publishing many more articles by Brendon in the near future!

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) found many issues in the add-on insurance market. These include poor-value products, unfair sales practices and outcomes, and worse claims outcomes than in other insurance markets. The deferred sales model was introduced by Parliament in December 2020, following a recommendation of the Banking Royal Commission. It introduces a mandatory 4-day pause between the sale of a principal product or service and the sale of add-on insurance. What do lenders need to know about the deferred sales model? You will find the answer in "Lenders and the add-on insurance deferred sales model regime", by editorial panel member **Andrea Beatty**, together with **Shannon Hatheier** and **Tom Murdoch** (Piper Alderman). The authors take a look at ASIC's *Regulatory Guide 275 — The deferred sales model for add-on insurance*, and consider the practical impacts for lenders.

Next, I am delighted that **Frank Downes** (Juris IT Services) writes for us again, and his article has this opening paragraph which I will use here as a teaser:

> Most people have heard of the dark web but are unclear on what it really is. For lawyers working in the banking and finance space it is important to know and understand what the dark web is and how it can potentially affect your clients. This area presents an excellent opportunity for a lawyer to be proactive and offer advice to their clients to assist them in meeting their compliance requirements.

Thank you, Frank, for sharing your expertise, in yet another article full of practical tips.

If you are looking for a practitioner-focused reference text that provides a comprehensive treatment of all aspects of winding up in insolvency, then *Assaf's Winding Up in Insolvency 3rd edn* may be the text for you. Financial services lawyers would benefit from having a text on their bookshelf that discusses the requirements of winding up in insolvency, such as those relating to establishing insolvency, setting aside statutory demands, and opposing winding up applications. Is this work an essential reference text for you? Editorial panel member of the *Australian Banking and Finance Law Bulletin* **Nicholas Mirzai** (Level 22 Chambers) has penned a book review to help our readers make this decision.

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Karen Lee is the General Editor of the Australian Banking & Finance Law Bulletin and the Financial Services Newsletter. She also partners LexisNexis in other capacities, including as Specialist Editor for precedents in banking and finance, mortgages and options, and as contributing author of a number of other publications, including Australian Corporate Finance Law, Halsbury's Laws of Australia and Practice Guidance for General Counsel. Karen established her legal consulting practice, Legal Know-How, in 2012. She provides expert advice to firms and businesses on risk management, legal and business process improvement, legal documentation, regulatory compliance and knowledge management. Prior to this, Karen worked extensively in-house, including as Head of Legal for a leading Australasian non-bank lender, as well as in top-tier private practice, including as Counsel at Allen & Overy and Clayton Utz.

Examining defective systems through the lens of the law relating to misleading and deceptive conduct

Brendon Clarke *CORRS CHAMBERS WESTGARTH*

A number of the case studies examined by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) involved instances where a financial institution failed to deliver what it had sold to customers due to deficiencies in its systems or processes.

The Royal Commission highlighted that when financial products or services are not delivered in accordance with contractual promises, there may be occasions where such failures should "be examined through the lens of the law relating to misleading and deceptive conduct".[1]

This observation clearly resonated with the Australian Securities and Investments Commission (ASIC) which has since commenced investigations and litigation against major financial institutions in relation to system defects which meant customers did not receive what they had been promised.

In spite of ASIC's recent leadership changes, ASIC's new chairman, Joe Longo, and head of enforcement, Sarah Court, have both made it clear that the regulator remains focused on issues stemming from inadequate systems. In a nod to the Royal Commission, Mr Longo has observed that continuing system failures are so common among financial institutions that "Hayne was absolutely right to call it out".[2] Further, Ms Court has observed that ASIC is getting "breach reports from major institutions on a daily basis about systems errors and compliance errors that are causing widespread detriment to consumers".[3]

So how can defective systems give rise to a claim for misleading or deceptive conduct and what can financial institutions do to mitigate the risk of such a claim?

How can defective systems give rise to a claim for misleading or deceptive conduct?

When defective systems or processes lead to shortcomings in the provision of a financial product or service, two avenues may be open to ASIC under the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) to pursue a claim for misleading or deceptive conduct. A claim may be available under either or both of:

- s 12DA which proscribes conduct that is misleading or deceptive in connection with the supply or possible supply of financial services or
- s 12DB which proscribes the making of specified kinds of false or misleading representations in connection with the supply or possible supply of financial services

At one end of the spectrum a defective system may lead to a service provider making an express statement of fact which is plainly false or misleading and provides a clear basis for a claim. For example, assume that a bank offered a term deposit account with an interest rate of 3% per annum but a system error meant that some customers were credited with interest at a rate of 1% per annum. If the account statements issued to impacted customers referred by default to the payment of interest at a rate of 3% then plainly this would be a false representation.

The position is more complicated at the other end of the spectrum when defective systems cause processing or administrative errors that cannot be linked to an express statement of fact which is false or misleading. The balance of this article focuses on this scenario because it entails a significantly broader scope for liability than the more obvious scenario involving express statements of fact.

In the absence of a false or misleading statement of fact, a claim potentially can be constructed by reference to implied representations that may arise as a consequence of the making of contractual promises. Specifically, it has been held that a contractual promise will ordinarily amount to an implied representation that the promisor has both the *intention* and *capacity* to carry out the promise.[4] This means that if a financial institution publishes and enters into contractual terms and conditions for a financial service when it is unable to reliably deliver the service in accordance with those terms it might contravene the prohibitions on misleading or deceptive conduct and false or misleading representations under ss 12DA and 12DB of the ASIC Act, respectively.

While there will usually be no question that a financial institution intended to abide by its terms and conditions, if the delivery of a financial product or service was hampered by a poorly designed system this may indicate that the service provider lacked the capacity to make good its contractual promises to its customers.

Assume, for example, that a bank offered a savings account which paid bonus interest when certain deposit criteria were met. Due to design flaws in the IT system that assessed whether the criteria had been met, the bank failed to apply the bonus interest entitlements reliably and a proportion of the account holders did not receive interest payments despite satisfying the qualifying criteria. In this example, even if none of the account statements incorrectly stated that bonus interest had been paid, the bank may still be liable for misrepresenting that it had the capacity to administer the product in accordance with its terms and conditions.

A claim for misleading or deceptive conduct under s 12DA involves an enquiry into whether the impugned conduct had the tendency to lead another person into error.[5] Therefore, it is not difficult to see how the making of a false representation as to capacity to perform a contractual obligation could give rise to liability under s 12DA.

Section 12DB is narrower in scope because it prohibits the making of specified kinds of false or misleading representations. This includes representations with respect to the "price"[6] or "benefits" of the service.[7] Therefore, if a system defect resulted in fees or charges being imposed incorrectly or meant that customers missed out on entitlements such as discounts, waivers or preferential rates, a claim may be available under s 12DB on the basis that the advertising materials and contractual documents associated with the service carried false or misleading representations as to the service provider's capacity to:

- charge the correct "price" for the service (in the case of incorrect fees) or
- ensure customers received the "benefits" they were promised (in the case of missed entitlements)

Although the breadth of s 12DA may mean that it provides a more straightforward route to liability in many defective systems cases, a claim under s 12DB will invariably be more attractive to ASIC from an enforcement perspective because it is a pecuniary penalty provision whereas penalties cannot be imposed for a contravention of s 12DA. Therefore, to achieve maximum deterrence ASIC would likely seek to identify the making of a false or misleading representation of a kind that would enliven a pecuniary penalty claim under s 12DB.

Representations as to present facts and future matters

The making of a contractual promise may give rise to two distinct implied representations as to the adequacy of the promisor's systems and processes to deliver what has been promised, as follows:[8]

- first, that the promisor *presently has* adequate systems to deliver what has been promised (a representation as to a present fact) and
- second, that the promisor *will continue* to maintain adequate systems (a representation as to a future matter)

If the promisor's systems are inadequate, a separate claim may be available in relation to the falsity of each type of representation (under either or both of ss 12DA or 12DB of the ASIC Act depending upon the facts of the case).

In relation to the first type of claim, a person who makes a false representation as to a present fact can be liable for the misrepresentation irrespective of whether they knew or ought to have known that the representation was inaccurate or untrue.[9] This highlights that it is critically important for a financial institution to ensure that its systems and processes are adequately designed and functioning correctly *before* bringing a new product or service to market.

Different considerations arise if a claim is directed at the second type of representation because a representation as to a future matter (eg, that adequate systems will be maintained in future) is neither true nor false at the time it is made. This is addressed by s 12BB of the ASIC Act which provides that if a person makes a representation in relation to a future matter and the person does not have "reasonable grounds" for making the representation, it will be taken to be misleading. This deeming provision operates unless evidence is adduced to the contrary (ie, evidence that the party making the representation *did* have reasonable grounds).

An enquiry into whether there were reasonable grounds for a representation as to a future matter essentially focuses on the degree of care taken by the person who made the representation. What matters is the information that was available and relied upon at the time the representation was made. Importantly, this means that an honest belief in the accuracy of a representation that turns out to be false will not necessarily mean that it was made on reasonable grounds.[10]

Consequently, a financial institution that launches a product without taking due care to design and test the systems, controls and monitoring processes that will support the administration of the product may have difficulty in establishing it had reasonable grounds for representing to customers it would maintain the capacity to deliver the product in accordance with its terms and conditions. Of course, if a financial institution was aware of actual or potential system defects and still launched the affected product or continued offering it to customers in spite of this knowledge, this would almost certainly make it more difficult to establish reasonable grounds. The latter conduct may also contravene the prohibition on unconscionable conduct in s 12CB of the ASIC Act, which a court would likely regard as a more serious breach warranting higher penalties.

What can financial institutions do to mitigate the risk of claims targeting defective systems?

A financial institution will not necessarily be exposed to the risk of a claim for misleading or deceptive conduct simply because its systems do not operate flawlessly. As Commissioner Hayne acknowledged in the Royal Commission's final report, no system for processing the number and variety of transactions offered by financial institutions will ever operate perfectly.[11]

Obviously, the most important step a financial institution can take to reduce the risk of this type of claim is to allocate sufficient time and resources to ensure that the systems and processes required to support each feature of a new product or service are carefully and robustly designed.

To promote this type of product governance the Federal Government has signalled its intention to strengthen accountability for the management of financial products and services through its proposed Financial Accountability Regime (FAR),[12] which is poised to replace the existing Banking Executive Accountability Regime. Under the proposed FAR, it will be mandatory for all entities regulated by the Australian Prudential Regulation Authority to implement clear lines of accountability for end-to-end product management, including all steps in the design, delivery and maintenance of products and services offered to customers. This proposed legislative change responds directly to a recommendation of the Royal Commission and seeks to address a finding that a key factor that led to the processing and administrative errors examined by the Royal Commission was an absence of end-to-end accountability for the relevant products or services.[13]

Other steps a financial institution can take to mitigate the risk of system failures or the risk of a claim for misleading or deceptive conduct if systems do fail include the following:

- Attention should be directed not only to IT systems but also to any manual processes that will be involved in ensuring that a product or service functions as intended. Manual tasks should be assessed to identify opportunities to reduce complexity and thereby reduce the scope for human error. In addition, employees must be adequately trained to ensure that operating processes are clearly understood and manual tasks can be performed effectively.
- Monitoring and complaint handling processes should be designed to detect trends and systemic issues that may be indicative of underlying system defects. When an error in the delivery of a product or service is linked to a system defect it is critical to take prompt action to remedy the root cause. If a system defect is remediated soon after detection this may help to mitigate the severity of the breach and reduce the risk of regulatory enforcement action.
- If a system defect cannot be fixed promptly it may be necessary to notify customers of how the issue may impact on the delivery of the product or service. If full disclosure is provided this should ensure that customers are not misled about the characteristics of the product or service while the underlying problem is remedied.

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Footnotes

1. KM Hayne, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, vol 1, Final report (2019) p 114.
2. M Pelly "We love litigation, say new ASIC chiefs" *The Australian Financial Review* 3 September 2021, viewed 4 September 2021, www.afr.com/companies/financial-services/we-love-litigation-say-new-asic-chiefs-20210831-p58nnz.
3. Above.
4. *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217 at 239 per Ormiston J. Compare with *Concrete Constructions Group v Litevale Pty Ltd* (2002) 170 FLR 290; ATPR (Digest) 46-224; [2002] NSWSC 670; BC200204352 where Mason P

at [171]–[173] cautioned that it would be erroneous to read *Futuretronics* as stating that a contractual promise will always carry with it a representation of capacity to perform, and that there are policy reasons for restraint in inferring the making of or reliance upon a representation as to capacity to perform express contractual promises.

5. See, for example, *Australian Securities and Investments Commission (ASIC) v Westpac Banking Corp (No 2)* (2018) 266 FCR 147; 357 ALR 240; [2018] FCA 751; BC201804154 at [2216] and [2172] per Beach J; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110; ATPR 41-879; [2002] FCAFC 197; BC200203308 at [74] per Heerey J.
6. Australian Securities and Investments Commission Act 2001 (Cth), s 12DB(1)(g).
7. Above, s 12DB(1)(e).
8. See, for example, *Re McGrath; Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230; (2008) 246 ALR 514; (2008) ATPR ¶42-213; [2008] FCAFC 2; BC200800143 at [135]–[138] per Allsop J.
9. *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; 18 ALR 639 at 647 per Stephen J.
10. C Lockhart, *The Law of Misleading or Deceptive Conduct*, 5th edn, LexisNexis, Sydney, 2019, pp 162.
11. Above n 1, p 113.
12. The Australian Government, The Treasury, *Financial Accountability Regime — List of prescribed responsibilities and positions* Policy Proposal Paper (2021).
13. Relatedly, the need for effective product governance arrangements is also a core pillar of the new design and distribution obligations with which issuers and distributors of financial products must comply from 5 October 2021. The purpose of the design and distribution obligations is to help consumers obtain suitable financial products by requiring issuers and distributors to take a customer-centric approach to designing, marketing and distributing financial products (see the Parliament of the Commonwealth of Australia, Senate, *Revised Explanatory Memorandum for the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* at 1.5).

Lenders and the add-on insurance deferred sales model regime

***Andrea Beatty**, **Shannon Hatheier**, and **Tom Murdoch** PIPER ALDERMAN*

As 2021 enters its final stretch, so does the compliance deadline for the new deferred sales model regime for add-on insurance (DSM). In July 2021, the Australian Securities and Investments Commission (ASIC) published new guidance and finalised customer information requirements for industry participants. Notably, ASIC published Regulatory Guide 275: *The DSM for add-on insurance*[1] (RG 275) following consultation on draft proposals with various stakeholders. RG 275 will usher in monumental changes to business practices from 5 October 2021 as industries adapt to the new DSM regime.

"Add-on" insurance

"Add-on" insurance is a financial product offered or sold to cover risks associated with the sale of a principal product or service by the provider or a related party. Examples of this include consumer credit insurance offered with credit facilities (eg credit cards), tyre and wheel rim insurance offered with vehicles and screen protection insurance offered with mobile phones.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) highlighted that the sales process for add-on insurance inhibits informed consumer decision-making.[2] It concluded in many cases, add-on insurance can be unfairly imposed and can contribute to poor consumer outcomes.[3] The Banking Royal Commission also highlighted evidence of add-on insurance representing poor value for consumers in terms of claims ratios resulting from pressure-selling and commission-based sales methods.[4]

Developments in regulation

The DSM regime for add-on insurance was introduced to Federal Parliament in December 2020 under Sch 3 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (FSR Act). This change forms part of a larger suite of reforms inserted into the Corporations Act 2001 (Cth) that target how insurance products are designed and sold and how claims are managed. The reforms actioned the recommendations made by the Banking Royal Commission. Accordingly, the DSM regime introduces a mandatory 4-day pause between the sale of a principal product or service and the sale of related add-on insurance.

On 28 July 2021, ASIC released guidance to implement these laws. RG 275 explains ASIC's interpretation of the requirements that will apply to providers of add-on insurance products under the DSM regime and provides guidance on compliance.

DSM outline

In accordance with RG 275, "add-on insurance" products are now subject to a 4-day deferral period. This 4-day period commences on the later of either:

- the customer purchasing or entering into a commitment to acquire the primary product or
- when the customer is given the prescribed information about the add-on insurance

After this period, providers can offer add-on insurance for a period of up to 6 weeks unless the customer has requested not to be contacted. Two notable features of this regime include those set out below:

- *Definition of "add-on insurance"*
  Section 12DO of the FSR Act defines "add-on insurance product" as *a financial product offered or sold to a consumer in connection with that person acquiring another product or service known as the principal product or service*.
  It must be offered or sold by either the provider of the principal product or service or another person under an arrangement with the principal provider. The "add-on insurance product" must represent a "contract of insurance" or a financial product that provides for the customer to benefit from a contract of insurance.
- *RG 275 interpretation of "in connection with"*
  RG 275 recognises that the regime only applies to add-on insurance sold "in connection with" a principal product or service.[5] Accordingly, RG 275 considers that "in connection with" should be given its ordinary meaning.[6] However, "in connection with" may also include add-on insurance

> offered by third-party providers referred to by the principal product or service provider. An insurance product is not sold "in connection with" a principal product or service if the customer buys the insurance product on the standalone market, even if the seller of the insurance also sells insurance as an add-on insurance product.[7]

The practical effect is that a lender may provide a home loan product to a customer and, under an arrangement, give the customer's contact details to an issuer of consumer credit insurance. If the issuer of the insurance contacts the customer three weeks later, the offer will still be "in connection with" the customer acquiring the principal product.[8]

What are the practical impacts on lenders?

The DSM regime aims to help promote informed purchasing decisions by consumers in add-on insurance markets. Considering this, it is clear that lenders will have to change business practices to adapt to the new DSM regime. The is conceived by the following:

- The actual provision of credit will likely be deferred until after the deferral period to allow the lender to offer add-on insurance to be financed after the deferral period. In principal, this may drive lenders away from arrangements with insurers if their products are distributed on a point-of-sale basis.
- Where credit is provided before the end of the deferral period, lenders must consider mechanisms to amend the loan contract to allow for add-on insurance, while complying with disclosure and responsible lending obligations.
- Lenders may consider amending their loan application to provide for questions regarding the DSM regime and recording when the consumer had made the commitment to purchase the add-on insurance.

After the deferral period

If a lender is aware that the person selling the insurance has complied with the DSM regime, then they can assume that the borrower has had an adequate chance to consider whether the insurance contract will meet their requirements and objectives. The lender need not make further inquiries as to whether the borrower's requirements and objectives include obtaining finance for insurance. However, a lender must note their dual obligations. The lender must consider their responsible lending obligations and whether the loan meets the consumer's requirements and objectives.

Before the deferral period

Difficulties arise for a lender if it entered into a contract prior to the end of the deferral period. If a lender were to contract with the borrower to cover the cost of the principle product, the lender will need to consider how it amends the contract to include any add-on insurance. This also involves questions on how to comply with pre-contractual disclosures and meeting the responsible lending obligations.

General observations

DSM regime and RG 275 are likely to include the following practical impacts:

- In an instantaneous sale, it will become impossible for a consumer to be offered both credit and add-on insurance at the point of sale. If at the point of sale, a dealer wants to offer add-on insurance, it will be advisable they defer the provision of credit until the add-on insurance can be finalised.
- For loans, such as mortgages, the point at which a consumer is deemed to have entered into a commitment is when the consumer is informed in writing of the approval of the credit facility.
- Loan applications may include questions dealing with DSM, including questions regarding when the commitment has been made by the consumer to purchase the vehicle.
- It is likely that penalties will be imputed on lenders who finance add-on insurance and fail to comply with the DSM regime. Where ASIC believes on reasonable grounds that a person has committed an offence under the DSM regime, ASIC is empowered to issue an infringement notice for the alleged contravention.[9] In addition, a customer is entitled to a full refund of the amount paid for the add-on insurance product if the provider sells the product in breach of the DSM regime.
- The prohibitions in the deferred sales model are ordinary offences under ss 12GB and 93E of the ASIC Act. However, it is unclear whether a lender would be caught by these penalties if it were to finance an insurance contract that didn't comply with the DSM regime.

Conclusion

The DSM regime will require lenders to increase their vigilance in regards to deferral periods, and further, action new practises when offering financial products. Through this, RG 275 will ensure lenders improve their cultures to facilitate a positive consumer experience.

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Footnotes

1. Australian Securities and Investments Commission *The deferred sales model for add-on insurance* Regulatory Guide 275 (July 2021).
2. Treasury *Reforms to the sale of add-on insurance products* Proposal Paper (2019) 3.
3. Above.
4. Above n 1.
5. Above n 1, RG 275.19.
6. Above.
7. Above n 1, RG 275.22.
8. Above n 1, RG 275.20.
9. Australian Securities and Investments Commission Act 2001 (Cth), s 12GXA.

The dark web and your clients′ compliance obligations

Frank Downes *JURIS IT SERVICES*

Most people have heard of the dark web but are unclear on what it really is. For lawyers working in the banking and finance space it is important to know and understand what the dark web is and how it can potentially affect your clients. This area presents an excellent opportunity for a lawyer to be proactive and offer advice to their clients to assist them in meeting their compliance requirements.

What is the dark web?

Think of the web like an iceberg floating at sea. When you see the iceberg only around 10% of its total mass is visible above the waterline, the remaining 90% is below the surface. The web follows this same ratio.

The surface web is where the vast majority of people spend their day; Google, Bing and other search engines deliver results on information that is public-facing, open source and available for anyone to find.

Below the surface we have a subset of the internet that is not publicly accessible; this is known as the deep web. The dark web is a subset of the deep web.

The deep web is simply any content that sits behind some form of wall-encrypted content, password-protected pages and sites. For example, the files and content contained in your firms' Sharepoint or OneDrive. This content is only accessible if you have the password.

Content that sits behind a paywall on a news site is another good example. The surface web will show you the site exists, but you will require some form of credentials to access the information.

In contrast the dark web does not show up in any conventional search engine; it is that part of the internet that is intentionally hidden from search engines, uses masked addresses and can only be accessed using special types of browsers in order for its users to remain anonymous and untraceable. Websites on the dark web operate in their own unique environment that can't be searched.

There has been a lot of media attention generated by the conviction of the Silk Road founder and recent news items on hackers using the dark web to sell stolen identities. However, the dark web is not all illicit deals and criminal undertakings; journalists use the dark web to protect their sources' identities. Facebook recently launched a version of its site on the dark web to make it easier to access the site from countries that restrict the service, such as China and Iran.

While there is plenty of this relatively harmless activity taking place on the dark web, cybercriminals use it to coordinate and execute cyberattacks, as well as to sell stolen data. Some portions of the dark web are accessible to anyone willing to download its software. Other parts are invite-only, requiring special access and years of relationship-building to be accepted among the cybercriminal community. It is in this closed part of the dark web where information of high value — and substantial risk — to your firm and your clients can be found.

Common use cases for dark web risk

Here are the six most common dark web use cases, along with guidance on how you can collect and analyse pertinent intelligence to stop threat actors at the earliest stage of an attack.

Leaked credentials

Most cybercriminals are out to make a buck, and they do this by selling leaked credentials, identities, and privileged access to valuable databases — often sold in bundles called dumps. By monitoring criminal underground sources for mentions of employee and customer credentials for sale, you and your clients can proactively reset compromised credentials and potentially remove them from the market.

Bank debit and credit cards

Selling stolen bank cards is the most common type of fraud on the dark web. Everything a criminal needs to conduct fraud and ID theft, including credit card numbers, CVCs, names, date of birth, address, phone, are readily available for sale. A bank or financial institution that leverages threat intelligence tools to monitor its bank identification number on the dark web can easily see when customers' bank cards have been stolen and quickly buy the information, potentially saving thousands of dollars in fraudulent purchases.

Personally identifiable information (PII)

For the low price of $10 or less, potential threat actors can purchase a valuable combination of information, such as a tax file number, Medicare number or Centrelink customer reference number and matching date of birth. Like credential dumps, anonymised data featuring personally-identifying information and private health information are readily available for purchase. For law firms, using threat intelligence to closely monitor the dark web for compromised PII of your partners and senior staff is particularly valuable. For your clients they can be monitoring for the credentials of their senior staff and key customers.

Ransomware-as-a-service

Ransomware demands are doubling every 6 months, and for large enterprises, those demands are often for millions of dollars. Ransomware-as-a-Service (RaaS) is a malware rental service in which other cybercriminals can essentially rent out malware to conduct ransomware attacks.

Disinformation-as-a-service

Disinformation services that fuel negative sentiment about a company are publicly available in underground criminal forums at a relatively low cost. Disinformation service providers have the ability to publish articles in reputable media sources and create and maintain social media accounts to propagate content without triggering content moderation controls. Hard-to-counter rumours, lies, and misleading information can have disastrous consequences for you and your financial services clients.

Why you need to know about the dark web

There has been a lot of activity recently in the legislative sphere with a number of proposals that are going to impact you and your clients.

Recently, Labor MP Tim Watts introduced a private members' bill proposing a mandatory ransomware reporting framework, requiring notice to be provided to the Australian Cyber Security Centre upon payment of a ransom demand. This type of reporting is becoming prevalent overseas and it will become the norm here also.

Last month the Australian Government published a discussion paper on Australia's cyber security regulation and incentives. One point to note is the government is canvassing the imposition of mandated obligations. This continues the trend evidenced by the recent *Critical Infrastructure* legislation which imposes criminal sanctions in the event-specific conditions are met in the event of a data breach.

Boards and executives will face increasing scrutiny to maintain effective data governance practices to mitigate against cyber incidents and they must demonstrate there are adequate policies and procedures in place.

This trend represents an excellent area to grow your practice. At a corporate level your clients require legal advisors that can assist them with cyber incident planning and liability and exposure from cyber breach events. At a personal level you can provide advice to directors and executives on their personal exposure to claims and what their obligations are.

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JurisIT can assist you by providing the technical threat management that will enable you and your clients to monitor and resolve potential cyber incidents before they impact on the firm or the business.

Book review: Assaf's Winding Up in Insolvency 3rd edn

Nicholas Mirzai *LEVEL 22 CHAMBERS*

As with the first two editions of this text, *Assaf's Winding Up in Insolvency* presents the encyclopaedic knowledge and research of the author in a digestible form for the benefit of the profession at large. Those familiar with other texts penned by Mr Assaf SC would take great comfort in the author's continued and generous use of appendices and check-list style guides to various parts of the statutory framework, reducing some of the complexity from a myriad of often elaborate and detailed rules to a sensible and practical path. These short-form practitioner tools are, self-evidently, the product of extensive and detailed research which ought to be obvious to the reader even at first blush — indeed, a brief flick through of the case list of references made within the text makes the scope of the scholarly analysis undertaken quite clear. With these features drawing the readers back to the text frequently, it should be no surprise that the third edition remains a "ready reference" for practitioners in the insolvency and restructuring space (and, indeed, those who practice commercial law more broadly) as was its predecessors.

For those who have used and are familiar with this resource from its earlier incantations, you will find (and as his Honour Black J comments on in his foreword) comprehensive treatment and comment of the developing case law in respect of each topic and theme of the text. By way of example, the pre-insolvency statutory demand and presumption of insolvency chapters have not only been updated by way of case law references, but also by way of the developing attitude of the court to particular questions which commonly arise when dealing with such topics. An experienced reader, thus, has the advantage of the author's tutelage not only in respect of the position at law at the time of publishing but also as to those matters which remain contentious — or which might be contentious — should an appropriate case warrant further interrogation or consideration of certain matters. This is an incredibly useful shortcut to what is otherwise a growing mass of cases in heavily populated Corporations Lists across Australia in both State and Federal courts.

One particular aspect of *Assaf's Winding Up in Insolvency* which is particularly merit worthy is its treatment of discrete — and sometimes obscure — questions which have arisen directly or indirectly in the decided case law. Statutory demands in the context of foreign currency offers one such example, the interaction between the Corporations Act 2001 (Cth) and security of payments legislation in the building and construction space is another. Unlike other practitioner-focused texts which, perhaps understandably, relegate tangential topics to "further reading" sections — *Assaf's Winding Up in Insolvency* addresses such topics directly and with a view to arming the readers with all that one will find if they had conducted conscientious research themselves. That this has led to an increase in the size of the text is obvious. What is perhaps less obvious, and much more impressive, is the amount of information the readers is offered in the author's comprehensive style.

The same is true for the generous exposition of practice and procedure reflecting the author's experience in the court room, not only at final hearing, but from the time of filing of the appropriate Originating Process. Chapter 10 of the text is dedicated to anticipating the workings of the present Corporations Lists across the country detailing the scope and content of the ordinary Originating Process, what sort of interlocutory processes might arise upon an application for winding up, what to expect from a final hearing and what matters might arise ancillary to a final hearing — including the questions of costs. Whilst the text is not designed to address all of the complexities and nuances which arise from civil procedure more generally — the readers do enjoy the benefit of the transparent thought process of highly experienced counsel not only in the substantive sense, which one might also see from decided cases, but also in the forensic sense. The opinions of the learned author on such matters are not only influential but improve the standard of best practice in what is invariably a busy Court list with expedited timetables often representing the orthodox position in applications of this kind. One example, by way of illustration rather than definition, is the treatment of the divergence of authority in respect of s 459S(1)(b) of the Corporations Act which speaks to the circumstances where a company may not oppose a winding up application of particular grounds.[1] Whilst at all times respectful, the author is not shy to provide his thoughts as to the correctness of a particular approach or line of analysis where divergence has occurred or where matters are left in an unsatisfactory state having regard to the totality of the winding up framework and the rationale of the Corporations Act more broadly.

Of course, the legislative intervention and alteration of the insolvency framework following the COVID-19 pandemic presents wholly new substantive topic areas dealt with by the text. Without limitation, ch 4 deals with this in the context of the formal requirements of a statutory demand, including changes to Form 509H. At ch 11, the topic of judicial discretion is canvassed in respect of the making of winding-up orders during the ongoing course of the COVID-19 pandemic. As practitioners have been forced to shift their approach to corporate liquidations, so too has the text provided a means by which that might occur.

Readers will also find thorough treatment of the implications of cross-border insolvencies at ch 12 of the text and the winding up of foreign companies or bodies recognised by Pt 5.7B of the Corporations Act. As Black J notes in his Honour's foreword, whilst applications concerning these provisions (and references to the Model Law) are not as common as conventional windings up of Australian corporations, the implications — particularly in the cross-border sense — can be commercially significant and of material jurisprudential importance. The delicate, and difficult, balance between keeping the text relevant to the busy practitioner, whilst providing the academic scholar with the sort of research one might hope to find in a dissertation or loose-leaf service is something approached carefully and deliberately in this text — and particularly this edition of the text — which is something noticeable and of assistance to its broad readership.

Unsurprisingly, and as with its predecessors, *Assaf's Winding Up in Insolvency* is a must buy for those who find themselves involved with or caused to advise on windings up of corporate in insolvency — whether prosecuting or defending. Further, the text is an easy one to recommend to those operating in the broader commercial space or who find themselves or their clients needing a working understanding of corporate insolvency and the consequences of it. Whilst the text is not pitched at a level which would exclude the law student or academic, given the practical focus of the legislative regime it comments on, the book is squarely practitioner focused. Superficially, if only for the appendices and guides to approaching the revised legislation, the text is something difficult to pass up. Whatever the overarching purpose, the readers will not be disappointed by the careful analysis of the author — which is as impressive in its breadth as it is its depth. I commend Mr Assaf SC on the updated 3rd edition of *Assaf's Winding Up in Insolvency.*

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Footnotes

1. F Assaf, *Assaf's Winding Up in Insolvency 3rd edn* LexisNexis, 2021, at [11.21].

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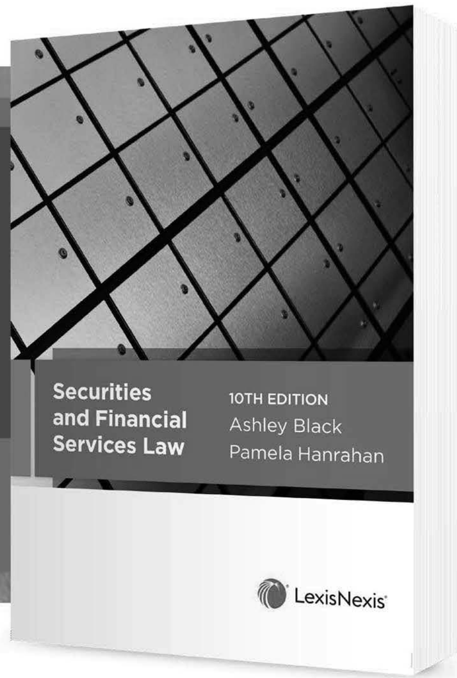

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