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Contents

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Financial Services
Newsletter

General Editor's note

Karen Lee *LEGAL KNOW-HOW*

The year 2020 has been a challenging year. As this year draws to a close, it is now time for our final edition of the *Financial Services Newsletter* for 2020. If you are all for practical legal knowledge and current awareness, this edition will not disappoint.

We begin with Part 4 of the article series "Overview of Regional Data Protection Regulations — what financial services lawyers need to know". The articles in this series provide an overview of legislative and regulatory frameworks that clients of financial services lawyers may be subject to under national, regional and industry-specific regulations governing the collection and use of personal information and data. In the final article in this series, **Frank Downes** (Juris IT Services) looks at the United States, and legislation that is considered global, including the European Union's General Data Protection Regulation (commonly known as the GDPR) and the Payment Card Industry Data Security Standard (often referred to as PCI DSS).

On 25 September 2020, the government announced proposed reforms to the responsible lending obligations contained in Ch 3 of the National Consumer Credit Protection Act 2009 (Cth). It is proposed that the obligations that apply before entry into a credit product or the provision of credit assistance will be amended. On 4 November 2020, draft legislation to effect this was released. Will they work? In their article "Is it responsible to remove 'responsible lending'?", editorial board member **Andrea Beatty**, **Elaine Cheung**, **Gabor Papdi** and **Chloe Kim** (Piper Alderman) consider this question by taking us through the draft legislation. Importantly, the authors also explain the actions credit providers need to immediately take. As the reforms are scheduled to come into force from 1 March 2021, this article is essential reading for all!

Next up is an article on BNPL. BNPL stands for "buy now pay later" and is an acronym that is becoming increasingly recognised. BNPL is in front of everyone's mind at the moment. This is not a surprise — we have all read news headlines such as "one in five consumers using buy now, pay later miss payments".[1] In their article "The DL on BNPL: ASIC's update on the buy now pay later industry", editorial board member **Andrea Beatty**, **Elaine Cheung**, **Chelsea Payne**, and **Chloe Kim** (Piper Alderman) take us through the Australian Securities and Investments Commission's latest industry report on BNPL, being *Buy Now Pay Later: An Industry Update*, released on 16 November 2020.[2]

The 5th Annual Credit Law Conference took place on 19 November 2020 in Sydney. The conference was chaired by *Financial Services Newsletter* editorial board member **Andrea Beatty** (Piper Alderman), who also presented. I am delighted to bring to you an article by **Andrea Beatty**, **Chloe Kim** and **Shannon Hatheier** (Piper Alderman). The authors provide a comprehensive write-up that reports on topics addressed by the many presenters, including, importantly, the global economic impact of COVID-19 and its implications for Australia. If you would like insights into managing non-financial risk and how the BNPL Code is going to work, and you would like to stay up to date on matters relating to cybersecurity, anti-money laundering, open banking, neobanks, blockchain, and more, this is a not-to-miss article for your holiday reading.

I would like to take this opportunity to wish you a merry Christmas and a very happy New Year. Stay safe and enjoy a lovely time with loved ones. While it is the end of the year, this is also a time for looking forward — see you soon again in early 2021!

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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.*

Footnotes

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Overview of Regional Data Protection Regulations — what financial services lawyers need to know — Part 4

Frank Downes *JURIS IT SERVICES*

This month we complete our review of legislative and regulatory frameworks that clients of financial services lawyers may be subject to under national, regional and industry specific regulations governing the collection and use of personal information and data. Particular attention will be paid to regulations that could impact cloud service providers. In this final article we will look at the United States and legislation that is considered global. This overview is focussed on the compliance requirements for the financial services sector and should not be considered exhaustive, local jurisdictions may have additional regulations in place not covered in this article.

United States

California Consumer Privacy Act (CCPA)

The California Consumer Privacy Act (CCPA) is the first comprehensive privacy law in the United States. It provides a variety of privacy rights to California consumers. Businesses regulated by the CCPA will have a number of obligations to those consumers, including disclosures, General Data Protection Regulation (GDPR)-like consumer data subject rights (DSRs), an "opt-out" for certain data transfers, and an "opt-in" requirement for minors.

The CCPA only applies to companies doing business in California which satisfy one or more of the following: (1) have a gross annual revenue of more than $25 million, or (2) derive more than 50% of their annual income from the sale of California consumer personal information, or (3) buy, sell or share the personal information of more than 50,000 Californian consumers annually.

European Union and United States Privacy Shield

The EU-US and Swiss-US Privacy Shield Frameworks is designed:

> . . . to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States.[1]

The transfer of personal data outside of the EU and Switzerland is governed by EU and Swiss law, which generally prohibit personal data from being transferred to countries outside the EEA unless "adequate" levels of protection are ensured. The Privacy Shield Frameworks and the Standard Contractual Clauses (or EU Model Clauses)[2] are two mechanisms designed to provide this level of data protection.

Federal Financial Institutions Examination Council (FFIEC)

FFIEC is a formal interagency body comprising five banking regulators that are responsible for US federal government examinations of financial institutions in the United States. The quality and effectiveness of IT audit programs of both financial institutions and Technology Service Providers are assessed.[3]

Financial Industry Regulatory Authority (FINRA), r 4511(c)

FINRA is the largest independent body regulating securities firms with oversight of more than 4500 brokerage firms in the United States. FINRA r 4511(c) governs the retention of books and records on electronic storage media.[4]

Gramm-Leach-Bliley Act (GLBA)

GLBA requires organisations within the financial services industry that offer financial products and services to consumers, such as loans, investment advice, and insurance to safeguard sensitive consumer. It requires the Federal Trade Commission (FTC) and other financial services regulators to implement regulations to address such privacy provisions as the Financial Privacy Rule and the Safeguards Rule. The FTC is charged with enforcing compliance.[5]

Sarbanes-Oxley Act (2002) (SOX)

SOX is a US federal law administered by the Securities and Exchange Commission (SEC). Among other directives, SOX requires publicly traded companies to have proper internal control structures in place to validate that their financial statements accurately reflect their financial results.[6]

The SEC does not define or impose a SOX certification process. Instead, it provides broad guidelines for the companies it regulates to determine how to comply with SOX reporting requirements.

Securities and Exchange Commission (SEC), r 17a and Systems Compliance and Integrity Regulation

SEC 17a

SEC is the primary overseer and regulator of US securities markets. It wields enforcement authority over federal securities laws, proposes new securities rules, and oversees market regulation of the securities industry.

The SEC defines rigorous and explicit requirements for regulated entities that elect to retain books and records on electronic storage media. It established several rules to regulate recordkeeping, including retention periods, for securities broker-dealers.[7]

SEC Regulation SCI (US)

The Regulation SCI is designed to bolster the technology infrastructure in the US securities markets. The regulation is designed to reduce the frequency of system outages, improve resiliency when such incidents do occur, and increase SEC oversight of securities market technology and enforcement of its regulations.

The SCI rules apply to SCI entities, which include such self-regulatory organisations (SROs) as stock and options exchanges, registered clearing agencies, and alternative trading systems (ATSs). The rules primarily regulate the systems that directly support key securities market functions: trading, clearance and settlement, order routing, market data, market regulation, and market surveillance.[8]

Title 23 NYCRR Part 500 (US)

This regulation applies to financial institutions that are licensed by, or do business in, the State of New York. Title 23 New York Codes, Rules, and Regulation Part 500: Cybersecurity Requirements for Financial Services Companies — "is designed to protect customer data and the information technology systems of financial institutions such as state-chartered, private, and international banks, mortgage brokers, and insurance companies."[9]

TruSight

TruSight is a third-party risk-assessment utility created by leading US financial services companies for the collective benefit of financial institutions, their suppliers, partners, and other third parties. TruSight simplifies assessments by executing best-practice, standardised evaluations once and making them available to many — enabling financial institutions to gain greater visibility and manage third-party relationships and the associated risks more efficiently and effectively.[10]

Canada

Canadian privacy laws

Canadian privacy laws were established to protect the privacy of individuals and give them the right to access information gathered about them. The Office of the Privacy Commissioner of Canada[11] (OPCC) oversees compliance with these laws.

The Privacy Act[12] regulates how federal government organisations collect, use, and disclose personally identifiable information including that of federal employees.

The Personal Information Protection and Electronic Documents Act[13] (PIPEDA) governs the same for the business activities of commercial for-profit enterprises and for the employees of federally regulated businesses like banks, airlines, and telecommunications companies.

In general, PIPEDA applies to commercial activities in all provinces and territories, except those operating entirely within provinces with their own privacy laws that have been declared "substantially similar" to the federal law. For example, British Columbia, Alberta, and Quebec have private sector privacy legislation deemed substantively similar to PIPEDA, and as a result the provincial laws are followed there in place of the federal legislation.

A review of the provincial regulations is outside the scope of this article.

Office of the Superintendent of Financial Institutions (OSFI)

The OSFI is an independent agency of the Government of Canada responsible for the prudential regulation and supervision of federally regulated financial institutions and pension plans in Canada. In its oversight role, OSFI published the B-10 Guidelines which establish "prudent practices, procedures, or standards" for federally regulated financial institutions to evaluate and manage the risk associated with outsourcing their business to a service provider. These regulations apply to material outsourcing providers.

In addition, the use of cloud services by financial institutions must comply with the PIPEDA discussed above, and in some instances, provincial data privacy laws.

Argentina

Personal Data Protection Act (PDPA)

The Personal Data Protection Act 25.326[14] (PDPA) (Ley de Protección de los Datos Personales)[15] came into effect in 2000 to help protect the privacy of personal data, and to give individuals access to any information stored in public and private databases and registries.

The PDPA aligns with the European legislative model for protecting data privacy, including model forms governing cross-border transfers of personal data and Argentina was the first country in Latin America to achieve an "adequacy" qualification for data transfers from the EU.

Global

CIS Benchmark

CIS Benchmarks are a collaboration of the Consensus Community and CIS SecureSuite members. The Consensus Community is made up of experts in the field of IT security who use their knowledge and experience to help the global internet community.

CSA STAR

CSA STAR Certification is an assurance framework, enabling cloud service providers to embed cloud-specific security controls. The maturity model brings a continual focus on addressing the changing risk of this technology, which aligns with British Standards Institution commitment to helping clients make excellence a habit.[16]

General Data Protection Regulation

The GDPR gives rights to people to manage personal data collected by an organisation. These rights can be exercised through a Data Subject Request (DSR). The organisation is required to provide timely information regarding DSRs and data breaches, and perform Data Protection Impact Assessments (DPIAs).[17]

The GDPR applies to *all* organisations that offer goods and services to people in the EU, or that collect and analyse data for EU residents no matter where the EU entity or your organisation is located. Given this condition it would be prudent to assume it applies to all financial institutions you act for.

ISO Standards (various)

There are numerous ISO standards (ISO 20000-1:2011, 22301, 27001, 27017, 27018, 27701, 9001) that will apply to financial institutions. A review of these standards is outside the scope of this article.

Payment Card Industry (PCI) Data Security Standard (DSS)

The PCI DSS is a global information security standard designed to prevent fraud through increased control of credit card data. Organisations of all sizes must follow PCI DSS standards if they accept payment cards from the five major credit card brands — Visa, MasterCard, American Express, Discover, and the Japan Credit Bureau (JCB). Compliance with PCI DSS is required for any organisation that stores, processes, or transmits payment and cardholder data.[18]

Service Organization Controls (SOC)

The Service Organization Controls (SOC) framework, is a standard for controls that safeguard the confidentiality and privacy of information stored and processed in the cloud. This aligns with the International Standard on Assurance Engagements (ISAE), the reporting standard for international service organisations.[19]

Service audits based on the SOC framework fall into two categories — SOC 1 and SOC 2 — that apply to cloud service providers. A SOC 1 audit, evaluates the effectiveness of a CSP's internal controls that affect the financial reports of a customer using the provider's cloud services. A SOC 2 audit gauges the effectiveness of a CSP's system based on the American Institute of Certified Public Accountants Trust Service Principles and Criteria.

That wraps up our birds-eye view of data protection and compliance regulations your financial services clients may be subject to.

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About the author
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Disclaimer*: This document is part of our commitment to assist lawyers understand the information technologies that will impact them and their clients. It is not legal or regulatory advice and it does not constitute any warranty or contractual commitment on our part. If you have any questions, please contact us.*

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Is it responsible to remove "responsible lending"?

***Andrea Beatty**, **Elaine Cheung**, **Gabor Papdi** and **Chloe Kim** PIPER ALDERMAN*

The Treasurer intends to remove the current responsible lending regime. Draft Bills have been released to effect this. The question is — will they work, or will they muddy the waters?

On 4 November 2020, the Treasury released proposed legislative reforms to the consumer credit regulatory regime for public consultation,[1] consisting of the following draft instruments:

- National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020: A new regulatory framework for the provision of consumer credit (Bill)
- National Consumer Credit Protection Amendment (A New Regulatory Framework for the Provision of Consumer Credit) Regulations 2020 (Regulations) and
- National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020 (Standards)

These proposed reforms follow Treasurer Josh Frydenberg's announcement on 25 September 2020 that changes will be made to remove responsible lending — that is, changes to Australia's consumer credit framework identified in the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) to reduce the timeframe for individuals and small businesses to access credit while still upholding protections for vulnerable consumers. These reforms are aligned with Treasurer Frydenberg's desire to replace the current "lender beware" approach with a "borrower responsibility" approach. Subject to legislation passing, the reforms will commence on 1 March 2021.

Background

The government hopes that this credit reform will remove the ambiguity concerning responsible lending obligations (ie, to make reasonable inquiries, take reasonable steps to verify information, assess whether a proposed credit contract is unsuitable for the consumer and not enter into a contract that is unsuitable for the consumer), assist with accelerating the timeframe for loan approvals and improve consumers' access to credit. These credit reforms are in response to the government's concern that the economy had been detrimentally impacted by COVID-19, despite the various economic packages introduced to stimulate the economy. The Treasurer has commented that the current responsible lending laws has "led lenders to become increasingly risk-averse and conservative for fear of falling foul of the guidance" which has also led to borrowers facing "longer and more intrusive approval process[es]".[2]

The overhaul of responsible lending also came after the *Westpac* litigation.[3] That case identified the difficulties and disparity between responsible lending legislation and the Australian Securities and Investments Commission's guidance on it. The Treasurer went so far as to say that responsible lending provisions have "evolved into a regime that is overly prescriptive, complex and unnecessarily onerous on consumers".[4] Accordingly, the proposed legislative reforms will move away from the existing "one-size-fits-all" approach. Instead a new framework was introduced that appropriately adopts key elements of the Australian Prudential Regulation Authority's (APRA) authorised deposit-taking institution (ADI) lending prudential standards to non-ADI lenders, other than in relation to small amount credit contracts (SACCs) and consumer leases. ADIs will continue to be required to comply with APRA's prudential standards, including an updated prudential standard *APS 220 Credit Risk Management*[5] (APS 220) which will expressly require systems and procedures to assess loan serviceability prior to entering into a credit contract.

In summary, the intended reforms will:

- remove responsible lending obligations from the NCCP Act, except in relation to SACCs, SACC-equivalent contracts provided by ADIs and consumer leases
- clarify the application of responsible lending obligations to small business lending and
- implement a new framework which will apply key elements of APRA's ADI lending prudential standards to non-ADIs (except for SACCs and consumer leases). ADIs will still be required to comply with APRA's prudential standards

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020: A new regulatory framework for the provision of consumer credit

From 1 March 2021, the existing responsible lending obligations contained in the NCCP Act will only apply in relation to SACCs, SACC- equivalent loans provided by ADIs and consumer leases. ADIs will no longer be expected to abide by responsible lending obligations, rather they will be subject to APRA's prudential standards. Non-ADI credit providers will need to establish and maintain systems, policies and processes that comply with the Standards to be determined by the Minister, based on obligations similar to those imposed on ADIs.

Upon this becoming legislation, the Minister will have the ability to make standards that require non-ADI credit providers to implement systems, policies and processes in relation to their credit assessment and approval conduct. The standards may also require a licensee to provide the consumer with a copy of a specified document.

The best interests obligations currently legislated for mortgage brokers will be extended to all broker-like credit assistance providers — that is, credit assistance providers (whether licensees or credit representatives) who:

- carry on a business of providing credit assistance in relation to credit contracts
- do not perform (or, if they are a credit representative, neither they nor their authorising licensee performs) the obligations or exercise the rights of a credit provider in relation to the majority of those credit contracts and
- in carrying on their business, provide credit assistance in relation to the credit contracts offered by more than one credit provider

A civil penalty of up to 5000 penalty units (currently $222 per unit) is specified for contraventions of the various obligations to be introduced by the Bill.

National Consumer Credit Protection Amendment (A New Regulatory Framework for the Provision of Consumer Credit) Regulations 2020

The proposed Regulations will limit or repeal the provisions made redundant from the Bill's removal of responsible lending obligations for credit contracts other than SACCs, SACC-equivalent loans provided by ADIs and consumer leases. In accordance with the Regulations, the existing regs 28HA, 28J and 28LC will be made redundant as the Bill limits the applicability of provisions of the NCCP Act to SACCs, SACC-equivalent loans by ADIs and consumer leases. It also reduces the period of the responsible lending exemptions provided for in the existing reg 28RB, which is a temporary COVID-19 exemption. The exemption period was meant to end on 2 April 2021, but the Regulations shortened the period to the end of the day before the Bill commences which is currently expected to be 28 February 2021.

The Regulations will also modify the Bill's definition of "non-ADI credit conduct" in relation to credit card contracts. The conduct of a licensee providing a consumer with a credit card for the purpose of entering into a credit contract that is formed or entered into by the consumer using or activating the credit card will also fall within the definition of "non-ADI credit conduct".

National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020

The Standards will require non-ADI credit providers to establish and maintain systems, policies and processes relating to non-ADI credit conduct. They will impose procedural obligations rather than individual contract-level conduct requirements. This will shift the credit assessment criteria from a "one-size-fits-all" prescriptive framework for lenders and borrowers. It will instead support risk-based lending which is tailored to the characteristics of the borrower and the particular credit product.

The Standards are based on aspects of APRA's updated prudential standard APS 220 (as due to commence in January 2021). This relates to an ADI's lending standards and management of credit risk exposures. However, while APS 220 is concerned with an ADI's risk management for the benefit of the ADI and broader financial system stability, the Standards are concerned with assessing whether a consumer could comply with their obligations under the credit contract only with financial hardship.

In relation to the assessment and approval of credit applications, the Standards will require a non-ADI credit provider to have in place systems, policies and processes which are adequate to ensure that the credit provider does not engage in non-ADI credit conduct unless:

- it has established credit assessment criteria that meet the requirements set out in the Standards (s 7 of the Standards)
- it assesses whether the consumer is likely to be able to comply with their financial obligations under the credit contract without substantial hardship if the credit contract is entered into or the credit limit is increased (s 8 of the Standards), with that assessment:

- being performed against the credit assessment criteria established by the licensee in compliance with the Standards and
- assessing the consumer to be unable to comply without substantial hardship if they could only comply:
  - by selling their principal place of residence when they do not intend to sell their principal place of residence in order to comply with their obligations under the credit contract
  - by failing to make rental payments in relation to their principal place of residence or
  - for a credit card contract, if the consumer could not repay an amount equal to the credit limit within 3 years (s 9 of the Standards) and
- complying with the "information requirements" set out in the non-ADI credit standards (s 8(2) of the Standards)

• it has approved the non-ADI credit conduct, and does not approve non-ADI credit conduct if the assessment is that the consumer would be unable to comply with their financial obligations under the credit contract without substantial hardship if the credit contract is entered into or the credit limit is increased (s 10 of the Standards)

The Standards will require a non-ADI credit provider's credit assessment criteria to:

- enable it to assess whether it is likely that the consumer will be able to comply with their financial obligations under the credit contract without substantial hardship if the credit contract is entered into or credit limit is increased
- allow for the assessment to be proportionate to the nature, type and size of the credit and
- require the assessment to consider each of the following relevant factors:
  - the purpose of the credit
  - the structure of the credit
  - the consumer's sources of repayment, including their income and cash flow
  - the current risk profile of the consumer, including their total indebtedness and other payment obligations
  - the consumer's repayment history and the consumer's capacity to repay the credit without substantial hardship in a range of situations involving reasonably foreseeable changes in the consumer's obligations under the credit contract, including:
    - a change from a fixed interest rate to a floating interest rate or vice versa and
    - if the credit contract has a limited interest-only period, a requirement to repay both principal and interest
  - the consumer's reasonably foreseeable expenses and
- the proposed terms and conditions of the credit contract

The Standards will also require a non-ADI to provide a consumer with a copy of the assessment on request by the consumer. This will replicate credit providers' current obligation under s 132 of the NCCP Act (if enacted, the Bill will confine s 132 to operate only in relation to SACCs and SACC-equivalent ADI credit contracts).

The Standards will be enforceable by way of prohibitions in the NCCP Act, to be introduced by the Bill, on a credit provider:

- engaging in non-ADI credit conduct if they do not have systems, policies and processes that comply with the Standards or a written plan that documents the systems, policies and processes established and maintained to comply with the Standards (draft s 133EB(1))
- repeatedly failing to implement the systems, policies and procedures required by the Standards while engaging in non-ADI credit conduct (draft s 133EC) and
- failing to give the consumer a copy of a document if required to do so by the Standards (draft s 133ED)

A civil penalty of 5000 penalty units will be prescribed for contravention of each of these obligations.

What you need to do now

As the reforms are scheduled to come into force from 1 March 2021, the actions credit providers need to immediately take include the following:

- analyse the impact of the reforms
- identify affected policies and procedures
- amend policies and procedures and/or write new ones
- have written plans which document the systems, policies and processes in place to deal with responsible lending
- identify the broader obligations for the operation of the business and
- assess consumer's ability to repay a loan for each type of impacted loan product without "substantial hardship"

Written plan

A requirement under the consumer credit reforms is for non-ADIs to have and to be able to provide, upon request, a written plan which documents the systems, policies and processes established and maintained by the credit provider to comply with the Standards. Many credit providers may have their systems, policies and processes dispersed across the business, prior to the March 2021 date. These should now be consolidated and reviewed to ensure they comply with the responsible lending requirements.

Broader obligations

Credit providers should continue to be aware of their obligations in the operation of the business. As a change in responsible lending compliance systems may affect the rest of the operation of the business, credit providers should be conscious of their general obligations. This includes the requirement to act efficiently, honestly and fairly, ensuring consumers are not adversely affected by conflicts of interest and maintaining compliance with credit laws.

Furthermore, to comply with the impending design and distribution obligations, credit providers will need to ensure that the credit products distributed to consumers fall within the target market. Awareness should also be given to the seemingly creeping concept of "best interests" duty.

Consideration of "substantial hardship"

Credit providers are still required to assess whether consumers will be capable of complying with their financial obligations without "substantial hardship". Accordingly, credit providers will still need to have appropriate assessments in place to ensure this is adequately conducted.

The consultation phase for the proposed consumer credit reforms closed on 20 November 2020. The government will now consider the submissions received before finalising the reforms.

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The DL on BNPL: ASIC's update on the buy now pay later industry

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On 16 November 2020, the Australian Securities and Investments Commission (ASIC) released their much-anticipated updated report on the booming buy-now-pay-later industry through Report 672 *Buy Now Pay Later: An Industry Update*[1] (REP 672). The buy now pay later (BNPL) industry has been growing exponentially over the past few years with more and more consumers turning to this method of payment as an alternative to traditional forms of credit, such as credit cards. REP 672 identifies the growth and evolution of the BNPL industry, the impact of BNPL arrangements on consumers and recent regulatory developments. This article will provide an outline of ASIC's new report and its findings.

Background

On 17 October 2018, the Senate referred an inquiry into the credit and financial services targeted at Australians at risk of financial hardship to the Senate Economics References Committee. The *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship*[2] released in February 2019 saw three recommendations made in regard to BNPL. These recommendations called for the formation and implementation of a regulatory framework, industry code of practice and the extension of design and distribution obligations to apply to the BNPL industry.

ASIC's first report on the BNPL industry Report 600 *Review of Buy Now Pay Later Arrangements*[3] was released on 28 November 2018 and looked into the growing popularity of credit not regulated by the National Consumer Credit Protection Act 2009 (Cth). No action by ASIC at the time has meant that most people believe the horse has now bolted on regulating the industry.

On 11 September 2019, the Senate established the Select Committee on Financial Technology and Regulatory Technology. In the Interim Report published by the Select Committee in September 2020, it was found that it would be "inappropriate to force" innovation such as BNPL into a "one size fits all approach", accordingly supporting a self-regulatory framework for providers rather than set legislation.[4]

There has been much controversy concerning BNPL, with many questioning whether it falls within the definition of "credit" or whether it can be merely considered as "electronic layby" for the modern world. While on one hand the views of Senator Andrew Bragg and the findings from the Interim Report evidence a support for a self-regulatory framework, others such as Matt Comyn, CEO of Commonwealth Bank Australia, was quoted as saying:

> When you open a buy now, pay later account and it said you are approved for $1000 that sounds like credit to me . . . We believe that regulation is inevitable but not imminent.[5]

This echoes the widely held sentiment that BNPL should be treated as credit, and accordingly comply with the prescriptive credit laws. Furthermore, Sebastian Siemiatkowski, CEO of Klarna, noted his surprise that "local players . . . [were] charging 400 basis points", an attack on Afterpay who charges merchants 4% of the cost of goods sold.[6] This is comparative to the 2.1% charged by Klarna and the 1% charged when customers utilise credit or debit cards as payment.[7] This analysis of fees charged conflicts with Afterpay's claim that they operate as a "platform" rather than a "payments business or a bank", differentiating themselves from traditional credit cards.[8]

Growth and evolution of BNPL

BNPL accounts

ASIC found that the number of active BNPL accounts held by BNPL providers increased steadily each financial year from the 2015/16 financial year (around 487,000 active accounts) to the 2018/19 financial year (around 3.7 million active accounts). As at June 2019, the six BNPL providers who participated in the review had collectively approved 6.1 million accounts. An "active account" is a BNPL account where at least one transaction has occurred during the financial year, so it is a good indication of how many people have entered into a BNPL arrangement during a financial year.

BNPL transactions

Similarly, there has been an increase in the *number* of BNPL transactions. There has been a 75% increase in

BNPL transactions from the 2017/18 financial year to the 2018/19 financial year. This is an increase from 1.9 million as at June 2018 to 3.4 million in June 2019. This 1.5 million increase in the course of 1 year indicates the rising popularity of BNPL. Not surprisingly, the number of BNPL transactions seems to reflect seasonal trends. ASIC has noted that there seems to be an increase in BNPL transactions in the lead up to Christmas in December each year.

Matching the increase in the number of BNPL transactions, the *value* of these transactions has also continued to increase. ASIC found that there was a 79% increase in the actual value of the BNPL transactions. From the 2017/18 financial year to the 2018/19 financial year there was an increase from $3.1 billion to $5.6 billion. ASIC found that Afterpay dominated the market with 73% of the value of BNPL transactions in the 2018/19 financial year.

Outstanding balance

REP 672 also shed some light concerning the outstanding balance or rather the total balance of outstanding debt from BNPL arrangements. Along with the increased number and value of BNPL transactions, the total outstanding balance of BNPL accounts has also increased. However, this was at a more modest rate of 53% — from $907 million in June 2018 to $1.4 billion as at June 2019.

Revenue

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. Interest is not charged in standard BNPL arrangements. Instead revenue is generated through merchant fees, missed payment fees, establishment fees and account-keeping fees. However, the revenue sources differ among the six BNPL providers, as these depend on the business models of each provider.

Diverse business models

All six BNPL providers were identified as having differences between the maximum loan amount and the loan terms. There was also a difference in the average transaction value for each BNPL provider. The providers with the lower average transactional value (such as Afterpay, with the lowest average transaction value of $147) were used for lower value items (such as clothing). Whereas BrightePay (with the highest average transaction value of $8222) was used for big-ticket items, such as home improvement products.

Future of credit?

ASIC's report found that over the same period as the BNPL industry continued to grow, the total value of personal credit card transactions plateaued, seeing a shift away from "traditional" credit offerings. There is a converse trend between the growth in the value of BNPL arrangements and the growth in the value of personal credit cards. The BNPL market's strong growth could suggest a shift towards consumers using BNPL arrangements instead of more traditional forms of credit, such as credit cards.

As BNPL arrangements have gained so much growth in recent years, there is no surprise that a plethora of new players have entered into the market. These include BNPL arrangements offered by licensed credit providers.[9]

There have also been credit card networks which allow BNPL arrangements to be offered outside of established merchant relationships. This is essentially a BNPL's take on "credit cards".[10]

Growth in 2020

Despite the disruptions caused to everyday life and the economy by COVID-19, the data collected by ASIC from the BNPL providers show that the BNPL industry continued to grow in 2020. The number of transactions made, the number of transacting users and the total value of transactions has each grown by more than 20% in the 12 months from June 2019 to June 2020.

Impact of BNPL arrangements on consumers

ASIC found that most BNPL providers charged consumers "missed payment fees" whenever they missed a payment. REP 672 noted that roughly 21% of BNPL consumers surveyed had missed a payment in the past 12 months. Of those consumers who admitted to missing a payment, some interesting points ASIC discovered were:

- 47% were aged between 18 to 29
- 39% also held small amount credit contracts and/or medium amount credit contracts
- 34% made at least six BNPL purchases in the previous 6 months and
- 55% had used at least two different BNPL arrangements in the previous 6 months

In that same financial year, most BNPL transactions were completed by consumers aged under 35. Of those transactions, 67% that incurred missed payment fees were also by consumers aged under 35. Generally, ASIC found that the number of missed payment fees incurred by consumers grew at a similar rate to the total number of BNPL transactions.

Not surprisingly, the growth in these fees meant that between June 2016 to June 2019, missed payment fees made up:

- about 15% of total revenue of the BNPL providers and
- about 44% of consumer revenue from all sources, including account-keeping fees

Although missed payment fees might be one of the more common revenue sources for BNPL providers, ASIC also considered other forms of revenue sources of BNPL providers such as ZipMoney Payments. They offer a continuing credit-type contract where the consumers only need to make a minimum monthly payment to avoid incurring a missed payment fee, which is similar to a credit card. If that minimum payment is made and there is an outstanding balance remaining on the BNPL account, the consumer is charged an account-keeping fee. The model used by ZipMoney Payments did not generate significant revenue from missed payment fees, but it did generate more significant account-keeping fees (which made up 61% of total revenue in the 2018/19 financial year). Another interesting point noted in REP 672 was that the percentage of missed payment fees incurred between January 2020 to June 2020 has generally *declined*, despite the effects of the COVID-19 pandemic.

Concerns for consumers

In a survey ASIC conducted, the regulatory body found:

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

Of these two groups of consumers surveyed, about 50% were in the 18–29 age group.

ASIC also took an alternate view when considering the impact of BNPL arrangements on consumers by looking at the credit card accounts of BNPL users from four major financial institutions. ASIC found that BNPL users with credit cards were more likely to incur interest charges on their credit card and have higher credit limit use.

Surcharging

All BNPL providers who participated in ASIC's review charged varying fees to their partnered merchants. REP 672 found that BNPL providers generally contractually prohibit merchants from increasing the cost of goods and services to consumers who use BNPL arrangements.

It is unlikely that surcharging occurs across the whole BNPL industry, as surcharging is not possible where the pricing of goods and services is transparent and standardised.

To prevent surcharging, ASIC and the Australian Competition and Consumer Commission have written to over 5000 merchant partners of BNPL providers (in industries which ASIC believed were more likely to engage in surcharging), warning them that it is illegal to mislead or deceive consumers about the costs of goods and services.

As part of its periodic review of retail payments regulation commenced in November 2019, the Reserve Bank of Australia asked for stakeholder views on the "no-surcharge" rules typically imposed by BNPL providers on merchants. However, as with many things this year, due to COVID-19, the Reserve Bank of Australia put the review temporarily on hold and it is now expected to be completed in 2021.

Regulatory developments

The international regulatory framework for BNPL arrangements is not consistent. In the jurisdictions considered in ASIC's REP 672 (being the United Kingdom, New Zealand and Sweden), BNPL arrangements fell outside of each jurisdiction's consumer credit regulatory regime.

United Kingdom

The United Kingdom's Financial Conduct Authority will be undertaking a review of the regulation of unsecured credit, including unregulated BNPL arrangements. Its focus will be on how regulation can better support a healthy unsecured lending market. The review is expected to be finalised in early 2021.

New Zealand

Legislation was passed in December 2019 which gave the New Zealand Government a regulation-making power to declare an arrangement or facility (including a BNPL arrangement) to be a consumer credit contract.

Sweden

Legislation was passed this year that further regulates e-payment providers to prohibit unnecessary debt that BNPL arrangements can create. The regulations include requiring credit providers to offer the lowest-cost direct payment options to consumers purchasing goods before suggesting any higher-cost alternatives.

Comparatively, in the United States there is "little-to-no regulation of BNPL".[11]

Design and distribution obligations

From October 2021, design and distribution obligations (DDOs) will apply to most products regulated by ASIC, including BNPL arrangements. BNPL arrangements are currently regulated as credit under the Australian Securities and Investments Commission Act 2001 (Cth) and are subject to ASIC's new product intervention order power.

BNPL providers will be required to use resources such as industry knowledge, information about their users and other data to define the target market for their particular BNPL arrangement and also to set distribution conditions in the determination and in considering the reasonable steps that are likely to result in distribution of the arrangement being consistent with its target market.

BNPL providers must review and monitor the outcomes of their arrangement and consider whether changes are required to the arrangement itself, how it is sold and to whom it is being sold. ASIC's review highlighted that while BNPL arrangements have generally been embraced by consumers, there are always some consumers who may encounter financial difficulty, as with most credit products. If a BNPL provider offers arrangements which are designed and marketed as offering cost-free or low-cost access to deferred payment, this should be a main consideration for the BNPL provider in terms of their DDOs. For example, if a BNPL provider's data reveal that the fees it is charging are having a significant impact on consumers, they will need to consider why this is occurring and how this can be addressed.

Industry self-regulation

The Australian Finance Industry Association announced in December 2019 that it is developing an industry code of practice for BNPL providers (BNPL Code). This will respond to the findings of ASIC's 2018 report and the recommendations by the Senate Economics References Committee inquiry.

If effective, the BNPL Code can play an important part in delivering benefits to both consumers and subscribers to the code. This will improve consumer confidence in the BNPL industry.

Product intervention power

In April 2019, the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth) (Product Regulation Act) provided ASIC with a product intervention power which included BNPL arrangements and complements the DDO and BNPL Code. Together, these provide opportunities for the BNPL industry to address the potential harm to consumers noted by ASIC in its reports.

The product intervention power gives ASIC an additional regulatory tool to address any significant consumer detriment caused by BNPL arrangements that is not addressed by industry. It allows ASIC to temporarily intervene if it sees a product has resulted in, or is likely to result in, significant detriment to consumers.

The product intervention power allows ASIC to confront and respond to consumer harms in a targeted and timely manner. It is unique in that in using the product intervention power, ASIC focuses on reducing significant detriment to consumers, instead of only intervening after a breach of a law has occurred. For example, the power allows ASIC to order that a person not engage in specified conduct in relation to a product or class of product, or except in accordance with certain conditions.

ASIC's REP 672 has provided informative insight into the rapidly developing BNPL industry. As it continues to grow in popularity surpassing traditional forms of credit, it is likely that concerns with how and if it should be regulated will continue to grow as well. It is hoped that the proposed BNPL Code will ease concerns noted in ASIC's report and strike a balance between allowing consumers to benefit from BNPL arrangements while providing a guideline as to how BNPL providers subscribed to the BNPL Code should operate in order to safeguard consumers' rights.

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Footnotes

1. Australian Securities and Investments Commission *Buy Now Pay Later: An Industry Update* Report 672 (2020) https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf.

2. Senate Economics References Committee *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (2019) www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report.
3. Australian Securities and Investments Commission *Review of Buy Now Pay Later Arrangements* Report 600 (2018) https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf.
4. Senate Select Committee on Financial Technology and Regulatory Technology *Interim Report* (2020) para 8.66 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024366/toc_pdf/SelectCommitteeonFinancialTechnologyandRegulatoryTechnology.pdf;fileType=application%2Fpdf.
5. J Frost "CBA CEO Comyn says property investors will return" *The Australian Financial Review* 18 November 2020.
6. J Eyers "Afterpay's fees make it an 'extortion scheme': Klarna CEO" *The Australian Financial Review* 25 November 2020.
7. Above.
8. Above n 6.
9. The Commonwealth Bank of Australia partnered with Klarna, a BNPL provider. Citigroup introduced "Citi Instalment Plan" which is part of a Citi credit card. The National Australia Bank and the Commonwealth Bank of Australia both launched credit card products that can be used as alternatives to BNPL arrangements.
10. FlexiCards Australia Pty Ltd launched "bundll" which allows purchases to be made at places which accept Mastercard. ZipMoney Payments allows Zip Pay arrangements anywhere Visa is accepted. Klarna offers a single-use virtual card which allows Klarna to be used anywhere Visa is accepted.
11. Treasury (Cth) *Payments System Review Issues Paper* (November 2020) 9 https://treasury.gov.au/sites/default/files/2020-11/c2020-129951-issues-paper.pdf.

5th Annual Legalwise Credit Law Conference

***Andrea Beatty**, **Chloe Kim** and **Shannon Hatheier** PIPER ALDERMAN*

The 5th Annual Legalwise Credit Law Conference was held in Sydney on 19 November 2020 at The Grace Hotel. Attendees included lawyers, financial professionals and representatives of Australian Securities and Investments Commission (ASIC), Australian Competition and Consumer Commission (ACCC), Australian Banking Association (ABA) and the Financial Rights Legal Centre. The conference commenced with a 5-minute video from Treasurer Josh Frydenberg who spoke of the government's policy initiatives, such as the SME Guarantee Scheme, to boost the flow of credit and stimulate economic recovery following the effects of COVID-19. Andrea Beatty, Partner at Piper Alderman, chaired the conference.

Keynote address: COVID-19 — the global economic impact and implications for Australia

Presented by: Professor Warwick McKibbin AO, Vice Chancellor's Chair in Public Policy and Director at the Centre for Applied Macroeconomic Analysis, Australian National University.

Professor McKibbin opened his presentation by emphasising the high degree of uncertainty concerning the impact of COVID-19 and the difficulties associated with forecasting economic projections. Professor McKibbin described the method of scenario-based forecasting as the most efficient means of understanding global economic consequences and designing public policy. Professor McKibbin spoke of his recent paper "Global macroeconomic scenarios of the COVID-19 pandemic" which employed this method to identify six potential scenarios ranging from a single wave of the virus to recurrent outbreaks.[1] On this basis Professor McKibbin was able to project infection and mortality rates for each scenario, initially by using the case fatality rate for SARS as a benchmark, however, eventually progressing to real figures as the virus evolved.

Professor McKibbin then described how these epidemiological assumptions were inserted into the global economic model, the G-Cubed Model, and converted into economic shocks. The model illustrated how these economic shocks in each of the scenarios would affect different production sectors in the economy, which Professor McKibbin emphasised are impacted in varying degrees. In all scenarios the change in Australia's real GDP drops starkly within the first year of the virus, however, slowly recovers over the next decade to return to its original position with the exception of Scenario 6. Scenario 6, as Professor McKibbin explained contemplates a situation where each country, in this instance Australia, experiences the most desirable scenario whereas the rest of the global community experiences Scenario 4 that consists of four waves of the virus. This unique premise illustrates the economic impact on a country due to worsening global pandemic outcomes despite that country having the virus under control. This scenario has the unique effect of preventing Australia's GDP from returning to its original position but plateaus at 2% below.

Concluding his presentation Professor McKibbin stressed the need for a coordinated global response to the pandemic, emphasising the importance of a global fiscal policy led by the G20. In particular, he emphasised the benefits of a coordinated response for all countries but most importantly for those who due to institutional limitations are constrained in their policy response to the virus. While two vaccines show promise, Professor McKibbin pragmatically noted that a vaccine will take time to roll out, during which the economic impact of COVID-19 will continue to be felt.

COVID-19 and financial hardship: what happens when the loan repayment holiday stops?

Presented by: Tim Gough, Senior Executive Leader, Credit, Retail Banking and Payments, ASIC; Christine Cupitt, Executive Director, Policy, Australian Banking Association; Diane Tate, CEO, Australian Financial Industry Association; and Karen Cox, CEO, Financial Rights Legal Centre.

The loan deferral scheme introduced by the government in March 2020 and recently extended to January 2021 was the first of a range of topics discussed that explored the facets of "financial hardship". Tim commenced the presentation by highlighting the growing trend of consumers coming off loan repayment deferrals in the last month. A trend perhaps attributable to the proportion of individuals who took up the scheme for precautionary reasons rather than due to significant financial strain. Nevertheless payment deferrals come at a cost, to which Tim emphasised the importance of lenders contacting borrowers early prior to the end of the loan deferral.

Tim noted three key observations in closing:

- the number of individuals coming off loan deferrals continues to increase, however, there will be a small portion of borrowers unable to make repayments after the deferral period has ended
- lenders need to ensure they communicate the right messages in order to engage borrowers who may be reluctant to contact their lender
- ASIC acknowledges and applauds industry's impressive response to the pandemic

Karen then spoke of a dramatic decline in the number of calls to the National Debt Helpline during COVID-19, a trend arguably attributable to the government's stimulus package, loan deferrals and moratorium on evictions. Karen also highlighted the dramatic decline in late credit card and buy-now-pay-later payments despite an enormous growth in its usage. However, going forward Karen predicts a sharp incline of calls to the helpline as the loan deferral schemes and stimulus packages come to an end. In order to overcome this looming economic hurdle, lenders will likely need to waive full or partial debts in order to avoid dire circumstances.

Christine followed by reiterating the efforts of industry in leaning into hardship more heavily and supporting customers during this difficult time.

Christine identified a number of key priorities for the banking industry:

- implementing the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's (Hayne Royal Commission) recommendations
- working closely with the government to institute e-conveyancing and e-transaction reforms
- liaising with consumer representative groups to understand customers' needs
- liaising with ASIC and the Australian Prudential Regulation Authority (APRA) to better understand their expectations of lenders

Diane concluded the session by pointing out the lack of clarity in respect of the definition of "financial hardship", so much so that each of the four members of the panel would likely disagree on its meaning. Nevertheless, Diane emphasised how COVID-19 presents the perfect opportunity to fix what she described as "clogs" in the system. However, Australia is in a much better position to handle the economic impact of COVID-19 following improvements made during the SARS and bird-flu outbreak in the mid-2000s. For this reason Diane described lenders as the "pistons of recovery" that unlike in the global financial crisis (GFC) has ensured there remains liquidity in the system.

The presentation concluded with the overall sentiment that in order to adequately address "financial hardship" more needs to be done to close the gap between lenders and borrowers including improving borrowers' financial literacy. Governments and lenders need to work collaboratively with consumers to provide advice and support during these tough periods.

Managing non-financial risk

Presented by: Joseph Rizk OAM, CEO and Managing Director of Arab Bank of Australia, and Alison Ewings, Head of Management at Regnan.

In an interview style presentation, Alison posed a range of questions to Joseph regarding how lenders should approach non-financial risks. Joseph began by highlighting the importance of a having a well-defined risk framework that outlines the parameters of the degree of risk a lender is willing to take on and the necessary mitigants to have in place. Central to which is an awareness of the lender's risk appetite in guiding the organisation's approach to risk management. However, Joseph insightfully noted that a successful system is rendered useless if individuals do not use them.

In response to a question regarding the importance of organisational culture, Joseph endorsed the importance of a positive workplace culture which guides lenders to take a similar approach to risk and interactions with their clients. At the Arab Bank Australia, employees are referred to as a family that encourages face-to-face interactions between all levels of management. Joseph stressed the importance of executives staying close to the operations of a business to facilitate a positive in-house culture that is subsequently reproduced in dealings with consumers. Though challenging in the present climate the most successful lenders in Joseph's opinion are those who remain focused on their clients and engage face-to-face on a regular basis.

Concluding the presentation, Alison enquired as to Joseph's thoughts on the trending term "pre-financial risk" as opposed to "non-financial risk". Joseph did not hide his preference for the former, describing the importance of thoroughly understanding risk. In his concluding remarks, Joseph noted industry's sudden need to rethink the category of high-impact, low-probability events such as COVID-19 and their impact on lending. Accordingly, emphasising the importance of considering non-financial risk and its widespread effects.

Governance systems in anti-money laundering and counter terrorism financing (AML/CTF)

Presented by: Richard Lee, Director of Education Capability and Communications, AUSTRAC.

Richard commenced the presentation with an emotional video detailing the dire effects of money laundering and terrorism financing.[2] The key message coming out of the video was the need for an approach that draws on a combination of intelligence and regulation to detect, deter and disrupt financial abuse and financial crimes.

AUSTRAC's risk-based approach to regulation scales risks based on their nature and effect. Areas classifiable as "high risks" are the focus of greater resources and enhanced monitoring. This approach ensures the most efficient use of resources in areas that will have the greatest impact. Richard emphasised the importance of financial institutions taking proactive steps to engage with, question and challenge suspicious transactions. Further highlighting the importance of a coordinated effort between regulators and industry to protect the integrity of financial services. The consequences of breaching AML/CTF are what Richard described as threefold. It causes reputational damage to the business, activates regulatory actions and penalties, and negatively impacts the community.

Though the recent penalty of $1.3 billion imposed on Westpac indicates the regulators' firm stance against breaches, Richard stated that the decision to take enforcement action is not done lightly. In accordance with *AUSTRAC's Approach to Regulation*[3] paper the following factors are considered when determining whether to pursue enforcement action:

- the type and nature of the breach
- the level of ML/TF risk
- willingness to comply
- whether the breach was voluntarily reported
- likely consequences

In his closing remarks Richard stressed the importance of terminating a relationship with a customer if suspicions are raised as financial abuse and financial crimes such as child sex trafficking and fraud have real and significant impacts on the community.

Cyber security: are you ready to manage a cyber attack?

Presented by: Chris McLaughlin, Director, Cyber Security Group Aon; Andrew Gray, Chief Counsel, Aon Reinsurance Solutions APAC, Associate General Counsel, Aon Commercial Risks Solutions Global; Olga Ganopolsky, General Counsel Privacy and Data, Macquarie Group; and Emily Hills, Senior Corporate Counsel, Toyota Finance Australia.

Cyber attacks present a major threat to both consumers and providers in the financial services industry. Chris noted that the incidence and sophistication of cyber crime has significantly increased and catching the perpetrators has become even more difficult. Cyber crime is now cheaper and easier than ever to commit due to the accessibility of tools such as hardware and information on how to commit a cyber attack. In light of these challenges Chris stressed the importance of proactively testing cyber security systems and identifying points of vulnerability. Even more important is the need to foster a workplace culture of awareness and having appropriate training for employees to identify potential cyber attacks.

Following on, Andrew provided a unique examination of silent cyber risks which are the losses stemming from traditional property and liability policies that were not specifically designed to cover cyber risk. Specifically he commented on the term "cyber loss" in exclusions policies which purport to exclude cyber losses from the ambit of insurance policies. A "cyber loss" is defined to include a "cyber incident" which in effect constitutes a broad definition. Andrew noted the confusion this causes in an insurance policy demonstrates the need for governance boards to provide further guidance.

Through the lens of a privacy lawyer, Olga described cyber security as an international and interrelated activity. For international businesses in particular, the regulatory and reporting obligations for a data breach requires an interdisciplinary and cross-functional approach. Olga also pointed out the critical role of individuals in contributing to cyber attacks as 43% of them are attributable to human error. This astounding statistic is indicative of the need to train and manage employees, and as iterated by Chris, developing a culture of awareness. Looking towards the future Olga spoke of the proposed reforms to the Privacy Act 1988 (Cth) and a requirement for businesses to better manage their data. Policy makers and businesses will need to work collaboratively to balance the need to develop a relationship of trust with consumers with the value of data.

Emily concluded the presentation with a focus on businesses' reporting requirements. Emily spoke of the need for an incident response plan policy and the range of questions that should be front of mind when an attack occurs. These include the following:

- What was the source of the attack?
- When did it occur?
- What actions were taken in response?
- Was personal information compromised?

- What was the nature of the personal information?
- Was the information encrypted or anonymised?
- Will it cause serious harm?
- How many individuals have been impacted?
- How long has the information been accessible?

Buy-now-pay-later (BNPL) update

Presented by: Andrea Beatty, Partner, Piper Alderman

Andrea Beatty gave a presentation detailing ASIC's newly released Report 672 *Buy-now-pay-later: An industry update*.[4] Andrea delineated ASIC's observations into three key areas:

(i) the growth and evolution of the BNPL industry
(ii) the impact of BNPL arrangement on consumers
(iii) recent regulatory developments in the BNPL industry

Andrea spoke of how the report examined the growth of the BNPL industry, focusing on a number of key factors. ASIC found that the number of active BNPL accounts held by the BNPL providers increased steadily each financial year from the 2015/16 financial year (around 487,000 active accounts) to the 2018/19 financial year (around 3.7 million active accounts). As at June 2019, the six BNPL providers who participated in the review had collectively approved 6.1 million active accounts. Matching the increase in the number of BNPL transactions, the value of these transactions has also increased by an astounding 79%. The total revenue of the six BNPL providers notably increased by 50% from $266 million in the 2017/18 financial year to $398 million in the 2018/19 financial year.

Following this Andrea discussed the impact of the BNPL arrangement on consumers. In their report ASIC found 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 15% 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 they had to take out an additional loan to make repayments.

The international regulatory framework for BNPL arrangements is not consistent. In the jurisdictions considered in ASIC's report (being the United Kingdom, New Zealand and Sweden), BNPL arrangements fell outside of each jurisdiction's consumer credit regulatory regime. However the Australian Finance Industry Association announced in December 2019 that it is developing an industry code of practice for BNPL providers (Code). This will respond to the finding of ASIC's 2018 report and the recommendations by the Senate Economics References Committee inquiry. The Code will play an important role in delivering benefits to both consumers and subscribers to the code.

Open banking, fintech, and regtech

Presented by: Paul Franklin, Executive General Manager, Consumer Data Right Division, ACCC; Senator Andrew Bragg, Senator for New South Wales and Chair of Select Committee on Financial Technology and Regulatory Technology; Rebecca Schot-Guppy, CEO, Fintech Australia; Neil Campbell, Head of Security and Compliance, Meeco; and Joshua Annese, Partner, Piper Alderman.

Senator Bragg commenced the presentation by summarising the findings of the Senate Select Committee into financial technology (fintech) and regulatory technology (regtech). The Interim Report released in September contained 32 key recommendations outlining Australia's agenda to enhance competition in the financial sector.[5] Of these recommendations eight were implemented in the October budget, which as Senator Bragg pointed out illustrates the government's motivation to take policy action.

Commenting on regulators such as ASIC, Senator Bragg reinforced that their role is as an enforcement agency and not a law maker. This was followed by a statement endorsing the government's support for innovation and a regulatory framework that does not unnecessarily constrain industry growth. Senator Bragg concluded by stating that the next step for Australia is to capitalise on the geopolitical climate and emerge as a fintech leader in the Asia-Pacific region.

Paul spoke extensively of the Consumer Data Right (CDR) and its progression towards adoption across the financial industry. From 1 July 2020 the four major banks were required to make available consumer data relating to credit and debit cards, deposit accounts and transaction accounts. Over time the sector will continue to build capability with all non-major banks to make available consumer data by the end of 2021. As Paul discussed the CDR remains in an infancy stage, and will require a vibrant ecosystem of data recipients before the benefits are realised by consumers.

Joshua subsequently spoke of the regulatory framework encompassing the CDR contained in the new Pt IV of the Competition and Consumer Act 2010 (Cth). The legislative framework will be actualised through a combination of CDR rules and standards. As pointed out by Joshua, the requirements for accreditation are similar to that of an Australian Financial Services Licence. At present there is only one tier of accreditation, however, it is anticipated that different levels will be introduced as the CDR evolves.

Following on from this was a lively discussion from the panellists on methods to encourage widespread consumer adoption of the CDR. The overall response from panellists was to encourage a wide offering of value proposition from accredited persons before engaging in consumer awareness campaigns.

Neobanks: the new age of banking

Presented by: Philip Haultain, General Counsel and Company Secretary, Volt Bank; Dean McAuley, Director Capital Product, Prospa; and Scott Jamieson, Chief Compliance Officer, Revolut.

Neobanks are an increasing phenomenon that is set to rival traditional systems of banking. Philip from Volt Bank described their entirely electronic offering and app focused services. This was followed by Dean from Prospa, a fintech whose digital first approach takes a different approach to consumer and small business loans, providing loans of up to $300,000 within 24 hours. Concluding the session was Scott from Revolut, a fintech that initially offered a multicurrency card but has since diversified to provide an array of products including peer-to-peer transfers, subscriptions accounts and cashback systems. This unique presentation provided an insight into the changing face of banking and the innovative new offerings provided by fintechs.

Blockchain: where are we?

Presented by: Michael Bacina, Partner, Piper Alderman; Natasha Blycha, Global Head of Digital Law for Herbert Smith Freehills; and Nikesh Lalchandani, Chief Strategy Officer for Bloxian.

The interactive presentation hosted by Michael commenced by describing Blockchain and the evolution of the ledger before delving into an analysis of smart contracts. As explained by Natasha, Smart Contracts are essentially digital assets that are predicted to have deep implications on our economy. A smart contract is in summary a self-executing code contained on a blockchain. A smart legal contract is distinct in terms of its ability to carry out post-execution activities. A capability Natasha analogised to an electronic secretary monitoring and carrying out the electronic contract. Smart contracts unlock an array of new efficiencies, displacing up to $250 billion a year that arises from the burden of legal and regulatory compliance in Australia. They have a perfect memory meaning they retain an audit trail and are jointly owned ensuring a single source of the truth.

Nikesh and Michael subsequently spoke on the topic of a central bank digital currency (CBDC) listing the following as advantages:

- reduction in the expense of transferring or managing cash
- possible increase of financial inclusion
- faster monetary policy using smart contracts
- innovative new products using smart contracts
- better macro tracking of the economy

Michael discussed the recent efforts of regions such as China and the Bank of Canada in pursuing CBDC. The Bahamas interestingly recently launched the “sand dollar”, the world’s first CBDC. The Reserve Bank in September announced that it is partnering with Commonwealth Bank, National Australia Bank, Perpetual and ConsenSys Software, a blockchain technology company, on a collaborative project to explore the potential use and implications of a wholesale form of central bank digital currency using distributed ledger technology. The project is expected to be completed at the end of 2020 with a report scheduled for early next year.

What new regulations are coming post Hayne Royal Commission?

Presented by: Narelle Smythe, Partner, Clayton Utz; Steven Klimt, Partner, Clayton Utz; and Alexandra Kelly, Principal Solicitor, Financial Legal Rights Centre.

The final presentation was the subject of a lively debate between panellists with diverging opinions. Steven commenced the session by analysing the proposed legislative amendments and overhaul of responsible lending. If enacted the following changes will commence 1 March 2020:

- Responsible lending obligations will only apply to small amount credit contracts, consumer leases and low limit credit contracts.
- Authorised deposit-taking institutions (ADIs) will no longer be required to comply with responsible lending obligations, however, they will continue to be required to comply with APRA’s prudential standards.
- Non-ADI credit providers will need to comply with new non-ADI lending standards.
- All credit assistance providers will be required to comply with best interest obligations.

In summary, Steven noted that the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth) was likely to succeed in the Lower House. However, it will require the support of three independents to pass the Senate.

Narelle subsequently delved into an in-depth analysis of the recent Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth). Key measures include:

- introducing a deferred sales model for add-on insurance

- banning the practice of hawking
- restricting the use of the terms "insurance" and "insurer"
- introducing a framework for establishing government instituted codes of conduct

Alexandra in response to the proposed Bill firmly opposed the changes on behalf of consumers. Alexandra emphasised that the changes would undermine established safety systems and will only worsen the misconduct of banks brought to light in the Hayne Royal Commission. In presenting this view Alexandra suggested a complete lack of evidence in support of the effect of COVID-19 on the flow of credit. She championed the need for stronger avenues for consumers to seek recourse and concluded by imploring the legislature to abandon the proposed changes in the interest of vulnerable customers.

Alexandra's comments were followed by a lively debate which showcased the opposing views of the panellists. By a show of hands Narelle and Steven agreed with the proposed changes to responsible lending contending that the amendments were not too dissimilar to the present legislative framework. This was firmly met with disagreement by consumer advocate, Alexandra.

Overall, the conference provided an insightful analysis of the varying impacts of COVID-19 on financial services and the future changes that are set to take place.

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Footnotes

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2. AUSTRAC's video can be viewed on their website: Australian Transaction Reports and Analysis Centre (AUSTRAC), About AUSTRAC, 10 December 2019, www.austrac.gov.au/about-us/austrac-overview.
3. AUSTRAC *AUSTRAC's Approach to Regulation* (July 2019) www.austrac.gov.au/sites/default/files/2019-05/AUSTRAC_ApproachRegulation1811_v2WEB.pdf.
4. ASIC *Buy now pay later: An industry update* REP 672 (November 2020) https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf.
5. A Bragg and others *Select Committee on Financial Technology and Regulatory Technology Interim Report* (September 2020).

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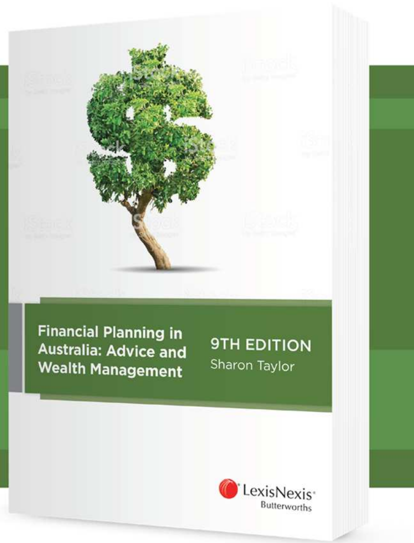

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About the Author

Sharon Taylor is an Associate Professor in Accounting and Financial Planning at Western Sydney University (WSU). She held the role of convenor of the Financial Services Discipline Team for many years and was Chair of the committee developing both the Master of Commerce (Financial Planning) and Bachelor of Financial Advising degree programs at WSU. A Fellow of CPA Australia and a Registered Tax Agent, Sharon has also worked previously at the Australian Taxation Office. She was a Foundation Fellow of the Association of Financial Educators. Currently she is a member of the Financial Planning Academic Forum and is Chair of the Financial Planning Education Council.

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Appendix A – Time Value of Money
Appendix B – Present and Future Value Tables

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