

# Banking and finance update

4 July 2017



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### 1 ASIC surveys marketplace lending providers and highlights lack of transparency in the determination of interest rates as an issue

On 1 June 2017 ASIC released the [results](#) of its survey of marketplace lending providers.

The report gives an interesting overview of the marketplace lending industry in Australia, in particular its structure and size.

In paragraphs 138 and subsequent ASIC observes comments on feedback from participants on emerging trends and issues and highlights including:

- lack of uniformity and transparency in the determination of interest rates, which compromises comparability between different loan products
- public awareness and understanding of the industry more generally

- non-application of National Credit Code Protections for SME borrowers.

ASIC makes various recommendations for the sector, including making sure that:

- investors are referred to the marketplace lending information available on ASIC's MoneySmart website
- investors are provided with an appropriately designed risk warning statement before making an investment
- investors are provided with an optional 'knowledge test' to assess their understanding of the product before they invest
- provide additional information on the website of marketplace lenders.

As most marketplace lenders operate under a managed investment scheme model (either regulated or unregulated) it is likely that ASIC has or will have the power to be in a position to enforce its recommendations. This is particularly so given the recent amendments to unfair contracts legislation.

## 2. Foreign investors the losers for NSW stamp duty rates

New South Wales follows suit with Victoria in tax hikes for foreign home buyers. The New South Wales government announced on 1 June 2017 that it will double its foreign investor stamp duty surcharge to 8% and also raise its annual land tax surcharge for foreign home owners from the existing 0.7% to 2%. Stamp duty concessions for investors purchasing off the plan will also be removed.

This follows similar type changes in Victoria recently.

In addition the announcement also foreshadows additional [incentives](#) for first home buyers by:

- Abolishing all stamp duty for first homebuyers on existing and new homes up to \$650,000 and stamp duty discounts up to \$800,000. These changes, to be introduced on July 1 2017, will provide savings of up to \$24,740 for first homebuyers
- Abolishing the stamp duty charged on lenders' mortgage insurance, which is often required by banks to lend to first homebuyers with limited deposits, providing a saving of around \$2,900 on an \$800,000 property.

## 3. ASIC Supervisory Cost Recovery Levy Act 2017 becomes law and implements an industry funding model for the Australian Securities and Investments Commission

On 15 June 2017, the Senate passed the ASIC Supervisory Cost Recovery Levy Bill 2017 and related bills to implement an industry funding model for the Australian Securities and Investments Commission.

Regulations that provide additional detail on the operation of the industry funding model [have now been made](#).

The new scheme commences on 1 July 2017.

Division 2 of Part 3 of the regulations relates to entities that are part of the deposit-taking and credit sector. Entities may fall within multiple subsectors within the sector depending on the activities they undertake during a financial year. The levy is calculated on business written of the relevant type.

For the credit sector:

- the credit sector will pay for the cost of its regulation by ASIC
- ASIC will levy each licensee with the notional cost of its regulation
- levies will either be a 'flat rate', a 'graduated rate' or a combination of both.
- Where a licensee enters the industry during the course of a year, levies may or may not be at a pro rata rate.

### Credit Sectors to have a base levy and a graduated levy

Levies will apply to:

- credit intermediaries
- credit providers
- deposit product providers
- payment product providers
- small amount credit providers

As stated in the explanatory statement:

- **Credit intermediaries** (holders of an Australian credit licence that authorises the entity to engage in credit activities other than as a credit provider) will have to pay a minimum levy of \$1,000 and then a variable amount depending on the number of credit representatives each entity has. (Regulation 25)
- **Credit providers** (same meaning as in the National Consumer Credit Protection Act 2009) will pay a minimum levy of \$2,000. Credit providers that provide more than \$100 million in credit contracts will also pay a variable component depending on their share of the total value of credit contracts above the \$100 million threshold provided in a financial year. (Regulation 26)
- **Small amount credit providers** (same meaning as in the National Consumer Credit Protection Act 2009) that also provide credit under small amount credit contracts will also have to pay an additional levy calculated by reference to each entity's share of the total amount of credit provided under SACCs issued by the subsector in the financial year (Regulation 24). In addition, a minimum levy of \$2000 will also apply on the basis that small amount credit are also credit providers (refer to Explanatory Memorandum)
- **Deposit product providers** (holders of an AFSL Licence that authorises the holder to deal in a financial product by issuing deposit products) will pay a minimum levy of \$2,000. Deposit providers that more than \$10 million in deposits in a financial year will also a variable component depending on their share of the total value of deposit products above the \$10 million threshold held in the financial year. (Regulation 27)
- **Payment product providers** (holders of an AFSL Licence that authorises the holder to deal in a financial product through which, or through the acquisition of which, non-cash payments can be made) will pay a minimum levy of \$2,000 and then an additional amount based on net revenue from payment product activity. (Regulation 28)

The consumer leasing sector is not mentioned in the Explanatory Statement, nor the Regulations. While it might be tempting to assume that providers of consumer leases will be treated as credit providers, this does not sit well with a plain reading of the credit legislation.

## Levies also apply to other sectors

A reminder that the ASIC Levies will apply to all sectors regulated by ASIC, including as set out in schedule 1 of the regulations:

Item	Sub-sectors	Provisions
1	Auditors of disclosing entities	section 15
2	Australian derivative trade repository operators	section 59
3	Corporate advisors	section 63
4	Credit intermediaries	section 25
5	Credit providers	section 26
6	Credit rating agencies	section 60
7	Custodians	section 31
8	Deposit product providers	section 27
9	Exempt CS facility operators	section 58
10	Exempt market operators	section 53
11	Insurance product distributors	section 70
12	Insurance product providers	section 72
13	Large futures exchange operators	section 52
14	Large futures exchange participants	section 64
15	Large proprietary companies	section 16
16	Large securities exchange operators	section 51
17	Large securities exchange participants	section 65
18	Licensees that provide only general advice to retail or wholesale clients	section 40
19	Licensees that provide personal advice on relevant financial products to retail clients	section 43
20	Licensees that provide personal advice to only wholesale clients	section 41
21	Licensees that provide personal advice to retail clients on only products that are not relevant financial products	section 42
22	Listed corporations	section 19
23	Managed discretionary account providers	section 32
24	Margin lenders	section 23
25	Operators of investor directed portfolio services	section 34
26	Overseas market operators	section 46
27	Over-the-counter traders	section 66
28	Payment product providers	section 28
29	Public companies (unlisted)	section 17
30	Registered company auditors	section 18

Item	Sub-sectors	Provisions
31	Registered liquidators	section 20
32	Responsible entities	section 35
33	Retail over-the-counter derivatives issuers	section 61
34	Risk management product providers	section 71
35	Securities dealers	section 67
36	Small amount credit providers	section 24
37	Small derivative market operators	section 50
38	Small futures exchange operators	section 49
39	Small securities exchange operators	section 48
40	Small securities exchange operators with self-listing function only	section 47
41	Superannuation trustees	section 36
42	Tier 1 clearing and settlement facility operators	section 54
43	Tier 2 clearing and settlement facility operators	section 55
44	Tier 3 clearing and settlement facility operators	section 56
45	Tier 4 clearing and settlement facility operators	section 57
46	Traditional trustee company service providers	section 33
47	Wholesale electricity dealers	section 62
48	Wholesale trustees	section 37

## 4. ASIC enforcement review – breach reporting by financial services licensees

Under current law (Corporations Act 2001) financial services licensees are required to report certain significant breaches applicable to ASIC.

A taskforce at ASIC has in recent months completed a [review](#) of the self-reporting of the contraventions regime by financial services licensees.

ASIC in the Compliance Review adopts certain positions in relation to the matter including:

- retain the 'significance test' but make it an objective test
- extend the obligation for licensees to report to include not only breaches by the licensee but also significant breaches by individual employees and representatives
- increase penalties for failure to report as and when required

- introduce a wider range of penalty options available to ASIC when there has been a contravention to add penalties such as civil penalties and infringement notices
- prescribe the contents of breach reports required to be lodged and reports to be submitted in electronic format
- certain other recommendations.

Originally Australian financial licensees were required to report any and all breaches. A number of years ago that requirement was changed to only require reporting of 'significant breaches'.

It is the subjective assessment by licensees of whether or not it is necessary to report a breach that is of concern. The smaller the organisation, the more likely it is that any breach will be regarded as 'significant', while the larger the organisation the more likely it is that a breach will not be considered to be 'significant' to the organisation as a whole.

It will be interesting to see where things go with this ASIC enforcement review.

## 5. Mandatory self-reporting of contraventions by credit licensees likely to be introduced

One of the recommendations of the ASIC enforcement review taskforce (referred to above) was that the mandatory self-reporting regime should be extended to impose the same obligations upon credit licensees.

This recommendation is in contrast to the original regulatory intention that regulation of credit should have a lighter touch than regulation of financial service providers – how times change and how easy it is to forget the original intentions!

Currently, when there has been a breach of applicable laws, credit licensees are required to record that breach in a breach register, but are not required to then report the breach to ASIC, other than noting same when lodging the annual compliance statement.

Extension of mandatory breach self-reporting regime to credit licensees will lead to a major shakeup of the industry. For example, brokers dismissed from aggregator panels might well find themselves being the subject of a breach report lodged with ASIC. It will also lead to enhanced compliance procedures at the offices of each credit licensee.

## 6. Standardisation of statements of advice and clawback rights for life insurance

ASIC has in the past issued sample standard forms for different products.

In another step along the road towards standardisation, on the 31st May, ASIC released a [consultation paper](#) on a new sample Statement of Advice (SOA) for life insurance products.

The sample SOA is a clear and comprehensive document and all participants in both the financial services industry and the credit industry would do well to be aware of the standard expected and the modern form of presentations used. One aspect that caught our eye was the forthright manner in which commission disclosures were made in the document and their positioning at the start of the document.

Another interesting development is that Government is clarifying the level of "clawbacks" (of commission) permitted where life insurance policies are cancelled within the first few years after the policy is taken out.

## Where to next?

Please contact your local Hunt & Hunt Lawyers office for further information or specific advice.

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