FINANCIAL SERVICES THINKING

A MCMAHON CLARKE PUBLICATION

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This edition of *Financial Services Thinking* brings you up to date with what's happening in the financial services sector.

Scroll down for a snapshot of the latest news from the corporate regulators and a Hot Tip for trustees and responsible entities about the consequences of agreeing to cap an indemnity provided by a service provider.

We encourage you to get in touch with our team who can provide tailored solutions for your business and answer any queries you may have.

Please share *Financial Services Thinking* with your friends and colleagues, and we value your feedback.

AUSTRALIAN LAW REFORM COMMISSION

Review of financial services laws

The ALRC has announced an **inquiry** into the potential for simplifying the laws which regulate financial services in Australia. The focus of the ALRC inquiry is:

- The use of definitions in corporations and financial services legislation (due 30 November 2021).
- The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards (due 30 September 2022).
- Potential for reframing and restructuring the provisions of the Corporations Act and the Corporations Regulations which deal with financial services and markets (due 25 August 2023).

ASIC

Another warning for fund managers about advertising

As part of ASIC's continued focus on fund advertising, the corporate regulator is warning fund managers to ensure their product name aligns with the underlying investments of their fund. The warning follows an ASIC investigation into 36 managed funds operated by 20 responsible entities primarily in the fixed income and property sectors. ASIC's investigation revealed two major concerns – the use of the term 'cash' to describe non-cash products (eg bonds) and advertised redemption characteristics not aligning with the fund's underlying investments.

We can help you establish internal controls for reviewing your advertisements and also review your advertisements for compliance with the law and ASIC policy. You can also view the latest edition of our ***Toolkit for Fund Managers*** for a recent article by Kristy McCluskey where she provides *10 tips to help you avoid ASIC's advertising axe.*

Extending relief for capital raisings and financial advice

ASIC has extended the existing relief for 'low doc' offers, introduced in April in response to COVID-19, until 2021. This relief applies to certain share purchase plans, placements and rights offers. Click **here** for more details. Our team can help with any queries you may have about your entitlements to ASIC relief.

Conflicts of interest within debt capital raising process

In September this year, ASIC issued **Report 688 *Allocations in debt capital market transactions***, which outlines better practice guidelines for identifying and managing potential conflicts of interest when making allocation recommendations, managing confidential and market-sensitive information, ensuring information provided to issuers and investors is accurate and not misleading or deceptive, and supervising and monitoring debt capital market transactions. These guidelines are consistent with the nine measures to address conflicts of interest contained in the Board of the International Organisation of Securities Commission's *Final report on conflicts of interest and associated conduct risks during the debt capital raising process.*

Transition from LIBOR

ASIC has strongly encouraged all financial and corporate institutions using derivative contacts referencing LIBOR to review and adhere to ISDA's new IBOR fallback protocols which are due to be launched on 23 October 2020. The purpose of the protocols is to provide a fallback for derivative contracts which reference LIBOR given the recent steps taken to transition away from the London rates. ASIC says adherence to the new fallback protocols is fundamental to ensuring an orderly transition from LIBOR.

ASIC HAS WARNED OFFER DOCUMENT ISSUERS OF THE DANGERS OF INCLUDING FORWARD-LOOKING STATEMENTS IN OFFERS TO RETAIL INVESTORS.

Forward-looking statements

ASIC has warned offer document issuers of the dangers of including forward-looking statements in offers to retail investors. ASIC opines that providing forward-looking statements in a pandemic is particularly difficult and reiterates that these statements should rely on reasonable rather than hypothetical grounds. ASIC says the issuer should deal with uncertainties by—

- shortening the duration of forecast periods
- increasing the prominence of sensitivity analyses
- disclosing the key factors and variables that will affect the prospect of the security being offered.

ASIC enforcement update

In September this year, ASIC released a report outlining its key actions to enforce the law and support its enforcement objectives over the past six months. Those key actions include:

- Civil penalties imposed in long-running matters, Octavier and Storm Financial, and against two large financial institutions. CBA was ordered to pay a civil penalty of $5 million and publish a corrective notice about its AgriAdvantage Plus Package and AMP was ordered to pay a civil penalty of over $5 million for failing to prevent insurance churn by its financial planners.
- Enforcement actions against individuals, including directors sentenced for insider trading, imprisonment of former Kleenmaid director Andrew Young for nine years for fraud, and insolvent trading and imprisonment of pre-insolvency adviser Stephen O'Neill for five years for money laundering.
- Commencement of civil penalty proceedings against—
  - Colonial First State Investments Limited (CFSIL) over alleged misleading and deceptive statements
  - CBA and CFSIL over alleged conflicted remuneration paid to CBA between 2013 and 2019.

The report also sets out ASIC's set of pandemic-related enforcement priorities to guide its response to misconduct associated with the pandemic. For more information about ASIC's enforcement priorities check out the latest edition of our ***Toolkit for Fund Managers*** for an article by senior associate Elliott Stumm.

AUSTRAC

Extended support of early release of superannuation COVID-19 initiative

In March this year, AUSTRAC introduced a new rule to facilitate streamlined customer verification for payments by superannuation funds to their members under the COVID-19 early release of superannuation initiative. Under the Rule, where the payment under this initiative is approved by the ATO, superannuation funds do not have to conduct upfront customer verification for AML/CTF purposes.

AUSTRAC has extended the rule to support the Government's initiative to allow early release of superannuation until 31 December 2020.

RBA

Financial Stability Review

The RBA has released its half-yearly *Financial Stability Review* providing insight into the central bank's assessment of how the Australian financial system is operating. Unsurprisingly, this edition focusses heavily on the pandemic. Here are some of the key takeaways:

- The Australian financial system has fared well – it has cushioned rather than absorbed the shock of the pandemic.
- Households have greatly increased their level of savings.
- Australian businesses have relied on relief and deferrals to maintain cashflow levels. The RBA expects more businesses to fail as these support measures are reduced.
- Australian banks have high capital levels, are profitable, and most of their loans are well-secured.

HOT TIP!

By agreeing to cap an indemnity provided by a service provider, trustees and responsible entities (REs) may inadvertently agree to assume liability in excess of the capped amounts. In these cases, the trustee or RE's professional indemnity insurance may not respond as the insured has effectively agreed to assume the liability. **Contact our team** for more details