Australia

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NATURE OF CLAIMS

Common causes of action

1 What are the most common causes of action brought against banks and other financial services providers by their customers?

Common causes of action commenced against banks and financial service providers by customers include:

- breach of contract – both express and implied terms;
- breaches of statute – most particularly in relation to standards of conduct such as engaging in misleading or deceptive conduct, 'unconscionable conduct' or, in relation to consumer credit activities, breaches of responsible lending legislation.

Statutory consumer protection provisions, such as unconscionable conduct and misleading or deceptive conduct, are generally mirrored in the Australian Securities and Investments Commission Act 2001 (ASIC Act) for banks providing credit facilities, and the Corporations Act 2001 (Corporations Act) for other financial product and service providers. Although not applying to financial services, the Australian Consumer Law similarly reflects these provisions to protect consumers of other products and services.

Additionally, for financial service providers other than banks, such as financial advisers, common causes of action brought by customers also include negligence and breach of fiduciary duty.

Breach of contract

The legal relationship between a bank and its customer is essentially one of contract, supplemented by laws in equity and tort and by statute.

Breach of contract claims frequently arise in the context of the Code of Banking Practice, soon to be the Banking Code of Practice (Code). The Code sets out standards and obligations of the banking industry and applies to individual borrowers as well as small businesses. Adherence to the Code is voluntary but all of the large banks are signatories. Although the Code currently does not have legislative force, banks that adopt it by incorporation into their lending documentation are contractually bound by it. Claims under the Code have been used by both borrowers and guarantors to challenge debt recovery action by lenders and as a ground for damages. The most common claim made under the Code is an alleged breach of the bank's obligation to 'exercise the care and skill of a diligent and prudent banker' in selecting and applying its credit assessment methods when forming an opinion about the borrower's ability to repay the subject facility. Although generally a bank does not owe its customers a duty to exercise care, in contract or tort, when performing its serviceability analysis, this effectively imposes a contractual warranty by the bank about the stipulated standard of care.

Customers may also allege that the bank has breached an implied term of the contract. Implied terms arise at both common law (such as an implied duty of good faith) and via statute, such as the implied warranty that services will be provided with due care and skill.

Unconscionable conduct

Given the expansive yet amorphous nature of 'unconscionable conduct', it is a cause of action regularly invoked by customers against banks and other financial service providers. Unconscionable conduct claims are available both at general law (as an equitable doctrine) and under statute.

To establish a claim of unconscionable conduct in equity, it must be shown that:

- there is a relationship that places one party at a 'special disadvantage' of some kind as regards the other party;
- the stronger party has knowledge of the special disadvantage; and
- the stronger party takes 'unconscientious advantage' of its position.

However, under statute, unconscionable conduct operates on a wider basis. For example, a customer under the statutory regime need not establish a 'special disadvantage', and a court may take into account a broad range of factors set out in the ASIC Act, including not just any inequality of bargaining power but also the numerical and financial literacy of a customer, any undue influence exerted over the customer, and the amount paid for the relevant services.

The wider scope of the statutory unconscionability regime means it has almost entirely superseded the equitable doctrine of unconscionable conduct in practice.

Misleading or deceptive conduct

Banks and other providers of financial products and services must not engage in conduct that is misleading or deceptive or likely to mislead or deceive. What is 'misleading or deceptive' is an objective test, and a bank or institution need not intend to mislead or deceive customers – rather, it is only necessary to show that a customer was in fact or likely to have been misled in relation to a particular matter.

In some circumstances, mere silence can amount to misleading conduct, for example, where a financial services provider offers a 'half-truth' or otherwise there is a reasonable expectation from the customer, on the facts of the case, that the provider, in fairness, would require the institution to have disclosed more.

Responsible lending

Responsible lending laws have received significant attention in recent times, being a topic of emphasis in the 2018 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) (discussed below). Responsible lending laws regulate consumer lending, as distinct from lending for business purposes. Chiefly, it requires lenders to make an assessment as to whether a contract is 'unsuitable' for the consumer and make reasonable inquiries about their requirements, objectives and financial situation, and to verify their financial situation. However, the responsible lending provisions are broad, particularly insofar as they require 'reasonable' inquiries and 'reasonable' verification steps. Reasonable minds may, and do, differ over what precisely is required. Ultimately, the Royal Commission did not find that any structural amendment to the current responsible lending framework is necessary. The view taken was essentially that the current laws should be upheld and enforced (as guided and monitored by the corporate regulator, ASIC). Banks and other lenders have significantly amended their origination practices as a result, which has increased the formalities and burdens on both lenders and their customers.

Non-contractual duties

2 In claims for the misselling of financial products, what types of non-contractual duties have been recognised by the court? In particular, is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

Non-contractual claims in connection with the mis-selling of financial products are generally actionable by both customers and regulators. These protections span disclosure requirements, anti-hawking provisions, suitability assessments and general conduct provisions.

Key non-contractual duties affecting banker or customer relationships in Australia include: the statutory prohibitions on misleading or deceptive conduct, false or misleading representations, and unconscionable conduct. Consumer credit legislation also prohibits misselling consumer products that are unsuitable for the customer. The National Consumer Credit Protection Act 2009 (NCCP Act) specifically states that a consumer product will be considered unsuitable where the consumer is unable to comply with the relevant financial obligations or making the repayments would result in substantial hardship. Additionally, the loan will be considered unsuitable where the loan agreement does not meet the consumer's objectives or requirements.

Further, financial services licensees and credit providers are both under a general licensing condition to ensure that their financial services or credit activities are provided 'efficiently, honestly and fairly'. A breach of this provision can result in penalties for the institution as well as imposition of licensing conditions and, in serious cases, loss of licence.

The mis-selling of financial products was a key issue examined by the Royal Commission, particularly in connection with the sale of add-on insurance – that is, insurance sold with other financial products (such as consumer credit insurance with credit cards). These were often found to be of little value, either because the customer was ineligible to make a claim from inception, or because the cover, when called upon, provided little benefit to the customer.

Australia also has anti-hawking provisions that generally prohibit offering financial products in an unsolicited meeting or telephone call with a retail client. In addition to the penalties imposed by the Corporations Act for committing an offence, the person who is impacted by the anti-hawking provision is given a right of return and refund within a designated cooling-off period.

A raft of disclosure provisions also operate to prevent the mis-sale of products through the imposition of obligations to inform customers before they acquire a financial product, including the obligation to provide Product Disclosure Statements. Chapter 3 of the NCCP Act places disclosure obligations on financial institutions to aid consumers in understanding the relevant credit activities. The Code also contains consumer protections in this area, including disclosure requirements and particular obligations in connection with vulnerable customers or low-income earners.

Statutory liability regime

3 In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

As noted in question 1, the ASIC Act provides the core regulations that control the publication of untrue or misleading statements in relation to financial products or services.

However, misleading or deceptive conduct in relation to disclosure documents (such as prospectuses and product disclosure statements), as well as in relation to material provided to satisfy an entity's continuous disclosure obligations, is regulated specifically by the Corporations Act (and the ASX Listing Rules for listed entities).

These laws operate to ensure that any statement provided in prospectuses, listing, and periodic financial disclosures must be accurate, complete and able to be substantiated. The Corporations Act specifically addresses disclosure documents that contain a misleading or deceptive statement, or omit required information.

Liability for a contravention of these provisions may extend to both the company and individuals who made or authorised the misleading statement. In addition to both criminal and civil penalties for contraventions, the regime also allows aggrieved parties who have suffered damage or loss to bring a civil claim against the company.

As to the issuance of a prospectus, the Corporations Act provides that the issuers must ensure that the information provided is not misleading or deceptive. Disclosed information will be considered misleading where it is speculative or based on mere matters of opinion or judgement, and not made on reasonable grounds.

The Corporations Act and ASX Listing Rules also set out continuous disclosure obligations, which require listed entities to inform the ASX immediately of any information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's securities.

This aims to ensure that investors have equal and timely access to relevant company information. Breach of continuous disclosure obligations has become the primary basis upon which shareholder class actions are commenced in practice in Australia, with shareholders seeking to recover the diminution in the value of their shares once the information that an entity ought to have disclosed at an earlier time eventually comes to light.

Duty of good faith

4 Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

The courts are willing to imply a duty of good faith in certain commercial contracts, such as franchise agreements. However, there is no prima facie duty of good faith imposed in contracts between financial institutions and customers, and this issue has received little judicial consideration. Accordingly, customers generally invoke the statutory duties mentioned in question 1, including a duty not to act unconscionably (which itself requires consideration as to whether the parties acted in good faith). Typically, those duties are imposed to avoid instances of particular unfairness in the operation of the contract.

Where the duty of good faith applies, it generally requires the parties to act honestly and have due regard to the legitimate interests of both parties, and in particular, not to act capriciously or arbitrarily to defeat the objects of the contract. However, the financial institution is under no obligation to subordinate its own interests to that of the customer.

Fiduciary duties

5 In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

As noted in question 2, the typical legal relationship between banker and customer is one of debtor and creditor arising from contract. It is not an accepted fiduciary relationship. However, in special circumstances, a financial institution may owe fiduciary duties to a customer. For a fiduciary relationship to arise between banker and customer, the bank must have exceeded its usual role and engendered in the customer an expectation or understanding that it will act in the customer's best interests by providing financial or investment advice (gratuitously or otherwise) for example. Common situations include where:

- the relationship is one of confidence;
- there is inequality of bargaining power;
- there are agency elements;
- one party undertakes to perform a task in the interests of the other;
- there is scope for one party to unilaterally exercise discretion; or
- there is particular dependency or vulnerability.

Today, more than ever, banks and financial institutions engage in a variety of transactions and roles. In circumstances where the bank takes on particular fiduciary obligations, in particular where it acts as a trustee (for instance, in the context of financial advice, investment management and superannuation), typical allegations in this context involve advisers or trustees acting in conflict with their duty or failing to sufficiently prioritise the customer's interests. Even where fiduciary obligations arise, the precise content of a bank's duties depends on the circumstances and context of the matter.

In the context of financial advice, there is a specific statutory regime involving the imposition of a 'best interests' duty. One recommendation from the Royal Commission, which will likely be implemented, is that this duty should be extended to mortgage brokers such that, when acting in connection with home lending, mortgage brokers must act in the best interests of the intending borrower.

While a fiduciary can contract to modify their fiduciary duties, they cannot exclude liability for fraud or the deliberate disregard of their duty.

Master agreements

6 How are standard form master agreements for particular financial transactions treated?

Australia uses standard form master agreements such as ISDA. Those provisions are accorded the full force of contract, but there has been limited judicial consideration of ISDA in Australia.

Limiting liability

7 Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

Financial institutions can seek to limit or exclude particular kinds of liabilities. Most commonly, this is done in relation to institutional clients. As a general proposition, a financial institution is not able to limit its liability or exposure to statutory claims such as misleading or deceptive conduct, on that basis that it would be against public policy. Each of the Corporations Act, NCCP Act and ASIC Act contain prohibitions from contracting out of certain legislative provisions. Australian courts also construe exclusion clauses against the party seeking to rely on them. However, as noted above, parties can contract to exclude or modify fiduciary obligations.

Australia also has an unfair contract terms regime that precludes certain types of contractual terms in consumer and small business standard form contracts, including limited liability clauses that go beyond protecting the parties' legitimate business interests.

Freedom to contract

8 What other restrictions apply to the freedom of financial institutions to contract?

While the general position is that parties are free to bargain and contract, there is an overlay of statutory and regulatory requirements and prohibitions, including under:

- the Code, which imposes particular requirements on banks; and
- statutory regimes in the Banking Act, Corporations Act and ASIC Act (including the unfair contract terms regime) and Superannuation Industry (Supervision) Act 1993.

The unfair contracts regime regulates standard form contracts to both consumer and small business customers. Unfair terms are those that would impose a significant imbalance in the rights and obligations of the parties, are not reasonably necessary to protect legitimate interests; and would cause detriment to the other party if applied, for example, unilateral variation clauses. The Contracts Review Act 1980 (NSW) also enables the court to make void a contract in its entirety if a provision is considered unjust in the circumstances.

In terms of financial charges to customers, banks are restricted from charging penalties, being liquidated damages charged pursuant to the contract that are not commensurate with the actual loss suffered as a result of a breach or other contractual implication. This is particularly so in the context of late fees or charging default interest.

There are additionally laws restricting certain restraints of trade, such as conduct constituting exclusive dealing.

Litigation remedies

9 What remedies are available in financial services litigation?

Customers can, depending on the underlying cause of action, generally apply for the following remedies:

- damages;
- injunctions;
- specific performance of a contract;
- setting aside an agreement; and
- declarations.

The remedies available to ASIC, the corporate regulator, are set out in question 21.

Limitation defences

10 Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

As a matter of procedural law, there is a statutory limitation regime in Australia. Each Australian jurisdiction has enacted legislation limiting the period within which certain claims may be brought. Generally, the time period begins to run from the date on which the cause of action accrues. For example, in most Australian jurisdictions, the limitation period for breach of contract is six years from the date of the breach.

As a general proposition, courts enforce statutory limitation periods strictly, although some particular jurisdictions have exclusions such as matters that are 'fraudulently concealed'.

Although not a judicial body, the Australian Financial Complaints Authority (AFCA), being the new external dispute resolution body (see question 27), resolves certain types of complaints, including up to six years after the customer first became aware, or ought to have become aware, of the loss suffered or, if they have already complained to the financial institution via its internal dispute resolution process, then two years following that response. In February 2019, AFCA's remit was expanded to establish a temporary 'legacy complaints jurisdiction' to consider eligible financial complaints outside of AFCA time limits. The Australian government announced the measure as part of its response to the Royal Commission, which considered cases of financial misconduct dating back to 1 January 2008. Between 1 July 2019 and 30 June 2020, AFCA will consider disputes since 1 January 2008 that have not previously been heard and that fall within AFCA's current monetary limits and compensation thresholds.

PROCEDURE

Specialist courts

11 Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

While there is a commercial list in the Federal Court and certain state Supreme Courts for case management purposes, there are no specialist courts for adjudicating financial services disputes. However, AFCA is the new one-stop shop external dispute resolution body for financial disputes (see question 27). AFCA hears both financial and superannuation complaints (previously heard by separate third-party external dispute resolution bodies).

Procedural rules

12 Do any specific procedural rules apply to financial services litigation?

There are no specific procedural rules applying to financial services litigation. By way of guidance, there is a Central Practice Note dealing with the management of cases in the Commercial and Corporations National Practice Area. This covers commercial and corporation disputes within federal jurisdiction, of which banking, finance and insurance are sub-areas as well as economic regulation, competition and access.

Arbitration

13 May parties agree to submit financial services disputes to arbitration?

Arbitration in Australia is voluntary and it is possible for financial service institutions to agree to arbitration provisions; a more common practice with institutional clients. However, ASIC does not use arbitration as a dispute resolution method with financial service providers.

Australia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention). As such, Australian courts will give effect to private agreements to arbitrate and recognise and enforce arbitration awards made in other contracting jurisdictions.

Out-of-court settlements

14 Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

There are legislative requirements for financial services providers to seek to resolve their disputes out of court, if possible (see question 15). However, generally, they are not required to refer matters to alternative dispute resolution before commencing proceedings.

While customers are not required to first raise their dispute with AFCA, membership of AFCA is either required by law or is a licence condition of financial institutions that provide financial products and services. Accordingly, in practice, this is often the first step to a dispute, becuase customers can pursue a court outcome if unsatisfied with AFCA's recommendations. AFCA is also free to consumers and small businesses because it is funded by contributions from subscribed financial institutions.

Pre-action considerations

15 Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

In Australia, there are no specific pre-action formalities generally applicable to financial services litigation. Some states have such formalities as a matter of course in litigation generally.

Various state jurisdictions and courts have particular pre-action requirements before commencing proceedings, including, by way of example, an obligation to take genuine steps to seek to resolve the matter and subsequently filing a 'genuine steps statement'.

There are, however, some requirements regarding agricultural customers as a result of farm-debt mediation regulations. This requires a mediation to be held in certain circumstances before the bank can take enforcement action. While this is only applicable in some jurisdictions, a recommendation of the Royal Commission was the implementation of a uniform national scheme, which will likely be carried out.

Unilateral jurisdiction clauses

16 Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral jurisdiction clauses, also known as 'asymmetric' or 'one-sided' jurisdiction clauses, limit one party to suing the other in a court of a particular country while the other party is free to sue the former party in a jurisdiction of its choice. Accordingly, this favours one party. While there is little judicial consideration of such clauses, it is likely that these would be enforceable under Australian law, although this is not the case in certain overseas jurisdictions (such as where the term is regarded as unfair or unconscionable).

Disclosure obligations

17 What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

Australia has wide-ranging 'disclosure' obligations for litigants (most commonly referred to as 'discovery').

Unlike other jurisdictions, this process is limited to discovery of documents and does not extend to the taking of witness statements.

There are only limited exceptions to the obligation to disclose relevant documents, most notably, documents prepared for the dominant purpose of seeking or being provided legal advice (legal professional privilege, which is a fundamental common law immunity). Another exception is without prejudice material – that is, material (which is often full and frank) evidencing a willingness or an attempt to settle the matter, which may include concessions not to be relied upon in court. However, without prejudice material may be shown to the court at the conclusion of the matter on the question of costs.

Courts can, in certain circumstances, draw inferences where documents likely to exist are not produced without reasonable excuse or where it appears that documents or particular evidence that could have been adduced in support of a party's position were not.

This common process varies within Australian jurisdictions. Most relevantly, in the Federal Court, parties must apply for court orders for discovery and this must be in circumstances where it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. In state and territory jurisdictions, the rules generally allow for discovery of documents relevant to the issues in dispute. Particularly in larger cases, the parties will often seek discovery by categories of documents (as opposed to general discovery).

Although there is no banking secrecy or blocking legislation in Australia, the courts have considered the operation of such laws from extraterritorial jurisdictions where necessary – typically in the context of a foreign applicant seeking to set aside a notice to produce certain documents or a subpoena to produce documents, if compliance would require the applicant to commit serious criminal offences in breach of local banking secrecy laws.

Protecting confidentiality

18 Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

As a general proposition, financial institutions will be required to disclose client information to the extent it is relevant to the issues in dispute. That being said, where third-party information is relevant to a dispute, courts will usually entertain specific confidentiality requirements in relation to that information. In some circumstances, parties can seek 'preliminary discovery' of documents that may give rise to a cause of action or are required to complete information necessary to bring a cause of action. Courts seek to balance an overriding principle of access to relevant information with the burden on the parties and any associated third-party rights.

Procedural devices to protect confidential information include suppression or non-publication orders. Courts may also allow redaction of confidential and irrelevant information, such as bank account details of third-parties or those not in dispute. Circumstances in which a suppression order may be granted include, for example, where it is required to prevent prejudice to the proper administration of justice or national security, or to protect the safety of any person or to avoid causing undue distress or embarrassment in particular cases.

Disclosure of personal data

19 May private parties request disclosure of personal data held by financial services institutions?

As noted in question 18, where proceedings are brought against a financial services institution, a party will ordinarily be entitled to discovery and inspection of all discoverable documents in the institution's possession or control. Disclosure of personal data could also be sought by a private party issuing a subpoena to produce on the institution.

An 'open banking' regime was recently introduced in Australia, which is in effect a data sharing regime to support customer choice and competition. This will see the introduction of a comprehensive right for consumers to access information about them held by certain entities and, where the customer has elected, share this information with third parties. Data will be shared in a usable, machine-readable form. While the implementation is being completed in stages, the 'big four' Australian banks have voluntarily commenced publishing certain data in accordance with the first phase of the regime. This data sharing will assist banks and other lenders to assess suitability.

Data protection

20 What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

There are complex regimes in Australia to deal with the extraction and use of data in court proceedings. Courts will entertain a range of different technological solutions for the extraction and compilation of potentially relevant data. Electronic discovery is now commonplace. There are also instances of courts permitting artificial intelligence solutions such as predictive coding to reduce the size of disclosure sets. Parties may agree (with or without court intervention) on regimes to lessen the burden of discovery, such as by excluding certain types of electronic data from discovery. The Federal Court has developed a template protocol that sets out the terms under which information may be electronically exchanged between parties, typically during the discovery process.

INTERACTION WITH REGULATORY REGIME

Authority powers

21 What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

Various regulators have broad powers to bring court proceedings against financial service institutions for matters such as contravention of financial services or credit laws or corporations laws.

The available remedies range from preservative actions (to avoid or limit the damage), recovery action (to recover assets or obtain compensatory damages), and remedial and protective actions (to remedy contraventions and otherwise prevent further loss or damage). The remedies regulators may seek include:

- injunctions (both interlocutory, mandatory and preventative);
- imposition of civil penalties;
- imposition of criminal penalties and custodial sentences;
- damages (on behalf of the corporation, or registered scheme, or by those persons who suffered as a result of the contravention);
- imposition of compliance regimes; and
- other remedies such as orders to disclose information or publish advertisements.

Regulatory authorities may bring court proceedings for a range of purposes, most notably:

- to act as a public deterrent to similar conduct by the entity or other entities;
- for the imposition of civil penalties (which cannot be imposed by simple agreement); and
- for any criminal sanction.

The corporate regulator also has powers to intervene in proceedings already on foot.

Court-based enforcement is commonly used by regulatory authorities in Australia. Following the Royal Commission, all major regulators (particularly the corporate regulator, ASIC) have indicated they will seek to commence court-based enforcement more frequently.

Australian regulators have broad investigative and information-gathering powers and can require financial institutions to provide documents and information, attend examinations to answer questions and provide assistance to investigations.

Generally, if ASIC has sufficient evidence to support a criminal offence, particularly in cases of serious conduct that is reckless, dishonest or intentional, it will refer the matter to the Commonwealth public prosecutor.

ASIC can also take administrative protective action (ie, action that does not involve the courts) including disqualification from managing a corporation, revocation, suspension, variation of licence conditions, enforceable undertakings and public warning notices.

Significant litigated regulatory matters in recent times include allegations of market manipulation in connection with financial benchmarks, anti-money laundering and alleged breaches of responsible lending provisions.

Disclosure restrictions on communications

22 Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

In recognition of the commercially sensitive material they hold, the key financial services regulators – ASIC, the Australian Competition and Consumer Commission (ACCC) and the Australian Prudential Regulation Authority (APRA) – are subject to confidentiality obligations. Regulators are required to take all reasonable measures to protect from unauthorised use or disclosure the information given to it in confidence or in connection with the performance of its functions. ASIC and the ACCC will generally give the relevant parties notice before disclosing confidential material so as to give the owner of the material the opportunity to take any action to protect their interests.

Regulators cannot compel the production of communications or documents subject to a valid claim of legal professional privilege. However, parties may voluntarily elect to provide privileged documents to ASIC on a limited and confidential basis under its standard form disclosure agreement. This 'limited waiver' regime was introduced to enable ASIC to obtain the relevant information needed to make regulatory and enforcement decisions. The standard agreement provides that the disclosure of information to ASIC is not a waiver of any privilege existing at the time of the disclosure. ASIC will generally treat the information as confidential, but the privilege holder retains responsibility for otherwise safeguarding any privilege claims he or she wishes to maintain (eg, asserting any privilege where ASIC is compelled by law to disclose information under a court order for discovery).

It is important to note, however, that the agreement does not prevent third parties from asserting that privilege has been waived. There is some case law in Australia to support the proposition that a voluntary 'limited waiver' should not amount to a wider waiver of privilege, although the authorities have not directly considered the position of ASIC's standard agreement. Until such time, and in the absence of legislative protection being enacted, there will remain a risk of waiver of privilege for parties voluntarily disclosing privileged communications to ASIC.

Specific statutory secrecy provisions may also operate to prohibit disclosure of information shared between financial institutions and the prudential regulator, APRA. Using its statutory confidentiality powers as set out in the Australian Prudential Regulation Authority Act 1998 (Cth), other than in permitted circumstances, APRA does not allow disclosure of certain information (referred to as protected information). APRA uses these prohibitions so that inadvertent disclosure does not provoke a market overreaction or lead to an unwarranted loss of confidence on the part of beneficiaries in the institution the subject of the disclosure.

Private claims

23 May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Prosecution of corporate, securities and financial service laws is not exclusive to regulators. Private parties can bring proceedings against financial institutions directly for certain kinds of breaches of regulations. However, there must be specific remedial provisions in the statute giving such persons standing to seek relief. Some provisions are enforceable only by regulators. Often, regulatory investigations will, in fact, act as catalysts for private claims, especially class actions.

24 In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

The disclosure of complaints made by other parties of a similar nature would usually not be relevant but that question may fall to be determined on the particular facts and allegations at hand.

Often, claimants will seek to subpoena a regulator to produce documents obtained by the regulator in its investigations, to the extent they are relevant to the extant action. Whether such orders are made by the court will depend on the relevance of the material and whether it is protected by public interest immunity, or other immunities such as those afforded by APRA to 'protected information'.

Enforcement

25 Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

Generally, private parties (customers or otherwise) cannot enforce an agreement between a financial institution and a regulator. Enforceable undertakings are often agreed between financial institutions and ASIC in lieu of legal proceedings (although ASIC has been criticised for overreliance on this method of resolution), which are essentially administrative out-of-court settlements that are enforceable by ASIC in court if breached. While, private parties cannot directly enforce enforceable undertakings, as a practical matter, if they were to alert the regulator, the regulator is likely to enforce on their behalf.

Changes to the landscape

26 Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

There have been significant regulatory landscape changes since the financial crisis, characterised by a significant increase in the suite of regulatory requirements. Notably in 2018, the federal government conducted a Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which focused in part on the role of the regulators. Among the recommendations from that Commission was additional regulation and changes to the approach to enforcement that would include the conduct of more investigations and an increased level of court-based enforcement.

Particular attention has also been given to the role of corporate culture, governance and remuneration and their links to corporate misconduct. This has drawn the attention of the prudential regulator, APRA, which has recently been requiring financial institutions to undertake self-assessments into governance, accountability and culture.

Complaints procedure

27 **Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?**

Australian Financial Services Licensees and Australian Credit Licensee (licensees) are both under a general licensing condition to have an internal dispute resolution procedure that meets certain criteria, and to be a member of the AFCA scheme (as an external procedure).

Internal disputes resolution

Internal dispute resolution procedures must comply with the standards and requirements made or approved by ASIC and cover disputes in relation to the credit activities engaged in by the licensee or its representatives. ASIC has published a regulatory guide that it is currently seeking to update (RG 165 – Licensing: Internal and external dispute resolution), which aims at ensuring consumer complaints are dealt with efficiently and quickly, and that the licensee is able to identify potential systemic issues. This guidance also sets out time frames in which disputes should be dealt with internally.

AFCA – external disputes resolution

AFCA is a non-governmental organisation that administers a free and independent dispute resolution scheme as an alternative to courts and tribunals. AFCA reviews complaints about credit, finance and loans, insurance, banking deposits and payments, investments and financial advice and superannuation. It has jurisdiction to award compensation for indirect financial loss (capped at A$5,000 per claim), compensation for non-financial loss (also capped at A$5,000), and compensation up to A$2 million but the subject credit facility must generally not exceed A$5 million.

Once a dispute is lodged, the lender is notified and must cease all enforcement action relating to the dispute (which has been used as a delay tactic by many consumers, particularly where there is imminent enforcement action such as a court hearing). AFCA may require information to assess the dispute, usually by requesting documents or interviewing either party.

AFCA aims to resolve complaints using informal methods and by reaching a negotiated settlement. It can make a preliminary assessment that will result in a recommendation of how the dispute should be resolved. If the parties do not accept this, AFCA can make a formal decision called a determination. If the applicant accepts the determination, it will be binding on both parties. If the applicant rejects it, neither party is bound, and the applicant customer is free to pursue a court-ordered outcome.

AFCA can award financial damages (albeit not punitive, exemplary or aggravated damages). Other remedies include forgiveness of debt, release of security, waiver of fees or reinstatement or vitiation of a contract etc.

The Code (referred to in question 1) also stipulates lender requirements as to dispute resolution (both internal and external) and supplements this with obligations, such as obligations relating to complaints handling.

Recovery of assets

28 **Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?**

In the event that a bank or other authorised deposit-taking institution (such as credit unions and building societies) fails, the Australian government has a financial claims scheme, also known as the Australian Government Deposit Guarantee, to protect and support the stability of the Australian financial system. This also covers the situation where a general insurer fails (for claims up to A$5,000). The scheme must be activated by the government and is administered by APRA. The scheme acts to protect deposits up to A$250,000 for each customer.

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UPDATE AND TRENDS

Challenges and trends

29 **What are the principal challenges currently facing the financial services litigation landscape in 2019? What trends are apparent in the nature and extent of financial services litigation? Are there any other noteworthy features that are specific to financial services litigation in your jurisdiction?**

The financial services landscape in Australia in 2019 is a challenging one for financial services institutions. There has been a significant increase in the number and nature of consumer protection regulations affecting banks. Combined with heightened regulator interest and activity, there is a strong correlation between financial services investigations and civil litigation, including class actions. In February 2019, the government substantially increased penalties for corporate misconduct and introduced a penalty for contraventions of the obligations to ensure that financial services and credit activities are provided efficiently, honestly and fairly. The imposition of those penalties, in conjunction with other statutory developments and regulatory attitudes, means that enforcement litigation and later corresponding claims will be a much more significant feature of the landscape in the years to come.

An upcoming area in modern litigation is the use of litigation funding. Due to strong demand, attractive returns and limited regulation, third-party litigation funding has evolved in Australia over the past decade and is now commonplace, particularly in class actions. Such funders are not subject to licensing or capital adequacy requirements. However, there are particular court rules applying to litigation funding – for example, litigation funding agreements must be disclosed early on in the proceedings.