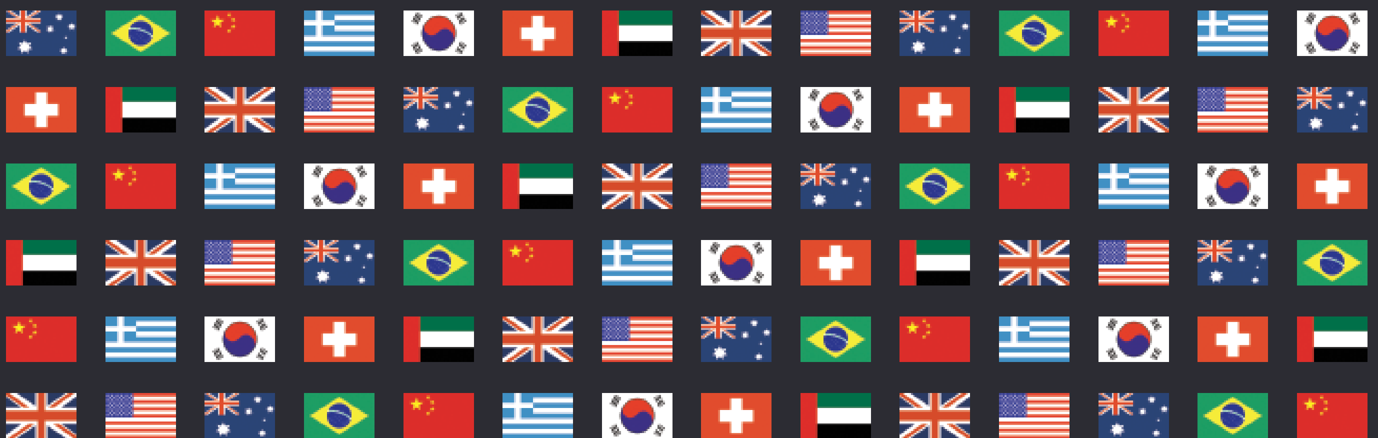
Financial Services Litigation 2021

Contributing editors
Elaina Bailes, Tom Otter and Aleks Valkov



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Elaina Bailes, Tom Otter and Aleks Valkov
Stewarts LLP

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Financial Services Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Greece.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Elaina Bailes, Tom Otter and Aleks Valkov of Stewarts LLP, for their continued assistance with this volume.

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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 services providers by customers include breaches of:

- contract – both express and implied terms;
- trust – either general trustee obligations or legislative equivalents; and
- statute – particularly concerning standards of conduct, such as engaging in misleading or deceptive conduct and unconscionable conduct, or concerning consumer credit.

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

Contract

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

Breach of contract claims frequently arise in the context of the Banking Code of Practice (the Code). The Code sets out standards and obligations of participants in the banking industry, seeking to protect individuals and small businesses. Adherence to the Code is voluntary, but all major banks are signatories. The Code has undergone significant reform in the past decade, most recently in July 2020, to take into account the impact of covid-19 on the lending market, and again in January 2021.

Although the Code currently does not have legislative force, signatory banks must incorporate it into their lending documentation and are contractually bound by its terms such that customers can pursue a breach of contract claim for non-compliance. 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 applying its credit assessment methods when forming an opinion about a borrower's repayment ability. This effectively imposes a contractual warranty by the bank about the stipulated standard of care.

While the Code was approved by the Australian Securities and Investments Commission (ASIC), that approval is without legal ramification as ASIC is yet to declare part or all of the Code as enforceable under its new code approval regime, which came into force in January 2021. Such approval would attract civil penalties if those provisions were breached. The Australian Banking Authority's (ABA) triennial review of the Code due in late 2021 will specifically consider which provisions ASIC should identify as enforceable. A revised Code is expected in 2022.

Customers may also allege that a 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 through statute, such as the implied warranty of due care and skill.

Statute

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 (Cth) (ASIC Act) for banks providing credit facilities and the Corporations Act 2001 (Cth) (Corporations Act) for other financial product and service providers. These Acts have largely superseded common law actions, although they are still available and sometimes raised in conjunction, or where they are the only claim available.

Unconscionable conduct

Given its expansive yet amorphous nature, unconscionable conduct is a claim regularly invoked by customers against financial services providers. It is also frequently deployed by ASIC. 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 vis-à-vis the other;
- the stronger party knows of the special disadvantage; and
- the stronger party takes unconscientious advantage of its position.

Unconscionable conduct operates on a much wider basis under statute. It does not require a special disadvantage, and a court may take into account a broad range of factors beyond inequality of bargaining power, including the numerical and financial literacy of a customer, undue influence and the service price. This wider scope means it has almost entirely superseded the equitable doctrine in practice.

Misleading or deceptive conduct

Banks and other financial providers must not engage in conduct that is misleading or deceptive or likely to mislead or deceive. An objective test is adopted, and a bank or institution need not intend to mislead or deceive – rather, it is only necessary to show that a customer was, or was likely to have been, misled.

Mere silence can amount to misleading conduct; for example, where a 'half-truth' is offered or there is otherwise a reasonable expectation that the provider disclosed more information.

Responsible lending

Responsible lending (RL) laws have recently received significant attention, being a topic of emphasis in the 2018 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission). Under the National Consumer Credit

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Protection Act 2009 (Cth) (NCCP Act), RL laws regulate consumer lending, as distinct from lending for business purposes. Chiefly, RL requires lenders to make an assessment regarding whether a contract is unsuitable for the consumer and make reasonable inquiries and certain verifications as to their requirements, objectives and financial situation.

The RL provisions are broad and reasonable minds differ over what precisely is required. Ultimately, the Royal Commission did not find any structural framework amendments necessary and rather, that the current laws should be upheld and enforced. Banks and other lenders have significantly amended their origination practices as a result, increasing formalities and burdens on both lenders and customers.

However, concerns regarding a perceived 'one-size-fits-all' approach to RL obligations and the desire to improve credit flow following covid-19 led to the Australian government proposing RL reforms in September 2020. These are yet to be enacted, with significant delays arising from industry and stakeholder concerns about the impact to the consumer protection regime.

Non-contractual duties

2 In claims for the mis-selling 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 and customer relationships in Australia include statutory prohibitions on misleading or deceptive conduct, false or misleading representations, and unconscionable conduct. Consumer credit legislation also prohibits mis-selling consumer products that are unsuitable for the customer, as per the RL provisions.

Further, financial services licensees and credit providers are under a general obligation to ensure that their services are provided efficiently, honestly and fairly. A breach of this provision can result in penalties, the imposition of licensing conditions and, in serious cases, loss of licence.

Australia also has anti-hawking legislation that prohibits the unsolicited offering of financial products to a retail client. Such provisions were recently amended, due to come into effect in October 2021, to introduce a general ban (rather than separate regimes) on the hawking of financial products to retail clients. In addition to penalties imposed for committing an offence, the client has a right of return and refund in certain circumstances. A new deferred sales model for add-on insurance operates alongside these anti-hawking provisions and prohibits the sale of insurance for at least four days post purchase of the principal product.

A raft of disclosure provisions also operates to prevent the mis-sale of financial products through pre-acquisition disclosure obligations, including the obligation to provide product disclosure statements. Chapter 3 of the NCCP Act and the Code also contain relevant consumer protections, including in connection with vulnerable or low-income customers.

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?

The ASIC Act provides core regulations regarding 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 continuous disclosure materials is regulated by the Corporations Act (and the Australian Securities Exchange (ASX) Listing Rules for listed entities).

These laws operate to ensure that statements provided in prospectuses, listing and periodic financial disclosures are accurate, complete and able to be substantiated. Prospectus information will be considered misleading where it is speculative, based on mere opinion or judgement, and not made on reasonable grounds.

Liability for contravention of these provisions may extend to both the company and individuals, and attracts both criminal and civil penalties. The regime also allows aggrieved parties who have suffered damage or loss to bring a civil claim against the company, often the impetus for shareholder class actions.

Continuous disclosure obligations under the Corporations Act and ASX Listing Rules 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. These obligations aim to ensure 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 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.

In light of covid-19, effective from May 2020 until March 2021, temporary amendments were introduced to relax the continuous disclosure framework by providing that entities and officers would only be liable for applicable civil penalties where they withheld information with 'knowledge, recklessness or negligence'. In February 2021 and due to be considered in August 2021, the government introduced draft legislation to make this mental element permanent. However, until it is passed, listed entities will be required to act in accordance with their existing disclosure obligations.

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 imposed in contracts between financial institutions and customers, and this issue has received little judicial consideration. Accordingly, customers generally invoke statutory duties including the duty not to act unconscionably (which itself requires consideration in respect of whether the parties acted in good faith). Typically, 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 parties to act honestly and have due regard to the legitimate interests of both parties; in particular, not to act capriciously or arbitrarily to defeat the objects of the contract. However, a 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?

The typical legal relationship between banker and customer is that of debtor and creditor, arising from contract. It is not an accepted fiduciary relationship. However, where a bank has exceeded its usual role and engendered an expectation that it will act in a customer's best interests

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(eg, by providing financial advice, gratuitously or otherwise), a fiduciary relationship may arise. Common examples 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; and
- there is a particular dependency or vulnerability.

Today more than ever, banks and financial institutions engage in a variety of transactions and roles. In circumstances where banks take on certain fiduciary obligations, in particular when acting as trustee (for instance, in the context of financial advice, investment management and superannuation), typical allegations include conflicting duties and failing to prioritise customer interests.

In the context of financial advice, there is a specific statutory regime that imposes best-interests duties. From 1 January 2021, this duty was extended to mortgage brokers, imposing an obligation with respect to home lending, to act in the best interests of the intending borrower.

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

Master agreements

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

Australia uses standard form master agreements such as International Swaps and Derivatives Association Master Agreements, published by the International Swaps and Derivatives Association, and Foreign Exchange and Options Master Agreements. Provisions of these agreements are accorded the full force of contract, but there has been limited judicial consideration of these standard form agreements 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 liabilities, most commonly in relation to institutional clients. As a general proposition, financial institutions are unable to limit liability or exposure to statutory claims on the basis that it would be against public policy. The Corporations Act, the NCCP Act and the ASIC Act all contain prohibitions on contracting out of legislative provisions. Australian courts typically construe exclusion clauses against the party seeking to rely on them. However, parties can contract to exclude or modify fiduciary obligations.

Australia also has an unfair contract terms regime that precludes certain contractual terms in consumer and small business standard form contracts, including limited liability clauses that go beyond protecting legitimate business interests. This regime was recently extended to insurance contracts from 5 April 2021.

Freedom to contact

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 1959 (Cth), Corporations Act and ASIC Act (including the unfair contract terms regime) and Superannuation Industry (Supervision) Act1993 (Cth) (SIS Act).

The unfair contracts regime regulates standard form contracts to both consumers and small businesses. 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 one party if applied (eg, 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.

Banks are also restricted from charging penalties, such as late fees or default interest. Additionally, there are laws restricting certain restraints of trade, such as exclusive dealings.

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 (most commonly sought);
- injunctions;
- specific performance;
- termination or rescission of the agreement; and
- declarations.

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, Australia has a statutory limitation regime, in which each jurisdiction has enacted legislation limiting the time period within which certain claims may be brought. Generally, the period begins to run from the date on which the cause of action accrues (eg, most limitation periods for breach of contract are six years from the date of the alleged breach).

Courts generally enforce statutory limitation periods strictly, although some jurisdictions have exceptions in circumstances such as where a cause of action is fraudulently concealed.

Although not a judicial body, the Australian Financial Complaints Authority (AFCA), being the external dispute resolution body for financial services organisations, may resolve certain complaints up to six years after the customer first became aware, or ought to have become aware, of the loss suffered. Following the Royal Commission, AFCA's remit was temporarily expanded between 1 July 2019 and 30 June 2020 to allow AFCA to consider disputes back to 1 January 2008.

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 are commercial and corporation lists operating in certain state Supreme Courts for case management purposes, there are no specialist courts for adjudicating financial services disputes. However, the Australian Financial Complaints Authority (AFCA) is the new 'one-stop shop' for financial and superannuation dispute resolutions.

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Procedural rules

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

No specific procedural rules apply to financial services litigation. There is a Federal Court Central Practice Note, as well as similar state jurisdiction practice notes, that covers commercial and corporate disputes (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 financial services institutions may agree to arbitration provisions, more commonly with institutional clients. However, the Australian Securities and Investments Commission does not use arbitration as a dispute resolution method with financial services 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 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 disputes out of court where possible. However, they are generally not required to refer matters to alternative dispute resolution before commencing proceedings.

AFCA is often the first step to a dispute, as customers can pursue a court outcome if unsatisfied with AFCA's recommendations. AFCA is also free to consumers and small businesses.

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?

Commonwealth and state jurisdictions have various general pre-action requirements, such as pre-action communications and taking genuine steps to seek to resolve disputes before the commencement of proceedings.

As a result of farm-debt regulations, there are requirements for agricultural customers to attend mediation in certain circumstances before a bank can take enforcement action. While only applicable in some jurisdictions, work is under way to introduce a uniform national scheme.

Unilateral jurisdiction clauses

16 | Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral jurisdiction clauses limit one party to suing the other in a particular court and country, while the other party is free to sue in any jurisdiction, ultimately favouring one party. Although there is little Australian judicial consideration of such clauses, it is likely that these would be enforceable under Australian law.

Unilateral jurisdiction clauses nominating a foreign jurisdiction will not prevail over statutory protective provisions of a valid Australian statutory right.

DISCLOSURE

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 (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 some exceptions to the obligation, including legal professional privilege (documents prepared for the dominant purpose of seeking or being provided legal advice), which is a fundamental common law immunity. Another exception is 'without prejudice' material, being material evidencing a willingness or an attempt to settle the matter, which may include concessions not to be relied upon in court (although this material may be shown to the court at the conclusion of the matter on the question of costs).

Further, under the Australian Prudential Regulation Authority Act 1998 (Cth), financial institutions are generally prohibited from making disclosures of 'protected information' (eg, Probability and Impact Rating System and the Supervisory Oversight and Response System ratings). Banks frequently redact this material when responding to regulatory investigations and discovery.

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

The discovery process varies within Australian jurisdictions. Most relevantly, in the Federal Court, parties must apply for discovery orders that 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, courts have considered the operation of such laws from extraterritorial jurisdictions.

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 are required to disclose client information in court to the extent it is relevant to issues in dispute. Where third-party information is relevant, courts will usually entertain specific confidentiality requirements. In some circumstances, parties can seek 'preliminary discovery' that may give rise to a cause of action (eg, information as to who the proper defendant is). Courts seek to balance the overriding principle of access to relevant information with the burden on the parties and any associated third parties.

Procedural devices to protect confidential information include suppression or non-publication orders, such as where required to protect national security. Courts may also allow redactions for confidentiality or relevance.

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Disclosure of personal data

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

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. However, the Australian Privacy Act 1988 (Cth) contains exemptions to the prohibition on disclosing personal information. Individuals are otherwise entitled to disclose their own personal information.

An 'open banking' regime was recently introduced in Australia, being essentially a data-sharing regime to support customer choice and competition. The regime introduces comprehensive rights for consumers to access their information that is held by certain entities (such as banks) and, where elected, share this information with third parties. During 2020, Australia's major banks met the first stages of compliance under the regime. Under the current phasing timeline, other banks have until 1 July 2021 to provide access to open banking data. Open banking is expected to be fully implemented by 1 November 2022.

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?

In Australia, there are complex regimes to deal with the extraction and use of data in court proceedings. Courts will entertain a range of different technological solutions, with electronic discovery now commonplace. There are also instances of courts and regulators 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.

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 contraventions of corporation or specific financial services laws.

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

- injunctions (interlocutory, mandatory and preventative);
- civil penalties;
- 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;
- 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 into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), all major regulators (particularly the Australian Securities and Investments Commission (ASIC)) indicated they will seek to commence court-based enforcement more frequently.

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

Generally, if ASIC has enough 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 or variation of licence conditions, enforceable undertakings, infringement notices and public warning notices.

Significant litigated regulatory matters in recent times include allegations of market manipulation in connection with financial benchmarks, anti-money laundering, matters related to financial advice, and alleged breaches of consumer protection provisions (such as alleged breaches of responsible lending provisions, misleading or deceptive conduct and unconscionable conduct).

ASIC's powers were recently expanded to cover the superannuation industry, enabling ASIC to play a more effective role in regulating conduct, including greater powers to take enforcement action against unlawful and harmful conduct by superannuation trustees. Proposed reform also includes the significant broadening of ASIC's directions powers, which would empower ASIC to direct financial services and credit licensees to engage in particular conduct if it 'has reason to suspect' that a licensee has breached, or will breach, a financial services law, which appears to be a low bar.

As ASIC continues to litigate case studies that were the subject of the Royal Commission, and following the introduction of the new corporate penalty regime in March 2019, there has also been a recent upward trend in pecuniary penalties being ordered by courts for breaches of consumer protection provisions, including under the ASIC Act. Civil penalties of close to A$160m were imposed by courts in the period of July to December 2020 alone. In September 2020, two National Australia Bank superannuation entities were ordered to pay penalties of around A$57.7 million. The conduct involved charging and deducting adviser fees from superannuation accounts and making misleading or false representations in respect to payment of those fees. This is the largest (single) civil penalty obtained by ASIC to date.

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 general, communications between regulators and financial institutions are not the subject of any particular privilege that would protect them from being disclosed in the context of litigation.

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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 them in confidence or in connection with the performance of their functions.

The relevant regulatory authorities cannot compel the production of communications or documents subject to a valid claim of legal professional privilege, although it is open for the immunity to be abrogated by legislation in certain circumstances. 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 they wish to maintain (eg, asserting any privilege where ASIC is compelled by law to disclose information under a court order for discovery).

However, 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 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, 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 services 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 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 in its investigations to the extent 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, which are essentially administrative out-of-court settlements that are enforceable by ASIC in court in the event they are breached (although ASIC has been criticised for over-reliance on this method of resolution, and this appears to have had an impact on the number of enforceable undertakings more recently). While private parties cannot directly enforce enforceable undertakings, as a practical matter, if they were to alert the regulator, the regulator would be 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 changes since the global financial crisis, characterised by a significant increase in the number of regulatory requirements, including the National Consumer Credit Protection Act (NCCP Act) introduced in 2009. Notably, in 2018 the Federal Government conducted the Royal Commission, which focused on, among other things, the role of the regulators. Among the Royal Commission recommendations were 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. From March 2019, the penalties for financial sector and corporate misconduct were also extended and significantly strengthened. This reform included trebling the maximum imprisonment penalties for serious criminal offences from five to 15 years, significantly increasing the maximum civil penalties, introducing civil penalties to existing provisions and introducing a relinquishment remedy in action to avoid unjust enrichment.

While the covid-19 pandemic has delayed the implementation of some Royal Commission recommendations, others have been passed into law, including legislative changes to impose an obligation on a licensee to comply with the Australian Financial Complaints Authority (AFCA), extending ASIC's power to approve codes of conduct and adding civil penalties to contravening provisions.

Particular attention has also been given to the role of corporate culture, governance and remuneration and their links to corporate misconduct.

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 and credit licensees (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).

The Banking Code of Practice also stipulates lender requirements as to dispute resolution (both internal and external) and supplements this with obligations, such as obligations relating to complaints handling.

Internal dispute 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

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representatives. ASIC has published a regulatory guide (RG 165 – Licensing: Internal and external dispute resolution), which aims to ensure 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. The increased levels of financial hardship and consumer vulnerability resulting from the covid-19 pandemic have led to an increased focus and reliance on the performance of internal dispute resolution procedures.

ASIC recently issued an updated regulatory guide (RG 271 – Internal dispute resolution), outlining what financial services entities must do to have an internal dispute resolution system in place that meets ASIC's standards and requirements. The guide was published in July 2020 to allow the industry to make the necessary changes before it takes effect in October 2021. ASIC has advised it will withdraw the current RG 165 at that time.

AFCA – external disputes resolution

AFCA is a non-governmental organisation that administers a free and independent dispute resolution scheme as an alternative to litigation. AFCA reviews complaints about credit, finance and loans, insurance, banking deposits and payments, investments and financial advice and superannuation. It 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.

Once a dispute is lodged, the lender 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). 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 customer 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.

From 21 January 2021, AFCA amended the rules under which it operates (Rules) to provide clarity for consumers and financial firms regarding its jurisdiction to receive complaints. The change is a direct result of a legislative instrument issued by ASIC on 5 January 2021 and arose after a decision in the New South Wales Supreme Court was handed down in November 2020. The direction required AFCA to update its Rules to reflect the same statutory liability for licensees regarding their authorised representatives as set out in the Corporations Act and the NCCP Act, with the changes applying to complaints received from 13 January 2021 onwards.

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 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.

Following a recommendation of the Royal Commission, the government released a discussion paper on establishing a compensation scheme of last resort in December 2019. The compensation scheme was due to be legislated by the end of 2020. In anticipation, AFCA began receiving and dealing with complaints against insolvent financial firms. However, owing to the impact of covid-19, measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021. As such, AFCA has currently paused processing complaints against insolvent firms.

UPDATE AND TRENDS

Challenges and trends

29 What are the principal challenges currently facing the financial services litigation landscape in 2020? 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 remains challenging for financial services institutions. There remains an increasing trend 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. From March 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 corresponding customer claims will be a much more significant feature of the landscape in the years to come.

On 31 January 2020, the government released exposure drafts of a raft of legislation designed to implement many of the recommendations made by Commissioner Hayne in his final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission). Legislation has been passed to implement a number of the recommendations and covers a wide range of subject matter, with particularly significant amendments to the breach reporting regime and Australian Securities and Investments Commission's (ASIC) power to issue directions, which will affect all financial services entities. Significant reforms have also been made in respect of superannuation and insurance. Overall, the reforms will impose more onerous obligations on financial service providers and significantly increase and broaden ASIC's powers. Although certain measures have come into effect, it is worth noting that the implementation of some of these laws continues to be delayed owing to the ongoing impacts of the covid-19 pandemic.

Connected to this, the government released a Financial Accountability Regime (FAR) Proposal Paper, which seeks to implement recommendations from the Royal Commission, including the recommendation to expand the scope of the current Banking Executive Accountability Regime (BEAR) to cover a broader range of Australian Prudential Regulation Authority-regulated entities under FAR and impose additional obligations on accountable persons. Larger maximum penalties would also apply under the FAR, to align with the new penalty framework discussed above. Implementation of the proposed FAR legislation is expected to commence in early 2022.

A topical issue in contemporary litigation is the use of litigation funding. Owing 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. On 22 May 2020, the government announced that it would regulate

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litigation funders under the Corporations Act. As part of further reforms introduced on 22 August 2020, litigation funders are required to hold an Australian financial services licence and comply with the managed investment scheme regime (similar to banks and other credit providers). The removal of the current exemptions held by litigation funders will obligate such funders to:

- act honestly, efficiently and fairly;
- maintain an appropriate level of competence; and
- have adequate organisational resources to provide the financial services covered by the licence.

Such funders are not subject to capital adequacy requirements. Further, there are particular court rules applying to litigation funding; for example, litigation funding agreements must be disclosed early on in the proceedings.

Coronavirus

30 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Further to the interim changes made to some provisions and delays to the implementation of certain Royal Commission recommendations, temporary changes were also made to financial advice laws to facilitate access to affordable and timely financial advice during the pandemic (which will expire in October 2021).

The government introduced measures for temporary relief for financially distressed businesses and to promote business continuity, including in relation to statutory demand thresholds to wind up companies, and directors' personal duty to prevent insolvent trading.

The financial regulators have also made changes to their regulatory priorities during this period. The Australian Prudential Regulation Authority has recommenced its planned policy and supervision initiatives with several consultation reviews and draft legislation to be expected across 2021, including updating prudential standards on operational risk, governance and risk management, finalising and implementing a revised prudential standard on remuneration and increased scrutiny of entities' cyber security capabilities. ASIC announced that it will 'recalibrate' its regulatory priorities to focus on covid-19 challenges and focus on matters where there is risk of significant consumer harm, serious breaches of law, risks to market integrity and matters that are time-critical.

In relation to litigation, the courts have generally embraced audio-visual technologies to facilitate hearings, which may well continue beyond the pandemic. Litigation has now recommenced for matters that were postponed during 2020.

Temporary debt relief measures introduced by the government ended on 1 January 2021, and the covid-19 pandemic's impact on companies' abilities to meet their obligations is expected to result in an increase of contract disputes, insurance claims and insolvency cases, as well as class actions. The full effects of the pandemic remain to be seen.

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