T-REX
tailored regulatory exchange

Provided by: HOLLEY NETHERCOTE commercial & financial services lawyers and COMPACT compliance & training

February 2017 - EDITION #152

Data breach reporting is on its way

The *Privacy Amendment (Notifiable Data Breaches) Bill 2016* ("legislation") was passed through both houses of Parliament this month. The legislation is pending royal assent and a date has not been set for when it will take effect, but it is likely to be within 12 months.

The legislation will amend existing privacy laws and creates a reporting obligation when an eligible data breach occurs. This specifically applies to credit reporting bodies, credit providers and tax file number recipients.

The legislation explains what constitutes an eligible data breach and factors relevant to the assessment of whether an eligible data breach has occurred. Notification obligations are triggered when there are reasonable grounds to believe that there has been an eligible data breach.

TIP 1: You can read more information in our recent **blog**.

TIP 2: Licensees and entities that are subject to the privacy law will need to start preparing for the new requirements. This includes ensuring the appropriate people within the organisation are notified, review processes and procedures, and the development of compliance programs relevant to breach identification, investigation and reporting.

Comment or Question?

IOSCO analyses Fintech regulation

The International Organization of Securities Commissions ("IOSCO") released its research report on financial technologies ("Fintech"). The report analyses securities and capital markets products and services provided using Fintech such as:

- financing platforms including peer to peer lending and crowdfunding;
- retail trading and investment platforms including robo-advisers and social trading and investment platforms;
- institutional trading platforms; and
- distributed ledger technologies (DLT) including the use of blockchain technology.

The report gives a detailed analysis of the benefits, risks and regulatory relevance or responses to each of the above categories. The report also compares the different approaches taken in differing international regulatory regimes. Some of the key findings from a regulatory perspective are:

- The automation involved in Fintech is becoming more complex and traditional sample audits may become less adequate. Regulators

may need to hire specialised staff and adopt a different approach towards surveillance.
- Regulators face a challenge in monitoring new trading platforms, which do not always fit squarely in an existing regime. Regulators could explore leveraging new compliance software and tools.
- A benefit of DLT is that regulators can participate and have access to all the data. However, they would need to assess whether they want extensive real time data access or not.

In the report, IOSCO identifies a significant implication for regulators of Fintech being that regulation is national or sub-national, whereas Fintech firms can operate globally.

This raises issues of consistency in regulation and cross-border supervision and enforcement. In its report, IOSCO suggests that these challenges be addressed by international cooperation and the exchange of information between regulators.

TIP: In addition to being an interesting read, the report contains an excellent summary of how Fintech is being used globally and the benefits and risks of incorporating Fintech in a business. You can access the report **here**.

Comment or Question?

AAT upholds AFSL suspension

MASU Financial Management Services Pty Ltd ("MASU") lost its application to the Administrative Appeals Tribunal (AAT) that ASIC's suspension of its AFS licence was not justified or lawful. MASU's application was based on an argument that the compliance issues had substantially been addressed and the power to suspend its license was not available, or should not have been exercised.

ASIC had suspended MASU's licence for eight weeks to be effective from 26 April 2016. The ASIC delegate's decision was based on historical instances of non-compliance as well as a concern that MASU would not meet its continuing obligations.

When issuing the suspension, ASIC had relied on the power in s915C of the *Corporations Act 2001* ("the Act") which is enlivened if a licensee has not complied with its obligations; and which can also be enlivened if there is a reason to believe the licensee is likely to contravene their obligations under s912A of the Act in the future.

The AAT agreed with ASIC that based on the facts it was likely that further contraventions would occur. The facts included:

- a lengthy track record of non-compliance;
- the same people who presided over past mistakes still being in the same roles;
- evidence that those in control had poor knowledge of the obligations in

s912A over a lengthy period and did not care; ?
- MASU was not yet compliant;
- while substantial progress had been made, more needed to be done; and
- further contraventions would be occurring at least until all the improvements are implemented.

In his decision, Deputy President, McCabe summarised the purpose for which ASIC should exercise its suspension power: *"ASIC must exercise the discretion in s915C judiciously and proportionately. It must make sense to exercise the discretion on every occasion where ASIC seeks to do so. Where ASIC has suspension in mind, it must be clear the suspension will help the organisation, or ASIC, or the market, to achieve that which the law requires."*

DP McCabe found that in this instance, a **brief suspension** would assist the embracing of a compliance culture, while reiterating the need to avoid poor behaviour in the future and that the public would be encouraged by constructive regulatory action.

TIP 1: Compliance culture starts at the top of an organisation and flows throughout. A poor compliance culture can result in contraventions of the law. In contrast, resources would be better directed towards a positive compliance culture through training, processes and procedures and even a licensee review.

TIP 2: While the suspension was "only" for 8 weeks – you should consider whether your business has sufficient financial resources to survive being "off market" for even a limited period of time.

Comment or Question?

Licence conditions imposed on NAB super trustee

NULIS Nominees (Australia) Limited ("NULIS") has had conditions imposed on its AFS licence by ASIC following ASIC inquiries arising from breach reports lodged by NAB.

ASIC found deficiencies in risk management and communication procedures following a particular transfer of members in a number of products. The failures included inadequate disclosure of changes to insurance, insurance policies not being updated and inadequate training for staff. The result was incorrect death and TPD insurance tests being applied and insurance claims of 10 members being incorrectly assessed, underpaid and declined.

NAB has compensated the affected members. The additional licence conditions require NULIS to engage an independent expert to assess and report on the adequacy of its compliance and risk management practices for all its retail and wrap superannuation funds. NULIS has agreed to the condition.

TIP: Large scale projects like the one which NULIS undertook here have a high risk of

compliance failure due to missed details. Comprehensive project management is needed in these circumstances.

Comment or Question?

Government Focus for Insurance Industry

In an address to the Insurance Council of Australia this month the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services ("the Minister") shared the Government's priorities for the insurance industry this year.

1. Meeting community expectations through financial literacy to which the insurance industry and the government should play a leading together.
2. Building resilience in Australia against natural disasters. The Minister acknowledged that promoting mitigation was a complex issue. However, reward for taking steps to mitigate risk is critical, and when mitigation is undertaken by homeowners it should be rewarded in the form of lower premiums.
3. Innovative products. The insurance industry must be ready to meet the ever-changing needs of Australians through offering new markets and re-assessing old practices. The Minister referred to blanket mental health exclusions for products such as travel insurance as an example.

TIP: Ensuring products are developed and reviewed to meet changes in needs is also relevant to the best interest test. A comparison of insurance policies is relevant when the insurance is attached to a superannuation policy and advice is being provided to switch policies. Advisers should ensure that 'super switching' processes and template statement of advices address a comparison of any insurance policies involved.

The full address can be accessed **here**.

Comment or Question?

Self Managed Super Fund sector is the fastest growing

During a speech to the Self-Managed Superannuation Funds Association Conference, the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services ("the Minister") stated several facts about the self managed superannuation fund ("SMSF") sector including:

- The number of SMSFs in Australia has grown by 87% in ten years reaching almost 575,000 funds by June 2016.
- On average, there has been 36,000 new funds established in each of the past four years.
- More than a million Australians are members of SMSFs.
- The sector now holds assets worth approximately $635 billion, which is 30% of Australia's total

superannuation asset pool.

In her address, the Minister also reminded attendees of the upcoming professional standards regime which will commence on 1 January 2019. From 1 January 2019, new advisers must hold a relevant degree. Existing advisers must pass the exam by 1 January 2021 and will have until 1 January 2024 to satisfy the education standards.

TIP: Advisers should begin preparing for the new regime by updating processes and procedures, ensuring that key staff are aware of the new requirements, and talking to advisers about individual training requirements.

Comment or Question?

Bankwest refunds overcharged interest

Following an internal investigation, Bankwest identified failures to link offset accounts to home loan accounts for some customers over a ten-year period. Bankwest reported the matter as a significant breach of its licence to ASIC and has refunded more than $4.9 million to approximately $10,800 customers who were overcharged interest. ASIC Deputy Chairman Peter Kell said *"When a problem is identified, licensees not only have an obligation to report the breach, but impacted customers must be returned to the position they would have been in, had the breach not occurred"*.

TIP: ASIC encourages licensees to proactively address systemic issues caused by misconduct or compliance failures, and have robust review and remediation processes in place to protect and compensate clients for loss or detriment suffered. More detailed information can be found in **ASIC's Regulatory Guide 256: *Client review and remediation conducted by advice licensees***.

Comment or Question?

Federal Court dismisses appeal against ASIC banning

Late last month, Justice Beach in the Federal Court, dismissed an appeal to set aside a decision from the Administrative Appeals Tribunal ("AAT") which had affirmed an ASIC banning. Former director of Unique Mortgage Services Pty Ltd ("UMS") Meenakshi Callychurn ("Ms Callychurn") was banned by an ASIC delegate in February 2015 from engaging in credit activities for five years. In February 2016, the AAT affirmed ASIC's banning decision but reduced the period of the banning to four years.

The appeal to the Federal Court involved particular questions of law regarding the interpretation and application of the provisions of the *National Consumer Credit Protection Act 2009* ("Credit Act"), with His Honour finding that no errors in law had occurred. Much of the discussion involved alleged breaches of s225 of the Credit Act, relating to disclosures not made by Ms

Callychurn in the annual compliance certificate ("the ACC") for UMS.

One issue was that Ms Callychurn had not disclosed that one of the fit and proper people on the licence, Mr Frugtniet, was subject a proceeding in the Victorian Civil and Administrative Tribunal ("VCAT") for misrepresenting himself as a lawyer to a Court, when he was not a qualified lawyer.

Another issue in contention was that due to a computer glitch (admitted by ASIC) Mr Frugtniet had been removed from the ACC as a fit and proper person, and there was no functionality for Ms Callychurn to manually add him.

We have identified the following learnings which may be of interest to our subscribers:

1. There is an obligation on the person signing an ACC to take reasonable steps to ensure that the ACC does not contain false or misleading statements. Failure to take such reasonable steps means that it is open to ASIC or a court to find that that the individual who failed to take reasonable steps is personally exposed to enforcement actions such as banning.
2. Mr Frugtniet had been banned from carrying on business as a layperson, and the banning would be considered if he applied to practice as a lawyer. For this reason, the VCAT proceedings fell within the definition of 'disciplinary action' to the declaration of whether a fit and proper person had been *"subject of any proceedings that are current or pending and which may result in disciplinary action being taken in relation to any such authorisation"*. The authorisation referred to is any authorisation required by law to carry on trade, business or profession.
3. It was open to ASIC and the AAT to find that Ms Callychurn's failure to contact ASIC, when she realised that Mr Frugtniet was not included in the ACCC was a breach of her obligation to take reasonable steps to ensure that she did not make or authorise a false or misleading statement. The computer glitch at ASIC did not alleviate this obligation.

TIP: This decision can be accessed in full **here** and is an important reminder that any document to be lodged with ASIC should not be considered as an administrative matter of process, but is always subject to the requirement that it not contain false or misleading information – including by omission, under the *Corporations Act 2001*.

Comment or Question? 🗨️

EDRS review expanded

The Government has released the report by the **Small Business and Family Enterprise Ombudsman** in relation to the inquiry into small business loans. The report contains 15 recommendations,

including that an External Dispute Resolution Scheme ("EDRS") type of process be available for small businesses with lending disputes. As a result, the Government released amended terms of reference for the review of the financial system's external dispute resolution and complaints framework to include recommendations on a compensation scheme of last resort; and consideration of the merits and issues involved in providing access to redress for past disputes.

Comment or Question?

FOS supports Ramsay Review proposals

The Financial Ombudsman Service ("FOS") has expressed support for the proposed single scheme for financial, credit, investments and insurance disputes. In its latest submission to the Ramsay Review, FOS provided detailed analysis to show that current claims limits and compensation caps for consumers and small business are outdated and need to be significantly increased.

The suggested compensation range was $625,000 to $955,000 for consumers and at least $1 million for small business disputes. FOS also supports a broader small business jurisdiction that would allow disputes in relation to credit facilities of up to $5m in value.

Tip: Follow the **link** to read the media release in full.

Comment or Question?

AUSTRAC and TAB Settlement

The long running litigation between AUSTRAC and Tabcorp ("TAB") has been settled in principle.

AUSTRAC had initiated proceedings against TAB alleging, amongst other things, that TAB failed to lodge suspicious matter reports, failed to appropriately verify certain customers and failed to maintain an appropriate AML/CTF Program. In total, AUSTRAC alleged over 200 breaches of AML/CTF legislation by TAB.

The settlement must be approved by the Federal Court before it is finalised, but it is proposed that as part of the settlement, TAB will pay a settlement sum of $45 million, establish a new financial crime risk team, provide comprehensive risk training for its staff, and implement new transaction monitoring procedures.

TIP: Further updates about the terms of settlement will be provided in later issues of T-REX.

Comment or Question?

AML/CTF Consultation

AUSTRAC has opened a consultation period during which it is inviting submissions on a potential change to the AML/CTF rules. The proposed change to

the rules addresses a circumstance in which a reporting entity may determine that a customer poses an unacceptable money laundering or terror financing risk, and then cease providing services to that customer.

However, a law enforcement agency may request that, to allow an investigation to occur, the reporting entity continue to provide services to the customer. Currently, this would result in the reporting entity breaching the AML/CTF rules.

The proposed changes to the rules would allow that reporting entity to continue to provide services to the customer, at the request of the law enforcement agency, without breaching the AML/CTF rules.

TIP: The Consultation Period closes on 16 March 2017. Submissions can be made **here**.

Comment or Question?

Other developments

A former Westpac Home Finance Manager, David St Pierre, has been sentenced to 3 years imprisonment for release within 6 months on a recognisance order. Mr St Pierre pleaded guilty to dishonestly using his position, by submitting loan applications that he knew contained false information.

ASIC cancelled the AFS licence of Sovereign MF Ltd (in liquidation) which was the responsible entity for to two schemes, in order to facilitate the liquidation process.

ASIC has banned a former authorised representative of Roan Financial Group from providing financial services for five years. The banning follows ASIC's findings that the adviser had engaged in misleading and deceptive conduct, and dishonest conduct by not disclosing clients medical conditions in insurance documents; and recklessly made misleading comparisons about superannuation products, inducing clients to switch products. The adviser has appealed ASIC's decision to the AAT.

Share Investing Limited has paid $130,000 to comply with an infringement notice given by the Markets Disciplinary Panel, for failing to comply with ASIC Market Integrity Rule 5.7.1(b)(iii) in relation to entering client orders which should be reasonably suspected to create a false or misleading appearance of active trading.

ASIC has permanently banned a former manager of 14 entities that held AFSLs from providing financial services after finding that he used investor funds for unauthorised purposes. ASIC states that Mr Wang has applied to the AAT for a review of the decision.

Anthony Doring, former manager of Phil Doring Insurance Brokers has been permanently banned by ASIC from providing financial services. ASIC's findings included failing to ensure financial services were provided under an AFS licence and dishonest conduct.

T-REX
tailored regulatory exchange

Provided by: HOLLEY NETHERCOTE commercial & financial services lawyers and COMPACT compliance & training

BGC Partners (Australia) Pty Limited has paid a $90,000 penalty to comply with an infringement notice issued by the Markets Disciplinary Panel, in relation to concerns about a contravention of the ASIC Market Integrity Rules.

ASIC has updated its Regulatory Guide 245: *Fee disclosure statements* to reflect amendments to the FOFA legislation and clarify its position on previous no-action positions. You can view the updated regulatory guide **here**.

Comment or Question?

Consultation

The following draft provisions and discussion papers have been open for consultation in February 2017:

AUSTRAC has opened a consultation inviting submissions on a potential change to the AML/CTF rules which would allow a reporting entity to continue to provide services to the customer, at the request of the law enforcement agency, without breaching the AML/CTF rules. The Consultation Period closes on 16 March 2017.

ASIC released Consultation Paper 278: *Remaking ASIC class order on reporting requirements for AFS licensees who are natural persons: [CO 03/748]* which is due to expire on 1 October 2017. Comments close on 20 March 2017.

The Treasury has released a discussion paper to **explore the key issues in developing more efficient retirement products** ("MyRetirement products"). Interested stakeholders are encouraged to provide feedback which is open until 28 April 2017.

Comment or Question?

T-REX Bites

Bang off another email - was that a guarantee you just signed?

If you've been in business for any length of time you will undoubtedly have found it necessary to give a personal guarantee. You know… guarantees are those thick documents full of unintelligible words that you have to take to your lawyer so that they can certify that you understand that you will lose everything if anything goes even slightly wrong. Right? Yes - but maybe that email chain between you and a potential service provider or supplier could end up being a guarantee too.

Since the 17th Century there has been a requirement that for a guarantee to be enforceable it must be in writing and must be signed by the guarantor. Clearly, the main reason for this prerequisite is so that the parties clearly understood that a guarantee was being given and so the "receiver" of the guarantee could readily prove that one was in place. In the bad old days some spouses of directors of companies had legal documents thrust in

front of them by their husband with instruction: “Here, sign this, I need it for the business.” The poor trusting and unsuspecting wives often had little or no idea of what they were signing and frequently had no inkling of the serious personal consequences of what they were being required to do.

Some smart lawyers began to find ways to get the wives out of the guarantees and so banks and other financiers invariably now require that a lawyer certify that the guarantor has been given an explanation of the obligations and personal consequences of giving a guarantee.
But have we become a bit complacent in this age of instantaneous written communication? Although you might not be communicating with a bank or a lender, you might be obtaining goods or services by email on behalf of your company or employer.

An email usually constitutes “writing” and the sender’s name at the end of the email can constitute a signature for those purposes.

In today’s fast moving electronic world all manner of transactions can be negotiated by email. The days of a response which has been considered carefully overnight are pretty much gone and now an immediate reply to an email is often expected.

A case in the UK Court of Appeal, in considering a dispute between two brokers acting on behalf of principals, held that an exchange of emails could constitute a binding contract of guarantee.

A couple of recent Australian cases have looked at whether the signing requirement may be satisfied in an affirmatory email even when the author did not intend to give a personal guarantee.

Directors need to be aware that negotiations via email can constitute a binding contract and that an unintended personal guarantee might later be implied by a court or tribunal. It should be realised that even the seemingly informal use of a person’s name in an email signature might constitute a signature for the purposes of a guarantee and thus have far-reaching, unintended and expensive consequences.

A prudent approach to email negotiations is to ensure it is made clear in the email chain that no binding legal relationship is intended until formal contracts are produced and signed. Even a few moments’ consideration of the possible effect of the email negotiations will probably repay the time spent before you fire off an email response in order to demonstrate your efficiency and willingness to “get the deal done”.

The commercial lawyers at Holley Nethercote have many years of experience at negotiations and assisting directors of companies achieve beneficial results for their companies. Whether you need advice on guarantees, to check whether you are “in too deep” or if you have reached the time for preparation of a formal contract which ensures your company gets what it

bargains for – we are ready to help.

Contact Tim Dixon, Special Counsel and head of our Commercial Department, if you would like any advice on or review of your contractual negotiations or you are ready for a formal effective contract to be prepared.

Comment or Question?

Disclaimer

This newsletter is current as at 28 February 2017.

www.ccct.com.au / **www.hnlaw.com.au** / **trex.complianceforum.com.au**

The liability of HN Law Pty Ltd trading as *HOLLEY NETHERCOTE commercial and financial services lawyers* is limited by a scheme approved under Professional Standards Legislation.

This newsletter briefly summarises a complex area of law and one that is dependent upon the precise facts that would apply. It is not a substitute for legal advice.

The TREX service is designed to alert you to developments in Australian law and regulation relating to financial services licensing, credit licensing and anti-money laundering and counter-terrorism financing. You may find the T-Rex Bites segment of TREX useful in bringing to your attention some developments in other areas of commercial and financial services law. However, you should not rely on TREX to alert you to developments in areas other than Australian law and regulation relating to financial services licensing, credit licensing and anti-money laundering and counter-terrorism financing.