KING&WOOD MALLESONS
金杜律师事务所

FINANCIAL CRIME AND REGULATION

YEAR IN REVIEW

2023

The Folds by Zhang Xin

KEY THEMES

RISING TENSIONS BETWEEN CUSTOMER EXPECTATIONS AND BANK OBLIGATIONS

Against the backdrop of increasing scam activity, 2023 has seen novel claims against banks based on alleged duties arising from common law, codes of practice and the AML/CTF Act. These claims demonstrate growing tension between customer expectations of what banks are required to do and banks' established legal obligations.

CUSTOMERS CHALLENGING BEING DE-BANKED

Banks in Australia and the UK are starting to feel the consequences of de-banking, as customers look to challenge their decisions and governments seek to regulate the exit process. Banks considering exiting a customer should have regard to their obligation to act fairly towards that customer. This may require that the bank have and record a valid reason for exiting the customer, to consider whether and how to communicate those reasons to the customer, and how to deal with the customer following their exit.

THERE WILL BE SIGNIFICANT REFORMS TO THE AML/CTF ACT AND SANCTIONS LAWS

Consultation commenced on long-awaited extension of the AML/CTF Act to "Tranche 2" entities and proposals to modernise the existing regime. Given the Government intends to implement these reforms before 2025, it remains to be seen how extensive any changes to modernise the AML/CTF Act may be.

Significant changes for sanctions laws may also be on the horizon with the Government considering introducing civil penalties for breach of sanctions laws. This will align Australia with foreign jurisdictions and may see a shift in the approach to enforcement.

AUSTRAC CONTINUES TO BE AN ACTIVE REGULATOR

While AUSTRAC has not commenced a new civil penalty proceeding this year, we have seen increased use of enforceable undertakings and we expect this continue through to 2025 as AUSTRAC focuses on legislative reforms and preparing for the FATF mutual evaluation. Based on AUSTRAC's previous enforcement pattern (see Annexure 1), we would also expect a new civil penalty proceeding to be commenced early next year. Following the resolution of the proceeding against Crown, reporting entities are closely considering the implications for their own AML/CTF programs and frameworks.

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RISING TENSIONS BETWEEN CUSTOMER EXPECTATIONS AND BANK OBLIGATIONS

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Delania Marvella Marundrury & Ors v Commonwealth Bank of Australia

Federal Court of Australia Proceeding No. VID59/2021

This proceeding may change the consequences for banks if they do not prevent illegal activity on an account.

The applicants claim that:

1 CBA owes a broad common law duty to exercise due care and skill to protect the interests of its customers against foreseeable harm, including loss arising from doubtful or potentially illegal transactions occurring through their accounts.

2 The implied statutory warranty under section 12ED of the *Australian Securities and Commission Act 2001* (Cth) (ASIC Act) to render services with due care and skill requires a bank to take steps to prevent illegal activity on an account.

On multiple occasions between 2013 and 2015, Mr Marundrury transferred large sums money from Indonesia to members of his family in Australia using a money changer who then engaged in "cuckoo smurfing" (meaning that, rather than transferring the funds directly into the Marundrurys' accounts with CBA using formal banking channels, the money changer transferred the money to criminals in Australia, who then made multiple deposits of cash into their accounts with CBA under the value of $10,000). This practice is intended to make the money received by the criminals appear to originate from a legitimate source (here being Mr Marundrury through the money changer), who then transfer on money to its intended destination in instalments of under $10,000 so as not to alert the bank.

Following an application from the AFP for a restraining order under the *Proceeds of Crime Act 2002* (Cth) in respect of the funds held in the CBA accounts, the Marundrurys agreed to forfeit the funds in those accounts (given they were alleged to be the proceeds of crime).

KEY ISSUES

At the time of publication, this case is still in the Federal Court. However, the procedural history offers some interesting insights into:

How customers are formulating claims against banks based on the AML/CTF Act.

The impact of sections 123 and 124 of the AML/CTF Act on the viability of those claims and AUSTRAC's approach to granting exemptions or modifying these provisions.

1 ORIGINAL CLAIM

The applicants originally claimed that, by failing to identify suspicious activity on their accounts and lodge suspicious matter reports under the AML/CTF Act, CBA breached its duties and the applicants suffered loss that could have been avoided if CBA had complied with its obligations.

2 CBA'S APPLICATION FOR SUMMARY DISMISSAL

In considering an application for summary dismissal, Moshinsky J stated that the applicants could not possibly establish breaches of section 41 (the obligation to file SMRs) because section 124 of the AML/CTF Act means that evidence relating to SMRs is inadmissible in court. Further, CBA could not properly defend the allegations because doing so would involve committing the offence of tipping-off. Accordingly the proceeding would place CBA in a manifestly unfair position and would constitute an abuse of process.

Notwithstanding this, Moshinsky J deferred decision on the summary dismissal application and instead allowed CBA time to seek an exemption from AUSTRAC that would allow it to adduce evidence relating to SMRs. AUSTRAC declined that exemption application in March 2022 on the basis that reporting entities may modify their reporting behaviour if they believe that AUSTRAC may permit the disclosure of SMR material in future legal proceedings.

3 AMENDED PLEADING

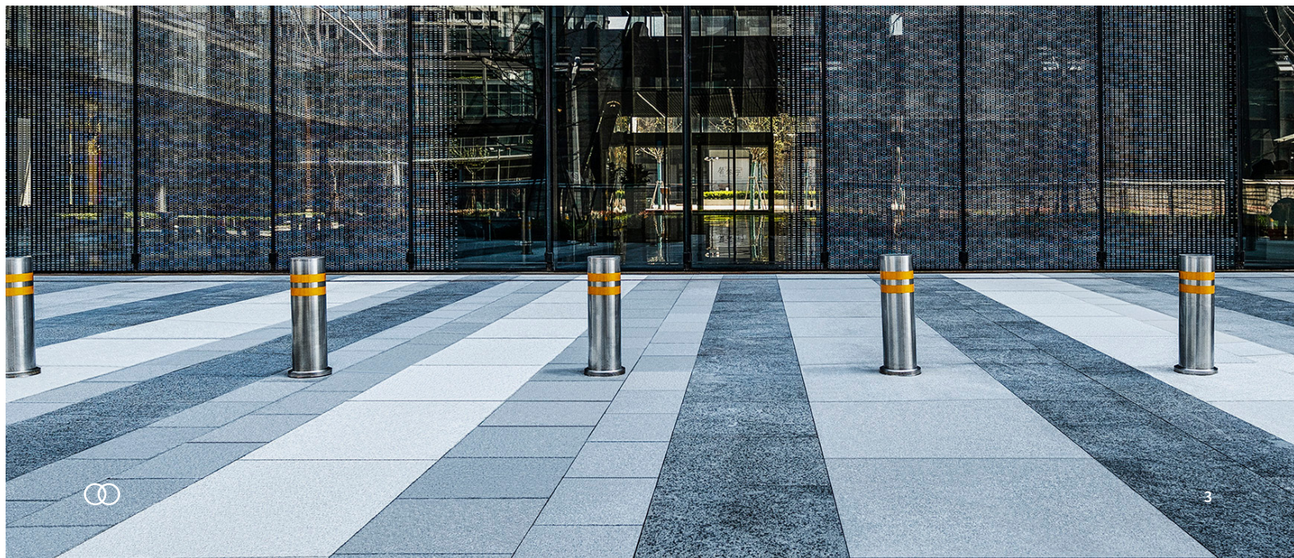
In July 2023, Moshinsky J granted the applicants leave to re-plead their claim in a way that does not allege CBA breached its obligation under section 41 but instead alleges that CBA ought to have known that the cash deposit transactions on the applicants' accounts involved "structuring" (ie deposits of cash below $10,000 to avoid reporting requirements).

4 CBA'S DEFENCE

CBA denies that it owed the common law duty of care alleged at all and denies that it breached the implied statutory warranty.

CBA also claims that, to the extent the applicants suffered loss or damage, that loss or damage was not caused by CBA's breach of any duty but by the applicants' consent to the forfeiture of those funds to the AFP (or, alternatively, that the applicants contributed to that loss by their own failure to take reasonable care - and any liability should be apportioned between Mr Marundrury and the Indonesian money changer).

CBA has not yet relied on a defence under section 235 of the AML/CTF Act (which provides protection from civil and criminal liability for acts done in good faith in compliance with the AML/CTF Act) although it has previously indicated it may wish to do.



O'Brien v Supercheap Security Pty Ltd [2023] NSWSC 21

This proceeding exemplifies the tension between the public's expectations of what banks are required to do to prevent scams and the bank's accepted legal obligations.

FACTS

After seeing advertisements online for a term deposit, Ms O'Brien contacted what she believed to be AMP Bank. The scammer, purporting to be an employee of AMP, told her that, to invest in a term deposit, she should transfer funds to a nominated bank account. They told her this account would be opened in her own name.

Ms O'Brien then transferred $500,000 from her CBA account to the nominated account. In her payment instruction, she included the BSB and account number given to her and specified her own name as the destination account name. She also included the references "*AMP*" or "*fixed deposit AMP*".

The nominated account was not a term deposit opened for Ms O'Brien but was in fact held by a company called Supercheap Security (Supercheap) with NAB. The next month Ms O'Brien tried to make a further transfer, however, by that time CBA had identified that the nominated account was suspicious and had placed a block on transactions to that account.

Ms O'Brien alleged that NAB, as the scammer's bank, owed her a duty to prevent the scammer from using their NAB account to facilitate fraud.

During a summary dismissal judgment, the New South Wales Supreme Court considered NAB's potential liability to a victim of a scam where NAB provided banking services to the scammer. This case offers a unique perspective because courts generally consider the liability of the victim's own bank for allowing them to make payments, rather than the scammer's bank.

CLAIMS & REASONS FOR DISMISSAL

	MS O'BRIEN'S CLAIMS	REASONS FOR DISMISSAL
DUTY OF CARE	NAB owed Ms O'Brien a duty to comply with the AML/CTF Act and block fraudulent accounts. Ms O'Brien argued this duty arose from representations made by NAB that it had systems in place to comply with the AML/CTF Act.	A novel duty of care to prevent pure economic loss cannot be imposed on the world at large. The duty of care a bank owes its customers does not extend to third parties.
NAB AS TRUSTEE FOR MS O'BRIEN	NAB held the funds transferred by Ms O'Brien on trust for her.	When a bank credits a customer's account, the bank itself does not receive that money (the owner does). Therefore, NAB did not receive or hold the funds at all.
NAB AS AGENT FOR MS O'BRIEN	Since Ms O'Brien was acting under a mistake of fact that NAB should have known of and NAB was acting as her agent, NAB should reimburse her because NAB was unjustly enriched.	A beneficiary institution is not an agent of the payer. Further, NAB was not enriched (unjustly or otherwise) because it did not receive the funds – they were credited to Supercheap's current account.
KNOWING ASSISTANCE	NAB knowingly assisted in Supercheap's fraudulent enterprise. This was because NAB knew it did not operate any account in Ms O'Brien's name, the reference text indicated it was a mistaken transfer, and this was a common pattern for Supercheap's account.	NAB did not have actual knowledge of the design. It is not enough to establish that a person was *"put on enquiry"*.
MISLEADING OR DECEPTIVE CONDUCT	NAB engaged in misleading or deceptive conduct by representing to Ms O'Brien that it would not credit funds to an account that did not exist or that if there was some ambiguity, the instruction would be checked with her.	The representation could not be inferred merely from the fact that NAB required an account name to be included in a transfer instruction. Further, Ms O'Brien relied on representations from the scammers in making the transfer and not on any representation from NAB.
UNCONSCIONABLE CONDUCT	NAB engaged in unconscionable conduct because Ms O'Brien was in a position of special disadvantage and NAB permitted the continued operation of the Supercheap account.	The ASIC Act requires a person not to engage in unconscionable conduct in connection with the supply of financial services. The Court held that the conduct must be in relation to the recipient of those services. Here, NAB provided no financial services to Ms O'Brien. Further, NAB's conduct in allowing Supercheap to open account without taking reasonable care to prevent the account from being used for fraud was not (in and of itself) *"so far outside the social norms of acceptable commercial behaviour"* as to be unconscionable.

Philipp v Barclays Bank UK plc [2023] UKSC 25

FACTS

Mrs Fiona Philipp and her husband were deceived by fraudsters (posing as representatives of the National Crime Agency and the Financial Conduct Authority) into instructing Barclays Bank to transfer £700,000 in two payments from Mrs Philipp's current account with Barclays to international bank accounts controlled by the fraudster.

On each occasion, Mrs Philipp attended a branch of Barclays Bank in person and gave instructions for the international transfers to be made in the belief that she was moving the money into "safe accounts" to protect them from fraud. Before making the transfer, Barclays telephoned Mrs Philipp to confirm she wished to proceed. The instructions were carried out by the bank and, following several visits from the police, Mrs Philipp came to realise that the money had been lost.

Mrs Philipp brought a claim against the Bank, alleging that the Bank had a contractual or common law duty to refrain from acting on her payment instructions where the Bank had reasonable grounds to believe that she was being defrauded. This claim was based, in part, on the application of the "Quincecare duty", which is a duty owed by banks not to execute payment instructions from a customer's agent if the bank reasonably believes the instruction is an attempt to misappropriate the customer's funds.

SUPREME COURT DECISION

The Court concluded that the "*Quincecare duty*" does not apply to cases where the account holder has unequivocally authorised a payment. In those cases, the ordinary duty of the bank is to simply carry out the instruction. Further, under UK law, the bank is under no obligation to concern itself with the commercial wisdom or risks associated with the payment instructions given by its customers. The Court held that the "*Quincecare duty*" is limited to cases concerning payment instructions that have been given by an agent on behalf of a customer.

The Court rejected the argument that a term should be implied into the contract between bank and customer requiring the bank not to carry out a payment if it believes, or has reasonable grounds to believe, that the customer had been deceived into authorising the payment.

In considering what exceptions exist to the bank's general duty to carry out valid payment instructions, the Court referred to the Australian case of *Ryan v Bank of New South Wales* [1978] VR 555. The Court in that case suggested that a bank should not comply with a valid payment instruction if a reasonable banker would know that the customer would not desire their orders to be carried out if they were aware of the circumstances known to the bank. But it was not necessary for deciding Mrs Philipp's case to express a view on how this exception should be applied.

CUSTOMERS CHALLENGING BEING DE-BANKED

Banks in Australia and the UK are starting to feel the consequences of de-banking, as customers look to challenge their decisions and governments seek to regulate the exit process. Banks considering exiting a customer should have regard to their obligation to act fairly towards that customer. This may require that the bank have and record a valid reason for exiting the customer, to consider whether and how to communicate those reasons to the customer, and how to deal with the customer following their exit.

Human Appeal International Australia v Beyond Bank Australia Ltd (No 2) [2023] NSWSC 1161

This case demonstrates that a contractual right to exit a customer can be challenged on the basis of the bank's broader duties to act fairly.

We recommend caution in relying on this decision as the bank conceded the key legal question of whether it was required to have a valid commercial reason for exiting the customer. Further, the outcome may have been different had Beyond Bank obtained an exemption from the tipping off provisions or made an argument that section 123 of the AML/CTF Act placed Beyond Bank in a manifestly unfair position.

FACTS

Human Appeal International (HAI), a charitable organisation, brought proceedings against Beyond Bank in relation to the closure of HAI's accounts. Beyond Bank's account terms permitted the Bank to close HAI's account by giving 20 days written notice and without giving reasons for the closure. The contract also expressly incorporated the terms of the Customer Owned Banking Code of Practice, a voluntary code of practice for Australia's customer-owned banking institutions.

Beyond Bank exercised the right to close HAI's account based "on a recent review" that concluded HAI's banking business was "not suited to Beyond Bank".

Beyond Bank conceded that it was only entitled to close the account if it had a valid commercial reason for doing so and accordingly Justice Parker was not required to consider whether this was the correct legal position.

KEY ISSUES

This case offers some interesting insights into:

How a bank should respond to a notice to produce where production may result in a breach of section 123 of the AML/CTF Act and whether section 123 prevents disclosure of SMR-related information to a court.

Whether section 124 of the AML/CTF Act prevents the pre-trial production of documents.

Parker J held that:

The closure was invalid because Beyond Bank was only entitled to close the accounts on reasonable grounds and Beyond Bank had no such grounds.

Section 123 of the *AML/CTF Act* does not prevent a party from disclosing to a Court, in general terms, the administrative burden that the AML/CTF Act imposed on the bank (in this case to demonstrate the additional time and resources spent on higher-risk customers).

Flynn v Westpac Banking Corporation (Discrimination) [2022] ACAT 21

Mr Flynn ran a cryptocurrency exchange. The funds related to his trading activities flowed through his personal account with Westpac and a business account with St George Bank. Following ten months of this arrangement, Westpac and St George wrote to Mr Flynn to advise that his accounts would be closed and that he was barred permanently from being provided with banking services by the Westpac Group on the basis that Mr Flynn was involved in the cryptocurrency industry.

Mr Flynn made a complaint to the Human Rights Commission alleging that Westpac had discriminated against him by refusing to provide banking services to him on the grounds of his occupation as a digital currency exchange provider. The complaint was referred to the ACT Civil and Administrative Appeals Tribunal.

The Tribunal did not consider it appropriate to comment on the merits of Mr Flynn's claims because Westpac claimed a defence under section 235 of the AML/CTF Act (ie that it was required to exit Mr Flynn to comply with the AML/CTF Act) and the Tribunal did not have jurisdiction to decide a matter under section 235 of the AML/CTF Act.

As Mr Flynn did not commence proceedings against Westpac in court, we still have no case law considering the application of section 235 of the AML/CTF Act. However, as banks continue to exit customers in certain high-risk industries, it is likely we will soon see a court consider:

(a) what is required under section 235 to demonstrate that a customer is exited "in good faith" and "in compliance, or purported compliance" with a requirement under the AML/CTF Act or Rules; and

(b) how those factors interact with a bank's requirement under codes of practice to strike a fair balance between the interests of the bank and the interest of its customers.

De-banking of Nigel Farage by Coutts

With Australian banks increasingly facing challenges from de-banked customers (including in the recent Beyond Bank case) the review provides a timely reminder to banks considering exiting a customer to have regard to their obligation to act fairly towards that customer. This may require that the bank have and record a valid reason for exiting the customer, to consider whether and how to communicate those reasons to the customer, and how to deal with the customer following their exit.

Earlier this year, Coutts de-banked Nigel Farage, former leader of the UK Independence and Brexit parties. Following controversy over whether Farage was de-banked for commercial and/or political reasons, Coutts appointed Travers Smith to conduct an independent review into Farage's account closure.

Although the review does not concern Australian requirements, certain provisions in the FCA Handbook that applied to Coutts (including to *"pay due regard to the interests of its customers and treat them fairly"*) are similar to requirements in banking codes of practice, including the provisions recently considered in *Human Appeal International Australia v Beyond Bank Australia Ltd (No 2)* [2023] NSWSC 1161 (**Beyond Bank**).

Travers Smith concluded that these requirements did not prohibit Coutts from exiting customers for predominantly commercial reasons, although they noted Coutts' failure to provide adequate reasons may have breached this requirement (and others in the FCA Handbook).

Unlike Beyond Bank, Coutts successfully established that there was a valid commercial reason for exiting Farage because increased monitoring and compliance costs associated with Farage being a politically exposed person meant the relationship was significantly loss-making.

However, the obligation to pay due regard to the interests of its customers and treat them fairly was breached in all the circumstances because Coutts failed to give reasons for the exit decision, it failed to handle Farage's complaint appropriately, Farage's confidential information was disclosed to the BBC following the account closure, and it failed to identify and consider what steps to take to mitigate false impressions had been created in the media concerning Farage's financial affairs.

Travers Smith noted in its report that HM Treasury has recently published guidance to the effect that:

(a) Banks should provide **clear and tailored explanatory reason for account closure** unless to do so would be unlawful, inconsistent with wider legal and regulatory requirements, or present a risk of serious harm to the customer or another individual. Further, if a bank exits a customer for **primarily commercial reasons (such as a policy decision not to take on the cost or reputational risk of certain categories of customer)**, this should be made **specifically clear to the customer.**

(b) Banks must provide **at least 90 days' notice** when terminating an account unless for a serious or uncorrected breach.

In June 2023, the Australian Government agreed in principle with a recommendation of the Council of Financial Regulators that banks should provide a customer with reasons for being de-banked and provide at least 30 days' notice. Treasury stated that it would work with banks and AUSTRAC to ensure these measures are implemented to the greatest extent possible.

SIGNIFICANT FINANCIAL CRIME REFORM PROPOSALS

Reforms to the AML/CTF Regime

In April 2023, the Attorney-General's Department (AGD) released the first of two consultation papers to:

(a) **extend the application** of the AML/CTF Act to certain high-risk professions (i.e., the long-touted "Tranche 2 reforms"); and

(b) **modernise the Act more generally,** in response to various reviews including the 2016 Statutory Review of the AML/CTF Act and the 2022 review conducted by the Senate Legal and Constitutional Affairs Reference Committee.

Extending the application of the AML/CTF Act to "Tranche 2" entities

The following table summarises the implementation of the "Tranche 2 reforms" at a high level.

THE FOLLOWING PEOPLE WILL BE CAPTURED...	IF THEY ENGAGE IN THE FOLLOWING ACTIVITIES (AS APPLICABLE)...	SUBJECT TO THE FOLLOWING EXCLUSIONS
• Lawyers • Accountants • Conveyancers • Trust/company service providers • Real estate agents • Property developers (and potentially property managers and leasing managers) • Dealers in precious metals and stones (including producers/miners, cutters/polishers, buyers/brokers, manufacturers, buyers/sellers in the secondary and scrap markets)	• Buying/selling real estate (including legal/equitable interests in real property) • Managing client money, securities or other assets • Management of bank, savings or securities accounts • Organisation of contributions for creation, operation or management of companies • Creation, operation or management of legal persons or arrangements (eg trusts) • Buying and selling of business entities • Engaging in cash transactions above $10,000 for the sale of precious metals and stones (including as agent or auctioneer)	Trust or company service providers when they prepare for/carry out transactions for clients relating to: • acting as formation agent of legal persons; • acting/arranging for someone to act as director or secretary of a company, partner of a partnership, or similar position in relation to other legal persons; • providing a registered office, business address or accommodation, or administrative address for a company, partnership or other legal person/arrangement; • acting/arranging for someone to act as trustee of an express trust or performing the equivalent function for another form of legal arrangement; or • acting/arranging for someone to act as a nominee shareholder. Additional exclusions will apply for non-commercial arrangements and representing clients in litigation.

Modernising the AML/CTF Act

The AGD released 13 reform proposals, in April 2023. The proposals that, in our view, are likely to have the greatest impact are highlighted in gold below.

Remove the distinction between Part A and Part B

Include within the Act an express requirement to undertake a risk assessment and document a risk assessment methodology

Include within the Rules more detail on what is required to meet obligations relating to "*appropriate systems and controls*"

Allow non-reporting entities to become part of a DBG to enable them to discharge AML/CTF compliance functions

Include within the Act an express obligation to mitigate/manage risk of financing proliferation of weapons of mass destruction

Replace the existing regime for services provided at or through a permanent establishment overseas with a requirement to extend the AML/CTF program to offshore operations to the extent permitted by local law and report to AUSTRAC if this is not possible

Remove existing CDD obligations from the Rules and include "*Core CDD obligations*" within the Act

Adopt an "*outcomes-focused*" approach to tipping-off similar to the UK and Canada

Expand the regulation of digital currency by including 4 new designated services within the Act

Include a requirement within the Act for financial institutions, remitters and digital currency exchanges to include payee information and verify payer information when passing on EFTIs

Reform process for obtaining exemptions to assist with law enforcement investigations

Repeal the *Financial Transaction Reports Act 1988* (Cth)

Extend the Act to cover "*Tranche 2*" entities

To truly achieve the objective of modernising the AML/CTF Act, in our view the following should also be considered:

Given the limited timeframe for implementation, it seems unlikely that some of these suggestions will be included in the reforms.

PROPOSED REFORMS TO AUSTRALIA'S AUTONOMOUS SANCTIONS FRAMEWORK

In January 2023, the Department of Foreign Affairs and Trade (DFAT) released an Issues Paper proposing reforms to Australia's autonomous sanctions framework ahead of the expiry of the Autonomous Sanctions Regulations on 1 April 2024.

The most significant proposal is to introduce a civil penalty regime. While the ASO is currently not an active enforcement agency and sees its role as educator, the introduction of civil penalties may increase the risk of enforcement action.

If a civil penalty regime is introdued, consideration should be given to whether:

1. The Act should provide protection from civil or criminal liability arising from any act or omission done in compliance with the provisions of the Autonomous Sanctions Act.

2. Other civil and administrative compliance options should also be available (such as infringement notices, enforceable undertakings, and remedial directions). Having a wide range of options allows for effective enforcement by the regulator and ensures that the tool used is appropriate to the type of breach and entity involved.

AUSTRAC CONTINUES TO BE AN ACTIVE REGULATOR

While AUSTRAC has not commenced any new civil penalty proceedings in 2023, we have seen increased use of enforceable undertakings and we expect this continue through to 2025 as AUSTRAC focuses on legislative reforms and preparing for the FATF mutual evaluation.

Based on AUSTRAC's previous enforcement pattern (see Annexure 1), we would also expect a new civil penalty proceeding to be commenced early next year.

AUSTRAC's enforcement focus has remained on casinos, gambling service providers and banks. Following an extensive supervisory campaign in the casino and gambling sector, AUSTRAC has:

a) finalised proceedings against Crown (the Federal Court of Australia approved an agreed penalty of $450 million);

b) ordered the appointment of external auditors to Sportsbet and Bet365;

c) commenced an investigation into Entain; and

d) commenced proceedings against Star and SkyCity casinos (alleging similar breaches to those included in its proceeding against Crown).

AUSTRAC's concerns in relation to these sectors are wide-ranging but focus on the following issues:

The adequacy of each reporting entity's Enterprise Wide Risk Assessment (EWRA), which impacts on whether any other measures and controls are appropriate and risk-based.

Whether the board and senior management of each reporting entity maintains sufficient oversight of each reporting entity's Part A Program.

Whether each reporting entity has transaction monitoring programs that are capable of identifying ML/TF risks relevant to the designated services being provided and enhanced customer due diligence programs that effectively mitigate and manage that risk. AUSTRAC has specifically expressed concerns that these programs lack documented governance processes (including assurance), rely on manual processes without sufficient guidance or resourcing, and fail to reflect all known typologies relevant to the designated services.

AUSTRAC's approach to enforcement

AUSTRAC's approach to enforcement is described in a document titled *"AUSTRAC's approach to regulation".* This has not been updated for several years but AUSTRAC has not made any public statements to suggest it intends to change this approach.

However recent public criticisms of the length of time taken by AUSTRAC to complete enforcement action and AUSTRAC's willingness to settle civil penalty proceedings may mean that AUSTRAC seeks to complete enforcement action more quickly (eg it may not give extensions for external audits or remedial action plans under EUs) and may also make it less likely that AUSTRAC will settle all civil penalty proceedings (as they have in the past).

In Justice Lee's judgment in the Crown proceeding, his Honour expressed strong concerns that AUSTRAC has never litigated a contested hearing or advocated for orders different to those proposed by the contravener, noting it may risk *"being perceived as a soft touch"* and that *"a danger arises that a sophisticated contravener will approach negotiations on the basis that it can present obstacles to making admissions, and delay and hold out to secure what they perceive to be the lowest possible permissible figure confident that the regulator will not take them on."*

Justice Lee also criticised the *"extraordinary delay"* in progressing the case and certain of AUSTRAC's decisions (for example, not to cross-examine the Crown CFO in relation to Crown's capacity to pay a higher agreed penalty).

AUSTRAC has also been criticised during hearings of the Legal and Constitutional Affairs Legislation Committee for granting extensions of time for the Perth Mint in connection with its external audit, despite AUSTRAC's acknowledgement that they had *"considerable concerns"* about Perth Mint's AML/CTF framework.

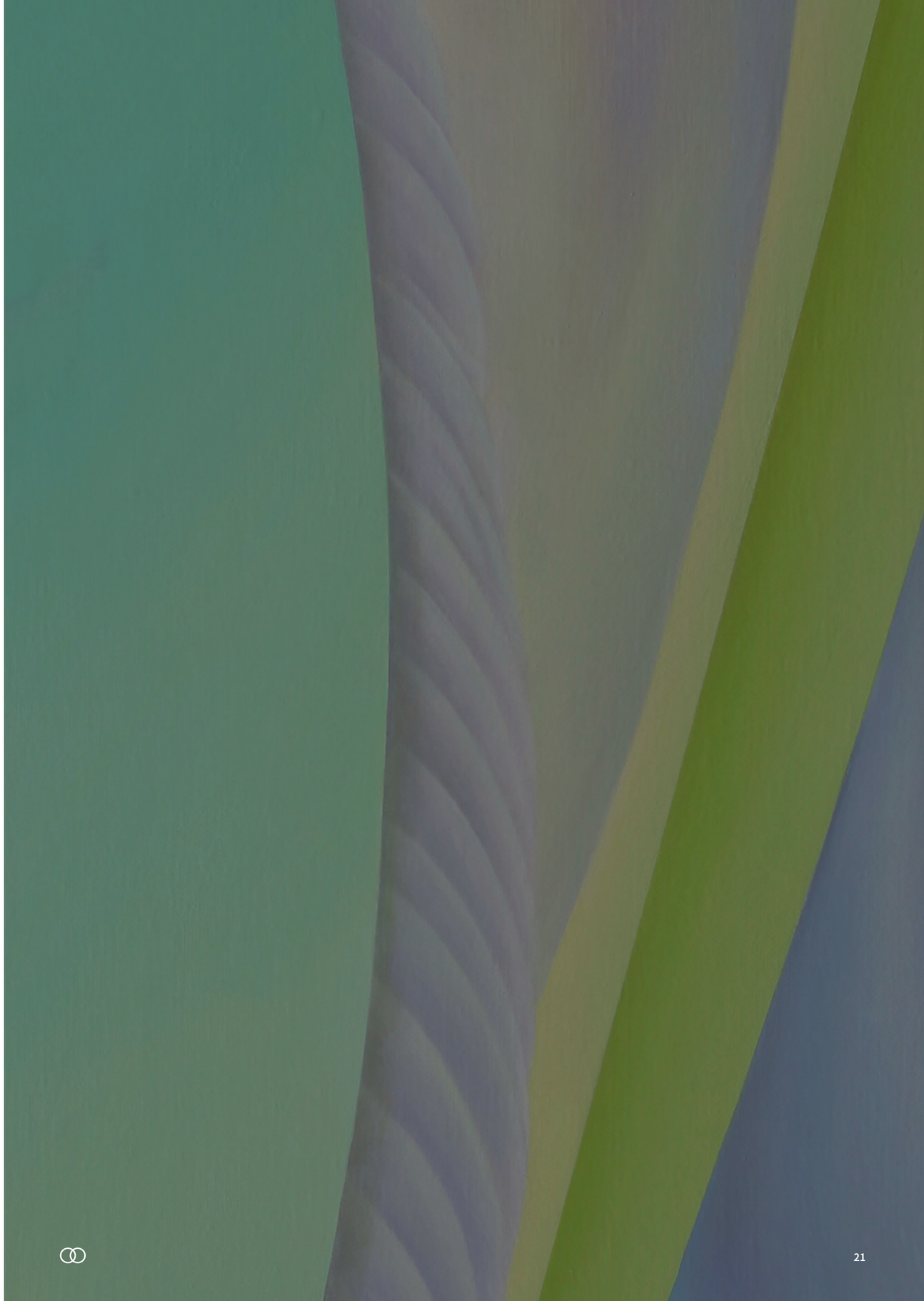
The impact of these criticisms may already be reflected in AUSTRAC's approach to the SkyCity litigation. In a recent case management hearing, Justice Lee noted that the prospects of AUSTRAC agreeing a penalty with SkyCity were *"pretty bleak"*. It may be that AUSTRAC chooses to run the SkyCity proceedings to the first ever contested hearing under the AML/CTF Act.

The Crown Proceedings

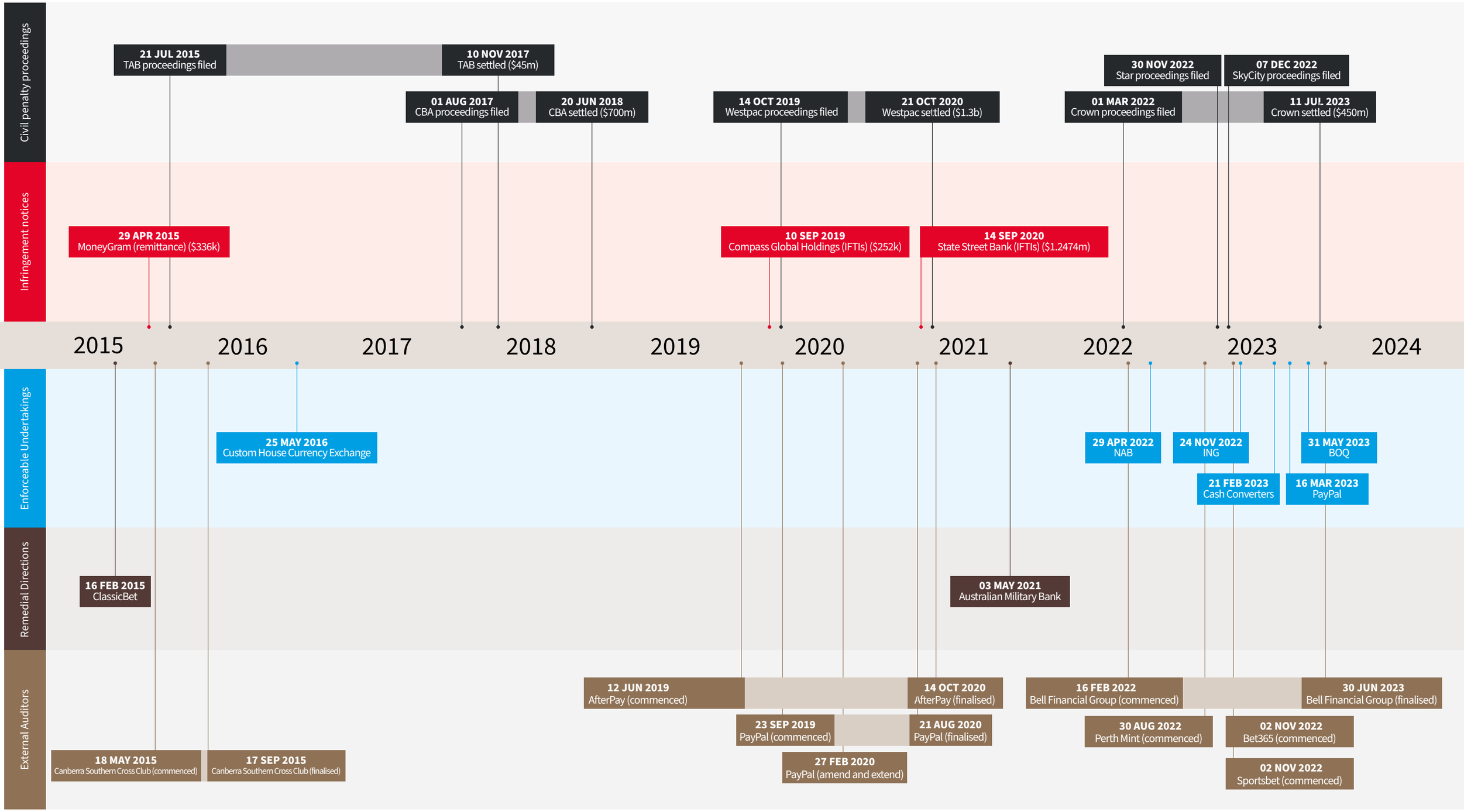
AUSTRAC commenced proceedings against Crown Melbourne and Crown Perth (**Crown**) in March 2022, alleging widespread non-compliance with the AML/CTF Act. The allegations included that Crown failed to appropriately assess the money-laundering and terrorism-financing risks faced by its business (and had not identified all designated services provided) and, as a consequence, many of the systems and controls included in its AML/CTF Program could not be "*appropriate and risk-based*". AUSTRAC alleged this led to Crown facilitating significant money-laundering activity and a failure to apply appropriate processes to mitigate and manage risk posed by high-risk customers.

Crown agreed to pay a $450 million penalty and the Court approved this settlement in July 2023. In addition to considering whether the settlement amount was appropriate, Justice Lee also provided some substantive commentary on aspects of AUSTRAC's claims.

ISSUE	JUSTICE LEE'S COMMENTS
What is required for Part A to have the primary purpose of identifying, mitigating and managing risk?	For Part A to have the Primary Purpose it must: (a) refer to or incorporate an ML/TF risk assessment and methodology; (b) include systems and controls that are aligned to the risk assessment (eg the systems were not capable of identifying the risk of junket channels and complex transactions); and (c) establish an appropriate framework for approval and oversight.
What is required for the board and senior management to have ongoing oversight?	Ongoing oversight of Part A of a Program should include: (a) the board determining ML/TF risk appetite; (b) complete and regular reporting to the board and senior management regarding AML/CTF compliance and a process to ensure the board discusses against measurable criteria; and (c) clear and well-understood reporting lines, documented roles and responsibilities.
What is required for an effective OCDD framework?	(a) Transaction monitoring must not be overly reliant on manual processes, must be supported by appropriate information management systems and assurance; (b) ECDD must have appropriate systems to obtain, analyse and record Source of Wealth/Source of Funds information; and (c) adequate guidance must be provided not only in relation to ECDD measures to be applied but also to senior management when considering whether to continue a business relationship.
What is an appropriate risk-based systems and controls for ACIP?	Part B must include appropriate risk-based systems and controls to: (a) identify high risk customers at the time ACIP is being carried out and have risk-based procedures to determine whether to collect and verify additional KYC information in respect of those customers; and (b) consider the nature and purpose of the business relationship with customers (eg junket operators, representatives and players have different business relationships to other players).



Annexure 1 – Timeline of AUSTRAC enforcement action



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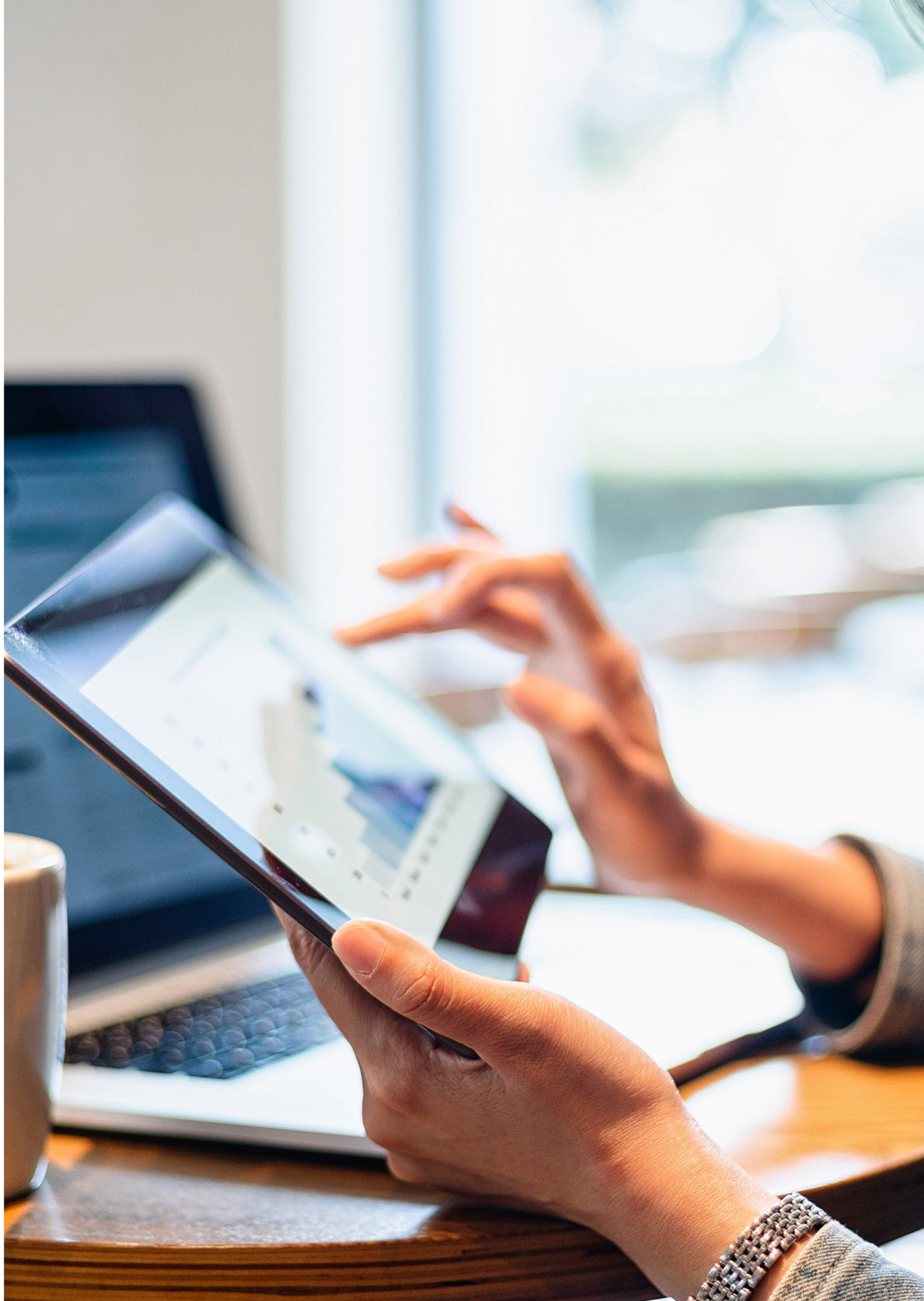

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