

20 SEPTEMBER 2018

ISSUE 22



BANKING SECTOR NEWSLETTER

AFCA welcomes ASIC's approval of the AFCA Rules

AFCA welcomes ASIC's approval of the AFCA Rules and AFCA's Independent Assessor Terms of Reference. ASIC's approval was issued in accordance with the Corporations Act 2001, which requires ASIC to approve any material changes made to the AFCA Scheme, such as changes made to AFCA's Rules

<http://www.fos.org.au/news/media/afca-welcomes-asic-approval-of-the-afca-rules-and-afcas-independent-assessor-terms-of-reference/>

IN THE MEDIA

How much will their misbehaviour cost the banks?

The big banks are facing at least \$1.3bn in fines and customer compensation and \$1.1bn in new regulatory costs, according to the investment bank Morgan Stanley

<http://www.abc.net.au/news/2018-09-14/bank-royal-commission-how-much-will-misbehaviour-cost-the-banks/10246846>

ASIC joins ACCC in pursuing ANZ over \$2.5b share placement

ANZ's battle to defend a \$2.5 billion capital raising is now raging on another front, with corporate watchdog ASIC confirming it will take action against the bank

<http://www.abc.net.au/news/2018-09-14/asic-joins-acc-in-pursing-anz-over-2.5bn-share-placement/10248192>

Prospa removes unfair loan terms for small business borrowers and guarantors

Following an ASIC review, Prospa Advance Pty Limited (Prospa) has changed loan terms in its standard form small business loan contract to address terms being unfair under the unfair contract terms provisions of the ASIC Act

<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-262mr-prospa-removes-unfair-loan-terms-for-small-business-borrowers-and-guarantors/>

FPA releases its complete set of recommendations to FASEA

The Financial Planning Association of Australia (FPA) has today publicly shared copies of its final recommendations that were submitted to the Financial Adviser Standards and Ethics Authority (FASEA) at the close of last month, calling for enhancements to the proposed guidance on the framework for financial advisers

<https://fpa.com.au/news/fpa-releases-complete-set-recommendations-fasea/>

'Not sure enforcement is the correct term': CommInsure negotiated 'punishment' with ASIC

The banking royal commission has revealed the corporate regulator gave the Commonwealth Bank's insurance arm the chance to change a media release and negotiate the consequences of misleading advertising

<http://www.abc.net.au/news/2018-09-13/comminsure-negotiated-punishment-with-asic/10242398>

ACCC seeks views on Consumer Data Right Rules Framework

The ACCC is progressing the development of the Consumer Data Right (CDR), which will allow consumers to require their bank to share their data with accredited service providers such as a comparison site or another bank in order to get more tailored, competitive services

<https://www.accc.gov.au/media-release/accc-seeks-views-on-consumer-data-right-rules-framework>

ABA: New Banking Code standards should be adopted by entire industry

The new Banking Code of Practice standards, recently approved by ASIC, should be adopted across the entire industry and include banks which aren't members of the Australian Banking Association (ABA)

<https://www.ausbanking.org.au/media/media-releases/media-release-2018/new-banking-code-standards-should-be-adopted-by-entire-industry>

Role of adviser changing, Macquarie report shows

The role of the financial adviser is changing due to increased client expectations and technological advances, Macquarie said in its *2018 Accounting and Financial Services Benchmarking Report* <https://www.moneymanagement.com.au/news/financial-planning/role-adviser-changing-macquarie-report-shows>

Financial services giant taken to court over fees for no service

The corporate watchdog has commenced Federal Court action against one of Australia's largest financial services companies over alleged charging of fees for no service and "misleading" conduct <https://www.nestegg.com.au/superannuation/12332-financial-services-giant-taken-to-court-over-fees-for-no-service>

Banking royal commission 'embarrassing' for 'inadequate' bank regulator APRA Analysis

A forum of some of the nation's leading economists comes up with its own verdict of Australian banking: a fee-gouging, rent-seeking, "confuse-opoly" with an embarrassingly poor regulator. <http://www.abc.net.au/news/2018-09-04/banking-royal-commission-embarrassing-apra/10200028>

RBA: Credit quality poses biggest risk to economy

The central bank has warned that the greatest risk to Australia's financial stability over the next few years will be the banks' large exposure to potentially deteriorating home loans <https://www.investordaily.com.au/regulation/43546-rba-credit-quality-poses-biggest-risk-to-the-economy>

IN PRACTICE AND COURTS

[APRA Letter: Aggregate results on the Committed Liquidity Facility](#)

All locally incorporated LCR ADIs were invited to apply for a CLF amount to take effect on 1 January 2019. All fifteen ADIs chose to apply. Following APRA's assessment of applications, the aggregate Australian dollar net cash outflow (NCO) of the fifteen ADIs was estimated at approximately \$ 381 billion. The total CLF amount allocated for 2019 (including an allowance for buffers over the minimum 100 per cent requirement) is approximately \$243 billion

[ASIC Report 585: ASIC enforcement outcomes: January to June 2018](#)

Released 9 August 2018, this report outlines the enforcement outcomes achieved by ASIC during the period from 1 January to 30 June 2018 (relevant period). The report provides a high-level overview of some of our enforcement priorities and highlights some important cases and decisions during this period. These matters relate to several ongoing areas of focus, presented by the areas we enforce: Corporate governance, Financial services, Market integrity and Small business

ASIC consultation: foreign financial services providers relief proposals

[CP 301](#) sets out a proposal to enable foreign providers to apply for a modified form of Australian financial services (AFS) licence (foreign AFS licence). This follows ASIC's review of the regulatory settings behind our foreign providers relief. The current foreign provider licensing relief due to sunset on 27 September 2018, will be extended until 30 September 2019 while we consult with stakeholders

[Reminder: Australian Financial Complaints Authority \(AFCA\) Complaint Resolution Scheme Rules](#)

It is a statutory requirement that financial firms including most credit representatives that deal with retail clients must join the AFCA scheme by 21 September 2018.

IFAC: Global Consultation: Identifying and Assessing the Risks of Material Misstatement

Proposed Changes to ISA 315 (Revised) to Advance Audit Quality

The International Auditing and Assurance Standards Board (IAASB) seeks public comment by November 2, 2018 on [Exposure Draft, ISA 315 \(Revised\), Identifying and Assessing the Risks of Material Misstatement](#).

AASB Invitation to Comment:

[ITC 40 Financial Instruments with Characteristics of Equity](#) – The International Accounting Standards Board has recently published Discussion Paper DP/2018/1 *Financial Instruments with Characteristics of Equity*. Submissions to the IASB are due by 7 January 2019. Read more [here](#).

[ABA Newsletter](#)

This issue outlines the newly released Banking Code. More information about the new Banking Code is available [here](#).

ABA Submissions

[Consumer Data Right Exposure Draft Response](#)

ABA members support the introduction of a consumer data right that will encourage innovation and enable customers to benefit from data sharing while ensuring their privacy is safeguarded.

COBA Submissions

Submission to Treasury - Consumer Data Right
COBA's submission to Treasury providing comment on the Exposure Draft of the [Treasury Laws Amendment \(Consumer Data Right\) Bill 2018](#) (the Bill) and the accompanying explanatory materials.

FSC Submissions

[FSC Submission - Response to Treasury Unfair Contract Terms Consultation](#).

[PPSR Data integrity at work](#)

Our collaboration with stakeholders and users has enabled us to further formalise our approach to proactive data integrity activities. As a result, we've identified a range of tools outlined here. The Group has also provided a list of known data integrity issues to AFSA's PPS Stakeholder Forum members for comment. Each data integrity issue has a number of recommended actions to address the issue. This can be found on the [Industry Engagement](#) page

APRA proposes updates to related parties framework for ADIs

APRA's proposals to modernise the framework include: explicitly addressing 'step-in risk' by incorporating guidance from the Basel Committee on Banking Supervision. A three-month consultation period on the proposed revisions to APS 222 and ARS 222.0 has now commenced, with APRA accepting submissions until 28 September 2018. Copies of the discussion paper are available [here](#).

CASES

[Victims of Financial Fraud and Department of the Treasury \(Freedom of Information\) \[2018\] AICmr61](#)

Freedom of Information – Whether documents contain deliberative matter prepared for a deliberative purpose – Whether contrary to the public interest to release conditionally exempt documents – (CTH) Freedom of Information Act 1982 ss 11A(5) and 47C

Victims of Financial Fraud (the applicant) applied to the Department for access to documents relevant to the collapse of Trio Capital which has been described in a Senate inquiry in 2012 as 'the largest superannuation fraud in Australian history'.^[1] Specifically, the applicant sought access to:

what ASIC^[2] and APRA^[3] contribute to safeguard and protect superannuation in the Australian financial market and the report by APRA alerting Treasury to the gaps in legislation that prevented the questioning of overseas Trio entities

[Anderson v Westpac Banking Corporation \(ABN 33 007 457 141\) \[2018\] VSCA 226](#)

CONTRACTS – Construction – Loan agreements between appellant and bank secured by mortgage over real property – Appellant failed to pay amounts to owners corporation – Bank paid owners corporation and debited amounts from loan account – Whether bank entitled to debit amounts before asking appellant for payment – Whether appellant was in default of loan agreements and mortgage by reason of failure to pay owners corporation.

UNCONSCIONABLE CONDUCT – Bank received demand from owners corporation for unpaid amounts in respect of secured property owned by appellant –

Bank paid owners corporation and debited amounts from appellant's loan account without notice – Whether bank's conduct inconsistent with conduct in similar transactions – Whether breach of Code of Banking Practice 2013 – Whether bank failed to properly investigate appellant's complaint – Whether bank acted unfairly in proceedings for debt and possession – Australian Securities and Investments Commission Act 2001 (Cth) s 12CB.

PRACTICE AND PROCEDURE – Leave to appeal – Where points in proposed grounds of appeal not raised before trial judge – Where success on proposed grounds would not impugn orders made by trial judge.

[Commonwealth Bank of Australia v Pascoe and Scott as trustees of the estate of Usha Wati Charan \[2018\] NSWSC 1332](#)

BANKRUPTCY – effect of bankruptcy on property and proceedings – vesting in trustee by operation of sequestration order – Bankruptcy Act 1966 (Cth), ss 60, 116 – bankrupt's proprietary rights not a "personal injury or wrong"

EQUITY – equitable remedies – account – account between mortgagor and mortgagee – discussion of circumstances where an account between parties is taken

MORTGAGES AND SECURITIES – sale of properties by mortgagee – surplus paid into court – competing claims to surplus – intervening equitable interest – equity of exoneration

[Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd & Ors \[2018\] SASCFC 95](#)

PERSONAL PROPERTY - OWNERSHIP AND POSSESSION

MORTGAGES - REGISTRATION OF SECURITY INTERESTS IN CHATTELS OR GOODS - REGISTRATION OF SECURITY INTERESTS IN PARTICULAR OR SPECIAL GOODS

Appeal from a decision granting declaratory relief to the effect that the respondent's perfected purchase money security interest (PMSI) under the Personal Property Securities Act 2009 (Cth) (the PPS Act) has priority over all other registered security interests with respect to 40 motorcycles.

Consideration of the circumstances in which a PMSI achieves super-priority under s 62(2)(b)(i) of the PPS Act, and in particular the requirement that the grantor of the PMSI achieve perfection by registration prior to obtaining possession of the relevant inventory. Whether the operation of s 62(2)(b)(i) turns upon possession of the inventory 'as grantor', as the trial judge held, or possession simpliciter.

Held per Doyle J (Kourakis CJ and Parker J agreeing) dismissing the appeal

LEGISLATION**Regulation****[ASIC Credit \(Unsuitability - Credit Cards_ Instrument 2018/753](#)**

05/09/2018 - This instrument prescribes a period of three years for responsible lending assessments for new credit card contracts or credit limit increases

[Banking exemption No. 2 of 2018](#)

03/09/2018 - This instrument replaces Banking exemption No. 1 of 2015 in order to maintain the exemption from section 8 of the Banking Act 1959 for financial corporations that no longer meet the definition of registrable corporation following amendment of the Financial Sector (Collection of Data) Act 2001 by the Treasury Laws Amendment (Banking Measures No. 1) Act 2018

THIS EDITION'S EDITORS**Julie Callea-Smyth**

Partner

+61 3 8080 3625

+61 411 600 945

jcallea-smyth@tglaw.com.au**Jessica Andreacchio**

Special Counsel

+61 3 8080 3631

+61 439 370 081

jandreacchio@tglaw.com.au**Michelle Lykiardopoulos**

Special Counsel

+61 3 8080 3567

+61 410 778 698

mlykiardopoulos@tglaw.com.au

This Alert is produced by Thomson Geer. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under Professional Standards Legislation.

SYDNEY | Level 25, 1 O'Connell Street | Sydney NSW 2000**MELBOURNE** | Level 39, Rialto South Tower, 525 Collins Street | Melbourne VIC 3000**BRISBANE** | Level 16, Waterfront Place, 1 Eagle Street | Brisbane QLD 4000**ADELAIDE** | Level 7, 19 Gouger Street | Adelaide SA 5000www.tglaw.com.au

Thomson Geer

@ThomsonGeer