

19 NOVEMBER 2018

ISSUE 26



## BANKING SECTOR NEWSLETTER

### APRA announces Terms of Reference for enforcement strategy review

APRA has announced Terms of Reference for a review of its enforcement strategy. The Review will be led by APRA Deputy Chair John Lonsdale, supported by APRA staff and external advisers as necessary

<https://www.apra.gov.au/media-centre/media-releases/apra-announces-terms-reference-enforcement-strategy-review>

### IN THE MEDIA

#### Life insurance industry begins rebuild with new consumer code

A radical overhaul of the code governing the conduct and practices of Australian life Insurers which belong to the Financial Services Council (FSC) has been released for public consultation. The draft FSC Life Insurance Code of Practice is designed to life standards in product design, sales, underwriting, customer service, complaints and claims handling

[https://www.fsc.org.au/\\_entity/annotation/63f602e7-f3e5-e811-815e-c4346bde3591](https://www.fsc.org.au/_entity/annotation/63f602e7-f3e5-e811-815e-c4346bde3591)

#### Court orders penalties and other relief against Westpac for BBSW conduct

The Federal Court of Australia has ordered Westpac Banking Corporation (Westpac) pay a pecuniary penalty of \$3.3 million for contravening s12CC of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) through its involvement in setting BBSW in 2010

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-341mr-court-orders-penalties-and-other-relief-against-westpac-for-bbsw-conduct/>

#### ASIC cancels AGM Markets licence for unconscionable conduct and unmanaged conflicts of interest

ASIC has cancelled the Australian financial services (AFS) licence of the retail OTC derivative issuer, AGM Markets. An ASIC investigation found AGM's financial services business involved core elements of unconscionability and unmanaged conflicts of interest and followed a business model that disregarded key conduct requirements.

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-340mr-asic-cancels-agm-markets-licence-for-unconscionable-conduct-and-unmanaged-conflicts-of-interest/>

#### KPMG issues warning on delinquent mortgages

In its analysis of the full-year results of Australia's major banks, KPMG stated: "There is a risk that high household leverage levels, higher lending rates, tightening credit conditions, the maturity of interest-only mortgages and continued high consumer confidence will drive an uptick in delinquencies and impairments

<https://www.mortgagebusiness.com.au/breaking-news/12839-kpmg-issues-warning-on-delinquent-mortgages>

#### APRA proposes raising ADI capital requirements

The APRA has proposed increasing total capital requirements of authorised deposit-taking institutions (ADIs), particularly the big four banks, to improve the financial system's resilience to shocks and stresses in closer alignment with international practice and minimise taxpayer support

<https://www.mortgagebusiness.com.au/breaking-news/12837-apra-proposes-raising-adi-capital-requirements>

#### APRA finalises information security standard for ADIs

Information security at APRA-regulated entities are "ultimately" the responsibility of boards, according to the final infosec standard issued by the prudential regulator

<https://www.mortgagebusiness.com.au/breaking-news/12834-apra-finalises-information-security-standard-for-adis>

#### COBA welcomes action on 'too big to fail' problem

COBA welcomes APRA's announcement proposing higher capital requirements for major banks to improve financial safety, financial system stability and competition. APRA estimates the total funding cost impact from increasing major bank capital requirements would not be greater than five basis points in aggregate

<http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1331-coba-welcomes-action-on-too-big-to-fail-problem>

**APRA's takeaways from BEAR's initial implementation**

Clear accountability is the necessary foundation for any institution in establishing and promoting good governance and a strong risk culture. That's the message from the APRA in an information paper released in October to help authorised deposit-taking institutions (ADIs) meet their obligations under the Banking Executive Accountability Regime (BEAR) <https://www.governanceinstitute.com.au/news-media/news/2018/nov/apra-s-takeaways-from-bear-s-initial-implementation/>

**New funding and reappointment of APRA Chair to further strengthen financial system supervision**

The Coalition Government will boost the Australian Prudential Regulation Authority's (APRA) capabilities with \$58.7 million of new funding and ensure continuity of leadership through the reappointment of Mr Wayne Byres as Chair <http://jaf.ministers.treasury.gov.au/media-release/044-2018/>

**Melbourne financial services and credit business to pay \$9 million for multiple breaches of obligations and consumer protection laws**

Financial Circle offered personal loans to consumers of up to \$5,000 that could only be obtained if the consumer agreed to receive and implement financial advice. The advice typically recommended purchasing personal insurance products and switching superannuation providers <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-334mr-melbourne-financial-services-and-credit-business-to-pay-9-million-for-multiple-breaches-of-obligation-s-and-consumer-protection-laws/>

**"Nothing in it for them" Small business let down by banking royal commission report**

Small business let down by banking royal commission. A lot of small businesses will be disappointed by the financial services royal commission's interim report, despite its scathing assessment of the industry, the sector's ombudsman says <http://www.franchisebusiness.com.au/news/nothing-in-it-for-them-small-business-let-down>

**Legislation to provide certainty to co-ops, mutuals and customer owned banks**

Draft legislation to provide a definition for a mutual entity in the Corporations Act and to clarify the uncertainty around the demutualisation provision of Part 5 Schedule 4 of the Corporations Act has been released by the Government for public consultation <https://www.financeminister.gov.au/assistant/media-release/2018/10/04/legislation-provide-certainty-co-ops-mutuals-and-customer-owned>

**Former CommBank planner convicted on appeal**

A former senior planner with Commonwealth Financial Planning who in late 2017 walked away from an Australian Securities and Investments Commission (ASIC) prosecution with a \$3,000 fine and no conviction recorded has found himself convicted after an ASIC appeal <https://www.moneymanagement.com.au/news/policy-regulation/former-commbank-planner-convicted-appeal>

**Industry must take more responsibility: APRA**

The Australian Prudential Regulation Authority has released its submission to the Hayne royal commission interim report and has told the industry to take more responsibility. APRA intends to strengthen the prudential standards to focus not only on policies and frameworks, but their implementation in practice and the outcomes achieved <https://www.investordaily.com.au/regulation/43895-industry-must-take-more-responsibility-apra>

**ASIC 2017-18 Annual Report**

ASIC has published its Annual Report for 2017-18. The report is a record of ASIC's activities and performance for the previous financial year <https://download.asic.gov.au/media/4922570/annual-report-2017-18-published-31-october-2018-full.pdf>

**One-stop shop for financial complaints opens for business**

Australian consumers and small businesses will be spared the expense and inconvenience associated with taking financial complaints to court, with the Coalition Government's Australian Financial Complaints Authority (AFCA) opened for business as of Thursday 1 November 2018 <http://srr.ministers.treasury.gov.au/media-release/029-2018/>

**Institutions "fall far short" in honest treatment of Australians: Treasurer**

In a statement following the release of the interim report, the Treasurer said the Government is committed to taking strong action to reform the financial sector. He also said it has continued to progress a comprehensive reform agenda to ensure institutions and their executives are held to account for illegal behaviour and that the financial system is "safe and robust" <https://www.moneymanagement.com.au/news/policy-regulation/institutions-%E2%80%9Cfall-far-short%E2%80%9D-honest-treatment-australians-treasurer>

**Banking royal commission interim report highlights greed and unethical behaviour**

"The findings of the interim report raise issues of major concern — particularly greed — the pursuit of short term profit at the expense of ethical behaviour," said Governance Institute's Acting Chief Executive, Meegan George. The report findings support the results of our 2018 Ethics Index, which found that the banking, finance and insurance sector is perceived as the least ethical sector <https://www.governanceinstitute.com.au/news-media/media-releases/2018/sep/banking-royal-commission-interim-report-highlights-greed-and-unethical-behaviour-says-governance-institute/>

## IN PRACTICE AND COURTS

### [Australia's Personal Property Securities Register - ASFA statistics release September quarter 2018](#)

Personal Property Securities Register (PPSR) statistics for the September quarter 2018, released 06 November 2018

### [AusPaynet: Payments Monitor - Third Quarter, 2018](#)

This quarter, we cover industry events and recent developments including our Australian Payment Summit, the Consumer Data Right, the CNP Fraud Mitigation Framework, review of our Standards Roadmap, and more

### [APRA proposed changes to the application for the capital adequacy framework for authorised deposit-taking institutions \(ADIs\)](#)

The key features of the proposals include: for the four major banks – increasing Total Capital requirements by four to five percentage points of risk-weighted assets (see the illustrative example attached); and for other ADIs – likely no adjustment, although a small number may be required to maintain additional Total Capital depending on the outcome of resolution planning. APRA proposes that the increased requirements will take full effect from 2023

### [Reminder: the Australian Financial Complaints Authority](#)

AFCA is the new one-stop-shop for financial complaints, and will replace the Superannuation Complaints Tribunal (SCT), the Financial Ombudsman Service and the Credit and Investments Ombudsman. AFCA commenced accepting complaints on 1 November 2018

### [Reminder: the Australian Financial Complaints Authority licences](#)

If licensees were not a member of AFCA as at 21 September 2018 they are in breach of their licence obligations and ASIC can immediately commence action to suspend or cancel their licence. For credit representatives, if they are required to join AFCA but did not do so by 1 November 2018, their authorisation is now invalid and they will need to cease engaging in credit activities. See the AFCA website: <https://www.afca.org.au/>

### [AUSTRAC: Draft amendments to Chapter 11 of the AML/CTF Rules](#)

Chapter 11 specifies the reporting and lodgment periods applicable to the compliance reporting obligation in section 47 of the Anti-Money Laundering and Counter-Terrorism Financing Act (AML/CTF Act). The draft amendments to Chapter 11 exempt reporting entities who in 2018 ceased, and did not recommence, to provide a designated service. The consultation period closes on 22 November 2018. Access the draft amendments on the [Draft AML/CTF Rules](#) page.

### [RBA: New payments platform: consultation](#)

The RBA is seeking views from interested stakeholders about the functionality of, and access to, the New Payments Platform. The Australian Competition and Consumer Commission is providing input and assistance on access issues, and will participate in the consultation. The closing date for submissions is 30 November 2018. For further details, see: [New Payments Platform Functionality and Access: Consultation](#)

### [Royal Commission Update](#)

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was established by the Government in December 2017, with the first of seven public hearings held in March 2018, and the final round to be held in November 2018

### [Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: interim report](#)

Note: This report covers policy related issues arising from the first four rounds of hearings. Additional topics, including superannuation and insurance, will be covered in the final report due by 1 February 2019.

### [AUSTRAC: Draft amendments to Chapter 11 of the AML/CTF Rules](#)

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## CASES

### [BCI Finances Pty Limited \(in liq\) v Binetter \[2018\] FCAFC 189](#)

CORPORATIONS – directors' duties – where certain directors involved companies in a scheme for the dishonest evasion of taxation – where, as a result of the scheme, the companies were assessed to taxation, penalties and interest – where the companies went into liquidation and were unable to pay their taxation liabilities – where the primary judge found that certain directors had breached their fiduciary duties to the companies – where the companies had entered into transactions with Israeli banks whereby the banks advanced money secured by offshore deposits – where the existence of the offshore deposits was concealed from the Australian Taxation Office – whether the primary judge erred in finding that the transactions between the companies and the Israeli banks were not loans – whether the primary judge erred in failing to hold that there was no breach of duty because the advances from the Israeli banks were interest-bearing loans – whether the primary judge erred in finding that one of the directors was not liable for

breach of the duties he owed to the companies

PRACTICE AND PROCEDURE – costs – deceased person – where a person was appointed to represent the deceased person's estate for the purpose of a proceeding pursuant to r 9.24 of the Federal Court Rules 2011 – where claims were brought against both the estate and the representative in his own right – where claims against the estate succeeded and claims against the representative in his own right failed – whether costs orders against the estate should be payable by the representative personally or limited to the assets of the estate – whether set-off of costs orders appropriate

[Morris Finance Ltd v Hodges & Anor \[2018\] FCAA 3235](#)

BANKRUPTCY – Administration of property – Property available for payment of debts – Property divisible amongst creditors – Property belonging to or vested in bankrupt at commencement of bankruptcy – Other particular cases

BANKRUPTCY – Administration of property – Property available for payment of debts – Property not divisible amongst creditors – Trade or professional equipment or property used in earning income by personal exertion

Commercial lease agreement – prime mover

[Caratti v Commissioner of Taxation \[2018\] FCA 1691](#)

CONTRACTS - Commissioner agreed to forbear from taking recovery action against applicants in respect of tax related liabilities until outcome of challenges to liabilities - consideration of proper construction of the terms of the agreement - whether security had to be provided within 30 days before agreed forbearance would operate - whether applicants provided required security - whether Commissioner bound to forebear from enforcing liabilities - whether principles of relief against forfeiture or unconscionability apply - application dismissed

Mortgage over additional property; mortgages

[Australian Securities and Investments Commission v Westpac Banking Corporation \(No 3\) \[2018\] FCA 1701](#)

CORPORATIONS – Pecuniary penalty – declarations of contraventions – compliance program – bank bill market – trading in prime bank bills – Bank Bill Swap Reference rate (BBSW) – bank accepted bill futures – interest rate swaps – cross-currency swaps – market manipulation – artificial price in traded BBSW referenced products – financial market – false or misleading appearance in a market – false or misleading appearance with respect to price for trading – unconscionable conduct – financial instruments referencing BBSW – non-disclosure of rate set trading practice to counterparties – statutory unconscionability – contraventions of the then s 12CC of Australian Securities and Investments Commission Act 2001 (Cth) – penalty imposed – declarations and other orders made

[Australian Securities and Investments Commission v Financial Circle Pty Ltd \[2018\] FCA 1644](#)

SUPERANNUATION – application from ASIC for court approval of declarations, injunctions and costs – where defendant company contravened numerous provisions of Corporations Act 2001 (Cth), the Australian Securities and Investments Commission Act 2001 (Cth) and the National Consumer Credit Protection Act 2009 (Cth) – where scheme created for “borrowers” to access small amounts of money – where company earned money by transferring “borrowers” to a retail superannuation fund and advising them to obtain insurance, thereby collecting commissions and fees in excess of the “loan” amount – where ASIC and defendant company reached agreement on liability for contravention of the statutory provisions and penalties – application approved by court

[Prodata Solutions Pty Ltd v South Australian Fire and Emergency Services Commission \[2018\] FCA 1665](#)

PRACTICE AND PROCEDURE – security for costs sought by two respondents from corporate applicant – applicant voluntarily providing security in significant amounts by way of irrevocable bank guarantees – whether additional security should be ordered – whether there is reason to believe the applicant will be unable to pay the costs of the respondents if the respondents are successful in their defence – whether security should be ordered in respect of past costs already subject to a costs order – whether respondents' delay in bringing the application is productive of unfairness – additional security ordered

[Print Mail Logistics Limited v Warratah Investments Pty Ltd \[2018\] FCA 1618](#)

CORPORATIONS – application to set aside a statutory demand or in the alternative for a permanent injunction – where creditor has refused to assign securities – whether the affidavit accompanying the statutory demand met the requirements of s 459E(3) of the Corporations Act 2001 (Cth) (Act) – whether creditor is intentionally acting to impair securities that ought to be available for a guarantor or an incoming financier upon payment of the principal debt – whether the Court should set aside the demand on the basis of s 459H(1) or s 459J(1)(b) of the Act or grant a permanent injunction – application allowed

[Doka Formwork Australia Pty Ltd v Complex Formwork Pty Ltd, Romeo Ibrahim, and Toplace Pty Ltd \[2018\] NSWDC 326](#)

Guarantees and Indemnities between principal and subcontractors – allocation of payments – implied or actual relationship of agency – misappropriation of cheques – supply and sale of goods and services – Mercantile law - Cheques Act 1986 (Cth)

**[Global Consulting Services Pty Ltd v Gresham Property Investments Ltd \[2018\] NSWCA 225](#)**

EQUITY – contribution – circumstances when contribution excluded – consideration of scope of common intention exception – significance of equity's regard for substance over form – Official Trustee in Bankruptcy v Citibank Savings Ltd (1995) 38 NSWLR 116 considered GUARANTEE AND INDEMNITY – contribution between guarantors – circumstances when contribution not available – exception when one guarantor enjoys all the benefit – exception when agreement or common intention to contrary – whether primary judge erred in finding guarantors' liabilities were coordinate

**[Firstmac Ltd & Ors v Hung & Hunt \(a firm\) \[2018\] QSC 258](#)**

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where, after the close of pleadings, the plaintiffs foreshadowed an amended statement of claim – where the Court ordered that the plaintiffs file and serve an amended statement of claim by a particular date (which was subsequently extended) – where the plaintiffs indicated they did not require leave for any of their amendments – where directions were made to permit the question of leave to be resolved by requiring the defendant to bring an application to strike out or disallow the amendments once the amended statement of claim was delivered in its amended form – where the plaintiffs delivered their amended statement of claim – where the defendant applied to strike out certain amendments made on the grounds that they raised new time-barred causes of actions for which leave of the Court was required, with no such leave having been sought or obtained – where the plaintiffs opposed the application on the basis that the amendments did not give rise to new causes of action from those pleaded in the original pleading, or alternatively, the plaintiffs sought leave to make the amendments – whether the plaintiffs' amendments made in their amended statement of claim should be struck out – whether the plaintiffs should be granted leave to make the amendments sought

The plaintiffs were companies involved in the business of making and managing loans on mortgage security for the acquisition of residential or investment property

**[National Australia Bank Limited v Rowe \[2018\] WASC 330](#)**

Practice and procedure - Pleadings - Whether counterclaim should be struck out as not disclosing a reasonable cause of action - Turns on own facts

Equity - Claim for a general account - Circumstances in which an account can be ordered in the context of a mortgagor-mortgagee relationship - Whether there is a possible fraud exception to the usual requirements for an order for an account

**[Jolimont Heights Pty Ltd v Ryan \[2018\] VSC 678](#)**

CORPORATIONS – Corporations Act 2001 (Cth), s 459 – Application to set aside statutory demand by reason of alleged genuine dispute in respect of the debt – The combination of issues raised by the Plaintiff means that it has established the existence of a genuine dispute – Statutory demand should be set aside – Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq) [2015] VSCA 330. Loan agreements

**LEGISLATION****Commonwealth****Bills****[Treasury Laws Amendment \(Australian Consumer Law Review\) Bill 2018](#)**

Assent Act no: 132 Year: 2018 25 October 2018

Implements certain recommendations of the Australian Consumer Law Review Final Report by amending the: Australian Securities and Investments Commission Act 2001 to: correct inconsistent terminology for financial products that involve interests in land; and clarify the application of consumer protections to financial products

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