

5 APRIL 2019

ISSUE 33



## BANKING SECTOR NEWSLETTER

### \$35 million to extend the Federal Court's jurisdiction to corporate crime

For the first time, the jurisdiction of the Federal Court of Australia will expand to include corporate crime, with the Coalition Government providing more than \$35 million in the 2019-20 Budget to support this expansion. The expansion and funding will ensure that those who engage in financial sector criminal misconduct are prosecuted

<http://jaf.ministers.treasury.gov.au/media-release/048-2019/>

### IN THE MEDIA

#### ASIC rejects criticism of new 'mandate'

Chair of the corporate regulator, James Shipton, has addressed "push back" from ASIC's "clear mandate" to use its new enforcement powers to monitor and penalise financial institutions for compliance breaches

<https://www.mortgagebusiness.com.au/breaking-news/13272-asic-rejects-criticism-of-new-mandate>

#### FSC endorses LCCC Inaugural Report into Life Insurance

The Financial Services Council (FSC) welcomes the inaugural Industry Data and Compliance Report, prepared by the Life Code Compliance Committee (LCCC) which provides independent oversight and monitoring of the Life Insurance Code of Practice (The Code)

<https://www.fsc.org.au/news/media-releases/>

#### 'Mind the gap' - consumers confusing different types of financial advice

The ASIC report, Financial advice: Mind the gap (REP 614), presents new independent research on consumer awareness and understanding of general and personal financial advice, identifying substantial gaps in consumer comprehension

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-069mr-mind-the-gap-consumers-confusing-different-types-of-financial-advice/>

### Bank bosses say they're 'ready to lend' amid responsible lending clampdown

Facing a parliamentary grilling, ANZ chief executive Shayne Elliott admits some Australians will find it harder to get loans, while NAB's acting boss Philip Chronican says the bank is receiving fewer loan applications

<https://www.abc.net.au/news/2019-03-27/anz-and-nab-bosses-face-parliamentary-grilling/10943760>

### Banks could lose power to set bosses' pay after boards fail to take decisive action: APRA

APRA says bank bosses and boards appear to be slow to learn from the scandals uncovered at the royal commission, and it seems inevitable it will have to intervene to rein in excessive bonuses

<https://www.abc.net.au/news/2019-03-27/apra-says-banks-have-been-to-slow-to-fix-executive-pay/10943776>

### APRA clamping down on P2P lending models

The prudential regulator has warned that it would take action if ADIs aren't more diligent in identifying and mitigating risks before entering into funding arrangements with peer-to-peer lenders

<https://www.mortgagebusiness.com.au/breaking-news/13260-apra-clamping-down-on-p2p-lending-models>

### FASEA releases its Relevant Providers Degrees, Qualifications and Courses Standard (Amendment No. 1) Legislative Instrument

FASEA has released its Relevant Providers Degrees, Qualifications and Courses Standard (Amendment No. 1) Legislative Instrument for consultation. The Legislative Instrument is updated with additional information from higher education providers on their historical degrees and as well extends the range of approved historical programs

<https://www.fasea.gov.au/fasea-releases-its-relevant-providers-degrees-qualifications-and-courses-standard-amendment-no-1-legislative-instrument/>

**COBA calls for fairer capital rules**

The Customer Owned Banking Association has called for fairer capital rules to promote competition in the mortgage market. APRA currently allows the major banks to hold much less regulatory capital against home loans than their smaller competitors such as mutual banks and credit unions  
<http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1358-coba-calls-for-fairer-capital-rules>

**APRA seeks to modernise prudential standard on credit risk management**

The APRA has proposed updating its prudential standard on credit risk management requirements for authorised deposit-taking institutions (ADIs). Credit risk refers to the possibility that a borrower will fail to meet their obligations to repay a loan, and is usually considered the single largest risk facing an ADI  
<https://www.apra.gov.au/media-centre/media-releases/apra-seeks-modernise-prudential-standard-credit-risk-management>

**APRA puts heat on climate change**

The APRA has announced it intends to increase its interest in the extent to which the Australian financial sector includes the risk of climate change in its activities. Reputational damage, flooding, regulatory changes and cyclones were nominated as the top climate-related financial risks  
<https://psnews.com.au/2019/03/25/apra-puts-heat-on-climate-change/>

**FPA rolls out online diagnostic tool designed to help identify fintech solutions**

The FPA announces the launch of a new online diagnostic tool designed to help identify fintech solutions that can improve the profitability and efficiency of financial planning practices  
<https://fpa.com.au/news/fpa-rolls-out-online-diagnostic-tool-designed-to-help-identify-fintech-solutions/>

**RBA: Developments in Banks' Funding Costs and Lending Rates**

Banks' funding costs increased a little over 2018, driven by a rise in the cost of wholesale funding linked to money market rates, but with some offset from reductions in the cost of retail deposits  
<https://www.rba.gov.au/publications/bulletin/2019/mar/developments-in-banks-funding-costs-and-lending-rates.html>

**House price falls could spill over into small businesses, financial regulators warn**

New research from Australia's peak financial regulators has found around half the outstanding small business loans are secured by residential property, and that could be a problem if house prices keep falling  
<https://www.abc.net.au/news/2019-03-20/financial-regulators-warn-of-house-price-spillover-to-small-bus/10919508>

**ABA: Raising the bar to help customers doing it tough**

Customers at risk of elder financial abuse, those exiting a violent relationship and someone experiencing an unexpected long-term illness are among the focus of new 'vulnerable customer guidelines', on which public consultation opens today  
<https://www.ausbanking.org.au/media/media-releases/media-release-2019/raising-the-bar-to-help-customers-doing-it-tough>

**House price falls could spill over into small businesses, financial regulators warn**

New research from Australia's peak financial regulators has found around half the outstanding small business loans are secured by residential property, and that could be a problem if house prices keep falling  
<https://www.abc.net.au/news/2019-03-20/financial-regulators-warn-of-house-price-spillover-to-small-bus/10919508>

**Alleged crimes exposed at banking probe unlikely to hit court, experts say**

Potential criminal acts in the financial services industry exposed at the banking royal commission may never hit court, governance experts say  
<https://www.abc.net.au/news/2019-03-19/royal-commission-criminal-charges-unlikely-to-hit-court/10913066>

**IN PRACTICE AND COURTS****[APRA: Open consultation on determination under paragraph 37EA \(4\)\(b\) of the Banking Act 1959](#)**

The Banking Executive Accountability Regime (BEAR), set out in Part IIAA of the [Banking Act 1959](#), establishes accountability obligations for authorised deposit-taking institutions (ADIs) and their senior executives and directors. The April 2019 consultation package sets out APRA's proposal to allow a structure-neutral application of the deferred remuneration obligations under the BEAR. Submissions are requested by 30 April 2019.

**APRA: Monthly banking statistics**

The Monthly Banking Statistics publication provides selected information on the banking business of individual banks with the domestic market. The latest update for 29 March is available [here](#).

**[FPA CFP Certification Program first professional designation program accredited by FASEA](#)**

The CERTIFIED FINANCIAL PLANNER® or CFP® Certification Program is now the first professional designation education program in Australia that qualifies for recognition of prior learning (RPL) by the Financial Adviser Standards and Ethics Authority (FASEA)

### [Consultation on AFCA Rules changes](#)

The AFCA is seeking submissions on proposed changes to its Rules which will expand its jurisdiction to deal with eligible complaints about conduct dating back to 1 January 2008. This expanded jurisdiction would operate for a period of 12 months from 1 July 2019. Submission close on 12 April 2019.

See further details [here](#)

### [ASFA: Recovering your unclaimed money](#)

From the 27th June 2019 applications for unclaimed monies under s254 of the Bankruptcy Act can be made directly to Australian Financial Security Authority (AFSA) replacing the current Court application process.

An application form and further information about the new process will be published closer to the commencement date

### **ABA Submissions**

#### [Ending Grandfathered Conflicted Remuneration for Financial Advisers](#)

While our member banks have taken steps to remove these conflicts of interest, the industry has advocated for a legislative approach to implementation of these reforms to ensure consistency across the industry and overcome practical and contractual challenges to fully removing conflicted remuneration.

### **ABA: Raising the bar to help customers doing it tough**

The ABA welcomes written responses to this consultation paper which should be submitted to [submissions@ausbanking.org.au](mailto:submissions@ausbanking.org.au).

### **ABA Newsletter 2019**

The ABA newsletter is sent regularly. Copies of the latest newsletter are available [here](#).

### **AFCA Newsletter**

AFCA News, contains case studies, articles and information that is relevant to members and consumers. See the latest edition here: [Edition 1, 21 March 2019](#)

### **Treasury Consultation: Recommendation 1.15: Enforceable code provisions**

This consultation paper sets out a series of questions which will inform the development of legislation to enact the Government's commitment to implement recommendation 1.15 (that certain provisions of financial sector codes should be 'enforceable code provisions'). The consultation paper is available on the [Treasury website](#). The consultation is open until 12 April 2019

### **ASIC Consultation: Responsible Lending Guidance**

ASIC has issued a consultation paper to update its guidance on responsible lending ([CP 309](#)).

ASIC wants to ensure its guidance provides industry with certainty, including as a result of emerging technology and initiatives such as open banking and comprehensive credit reporting. ASIC is currently welcoming submissions from interested parties. The consultation is open for a period of three months, with comments due by 20 May 2019

### **CASES**

#### [TMeffect Pty Limited and Australian Prudential Regulation Authority \[2019\] AATA 459](#)

CORPORATIONS – prudential regulation – use of restricted word in relation to a financial business – whether consent should be granted to allow applicant to use restricted word in relation to financial business – equity crowd-funding business – protection of the public from being misled – whether exceptional circumstances – decision affirmed. Banking Act 1959 (Cth) ss 11, 51B, 51C, 66

#### [JPA Finance Pty Ltd v Gordon Nominees Pty Ltd \[2019\] VSC 171](#)

CONTRACT – Notice of default – Service of notice – Whether strict compliance with address for notices required – Notice not given in accordance with notice requirements – Notice invalid.

RELIEF AGAINST FORFEITURE – Consequence of non-observance of statutory notice was the loss of a party's right to buy 20 per cent of units in a unit trust that owns a motel – Held loss of option constituted circumstances where equity would grant relief against forfeiture. Deed of loan

#### [Harker-Mortlock v Commonwealth Bank of Australia \[2019\] NSWCA 56](#)

REAL PROPERTY – mortgages – where bank relies on liquidation of company to enforce possessory interest under mortgages – whether liquidation of company an event of default – whether repayment of bills matured loan account secured by mortgages – whether appointment of new trustee replaces the borrower in loan documents

PRIMARY INDUSTRY – farm debt mediation – Farm Debt Mediation Act 1994 (NSW) – where proceedings for possession an enforcement action under the Act – where s 11 certificate issued following farm debt mediation and settlement – whether certificate void – whether the Act applied at time of enforcement action

MISLEADING AND DECEPTIVE CONDUCT – where mortgagee informs mortgagor that mediation under Farm Debt Mediation Act 1994 (NSW) unavailable – whether misleading or deceptive conduct – whether mortgagor principally engaged in farming operations

EQUITY – rectification – where trustee purportedly declares property as being held for the benefit of itself – where true meaning of documents can be ascertained as a matter of construction – whether declarations of trust should be rectified

GUARANTEE AND INDEMNITY – where parties have agreed to maximum amount that the guarantor can be called to pay on demand – whether award of interest under Civil Procedure Act 2005 (NSW), s 100 contrary to agreed maximum

[Tate v Westpac Banking Corporation \(Common Fund Orders\) \[2019\] FCA 405](#)

REPRESENTATIVE PROCEEDINGS – representative proceeding under Part IVA of the Federal Court of Australia Act 1976 (Cth) – application for common fund order – whether order appropriate prior to filing and service of Statement of Claim – consideration of Class Actions Practice Note. Federal Court of Australia Act 1976 (Cth) ss 33X, 33Y - the Respondent to file and serve an affidavit deposing to the nature and form of data in its possession, custody or control, in respect of the contact details of natural persons who had entered into residential loans with it since January 2011

[YPQF and Commissioner of Taxation \(Taxation\) \[2019\] AATA 518](#)

INCOME TAX – assessment of payments said to be loans – whether payments were borrowed money or proceeds from disposal of assets from China – fraud or evasion – decision affirmed for 2011 and 2012 years of income – decision varied for 2013 year of income

[Jams 2 Pty Ltd & Ors v Stubbings \(No 3\) \[2019\] VSC 150](#)

EQUITY – Asset-based loan organised and implemented by solicitors – Loan structured by the solicitors to avoid National Credit Code – Loan to a company and guaranteed by a person who is the person receiving and using the money lent – Unconscionable conduct on the part of the lenders – Unconscionable dealing – Mortgages – Special disadvantage – Plaintiff's knowledge of special disadvantage – Plaintiff's wilful blindness – Mortgage brokers. NEGLIGENCE – Claim against accountant – Breach of duty found.

## LEGISLATION

### Commonwealth

#### Regulations

[ASIC \(Fees - Complexity Criteria\) Amendment Instrument 2019/130](#)

27/03/2019 - This instrument amends ASIC (Fees - Complexity Criteria) Instrument 2018/578 to determine a 'fees for service' determination criteria for whether certain applications are of low, medium or high complexity.

## THIS EDITION'S EDITORS



**Julie Callea-Smyth**

Partner

+61 3 8080 3625

+61 411 600 945

[jcallea-smyth@tglaw.com.au](mailto:jcallea-smyth@tglaw.com.au)



**Jessica Andreatchio**

Special Counsel

+61 3 8080 3631

+61 439 370 081

[jandreatchio@tglaw.com.au](mailto:jandreatchio@tglaw.com.au)



**Michelle Lykiardopoulos**

Special Counsel

+61 3 8080 3567

+61 410 778 698

[mlykiardopoulos@tglaw.com.au](mailto: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.