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ISSUE 7



## BANKING SECTOR NEWSLETTER

### Bank lending in spotlight as Australian inquiry begins

A government-backed inquiry into Australia's finance sector said it will start its year-long investigation by scrutinizing the selling tactics of banks' most lucrative products - mortgages. The commission also will examine the scandal-hit wealth management and financial advice industries. Its final recommendations could lead to criminal or civil prosecutions as well as greater regulation.

<https://www.reuters.com/article/us-australia-banks-inquiry/bank-lending-in-spotlight-as-australian-inquiry-begins-idUSKBN1FW00Y>

### IN THE MEDIA

#### Australia's banks tighten mortgage checks amid government inquiry, face revenue strain

Australia's largest banks have stepped up screenings of mortgage loan applications amid a powerful government-backed inquiry into the nation's lenders and their sales practices, potentially hurting revenues from their most lucrative products.

<https://www.reuters.com/article/us-australia-banks/australia-banks-tighten-mortgage-checks-amid-government-inquiry-face-revenue-strain-idUSKCN1G00Q7>

#### Putting banking consumers first: cracking down on credit card practices and boosting competition in banking

Credit card providers will be forced to scrap unfair and predatory practices - after the Turnbull Government passed legislation, the Treasury Laws Amendment (Banking Measures No. 1) 2017, through the parliament. This legislation will protect vulnerable Australians from predatory behaviour which seeks to make a quick buck from people's misfortune, and compound their financial hardship.

<http://sjm.ministers.treasury.gov.au/media-release/013-2018/>

### Strengthening APRA's crisis management powers

The Turnbull Government is ensuring Australia's financial system remains unquestionably strong - by strengthening the APRA's crisis management powers, with the Senate passing of the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017.

<http://sjm.ministers.treasury.gov.au/media-release/012-2018/>

### NAB in residential green bond first

National Australia Bank has launched a \$2 billion residential mortgage-backed bond that, for the first time in Australia, includes \$300 million of mortgages that meet the Climate Bonds Standard for low-carbon residential buildings. NAB said the green tranche attracted socially responsible funds and mainstream investors from Australia.

<https://www.thefifthestate.com.au/business/finance/nab-in-residential-green-bond-first/97738>

### Banks will have to set aside more capital against interest-only mortgages

Australian banks will be forced to set aside more capital against interest-only home loans to property investors and homebuyers, under a new plan designed to counter risks in the mortgage market. On Wednesday, the APRA highlighted risks to financial stability due to the high level of property investor debt in a new discussion paper. The regulator will also outline plans to make banks more resilient to potential housing shocks.

<https://www.yourmortgage.com.au/mortgage-news/banks-will-have-to-set-aside-more-capital-against-interestonly-mortgages/246723/>

### **Mortgages and credit cards the first focus of the banking royal commission**

Unfair and dishonest practices by the big banks in relation to residential mortgages, credit cards and car loans will be the first item the banking royal commission will investigate. Counsel assisting the commission Rowena Orr, QC, told the first public hearing for the banking royal commission in Melbourne on Monday that the commission would initially review consumer lending products, particularly housing loans

<http://www.smh.com.au/business/banking-and-finance/mortgages-and-credit-cards-the-first-focus-of-banking-royal-commission-20180212-p4z02b.html>

### **ASIC welcomes establishment of the Australian Financial Complaints Authority**

ASIC welcomes the passage through Parliament of the Bill to establish the Australian Financial Complaints Authority (AFCA). In the transition to the commencement of AFCA, ASIC will retain direct oversight of the two ASIC-approved schemes - FOS and CIO - which will continue to provide high levels of service to consumers and firms.

<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-041mr-asic-welcomes-establishment-of-the-australian-financial-complaints-authority/>

### **Realtime payments, any hour, any day of the week**

Australians will now be able to make instant electronic payments at any time of the day, with the launch of the New Payments Platform (NPP). The Turnbull Government welcomes the launch of the new platform which is set to revolutionise the payments process for millions of Australians, making payments faster and simpler for consumers.

Further information is available at the [NPPA website](#) or from individual financial institutions.

<http://sjm.ministers.treasury.gov.au/media-release/011-2018/>

### **Taking action now on bank executive accountability**

The Senate has passed the Banking Executive Accountability Regime (BEAR), imposing higher standards of behaviour. Banks will be required to register their senior executives and directors (accountable persons) with APRA and provide greater clarity regarding their responsibilities. For large authorised deposit-taking institutions (ADIs), the BEAR will commence on 1 July 2018.

<http://sjm.ministers.treasury.gov.au/media-release/007-2018/>

## **IN PRACTICE AND COURTS**

### **Report of the Review into Open Banking**

The Open Banking Report makes 50 recommendations in total. It makes recommendations on: the regulatory framework to support Open Banking; what data should be shared and with whom; what safeguards are needed to inspire confidence in data sharing; how data should be transferred; and, how Open Banking should be rolled out. Interested parties can make submission on recommendations by 23 March 2018. The Report can be accessed and submissions made [here](#).

### **Mandatory Comprehensive Credit Reporting**

This Bill will place a new obligation on credit providers to be satisfied with the security arrangements of the credit reporting bodies prior to supplying credit reporting data. Credit reporting bodies will also have a new obligation placed on them as to where consumer credit data can be stored. This Bill builds on and complements the existing protections established by the Privacy Act and Code and regulated by the OAIC. The exposure draft of the legislation is available on the website.

### **Banking Executive Accountability Regime (BEAR) commencement dates**

Banks will be required to register their senior executives and directors (accountable persons) with APRA and provide greater clarity regarding their responsibilities. For large authorised deposit-taking institutions (ADIs), the BEAR will commence on 1 July 2018. For small and medium ADIs, the regime will commence from 1 July 2019, allowing them more time to comply.

<http://sjm.ministers.treasury.gov.au/media-release/007-2018/>

## **CASES**

### **[Australian Competition and Consumer Commission v Swishette Pty Ltd \[2018\] FCA 55](#)**

ESTOPPEL – issue estoppel – Anshun estoppel – abuse of process

CONSUMER LAW – misleading or deceptive conduct – unconscionable conduct – person “involved” in contravention – whether respondents were knowingly concerned in, or party to, contraventions of the Australian Consumer Law – where contravener and respondents had same director – where conceded that knowledge of director is to be imputed to the respondents – where one respondent used its credit card to pay relevant expenses for the contravener – where one respondent provided a guarantee and mortgage to support the contravener’s overdraft

TRUSTS AND TRUSTEES – trustee’s right of indemnity or exoneration – where trustee found to have been involved in contraventions of the misleading or deceptive conduct and unconscionable conduct provisions of the Australian Consumer Law – whether trustee would have a right of indemnity or exoneration in respect of the liability that would arise if a consumer redress order were made under s 239 of the Australian Consumer Law

### **[Kobelt v Australian Securities and Investments Commission \[2018\] FCAFC 18](#)**

CONSUMER LAW – whether the primary judge erred in finding that the appellant contravened s 29(1) of the National Consumer Credit Protection Act 2009 (Cth) by engaging in credit activity within the meaning of s 6(1) of the National Credit Act when selling second-hand vehicles by way of a book-up without holding a licence to engage in that credit activity – whether the purchase of second-hand motor vehicles under the appellant’s book-up system fell within the terms of s 11 of the National Credit Code (contained in Schedule 1 of the

National Credit Act) – whether there was a charge for the appellant’s provision of credit within s 5(1)(c) of the National Credit Code

CONSUMER LAW – whether the primary judge erred in finding that the appellant had contravened s 12CB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) in that, in connection with the supply of financial services to customers, the appellant engaged in a system of conduct or pattern of behaviour which was unconscionable – whether the appellant’s conduct was unconscionable within the meaning of s 12CC(1) of the ASIC Act – where customers are indigenous residents of the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands), and in most cases, have very limited or no assets, limited net income and low levels of financial literacy – where the book-up system is neither recent nor unique – where the book-up system has advantages to customers in terms of alleviating the disadvantages associated with demand sharing and “boom and bust” expenditure – where no undue influence or exerted undue influence – where no dishonest use of debit cards or personal identification numbers (PINs) – where no dishonest maintenance of records by the appellant – where customers have low levels of financial literacy, but basic understanding of the book-up system – where customers voluntarily enter into the book-up arrangements – where customers understand the basic elements of the book-up arrangements – where conduct is not predatory in the relevant sense

PRACTICE AND PROCEDURE – whether the orders made by the primary judge ought to be set aside – whether an order by the primary judge that the Amended Originating Application brought by the respondent ought to be dismissed

National Consumer Credit Protection Act 2009 (Cth) ss 3, 6, 29, 131

National Credit Code ss 5, 11, 13, 17, 204

[Australia’s Residential Builder Pty Ltd \(In Liq\) & Anor v Robert Wiederstein & Ors \[2018\] VSC 37](#)

FUNDS IN COURT – Net proceeds of sale of joint interest realised pursuant to the provisions of the governing Joint Venture Agreement – Application for payment out – Competing claims – Plaintiffs’ claims pursuant to a constructive trust, a proprietary remedy under s 588FF of the Corporations Act 2001 (Cth) (‘Corporations Act’) or pursuant to the rule in Universal Distributing Company Limited (in liq) – Claim by corporate trustee (now in liquidation) as the former holder of the joint venture interest to a right of indemnity secured by a charge or lien over the fund in court – Claim by beneficiary of the trust that the joint venture interest had been distributed to another trust prior to realisation pursuant to the Joint Venture Agreement.

BREACH OF FIDUCIARY DUTY BY DIRECTOR – Constructive trust – Personal obligation attaching to trust property – Interrelationship between a constructive trust and tracing.

CORPORATIONS – Corporations Act, s 588FF(1)(d) – Availability of proprietary remedy – Identification of property to which the remedy could attach.

TRACING – Equitable tracing – Money paid to meet liabilities – Money paid into bank account to extinguish debt or meet expenses.

RULE IN UNIVERSAL DISTRIBUTING – Creation of fund – Increase in fund paid into court – Benefit to trust property.

TRUSTEES RIGHT OF INDEMNITY – Whether deed of settlement – Can exclude the trustee’s right of indemnity.

[Commonwealth Bank of Australia v Saggese \[2018\] VSC 40](#)

PRACTICE AND PROCEDURE – Warrants of execution – Appeal from refusal of a Judicial Registrar to grant leave to issue warrant of execution to enforce judgment – Where six years had elapsed since judgment took effect – Where change had taken place, by assignment, in the identity of the person entitled to execution under the judgment – Whether legal assignment required by the rules or equitable assignment sufficient – Appeal requiring hearing of application de novo – Evidence showing reasons for delay not satisfactory – discretion to grant or refuse leave – Discretion exercised to refuse leave –

ASSIGNMENT OF CHOSSES IN ACTION – Assignment of judgments – Requirements for valid legal assignment of a judgment for debt – Assignment in equity – Notice of assignment to the debtor not essential to the validity of equitable assignment of a presently existing legal chose in action – In equity and at law a judgment may be the subject of an assignment – Assignment of a legal chose in action, for value, which fails to satisfy the requirements for an assignment at law is effectual as an equitable assignment

[Sayour v Elliot \[2018\] NSWSC 59](#)

EQUITY – Trusts and trustees – Alleged misappropriation of trust funds – Deposit of funds to bank account styled as trust account. Uniform Civil Procedure Rules 2005(NSW), r 14.26(1)

**LEGISLATION**

**Commonwealth**

**New Bills**

**[Bankruptcy Amendment \(Debt Agreement Reform\) Bill 2018](#)**

Introduced HR - 14 February 2018 – The Bill will effect a comprehensive reform of Australia’s debt agreement system. Debt agreements are an increasingly popular alternative to bankruptcy. Significant measures in the Bill make provision for:

- the types of practitioners authorised to be debt agreement administrators
- registration, deregistration and the obligations of debt agreement administrators
- formation, administration, variation and termination of debt agreements
- protections against debt agreements that cause financial hardship or have other defects, and
- powers of the Inspector-General in Bankruptcy (Inspector-General) with respect to debt agreements and debt agreement administrators.

It is intended that the measures in the Bill will boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency between the administrator and stakeholders, and ensure that the debt agreement system is accessible and equitable.

**[National Housing Finance and Investment Corporation Bill 2018](#)**

Introduced HR 15 February 2018 - This Bill gives effect to the Government’s commitment to establish a new corporate Commonwealth entity, the NHFIC

Part 5 of the Bill sets out the arrangements for NHFIC’s financial affairs in relation to: maintenance of adequate capital and reserves; payment of dividends to the Commonwealth; borrowings; guarantee by Commonwealth; and taxation.

The Bond Aggregator will improve the efficiency of financing for CHPs by aggregating the lending requirements of multiple CHPs and financing those requirements by issuing bonds to institutional investors. The Bond Aggregator will build capacity of the sector and improve housing outcomes by providing CHPs with a more efficient source of funds, reducing the refinancing risk faced by CHPs and reducing borrowing costs.

**[Treasury Laws Amendment \(2018 Measures No. 2\) Bill 2018](#)**

Introduced HR 08 February 2018 - FinTech Sandbox Regulatory Licensing Exceptions - Schedule 1 to this Bill amends the Corporations Act 2001 and National Consumer Credit Protection Act 2009 to expand the regulation-making powers to allow the regulations to provide for exemptions from the Australian Financial Services Licence and Australian Credit Licence requirements for the purposes of testing financial and credit products and services under certain conditions.

**Bills Passed**

**[Treasury Laws Amendment \(Banking Measures No. 1\) 2017](#)**

Finally passed both Houses 15 February 2018 - Amends the: Banking Act 1959 to: enable the Australian Prudential Regulation Authority (APRA) to make rules and directions relating to the provision of finance by non-authorised deposit-taking institution lenders which APRA has identified may materially contribute to risks of instability in the Australian financial system; remove restrictions on the use of the term ‘bank’; and insert an objects provision; National Consumer Credit Protection Act 2009 to: require that the suitability of a credit card contract is assessed on the consumer’s ability to repay the credit limit within a certain period; prohibit providers from making unsolicited credit limit offers in relation to credit card contracts and from retrospectively charging interest on credit card balances; and enable consumers to reduce credit card limits and terminate credit card contracts, including by online means; and Financial Sector (Collection of Data) Act 2001, Insurance Act 1973, Life Insurance Act 1995 and National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 to make consequential amendments.

**[Financial Sector Legislation Amendment \(Crisis Resolution Powers and Other Measures\) Bill 2017](#)**

Finally passed both Houses 14 February 2018 - Amends the Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995 and five other Acts to give the Australian Prudential Regulation Authority additional powers for crisis resolution and resolution planning in relation to regulated entities, including in relation to: statutory and judicial management; directions powers; transfer powers; conversion and write-off of capital instruments; stay provisions; foreign branches; the Financial Claims Scheme; and wind-up and other matters

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