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ISSUE 8



BANKING SECTOR NEWSLETTER

NAB develops mortgage for the 'world first' co-ownership platform

The major bank has developed a new mortgage product in partnership with a co-ownership platform, positioning the product as a potential solution to Australia's housing affordability crisis.

<https://www.mortgagebusiness.com.au/breaking-news/11997-nab-develops-mortgage-for-world-first-co-ownership-platform>

IN THE MEDIA

Major banks announce rate changes

Two of the big four banks have announced changes in their fixed rates.

<https://www.mortgagebusiness.com.au/breaking-news/11994-major-banks-announce-rate-changes>

ASIC consults on its oversight of AFCA

The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has welcomed the Australian Securities and Investments Commission's (ASIC) public consultation on draft regulatory guidance on its oversight of the Australian Financial Complaints Authority (AFCA). The draft regulatory guidance Regulatory Guide 139, Oversight of AFCA, will be open for public consultation until 6 April 2018. The consultation paper and draft regulatory guide is available on the [ASIC website](http://asic.gov.au).

<http://kmo.ministers.treasury.gov.au/media-release/023-2018/>

Mortgage arrears rise for the first time in 4 months

Mortgage arrears have risen in December, bucking a four-month trend on declines, according to the latest data from Standard & Poor's.

<https://www.mortgagebusiness.com.au/breaking-news/11992-mortgage-arrears-rise-for-the-first-time-in-4-months>

Advocacy group calls for LMI to be abolished

CHOICE consumer advocacy group has urged the Productivity Commission to abolish lenders mortgage insurance, arguing that it does not provide any value to borrowers.

<https://www.mortgagebusiness.com.au/breaking-news/11984-advocacy-group-calls-for-lmi-to-be-abolished>

Former NAB exec warns of 'tsunami of change' in mortgages

A former major bank executive and founder of a new Australian mortgage provider believes that the banking establishment is not equipped with the tools to survive a "massive" wave of change approaching the market.

<https://www.mortgagebusiness.com.au/breaking-news/11989-former-nab-exec-warns-of-tsunami-of-change-in-mortgages>

Five largest banks pay \$51.4m in compensation

AMP, ANZ, CBA, NAB and Westpac, after paying an additional amount of \$21.4 million, have together paid a total of \$51.4 million to customers who suffered loss or detriment as a result of non-compliant conduct by advisers.

<https://www.mortgagebusiness.com.au/breaking-news/11964-five-largest-banks-pay-51-4m-in-compensation>

New Payments Platform arrives

The arrival of the New Payments Platforms (NPP) will create ample opportunity for FSC members to create new products and services, be more efficient and realise cost savings. The NPP is a significant upgrade to the nation's payments infrastructure which shortens the processing of transactions from two or three days to just a matter of seconds.

<https://www.fsc.org.au/news/blogs/news/NPP/>

Commencement of the Notifiable Data Breaches Scheme

New rules around mandatory reporting of serious data breaches come into effect from today. Through the Notifiable Data Breaches Scheme, the Australian Government is setting new standards of accountability and transparency to protect individuals' personal information. Data breaches that might increase the risk of serious harm include the release of sensitive information about an individual's health, Medicare card information, driver's licences, passport details, or financial information.

<https://www.attorneygeneral.gov.au/Media/Pages/Commencement-of-the-Notifiable-Data-Breaches-Scheme.aspx>

ACCC to release mortgage report and investigate PC findings

Australia's competition watchdog has confirmed that a report into mortgage pricing will soon be released and that it will be following up on issues raised by the Productivity Commission.

<https://www.mortgagebusiness.com.au/breaking-news/11958-accq-to-release-mortgage-report-and-investigate-pc-findings>

Reserve Bank warns on interest-only mortgage timebomb

The Reserve Bank is warning that a wave of interest-only mortgages sold when standards were more lax, and which are due to expire in the next four years, may put borrowers into financial stress.

<http://www.abc.net.au/news/2018-02-20/rba-warns-on-interest-only-loans-and-financial-stability/9464536>

ACCC focuses on energy, broadband, net economy and financial services in 2018

This year, the regulator will focus on consumer issues in broadband services and energy, competition in the financial services and commercial construction sectors, systemic consumer guarantee issues, and conduct that may contravene the new misuse of market power and concerted practices provisions.

<https://www.accc.gov.au/media-release/accc-focusses-on-energy-broadband-net-economy-and-financial-services-in-2018>

ABA: Action needed on elder financial abuse reform by Christmas

The Australian Bankers' Association has today called on the Federal Government to act now on financial abuse against the elderly and resolve three key issues.

<https://www.ausbanking.org.au/media/media-releases/media-release-2018/action-needed-on-elder-financial-abuse-reform-by-christmas>

IN PRACTICE AND COURTS**ABA Newsletter**

The ABA newsletter for 05 March is available [here](#).

CIOs Consumer News

This issue contains information about our outreach program, the AFCA transition, systemic issues, quarterly statistics, and more. Read it [here](#).

APRA monthly banking statistics for January 2018

APRA has released monthly banking statistics for January 2018, which can be found [here](#).

FOS submission to the Financial Royal Commission

FOS has released its response to the Royal Commission's requests for information submitted on 22 January 2018 and 2 February 2018. Find it [here](#).

ASIC consults on updated guidance for its oversight of the Australian Financial Complaints Authority (AFCA)

ASIC today released draft updated Regulatory Guide 139, Oversight of AFCA (updated RG139) for public consultation. The Bill to establish AFCA passed on 14 February 2018, and Minister for Financial Services, the Hon. Kelly O'Dwyer has announced that AFCA will commence operations no later than 1 November 2018. Responses to the consultation close on 6 April 2018.

Download the [consultation paper and draft regulatory guide](#)

ASIC reports on corporate finance regulation - July to December 2017

The report provides companies and their advisers with insights about ASIC's regulatory approach in the corporate finance sector to help them carry out their legal and compliance obligations. It also demonstrates how ASIC facilitates business transactions in Australia while maintaining legal protections and safeguards for the investing community.

View the report [here](#).

ACCC remarks: Competition in the Australian Financial System

The ACCC has welcomed the [Productivity Commission's draft report](#) into Competition in the Financial System at a public hearing this morning. At the public hearing, Marcus Bezzi (Executive General Manager (Enforcement & Compliance Division)) focused his remarks on: Competition Advocacy; The ACCC's Financial Services Unit and 'Embedding greater transparency in decision-making and a commitment to competition'

See the [ACCC's opening statement](#)

2018 ACCC Compliance and enforcement policy and priorities

This year, the ACCC will focus on consumer issues in broadband services and energy, competition in the financial services and commercial construction sectors, systemic consumer guarantee issues, and conduct that may contravene the new misuse of market power and concerted practices provisions

<http://apo.org.au/node/133666>

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

The Commissioner, the Honourable Kenneth Madison Hayne AC QC, is authorised to submit an interim report no later than 30 September 2018, and will provide a final report by 1 February 2019.

The next round of public hearings will commence Tuesday, 13 March 2018. More information is available on the Transcripts and hearings page. Practice Guidelines are available on the Practice Guidelines page.

The Royal Commission's initial public hearing was held on 12 February 2018. A [video](#) recording and transcript of the initial hearing is available.

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 submissions on recommendations by 23 March 2018. The Report can be accessed and submissions made [here](#).

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/>

QLS Reminder - National Mortgage Form transition ends on 2 March 2018

QLS Reminder – National Mortgage Form transition ends on 2 March 2018

Practitioners are reminded that the existing Form 2 Mortgage will be not accepted for lodgement after 2 March 2018 unless one of the parties has executed the Form 2 before that date.

http://www.qls.com.au/About_QLS/News_media/News/Reminder_-_National_Mortgage_Form_transition_ends_on_2_March_2018

National Mortgage Form - Extension to transition period

The NSW Registrar General has, via waiver, granted an extension to the transition period to comply with Conveyancing Rule 10.1.10, related to the mandatory use of the National Mortgage Form until 2 March 2018. Pursuant to this waiver, NSW Land Registry Services will continue to accept the existing NSW Mortgage form (Form 05M) until 2 March 2018. For details, see the [NSW LRS Circular](#).

Current Inquiries - Economics Legislation Committee [Financial Sector Legislation Amendment \(Crisis Resolution Powers and Other Measures\) Bill 2017 \[Provisions\]](#)

Status: Accepting Submissions Date Referred: 16 November 2017 Submissions Close: 18 December 2017 Reporting Date: 09 February 2018

[Consumer protection in the banking, insurance and financial sector](#)

Status: Submissions Closed Date Referred: 29 November 2016 Reporting Date: 28 March 2018

CASES

[Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited \[2018\] FCA 155](#)

CONSUMER LAW – credit contracts with consumers – s 128, s 129 and s 130 of the National Consumer Credit Protection Act 2009 (Cth) – assessment of credit – appropriateness of penalty – considerations to take into account in setting penalties – multiple contraventions – National Consumer Credit Protection Act 2009 (Cth)

[Lauvan Pty Limited & Anor v Bega & Ors \[2018\] NSWSC 154](#)

BANKING AND FINANCE – instruments – loan facilities – construction of loan agreement – whether drawdown notice required – whether direction to pay necessary for advance – whether oral direction given – whether credit provider engaged in unlicensed credit activity contrary to National Consumer Credit Protection Act 2009 (Cth), s 29 – whether contract to which National Credit Code applied – National Credit Code, ss 5(1)(b)(i), (ii), 5(1)(d) – whether credit provided for personal, domestic or household purposes – whether credit provided to purchase residential property for investment purposes – whether credit provided in the course of a business of providing credit – whether relief should be granted under National Consumer Credit Protection Act 2009 (Cth), s 180 CONTRACTS – under statute – whether contract unjust – Contracts Review Act 1980 (NSW), s 7 – whether transaction should be reopened – National Credit Code, ss 76 and 77 – whether contract unconscionable – Australian Securities and Investments Act 2001 (Cth), ss 12CB and 12CC CONTRACTS – formation – parties – principal and agent – creation of relationship of agency – authority of agents – implied or express authority – whether authority inferred from conduct of parties – construction and extent of agent's authority – authority of sub-agent EQUITY – equitable remedies – constructive trust – equitable charges and liens – contribution to acquisition of another's property – where no claim for subrogation to vendor's lien or security held by outgoing mortgagees – no trust created – minimum equity necessary in the circumstances EQUITY – fiduciary duties – proscriptive only – no conflict rule – conflict of interest and interest – whether real and sensible possibility of conflict GUARANTEE AND INDEMNITY – contract of guarantee – action to enforce guarantee – guarantor's liability – factors affecting validity of guarantee – whether guarantee procured by misrepresentation – unconscionability – whether special disadvantage established PROFESSIONS AND TRADES – lawyers – duties and liabilities – solicitor and client – scope of retainer to provide independent legal advice – duties of solicitor when advising on loan

and mortgage transaction – duty of care – fiduciary duty – whether duty to disclose conflict of interest
RESTITUTION – claim for restitution – whether total failure of consideration – whether advance under loan agreement authorised – recovery of money had and received – whether unconscionable to retain benefit of money paid
WORDS AND PHRASES – “unjust” – Contracts Review Act 1980 (NSW), s 7 – National Credit Code, s 76 – “unconscionable” – Australian Securities and Investments Commission 2001 (Cth), s 12CB – “credit contract” – National Consumer Credit Protection Act 2009 (Cth), s 6 – “personal, domestic or household purposes” – “purchase, renovate or improve residential property for investment purposes” – “carrying on a business” – “incidentally to” – National Credit Code, ss 5(1)(b)(i) and (ii), 5(1)(d)

[Gresham Property Investments Limited v Global Consulting Services Pty Limited: Global Consulting Services Pty Limited v Gresham Property Investments Limited \[2018\] NSWSC 141](#)

GUARANTEE AND INDEMNITY – Guarantor – Rights against co-guarantors – General principle of equal contribution among co-guarantors – Exceptions – Express agreement to the contrary
GUARANTEE AND INDEMNITY – Guarantor – Rights against co-guarantors – General principle of equal contribution among co-guarantors – Exceptions – Common intention to the contrary
GUARANTEE AND INDEMNITY – Guarantor – Rights against co-guarantors – General principle of equal contribution among co-guarantors – Exceptions – Where one guarantor obtains the whole benefit of the guarantee
GUARANTEE AND INDEMNITY – Guarantor – Right to contribution – Whether differences between interests of guarantors prevent liabilities from being co-ordinate
GUARANTEE AND INDEMNITY – Contract of guarantee – Construction – Extent of co-guarantor’s right to priority under inter-creditor deed

[NWC Finance Pty Limited v Borsellino \[2018\] NSWSC 134](#)

POSSESSION – Registered mortgage – default – compromise of debt – alleged repudiation of Deed of Release – no repudiation – debt confined to outstanding money from Deed
CONTRACT – principles of repudiation – secondary obligation to pay damages for the breach – construction of the contract

[Commonwealth v Byrnes and Hewitt \[2018\] VSCA 41](#)

CORPORATIONS – External administration – Winding up and receivership – Distribution of surplus – Insolvent corporate trustee – Trustee’s right of indemnity by way of exoneration – Whether right of indemnity is ‘property of the company’ – Whether statutory priority regime applies – Corporations Act 2001 (Cth) ss 433, 555, 556, 560, 561.

TRUSTS AND TRUSTEES – Insolvency – Insolvent corporate trustee – Right of indemnity in respect of trust assets – Nature of trustee’s interest – Nature of trust creditors’ rights of subrogation

CORPORATIONS – External administration – Winding up and receivership – Distribution of surplus – Company operated as trading trust – Application of priority regime in Corporations Act 2001 (Cth) s 433 – Where property of company includes trustee’s right of indemnity in respect of trust assets – Whether necessary for right of indemnity to be subject to circulating security interest – Whether right of indemnity subject to circulating security interest – Right of indemnity characterised by trust assets available to satisfy it – Trust assets subject to circulating security interest to be treated under priority regime – Corporations Act 2001 (Cth) ss 51C, 433(2)–(3), Personal Property Securities Act 2009 (Cth) ss 8(1), 340.

CORPORATIONS – External administration – Winding up and receivership – Distribution of surplus – Company operated as trading trust – Application of priority regime in Corporations Act 2001 (Cth) s 433 – Relevant date for ascertaining whether property subject to circulating security interest – Whether date of creation of security interest or date of receivers’ appointment – Corporations Act 2001 (Cth) s 433

SECURITIES – ‘Circulating asset’ – Whether property circulating asset under Personal Property Securities Act 2009 (Cth) s 340 – Relationship between sub ss (1)(a) and (b) – Meaning of ‘in any other case’ in sub-s (1)(b) – Whether sub-s (1)(b) applicable if property excluded as circulating asset under sub-ss (1)(a) and (2) – Whether sub-s (1)(b) applies to assets covered in sub-s (5) – Corporations Act 2001 (Cth) s 51C; Personal Property Securities Act 2009 (Cth) ss 31, 340, 341, 341A.

[CBA v Iloska & Anor \[2018\] VCC 144](#)

PRACTICE AND PROCEDURE – whether leave should be granted for lay person to represent defendant – McKenzie friend – requirement for independent interpreter

EQUITY – subrogation – general principles – where third party has paid off mortgage – presumption that third party intends to keep mortgage alive for its own benefit

Legislation Cited: Civil Procedure Act 2010 (Vic); County Court Civil Procedure Rules 2008 (Vic)

LEGISLATION

Commonwealth

New Bill

[Banking Amendment \(Rural Finance Reform\) Bill 2018](#)

HR Second reading moved 26 February 2018

Amends the Banking Act 1959 to impose certain obligations and requirements on authorised deposit-taking institutions in relation to loans of up to \$5 million to small primary production businesses

Bills Progress

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

HR Third reading agreed to 28 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](#)

HR Third reading agreed to 01 March 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 \[Provisions\]](#)

On 15 February 2018, the Senate referred the Treasury Laws Amendment (2018 Measures No. 2) Bill 2018 [Provisions] to the committee for inquiry and report by 15 March 2018.

Bills assented

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

Assent Act No: 9 Year: 2018 05 March 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.

[Regional Investment Corporation Act 2018](#)

Assent Act No. 6 of 2018 20 February 2018

The bill: establishes the Regional Investment Corporation to administer farm business loans and financial assistance granted to states and territories in relation to water infrastructure projects, and any future programs prescribed by rules; provides for the corporation’s functions, operating mandate, ministerial directions, board membership and appointment of a chief executive officer and staff; and provides for miscellaneous matters, including the recovery of costs, delegations, power to make rules, and an independent review of the operation of the Act before 1 July 2024.

Regulations

[Accounting Standard AASB 2018-1 Amendments to Australian Accounting Standards - Annual Improvements 2015-2017 Cycle](#)

27/02/2018 - This standard amends the AASB 3 - Business Combinations - August 2015, AASB 11 - Joint Arrangements - July 2015, AASB 112 - Income Taxes - August 2015, and AASB 123 - Borrowing Costs - August 2015 as a consequence of the issuance of International Financial Reporting Standard Annual Improvements to IFRS Standards 2015–2017 Cycle by the International Accounting Standards Board (IASB) in December 2017

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