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ISSUE 9



## BANKING SECTOR NEWSLETTER

### Bribes, conflicts of interest and hidden fees: Banking royal commission off to incredible start

Revelations about a tailor pushing \$122m in home loans, gym owners assessing peoples' finances, and paper envelopes filled with cash bribes — it has been an astonishing first week of public hearings

<http://www.abc.net.au/news/2018-03-17/banking-royal-commission-hears-mortgage-brokers-bribed/9557558>

### IN THE MEDIA

#### Building and strengthening ASIC

The Government has announced that the Turnbull Government intends to create a new Deputy Chairperson role at the Australian Securities and Investments Commission (ASIC). The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP said a second Deputy Chair will give ASIC greater flexibility to manage the breadth of ASIC's new powers and increased responsibilities resulting from recent and upcoming law changes

<http://kmo.ministers.treasury.gov.au/media-release/025-2018/>

#### APRA approves ING Bank (Australia) Limited to use internal models to calculate regulatory capital

The Australian Prudential Regulation Authority (APRA) today announced that it has granted approval to ING Bank (Australia) Limited to begin using its internal models to determine its regulatory capital requirements for credit and market risk, commencing from the quarter ended 30 June 2018

[http://www.apra.gov.au/MediaReleases/Pages/18\\_13.aspx](http://www.apra.gov.au/MediaReleases/Pages/18_13.aspx)

#### The distribution of mortgage rates

Mortgage interest rates can vary considerably across borrowers and are typically less than the standard variable rates (SVRs) advertised by banks

<http://www.rba.gov.au/publications/bulletin/2018/mar/the-distribution-of-mortgage-rates.html>

#### Developments in bank's funding costs and lending rates

This article updates previous Reserve Bank research on the composition and pricing of banks' debt funding and lending rates

<http://www.rba.gov.au/publications/bulletin/2018/mar/developments-in-banks-funding-costs-and-lending-rates.html>

#### ABA: ACCC report shows massive home loan discounts

The Australian Banking Association welcomes ACCC interim report into residential mortgages, which clearly shows very high levels of discounting in the Australian home loan market. It's clear that competition is delivering better deals for customers, shopping around works and Australians should continue to do so to get the best discounts on the advertised rate

<https://www.ausbanking.org.au/media/media-releases/media-release-2018/accc-report-shows-massive-home-loan-discounts>

#### Mortgage pricing not strongly competitive

The opaque pricing of discounts offered on residential mortgage rates makes it difficult for customers to make informed choices and disadvantages borrowers who do not regularly review their choice of lender, a report by the ACCC has found. The [Inquiry's interim report](#), reveals signs of less-than-vigorous price competition, especially between the big four banks.

<https://www.accc.gov.au/media-release/mortgage-pricing-not-strongly-competitive>

#### APRA curbs thwarting price competition

Macro-prudential measures imposed by the regulator prompted the major banks to increase rates on their loan offerings, which could have offset the cost of the Major Bank Levy, an ACCC report has revealed.

<https://www.mortgagebusiness.com.au/breaking-news/12037-apra-curbs-thwarting-price-competition>

**ASIC reports on changes to small business loan contracts by big four banks**

ASIC has released a report setting out the details of the changes made by the big four banks to remove unfair terms from their small business loan contracts of up to \$1 million  
<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-073mr-asic-reports-on-changes-to-small-business-loan-contracts-by-big-four-banks/>

**Corpac Partners' AFS licence suspended for failing to lodge financial statements**

ASIC has suspended Corpac Partners' licence until 28 August 2018 for failing to lodge financial statements and auditor's reports for a period of four years. This failure is in breach of both Corpac Partners' legal obligations and their licence conditions  
<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-072mr-corpac-partners-afs-licence-suspended-for-failing-to-lodge-financial-statements/>

**APRA figures provide momentum in 2018**

COBA has welcomed the latest quarterly statistics from APRA which indicate a strong 2018 ahead for the customer owned banking sector  
<http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1277-apra-figures-provide-momentum-in-2018->

**Securitiser assets up by \$7.3bn in December quarter**

Assets held by securities spiked by 6 percent in December quarter, according to the latest figures from the Australian Bureau of Statistics  
<https://www.mortgagebusiness.com.au/breaking-news/12023-securitiser-assets-up-by-7-3-billion-in-december-quarter>

**ASIC permanently bans Victorian mortgage broker**

ASIC has permanently banned Mr Koresh Daniel Houghton, of Endeavour Hills, Victoria from being a mortgage broker and cancelled his Australian credit licence. Mr Houghton was found not to be a fit and proper person to engage in credit activities  
<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-069mr-asic-permanently-bans-victorian-mortgage-broker/>

**ASIC prefers quicker, cheaper enforcement action: Ian Ramsay**

ASIC rarely punishes financial services wrongdoing through the courts, raising questions about whether the regular sent strong enough deterrence messages in the years leading up to the royal commission, University of Melbourne economics professor Ian Ramsay says  
<http://www.afr.com/business/banking-and-finance/financial-services/asic-prefers-quicker-cheaper-enforcement-action-ian-ramsay-20180302-h0wx2x>

**Regulator concedes comparison rates are 'opaque'**

ASIC has told the Productivity Commission that the comparison rates used for mortgages are "not a very good guide" for whether a rate is good or not, stating that it would be "broadly" in favour of these rates being looked at  
<https://www.mortgagebusiness.com.au/breaking-news/12006-regulator-concedes-comparison-rates-are-opaque>

**Working together for stronger financial capability**

ASIC has released the National Financial Literacy Strategy Annual Highlights Report 2016-17. The Report paints a national picture of financial literacy programs and initiatives delivered by a wide range of organisations across the government, education, industry and community sectors in support of the National Financial Literacy Strategy, led and coordinated by ASIC  
<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-066mr-working-together-for-stronger-financial-capability/>

**ABA: Comprehensive credit reporting must be fair for all**

The upcoming Comprehensive Credit Reporting (CCR) reforms must be fair for all and ensure Australians who have experienced past financial difficulties are not discriminated against  
<https://www.ausbanking.org.au/media/media-releases/media-release-2018/comprehensive-credit-reporting-must-be-fair-for-all>

**ASIC winds up payday lending companies for unpaid fines**

ASIC has obtained orders winding up Fast Access Finance Pty Ltd, Fast Access Finance (Beenleigh) Pty Ltd and Fast Access Finance (BurleighHeads) Pty Ltd (the FAF Companies) for their failure to pay fines for breaching consumer credit laws  
<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-064mr-asic-winds-up-payday-lending-companies-for-unpaid-fines/>

**ASIC consults on its oversight of AFCA**

The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has welcomed the ASIC's 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://www.asic.gov.au)  
<http://kmo.ministers.treasury.gov.au/media-release/023-2018/>

**FOS submission points finger at advisers**

Financial advisers account for more than one-third of all serious misconduct issues identified by the Financial Ombudsman Service since early 2012. In a submission to the Royal Commission, FOS attributed 39% of serious misconduct identified in the last six years to financial advisers  
<http://www.financialstandard.com.au/news/fos-submission-points-finger-at-advisers-113587530>

## IN PRACTICE AND COURTS

**AFSA: Want to get a PPSR registration removed or amended**  
AFSA has developed a handy double-sided [visual guide](#) about the steps involved that could assist you or your staff. The PPSR information website pages about [disputing a registration](#) have also been updated.

There is also a new PPSR [industry information](#) section on the website and you can leave your feedback and suggestions for improvement at the bottom of each webpage

### ASIC Credit (Amendment) Instrument 2018/114

ASIC has issued Credit (Amendment) Instrument 2018/114, which amends [Class Order 14/41](#) as it applies to providers of consumer credit and consumer leases.

The newly made instrument extends the exemptions granted under transitional regulations (set out in ss 69A and 69B of the NCCP Regulations 2010) that relieve credit providers and lessors from the obligation to provide a written response to a hardship notice in certain circumstances

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

ASIC has 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 and draft regulatory guide [here](#).

### 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](#).

### Current Inquiries - Economics Legislation Committee [Consumer protection in the banking, insurance and financial sector](#)

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

On 14 February 2018, the Senate granted an extension of time to report by 26 June 2018. Submissions closed on 7 March 2017

## CASES

### [Westpac Banking Corporation v Klaric \[2018\] QSC 38](#)

MORTGAGES – MORTGAGEE'S REMEDIES – POSSESSION – PROCEEDINGS TO OBTAIN – where the applicant mortgagee sought to recover from the respondent possession of a property pursuant to s 78(2)(c) of the Land Title Act 1994 (Qld) – where the respondent had been in default for over five years

– where notice had been given and the respondent had not remedied the default – whether the applicant mortgagee is entitled to possession

### EQUITY – EQUITABLE REMEDIES – INJUNCTIONS

– where the applicant mortgagee sought to restrain the respondent from entering onto the property or interfering with, obstructing or disturbing the applicant mortgagee in taking and maintaining possession and effecting a sale of the property – whether the applicant mortgagee is entitled to an injunction

### [National Australia Bank Ltd v Blunya Pty Ltd \[2018\] QSC 49](#)

Decision: That the whole of the amended defence and counterclaim be struck out and the defendants be given liberty to replead

### PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY

– SUMMARY DISPOSAL – where the plaintiff applies for summary judgment pursuant to r 292 of the Uniform Civil Procedure Rules 1999 (Qld) against the second defendant in relation to part of the claim – where the dispute arises from the alleged default of the defendant of loan agreements between the plaintiff as lender and the defendants as borrowers – where the plaintiff seeks orders that the second defendant deliver up possession of the land subject of the loan agreement or otherwise pay moneys to the plaintiff pursuant to the agreement – where the second defendant claims misleading and deceptive conduct and on the basis that the plaintiff breached the agreement – whether the defendant has no real prospect of successfully defending the relevant part of the plaintiff's claim – whether there is no need for a trial of the relevant part of the plaintiff's claim

### PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT

– where the plaintiff seeks, in the alternative, an order that certain paragraphs of the amended defence and counterclaim be struck out pursuant to r 171 of the Uniform Civil Procedure Rules 1999 (Qld) or the inherent jurisdiction of the Court – where the plaintiff complains that paragraphs of the pleading variously: fail to plead material facts; fail to plead particulars; do not disclose any reasonable cause of action; have a tendency to delay or prejudice a trial; are false and scandalous; are vague; are irrelevant; and are an abuse of the court process – where the second defendant is self-represented – whether the application to strike out should be granted for all or part of the amended defence and counterclaim. Uniform Civil Procedure Rules 1999 (Qld) rr 171, 292

### [National Australia Bank v Sayed \(No. 13\) NSWSC 325](#)

Leave to issue the further subpoena to MERC is refused  
PROCEDURE – subpoenas – application by litigant in person to issue further subpoena to an agent of the plaintiff to produce documents – proposed evidence outside pleadings and issues – subpoena amounting to a fishing expedition – width of production oppressive – leave refused

[National Australia Bank v Sayed \(No. 12\) \[2018\] NSWSC 283](#)

PROCEDURE – subpoenas – application by litigant in person to issue subpoenas to person to attend to give evidence – late application – proposed evidence outside pleadings and issues – directions that evidence be completed by December 2016 – matter fixed in July 2017 for hearing in April 2018 – proposed evidence related to claims for which leave earlier refused  
Civil Procedure Act 2005 (NSW)

[Gomez v Carrafa \(Trustee\) \[2018\] FCA 201](#)

BANKRUPTCY – appeal from Federal Circuit Court of Australia – where trustee in bankruptcy of the wife’s estate sought declarations that transfers of two properties to the husband and a payment of money to a company associated with their son were void against the trustee pursuant to s 120 of the Bankruptcy Act 1966 (Cth) – where equity of exoneration raised as a defence – where primary judge held that the defence was not made out – whether primary judge erred in so holding – appeal dismissed

The mortgage over the Richmond Property to NRMA was discharged and was replaced with a mortgage to ANZ

[Swiss Re International SE v David Simpson \[2018\] NSWSC 233](#)

The proceedings are dismissed.

CONSUMER LAW – Competition and Consumer Act 2010 (Cth) – Schedule 2, ss 18(1) and 236(1) – Misleading or deceptive conduct – plaintiff insurers claimed that they were induced to issue surety performance bonds for a publicly listed company by misleading or deceptive conduct on the part of the defendant individual officers of the company – misleading or deceptive conduct claimed to be representations and non-disclosures – no claim of accessory liability – HELD: no misleading or deceptive conduct on the part of the defendants established – the alleged misleading or deceptive conduct was not causative of the plaintiffs’ loss.

Swiss Re, QBE and Assetinsure provide security bonds for clients, which secure performance of contractual obligations. Forge had various banking facilities with ANZ including revolving guarantee facilities of \$80 million

Australian Contract Guarantee Services was Forge’s surety bond broker.

[Fin One Pty Ltd v Kucharski \[2018\] QDC 35](#)

Appeal dismissed. APPEAL – JURISDICTION OF MAGISTRATES COURTS – whether a proceeding to recover personal property was a “personal action” – whether Magistrates Courts have jurisdiction in any event.  
District Court of Queensland Act 1967 (Qld), ss 68, 69

The appellant alleged that the respondent had defaulted in making payments pursuant to the consumer loan contract and wished to exercise rights to repossess the vehicle pursuant to section 123 of the Personal Property Securities Act 2009 (Cth).

[Michelangelo Alfredo Mascarello & Anor v Registrar-General of New South Wales \[2018\] NSWSC 284](#)

EQUITY – subrogation – general principles – Registrar-General’s statutory right of subrogation – nature of statutory right of subrogation under Real Property Act 1900 (NSW) – amount Registrar-General can seek to recover in subrogation

NEGLIGENCE – duty of care – general principles – causation – proportionate liability – duty of care of solicitor – whether solicitor breached duty of care witnessing fraudulent signatures

CONTRACT – penalty – loan agreement – where the lower rate was 36% p.a. and higher rate 72% p.a. – whether higher interest rate void as penalty – whether deed of settlement entered into by Plaintiffs bar to Registrar-General’s claim under penalty

[Permanent Custodians Ltd v Klear \[2018\] NSWSC 320](#)

LAND LAW – mortgages – rights and liabilities of mortgagor and mortgagee – whether mortgage and incorporated memorandum entitled mortgagee to possession of land upon default of mortgagor – whether default notices were valid in respect of the loan agreement – no defence disclosed in Defence filed – Civil Procedure Act 2005 (NSW) s 73; National Credit Code s 88

[Australian Motor Homes Pty Ltd v Maria’s Farm Veggies Pty Limited \[2018\] NSWSC 216](#)

COMMON LAW – APPEAL FROM THE LOCAL COURT – appeal from decision of the Local Court – nature of proceedings – money claim – whether claim equitable in nature – jurisdiction – question of test to be applied to a claim for restitution. Corporations Act 2001 (Cth); Local Court Act 2007 (NSW); Personal Property Securities Act 2009

[BNMB Transport Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd \[2018\] FCA 223](#)

CONSUMER LAW – consumer guarantees – purchase of second-hand high performance vehicle where major failure occurred within two months of purchase – alleged breach of guarantees as to acceptable quality and fitness for purpose under sections 54 and 55 of the Australian Consumer Law – alleged contravention of statutory warranty under section 54 of the Motor Car Traders Act 1986 (Vic) – whether statutory defences made out – finding at trial that damage caused by harsh acceleration after point of sale – allegation of apprehended bias – burden of proof for statutory defences – whether finding of cause and timing of damage open on evidence – whether Jones v Dunkel inference appropriate for failure to call witness and produce documents – basis for accepting expert evidence – no appealable error made out.

Mercedes-Benz Finance commenced a cross-claim to recover the monies due to it under the hire purchase agreement

[Gogetta Equipment Funding Pty Ltd v Mark & Liz Pty Ltd \[2018\] VSC 91](#)

CONTRACT – Whether standard terms in a separate unsigned document incorporated into a signed contract – If so, whether the terms create a charge or only an obligation to give one on request – held that terms incorporated and created a charge – Ange v First East Auction Holdings Pty Ltd [2011] VSCA 335 applied.

PRIORITIES – Contest between a charge first in time given for equipment finance and later equitable mortgage given for business lending – Which is the ‘better equity’ – Comparison of conduct of each lender – Both lenders found to have been derelict to some degree – The charge first in time nevertheless postponed because the giving of it was not critical to the credit, whereas the grant of the mortgage was critical to the subsequent lending and this was reflected in the conduct of the respective lenders and documentation of the interests – Clark v Raymor (Brisbane) Pty Ltd [No 2] [1982] Qd.R. 790 considered.

**LEGISLATION**

**Commonwealth**

**Bills Progress**

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

Senate: Introduced and read a first time 19 March 2018, Second reading moved 19 March 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](#)

Senate: Introduced and read a first time 19 March 2018, Second reading moved 19 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.

**Acts**

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

Assent Act no: 10 Year: 2018 05 March 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.

**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 Andreacchio**

Special Counsel

+61 3 8080 3631

+61 439 370 081

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



**Michelle Lykiardopoulos**

Special Counsel

+61 3 8080 3567

+61 410 778 698

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

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