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ISSUE 12



BANKING SECTOR NEWSLETTER

AMP could face criminal charges for misleading ASIC
Delivering her closing statement at the banking royal commission, Rowena Orr, QC said AMP may have breached the Corporations Act over numerous misleading statements relating to its practice of charging fees for no service.

<http://www.abc.net.au/news/2018-04-27/asic-fronts-hayne-royal-commission/9702662>

IN THE MEDIA

ASIC takes action to wind up five land banking companies and to disqualify officers from managing corporations

ASIC has started legal action in the Federal Court in Melbourne to wind up companies associated with two land banking schemes operated in Victoria. These types of investments may constitute a managed investment scheme and/or a financial product. Developers and promoters should therefore hold an Australian Financial Services Licence and register these schemes with ASIC.
<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-117mr-asic-takes-action-to-wind-up-five-land-banking-companies-and-to-disqualify-officers-from-managing-corporations/>

AMP chairman Catherine Brenner steps down after royal commission revelations

AMP chairman Catherine Brenner resigns following damning evidence at the banking royal commission of misconduct by the company's staff.
<http://www.abc.net.au/news/2018-04-30/amp-chairperson-catherine-brenner-steps-down/9709874>

AAT affirms decision to cancel registration of NSW liquidator

The Administrative Appeals Tribunal (AAT) has affirmed a decision to cancel the registration of the Sydney liquidator, Mr Randall Clinton Joubert. The AAT found that Mr Joubert's actions as a registered liquidator of several companies were deliberate and dishonest and that he was not a fit and proper person to be a registered liquidator.

<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-116mr-aat-affirms-decision-to-cancel-registration-of-nsw-liquidator/>

Telstra to pay \$10 million for misleading premium billing charge representations

The Federal Court has ordered Telstra to pay penalties of \$10 million for making false or misleading representations to customers in relation to its third-party billing service known as "Premium Direct Billing" (PDB), following action by the ACCC. The Court found that in 2015 and 2016, Telstra did not adequately inform customers it had set the Premium Direct Billing service as a default on their mobile accounts.

<https://www.accc.gov.au/media-release/telstra-to-pay-10-million-for-misleading-premium-billing-charge-representations>

Bank regulator relaxes investor loan 'speed limit', boards made accountable

APRA says 10 per cent speed limit has done its job and it will now target overall household debt and quality of loan serviceability.

<http://www.abc.net.au/news/2018-04-26/bank-regulator-relaxes-investor-lending-speed-limit/9698560>

Rise of instant loan machines sparks fears for low-income earners

APRA says 10 per cent speed limit has done its job and it will now target overall household debt and quality of loan serviceability.

<http://www.abc.net.au/news/2018-04-26/rise-of-instant-cash-loan-machines-in-disadvantaged-nsw-areas/9696134>

APRA announces plans to remove investor lending benchmark and embed better practices

The Australian Prudential Regulation Authority (APRA) has announced plans to remove the investor loan growth benchmark and replace it with more permanent measures to strengthen lending standards.

http://www.apra.gov.au/MediaReleases/Pages/18_16.aspx

Interest-only borrowers face \$7,000 mortgage hike: RBA

Borrowers approaching the expiry of their interest-only home loans period could be required to fork out an additional \$7,000 a year, according to the Reserve Bank. <https://www.mortgagebusiness.com.au/breaking-news/12168-interest-only-borrowers-face-7-000-mortgage-hike-rba>

ASIC releases guidance on the AFS licensing exemption for tax and BAS agents

ASIC has updated its guidance for accountants who provide services on self-managed superannuation funds (SMSFs) to cover the exemption from the Australian Financial Services (AFS) licensing requirements for tax and BAS agents <http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-115mr-asic-releases-guidance-on-afs-licensing-exemption-for-tax-and-bas-agents/>

Credit repair business Malouf Group Enterprises and its director pay \$1.7 million for misleading and unconscionable conduct

The Federal Court has found that credit repair business Malouf Group Enterprises Pty Ltd (Malouf Group) and its director Jordan Francis Malouf breached the Australian Consumer Law during the period 1 January 2014 to 31 December 2015 by making false and misleading representations and by engaging in unconscionable conduct.

<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-114mr-credit-repair-business-malouf-group-enterprises-and-its-director-pay-17-million-for-misleading-and-unconscionable-conduct/>

Australian regulator under fire over banking misconduct

Australia's corporate watchdog is "litigation shy" and failed to aggressively pursue banking misconduct, the former competition regulator chairman said on Tuesday, as barristers continued to grill executives at a major inquiry into the financial sector.

<https://www.reuters.com/article/australia-banks-inquiry/australian-regulator-under-fire-over-banking-misconduct-idUSL3N1S100T>

AMP facing threat of several shareholder class actions for misleading ASIC over 'fee for no service' scandal

Wealth management giant AMP could face several shareholder class actions over misleading statements made to the corporate regulator.

<http://www.abc.net.au/news/2018-04-23/amp-facing-threat-of-several-shareholder-class-actions-banking/9688922>

Consultation on ASIC Industry Funding Levy Amendments

The Government is committed to improving consumer outcomes in the financial services sector. The industry funding model delivers on a key recommendation of the 2014 Murray Financial System Inquiry, with draft regulations released this week to make technical amendments to the levies

<http://kmo.ministers.treasury.gov.au/media-release/040-2018/>

ACCC boss backs massive fines for banks

ACCC Chairman, Rod Sims, is talking penalties again in the context of investigating competition in the financial system, arguing for penalties in hundreds of millions of dollars. The head of the consumer watchdog believes penalties of hundreds of millions of dollars for financial misconduct would prevent banks seeing the fines as a cost of doing business.

<https://www.9news.com.au/national/2018/04/23/08/27/accc-boss-backs-massive-fines-for-banks>

Privacy watchdog OAIC pulls up data breaches

The top five sectors that notified the OAIC of eligible data breaches included health service providers (24 per cent of notifications), legal, accounting and management services (16 per cent), finance (13 per cent), private education (10 per cent), and charities (6 per cent).

<http://psnews.com.au/2018/04/23/privacy-watchdog-pulls-up-data-breaches/>

FSC supports stronger penalties for misconduct

The FSC supports the Government's announcement that it will increase criminal and civil penalties for corporate misconduct in order to better protect consumers.

<https://www.fsc.org.au/resources/resource-detail/?documentid=d2b29af4-5b44-e811-8139-e0071b686a81>

Statement from CEO Anna Bligh, ABA

The past few days of hearings at the Royal Commission have been sobering for the entire industry. The issues raised have been unacceptable and do not meet the high standards the community rightly expects of banks. The industry expects that further changes should and will be made following the final recommendations of the Commission.

<https://www.ausbanking.org.au/media/media-releases/media-release-2018/statement-from-ceo-anna-bligh>

Boosting penalties to protect Australian consumers from corporate and financial misconduct

The Turnbull Government is strengthening criminal and civil penalties for corporate misconduct and boosting the powers of the ASIC to protect Australian consumers from corporate and financial misconduct. The reforms to ASIC's powers and penalties follow recommendations made by the ASIC Enforcement Review Taskforce (The Taskforce).

<http://sjm.ministers.treasury.gov.au/media-release/boosting-penalties-to-protect-australian-consumers-from-corporate-and-financial-misconduct/>

Scott Morrison announces new penalties for financial crimes

The government has announced stiff new penalties for individuals and businesses found guilty of financial crimes, including longer prison sentences and higher fines. The new measures also significantly increase the powers of the corporate watchdog ASIC. Announced by Treasurer Scott Morrison on Friday, the new measures came at the end of a week of explosive revelations at banking royal commission hearings in Melbourne.

<https://thenewdaily.com.au/money/finance-news/2018/04/20/scott-morrison-bank-penalties/>

Corporate crooks to face tougher penalties under new rules to be revealed by Government

Dodgy bankers and other corporate criminals could face a maximum 10 years' imprisonment under tough new penalties revealed today. Financial services companies risk maximum fines of \$210 million, with their annual turnover potentially stripped by 10 per cent under the new penalties regime

<http://www.abc.net.au/news/2018-04-20/corporate-crooks-set-to-face-tougher-penalties/9677792>

Consultation on regulations to protect client money in the financial sector

The Turnbull Government has released exposure draft regulations (the Regulations) to support and improve the powers of the Australian Securities and Investments Commission (ASIC) to enforce the new client money regime which commenced on 4 April 2018

<http://kmo.ministers.treasury.gov.au/media-release/038-2018/>

ABA: Final McPhee report shows reform well underway

The release of the final report of independent governance expert, Mr Ian McPhee AO PSM, shows that Australia's banks have made significant progress on the Better Banking Reform Program, including finalising many of its measures

<https://www.ausbanking.org.au/media/media-releases/media-release-2018/final-mcphee-report-shows-reform-well-underway>

IN PRACTICE AND COURTS**ASIC guidance on AFS licensing exemption for tax and BAS agents**

The guidance sets out some basic principles which tax and BAS agents can apply to understand whether their advice falls within the licensing exemption, and explains the relationship between this exemption (section 766B(5)(c) of the Corporations Act) and the exemption for providing tax advice on financial products (regulation 7.1.29(4) of the Corporations Regulations). The guidance is being released as part of updates to Information Sheet 216 AFS licensing requirements for accountants who provide SMSF services ([INFO 216](#)).

Recommendations made by the ASIC Enforcement Review Taskforce (The Taskforce)

The Government has agreed, or agreed in principle, to all 50 of the Taskforce recommendations and will prioritise the implementation of 30 of the recommendations. The remaining 20 recommendations relate to self-reporting of breaches, industry codes and ASIC's directions powers, which will be considered alongside the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The Government's full response to the Taskforce Report can be found on the [Treasury website](#).

Comment on the proposed PPSR fees and charges to apply from 1 July 2018

AFSA has recently undertaken a review of the PPSR fees and charges and has prepared a Cost Recovery Implementation Statement (CRIS) for the proposed fees and charges to commence from 1 July 2018.

If you would like to comment on the CRIS, please forward your comments to stakeholders@afsa.gov.au by 4 May 2018

ASIC fees-for-service: Consultation

Under the new fees-for-service regime, fees for activities such as processing a licence application will be revised to reflect ASIC's actual costs. This is the final aspect of the ASIC Industry Funding Model and will commence from 1 July 2018. Consultation is open from 11 April to 1st May 2018. Stakeholders are invited to provide their feedback on the [Treasury website](#)

AUSTRAC: Digital currency exchange providers: register online with AUSTRAC

From 3 April 2018 all businesses providing DCE services in Australia are regulated under new anti-money laundering and counter-terrorism financing (AML/CTF) laws. Existing businesses providing DCE services will need to register by 14 May 2018.

Register online [here](#).

New APRA Publications

APRA's [monthly banking statistics](#) for March 2018

APRA's [Insight Issue 1](#) 2018

APRA Response to Submissions - Counterparty credit risk for ADIs - April 2018

Letter to all authorised deposit-taking institutions, Monday, 23 April 2018

See [Response to Submissions](#).

CASES[**Birketu Pty Ltd v Westpac Banking Corporation \(No.2\) \[2018\] NSWSC 494**](#)

CIVIL PROCEDURE – interlocutory orders – Mareva injunctions – whether earlier freezing orders should be amended – where plaintiff alleges fifth defendant acted fraudulently in obtaining money owned by the plaintiff – whether fifth defendant should be entitled to ordinary living expenses and reasonable legal expenses from the trust property held in frozen bank accounts – where fifth defendant asserts a limited proprietary claim – where no lawful entitlement to money held in frozen accounts – consideration of priority in mixed funds

[**Win Securities Limited & Anor v Bower \[2018\] VSC 180**](#)

PRACTICE AND PROCEDURE – Summary judgment – Whether defendant has real prospects of success on his defence – Civil Procedure Act 2010 (Vic), ss 61 and 63 – Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158; (2013) 42 VR 27 – Daniel Simon Hausman and Lance Vincent Hodgkinson v Abigroup Contractors Pty Ltd [2009] VSCA 288; (2009) 29 VR 213 – Application for summary judgment allowed.

Plaintiffs also allege that on or around 8 March 2017, the defendant provided them with a deed of guarantee which he had signed, guaranteeing the Loan ('Guarantee'). Pursuant to the Loan Agreement, the Loan was advanced to Compello

[**Warwick Entertainment Centre Pty Ltd \(Receivers and Managers Appointed\) atf the Warwick Entertainment Centre Unit Trust v Silkchime Pty Ltd \(Receivers and Managers Appointed\) atf the Silkchime Unit Trust \[No 4\] \[2018\] WASC 120**](#)

Corporations - Insolvency - Judgment debt owned beneficially by secured creditor of judgment creditor - Whether judgment debtor can set off debt due by judgment creditor assigned to judgment debtor - No mutuality of beneficial interest - Set off not permitted in absence of beneficial mutuality - Equitable set-off not raised

Practice and procedure - Judgments and orders - Enforcement - Suspension of Property Seizure and Sale Order - Whether special circumstances exist justifying suspension - Existence of cross claim not a special circumstance

Subrogation - Limitation period applicable to claims sought to be enforced by subrogation to securities held by principal creditor - Limitation period applicable to causes of action based on subrogated security applies to claims sought to be enforced by subrogation

Guarantor's right of indemnity against principal debtor where guarantee given at the request of principal debtor - Whether cause of action contractual or based on restitutionary principles - Cause of actual contractual in nature

[**Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board \[2018\] AATA 944**](#)

CORPORATIONS – liquidators – duties and functions of an administrator and liquidator – whether applicant failed to carry out or perform adequately and properly the duties of a liquidator – whether failure to disclose relevant relationships – “relationship”, meaning of – whether failure to disclose indemnities and payments received – whether failure to investigate causes of company failures – whether failure to have proper or adequate systems in place – whether applicant is a fit and proper person to remain registered as a liquidator – whether failure to perform adequately and properly the duties of a liquidator – whether applicant acted recklessly or dishonestly – failure to disclose relevant relationship amounted to dishonesty – lack of due care and diligence established – applicant not a fit and proper person to remain registered as a liquidator – decision affirmed – consideration for the sale was the assignment of the remaining obligations under the hire purchase agreement for the goods sold to LGM which reflected the value of the asset at the time.

[**In the matter of Bantex Pty Limited \(subject to deed of company arrangement\) \[2018\] NSWSC 531**](#)

CORPORATIONS – voluntary administration – deed of company arrangement – Corporations Act 2001 (NSW), s 450E(2) – requirement that the words “subject to deed of company” be included after the company's name in public documents and negotiable instruments – where dispensation order sought – Corporations Act 2001 (NSW), s 450E(5) – where the deed administrators do not oppose the dispensation – whether the dispensation will result in any significant risk to interests of creditors – exercise of discretion to grant dispensation from the requirement of s 450E(2)

Personal Property Securities Act 2009 (Cth), s 267 - The Toll proceedings concern an alleged liability of Bantex for certain demurrage and shipping costs of the Toll companies, as well as whether one or other of the Toll companies has a lien over the goods (and, if so, whether that security interest vested in Mr Tayeh and Ms McCallum upon their appointment as administrators pursuant to s 267 of the Personal Property Securities Act 2009 (Cth)

LEGISLATION**Commonwealth**

[**Banking \(prudential standard\) determination No.1 of 2018**](#)
27/04/2018 - This instrument determines Prudential Standard APS 180 Capital Adequacy: Counterparty Credit Risk.

[**Banking \(prudential standard\) determination No.2 of 2018**](#)
27/04/2018 - This instrument determines Prudential Standard APS 112 Capital Adequacy: Standardised Approach to Credit Risk

[Treasury Laws Amendment \(Putting Consumers First - Establishment of the Australian Financial Complaints Authority\) Regulations 2018](#)

24/04/2018 - This instrument makes consequential amendments to seven regulations as a result of the Treasury Laws Amendment (Putting Consumers First— Establishment of the Australian Financial Complaints Authority) Act 2018

[Banking \(prudential standard\) determination No.3 of 2018](#)

24/04/2018 - This instrument determines Prudential Standard APS 330 Public Disclosure and revokes Banking (prudential standard) determination No. 3 of 2015, including Prudential Standard APS 330 Public Disclosure

[National Consumer Credit Protection Amendment \(Credit Cards\) Regulations 2018](#)

23/04/2018 - These regulations make consequential changes to the National Consumer Credit Protection Regulations 2010 to support the Government's reforms to the National Consumer Credit Protection Act 2009 to improve consumer outcomes under credit card contracts

THIS EDITION'S EDITORS



Julie Callea-Smyth

Partner

+61 3 8080 3625

+61 411 600 945

jcallea-smyth@tglaw.com.au



Jessica Andreacchio

Special Counsel

+61 3 8080 3631

+61 439 370 081

jandreacchio@tglaw.com.au



Michelle Lykiardopoulos

Special Counsel

+61 3 8080 3567

+61 410 778 698

mlykiardopoulos@tglaw.com.au

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