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ISSUE 23



## BANKING SECTOR NEWSLETTER

### Release of the Royal Commission's interim report into Misconduct in the Banking, Superannuation and Financial Services Industry

The Government has welcomed the interim report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and tabled it in Parliament.

<http://jaf.ministers.treasury.gov.au/media-release/018-2018/>

The interim report can be accessed on the [Royal Commission's webpage](#).

### IN THE MEDIA

#### Excessive' bank foreign transaction fees to be investigated by ACCC

Banks that charge fees for international credit card purchases and converting currencies will soon come under the microscope of the competition watchdog

<http://www.abc.net.au/news/2018-10-02/accc-to-investigate-foreign-transaction-fees/10327792>

#### ASIC: All managed discretionary account providers now required to be licensed

All managed discretionary account (MDA) providers must now have an Australian financial services (AFS) licence, with an MDA-specific 'dealing by issue' licence authorisation

<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-292mr-all-managed-discretionary-account-providers-now-required-to-be-licensed/>

#### ASIC releases guidance on code of ethics compliance schemes for financial advisers

ASIC has released guidance on its proposed approach to approving and overseeing compliance schemes for financial advisers. The financial advice professional standards reforms include obligations for financial advisers to, from 1 January 2020, comply with a code of ethics and be covered by an ASIC-approved compliance scheme

<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-290mr-asic-releases-guidance-on-code-of-ethics-compliance-schemes-for-financial-advisers/>

#### FSC: Consumers have a right to fair, honest and professional financial services

The culture of the financial services industry must be urgently transformed to ensure organisations put the best interests of consumers at the heart of what they do, the Financial Services Council (FSC) said following the release of the interim report of the Royal Commission into Banking and Financial Service

[https://www.fsc.org.au/\\_entity/annotation/75418239-e9c2-e811-8159-c4346bde3591](https://www.fsc.org.au/_entity/annotation/75418239-e9c2-e811-8159-c4346bde3591)

#### Government consults on stronger penalties for corporate and financial sector misconduct

The Coalition Government is committed to ensuring the ASIC has the powers it needs to take strong action to protect consumers from corporate and financial sector misconduct. Draft legislation to strengthen penalties for corporate and financial sector misconduct has been released by the Government for public consultation

<http://jaf.ministers.treasury.gov.au/media-release/016-2018/>

#### Australia strengthens international partnerships in the fight against financial crime

AUSTRAC and its U.S. counterpart, the Financial Crimes Enforcement Network (FinCEN), have recently strengthened their alliance in the fight against serious financial crime and terrorism financing

<http://www.austrac.gov.au/media/media-releases/australia-strengthens-international-partnerships-fight-against-financial-crime>

#### AICD welcomes steps towards stronger penalties for corporate and financial sector misconduct

The Australian Institute of Company Directors today welcomed draft legislation that would significantly strengthen penalties for corporate and financial sector wrong-doing by individuals and corporations

<https://aicd.companydirectors.com.au/media/media-releases/stronger-penalties-corporate-financial-sector-misconduct>

**ABA: ASIC review into breach reporting obligations**

The release of the ASIC report into compliance with breach reporting obligations shows that banks need to identify, report and fix issues more quickly to regain customer trust and ensure they comply with the law <https://www.ausbanking.org.au/media/media-releases/media-release-2018/asic-review-into-breach-reporting-obligations>

**ASIC review finds unacceptable delays by financial institutions in reporting, addressing and remediating significant breaches**

In a report recently released, ASIC has identified serious, unacceptable delays in the time taken to identify, report and correct significant breaches of the law among Australia's most important financial institutions <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-284mr-asic-review-finds-unacceptable-delays-by-financial-institutions-in-reporting-addressing-and-remediating-significant-breaches/>

**ASIC encourages submissions to the Council of Financial Regulators' Issues Paper on Retail Payments Regulation**

ASIC encourages interested stakeholders to view the CFR's Issues Paper and consider making a submission to the review. Submissions are due by 19 October 2018. A copy of the Issues Paper and details on how to make a submission can be found on the CFR website <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-283mr-asic-encourages-submissions-to-the-council-of-financial-regulators-issues-paper-on-retail-payments-regulation/>

**ASIC extends relief for foreign financial services providers**

ASIC has extended to 30 September 2019 licensing relief for foreign financial services providers (FFSPs) to allow them to provide financial services to Australian wholesale clients without needing to hold an Australian financial services licence <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-278mr-asic-extends-relief-for-foreign-financial-services-providers/>

**Financial firms must join AFCA now**

ASIC warns all Australian financial services licensees, Australian credit licensees, authorised credit representatives and superannuation trustees that they must join the Australian Financial Complaints Authority (AFCA) now if they have not already done so <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-275mr-financial-firms-must-join-afca-now/>

**COBA: Customer-owned banking sector outpaces major banks**

APRA's quarterly banking figures indicate that customers have faith in the customer-owned banking sector. APRA's latest numbers show that customer owned banking institutions outpaced the major banks and the broader banking sector in growth in housing loans and deposits on both an annual and quarterly basis <http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1305-customer-owned-banking-sector-outpaces-major-banks>

**Financial planners to sign statutory declarations under commonwealth legislation**

Financial planners and financial advisers have been granted status to sign statutory declarations under commonwealth legislation. The FPA secured recognition of financial planners and financial advisers as additional categories of people who are authorised to witness a Commonwealth statutory declaration, in the new Statutory Declarations Regulations 2018 <https://fpa.com.au/news/big-win-consumers-financial-planners-sign-statutory-declarations-commonwealth-legislation/>

**Passage of government's action to enhance ASIC's capabilities**

The *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018* successfully passed through the Parliament last night. ASIC will now have the ability to attract and retain the most appropriate people, to achieve its short and long-term priorities. The Bill also ensures that ASIC consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system <http://srr.ministers.treasury.gov.au/media-release/001-2018/>

**Record dispute number in final year of FOS**

The Financial Ombudsman Service (FOS) Australia received record dispute numbers in 2017-18, according to the Annual Review, published recently. The increase in 2017-18 was driven by growing dispute numbers in all categories, especially later in the year. <http://www.fos.org.au/news/media/record-dispute-number-in-final-year-of-fos/>

See the [FOS Annual Review](#).

**FASEA warned on over-complication**

One hundred and ninety-three of the Financial Planning Association's (FPA's) existing practitioner members hold foreign qualifications and the Financial Adviser Standards and Ethics Authority (FASEA) should not move to unduly complicate their status, according to the FPA <https://www.moneymanagement.com.au/news/financial-planning/fasea-warned-over-complication>

## IN PRACTICE AND COURTS

### [ASIC guidance on code of ethics compliance schemes for financial advisers](#)

The financial advice professional standards reforms include obligations for financial advisers to, from 1 January 2020, comply with a code of ethics and be covered by an ASIC-approved compliance scheme under which their compliance with the code of ethics will be monitored and enforced. RG 269 explains the process and criteria for determining whether to grant approval to compliance scheme

### [AUSPAYNET: Creating Consumer Data Right Standards Update](#)

The Consumer Data Right (CDR) is an economy-wide right to data, which will be rolled-out first in the banking sector on 1 July 2019. CSIRO's Data61 has been appointed by the federal government to lead the introduction of the CDR, as the Data Standards Body (DSB).

**Phase 2:** Running from October to December 2018, called V.1 Development, this phase will cover off the initial development of drafts and payloads that will be in scope for implementation by 1 July 2019. During this period, there will be several drafts released that will form part of the initial standards

### [RBA Bulletin: The new payments platform and fast settlement service](#)

A significant advance in the Australian payments system occurred in February 2018 with the public launch of the New Payments Platform (NPP). The initial adoption of the NPP has been gradual, reflecting the staged introduction of services by financial institutions, as well as the time taken for customers to assess and adjust to the new services being offered.

### [Reforms to strengthen penalties for corporate and financial sector misconduct - Draft legislation](#)

The Government is seeking public comment on draft legislation to strengthen penalties for corporate and financial sector misconduct. The proposed changes would double maximum imprisonment penalties and significantly increase financial penalties for some of the most serious 'white-collar' criminal offences. Submissions open today, 26 September 2018 and close on 23 October 2018

### [APRA Monthly Banking Statistics August 2018](#)

APRA releases Monthly Banking Statistics for August 2018

### [APRA: Council of Financial Regulators to review retail payments regulations](#)

The Council of Financial Regulators (CFR) has released an Issues Paper, Review of Retail Payments Regulation: Stored-value Facilities, for public consultation. The Issues Paper is part of a CFR review of the regulatory framework for stored-value facilities, such as purchased payment facilities

### **APRA: Testing resilience: The 2017 Banking Industry Stress Test: [Insight Issue 3 2018](#)**

Stress testing plays an important role for both banks and APRA in testing financial resilience and assessing prudential risks. This article provides an overview of APRA's approach to stress testing, with insights into how APRA developed the 2017 Authorised Deposit-taking Institution (ADI) Industry Stress Test.

### [CFR Issues Paper: Review of Retail Payment Regulation: Stored-value Facilities](#)

On 24 September 2018, the CFR released an [Issues Paper](#), for public consultation. The Issues Paper is part of a CFR review of the regulatory framework for stored-value facilities, such as purchased payment facilities. The review will also consider the operation of a number of other aspects of the regulation of retail payments service providers that may have the potential to be improved or clarified. The closing date for submissions is 19 October 2018

### **IFAC: Global Consultation: Identifying and Assessing the Risks of Material Misstatement**

*Proposed Changes to ISA 315 (Revised) to Advance Audit Quality*

The International Auditing and Assurance Standards Board (IAASB) seeks public comment by November 2, 2018 on [Exposure Draft, ISA 315 \(Revised\), Identifying and Assessing the Risks of Material Misstatement](#)

### **AASB Invitation to Comment**

[ITC 40 Financial Instruments with Characteristics of Equity](#) – The International Accounting Standards Board has recently published Discussion Paper DP/2018/1 *Financial Instruments with Characteristics of Equity*. Submissions to the IASB are due by 7 January 2019 [Read More](#)

### **ABA Newsletter**

[This edition](#) covers the release of the interim report of the Royal Commission into Financial Services, Insurance and Superannuation and ASIC review of breach reporting

**CASES**[Australian Securities and Investments Commission v AGM Markets Pty Ltd \(No 2\) \[2018\] FCA 1470](#)

CORPORATIONS – administrative process to cancel or suspend financial services licence – concurrent application for winding up – interference with administration of justice – unconscientious exercise of legal rights – anti-suit injunction – injunction application refused – temporary stay of court proceeding granted

Australian Securities and Investments Commission Act 2001 (Cth) ss 1(2), 51, 59; Corporations Act 2001 (Cth) ss 760A, 911A, 912A, 913B, 915C

[Hutchison and Australian Securities and Investments Commission \[2018\] AATA 3520](#)

FINANCIAL SERVICES AND FINANCIAL MARKETS – permanent banning order – whether power to make a banning order – financial services business – whether the Applicant engaged in dishonest conduct in relation to a particular financial product or financial service – whether the Applicant is of good fame or character – whether the Applicant is likely to contravene a financial services law – dishonesty was not in relation to a financial product or a financial service – decision under review is set aside

[Colefax & Ors v National Australia Bank Ltd \[2018\] QCA 244](#)

BANKRUPTCY – ADMINISTRATION OF PROPERTY – PROPERTY AVAILABLE FOR PAYMENT OF DEBTS – PROPERTY NOT DIVISIBLE AMONGST CREDITORS – PROPERTY HELD ON TRUST – GENERAL PRINCIPLES – where the first appellant executed mortgages over properties in his capacity as trustee of two trusts – where the mortgages were secured by guarantees and indemnities also executed by the first appellant as trustee of the trusts – where the first appellant was replaced by the second appellant as trustee of the trusts – where the first appellant was declared bankrupt upon his own debtor's petition – where the bank subsequently demanded payment – where the third appellant replaced the second appellant as trustee of Trust No 2 – where the respondent bank sought possession of the properties – whether the respondent bank had elected to abandon their security over the properties

[Gujarat NRE India Pty Ltd v Wollongong Coal Limited \[2018\] NSWSC 1459](#)

GUARANTEE AND INDEMNITY – Guarantor – Rights against debtor – Right of indemnity – Whether the plaintiff as a guarantor and third-party chargee should be indemnified by the defendant debtor in the amount of \$12,000,000 in respect of the liability of the defendant to a creditor

GUARANTEE AND INDEMNITY – Contract of guarantee – Deed – Construction GUARANTEE AND INDEMNITY – Contract of guarantee – Waiver – Debtor's rights to enforce waiver of indemnity

given by guarantor in general terms – permanent and irrevocable waiver – whether the plaintiff is disentitled from seeking indemnity from the defendant GUARANTEE AND INDEMNITY – Contract of guarantee – Contractual intention – Enforcement DEBT – Money had and received – GUARANTEE AND INDEMNITY – Contract of guarantee – Set-off EQUITY – General principles and maxims – Set-off – whether the defendant is entitled to set-off debts it owes to the plaintiff – the defendant is not entitled to set-off debts it owes to the plaintiff

[Turner v MyBudget Pty Limited \[2018\] FCA 1407](#)

CONTRACT – proper construction of interest provision in consumer contract – whether it authorises respondent to take and use interest earned on client funds for its own purposes – whether breach of trust or breach of fiduciary duty – held contract authorises respondent's actions and no breach

CONSUMER LAW – Australian Consumer Law s 24(1) – meaning of an unfair term – relevant considerations – whether a term is unfair if it authorised respondent to take and use interest earned on client funds for its own purposes – discussion of matters relevant to establish an unfair term including meaning of a "significant imbalance in the parties' rights and obligations arising under the contract" – held no unfair term

REPRESENTATIVE PROCEEDING – orders made under s 33ZB of Federal Court of Australia Act 1976 (Cth) binding group members who have not opted out. [Bank fees – Line of credit – loans]

[Permanent Custodians Ltd v Shannon \[No 2\] \[2018\] WASC 295](#)

Contract law - Mortgage contract - Default - Repayments not made in accordance with terms of agreement

General law - Unconscionable conduct - Whether defendants were in a position of weakness and vulnerability and accordingly under a special disability at the time of entering the contract

Statutory unconscionable conduct - Whether procuring mortgage and loan was unconscionable conduct in contravention of ASIC Act 2001 (Cth) s 12CB

Property law - Fraud - Whether mortgage is void pursuant to Transfer of Land Act 1983 (WA) s 214A

National Credit Code - Unjust transactions - Whether transaction should be reopened pursuant to s 76

Limitation periods - Valid cause of action - Whether various claims by the defendant are time barred

[Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd \(in liquidation\) \(receivers and managers appointed\) \[2018\] WASCA 163](#)

Corporations - Insolvency - Statutory set-off - Corporations Act 2001 (Cth) s 553C - Whether s 553C is an exclusive code regulating set-off in insolvency - Pari passu principle - Whether s 553C operated to the exclusion of any contractual

or equitable rights of set-off available in insolvency - Whether set-off rights preserved in insolvency by Personal Property Securities Act 2009 (Cth) (PPSA) s 80(1)

Transferee of an account - Whether PPSA s 80(1) applies to assignments by way of charge or only outright assignments

Floating charges - Equitable set-off - Crystallisation - General law - Circulating assets under PPSA - Control - Circulating security interests under Corporations Act ch 5

Personal Property Securities - PPSA - Where contractor has entered general security agreement with lender - Where lender has registered security agreement over contractor's personal property - Where contractor has gone into liquidation - Whether general security agreement effective according to its terms creating charge over claims to personal property - Whether attachment of a security interest destroys mutuality

Account under PPSA - Whether claim for wrongful call under guarantees provided by builder under building contract an 'account' Contract - Construction contract - Interpretation - contractual right of deduction

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Contract law - Enforceability of contract - Terms and conditions - Whether terms and conditions contained in separate document form part of the contract

Contract law - Agency - Whether intermediary between lender and borrower was an agent of the lender

Contract law - Whether assignment of rights, title and interest was effective

Contract law - Misrepresentation - Whether transaction is void or voidable as a result of misrepresentation

Misleading and deceptive conduct - Whether representations were misleading or deceptive under ASIC Act 2001 (Cth) s 12DA - Whether false or misleading representations made in contravention of National Credit Code s 124 and s 154 or Consumer Credit (Western Australia) Code s 144 and s 114

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## LEGISLATION

### Regulation

#### [ASIC Corporations \(Amendment\) Instrument 2018/807](#)

24/09/2018 - This instrument amends the ASIC Corporations (Repeal and Transitional) Instrument 2016/396, ASIC Corporations (Foreign Financial Services Providers - Limited Connection) Instrument 2017/182 and the ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109

#### [ASIC Corporations \(Group Purchasing Bodies\) Instrument 2018/751](#)

18/09/2018 - This instrument continues the effect of the relief in ASIC Class Order [CO 08/1] beyond the class order's sunset date and extends the relief to 'limited licensees'. A group purchasing body does not have to comply with subsection 911A(1) of the Act for the provision of the following financial services outlined here

#### [Statutory Declarations Regulations 2018](#)

17/09/2018 - These regulations set out the prescribed form for making a Commonwealth statutory declaration, list the occupations and persons before whom a Commonwealth statutory declaration can be made and repeal the Statutory Declarations Regulations 1993

#### [ASIC Credit \(Amendment\) Instrument 2018/836](#)

20/09/2018 - This instrument amends the ASIC Corporations and Credit (Transition to AFCA) Instrument 2018/814

#### [ASIC Corporations and Credit \(Transition to AFCA\) Instrument 2018/814](#)

20/09/2018 - This instrument provides transitional relief from the requirement for Australian financial services licensees (AFSL) and Australian credit licensees (ACL), corporate authorised representatives and unlicensed carried over instrument lenders to notify the Australian Securities and Investments Commission (ASIC) of their Australian Financial Complaints Authority (AFCA) membership details

## 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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**SYDNEY** | Level 25, 1 O'Connell Street | Sydney NSW 2000

**MELBOURNE** | Level 39, Rialto South Tower, 525 Collins Street | Melbourne VIC 3000

**BRISBANE** | Level 16, Waterfront Place, 1 Eagle Street | Brisbane QLD 4000

**ADELAIDE** | Level 7, 19 Gouger Street | Adelaide SA 5000

[www.tglaw.com.au](http://www.tglaw.com.au)

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