

4 DECEMBER 2018

ISSUE 27



## BANKING SECTOR NEWSLETTER

This edition covers a wide variety of issues including recent activities undertaken by the newly established AFCA, including the appointment of a dedicated small business lead ombudsman.

### IN THE MEDIA

#### AFCA announces dedicated small business ombudsman

The newly established Australian Financial Complaints Authority (AFCA) has announced it will appoint a dedicated small business lead ombudsman to resolve the financial disputes that small business have with their financial service providers.

<https://www.afca.org.au/news/media-releases/afca-announces-dedicated-small-business-ombudsman/>

#### Financial advisers urged to ensure registration by 31 December 2018

The Australian Securities and Investments Commission (ASIC) is reminding financial advisers, who are currently authorised, to make sure that they are on ASIC's Financial Advisers Register no later than 31 December 2018, before new professional standards requirements take effect

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-355mr-financial-advisers-urged-to-ensure-registration-by-31-december-2018/>

#### Former manager convicted of making false or misleading statements to ASIC in a licence application

Mr Andrew Law has been fined \$3,000 after he pleaded guilty to three counts of knowingly making false or misleading statements in documents submitted in support of an Australian Financial Services (AFS) licence application or involving his nomination as a responsible manager of an AFS licence

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-353mr-former-manager-convicted-of-making-false-or-misleading-statements-to-asic-in-a-licence-application/>

#### Dampier Finance Australia Limited convicted and fined \$240,000

Sydney-based company Dampier Finance Australia Limited, who holds an Australian Financial Services licence (AFSL), has been fined \$240,000 for failing to lodge its company annual reports and financial statements with ASIC

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-350mr-dampier-finance-australia-limited-convicted-and-fined-240-000/>

#### FSC begins consultation on FASEA standards blueprint

The Financial Services Council (FSC) has begun consulting with its members on the Financial Adviser Standards and Ethics Authority (FASEA) Standards Blueprint and the two draft legislative instruments

[https://www.fsc.org.au/\\_entity/annotation/8953c7c8-6bec-e811-8174-70106fa11a21](https://www.fsc.org.au/_entity/annotation/8953c7c8-6bec-e811-8174-70106fa11a21)

#### FASEA consultations

The Assistant Treasurer, the Hon Stuart Robert MP, welcomes the release of the details by the Financial Adviser Standards and Ethics Authority (FASEA) of its revised standards framework for financial advisers following stakeholder consultation

<http://srr.ministers.treasury.gov.au/media-release/033-2018/>

#### FASEA releases Standard Blueprint

FASEA issued a Summary of Standards for the professional standards framework for financial advisers on Friday 16 November 2018, as well as two draft legislative instruments. The Summary of Standards provides an overview of the key parameters for each of the Standards which will be reflected in the forthcoming legislative instruments and associated documentation

<https://www.fasea.gov.au/fasea-releases-standards-blueprint/>

**Strengthening competition in the financial system**

The Morrison Government continues to demonstrate its commitment to improving competition in the financial sector, with legislation relaxing the restriction on ownership of banks and insurers as well as introducing a new streamlined approval path under the *Financial Sector (Shareholdings) Act 1998 (FSSA)* passing Parliament <http://srr.ministers.treasury.gov.au/media-release/035-2018/>

**ASIC extends relief for non-cash payment facilities**

ASIC has amended ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 to remove an expiry date that would have seen the instrument cease operating in March 2019. ASIC originally provided this relief because it was apparent that the financial services regulatory regime was unintentionally broad in relation to these products <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-345mr-asic-extends-relief-for-non-cash-payment-facilities/>

**COBA: Grant Thornton report: rising fear over disproportionate costs of banking regulation for smaller lenders and the ultimate cost to competition and consumers**

An independent survey of Australian bank executives has found growing concern about the disproportionate cost of regulatory compliance as decision-makers try to rebuild public trust in response to the Hayne Royal Commission <http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1332-grant-thornton-report-rising-fear-over-disproportionate-cost-of-banking-regulation-for-smaller-lenders-and-the-ultimate-cost-to-competition-and-consumers>

**Banks have answered the call by customers in financial difficulty, but more will need to be done before 1 July 2019**

Australian banks have financial difficulty programs that, for the most part, meet the requirements under the 2013 Code of Banking Practice, according to inquiry findings released. The inquiry, *Assisting customers in financial difficulty (Part 1)*, was conducted by the independent Banking Code Compliance Monitoring Committee (CCMC) and included data from banks and the views of consumer advocates <https://www.ccmc.org.au/2018/11/15/media-release-banks-have-answered-the-call-by-customers-in-financial-difficulty-but-more-will-need-to-be-done-before-1-july-2019-to-be-ready-for-the-abas-new-and-enhanced-code/>

**AFCA announces dedicated small business ombudsman**

The newly established Australian Financial Complaints Authority (AFCA) has announced it will appoint a dedicated small business lead ombudsman to resolve financial disputes that small businesses have with their financial service providers <https://www.afca.org.au/news/media-releases/afca-announces-dedicated-small-business-ombudsman/>

**\$51.5 Million Boost to pursue Criminal Prosecutions for Financial Misconduct**

The Liberal National Government is providing an additional \$51.5 million to the Commonwealth Director of Public Prosecutions (CDPP) and the Federal Court of Australia to enable further prosecutions of criminal misconduct by banks and other financial institutions and to ensure civil claims are dealt with effectively and expeditiously <https://www.attorneygeneral.gov.au/Media/Pages/51-5-Million-Boost-to-pursue-Criminal-Prosecutions-for-Financial-Misconduct-16-November-2018.aspx>

**IASB proposes year-delay for IFRS 17**

The International Accounting Standards Board (IASB) has proposed to delay the implementation of IFRS 17 – a new international accounting standard for insurance contracts – by one year <https://www.insurancebusinessmag.com/au/news/breaking-news/iasb-proposes-year-delay-for-ifs-17-116276.asp>

**FPA Conduct Review Commission imposes \$50,000+ in fines on Sam Henderson**

The Financial Planning Association of Australia's (FPA) independent disciplinary body, the Conduct Review Commission (CRC), has imposed \$50,000 in fines plus costs on Sam Henderson for the nine proven breaches of the FPA's Code of Professional Practice <https://fpa.com.au/news/fpa-conduct-review-commission-imposes-50000-fines-sam-henderson/>

**FSC: Franking credit refunds benefit millions of Australian super fund members**

A survey of large super funds by the Financial Services Council (FSC) has found it is likely that the largest group of people benefiting from franking credit refunds are ordinary Australians who are members of large super funds [https://www.fsc.org.au/\\_entity/annotation/29c0d8e2-9be7-e811-815e-c4346bde3591](https://www.fsc.org.au/_entity/annotation/29c0d8e2-9be7-e811-815e-c4346bde3591)

**Senators support product design reform**

A Treasury bill that would overhaul the way financial products including insurance are sold has been backed by the Senate Economics Legislation Committee <http://www.insurancenews.com.au/regulatory-government/senators-support-product-design-reform>

**Life insurance industry begins rebuild with new consumer code**

A radical overhaul of the code governing the conduct and practices of Australian life Insurers which belong to the Financial Services Council (FSC) has been released for public consultation. The draft FSC Life Insurance Code of Practice is designed to lift standards in product design, sales, underwriting, customer service, complaints and claims handling [https://www.fsc.org.au/\\_entity/annotation/63f602e7-f3e5-e811-815e-c4346bde3591](https://www.fsc.org.au/_entity/annotation/63f602e7-f3e5-e811-815e-c4346bde3591)

## IN PRACTICE AND COURTS

### [AASB: Exposure Draft: Not-for-profit lessors may elect not to fair value 'peppercorn leases'](#)

ED 286 Amendments to Australian Accounting Standards – Right-of-Use Assets of Not-for-Profit Entities proposes a temporary option for not-for-profit lessees to elect to measure right-of-use assets at initial recognition at cost rather than at fair value for 'peppercorn leases'. The Exposure Draft is open for comment until 7 December 2018

### **AASB Roundtable Summary: stakeholders enhancing financial reporting and replacing SPFS**

The AASB ran for-profit entity focussed roundtables across the country to obtain feedback from stakeholders on its Phase 2 proposals in [ITC 39](#). Read the [roundtable summary](#) to find out what the AASB heard

### **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

### **FASEA Standards Blueprint**

The Financial Adviser Standards and Ethics Authority (FASEA) has released details of its revised standards framework for financial advisers following stakeholder Legislative instruments are progressively being released for each of the standards which will be available for consultation for varying periods up to four weeks. FASEA will then review feedback received and finalise the standards. The standards summary can be viewed [here](#).

### **FASEA Code of Ethics Legislative Instrument**

FASEA has released its legislative instrument for the Code of Ethics standard for consultation.

Under the standard, FASEA proposes the Code of Ethics addresses the values of Trust, Competence, Honesty, Fairness and Diligence. All advisers must act at all times, in all cases in a manner that is demonstrably consistent with the 12 standards which will be monitored by ASIC's approved code monitoring bodies. The legislative instrument and explanatory statement can be viewed [here](#). All feedback and submissions on the legislative instrument close on 19 December 2018

### **ABA Submissions**

14 November 2018 - [Submission to the Royal Commission Interim Report](#)

### [ASIC Consultation: Organisational competence requirements for advice licensees: Update to RG 105 \(CP 305\)](#)

The proposals in Consultation Paper 305 are based on the existing draft guidance published by the Financial Adviser Standards and Ethics Authority (FASEA). Submissions for CP 305 are due by 6 December 2018, with an updated RG 105 setting out the new organisational competence requirements for advice licensees expected to be released in early 2019

### **AFCA: time for licensees to update ASIC with their AFCA membership details**

AFCA members holding a financial services or credit licence must notify ASIC of their AFCA membership details by 30 November 2018. Credit licensees must also notify ASIC of the AFCA membership details of their authorised credit representatives who are AFCA members. Late fees will not apply if AFCA details are updated by 30 November. For AFCA members who were former FOS members, you should enter a commencement date of 1 May 2018

### **Update your details on the ASIC portal**

AFS licensee portal: <https://asic.gov.au/for-finance-professionals/afs-licensees/changing-details-and-lodging-afs-forms/afs-licensees-portal/>

Credit licensee portal: <https://asic.gov.au/for-finance-professionals/credit-licensees/changing-details-of-your-credit-licence/>

Credit representatives who sub-authorise other credit representative: <https://asic.gov.au/for-finance-professionals/credit-licensees/credit-representatives/>

### **Royal Commission Update**

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was established by the Government in December 2017, with the first of seven public hearings held in March 2018, and the final round held in November 2018

### **RBA: New Payments Platform: Consultation**

The RBA is seeing views from interested stakeholders about the functionality of, and access to, the New Payments Platform. The Australian Competition and Consumer Commission is providing input and assistance on access issues, and will participate in the consultation. The closing date for submissions is 30 November 2018. see: [New Payments Platform Functionality and Access: Consultation](#)

### [Regulatory framework for the protection of consumers in the banking, insurance and financial services sector](#)

Senate Economics References Committee, Parliament of Australia

This report focuses on a number of key issues in the current consumer protection system. The list of key issues is not intended to be comprehensive; rather, the report provides a 'snapshot' of concerns raised in evidence about consumer protections, or the lack thereof, in particular areas of the banking, insurance and financial services sector

### [Information about selected aspects of foreign financial services regulation: background paper 30](#)

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This technical paper, requested by the Royal Commission, examines aspects of the regulation of financial product and service providers in the United Kingdom, the Netherlands, New Zealand and the United States.

## CASES

### [Alford v Parliamentary Joint Committee on Corporations and Financial Services \[2018\] HCA 57](#)

Interlocutory order – Application for stay or injunction – Where Parliamentary Joint Committee conducting inquiry – Where plaintiffs directed to appear before Committee – Where plaintiffs sought to restrain Committee's exercise of power – Whether plaintiffs established prima facie case for relief – Whether balance of convenience favoured relief. Words and phrases – "compel", "joint committee", "parliamentary privileges". Constitution, ss 49, 50. Parliamentary Privileges Act 1987 (Cth), ss 3, 16.

### [Robert Angius v John Angius & Anor \[2018\] NSWSC 1172](#)

MORTGAGES AND SECURITIES – mortgages – duties, rights and remedies of mortgagee – sham mortgages – whether two mortgages entered into between parties liable to be set aside as sham mortgages EQUITY – general principles – unconscionable conduct – undue influence – whether mortgages should be set aside by way of doctrine of undue influence

### [Sox Holdings Pty Ltd v South East Developments \(Vic\) Pty Ltd and Anor \[2018\] VCC 1864](#)

CONTRACT – construction and interpretation – commercial contract – termination – ambiguity – surrounding circumstances – whether one transaction or two distinct transactions – entire agreement clause – related entities – implied good faith term – whether termination was in breach of an implied good faith term – penalty clause - Construction Bank Guarantees - Corporations Act 2001 (Cth)

### [Down Town Visuals v Panorama Investments \(No 3\) \[2018\] VSC 691](#)

COSTS – Interest on costs – Jurisdiction as to Costs – Discretion as to costs – Where parties seek determination on interest entitlement – Whether interest should run from the date invoices were paid – Whether claimant should be indemnified for costs under loan agreement – Supreme Court Act 1986 (Vic) s 101. This litigation arises out of the default of Mr Nicholas Sevdalis, who is now bankrupt, and associated entities in respect of a number of secured and unsecured loan agreements

### [Lopes v Taranto \[2018\] VSCA 288](#)

CONTRACT – Deed of loan stating amount 'lent or agreed to be lent' – Whether deed of loan acknowledged making of loan – Commercial purpose – Documents showing debtor accepted liability to repay creditor amounts lent to creditor by third parties and amounts lent to other parties by debtor – Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104; Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12; (2017) 91 ALJR 486; Eureka Operations Pty Ltd v Viva Energy Australia Ltd [2016] VSCA 95, applied.

CONTRACT – Guarantee – Guarantees securing amounts due under deed of loan – Estoppel by deed between lender and borrower – Borrower indebted under deed of loan – No privity between guarantors and debtor – Guarantors unable to claim deed of loan operated differently for purposes of guarantee – Labracon Pty Ltd v Cuturich [2013] NSWSC 97; (2013) 17 BPR 32,497; Begley v Attorney-General (NSW) [1910] HCA 69; (1910) 11 CLR 432, referred to.

PLEADINGS – Whether estoppel properly pleaded – Function of pleadings – Statements of issues – Estoppel argument canvassed during closing addresses – Applicants addressed estoppel issue in written submissions – Respondent eschewed estoppel by deed but argued deed of loan had same operation as against guarantors – Applicants alleged in supplementary closing submissions new case being run – No amendment sought – Banque Commerciale SA, en liquidation v Akhil Holdings Ltd (1990) 169 CLR 279, applied

## LEGISLATION

### Commonwealth

#### Regulations

### [ASIC Corporations \(Amendment\) Instrument 2018/1028](#)

12/11/2018 - This instrument amends ASIC Class Order [CO 13/763] to reinstate the exemptions previously granted to investor directed portfolio services (IDPS) operators from Division 8 of Part 7.8, and Part 7.9, in relation to a financial product that is an interest in a managed investment scheme arising out of participation in the IDPS.

### [ASIC Corporations \(Amendment\) Instrument 2018/752](#)

12/11/2018 - This instrument amends the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 to continue the effect of the relief by removing the provision for a three-year cessation date in section 3.

### Bills Progress

#### [Treasury Laws Amendment \(Financial Sector Regulation\) Bill 2018](#)

Amends the: Financial Sector (Shareholdings) Act 1998 to: increase from 15 per cent to 20 per cent the ownership restriction applying to life insurance and general insurance companies, authorised deposit-taking institutions (ADIs) and relevant holding companies; and create a streamlined path for owners of qualifying domestically incorporated companies with assets less than the relevant threshold applying to become a financial sector company; and Banking Act 1959 to: enable the Australian Prudential Regulation Authority to grant a new entrant to the banking sector a time limited ADI licence; and correct a drafting error. Finally passed both Houses 15 November 2018

### Government Bills

The Government has scheduled bills for debate this week as follows:

29/11/2018 - [Treasury Laws Amendment \(Strengthening Corporate and Financial Sector Penalties\) Bill 2018](#)

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