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ISSUE 36



## BANKING SECTOR NEWSLETTER

### ARITA: Draft Taxation Determination TD 2019/D2

The ATO released a [draft taxation determination](#) (draft TD) setting out a receiver's obligation to retain money for post appointment tax liabilities under section 254 of the Income Tax Assessment Act 1936. The draft TD provides that when income, profits or gains of a capital nature are derived by an entity through the actions of a receiver acting as the entity's agent, the receiver must retain enough money to pay the tax that has been assessed on the income, profits or gains.

[https://www.arita.com.au/ARITA/News/Submissions/Draft\\_Taxation\\_Determination\\_TD\\_2019\\_D2.aspx](https://www.arita.com.au/ARITA/News/Submissions/Draft_Taxation_Determination_TD_2019_D2.aspx)

### IN THE MEDIA

#### Incorrect dual authorisation of 58 AFS licence holders rectified

Fifty-eight Australian finance services (AFS) licensees, who were in breach of the law because they were also authorised representatives. An AFS licensee cannot be the authorised representative of another AFS licensee, unless they are a general insurance underwriting agent or broker operating under a binder given by an insurer.

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-111mr-incorrect-dual-authorisation-of-58-afs-licence-holders-rectified/>

#### Customer Advocates Post-Implementation Review

Deloitte have released their report outlining observations and recommendations from the Post-Implementation Review of the ABA's Customer Advocate Initiative

<https://www.ausbanking.org.au/wp-content/uploads/2019/05/Customer-Advocate-Post-Implementation-Review.pdf>

#### Regulators urge financial institutions to plan for LIBOR transition

The ASIC has written to the CEOs of several major Australian financial institutions regarding their preparations for the end of LIBOR. This initiative is strongly supported by the APRA and the Reserve Bank of Australia (RBA)

<https://www.apra.gov.au/media-centre/media-releases/regulators-urge-financial-institutions-plan-libor-transition>

#### Do industry funds now have an advice advantage?

On the back of the Association of Financial Advisers' (AFA's) strong rebuttal of Industry Super Australia (ISA) calls for a rapid end to all grandfathered commissions, some advisers are warning that salaried industry fund advisers now have a significant advantage

<https://www.moneymanagement.com.au/news/financial-planning/do-industry-funds-now-have-advice-advantage>

#### Backdown on banning conflicted financial advice will leave consumers exposed

Thousands of consumers of financial products, including superannuation, will remain exposed to conflicted financial advice if proposed regulations on grandfathered conflicted remuneration get the green light, the Australian Institute of Superannuation Trustees has warned

[http://www.aist.asn.au/media/1298489/29\\_04\\_2019\\_aistmedia\\_grandfathered\\_commissions\\_leave\\_consumers\\_exposed\\_002.pdf](http://www.aist.asn.au/media/1298489/29_04_2019_aistmedia_grandfathered_commissions_leave_consumers_exposed_002.pdf)

### IN PRACTICE AND COURTS

#### AFSA: Tips for sending an amendment demand

Last year ASFA released a revised version of the 'Personal Property Securities Registrar Practice Statement 4 - Amendment Demand Process' which is shorter, simpler and uses plain English. To complement this ASFA have now released 'Registrar's Practice Statement 41 - Tips for sending an Amendment Demand'. This provides seven key tips on dispute a registration; how to send a valid amendment demand and what you can do to help achieve a quick resolution. See the Practice statement [here](#).

**AASB: Exposure Draft: Interest Rate Benchmark Reform**

ED288 *Interest Rate Benchmark Reform* proposes to amend AASB 9 *Financial Instruments* and AASB 139 *Financial Instruments: Recognition and Measurement*, to provide relief from specific hedge accounting requirements that could have resulted in the discontinuation of hedge accounting due solely to the uncertainty arising from interest rate benchmark reform. Please submit your comments to the AASB by 31 May 2019

[https://www.aasb.gov.au/admin/file/content105/c9/ACCED288\\_05-19.pdf](https://www.aasb.gov.au/admin/file/content105/c9/ACCED288_05-19.pdf)

**AASB-AUASB Climate-related risks disclosure update**

The AASB and AUASB have released the latest version of [Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB Practice Statement 2](#). This research paper, originally published in December 2018, contains several updates and guides directors, preparers and auditors when preparing and auditing financial statements. Even though the guidance is not mandatory, it represents the IASB's best practice interpretation of materiality.

**[RBA: Statement by Philip Lowe, Governor: Monetary Policy Decision](#)**

7 May 2019 - At its meeting, the Board decided to leave the cash rate unchanged at 1.50 percent

**[FPA Pronup campaign for Certified Financial Planner](#)**

The FPA of Australia has conceived a new way for CERTIFIED FINANCIAL PLANNER professionals to help beat the disheartening statistic and inspire more Australians to seek their services by introducing the concept of a Pronuptial Agreement (or "Pronup" for short)

**ABA Submissions**

10 May 2019 - [ACCC Draft Consumer Data Rules](#)

The ACCC's draft Rules provide a good foundation for the implementation of open banking, however there are a number of areas that have not been addressed in the draft Rules or which require further guidance.

**[ACSI: Towards Better Corporate Accountability](#)**

This policy lists tangible proposals designed to strengthen corporate accountability. Improving corporate accountability will drive better outcomes for companies, investors and the Australian community more broadly

**[Australian Law Reform Commission \(ALRC\): Review into Australia's corporate criminal responsibility regime](#)**

*Note: Scope of the reference* -The reports which the ALRC should consider should include but not be limited to the: 2019 Final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; and 2017 report of the ASIC Enforcement Review Taskforce. The ALRC should provide its report to the Attorney-General by 30 April 2020

**APRA Consultation: The Financial Sector (Shareholdings) Rules 2019 (the Rules)**

In particular, APRA has proposed Rules setting out the matters that must be considered in determining if a person is "fit and proper" for the purposes of the FSSA. The consultation period on the proposed Rules has now commenced, with APRA accepting submissions until 27 May 2019. Copies of the draft Rules and explanatory material are available [here](#).

**ASFA Reminder: Recovering your unclaimed money**

From the 27th June 2019 applications for unclaimed monies under s254 of the Bankruptcy Act can be made directly to the Australian Financial Security Authority (ASFA) replacing the current Court application process. An application form and further information about the new process will be published closer to the commencement date.

<https://www.afsa.gov.au/about-us/newsroom/recovering-your-unclaimed-money>

**IFAC: Global Consultation on Quality Management for Firms and Engagements now open**

The International Auditing and Assurance Standards Board (IAASB) seeks public comment by July 1, 2019 on [three interrelated standards that address quality management](#). The proposals bring important changes to the way professional accountancy firms are expected to manage quality - for audits, reviews, and other assurance and related services engagements

**[RBA: Consultation on ISO 20022 Migration for the Australian Payments System](#)**

The Reserve Bank and the Australian Payments Council (APC) has issued a [consultation paper](#) seeking stakeholder views on the migration of messaging used in some parts of the Australian payments system to the International Organisation for Standardisation (ISO) 20022 payments messaging standard. Submissions close on 31 May 2019.

**ASIC Consultation: Responsible Lending Guidance**

ASIC has issued a consultation paper to update its guidance on responsible lending ([CP 309](#)).

ASIC wants to ensure its guidance provides industry with certainty, including as a result of emerging technology and initiatives such as open banking and comprehensive credit reporting. ASIC is currently welcoming submissions for interested parties. The consultation is open for a period of three months, with comments due by 20 May 2019

**FSC Submissions**

09 May 2019 - [FSC Submission - Enforceability of Financial Services Industry Codes 12 April 2019](#)

09 May 2019 - [FSC- Ending Grandfathered Conflicted Rem for Financial Advisers 22nd March 2019](#)

**Current Inquiries - Economics Legislation Committee**  
[Banking System Reform \(Separation of Banks\) Bill 2019](#)  
Reporting Date: 13 May 2019

## CASES

### [ASIC v Berndale Capital Securities Pty Ltd \[2019\] FCA 595](#)

CORPORATIONS – appointment of receiver and manager – where court previously made asset freezing and disclosure orders – whether existing asset freezing and disclosure orders sufficient to protect interests of company's creditors

Between 16 August 2005 and 22 November 2018, Berndale was the holder of an Australian financial services licence (AFSL) 290108 which, among other things, allowed Berndale to provide general financial product advice and deal and make a market in derivatives and foreign exchange products

### [Capital Securities XVII Pty Ltd v Yusofzai \[2019\] NSWSC 468](#)

Summary judgment for the plaintiff for possession of the mortgaged land.

MORTGAGES AND SECURITIES – mortgages – duties, rights and remedies of mortgagee – possession – land already encumbered by mortgage to secure prior debt – no triable issue raised that may deny plaintiff judgment for possession

CONTRACTS – unjust contracts – under statute – s 7(1)(b) Contracts Review Act – whether guarantors to mortgage correctly understood transaction – no special disadvantage proved on facts – no unjust or unconscionable advantage

### [Charub Pty Ltd v Triandafyllou \[2019\] NSWSC 487](#)

LAND LAW – possession of land – application for summary judgment – mortgage given by the defendants as guarantors of a loan agreement – default of loan and mortgage obligations by defendants - whether defendants entitled to redeem the mortgage – whether an intention to sell the property is an offer of redemption – assignment of mortgage – no notice of assignment given – transfer of mortgage registered – no notice of assignment necessary to perfect assignment – ss 51 and 52 Real Property Act – whether a requirement of plaintiff to plead service of s 57(2)(b) notice – whether summary judgment should be granted – defendants' defences disclose no defence to the claim for possession – summary judgment given

### [Australian Securities and Investments Commission v Goldsky Global Access Fund Pty Ltd & Ors \[2019\] QSC 114](#)

CORPORATIONS – FINANCIAL SERVICES – FINANCIAL SERVICES PROVIDERS – LICENCE: WHEN REQUIRED – where s 911A of the Corporations Act 2001 (Cth) requires a person to hold an Australian financial services licence (AFSL) if a person carries on a financial services business in this jurisdiction – where a company incorporated in the United States of America, of which the fourth respondent was managing director,

applied to the applicant for class order relief from the requirement to hold an AFSL – where the applicant accepted the fourth respondent's reliance on class order relief – where the first, second and third respondents, which were also controlled by the fourth respondent, each operated a bank account – where third parties deposited funds into the first, second and third respondent's bank accounts – where none of the first, second and third respondents held an AFSL – where the fourth respondent was subsequently the subject of an investigation by the United States Securities and Exchange Commission – where the fourth respondent initially did not notify the applicant of the investigation – whether the first, second and third respondents carried on a financial services business – whether the first, second and third respondents were exempted from holding an AFSL

PROCEDURE – DECLARATIONS – APPROPRIATE FORM OF RELIEF - DISCRETION OF COURT – OTHER CASES – where the applicant requests the Court to make declarations that the first, second and third respondent have contravened s 911A of the Corporations Act 2001 (Cth) – whether it is an appropriate exercise of the Court's discretion to make the declarations sought by the applicant. Australian Securities and Investments Commission Act 2001 Cth s 30; Corporations Act 2001 Cth s 9, s 21, s 761A, s 761C, s 763A, s 766A, s 766E, s 910A, s 911A

### [Karam v Varga \[2019\] QCA 82](#)

Appeal dismissed. Cross-appeal dismissed.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the appellant was loaned money by the respondent through entry into two transactions – where the transactions were characterised by the appellant as the Secured Loan Agreement and the replacement further agreement – where the transactions were characterised by the respondent as the Secured Loan Agreement and the variation to the Secured Loan Agreement – where the principal amount and a component of the interest owing was never repaid – where the respondent commenced proceedings against the appellant seeking recovery of the principal amount and the accrued interest – where the learned trial judge gave judgment for the respondent – where the learned trial judge found the terms of the two agreements were not inconsistent and could be performed together – whether the evidence showed either an express or implied intention to terminate the Secured Loan Agreement – whether the learned trial judge erred in failing to find that the second transaction replaced the Secured Loan Agreement

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS

CONTRACTS AND OTHER MATTERS – where the appellant (in her personal capacity or alternatively in her capacity as co-director of Waves Medical Pty Ltd) was loaned money by the respondent through entry into two transactions – where the appellant personally guaranteed the first, but not the second, transaction – where the guarantee did not contain an “all monies” clause – where the transactions were characterised by the appellant as the Secured Loan Agreement and the replacement further agreement – where the transactions were characterised by the respondent as the Secured Loan Agreement and the variation to the Secured Loan Agreement – where the principal amount and a component of the interest owing was never repaid – where the respondent commenced proceedings against the appellant seeking recovery of the principal amount and the accrued interest – where the learned trial judge found for the respondent holding that the terms of the two agreements were not inconsistent and could be performed together – where the learned trial judge found the guarantee contained in the Secured Loan Agreement applied only in respect of the first, and not the second, transaction – where the respondent cross-appeals the learned trial judge’s finding in respect of the guarantee – whether the guarantee in the Secured Loan Agreement extends to the second transaction

[Allen v G Developments Pty Ltd & Ors \[2019\] QSC 107](#)

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTEREST – AGREEMENTS TO PAY INTEREST – RECOVERABILITY OF INTEREST – where the plaintiff, as a trustee, agreed to lend the first defendant a principal sum of \$1 million pursuant to a deed of loan, for the purpose of funding the acquisition of land for a development project – where by the deed of loan the first defendant covenanted to repay the principal sum plus interest at the rate of 25 per cent per annum within one year – where no repayments were made prior to the commencement of proceedings, more than five years after the loan debt was due – where the plaintiff contends that the deed of loan bound the first defendant to pay interest at the rate of 25 per cent per annum on the outstanding loan amount, comprising the principal sum and accrued interest, until all monies were repaid – whether, on its proper construction, the deed of loan provided for the payment of interest at the rate of 25 per cent per annum on the outstanding amount beyond the end of the one year term – whether, in the alternative, interest should be awarded on the outstanding balance from time to time pursuant to s 58(3) of the Civil Proceedings Act 2011 (Qld) and, if so, the date from which it should be awarded

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – DISCHARGE,

BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – EQUITY – EQUITABLE REMEDIES – where the plaintiff as trustee, the first defendant and the defendants by counterclaim, as unitholders in the unit trust, discussed an arrangement whereby each unitholder would receive two lots in the completed development in exchange for the plaintiff’s release of the outstanding loan debt and interest owed by the first defendant to the plaintiff – where a special condition drafted for each sale contract stated that the deposit and balance purchase price were deemed to be paid in full by application of the loan funds – where clause 2.1 of the special condition stated that the condition would only apply if eight sale contracts were executed and completed simultaneously and a deed of release was fully executed in respect of the deed of loan – where only seven of the eight sale contracts were executed, none of the contracts completed and the deed of release was not fully executed – where the first defendant demanded payment of the deposit amount for each contract – where, upon failure to pay the deposit, the first defendant purported to terminate the contracts – where the defendants by counterclaim accepted the first defendant’s purported termination as repudiatory and purported to terminate the contracts – whether, on the proper construction of the special condition, the first defendant was entitled to demand payment of the deposit and whether the unpaid deposits and associated monies are recoverable by the first defendant from the defendants by counterclaim – alternatively, whether the first defendant’s conduct was repudiatory and whether the termination by the defendants by counterclaim was lawful – where the third, fourth and fifth defendants by counterclaim seek rectification of the sale contracts or alternative declaratory or equitable relief – whether there is any utility in granting such relief

Civil Proceedings Act 2011 (Qld), s 58(3)

[Xu v Wang \[2019\] VSC 269](#)

RECOGNITION OF FOREIGN JUDGMENT – Concurrent proceedings in Australia and the People’s Republic of China – Plaintiff obtained judgment in a court in the People’s Republic of China without notifying defendant or this Court – Whether plaintiff entitled to recognition of judgment obtained in secret – Whether defendant submitted to the foreign jurisdiction – Whether foreign judgment obtained by fraud – Whether defendant denied natural justice – Whether an abuse of process – Evidence Act 2008 (Vic) s 174 considered

CHEQUES ACT 1986 (CTH) – Dishonoured cheque in purported repayment of loan – Loan monies advanced by contra agreement – Whether total or partial failure of consideration – Cheques Act 1986 (Cth) ss 35, 36, 71, 76 considered

BREACH OF CONTRACT – Personal loan from plaintiff to defendant – Loan monies advanced by contra agreement – Consideration – Whether total failure of consideration.

MISLEADING OR DECEPTIVE CONDUCT – Representations made to defendant about performance and profitability of business – Representations made to defendant about plaintiff's involvement in business – Representations made to defendant about defendant's involvement in business – Whether misleading or deceptive – Whether statements in the ordinary course of business – Whether statements of opinion – Whether statements as to future matters – Whether representations attributable to plaintiff – Whether representations caused defendant to invest in business – Competition and Consumer Act 2010 (Cth) Sch 2, ss 4, 18; Australian Consumer Law and Fair Trading Act 2012 (Vic) s 8 considered

## LEGISLATION

### Commonwealth

#### Act Compilation

#### [Financial Sector \(Transfer and Restructure\) Act 1999](#)

03/05/2019 - Act No. 45 of 1999 - An Act to provide for transfers of business between some kinds of financial institutions, to provide for transfers of shares and other interests in some kinds of financial institutions, and to make provision in relation to internal restructures within some groups of financial institutions

## Regulation

#### [Banking, Insurance, Life Insurance and Health Insurance \(prudential standard\) determination No. 1 of 2019](#)

07/05/2019 - The key requirements of this Prudential Standard are that an APRA-regulated institution and a Head of a group must: maintain a risk management framework that is appropriate to the size, business mix and complexity of the institution or group, as relevant; maintain a Board-approved risk appetite statement; risk management and a Board-approved business plan

#### [Federal Court Amendment \(Court Administration and Other Measures\) Rules 2019](#)

01/05/2019 - The Judges have agreed to amend the FCR 2011 by: 7. amending Division 33.3, consequential to changes made by the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018, in replacing the Superannuation Complaints Tribunal with the Australian Financial Complaints Authority

#### [Banking, Insurance, Life Insurance and Health Insurance \(prudential standard\) determination No. 2 of 2019](#)

30/05/2019 - It's objective is to ensure that an institution and group is managed soundly and prudently by a competent Board (or equivalent), which can make reasonable and impartial business judgements in the best interests of the institution and group and which duly considers the impact of its decisions on depositors and/or policyholders

## THIS EDITION'S EDITORS



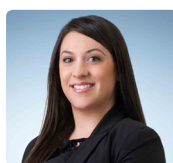
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