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## BANKING SECTOR NEWSLETTER

### IN THE MEDIA

#### **ABA: The new rule book for banks goes live**

Australia's banks will comply with a strong new code of practice that significantly increases and enshrines customer protections and introduces tough new penalties for breaches from 01 July 2019. The ASIC-approved Banking Code of Practice represents the most significant increase to customer protections under a code in the industry's history. <https://www.ausbanking.org.au/the-new-rule-book-for-banks-goes-live-tomorrow/>

#### **APRA finalises amendments to guidance on residential mortgage lending**

APRA has announced that it will proceed with the proposed changes to its guidance on the serviceability assessments that authorised deposit-taking institutions (ADIs) perform on residential mortgage applications. Previously, common industry practice has been to assess home loan applications using a minimum interest rate of approximately 7.25 percent. ADIs will now be able to review and set their own minimum interest rate floor for use in serviceability assessments and utilise a revised interest rate buffer of at least 2.5 per cent over the loan's interest rate. These changes take effect immediately. <https://www.apra.gov.au/media-centre/media-releases/apra-finalises-amendments-guidance-residential-mortgage-lending>

#### **ASIC cancels AFS licence of Australasia Wealth Services and Management**

ASIC has cancelled the Australian financial services (AFS) licence of Sydney-based financial services provider Australasia Wealth Services and Management Pty Ltd (AWSM) as of 4 June 2019. AWSM breached its financial reporting and audit obligations, as well as the requirement to obtain membership of the Australian Financial Complaints Authority (AFCA). <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-173mr-asic-cancels-afs-licence-of-australasia-wealth-services-and-management/>

#### **ASIC takes action against Linchpin Capital Group and Endeavour Securities (Australia)**

ASIC has commenced proceedings in the Federal Court of Australia against Linchpin Capital Group Ltd (Linchpin) and Endeavour Securities (Australia) Ltd (Endeavour). Linchpin and Endeavour operate two managed investment schemes. Endeavour has entered into related party transactions in contravention of the Corporations Act. <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-197mr-asic-takes-action-against-linchpin-capital-group-and-endeavour-securities-australia/>

#### **Data Standards Body welcomes initial live use of banking Product Reference Data standards**

The Federal Government's Consumer Data Right (CDR) regime, which will give Australians greater control over their own data, is one step closer with the API-based publication of banking Product Reference Data on 1 July 2019, developed using CDR standards. <https://www.csiro.au/en/News/News-releases/2019/Data-Standards-Body-welcomes-initial-live-use-of-banking-Product-Reference-Data-standards>

#### **'Open banking' era dawns in Australia**

Australian's major banks now have to starting giving customers greater access to their own data, in what one analyst says will eventually be a "seismic shift in retail banking" (30 June 2019) <https://www.sbs.com.au/news/open-banking-era-dawns-in-australia>

#### **Bank opens doors on privacy**

The Office of the Australian Information Commissioner (OAIC) has accepted an enforceable undertaking from the Commonwealth Bank of Australia (CBA) that it will improve its privacy practices. The bank's enforceable undertaking will be overseen by an independent external reviewer who will consult with and report to the OAIC on the CBA's compliance. <https://psnews.com.au/2019/07/01/bank-opens-doors-on-privacy/>

## IN PRACTICE AND COURTS

### [ASIC provides new guidance for certain AFS licence applications](#)

ASIC has released Information Sheet 240 AFS licensing – Requirements for certain applicants to provide further information ([INFO 240](#)) to provide guidance to applicants on recent changes to ASIC's Australian financial services (AFS) licensing assessment procedures.

### [ASIC consultation: relief for foreign providers of funds management services to Australian professional investors](#)

Consultation Paper 315 Foreign financial services providers: Further consultation ([CP 315](#)) proposes to provide licensing relief for foreign financial services providers of funds management services in Australia to professional investors. (03 July 2019)

### [ABA Newsletter](#)

Issue, 02 July 2019 - The new Banking Code of practice commenced on 1 July 2019. Find out more about the benefits of the new Code here: [www.ausbanking.org.au/code](http://www.ausbanking.org.au/code)

### [APRA grants new foreign authorised deposit-taking institution licence to Investec Bank Plc](#)

The Australian Prudential Regulation Authority (APRA) has granted Investec Bank Plc a licence to operate as a foreign authorised deposit-taking institution (Foreign-ADI) under the Banking Act 1959. An updated list of all APRA-authorised ADIs can be found on the APRA website [here](#). (01 July 2019)

### [FASEA approves education credits for AFA and SMSFA coursework](#)

The Standards Authority has today confirmed the recognition of coursework from the Association of Financial Advisers (AFA) and Self-Managed Super Fund Association (SMSFA) as part of its education standards for financial advisers. FASEA is continuing to assess coursework to attain Professional Designation applications that have been received from Professional Associations. The full list of approved courses can be found on the FASEA website. (27 June 2019)

### [FASEA releases online Education feedback services](#)

The Corporations Act 2001 requires all advisers to complete a bachelor or higher degree, or equivalent qualification, approved by FASEA. A released online tool to give new entrants and existing advisers within Australia feedback on their required education pathway ([link](#)). The Education Pathways Tool and the Australian feedback Service is for Australian qualifications and courses. For Foreign Qualification assessment, please refer to the Foreign Qualification Assessment Service ([link](#)). (27 June 2019)

## CASES

### [Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth \[2019\] HCA 20](#)

This highly anticipated case addressed the unresolved question regarding whether or not section 433 of the Corporations Act 2001 (Cth), which obliges a receiver to pay certain unsecured employee creditors in priority to secured creditors out of circulating assets, apply to trust asset proceeds in the winding up of an insolvent corporate trustee? This was a significant issue given the number of trading trusts in Australia and the material advantages given to priority employee creditors by the Corporations Act.

The High Court has held that section 433 of the Corporations Act does apply to the distribution of trust property in the winding up of an insolvent corporate trustee, but the extent of its application depends on the nature of the trustees' right exercised.

Corporations – External administration – Receivers and other controllers of property – Priority debts – Where corporation carrying on business solely as trustee created circulating security interest over trust assets in favour of bank – Where receivers and managers appointed by bank realised trust assets and satisfied obligations to bank – Whether surplus proceeds required to be paid in accordance with Corporations Act 2001 (Cth), s 433 – Whether corporation's right of indemnity is property of the company "comprised in or subject to a circulating security interest" within meaning of s 433 – Whether trust assets themselves are such "property of the company" – Whether statutory order of priorities for payment of debts applicable to distribution of surplus proceeds from trust assets among trust creditors – Whether proceeds from exercise of insolvent corporate trustee's right of exoneration to be applied only in satisfaction of trust liabilities to which it relates. Words and phrases – "beneficial interest", "circulating asset", "circulating security interest", "floating charge", "insolvent corporate trustee", "payment of creditors out of property", "power of exoneration", "PPSA security interest", "priority payments", "property", "property comprised in or subject to a circulating security interest", "property held by the bankrupt on trust", "property of the company", "right of exoneration", "right of indemnity", Corporations Act 2001 (Cth), ss 9, 51, 51C, 433, 555, 556, 560; Personal Property Securities Act 2009 (Cth), ss 10, 12, 340

### [Ms Amy Leigh Ferguson \(nee Thomson\) Kevin Robert Ferguson Jennifer Margaret Thomson v Kimberley College Ltd T/A Kimberley College \[2019\] FWC 4186](#)

Act 2009 s.394 - Application for unfair dismissal remedy Application for an unfair dismissal remedy – Three separate applications for unfair dismissal remedy heard together – Serious allegations involving a wide range of fraudulent financial transactions – Alleged breaches of duty under Corporations Act and Australian Education Act - Failure to remit SGC payments resulting

in Director Penalty Notices – Failure to assess, record and lodge FBT returns – Valid Reason for termination – Applications dismissed.

[Australia and New Zealand Banking Group Limited v James \(No 3\) \[2019\] NSWSC 832](#)

JUDGMENTS AND ORDERS – Amending, varying and setting aside – Fraud, misrepresentation or suppressions of material fact – whether to set aside judgment by consent – whether misleading and deceptive conduct by plaintiff – discretionary considerations – whether defendant has arguable defence – delay – whether delay in advancing case of misleading and deceptive conduct disentitles defendant to relief.

MISLEADING AND DECEPTIVE CONDUCT – Australian Consumer Law – silence – whether reasonable expectation of being informed of information concerning activities of receivers – whether disclosure required by terms of guarantee – whether reasonable expectation of disclosure of other matters – reliance – whether defendant relied on absence of that information – whether knowledge of that information would have led defendant to not accept judgment by consent.

CORPORATIONS – Receivers and managers – duties – s 420A of Corporations Act 2001 (Cth) – whether arguable defence based on this provision – scope and function of s 420A – rights of guarantors – standard imposed on receivers – exclusion by contract.

[ARWON FINANCE PTY LTD -v- WILSON \[2019\] WASC 244](#)

Loan - Recovery action - Promissory estoppel - Defence - Evaluation of estoppel requirements - Assumption held regarding recovery and recourse to security by foreclosure - Express terms of loan agreement - Insider's corporate knowledge of recovery policy used to found assumption by ex-director and senior administrator - Failure to establish representation or reliance on assumption - No position of detriment established. Corporations Act 2001 (Cth)

[‘QP’ and the Commonwealth Bank of Australia Limited \(Privacy\) \[2019\] AICmr 48](#)

Privacy – Privacy Act 1988 (Cth) – Australian Privacy Principles – APP 10 Quality of personal information disclosed – Breach of APP 10.2 – Compensation awarded – Non-economic loss – Aggravated

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