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BANKING SECTOR NEWSLETTER

IN THE MEDIA

ASIC to 'review' Federal Court's HEM verdict

The Federal Court has ruled in favour of Westpac in a responsible lending "test case" against the corporate regulator. Federal Court Justice Nye Perram has dismissed the Australian Securities and Investments Commission's case against Westpac regarding alleged breaches of responsible lending obligations in its issuance of home loans through the use of the Household Expenditure Measure (HEM) benchmark. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-210mr-asic-s-responsible-lending-case-dismissed-by-federal-court/>

Strict serviceability rules 'lead to poor customer outcomes'

The head of the Australian Banking Association has said that "really strict" serviceability assessments have resulted in poor customer outcomes. <https://www.mortgagebusiness.com.au/breaking-news/13715-strict-serviceability-rules-lead-to-poor-customer-outcomes>

HEM decision to 'open can of worms' in mortgage space

The Federal Court's decision to dismiss ASIC's responsible lending case against Westpac could lead to an overhaul of credit practices the mortgage industry, according to one analyst. <https://www.mortgagebusiness.com.au/breaking-news/13718-hem-decision-to-open-can-of-worms-in-mortgage-space>

More than half of us have lost money due to financial services misconduct: study

The most common problems cited in the survey are "inappropriate but not illegal" issues such as high fees, being offered credit cards or increases to credit limits when not requested, poor or misleading information and being charged for services that were never received. [https://www.abc.net.au/news/2019-08-19/customers-may-have-lost-\\$201b-due-to-financial-misconduct/11422376](https://www.abc.net.au/news/2019-08-19/customers-may-have-lost-$201b-due-to-financial-misconduct/11422376)

Code Monitoring Australia submits proposal to ASIC

The FPA and a consortium of five other professional associations have filed a formal submission with the Australian Securities and Investments Commission (ASIC) on behalf of Code Monitoring Australia Pty Ltd (CMA) to advance a profession-wide solution to the monitoring of the FASEA Code of Ethics. <https://fpa.com.au/news/code-monitoring-australia-submits-proposal-to-asic/>

The public's tolerance is exhausted': Frydenberg announces timetable for banking sector shake-up

The Federal Government releases a timeframe for implementing 54 recommendations from the financial services royal commission, spurred into action by criticism about a sluggish response. <https://www.abc.net.au/news/2019-08-18/banking-royal-commission-recommendations-implemented-by-2020/11425910>

ABA: Economy-wide Cash Payment Limit

The Australian Banking Association (ABA) supports the Government's introduction of an economy-wide cash payment limit to businesses for goods and services. Having a taxation system that is robust and one that meets community expectations is vital and we recognise the importance of this initiative to the integrity of our tax system. <https://www.ausbanking.org.au/submission/economy-wide-cash-payment-limit/>

400,000 NAB customers notified of 'junk insurance' class action

In one of the largest court-ordered notices in the nation's legal history, more than 400,000 Australians were today notified they may be eligible for a class action accusing National Australia Bank (NAB) of selling "junk" consumer credit insurance (CCI). The NAB claim alleges the lender engaged in unconscionable, misleading and deceptive conduct. <https://www.insurancenews.com.au/daily/400000-nab-customers-notified-of-junk-insurance-class-action>

APRA fines Westpac for failing to meet legal reporting requirements

APRA has served infringement notices on Westpac Banking Corporation (Westpac) and two of its subsidiaries for failing to meet their legal obligations to report data to APRA. Under the terms of the infringement notices, APRA requires the Westpac entities to pay a cumulative penalty of \$1,501,500. <https://www.apra.gov.au/media-centre/media-releases/apra-fines-westpac-failing-meet-legal-reporting-requirements>

Latest data shows decline in rate of card payments fraud

Figures released today by the Australian Payments Network (AusPayNet), the payments industry self-regulatory body, show the rate of card fraud for the 12 months to 31 December was 72.8 cents per \$1,000 of card spending, down from 75.0c per \$1,000 in the previous period. The data also show a decline in the growth of card-not-present (CNP) fraud. https://www.auspaynet.com.au/insights/Media-Release/FraudStats_JanToDec_2018

APRA provides six-monthly update on Royal Commission recommendations

The APRA provides the following update on its implementation of the recommendations directed at APRA by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. <https://www.apra.gov.au/media-centre/media-releases/apra-provides-six-monthly-update-royal-commission-recommendations>

IN PRACTICE AND COURTS

[ARITA: Financial Recovery 2020 – ARITA's 8-point plan to strengthen the insolvency regime](#)

ARITA has published an 8-point plan to improve Australia's business rescue culture, better help indebted individuals back onto their feet, and ensure that creditors get a fairer deal from insolvency.

[RBA Payments System Board Update: August 2019 Meeting](#)

Number 2019-22 - 16 August 2019

At its meeting today, the Payments System Board discussed a number of issues, including:

The New Payments Platform (NPP); The assessment of the ASX clearing and settlement facilities against the Bank's Financial Stability Standards; ATMS; Least-cost routing (LCR) of contactless debit card transactions; card-not-present (CNP) payment fraud; Crypto-assets; Migration to ISO 20022.

IASB proposed amendments to IFRS 3 Business Combinations

The amendments would update a reference to the Conceptual Framework for Financial Reporting without changing the accounting requirements for business combinations. IFRS 3 specifies how a company should account for the assets and liabilities it acquires when it obtains control of a business. View the [Exposure Draft Reference to the Conceptual Framework](#), Submit your [comment letters here](#). Comments close 27 September.

[ASIC consultation: foreign financial services providers relief proposals](#)

CP 301 sets out a proposal to enable foreign providers to apply for a modified form of Australian financial services (AFS) licence (foreign AFS licence). This follows ASIC's review of the regulatory settings behind our foreign providers relief. The current foreign provider licensing relief due to sunset on 27 September 2018, will be extended until 30 September 2019 while we consult with stakeholders.

[ASIC consultation: securities lending and 'substantial holding' disclosure](#)

Consultation Paper CP 319 on securities lending by agents, and subsequent disclosure of a substantial holding in a listed entity explains how the relevant interest provisions in s608 and 609 apply to agent lending and therefore ASIC's expectations for compliance with s671B. Comments are due by 6 September 2019.

CASES

[Australian Securities and Investments Commission v Westpac Banking Corporation \(Liability Trial\) \[2019\] FCA 1244](#)

The Federal Court has dismissed ASIC's case against Westpac regarding alleged breaches of responsible lending obligations in its issuance of home loans through the use of the Household Expenditure Measure (HEM) benchmark. In September 2018, Westpac admitted to breaches of responsible lending obligations when issuing home loans to customers and agreed to pay a \$35-million civil penalty to resolve Federal Court proceedings under the National Credit Act. Justice Nye Perram considered whether the Westpac case even constituted a breach of the NCCP (reportedly stating that "there is no fact before [him] that any unsuitable loans were made"). Following his review of the case, Justice Perram judged that a lender "may do what it wants in the assessment process", noting that other provisions of the NCCP impose penalties if lenders make unsuitable loans as a result of that process, in part as his honour did not consider that it is possible to accept that the consumer's declared living expenses tell one anything about their capacity to meet the repayments under the loan.

CONSUMER LAW – alleged contraventions of s 128 of National Consumer Credit Protection Act 2009 (Cth) – where respondent used automated system for conditional approval of home loans – where respondent calculated proposed repayments with principal amortised over life of interest only loan – whether respondent made assessment of unsuitability – whether assessment of unsuitability requires direct comparison of declared living expenses against loan repayments – whether assessment of unsuitability requires assessment by reference to repayments due after interest only period.

Federal Court of Australia Act 1976 (Cth) ss 37AF, 37AG; National Consumer Credit Protection Act 2009 (Cth) ss 125, 128, 129, 130, 131, 132, 133.

[Rigoni Private Finance Pty Ltd & Anor v Sarar Australia and NZ Pty Ltd & Anor \[2019\] VSC 539](#)

PRACTICE AND PROCEDURE – Summary procedure to enforce terms of settlement – Whether Court clearly satisfied that justice can be done – Roberts v Gippsland Agricultural Earthmoving Contracting Co Pty Ltd [1956] VicLawRp 86; [1956] VLR 555 applied – Seachange Management Pty Ltd v Pital Business Pty Ltd [2009] VSCA 139; (2009) 23 VR 396.- The loan, the guarantee, the mortgage and the defaults thereunder.

[Spice Chest Pty Ltd v MacDonald \[2019\] FCA 1268](#)

PRACTICE AND PROCEDURE – application for default judgment – where respondents have not appeared before Court – originating process and statement of claim taken to be served – applicant entitled to make default application.

CORPORATIONS – misleading or deceptive conduct – whether first respondent contravened s 12DA of the Australian Securities and Investments Commission Act 2001 (Cth) – where pleaded facts do not support pleaded representations – applicant not entitled to default judgment against first respondent.

CORPORATIONS – unjust enrichment – where funds were not used for the purpose that they were advanced – failure of consideration – applicant entitled to default judgment against second respondent.

Spice Chest would advance funds, by way of a loan, to one or more of the companies used by Mr MacDonald as vehicles for property (2) the security for the loan would include Mr MacDonald giving to Spice Chest a personal guarantee, by which he guaranteed the repayment of funds advanced by Spice Chest (guarantee representation).

[In the matter of Invigor Group Limited \[2019\] NSWSC 995](#)

CORPORATIONS – Winding up – Statutory demand – Genuine dispute – Where Loan and Convertible Note Agreement provided for conversion of notes into shares by certain date or for loan amount to be repaid – Where later variations entered into but never completed – Where plaintiff proposed further variations – Plaintiff and associated entities acted unilaterally in terms of proposed further variations – No acceptance of offers by defendant – Whether defendant estopped from denying the existence of variations – No estoppel arises – No genuine dispute that loan monies repayable – Application dismissed.

THIS EDITION'S EDITORS



David Murray-Nobbs

Partner

+61 2 9225 2714

+61 405 183 587

dmurraynobbs@tqlaw.com.au



Marc Saadie

Partner

+61 2 9225 2752

msaadie@tqlaw.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 28, Waterfront Place, 1 Eagle Street | Brisbane QLD 4000

PERTH | Level 27, Exchange Tower, 2 The Esplanade | Perth WA 6000

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

www.tqlaw.com.au

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