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BANKING SECTOR NEWSLETTER

IN THE MEDIA

ACCC inquiry into residential mortgage prices

The Coalition Government has directed the ACCC to undertake an inquiry into the pricing of residential mortgage products. The inquiry will ensure the pricing practices of Australia's financial institutions are better understood and made more transparent. <http://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accq-inquiry-residential-mortgage-prices>

Taking action on the Banking, Superannuation & Financial Services Industry Royal Commission – Recommendation 2.10: New financial adviser disciplinary system

The Morrison Government is accelerating the establishment of a new disciplinary system and single disciplinary body for financial advisers in early 2021, subject to the passage of legislation which will be introduced into the Parliament next year. <http://ministers.treasury.gov.au/ministers/jane-hume-2019/media-releases/taking-action-banking-superannuation-financial-services>

Investors, First Home Buyers Drive 12pc Rebound in Lending

A promising uptick in investor lending and a surge in first home buyer loans has bolstered home loan activity, with approvals booming 12 per cent over the last three months. <https://theurbandevolver.com/articles/investors-first-home-buyers-drive-12pc-rebound-in-lending>

Millions of Australians switching financial products

Competition between banks remains strong, with millions of Australians switching banks for home loans, credit cards and transaction accounts last year, according to a newly-released report by Deloitte Access Economics <https://www.ausbanking.org.au/millions-of-australians-switching-financial-products/>

ASIC warns AFS licensees to meet financial reporting obligations on time

ASIC is reminding all Australian Financial Services (AFS) licensees to lodge their annual financial statements and auditor reports by the due as required under the

Corporations Act 2001. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-273mr-asic-warns-afs-licensees-to-meet-financial-reporting-obligations-on-time/>

CBA faces criminal charges over CommInsure scandal

Australia's largest bank is facing 87 criminal charges over unscrupulous practices in its life insurance arm — the first major bank to face criminal charges following the banking royal commission. <https://www.abc.net.au/news/2019-10-04/cba-faces-criminal-charges-comminsure-scandal/11573790>

Research finds almost 90 per cent of customer owned banking customers satisfied with their institution

Almost 90 per cent of customers of customer owned banking institutions declared themselves satisfied with their institutions, according to new research from Roy Morgan. The research follows the release of statistics from the APRA showing growth in housing loans and deposits across Australia's credit unions, mutual banks and building societies. <http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1397-research-finds-almost-90-per-cent-of-customer-owned-banking-customers-satisfied-with-their-institution>

Ticking time bomb': Home loans for secondary residences in APRA's sights

A change in rules by the banking regulator may see home owners with unrented, secondary apartments and holiday homes paying more on their mortgages. <https://www.abc.net.au/news/2019-10-03/home-loan-crackdown-apra-has-secondary-residences-in-its-sights/11570348>

AUSTRAC orders audit of PayPal

AUSTRAC has ordered the appointment of an external auditor to look into PayPal Australia in relation to "ongoing concerns" about its compliance with financial crime law. <https://www.financialstandard.com.au/section/regulatory>

Finance sector to combat modern slavery

The global finance sector has launched an initiative to eliminate modern slavery and help victims of the practice regain their financial independence. It outlines several areas where the finance sector can combat slavery and human trafficking, including increasing funding for investigations into slavery and developing better indicators of trafficking-related money laundering <https://www.investordaily.com.au/regulation/45761-finance-sector-to-combat-modern-slavery>

AUSTRAC warns fintechs, pubs to 'harden their systems'

Financial intelligence agency AUSTRAC is warning pubs and clubs, money remitters and fintechs offering payments services to "harden" their technology systems to help protect against organised crime, or risk being hit with public enforcement actions as the agency is emboldened after the Hayne royal commission. <https://www.afr.com/companies/financial-services/austrac-warns-fintechs-pubs-to-harden-their-systems-20190927-p52vh8>

APRA releases new Monthly Authorised Deposit-taking Institution Statistics for August 2019

The APRA has released its Monthly Authorised Deposit-taking Institution Statistics (MADIS) for August 2019. This is the second edition of the new MADIS publication, which replaces the Monthly Banking Statistics (MBS). <https://www.apra.gov.au/news-and-publications/apra-releases-new-monthly-authorised-deposit-taking-institution-statistics-0>

IN PRACTICE AND COURTS

[Director and officer oversight of non-financial risk report](#)

ASIC Corporate Governance Taskforce; ASIC: 02 October 2019
This report sets out the Taskforce's observations on director and officer oversight of non-financial risk. The seven financial services institutions selected for this review are those that many Australians are exposed to, through their personal and business banking, superannuation or insurance, or as shareholders.

[AASB: Amendments to AASB 1059 Service Concession Arrangements: Grantors](#)

The AASB issued AASB 2019-2 *Amendments to Australian Accounting Standards – Implementation of AASB 1059* to amend the modified retrospective method set out in paragraph C4 of AASB 1059, and to provide a practical expedient to grantors of service concession to not apply AASB 16 Leases to assets that would be recognised as service concession assets under AASB 1059.

[Reminder: AFCA naming and shaming from October](#)

The Australian Financial Complaints Authority (AFCA) has confirmed a starting date for it to name firms in its determinations, with the watchdog to start exposing perpetrators from 1 October. The rules which were approved by ASIC in August will allow AFCA to publish the names of financial firms in all determinations.

AASB: Exposure Draft: Disclosure of Accounting Policies

[ED 296 Disclosure of Accounting Policies](#) proposes amendments to help entities provide accounting policy disclosures that are more useful to primary users of financial statements. Please submit your comments to the AASB by 28 October 2019 via the [AASB website](#).

[APRA remakes Reporting Standard ARS 117.1 Interest Rate Risk in the Banking Book](#)

APRA has remade ARS 117.1, the reporting standard on interest rate risk in the banking book (IRRBB), which was due to expire on October 01, 2019. The updated ARS 117.1 will apply for reporting periods commencing on or after October 01, 2019 See the [Proposed IRRBB Standard \(PDF\)](#).

APRA: Consultations on revisions to the capital framework for authorised deposit-taking institutions

APRA is consulting on revisions to the capital framework for authorised deposit-taking institutions (ADIs) to implement 'unquestionably strong' capital ratios and the Basel III reforms. *September 2019 - Round 3- Response paper on interest rate risk in the banking book requirements*. Written submissions are requested by 6 December 2019.

[Response to Submissions - Interest rate risk in the banking book for authorised deposit-taking institutions September 2019](#)

[Draft Prudential Standard APS 117 Capital Adequacy Interest Rate Risk in the Banking Book](#)

NHFIC Consultation: lenders participation in the Government's First Home Loan Deposit Scheme

NHFIC is seeking feedback from lenders on implementation of the Scheme via a market sounding process. NHFIC is making a Scheme Features paper available to participants for the purposes of the market sounding process *The National Housing and Finance Investment Corporation Bill* passed the House of Representatives and will be the subject of a brief Senate inquiry reporting by 10 October. Click [here](#) for more details.

CASES

[Fuge v Commonwealth Bank of Australia \[2019\] FCA 1621](#)

CONTRACTS – whether release extended to certain claims – application of legal and equitable principles of construction applicable to wide or general words of release.

CONTRACTS – Unjust contracts – When contract or provision of contract is "unjust" – Where money borrowed for farming purposes on basis of business plan prepared on behalf of borrower – Bank applied standard assessment tools and not indifferent to purpose and practicality of loans.

CONTRACTS – Unjust contracts – provisions of heads of agreement settling dispute resulted in the inevitability of default and were unnecessary to protect the legitimate interests of the Bank – provisions "unjust" but were not

enforced so no relief declaring the provisions void granted.

BANKING AND FINANCIAL INSTITUTIONS – scope and content of obligation to participate in a mediation in good faith – whether Bank breached its obligations pursuant to the Code of Banking Practice – whether Bank engaged in asset lending – whether Bank breached cl 3.2 and 28.2 of the 2013 Code of Banking Practice in refusing to accept refinancing offers. **MORTGAGES** – sale of assets under power – remedies of mortgagor – consideration of Bank’s obligations upon sale.

EQUITY – a mortgagor alleging that a mortgagee has exercised a power of sale in such a way that the equity of redemption has been lost discloses no cause of action at common law the proper remedy is a suit in equity for an account on the footing of wilful default – *Coroneo v Australian Provincial Assurance Association Ltd* [1935] NSWStRp 47; (1935) 35 SR (NSW) 391 applied. **EVIDENCE** – whether s 18F of the Farm Debt Mediation Act 1994 (NSW) preventing evidence being adduced as to what occurs during a farm debt mediation is picked up by s 79 of the Judiciary Act 1903 (Cth) in respect of proceedings in the Federal Court where admissibility is governed by ss 55 and 56 of the Evidence Act 1995 (Cth) – provision not picked up. **EVIDENCE** – no *Dobbs v National bank of Australasia Limited* [1935] HCA 49; (1935) 53 CLR 643 certificate proving debt – Bank tendered some business records and adduced some evidence relevant to proving debt – whether evidence sufficient to prove alleged cross-claim debt.

CONSUMER LAW – alleged misleading and deceptive conduct – findings relating to whether oral representations were conveyed – application of principles explained in *Watson v Foxman* (1995) 49 NSWLR 315.

DISCOVERY – allegation that discovery obligations not complied with such that there could not be a proper testing in evidence of the credit assessments – whether *Kuhl v Zurich* inference should be draw.

[Thirty-Sixth Penny Pty Ltd & Anor v National Australia Bank Limited \[2019\] VSC 652](#)

PRACTICE AND PROCEDURE – Bank’s former clients claim that the Bank acted unconscionably within the meaning of the Australian Securities and Investment Commission Act 2001 (Cth) and/or breached the Banking Code of Practice by raising facility fees

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upon refinancing – Summary judgment sought by the defendant pursuant to Rule 22.16 of the Supreme Court (General Civil Procedure) Rules 2015 and ss 62-63 of the Civil Procedure Act 2010 (Vic) on the basis that the plaintiffs’ claims are time barred – Cautionary approach to granting summary judgment where the sole issue is whether plaintiffs’ claims are time barred – *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514, referred to – Successive or subsequent losses do not give rise to a new cause of action – *James v Australia and New Zealand Banking Group Ltd* [1986] FCA 41; (1986) 64 ALR 347, referred to – Whether separate claims could be made for distinct losses arising out of the same contravening conduct – *Murphy v Overton Investments Pty Ltd* (2004) 215 CLR 388, referred to – Plaintiffs’ causes of action may not accrue until payments were made under the new facility agreements – Summary judgment not granted with respect to the unconscionable conduct claim – Breach of contract occurred outside the limitation period – Summary judgment granted with respect to the contract claim.

[Golden J Wealth Pty Ltd v AC Holdings Co Pty Limited \[2019\] NSWSC 1342](#)

CONTRACT – mortgage – construction – where Event of Default occurs if in the opinion of the Lender the Debtor suffers a material degradation in their ability to comply with the terms of the mortgage – whether opinion has to be reasonable or objectively available – whether the mortgagee held the necessary opinion – whether the opinion was held in good faith – default by Debtor in failing to pay an instalment of interest – whether mortgagee is precluded from relying on the default because it would constitute taking advantage of its own wrong – whether a provision that interest is payable at a Higher Rate but that a Lower Rate will be accepted if payment is made on time is an unenforceable penalty; HELD: opinion not required to be held reasonably or be objectively available, but in any event it was – opinion was held in good faith – mortgagee not precluded from relying on failure to pay interest – interest provision not an unenforceable penalty.

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