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ISSUE 60



BANKING SECTOR NEWSLETTER

Welcome to Issue 60 of our fortnightly Banking Sector Newsletter.

In this issue, we refer to an announcement by the Federal Treasurer that will result in greater regulatory oversight of litigation funders.

Commentary surrounding the ongoing impact of the COVID-19 crisis include remarks by the Australian Securities and Investments Commission's (ASIC) Chair on the application of responsible lending laws in the current economic environment and statistics on banks' deferral of loan repayments.

This issue of the Newsletter also provides the usual round-up of practice notes, cases and legislation assistance.

IN THE MEDIA

Responsible lending leeway 'put to the test' by COVID-19

The COVID-19 crisis will bring to light the effectiveness of principles-based responsible lending guidance, according to ASIC Chair James Shipton. <https://www.mortgagebusiness.com.au/breaking-news/14568-responsible-lending-leeway-put-to-the-test-by-covid-19>

Litigation funders to be regulated under the Corporations Act

Litigation funders do not face the same regulatory scrutiny and accountability as other financial services and products under the Corporations Act. The removal of these exemptions will require litigation funders to obtain an AFSL from the ASIC. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/litigation-funders-be-regulated-under-corporations>

AFCA launches new videos for diverse communities

The Australian Financial Complaints Authority (AFCA) is launching improved online resources in languages other than English to make it easier for all communities to access financial dispute resolution. <https://www.afca.org.au/news/media-releases/afca-launches-new-videos-for-diverse-communities>

ASIC maintains focus on credit insurance

The Australian Securities and Investments Commission (ASIC) says it is continuing to investigate the suspected misconduct of "several entities" involved in the consumer credit insurance market, with a view to taking enforcement action. The regulator announced the final tranche of a remediation program that has involved 11 banks and lenders. <https://www.insurancenews.com.au/regulatory-government/asic-maintains-focus-on-credit-insurance>

Inquiry into Future Directions for the Consumer Data Right

The ABA supports the ongoing development and expansion of the Consumer Data Right (CDR). As the first sector to launch with Open Banking, the banking industry has contributed significantly to operationalising the CDR vision through expertise within the sector as well as providing the Open Banking systems through which the first consumer data will flow in the CDR. <https://www.ausbanking.org.au/submission/inquiry-into-future-directions-for-the-consumer-data-right/>

Government response to Treasury consultation on stamping fee exemption

Following the conclusion of Treasury's consultation, the Morrison Government will move to extend the ban on conflicted remuneration to LICs. These changes will take effect from 1 July 2020. The treatment of equity and debt securities in trading companies (including hybrids), real estate investment trusts (REITs), and listed infrastructure investments will not be impacted by these change. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/government-response-treasury-consultation-stamping>

Treasury consultation of stamping fee exemption

The Financial Planning Association welcomes the removal of the exemption that allows stamping fees on listed investment entities, and now calls on the Senate to urgently turn its attention to the FASEA extension bill that was recently delayed. <https://fpa.com.au/news/treasury-consultation-of-stamping-fee-exemption/>

FPA releases consumer guide

The Financial Planning Association of Australia (FPA) has released a free guide to help consumers manage their finances during the crisis. <https://www.moneymanagement.com.au/news/financial-planning/fpa-releases-consumer-guide>

Banks defer repayment of 429,000 mortgages due to COVID-19

The Australian Banking Association released new figures which showed 429,000 mortgages had been deferred totalling \$153.5 billion. The figures take the total number of loans deferred to 703,000, worth a value of \$211 billion. <https://www.ausbanking.org.au/banks-have-now-deferred-more-than-400000-mortgages/>

Auditor unveils targets for next year

The Auditor-General has issued a proposed program of performance audits for the coming financial year and has invited members of the Australian Public Service to comment on it. <https://www.anao.gov.au/work-program/draft>

ASIC secures \$160m in remediation over junk credit insurance

ASIC has announced it has secured \$160 million in remediation for consumers sold junk credit insurance from 11 major banks and lenders between 2011 and 2018. <https://www.financialstandard.com.au/news/asic-secures-160m-in-remediation-over-junk-credit-insurance-160518152>

ASIC statement [20-115MR ASIC secures over \\$160 million in remediation for junk consumer credit insurance](#)

Australia risks a 32pc house price crash in a 'prolonged downturn', CBA warns

Australia's biggest home lender warns Australian house prices could tumble by a third if COVID-19 leads to a "prolonged downturn" and extended period of high unemployment. <https://www.abc.net.au/news/2020-05-13/coronavirus-commonwealth-bank-house-prices-economy-unemployment/12241338>

Industry Super, ME Bank summoned for parliamentary probe

Industry Super Australia and ME Bank have been called to front an "urgent" public hearing by a parliamentary committee, with an MP saying the conduct of the organisations has been questionable. <https://www.investordaily.com.au/superannuation/47043-industry-super-me-bank-summoned-for-parliamentary-probe>

Insurers urged to learn from AFCA decisions

Insurers should examine Australian Financial Complaints Authority decisions to improve their own internal complaints processes and must make clear to consumers that disputes can be taken to the adjudicator, the General Insurance Code of Practice Governance Committee says. <https://www.insurancenews.com.au/local/insurers-urged-to-learn-from-afca-decisions>

COBA members help first home buyers realise their dream through FHLDS

More than 1,150 first home buyers have purchased a property with a loan from customer owned banking institutions participating in the First Home Loan Deposit Scheme. <http://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1417-coba-members-help-first-home-buyers-realise-their-dream-through-fhlds>

IN PRACTICE AND COURTS

[FINSIA – The regulators: Priorities updated](#)

Opening remarks by James Shipton, Chair, Australian Securities and Investments Commission, to the Financial Services Institute of Australasia (FINSIA) webinar 'The Regulators: Priorities Updated', 21 May 2020.

[RBA: Payments System Board Update: May 2020 Meeting](#)

22 May 2020 – Includes: NPP Australia's recent update on its capability development roadmap for the New Payments Platform; The Review of Retail Payments Regulation; ASX's project to replace the CHES clearing and settlement system for cash equities; Reserve Bank Information and Transfer System (RITS); COVID-19 Impacts.

[PPSR: Notice of Discovery outage \(R7.1\) release](#)

The Discovery environment scheduled outage window on 28 May will allow for the deployment of new PPSR code (R7.1).

[AUSPAYNET: Inquiry into Future Directions for the Consumer Data Right](#)

AusPayNet's submission highlighted the prerequisites for a successful data economy: an effective and robust governance framework and customer identification and verification.

[The Auditor-General proposed program of performance audits for the coming financial year](#)

The ANAO will accept feedback on the draft program until 29 May. Among the broader selection of possible audit targets in the year ahead are:

Finance

The Implementation of Recommendations from the Independent Review of Whole-of-Government Internal Regulation and the Independent Parliamentary Expenses Authority.

Home Affairs

AUSTRAC's Regulation of Digital Currency Exchange Providers, and the Australian Federal Police's Use of Statutory Power.

[APRA: Frequently asked question on market risk capital requirements in response to COVID-19](#)

The Australian Prudential Regulation Authority (APRA) has published a frequently asked question (FAQ) providing guidance to authorised deposit-taking institutions in determining their capital requirements under APS 116 Capital Adequacy: Market Risk.

[The Impact of COVID-19 on Going Concern and Related Assessments - Joint Publication by the AASB and AUASB](#)

The AASB and AUASB have released a new publication on the impact of COVID-19 on Going Concern and related assessments. Refer to the [COVID-19](#) page for this and a series of FAQs on matters for auditors to consider.

ASFA: Guidelines for debt agreement administrators

ASFA has made important temporary updates to the certified duties of debt agreement administrators, regarding proposals to vary debt agreements. These changes are currently in effect for six months (until 30 September 2020).

For more information see [Practitioners: COVID-19 and changes to debt agreements](#).

For updated general guidelines for practitioners, see [Practitioners: COVID-19 and updated advice from the Inspector-General](#).

[ASIC draft guidance on the new best interests duty for mortgage brokers](#)

The new obligations were legislated by the Parliament in response to [Recommendation 1.2 of the Royal Commission](#). From 1 July, the obligations will require mortgage brokers to act in the best interests of consumers and to prioritise consumers' interests when providing credit assistance. ASIC intends to publish final guidance before the obligations commence on 1 July 2020.

[ABA: FAQs: what you need to know about COVID-19 bank relief](#)

Helping Aussie businesses remain viable and keeping people in their homes.

[IAASB Publishes COVID-19 related Guidance on Audit Considerations for Subsequent Events](#)

On May 15, IAASB released guidance on auditor considerations when undertaking procedures relating to subsequent events, in light of the changing environment due to the COVID-19 Pandemic.

[IASB issues package of narrow-scope amendments to IFRS Standards](#)

The International Accounting Standards Board (IASB) has issued several small amendments to IFRS Standards. All amendments are effective 1 January 2022. Some of these are:

Amendments to IAS 16 Property, Plant and Equipment prohibit a company from deducting from the cost of property, plant and equipment amounts received from selling items produced while the company is preparing the asset for its intended use. Instead, a company will recognise such sales proceeds and related cost in profit or loss.

Annual Improvements make minor amendments to IFRS 1 First-time Adoption of International Financial Reporting Standards, IFRS 9 Financial Instruments, IAS 41 Agriculture and the Illustrative Examples accompanying IFRS 16 Leases.

[IFRS Standards in 2020: Consultations](#)

The first major consultation document, already out for comment, proposes improving the way information is communicated in the financial statements, with a focus on financial performance. Exposure Draft General Presentation and Disclosures, which the Board published in December 2019 as part of its Primary Financial Statements project, is open for comment until 30 June 2020.

[IPSASB Exposure Drafts: Revenue and Transfer Expenses for public sector entities](#)

The International Public Sector Accounting Standards Board (IPSASB) has recently issued three Exposure Drafts proposing new recognition and measurement requirements for revenue transactions and transfer expenses. Comments are due to the IPSASB by 15 September 2020.

[IAASB Consults on Extended External Reporting \(EER\) Assurance](#)

Organizations are increasingly reporting about their broader performance or impact ("Extended External Reporting" or "EER") either voluntarily or as required by law or regulation, and there is a growing demand for assurance engagements on such reporting. In response, the IAASB has developed for feedback its non-authoritative EER Guidance and is requesting public input by July 13, 2020.

Current Inquiries - Economics Legislation Committee [National Consumer Credit Protection Amendment \(Small Amount Credit Contract and Consumer Lease Reforms\) Bill 2019 \(No. 2\)](#)

Status: Date Referred: 05 December 2019
Reporting Date: 21 September 2020

CASES

[Clark v National Australia Bank Limited \(No 2\) \[2020\] FCA 652](#)

REPRESENTATIVE PROCEEDINGS – where order sought pursuant to ss 22, 23 or s 33ZF of the Federal Court of Australia Act 1976 (Cth), r 1.32 of the Federal Court Rules 2011 (Cth) and/or the Court's implied jurisdiction dismissing the proceeding – consideration as to how s 33ZB operates to bind group members to a settlement not the dismissal of the class action

REPRESENTATIVE PROCEEDINGS – application for approval of settlement pursuant to s 33V of the Federal Court of Australia Act 1976 (Cth) – settlement approved

PRACTICE AND PROCEDURE – where applicant sought confidentiality orders pursuant to Pt VAA of the Federal Court of Australia Act 1976 (Cth) in respect of extensive material put before the Court on the settlement application – consideration of threshold for the grant of such an order – consideration of principles of open justice as fundamental to the operation of the judicial power of the Commonwealth

[Harvard Nominees Pty Ltd v Tiller \(No 2\) \[2020\] FCA 604](#)

CONSUMER LAW - misleading or deceptive conduct - express oral representations regarding involvement of party in proposed leases - certain representations found to have been made - reliance on representations - whether representations misleading or deceptive - involvement in misleading or deceptive conduct - causation of loss or damage - applicant not pursuing 'no transaction' or 'different transaction' case - whether detriment or disadvantage required - whether counterfactual required to establish causation - whether entry into contractual relations amounts to loss or damage - whether misleading or deceptive conduct had continuing operative effect - no loss or damage caused by misleading or deceptive conduct

CONSUMER LAW - misleading or deceptive conduct - non-disclosure of deeds of assignment - terms of deeds falsified letter - whether omission to disclose deeds misleading or deceptive - whether applicant would have been able to terminate leases if the deeds had been disclosed - whether respondents engaged in misleading conduct involving non-disclosure

LANDLORD AND TENANT - equitable leases - assignment of equitable interest in equitable lease - requirement of delivery of deeds - whether deeds implemented - deeds held to be legally effective - whether clause in leases prohibiting assignment applies to equitable assignment - construction of leases - clause held to prohibit assignment in equity

CONTRACT - prohibition on assignment - whether fundamental breach or repudiation - application of general contractual principles to leases - privity of estate between lessor and lessees not displaced by equitable assignment - breach not going to root of contract - fundamental breach or repudiation not established - application dismissed

[Birdseye and Tax Practitioners Board \[2020\] AATA 1250](#)

PRACTICE AND PROCEDURE – STAY APPLICATION – termination of tax agent registrations – whether Applicants denied procedural fairness by decision-maker – whether conditional stays should be granted pending decisions on applications for review – whether conditional stays should be granted pending determination of procedural fairness issue as a preliminary issue – where Tribunal not satisfied there are prospects of success – stays refused

Administrative Appeals Tribunal Act 1975 (Cth), ss 2A, 41, 42D, 43; Tax Agent Services Act 2009 (Cth), ss 2-5, 20-15, subdivisions 30-A, 40-A, ss 60-95, 60-100, 60-115, 60-125, 70-10

[Canon Finance Australia Limited v Reliance Medical Practice Pty Ltd & Ors \(No 7\) \[2020\] NSWSC 554](#)

CONSUMER LAW – Competition and Consumer Act 2010 (Cth) – Australian Securities and Investment Commission Act 2001 – misleading and deceptive conduct – persons involved in the contravention – contract for IT equipment, software and services – financing of contract by commercial lease - oral representations made about efficiency of IT system to be supplied – contract repudiated – hypothetical question of misrepresentation – misrepresentation a question of fact – measure of loss

Australian Securities and Investment Commission Act 2001 (Cth), ss 12DA, 12GF

[Oxygen Funding Solutions Pty Ltd v Dick-Telfar \[2020\] NSWSC 582](#)

(1) Judgment for the plaintiffs in the sum of \$2,351,780.
CONTRACTS – Remedies – money claim made under loan agreement – whether attempts to discharge debt by refinancing were frustrated by conduct of the lenders
CONTRACTS – Unconscionable conduct – Australian Securities and Investments Commission Act 2001 (Cth) s 12CA – whether interest rates in the loan agreement unconscionable

[Winau Aust Pty Ltd & Ors v LCC Property Development Pty Limited & Ors \(No 2\) \[2020\] NSWSC 586](#)

Answer to separate question remains "No".

LAND LAW – Torrens title – Indefeasibility of title – Effects of indefeasibility – Proper construction of acknowledgement in mortgage where advance never received by mortgagor due to intervention of alleged fraudster

[Xinfeng Australia International Investment Pty Ltd v GR Capital Group Pty Ltd \[2020\] NSWSC 620](#)

4. Direct that there be general access to the parties in respect of documents produced in compliance with orders 1 and 2.

CIVIL PROCEDURE – Subpoenas and notices to produce – Application to set aside

EVIDENCE – Privileges – Legal professional privilege – Waiver – Implied waiver by putting in issue state of mind – loan agreements and guarantees

[Ascot Vale Self Storage Centre Pty Ltd v Nom De Plume Nominees Pty Ltd & Ors \[2020\] VSC 242](#)

PRACTICE AND PROCEDURE - Application for insolvent trading exoneration defence to be heard separately – Application for third party proceeding to be heard separately – Utility, economy and fairness of trial of separate questions not beyond question – Applications dismissed – Application by defendants for leave to commence derivative proceeding in the name of the plaintiff – Allegations of breach of trust and fiduciary duties by receivers – Potential delay of trial – Derivative proceeding inutile if Court rejects aspects of defence and counterclaim – Application dismissed – Application by third parties for summary judgment – Second defendant claiming equitable contribution in respect of liability for insolvent trading – Questionable whether limitation period prescribed by s 24(4) Wrongs Act 1958 (Vic) applies to claim for equitable contribution – Allegations of unconscionable conduct potentially relevant to application of s 24(4) Wrongs Act 1958 (Vic) – Appropriate to determine issue at trial – Application dismissed – Mortgage facility and charge Corporations Act 2001 (Cth) ss 588G, 588M, 1317S, 1318 – Wrongs Act 1958 (Vic) ss 23B, 24(4) – Civil Procedure Act 2010 (Vic) ss 7, 62, 63 – Supreme Court (General Civil Procedure) Rules 2015 (Vic) rr 11.12, 11.13, 47.04.

[PropertyShares Holdings Pty Ltd v 8 Hopetoun Rd Pty Ltd & Ors \[2020\] VSC 265](#)

EQUITY – Rectification – Application for rectification of electronic mortgage instrument - Where mortgagee is incorrectly identified - Whether remedy ought be granted in relation to unilateral document – Whether remedy appropriate given doctrine of indefeasibility.

REAL PROPERTY – Whether Registrar should be directed to amend Register under s 103(1) Transfer of Land Act 1958 – Relevant considerations - Order made.

[Shingle Inn Franchising Pty Ltd & Anor v Majestic Coffee Pty Ltd & Anor \[2020\] NSWDC 142](#)

1. Verdict and judgment on the amended statement of claim in favour of the second plaintiff against the defendants in the amount of \$19,666.72.

LICENSING – Breach – licence agreement – licence term – unpaid fees.

TORT – conversion – damages – conversion of business assets – value of goods.

TORT – bank guarantee – failure to return on demand – conversion.

[Wylie v Orchard \[2020\] QDC 86](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – application for summary judgment for fraudulent breach of trust – where the Applicant advanced \$100,000 to the Respondent under a Loan Agreement – whether advance was held on trust – where the plaintiff alleges the monies were then dishonestly disbursed in fraudulent breach of trust – where the plaintiff must show the breach of trust was fraudulent to answer a limitations defence – where the plaintiff alleges the monies were dishonestly disbursed to third parties – where the Respondent was subsequently convicted of fraud under 408C of the Criminal Code – whether under s 79(2) of the Evidence Act that conviction is evidence of disposition of the monies by fraudulent breach of trust – whether application for summary judgment should be granted

LEGISLATION**Commonwealth****Regulations**[Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2020 \(No. 3\)](#)

22/05/2020 - This instrument amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) by repealing and replacing Part 4.15.

[ASIC Corporations \(Amendment\) Instrument 2020/452](#)

20/05/2020 - This instrument amends the ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840, ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73, ASIC Corporations (Wholly-owned Companies) Instrument 2016/785, and ASIC Corporations (Extended Reporting and Lodgment Deadlines—Unlisted Entities) Instrument 2020/395 to assist listed and unlisted entities affected by the impacts of COVID-19 by enabling them more time to report and have audits. This includes public companies, proprietary companies, registered schemes, disclosing entities and financial services licensees.

[ASIC Corporations \(Extended Reporting and Lodgment Deadlines—Listed Entities\) Instrument 2020/451](#)

20/05/2020 - This instrument implements temporary measures aimed at facilitating financial reporting by listed entities whose reporting processes take additional time due to current remote work arrangements, travel restrictions and other impacts of COVID-19. The temporary measures are intended to allow listed entities up to one additional month to complete financial reports and have those reports audited, in compliance with the financial reporting and audit requirements of the Corporations Act 2001.

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