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ISSUE 62



BANKING SECTOR NEWSLETTER

Welcome to Issue 62 of our fortnightly Banking Sector Newsletter.

In this issue, we refer to an article on ASIC's unsuccessful appeal against Westpac in the 'wagyu and shiraz' home loan case, as well as new laws that have come into effect allowing customers to share their bank data to make it easier to compare and switch banks.

In other news, the Australian Financial Complaints Authority (AFCA) has banned MCR Partners, who act as a paid representative, from lodging complaints on behalf of consumers and small businesses. This is the first time that the AFCA has exercised its discretion to exclude a third party paid representative.

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

IN THE MEDIA

These new laws threaten to unstick the big banks' customer base

The sticky bank customer is as common as a bank fee in Australia, but new changes to the banking sector mean this could all change — and quickly. <https://www.abc.net.au/news/2020-07-04/open-banking-customer-data-switching-banks-made-easier/12417718>

The Consumer Data Right arrives

Australians will be able to unleash the power of their own data to compare and switch banking products as the Morrison Government officially launches the Consumer Data Right. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/consumer-data-right-arrives>

Open Banking data flows

Australia's four major banks open up their data so that customers can share it in order to get the best deal possible on credit cards, savings accounts and other deposit products. <https://www.ausbanking.org.au/open-banking-data-flows-from-today/>

Customer owned bank at the forefront of Consumer Data Right innovation

The Customer Owned Banking Association has congratulated Regional Australia Bank for being one of only two accredited data recipients at the commencement of open banking. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1457-customer-owned-bank-at-the-forefront-of-consumer-data-right-innovation>

The Australian Financial Complaints Authority (AFCA) receives more than 80,000 complaints in FY19/20, nearly 5,000 of which are COVID-19 related

Australians in dispute with their bank, insurer, super fund or financial firm have lodged more than 80,000 complaints in the last 12 months, with the AFCA securing \$258.6 million in compensation and refunds direct to consumers. <https://www.afca.org.au/news/media-releases/afca-receives-more-80000-complaints-in-fy1920-nearly-5000-of-which-are-covid-19-related>

AFCA bans paid representative from lodging complaints

The AFCA has banned paid representative MCR Partners from lodging complaints on behalf of consumers and small businesses. <https://www.afca.org.au/news/media-releases/afca-bans-paid-representative-from-lodging-complaints>

Financial Services Council (FSC) welcomes release of report slamming insurance duties

The FSC has welcomed the release of a report that condemns duties on insurance as being inefficient, inequitable, unfair, potentially causing serious human and social consequences, and leading to a national crisis of underinsurance. <https://www.fsc.org.au/resources/2033-fsc-media-release-fsc-welcomes-release-of-report-slammng-insurance-duties/file>

Rush to Refinance Drives Mortgage Activity

Mortgage activity is up 11 per cent on this time last year, driven by an uptick in refinancing as mortgage holders take advantage of record-low interest rates. <https://theurbandeveloper.com/articles/mortgage-activity-auctions>

First home buyers receive another boost: HIA

The release of 10,000 new guarantees under the First Home Loan Deposit Scheme will provide another boost for home buyers looking to move into their first home. "The First Home Loan Deposit Scheme recognises the importance of making the pathway to home ownership reasonable and timely for first home buyers." <https://hia.com.au/-/media/HIA-Website/Files/Media-Centre/Media-Releases/2020/national/first-home-buyers-receive-another-boost.ashx>

Account manager banned from financial services

An account manager for the embattled financial services company has been banned from providing financial services for three years after engaging in unconscionable conduct. Steven Marsh, an account manager for retail OTC derivatives issuer Forex Capital Trading (Forex CT) – which has now had its AFSL revoked. <https://www.investordaily.com.au/regulation/47353-account-manager-banned-from-financial-services>

FSC response LCCC compliance report

The FSC notes the Life Code Compliance Committee's (LCCC) report on the life insurance industry's compliance with the Life Insurance Code of Practice (the Code) for the year from 1 July 2018 to 30 June 2019, just the second year of the Code's existence. <https://www.fsc.org.au/resources/2032-fsc-media-release-fsc-response-lccc-compliance-report/file>

Company director permanently banned

David Wynd was the sole director and responsible manager of Financial Circle, which was ordered to pay \$8,980,000 in total penalties after contravening financial services, credit, and consumer protection laws. <https://www.investordaily.com.au/regulation/47350-company-director-permanently-banned>

Westpac's win stands in 'wagyu and shiraz' home loans case as ASIC loses appeal

Westpac's win in the landmark 'wagyu and shiraz' responsible lending case stands, with the corporate regulator's appeal dismissed with costs against it. <https://www.abc.net.au/news/2020-06-26/asic-appeal-on-westpac-wagyu-shiraz-home-lending-dismissed/12396646>

COVID-19 sees banking code watered down

The peak body for the banking industry has inserted a number of changes to its code of practice to extend expected consumer wait times for customer communication as a result of COVID-19. <https://www.investordaily.com.au/regulation/47349-covid-19-sees-banking-code-watered-down>

Temporary changes to Code due to COVID-19

The Australian Banking Association has made temporary changes to the Banking Code of Practice to reflect the fact that the COVID-19 pandemic may temporarily affect the provision of banking services. <https://www.ausbanking.org.au/temporary-changes-to-code-due-to-covid-19/>

Banks welcome creative economy restart

The Australian Banking Association welcomes the Government's announcement to help restart the creative economy and get the entertainment, arts and screen sectors back on their feet following the impacts of COVID-19. <https://www.ausbanking.org.au/banks-welcome-creative-economy-restart/>

Tax Practitioners Board and FPA sign new MOU

In the first agreement of its kind between the Tax Practitioners Board (TPB) and one of its recognised professional associations, a new Memorandum of Understanding (MOU) has been signed with the Financial Planning Association of Australia (FPA) which will facilitate information exchange about matters of mutual interest. <https://fpa.com.au/news/tax-practitioners-board-and-financial-planning-association-sign-new-mou/>

ATO doubles down on fraud crackdown

The Australian Taxation Office (ATO) said it is building on its significant efforts, zeroing in on fraud and schemes designed to take advantage of the Government's COVID-19 stimulus package. <https://www.financialstandard.com.au/news/ato-doubles-down-on-fraud-crackdown-166831863>

ASIC refuses just 3% of AFSL relief applications

The corporate regulator refused just 3% of Australian financial services licence relief applications in the six month period that saw COVID-19 intensify. <https://www.financialstandard.com.au/news/asic-refuses-just-3-of-afsl-relief-applications-166831940>

Australia's AAA credit rating and stable outlook reaffirmed by Moody's

Moody's has reaffirmed Australia's AAA credit rating and maintained the stable outlook supported by the "underlying resilience of the economy" and our "track record of proactive and effect. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/australias-aaa-credit-rating-and-stable-outlook>

Binary options trader cops \$1.8m penalty, directors banned

The Federal Court has banned two companies from carrying on a financial services business, with a director to be permanently disqualified from managing corporations, in a binary options case brought against them by the corporate watchdog. <https://www.investordaily.com.au/regulation/47299-binary-options-trader-cops-1-8m-penalty-directors-banned>

FASEA Extension Bill passes parliament

The Morrison Government has passed legislation through the Parliament to provide additional time for existing financial advisers to meet the qualification and examination requirements set by the Financial Adviser Standards and Ethics Authority (FASEA).

<https://ministers.treasury.gov.au/ministers/jane-hume-2019/media-releases/fasea-extension-bill-passes-parliament>

<https://fpa.com.au/news/fpa-welcomes-critical-legislative-milestone-for-financial-planners/>

<https://www.fasea.gov.au/fasea-welcomes-certainty-around-exam-and-education-extension/>

ASIC defines product intervention reach

ASIC has set out the rules for its product intervention power, with its new guidance stating where and how it may use the capability. However it is not supposed to be used for pre-approval of products or to prevent all monetary losses or eliminate all market risk. <https://www.investordaily.com.au/regulation/47284-asic-defines-product-intervention-reach>

IN PRACTICE AND COURTS

[Consumer Data Right commences 01 July 2020](#)

Open Banking will also allow consumers to share their data with other banks to make it easier to compare and switch and get access to the best deal for them. From 1 November 2020, the range of banking products available under Open Banking will be expanded, allowing customers of the four major banks to access and share their mortgage, personal loan and joint account data. Non-major banks will allow their customers to share their data for each account type within twelve months.

[ABA: Banking activity during the COVID-19 pandemic](#)

Between 14 May and 19 June the ABA published data on total deferrals member banks made to customers. These figures represented the sum total of deferrals made at the time of each data publication, and does not account for deferrals which had been reversed at the customer request.

[RBA Bulletin June 2020](#)

Insights into the economy and financial system from teams throughout the Reserve Bank of Australia - Transactional Banking at the RBA in Extraordinary Times; Australian Economy; Bank Fees in Australia; Cash Use in Australia: Results from the 2019 Consumer Payments Survey.

[ASIC guidance on the administration of its product intervention power](#)

Following consultation, ASIC has released a new regulatory guide on the administration of its product intervention power [Regulatory Guide 272 Product intervention power](#) (RG 272).

[APRA frequently asked question on standardised approach to credit risk-weighted assets](#)

APRA has published a frequently asked question (FAQ) page providing clarification to authorised deposit-taking institutions (ADIs) in determining their capital requirements under Prudential Standard APS 112 Capital Adequacy: Standardised Approach to Credit Risk (APS 112).

[FASEA Opening Statement – House of Representatives Standing Committee on Economics](#)

FASEA appeared at the House of Representatives Standing Committee on Economics on 30 June 2020.

[FASEA Consultation – three month Continuing Professional Development relief](#)

FASEA has released Corporations (Relevant Providers Continuing Professional Development Standard) Determination (Amendment) 2020 for consultation. The legislative instrument and explanatory statement can be viewed [here](#). All feedback and submissions can be submitted to consultation@fasea.gov.au by 1 July 2020.

[FASEA confirms remaining Exam sitting dates for 2020 and adviser participation rates](#)

FASEA confirms the remaining 2020 sittings for the Adviser Exam will be held over 5 days in each of August, October and November. The Exam is scheduled to be offered across 327 separate sessions in those months.

[SME Guarantee Scheme](#)

Under the Scheme, the Government will guarantee 50 per cent of new loans issued by eligible lenders to SMEs. The Scheme will be available for new loans made by participating lenders until 30 September 2020. A list of participating lenders will be available on the Treasury website once the offers to lenders have been accepted.

[AFCA: LCCC publishes annual industry data and compliance report](#)

On 26 June 2020, the Life Code Compliance Committee published its annual industry data and compliance report 2018-19.

[AFCA details of non-compliant members](#)

The Australian Financial Complaints Authority has published the details of 680 financial firms who have failed to pay their AFCA membership levy.

ASFA: Guidelines for debt agreement administrators

We have made important temporary updates to the certified duties of debt agreement administrators, regarding proposals to vary debt agreements. These changes are currently in affect 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](#).

[AASB Reminder: Exposure Draft ED 301: Classification of Liabilities as Current or Non-current—Deferral of Effective Date](#)

The AASB is proposing to defer the effective date of recently issued [AASB 2020-1 Amendments to Australian Accounting Standards – Classification of Liabilities as Current or Non-current](#) (March 2020) by one year to annual reporting periods beginning on or after 1 January 2023 via ED 301 *Classification of Liabilities as Current or Non-current—Deferral of Effective Date*.

[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.

[Amendments to Australian Accounting Standards – Annual Improvements 2018–2020 and Other Amendments](#)

Several small amendments have been issued via AASB 2020-3 Amendments to Australian Accounting Standards – Annual Improvements 2018–2020 and Other Amendments. The amendments include narrow-scope amendments as well as the Annual Improvements.

[IASB issues amendments to IFRS 17 Insurance Contracts to help companies with implementation](#)

The International Accounting Standards Board (Board) have issued amendments to IFRS 17 Insurance Contracts aimed at helping companies implement the Standard and making it easier for them to explain their financial performance.

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.

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

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

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.

[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

[Banking Amendment \(Deposits\) Bill 2020](#)

Status: Accepting Submissions

Date Referred: 18 June 2020

Submissions Close: 10 July 2020

Reporting Date: 10 August 2020

[National Consumer Credit Protection Amendment \(Small Amount Credit Contract and Consumer Lease Reforms\) Bill 2019 \(No. 2\)](#)

Date Referred: 05 December 2019

Reporting Date: 21 September 2020

CASES

[Australian Securities and Investments Commission v Westpac Banking Corporation \[2020\] FCAFC 111](#)

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 the assessment required of unsuitability

APPEAL – whether primary judge erred in failing to find respondent contravened s 128 by not making an assessment in accordance with s 128(c) of National Consumer Credit Protection Act 2009 (Cth) – appeal dismissed with costs

Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth); National Consumer Credit Protection Act 2009 (Cth); National Consumer Credit Protection Regulations 2010 (Cth)

[Australian Securities and Investments Commission v One Tech Media Ltd \(No 6\) \[2020\] FCA 842](#)

CORPORATIONS – penalties for breaches of Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and Corporations Act 2001 (Cth) (Corporations Act) – where breaches already established – pecuniary penalty for breach of s 12CB(1) of the ASIC Act – maximum penalty justified – disqualification orders under s 206E of the Corporations Act – permanent disqualification and disqualification for 15 years respectively justified – permanent injunctions preventing defendants from carrying on a financial services business granted

PRACTICE AND PROCEDURE – costs – where plaintiff applied for Sanderson or Bullock Order against unsuccessful defendants in respect of successful defendants' costs – proceedings reasonably started against successful defendants but unreasonably persisted in – unsuccessful defendants did not induce plaintiff to continue proceedings against successful defendants – not fair and reasonable to impose liability for successful defendants' costs on unsuccessful defendants – Sanderson and Bullock Orders refused

[Ovalglen Holdings Pty Ltd \(in liq\) v Viewnorth Investments Pty Ltd \[2020\] FCA 889](#)

PRACTICE AND PROCEDURE - application for return of bank guarantees provided as security for costs - where defendant is an incorporated legal practice representing itself - bank guarantees provided prior to Bell Lawyers Pty Ltd v Pentelow [2019] HCA 29; (2019) 372 ALR 555 - exercise of court's discretion to make interlocutory orders - not necessary nor desirable to order return of bank guarantees - application dismissed

[Tresize v National Australia Bank Limited \[2020\] FCA 902](#)

PRACTICE AND PROCEDURE – application for summary dismissal – where the applicant claimed that consent orders made in 1993 should be set aside on the basis of fraud on the part of the respondent – where the applicant had brought at least three earlier proceedings seeking to have the consent orders set aside – whether the claims should be permanently stayed or dismissed on the basis of abuse of process, Anshun estoppel, res judicata or issue estoppel – whether the claims should be dismissed on the ground that they had no reasonable prospect of success or constituted an abuse of process

Mr Tresize contends that the Bank obtained both the Consent Orders and the Deed of Settlement by fraud, misleading or deceptive conduct, or unconscionable conduct. In particular, he claims that, prior to the Deed of Settlement being entered into, the Bank falsely represented the amounts owing by the applicants (to the 1992 Proceeding) to the Bank and that certain mortgages were in default

[Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd \(in liq\) & Courtenay House Capital Trading Group Pty Ltd \(in liq\) \(No 2\) \[2020\] NSWCA 117](#)

1. Appeal allowed

CORPORATIONS – unregistered managed investment scheme – two companies operating a Ponzi scheme – freezing order on companies' bank accounts – deposits made to companies' bank accounts on day of and in days after freezing order by unsuspecting investors – liquidators appointed – Court directions sought as to method of distribution of limited funds in bank accounts – mixed and co-mingled accounts – whether rule in Clayton's Case, simple pari passu approach or lowest intermediate balance rule to be applied – tracing – role of "hotchpot"

On 21 April 2017, the Australian Securities and Investment Commission (ASIC) obtained ex parte freezing orders over CH's assets and restrained the companies carrying on a financial services business

[In the matter of Glenvine Pty Limited \(in liquidation\) \[2020\] NSWSC 866](#)

CORPORATIONS – Receivers and managers – Appointment of liquidator as receiver with power of sale – Where mortgaged property was the only substantial trust property – Where company in liquidation has right of exoneration for liabilities incurred under outstanding mortgage – Where there is outstanding judgment debt against company in liquidation in separate proceedings

[Central Stone Pty Ltd v GEM Management Group Pty Ltd \(In Liq\) \[2020\] VSC 373](#)

REAL PROPERTY – Surplus proceeds from sale of land paid into court by mortgagee – Applications for payment out – One claimant entitled to an equitable charge under loan agreement – Equitable charge secured principal, interest and all legal costs 'associated with the loan' – Whether legal costs of dealing with the claims of a lender under a back-to-back loan are legal costs associated with the loan – Section 77(3) of the Transfer of Land Act 1958 and s 69 of the Trustee Act 1958

CONTRACT – Construction of indemnity provision in loan agreement - Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104 referred to

[Hamex Corporation Pty Ltd & Anor v Latrobe Street Ventures & Ors \[2020\] VSC 360](#)

PRACTICE AND PROCEDURE – Application by Fourth Defendant to strike out sections of statement of claim – Application by Plaintiffs seeking leave to file amended statement of claim – Strike out application refused – Plaintiffs' proposed amendments to statement of claim allowed – Standing question to be determined on the facts as found at trial – Supreme Court (General Civil Procedure) Rules 2015 (Vic)

Further, or in the alternative, Latrobe's conduct in issuing the redemption notice and in seeking to redeem the Estate's units in the Unit Trust comprises conduct in relation to provision of a financial service which is unconscionable contrary to ss 12CA and 12CB of the Australian Securities and Investments Commission Act 2001 (the ASIC Act). 93B.1 A unit in the Unit Trust is a financial product within the meaning of s 12BAA of the ASIC Act

LEGISLATION

Commonwealth

Regulations

[Accounting Standard AASB 2020-4 Amendments to Australian Accounting Standards – COVID-19-Related Rent Concessions](#)

03/07/2020 - This instrument amends AASB 16 to provide a practical expedient for lessees regarding the accounting under a lease for rent concessions granted due to the COVID-19 pandemic.

[Accounting Standard AASB 2020-3 Amendments to Australian Accounting Standards – Annual Improvements 2018–2020 and Other Amendments](#)

03/07/2020 - This Standard makes amendments to the following Australian Accounting Standards: AASB 1 First-time Adoption of Australian Accounting Standards (July 2015); AASB 3 Business Combinations (August 2015); AASB 9 Financial Instruments (December 2014); AASB 116 Property, Plant and Equipment (August 2015); AASB 137 Provisions, Contingent Liabilities and Contingent Assets (August 2015); and AASB 141 Agriculture (August 2015).

[ASIC Corporations \(Approval of Variation of March 2020 Banking Code of Practice\) Instrument 2020/602](#)

30/06/2020 - This instrument approves a variation of the March 2020 Banking Code of Practice.

The COVID-19 Special Note is stated to commence on 1 July 2020 and will apply until 1 March 2021. The COVID-19 Special Note applies to banking services and guarantees during that period.

[ASIC Corporations, Superannuation and Credit \(Amendment\) Instrument 2020/99](#)

26/06/2020 - This instrument amends the ASIC Corporations and Credit (Internal Dispute Resolution—Transitional) Instrument 2019/965 to preserve ASIC's existing internal dispute resolution policy in relation to complaints received by financial firms before 5 October 2021.

[Competition and Consumer \(Consumer Data Right\) Amendment Rules \(No. 1\) 2020](#)

18/06/2020 – This instrument amends the Competition and Consumer (Consumer Data Right) Rules 2020 to clarify the intended operation of particular rules and to ensure appropriate alignment of rules with the technical data standards prior to the commencement of consumer data sharing on 1 July 2020.

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