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ISSUE 63



## BANKING SECTOR NEWSLETTER

Welcome to Issue 63 of our fortnightly Banking Sector Newsletter.

In this issue, we refer to an article about the impacts of artificial intelligence on the future of banking, as well as articles on Australian banks announcing the next phase of COVID-19 support.

In other news, ASIC has released a consultation paper on the proposed use of its intervention power to address significant detriment in the continuing credit industry.

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

### IN THE MEDIA

#### Data bias, risks inherent in banking artificial intelligence

While the majority of banking executives believe artificial intelligence will separate winning banks from “losers”, new research has shown that there are fundamental risks involved. <https://www.mortgagebusiness.com.au/breaking-news/14744-data-bias-risks-inherent-in-banking-ai>

#### Fighting financial crime and online child exploitation

Through AusPayNet’s Fraud in Banking Forum (FBF), financial institutions, law enforcement and the Australian Financial Crimes Exchange work collaboratively to combat financial crime. <https://www.auspaynet.com.au/insights/blog/Fighting>

#### Federal Court upholds ASIC’s appeal on Robert Hutchison

On 13 July 2020, following an appeal by ASIC, the Federal Court set aside a decision of the Administrative Appeals Tribunal (AAT) not to ban financial adviser Mr Robert Hutchison from providing any financial services. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-162mr-federal-court-upholds-asics-appeal-on-robert-hutchison/>

#### FSC welcomes new fund managers to board

The Financial Services Council (FSC) welcomes four appointments to its Board. The FSC also announces the establishment of a new board committee, the Fund Management Board Committee (FMBC), to drive the strategic policy direction for the Australian funds management sector. <https://www.fsc.org.au/resources/2039-fsc-media-release-fsc-welcomes-new-fund-managers-to-board/file>

#### FSC backs policies to promote Australia as a financial services hub

The Financial Services Council (FSC) reforms would build on Australia’s existing strengths including our high quality education and training sector, the rule of law, our political stability, and our well-established funds management industry servicing Australia’s superannuation sector. <https://www.fsc.org.au/resources/2038-fsc-media-release-fsc-backs-policies-to-promote-australia-as-a-financial-services-hub/file>

#### Financial planners ‘completely ripped off’ by AMP plan class action, push parliamentary inquiry

Embattled wealth manager AMP is likely to face an inquiry over its treatment of financial planners, after a move that forced hundreds of its own advisers out of business. <https://www.abc.net.au/news/2020-07-15/amp-face-another-inquiry-over-behaviour-to-financial-planners/12455900>

#### ASIC grilled over remediation failures

ASIC has been taken to task for its failure to bring the big four banks into line after it was revealed they were splurging on consultants rather than remediating customers. <https://www.investordaily.com.au/regulation/47457-asic-grilled-over-remediation-failures>

### **New initiative helps older Australians access online banking with confidence**

A new course launched by the eSafety Commissioner, as part of the Be Connected program, seeks to make online banking both safer, and more accessible, to more older Australians. <https://www.esafety.gov.au/about-us/newsroom/new-initiative-helps-older-australians-access-online-banking-confidence>

### **Litigation funding fight heats up**

The Senate Parliamentary Joint Committee, Corporations and Financial Services looking into litigation funding and the regulation of the class action industry sparked a heated debate. <https://www.financialstandard.com.au/news/litigation-funding-fight-heats-up-168327891>

### **Deferral extensions 'significantly raise' credit quality risks**

The banking sector's commitment to extend loan repayment holidays for distressed borrowers could prolong the deterioration in credit quality and require higher loan loss provisions, according to analysts. <https://www.mortgagebusiness.com.au/breaking-news/14716-deferral-extensions-significantly-raise-credit-quality-risks>

### **ASIC consults on second product intervention order to stop continuing consumer harm**

In monitoring the effect of the short term credit intervention, ASIC has identified another class of financial products, namely continuing credit products, being issued to borrowers. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-159mr-asic-consults-on-second-product-intervention-order-to-stop-continuing-consumer-harm/>

### **APRA updates regulatory approach to loans subject to repayment deferral**

The APRA announced an extension of its temporary capital treatment for bank loans with repayment deferrals, as well as temporarily adjusting the capital treatment of loans where terms are modified or renegotiated ('restructured') to cover a maximum period of 10 months from the start of a repayment deferral, or until 31 March 2021. <https://www.apra.gov.au/news-and-publications/apra-updates-regulatory-approach-to-loans-subject-to-repayment-deferral>

### **Banks announce expanded loan deferral policies**

Australian banks have announced that they will support customers with a new phase of COVID-19 support, extending mortgage repayment deferrals by another four months, on a case-by-case basis for customers who require it. For most banks, this will be considered only when the current deferral is expiring. <https://www.mortgagebusiness.com.au/breaking-news/14712-banks-extend-covid-19-loan-support>

### **ABA: Banks enter phase two on COVID-19 deferred loans**

As customers approach the end of their six-month loan repayment deferral period, Australia's banks will implement a new phase of support to assist customers to get back to making their repayments. <https://www.ausbanking.org.au/banks-enter-phase-two-on-covid-19-deferred-loans/>

### **COBA welcomes APRA's announcement on treatment of loan repayment deferrals**

The Customer Owned Banking Association welcomes APRA's announcement on loan repayment deferrals. This gives all banking institutions, including COBA members, continued flexibility in the regulatory framework to assist in dealing with customers affected by the COVID-19 crisis. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1464-coba-welcomes-announcement-on-treatment-of-repayment-deferrals>

### **ASIC issues no-action position to allow right-of-use lease assets to count in satisfying AFS licensee requirements**

ASIC issued a temporary no-action position for Australian Financial Services (AFS) licensees in relation to potential breaches of the financial resource requirements that arise from recent changes to the accounting treatment of lease assets. The no-action position will apply until further notice. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-158mr-asic-issues-no-action-position-to-allow-right-of-use-lease-assets-to-count-in-satisfying-afs-licensee-requirements/>

### **Focuses for financial reporting under COVID-19 conditions**

ASIC provided further information on focus areas for financial reporting in the COVID-19 environment for years ending 30 June 2020 following its guidance via the frequently asked questions already published on the ASIC website. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-157mr-focuses-for-financial-reporting-under-covid-19-conditions/>

### **Statement by Philip Lowe, Governor: Monetary Policy Decision**

The RBA Board decided to maintain the current policy settings, including the targets for the cash rate and the yield on 3-year Australian Government bonds of 25 basis points. <https://www.rba.gov.au/media-releases/2020/mr-20-17.html>

## **IN PRACTICE AND COURTS**

### **Australian Bureau of Statistics**

09/07/2020 [Lending Indicators](#), May 2020 (cat no. 5601.0)

### **ASIC Consultation Paper 330 (CP 330)**

ASIC has released Consultation Paper 330 (CP 330) on the proposed use of its product intervention power to address significant detriment it has identified in the continuing credit industry. ASIC is concerned that the continuing credit products are likely to result in significant detriment due to borrowers incurring very high cost, relative to the loan amount.

### **[AFSA: Guidelines for debt agreement administrators](#)**

The AFSA 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](#).

### **[AFSA: Guidance to help you during COVID-19 – PPSR protection](#)**

The AFSA have developed new resources to help you protect your business during and after the COVID-19 crisis.

### **[AFCA Current Matters](#)**

AFCA has paused processing complaints against insolvent firms. Read [AFCA's statement on the investigation of complaints about insolvent firms](#).  
[Sterling Group investors](#) (Updated 20 July 2020)

### **[FASEA formalises three month CPD relief for advisers in recognition of COVID-19 business disruption](#)**

FASEA has registered the 2020 Legislative Instrument and Explanatory Statement for its Corporations (Relevant Providers Continuing Professional Development Standard) Determination (Amendment) 2020 on the Federal Register of Legislation.

### **[FASEA provides remote August Exam sitting option for financial advisers in Melbourne due to COVID-19 restrictions](#)**

Following the reimposition of Stage 3 stay at home restrictions for metropolitan Melbourne and Mitchell Shire and the closure of exam venues, FASEA advises that Melbourne metropolitan physical location exams will not be offered for the August sitting.

### **[APRA letter and data on temporary loan repayment deferrals due to COVID-19](#)**

The APRA has issued a letter to authorised deposit-taking institutions (ADIs) and published aggregated data on temporary loan repayment deferrals due to COVID-19. The aggregated data is available on the APRA website at: [Temporary loan repayment deferrals due to COVID-19](#).

### **[APRA publishes frequently asked question on securitisation requirements in response to COVID-19](#)**

The APRA has published a frequently asked question (FAQ) providing guidance under Prudential Standard APS 120 Securitisation to authorised deposit-taking institutions in repurchasing loans from securitisations in response to COVID-19 repayment deferrals.

### **[AASB Staff FAQ on Impairment of Non-Financial Assets](#)**

In response to economic uncertainties arising from COVID-19 pandemic, AASB staff have prepared a new FAQ which reminds entities of the guidance available in the accounting standards when testing a non-financial asset for impairment.

### **[AASB: Exposure Draft: COVID-19 Related Rent Concessions: Tier 2 Disclosures](#)**

[ED 303 COVID-19 Related Rent Concessions: Tier 2 Disclosures](#) proposes amendments to AASB 1060 General Purpose Financial Statements - Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 Entities, which will ensure that entities applying AASB 1060 continue to have all disclosure requirements in one place.

### **[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.

### **[IASB: Amendments to IFRS Standards](#)**

The International Accounting Standards Board (Board) has issued several small amendments to IFRS Standards. All amendments are effective 1 January 2022. 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: IASB defers the effective date of amendments to IAS 1](#)**

The International Accounting Standards Board (Board) has issued an amendment to defer by one year the effective date of Classification of Liabilities as Current or Non-current, which amends IAS 1 Presentation of Financial Statements for annual reporting periods beginning on or after 1 January 2023. The amendment [can be accessed on eIFRS](#).

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

Organisations 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 13 July 2020.

### [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.

### **Current Inquiries - Economics Legislation Committee** [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

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

Status: Accepting Submissions  
Date Referred: 18 June 2020  
Submissions Close: 10 July 2020  
Reporting Date: 10 August 2020

## CASES

### [Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited \(No 2\) \[2020\] FCA 1013](#)

EVIDENCE – legal professional privilege – waiver – whether privilege over certain documents waived by way of disclosure in prior correspondence – whether privilege over certain documents impliedly waived – no waiver found

Federal Court Rules 2011 (Cth), rr 20.16, 20.17, 20.22

### [Australian Securities and Investments Commission v Hutchison \[2020\] FCA 978](#)

ADMINISTRATIVE LAW - appeal from Administrative Appeals Tribunal - conduct of authorised representative of Australian Financial Services licensee - where banning order made - whether conduct 'in relation to' financial product or financial service - whether Tribunal's construction of provisions including s 1041G and s 1041H of the Corporations Act 2001 (Cth) promotes the purpose or object of Chapter 7

ADMINISTRATIVE LAW - whether Tribunal failed to consider a clearly articulated claim - whether class of person who might be misled by authorised representative limited to consumer - whether constructive failure to exercise jurisdiction - whether denial of procedural fairness

CORPORATIONS - financial services and market - object of Chapter 7 of the Corporations Act - where object includes promotion of fairness, honesty and professionalism by those who provide financial services - meaning of 'in relation to' in s 1041G and s 1041H - whether conduct must relate directly to the nature, quality or characteristic of the financial product or service and must impact consumer - whether indirect or less than substantial connection sufficient

Acts Interpretation Act 1901 (Cth) s 15AA, 15AB, 15AD;  
Administrative Appeals Tribunal Act 1975 (Cth) s 44

Australian Securities and Investments Commission Act 2001 (Cth) s 19, 12BAB; Corporations Act 2001 (Cth) ss 760A, 760B, 761A, 766A, 766B, 912A, 916A, 920A, 920B, 1040A, 1041A, 1041B, 1041C, 1041G, 1041H, 1041J, 1317B; Evidence Act 1995 (Cth) s 140

### [HQ Insurance Pty Limited v Stonehatch Risk Solutions Limited \(No 2\) \[2020\] FCA 1010](#)

PRACTICE AND PROCEDURE – application for preliminary discovery under r 7.23 of Federal Court Rules 2011 (Cth) – where the prospective applicant reasonably believes it may have a right to relief under s 1324(1) of the Corporations Act 2001 (Cth) – whether reasonable inquiries have been made by the prospective applicant – failure to establish sufficient reasonable inquiries were made – whether the prospective applicant has sufficient information to decide whether to start a proceeding – failure to satisfy the Court that all information material to the decision whether to start a proceeding was before the Court – application dismissed

The prospective applicant, HQ Insurance Pty Limited, says it has a reasonable belief that it may have a right to relief, including under s 1324 of the Corporations Act 2001 (Cth), against the prospective respondent, Stonehatch Risk Solutions Limited, for operating in Australia without an Australian Financial Services Licence (AFSL).

### [Leahy and Tax Practitioners Board \(Taxation\) \[2020\] AATA 2164](#)

Pursuant to section 41(2) of the Administrative Appeals Tribunal Act 1975, the decision of the Respondent of 19 December 2019 to terminate the Applicant's registration as a tax agent is stayed until further order of the Tribunal.

PRACTICE AND PROCEDURE – stay application – termination of registration as a tax agent - consideration of principles in Scott – whether it is in the public interest for stay to be granted – consideration of purpose of legislative scheme – stay granted

[Kabir v R \[2020\] NSWCCA 139](#)

APPEAL – sentence appeal – where appellant obtained a financial advantage by deception from a Commonwealth entity – where bank accounts opened for tax refunds from lodgement of false income tax returns – where appellant dealt with proceeds of crime – where additional offence to be taken into account on s 16BA schedule – whether appellant asked whether he wished the additional offence to be taken into account – whether denial of procedural fairness – whether a particular person to be considered victim of offending – where term victim to be construed broadly – whether sentencing judge took relevant matters into account – whether error in finding appellant was not remorseful

[Bayly v Westpac Banking Corporation \[2020\] QCA 148](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the respondent sued the appellant under a mortgage and successfully applied for summary judgment – where the appellant had delivered a promissory note to the respondent – where the respondent did not agree to accept the promissory note in satisfaction of the debts secured by the mortgage – where the appellant nonetheless claimed he had discharged his liability to the respondent under the mortgage by delivering the promissory note – whether the learned primary Judge erred in finding the appellant had no real prospect of succeeding in his defence based on the contention that his debt to the respondent had been extinguished as a result of the delivery of the promissory note

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the respondent sued the appellant under a mortgage and successfully applied for summary judgment – where the appellant entered into the mortgage with the respondent's predecessor in law – where all of the assets and liabilities of the respondent's predecessor in law became the assets and liabilities of the respondent without any transfer, conveyance or assignment on 1 March 2010, pursuant to the Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth) – where the appellant nonetheless claimed the respondent was not entitled to enforce the mortgage because he had not entered into any contract with the respondent – whether the learned primary Judge erred in finding the appellant had no real prospect of succeeding in his defence based on his challenge to the standing of the respondent. Financial Sector (Business Transfer and Group Restructure) Act 1999 Cth s 20, s 22

[Lo v Huang \(No 2\) \[2020\] QCA 149](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – OTHER MATTERS – where the appellant was successful in the appeal – where the appellant submitted draft orders at the court's invitation – where the respondent did not respond to the appellant's draft orders – where the appellant did not press personal relief on appeal – where the appellant's draft orders sought personal relief – whether personal relief should be ordered

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the appellant was unsuccessful at trial – where the trial costs were reserved – where the appellant was successful in the appeal – whether the appellant should be awarded costs at trial and on appeal

This Court found that the Appellant had an equitable mortgage over the Toorbul Property owned by the Respondent.

[DR & DE Holdings Pty Ltd v Marchant \[2020\] NSWSC 912](#)

CIVIL PROCEDURE – Discovery – General Discovery – application of principles of election, waiver and estoppel on account of previous deliberate non-pursuit of orders – principles do not apply – Categories of documents – delay – quick, cheap and just – discovery ordered in amended terms.

To inform the determination of the parties to the partnership and the terms of that partnership, which, in turn, will determine or assist in determining the parties to the loan agreement and the party or parties required to repay the loan.

[GR Capital Group Pty Ltd \(Receivers and Managers Appointed\) \(subject to Deed of Company Arrangement\) v Yan \[2020\] NSWSC 911](#)

LAND LAW – Caveats – Removal of caveat – Withdrawal of caveat by caveator – where there are uncertainties involved in determining the effect of the relevant agreements – where, noting the probable indefeasibility of a registered mortgage, a sufficiently serious question to be tried has not been established – where, in the circumstances, the balance of convenience is in favour of an unconditional order for the withdrawal of the caveat

LAND LAW – Caveats – Caveatable interest – where mortgage duty was not paid in respect of the relevant agreements or the caveat – where the failure to attend to the requirements of s 227 of the Duties Act 1997 (NSW) means that the caveat should be withdrawn

[Reavill Farm Pty Limited v AR Mortgages Pty Ltd \(No 4\) \[2020\] NSWSC 884](#)

PERSONAL PROPERTY — title — particular kinds of personalty — animals — cattle PERSONAL PROPERTY — possession — right to possession — no issue of principle

[El-Saafin & Anor v Franek & Ors \(No 4\) \[2020\] VSC 389](#)

CORPORATIONS – Application to bring proceedings on behalf of company in liquidation – Derivative action – Inherent jurisdiction – Relevant criteria – Where leave not opposed by liquidator – Where circumstances favour exercise of discretion to grant leave – Leave granted. Balanced Securities loan

## LEGISLATION

### Commonwealth

#### Act Compilation

[National Consumer Credit Protection \(Transitional and Consequential Provisions\) Act 2009](#)

17/07/2020 - Act No. 135 of 2009 as amended, taking into account amendments up to Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020.

### Regulations

[Corporations \(Relevant Providers Continuing Professional Development Standard\) Determination \(Amendment\) 2020](#)

15/07/2020 - This instrument amends the Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018 to modify the current requirements for continuing professional development (CPD) that relevant providers (financial planners and financial advisers) must undertake to meet the fourth of the education and training standards under section 921B of the Corporations Act 2001 (see subsection 921B(5) of the Act).

[Auditing Standard on Review Engagements ASRE 2410 Review of a Financial Report Performed by the Independent Auditor of the Entity \(July 2020\)](#)

14/07/2020 - This instrument establishes requirements and provides application and other explanatory material regarding the responsibilities of an auditor of an entity when engaged to undertake a review of a financial report, and on the form and content of the auditor's review report.

[Treasury Laws Amendment \(Acquisition as Consumer—Financial Thresholds\) Regulations 2020](#)

13/07/2020 - These regulations give effect to proposal 15 of the Australian Consumer Law Review which recommended changing the monetary threshold in the definition of 'consumer' for the purposes of the Australian Consumer Law (ACL).

[Auditing Standard ASA 2020-2 Amendments to Australian Auditing Standards made under Section 336 of the Corporations Act 2001](#)

07/07/2020 - This instrument makes amendments to Australian Auditing Standards. The amendments arise from changes made by the International Auditing and Assurance Standards Board (IAASB) to numerous International Standards in response to the revised International Code of Ethics for Professional Accountants (including International Independence Standards) issued by the International Ethics Standards Board for Accountants (IESBA Code).

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