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ISSUE 65



BANKING SECTOR NEWSLETTER

Welcome to Issue 65 of our fortnightly Banking Sector Newsletter.

In this issue, we have a link to ASIC's recent paper on its expectations on lenders when loan repayment deferrals for COVID-19 come to an end. We also have a link to an article on AFCA's response to ASIC's product intervention powers consultation.

We also refer to the Victorian Court of Appeal judgment in *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200. The decision adds to the existing law on application of unconscionable conduct principles to asset lending cases. Thomson Geer's alert on this topic can be accessed [here](#).

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

IN THE MEDIA

ASIC winds up illegal land banking scheme

The Federal Court has made orders to wind up an investment group which swindled 270 investors of more than \$10 million in an illegal unregistered land banking scheme. <https://www.financialstandard.com.au/news/asic-winds-up-illegal-land-banking-scheme-170799204>

Banks get green light to continue co-ordinating relief

The ACCC has given banks approval to continue co-ordinating their COVID-19 support measures. The authorisation will apply until August next year and the ABA must notify the ACCC of any proposed conduct. <https://www.bankingday.com/banks-green-light-to-co-ordinated-relief>

Loan repayment holidays for COVID-19 customers will end soon

With time running out on the initial six-month COVID-19 home loan repayment deferrals, the regulator is telling banks how affected customers should be dealt with. <https://www.abc.net.au/news/2020-08-14/coronavirus-bank-assistance-guidance-issued-by-asic/12556482>

New data shows sharp decline in card fraud in 2019 as industry fraud prevention measures bed down

Data released by the payments industry self-regulatory body Australian Payments Network (AusPayNet) revealed a 19.5% decline in card fraud in 2019, the biggest decline since fraud data was first published. https://www.auspaynet.com.au/insights/Media-Release/FraudStats_JanToDec_2019

Scam alert: AFSA logo misused on request for US dollar transfer

AFSA has been made aware of a scam letter that includes the Australian Financial Security Authority logo, requesting US dollars in exchange for the release of a large sum of money. <https://www.afsa.gov.au/about-us/newsroom/scam-alert-afsa-logo-misused-request-us-dollar-transfer>

Brisbane broker permanently banned

ASIC has permanently banned a Brisbane-based broker from engaging in credit activities, after the corporate watchdog found he had falsified a letter of approval for a home loan. <https://www.financialstandard.com.au/news/brisbane-broker-permanently-banned-170377731>

APRA to recommence prudential policy program and issuing of new licences

The APRA announced it will recommence public consultations on select policy reforms and begin a phased resumption of the issuing of new licenses, which will occur in two phases, with phase one starting in September 2020 and phase two in March 2021. <https://www.apra.gov.au/news-and-publications/apra-to-recommence-prudential-policy-program-and-issuing-of-new-licences>

ACCC sides with banks in screen scraping warning war

Australia's competition watchdog has sided with the major banks over accusations that warning customers against using third-party fintech apps and other services that employ screen scraping constitutes an abuse of market power. <https://www.itnews.com.au/news/accc-sides-with-banks-in-screen-scraping-warning-war-551529>

ACCC says bank screen scraping warnings are not anti-competitive

The ACCC has said warnings to consumers from banks over the use of screen scraping are not designed to lower competition in the local market, and are general security warnings. The commission added it currently has six investigations looking into anti-competitive conduct in the finance sector, as well as working on a market study, and introducing the Consumer Data Right. <https://www.zdnet.com/article/accc-says-bank-screen-scraping-warnings-are-not-anti-competitive/>

ASIC cancels AFS licence of Global Merces Funds Management Limited

ASIC has cancelled the Australian Financial Services (AFS) licence of Global Merces Funds Management Limited (Global Merces) effective 20 July 2020. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-181mr-asic-cancels-afs-licence-of-global-merces-funds-management-limited/>

AFCA makes submission to ASIC's product intervention powers consultation

The Australian Financial Complaints Authority (AFCA) has published its response to ASIC's consultation on the proposed use of its product intervention powers to address significant consumer detriment arising from continuing credit contracts being provided to retail clients under a 'collateral services' model. <https://www.afca.org.au/news/media-releases/afca-makes-submission-to-asics-product-intervention-powers-consultation>

FSC Correction to ABC News Report

The Financial Services Council (FSC) wishes to correct the record on a report published on ABC News on Wednesday 29 July titled 'Superannuation's default disability insurance highlights trustee failings' (ABC Report) which relied heavily on ASIC Report 633. <https://www.fsc.org.au/resources/2053-fsc-media-response-response-to-abc-news-on-tpd-adl-claims/file>

Former financial adviser sentenced to six years' imprisonment for dishonest conduct

Graeme Walter Miller, a former financial adviser and director of Australian Financial Services licensee CFS Private Wealth Pty Ltd, pleaded guilty to six counts of engaging in dishonest conduct in the course of carrying on a financial services business, contrary to section 1041G of the Corporations Act 2001. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-177mr-former-financial-adviser-sentenced-to-six-years-imprisonment-for-dishonest-conduct/>

CUPID-19: Prolonged pandemic emboldens romance scammers

The prolonged impact of COVID-19 on psychological wellbeing is emboldening romance scammers, says financial crimes expert, Leanne Vale of the Customer Owned Banking Association. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1466-prolonged-pandemic-emboldens-romance-scammers>

IN PRACTICE AND COURTS**[High Court \(2021 Sittings\) Rules 2020](#)**

The High Court of Australia has published the High Court (2021 Sittings) Rules 2020, which set out the Court's sitting schedule for 2021.

[ASIC expectations of retail lenders when loan repayment deferrals end](#)

ASIC has published [expectations of lenders](#) to assist them to deliver appropriate and fair outcomes to consumers whose six-month loan repayment deferrals will expire in the coming months. These add to ASIC's [earlier expectations](#) published on 29 April 2020.

[APRA letter for ADIs on loans impacted by COVID-19](#)

The APRA has issued a [consultation letter](#) to authorised deposit-taking institutions (ADIs) regarding capital measures and reporting requirements for loans impacted by COVID-19. The consultation formalises the capital treatment outlined in the [letter sent by APRA to ADIs](#) on 9 July 2020.

[APRA Banking COVID-19 frequently asked questions](#)

APRA has also updated its banking COVID-19 frequently asked questions relating to the treatment of loans impacted by COVID-19.

[APRA monthly data on temporary loan repayment deferrals](#)

The APRA has published the latest aggregated data for temporary loan repayment deferrals due to COVID-19. APRA will continue to update this information on a monthly basis.

[Statement by Philip Lowe, Governor: Monetary Policy Decision](#)

Number 2020-18 - The 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.

[AUSPAYNET: TrustID Framework Governance Consultation](#)

AusPayNet is conducting a consultation on the governance of the TrustID Framework. We're seeking the views of interested parties on key governance principles and features.

[AASB: Deferral of Liability Classification Amendments](#)

To help preparers during the COVID-19 pandemic, the recent liability classification amendments to AASB 101 Presentation of Financial Statements have been deferred by one year through a new amending Standard [AASB 2020-6](#).

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

Entities reporting under Tier 2 (Simplified Disclosures) will be required by AASB 2020-7 to make the same COVID-19 related rent concession disclosures as entities complying with the disclosure requirements in AASB 16.

[AASB Staff FAQ on Accounting for Concessionary Loans by NFP entities](#)

Staff FAQs for not-for-profit entities have been extended to accounting for concessionary loans, focussing on the interaction between AASB 1058 Income of Not-for-Profit Entities and AASB 9 Financial Instruments.

[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.

AFSA: 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](#).

AFCA Current Matters

AFCA has paused processing complaints against insolvent firms. Read [AFCA's statement on the investigation of complaints about insolvent firms](#).

[Union Standard International Group Pty Ltd](#) (Updated August 2020)

[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.

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](#)

Submissions Close: 10 July 2020
Reporting Date: 10 August 2020

Pursuant to the temporary order agreed to on 23 March 2020, the Senate Economics Legislation Committee has agreed that the time for presentation of the report of the inquiry into the Banking Amendment (Deposits) Bill 2020 be extended to 24 August 2020.

CASES

[Australian Securities and Investments Commission v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty Ltd \[2020\] FCA 1166](#)

CORPORATIONS – investigation by ASIC – ex parte application – ASIC seeks appointment of provisional liquidator, asset preservation orders, restraining orders and travel restriction orders – whether orders should be made on ex parte basis – whether orders necessary and appropriate in the particular circumstances – risk of potential fraudulent dissipation of assets – risk conduct has characteristics of a "Ponzi scheme".

Held: orders sought are necessary and appropriate on the basis of evidence presented.

ASIC seeks an order, pursuant to ss 1101B(5) and 1324(4) of the Corporations Act, that, until further order, Mr Mawhinney (by himself, his servants, agents, employees and any company of which he is an officer or member) be restrained from: receiving or soliciting funds in connection with any financial product; advertising, promoting or marketing any Financial Product.

[Argyle Building Services v Franek \[2020\] VSCA 196](#)

PRACTICE AND PROCEDURE – Freezing order – Whether good arguable case for continuation of ex parte freezing order – Indorsement of claim relied on causes of action of conspiracy by lawful means, conspiracy by unlawful means, equitable fraud, knowing assistance and receipt, alienation of property to defraud creditors contrary to s 172(1) Property Law Act 1958 – Judge correct to discharge freezing order – Leave to appeal refused.

Mortgage to NAB over the Land. The mortgage secured amounts totalling \$7,179,500. Clause 15 of the Memorandum of Common Provisions accompanying the mortgage set out events of default which enlivened the mortgagee's power of sale.

[Jams 2 Pty Ltd v Stubbings \[2020\] VSCA 200](#)

EQUITY – Unconscionable conduct – Asset-based lending – Wilful blindness – Lending organised by firm of solicitors – Lending secured on borrower's only significant assets – No evidence of ability to repay sought or received – Whether asset-based lending unconscionable – Consideration of unconscionability requires close examination of all the circumstances – Whether lenders put on inquiry – Lenders entitled to rely on certificates of independent legal and financial advice – Australian Securities and Investments Commission v Kobelt (2019) 368 ALR 1; (2019) 93 ALJR 743; [2019] HCA 18 considered; Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413 considered and distinguished; Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389 considered – Application for leave to appeal granted – Appeal allowed.

[Nakhl v R \(Cth\) \[2020\] NSWCCA 201](#)

CRIMINAL LAW – sentence appeal – eight counts of engaging in dishonest conduct in relation to providing financial services – further four offences of the same kind on a s 16BA schedule – money obtained from individuals – total loss to clients of \$5,121,168.00 – losses incurred over a four year period – sentence of 10 years with non-parole period of 6 years imposed – whether sentencing judge erred in assessment of objective seriousness of offending – whether error in assessment of accumulation, concurrency and totality – whether sentence manifestly excessive – leave to appeal granted but appeal dismissed. Corporations Act 2001 (Cth) – s 1041G(1); Crimes Act 1914 (Cth) – s 16BA, s 21B

[One Pro Baulkham Hills Pty Ltd v Ming Tian Real Property Pty Ltd \[2020\] NSWSC 1043](#)

Proceedings dismissed with costs

CONTRACTS – building contract – construction – conditions precedent – whether conditions precedent were to formation of contract or parties' performance of their obligations under the contract – whether defendant contractor obliged to commence work under contract – whether failure by defendant to provide bank guarantees and evidence of home warranty insurance caused plaintiff to suffer damage

CONTRACTS – ambit of exclusion clause – whether exclusion clause survived consensual termination of contract

CONTRACTS – remedies – damages – whether plaintiff principal proved it had suffered damage by reason of defendant's conduct

CONSUMER LAW – misleading or deceptive conduct – where director of defendant represented guarantee was genuine – where bank guarantee was not genuine – where plaintiff general manager saw at once that bank guarantee was not genuine – whether plaintiff has suffered any loss by director's conduct

[Papadopoulos v Meletis & Anor \[2020\] VSC 505](#)

PRACTICE AND PROCEDURE – Summary judgment – Whether plaintiff has real prospects of success on his statement of claim – Overarching obligations – Disproportionality to the complexity, importance and amount in dispute – Civil Procedure Act 2010 (Vic), ss 9, 24, 62 and 63 – Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158; (2013) 42 VR 27 – Application for summary judgment partially granted.

Orders made granting the Application in part. The Plaintiff's claims in respect of the Supplier Obligations will be dismissed. The Plaintiff's claims in respect of the Guarantee Release Obligation may proceed to trial, save that the relief sought should not include orders for specific performance of the Guarantee Release Obligation.

[Fanshil v Akman \[2020\] NSWDC 393](#)

1. Judgment for the plaintiff in the amount of \$673,617.87 including interest.

2. Costs as agreed or assessed. MERCANTILE Law – Other – unrepaid loan for property development – undocumented loan or "investment" between extended family members – defended on falsehoods – credibility of witnesses

[DEFRANCESCA v RUBY LOANS PTY LTD & ANOR \[2020\] SADC 106](#)

TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - DUTY OF CARE

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH

PROFESSIONS AND TRADES

FINANCE BROKER - DUTIES AND LIABILITIES

EQUITY - GENERAL PRINCIPLES - FIDUCIARY OBLIGATIONS - FIDUCIARY DUTY

DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD - FORGERY

FINANCE BROKER - Where plaintiff claims that her purported signature to loan documents was forged by her then partner and joint borrower - where defendant broker unaware of alleged forgery - duties and liabilities of finance broker to client - scope of duty of care to borrowers - specific advice not sought as to the wisdom of incurring further debt - effect of changing circumstances in determining the scope of the duty of care - whether finance broker should have enquired as to the borrowers capacity to meet payments under the loan secured for them - whether broker should have been aware of risk of fraud by one joint borrower - subsequent financial loss by the joint borrower - measure of damages for breach of duty - whether alleged breaches by finance broker causative of any losses - whether the plaintiff has proved that her purported signature was forged.

The plaintiff has failed to satisfy the court that the signatures on the subject loan document were forged.

LEGISLATION

Commonwealth

Regulation

[High Court \(2021 Sittings\) Rules 2020](#)

13/08/2020 - This instrument appoints the High Court days of sitting for 2021.

[ASIC Corporations \(Amendment\) Instrument 2020/635](#)

14/08/2020 - This instrument provides that the exemption from the requirement to hold an Australian financial services licence covering the provision of certain financial product advice (in limited circumstances), in ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792, also applies where financial counselling services are provided to small businesses.

[Accounting Standard AASB 2020-5 Amendments to Australian Accounting Standards – Insurance Contracts](#)

10/08/2020 - This instrument amends the AASB 4 - Insurance Contracts - August 2015 and AASB 17 Insurance Contracts - July 2017 to defer the effective date of AASB 17 by two years to annual periods beginning on or after 1 January 2023 and simplifies some of its requirements.

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