

9 OCTOBER 2020

ISSUE 68



## BANKING SECTOR NEWSLETTER

Welcome to Issue 68 of our fortnightly Banking Sector Newsletter.

In this issue, the Morrison Government's economic recovery plan introduces changes to accessing credit and ASIC is extending the temporary relief for capital raisings and financial advice.

In other news, we refer to an article on the memorandum of understanding between APRA and ACCC designed to foster closer collaboration between the two regulators.

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

### IN THE MEDIA

#### The Australian Banking Association has welcomed proposed changes to the nation's consumer credit laws

"It is important to ensure that these changes strike the right balance between maintaining strong consumer protections while providing credit into the economy at a critical time", said ABA Chief Executive Officer, Anna Bligh. This proposed reform removes duplication and overlap between regulators while continuing to ensure strong protections for consumers. <https://www.ausbanking.org.au/changes-to-australian-credit-laws/>

#### Insolvency reforms to support small businesses recovery

The Morrison Government will undertake the most significant reforms to Australia's insolvency framework in 30 years as part of our economic recovery plan to keep businesses in business and Australians in jobs. The reforms draw on key features from Chapter 11 of the Bankruptcy Code in the United States, and will cover around 76 per cent of businesses subject to insolvencies. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/insolvency>

#### Simplifying access to credit for consumers and small business

The Morrison Government's economic recovery plan, reduces the cost and time it takes consumers and businesses to access credit. Key elements of the reforms include removing responsible lending obligations from the National Consumer Credit Protection Act 2009, with the exception of small amount credit contracts (SACCs) and consumer leases where heightened obligations will be introduced. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/simplifying-access-credit-consumers-and-small>

#### ASIC extends COVID-19 relief for certain capital raisings and financial advice

ASIC is extending the temporary relief for capital raisings and financial advice due to the continuing uncertain impacts of COVID-19. ASIC will continue to monitor the appropriateness of these temporary relief measures in light of the impacts of COVID-19 on capital markets and on the demand for financial advice. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-220mr-asic-extends-covid-19-relief-for-certain-capital-raisings-and-financial-advice/>

#### ASIC tells fund managers to be 'true to label'

A recent ASIC surveillance has found that fund managers must do more to ensure their products are 'true to label' – that the product name aligns with the underlying assets. ASIC examined the appropriateness of the product labels used by the 37 managed funds and assessed whether the funds were described and promoted in a manner that reflects the underlying assets in terms of risk and liquidity. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-218mr-asic-tells-fund-managers-to-be-true-to-label/>

### APRA and ACCC sign closer collaboration

The Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC) have signed an updated Memorandum of Understanding (MoU) designed to foster closer collaboration between the two regulators. <https://www.apra.gov.au/news-and-publications/apra-and-acc-sign-updated-memorandum-of-understanding>

### COBA welcomes proposed reforms to credit regulation

The Customer Owned Banking Association welcomes the Government's announcement that it will simplify Australia's credit framework to ensure consumers and small business can get timely access to credit. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1474-coba-welcomes-proposed-reforms-to-credit-regulation>

### FPA highlights shifts in consumer behaviour and the importance of universal access to financial advice in the "new normal"

Australians are making long term changes in their spending behaviour to minimise the impact of COVID-19 on their finances, according to CoreData research presented at The Financial Planning Association's (FPA) keynote event. <https://fpa.com.au/news/fpa-highlights-shifts-in-consumer-behaviour-and-the-importance-of-universal-access-to-financial-advice-in-the-new-normal/>

### AUSTRAC issues infringement notice to State Street over international funds transfer reporting breaches

AUSTRAC has issued an infringement notice to State Street Bank and Trust Company (State Street) for over \$1.24 million for failing to report international funds transfer. <https://www.austrac.gov.au/news-and-media/media-release/infringement-notice-state-street-international-fund-transfer>

## IN PRACTICE AND COURTS

### [Consultation on Financial Products and the Personal Property Securities Act 2009](#)

The Attorney-General's Department has released its consultation paper on the Personal Properties Securities Act 2009 and Financial Products. The Department is accepting submissions in regards to the practical impact of the PPSA on the trading of financial products and whether current provisions in the legislation should be amended.

### [AFCA Datacube updated with latest complaint statistics](#)

The Australian Financial Complaints Authority (AFCA) has updated its online comparative reporting tool, the AFCA Datacube, to include information about all financial complaints lodged with it from 1 July 2019 to 30 June 2020.

### [AFCA submission to ASIC's product intervention power on add-on motor vehicle financial risk products consultation](#)

The Australian Financial Complaints Authority (AFCA) has published its submission to ASIC's consultation on the proposed use of its product intervention powers to address significant cons.

### [PIR Newsletter – September 2020](#)

The Personal Insolvency Regulator (PIR) is a quarterly newsletter from AFSA's independent Regulation and Enforcement division.

### **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](#).

### **AFCA Current Matters**

[Mayfair group of companies](#) (Updated September 2020 )

### **CPA Current Consultations**

[IAASB: Auditor reporting post-implementation review: stakeholder survey](#)

Comments due: Friday 23 October

**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

### [APRA issues letter to ADIs following review of treatment of loans impacted by COVID-19](#)

The APRA has issued a letter to authorised deposit-taking institutions (ADIs) following a review of ADIs' comprehensive plans for the assessment and management of loans with repayment deferrals.

### [AASB: Amendments to Australian Accounting Standards – Interest Rate Benchmark Reform – Phase 2](#)

[AASB 2020-8 Amendments to Australian Accounting Standards – Interest Rate Benchmark Reform – Phase 2](#) addresses issues that may affect financial reporting during the interest rate benchmark reform.

### [APRA consultation on alignment of Daily Liquidity Report for authorised deposit-taking institutions](#)

APRA has released a consultation on updates to Reporting Standard ARS 210.0 Liquidity. The proposed changes extend data items currently collected and align the Reporting Form ARF 210.5 Daily Liquidity Report with the modified version submitted by certain authorised deposit-taking institutions (ADIs).

### [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.

### [RBA Bulletin: Managing the Risks of Holding Self-securitisations as Collateral](#)

17 September 2020: Duke Cole and Calebe de Roure  
Self-securitisations are structured pools of assets, such as residential mortgages, created by banks specifically to use as collateral to access liquidity from the Reserve Bank.

## CASES

### [Australian Securities and Investments Commission v Goel \[2020\] FCA 1369](#)

CORPORATIONS - ex parte application for interim asset preservation and travel restraint orders - Australian Securities and Investments Commission investigation into potential violations of Corporations Act 2001 (Cth), Australian Securities and Investments Commission Act 2001 (Cth) and Criminal Code Act 1913 (WA) - interim orders made.

Both Mr Goel and AR Wealth are authorised representatives of an Australian Financial Services Licence holder called Australian Financial Directions Pty Ltd

### [Hylepin Pty Ltd v Doshay Pty Ltd \[2020\] FCA 1370](#)

CORPORATIONS – share and debt capital invested by the first defendant in various joint venture companies – whether transactions undertaken in breach of fiduciary duties, specifically the conflict rule and the profit rule – whether monies of the first defendant were applied for the purchase of real property – whether real property held on a constructive trust for the first defendant – whether claims are time barred in equity by analogy to claims based upon breach of the statutory duties of directors or by the equitable doctrine of laches – whether share transfer to the first defendant vitiated by mistake – whether decision by the first defendant not to renew a lease of commercial premises a breach

of the statutory duty to act in good faith – dividends not declared by the first defendant for a lengthy period – whether the affairs of the first defendant have been either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, the plaintiff Loan transactions and agreements.

### [Abdi v Equitable Financial Solutions Pty Ltd & Anor \[2020\] FCCA 2521](#)

CONSUMER LAW – Costs – Where first respondent intends to conduct business of raising funds in relation to a Shariah-compliant investments program – where first respondent accepts appointment by applicant as its Wakeel agent to invest its funds and to repay principle and profit in consideration for agency fee – where first respondent accepts investment by applicant – where investments are not fully repaid – where condition of first respondent’s investment license was that it would participate in dispute resolution scheme conducted by Credit and Investments Ombudsman – where Ombudsman makes determination that first respondent repay investment – where first respondent does not repay monies – where proceedings ensued – proceeding allocated to Consumer Protection List – where first respondent placed in administration – where second respondent overseas and does not provide instructions when matter listed for directions – costs ordered – where proceeding set down for hearing – jurisdiction put in issue – applicant discontinues proceeding – second respondent seeks costs on indemnity or party/party basis – applicable principles – discretionary considerations – relevance of conduct – no order as to costs – Registrar directed to supply copy of reasons for judgment to Australian Securities & Investments Commission.

Corporations Act 2001 (Cth), s 131A.

### [Commonwealth Bank of Australia trading as Bankwest v Mastronardo \(No.2\) \[2020\] FCCA 2609](#)

BANKRUPTCY – Application for sequestration order where preconditions for making a sequestration order under s.52(1) of the Bankruptcy Act 1966 (Cth) (Act) are satisfied for the hearing of application by supporting creditor to be substituted as petitioning creditor.

GUARANTEES AND MORTGAGES – Whether liability of debtor to pay the “secured moneys” under guarantees debtor gave is likely to be held to have depended on the creditor first making a demand for the payment of the “secured moneys” under the terms of each guarantee – demand likely necessary – whether rights of creditor to appoint receivers over properties debtor mortgaged to creditor as security for his liability under the guarantees to pay the “secured moneys” is likely to be held to have depended on creditor first making a

demand under each of the guarantees for the payment of the "secured moneys" – creditor's rights are likely to be held to have depended on the creditor making such demands – whether by appointing receivers over the mortgaged properties purportedly pursuant to the terms of the mortgages without having first made a demand under each of the guarantees for the payment of the "secured moneys" it is likely to be held that the debtor was discharged from his liability under each of the guarantees without the debtor having to make an election that he is no longer bound by the guarantees

– likely to be held that election required – whether it is likely to be held that before debtor purported to elect not to be bound by each of the guarantees the debtor affirmed his obligations under each guarantee – likely to be held that affirmation not made – whether in these circumstances it is likely to be held that the debtor has a claim against the Bank for an amount representing the proceeds of sale of the mortgaged properties sold by the receivers – likely to be held that the debtor has such claim and likely that at the trial of such claim he will succeed on such claim.

CONSUMER LAW – UNCONSCIONABLE CONDUCT – Whether by offering to lend additional amounts under an existing facility on particular terms the creditor is likely to be held to have engaged in unconscionable conduct – whether by appointing receivers over mortgage property the creditor is likely to be held to have engaged in unconscionable conduct – no reasonably arguable case of unconscionable conduct. Australian Securities and Investments Commission Act 2001 (Cth), ss.12BAA, 12BAB, 12BD, 12CA, 12CB, 12CC, 12GF, 12GM, Australian Securities and Investments Commission Regulations 2001 (Cth), reg.2B Bankruptcy Act 1966 (Cth), ss.49, 52(1), 52(2)(b)

#### [Glover v Kaji Australia Pty Limited \[2020\] NSWCA 222](#)

(1) Appeal dismissed with costs. TORTS – fraudulent conspiracy – appellant alleged multiple parties fraudulently conspired to procure him to obtain a short-term loan he as unable to repay – case entirely circumstantial with no direct evidence – matters relied upon fell well short of proving allegations to the relevant Briginshaw standard – findings by primary judge credit-based and not shown to be in error Evidence Act 1995 (NSW).

#### [Australia and New Zealand Banking Group Limited v Giannaklis \(No 3\) \[2020\] NSWSC 1271](#)

COSTS – indemnity costs – right under contract – also otherwise payable as more appropriate compensation of plaintiff. Uniform Civil Procedure Rules 2005 (NSW), r 42.5.

#### [Uber Builders and Developers Pty Ltd v MIFA Pty Ltd \[2020\] VSC 596](#)

CONTRACTS – Injunctive relief – Performance securities – Contractual risk allocation mechanism – Disputed agreement regarding ability to call on performance securities for delay damages – Disputed agreement regarding ability to call on performance securities for variations – Whether calling upon performance security is unconscionable – Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd (2015) 31 BCL 407 – Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd [2019] VSCA 318 – Re Concrete Constructions Group Pty Ltd [1997] 1 Qd R 6 – Olex Focas Pty Ltd v Skodaexport Co Ltd [1998] 3 VR 380 – Boral Formwork & Scaffolding Pty Ltd v Action Makers Limited (2003) 1 BFRA 34 – Australian Standard General Conditions of Contract for Design and Construct AS4300-1995.

PRACTICE AND PROCEDURE – Injunctive relief – Building contract – Application to restrain principal from call on bank guarantees – Serious issue to be tried – Consideration of whether appropriate to decide contract interpretation question as if on a final basis – Proper approach – Balance of convenience – Application for injunction dismissed.

#### [Heritage Bank Limited v Gleeson & Anor \(No 4\) \[2020\] QDC 224](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – where the defendants had defaulted on mortgage repayments – where default judgment was entered against the defendants following service under an order for substituted service – where the defendants applied to set aside an order of substituted service – where the court ordered that the application to set aside the order for substituted service be listed for hearing not before 28 May 2020 – where a mention limited only to the issue of production and access to subpoenas was listed on 23 April 2020 – where the orders made on that day and initially endorsed on the file and included in a sealed order taken out by the plaintiff related only to the subpoena issues – where the plaintiff's solicitors approached the associate without notice to the defendants seeking the orders be amended to add an order dismissing the substantive application – where the initial sealed order was amended to add an order dismissing the substantive application without notice to the defendants – whether the amended order was properly made – whether the amended order should be set aside Uniform Civil Procedure Rules 1999 (Qld) r. 667(2).

**LEGISLATION****Regulation****[ASIC Corporations \(Amendment\) Instrument 2020/862](#)**

23/09/2020 - This instrument amends ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289, ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 and ASIC Corporations (Amendment) Instrument 2020/565 to provide extensions to the end dates for three separate temporary relief measures relating to capital raisings and financial advice due to the uncertain impacts of COVID-19.

**[Corporations and Bankruptcy Legislation Amendment \(Extending Temporary Relief for Financially Distressed Businesses and Individuals\) Regulations 2020](#)**

21/09/2020 - This instrument amends various definitions and concepts in the Bankruptcy Regulations 1996 and the Corporations Regulations 2001 to extend the application of temporarily increased thresholds until 31 December 2020. Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020.

**[Financial Sector Reform \(Hayne Royal Commission Response—Protecting Consumers\) \(Mortgage Brokers\) Regulations 2020](#)**

21/09/2020 - These regulations amend the National Consumer Credit Protection Regulations 2010 to address conflicted remuneration for mortgage brokers, as per Recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

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