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ISSUE 69



## BANKING SECTOR NEWSLETTER

Welcome to Issue 69 of our fortnightly Banking Sector Newsletter.

In this issue, the RBA predicts a rise in the failure of Australian businesses as stimulus and loan support are wound back and the Federal Government has announced a new digital plan to modernise the way Australians do business.

We also refer to an article on the Financial Planning Association of Australia's call for the law to be amended to rename the term 'general advice' as part of significant reform recommendations to streamline regulation of the financial planning profession.

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

### IN THE MEDIA

#### Australian funds last on disclosure: Morningstar

Australia has the world's worst practice in portfolio holdings disclosure, according to Morningstar, with an analyst calling the lack of transparency an "indictment" of the local investment industry. <https://www.investordaily.com.au/regulation/48010-australian-funds-last-on-disclosure-morningstar>

#### 'Business failures will rise substantially': RBA

While Australian businesses had low levels of debt going into the crisis, and income support measures, rental relief and loan deferrals have helped them stay above water through the pandemic, the RBA believes that time has now run out. <https://www.investordaily.com.au/markets/48015-business-failures-will-rise-substantially-rba>

#### Budget 2020 charts the road to recovery

The Australian Banking Association has welcomed the strong focus on support for small and medium businesses and direct assistance to families. <https://www.ausbanking.org.au/budget-2020-charts-the-road-to-recovery/>

#### Redefining the new era of financial planning to better protect consumers

The Financial Planning Association of Australia (FPA) has renewed its call for the law to be amended to rename the term 'general advice' to 'product information' or 'strategy information', to better protect the interests of consumers and promote confidence in the financial planning profession. <https://fpa.com.au/news/redefining-the-new-era-of-financial-planning-to-better-protect-consumers/>

#### Tax Practitioners Board signs new MOU with CPA Australia

The Tax Practitioners Board (TPB) has signed its first Memorandum of Understanding (MOU) with a recognised tax agent association, CPA Australia. These agreements are already proving most effective in promoting information exchange for the mutual benefit of both parties and ensuring we are better able to track and monitor compliance with the Tax Agent Services Act 2009 including the Code of Professional Conduct. <https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/media/media-release/cpa-tpb-mou-media-release.pdf?la=en&rev=2f6625cc8bf3478db242f4b0cff5abe0>

#### More pain awaits Aussie banks: S&P

Australian banks are confronting a "protracted recovery" from the COVID-19 recession despite their strong capital buffers, according to S&P Ratings. A downgrade on the Australian sovereign remains the main risk to our ratings on the four major Australian banks and Macquarie Bank Ltd. <https://www.investordaily.com.au/markets/48006-more-pain-awaits-aussie-banks-s-p>

#### Auspaynet: Digital Business Plan forms key part of jobs-focused Budget: What were the key takeouts for the payments industry?

The 2020 Budget was all about creating jobs and boosting Australia's economic recovery from COVID-19. It includes significant expenditure on infrastructure and tax cuts and announcements of potential reforms to several sectors, including superannuation and payments. <https://www.auspaynet.com.au/insights/blog/Budget2020>

### COBA welcomes 10,000 new allocations to First Home Loan Deposit Scheme

The Customer Owned Banking Association has welcomed the Federal Government's announcement to increase the First Home Loan Deposit Scheme (FHLDS) by a further 10,000 allocations. Reserved for new homes and newly built homes, the additional scheme allocations will be available to eligible first home buyers from 6 October 2020 to 30 June 2021. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1475-coba-welcomes-new-allocations-to-fhlds>

### Auspaynet Senate Fintech & Regtech Committee Interim Report Offers 'Quick Wins'

The Interim Report of the Senate Select Committee on Financial Technology and Regulatory Technology tabled in September 2020 contains 32 recommendations to the executive government. [https://www.auspaynet.com.au/insights/blog/SFRC\\_Interim\\_2020](https://www.auspaynet.com.au/insights/blog/SFRC_Interim_2020)

### ASIC and RBA announce expectations for CHES replacement

ASIC and the Reserve Bank of Australia (RBA) (the regulators) have outlined their expectations of ASX as it replaces the Clearing House Electronic Sub-register System (CHES). This follows the release of the RBA's [2020 Assessment of ASX Clearing and Settlement Facilities](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-229mr-asic-and-rba-announce-expectations-for-ches-replacement/). <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-229mr-asic-and-rba-announce-expectations-for-ches-replacement/>

### FASEA highlights problem areas in August exam

The FASEA has once again cited the areas advisers struggled with in the latest FASEA exam, with three of the Standards, ethical obligations, understanding client best interests and understanding the difference between types of advice as key areas. [https://www.moneymanagement.com.au/news/financial-planning/ fasea-highlights-problem-areas-august-exam](https://www.moneymanagement.com.au/news/financial-planning/fasea-highlights-problem-areas-august-exam)

### Electronic execution and remote witnessing of documents: things writ in water?

The Treasury continues to receive submissions on cutting red tape in the life insurance context. It is to be hoped that one outcome of the current situation will be a uniform treatment of the law of execution and witnessing in all Australian jurisdictions. It is hardly efficient if one Australian jurisdiction requires witnessing of a Deed but another does not. <https://www.fsc.org.au/news/remote-witnessing>

### ASIC remakes two 'sunsetting' class orders relating to credit

ASIC has remade ASIC Class Order [CO 10/381] relating to notification requirements for unlicensed carried over instrument (COI) lenders which was due to end on 1 October 2020. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-225mr-asic-remakes-two-sunsetting-class-orders-relating-to-credit/>

### ASIC bans fixed income broker

Former BGC Securities (Australia) broker David Moore has been banned from providing financial services for ten years. ASIC found that Mr Moore breached a contractual agreement between BGC and a referring broker by charging unpermitted spreads on transactions entered on behalf of a number of accounts of clients referred to BGC. <https://www.investordaily.com.au/regulation/47946-asic-bans-fixed-income-broker>

### IFAC Applauds IFRS Consultation on Sustainability Standards Board

IFAC applauds the IFRS Foundation Trustees in issuing their Consultation Paper on Sustainability Reporting. This marks a critical step on the path towards a global solution to sustainability reporting, called for by IFAC in its Enhancing Corporate Reporting: The Way Forward roadmap. <https://www.ifac.org/news-events/2020-09/ifac-applauds-ifrs-consultation-sustainability-standards-board>

### ABA: Government digital plan good for consumers

A new digital plan announced by the Federal Government is a major step forward that will modernise the way Australians do business and deliver significant benefits to consumers. <https://www.ausbanking.org.au/government-digital-plan-good-for-consumers/>

## IN PRACTICE AND COURTS

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

Number 2020-24: 6 October 2020

The RBA Board decided to maintain the current policy settings, including the targets for the cash rate, the yield on 3-year Australian Government bonds, and the parameters for the expanded Term Funding Facility.

### ASIC Updates - 28 September 2020

[ASIC Credit \(Notice Requirements for Unlicensed Carried Over Instrument Lenders\) Instrument 2020/834](#)

Remakes sunseting Class Orders [[CO 10/381](#)] and [[CO 10/1230](#)] relating to credit: see [20-225MR ASIC Credit \(Electronic Precontractual Disclosure\) Instrument 2020/835](#)

[ASIC Credit \(Repeal\) Instrument 2020/836](#)

### [FASEA Consultation – Draft Financial Planners & Advisers Code of Ethics 2019 Guide](#)

FASEA has released the draft Financial Planners & Advisers Code of Ethics 2019 Guide for consultation. The draft Financial Planners and Advisers Code of Ethics 2019 Guide can be accessed [here](#). All feedback and submissions are welcomed on the draft guide and can be submitted through FASEA's dedicated consultations email [consultation@fasea.gov.au](mailto:consultation@fasea.gov.au) until 2 November 2020.

### [PwC - where next for financial services](#)

In the years to come, nine critical forces will amplify change in all sectors of the Australian economy, and financial services (FS) is no exception. To meet the challenge, banks, insurance providers, super funds and asset managers will have to address challenges to every part of the enterprise.

### [FPA Submissions: Growth/defensive asset categorisation: proposed solution for consultation](#)

Growth/Defensive Categorisation Protocol - The Conexus Institute

The FPA welcomes the opportunity to provide input into the Conexus Institute's consultation on Growth/Defensive Asset Categorisation. The FPA congratulates the Conexus Institute on leading this important work. Clarity, comparability and true labelling are critically important to consumers to enable the appropriate selection of products to meet a consumers financial objectives.

### [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](#)

This document seeks to provide some guidance to practitioners in relation to COVID-19 and its effect on our stakeholders. The changes outlined here will remain in place until 31 December 2020.

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.

### [AFCA Current Matters](#)

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

[Bendigo and Adelaide Bank Great Southern loans](#)  
(Updated October 2020)

### [CPA Policy Bulletins](#)

[Federal Budget Member Report 2020-21](#)  
(06 October 2020)

Breakdown of all relevant Budget initiatives

### [CPA Current Consultations](#)

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

Comments due: Friday 23 October 2020

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

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.

### [APRA Monthly Authorised Deposit-taking Institution Statistics - August 2020](#)

The APRA has released its Monthly Authorised Deposit-taking Institution Statistics (MADIS) publication for August 2020.

### [APRA issues letter to ADIs on resuming consultation on confidentiality of data](#)

The APRA has released a letter advising it is resuming its consultation on the confidentiality of data submitted by authorised deposit-taking institutions (ADIs), and a proposed list of key data items to be determined non-confidential. This consultation was paused in response to COVID-19.

### [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

### [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](#)

[Habrok \(Dalgara\) Pty Ltd v Gascoyne Resources Ltd \[2020\] FCA 1395](#)

CORPORATIONS – gold mining group – insolvency – voluntary administration – deed of company arrangement – rival deeds of company arrangement – dual track process – inadequacy of sale process – recapitalisation – capital raising of \$85 million – role of administrators – conflict of interest – relevance of work prior to administration – adequacy of investigation – report to creditors – deficiency in report to creditors – precluding creditors from considering rival deeds of company arrangement – failure to adjourn second meeting of creditors – terminating deed of company arrangement – liquidation – application under ss 445D and 447A of Corporations Act 2001 (Cth) – COVID-19 special measures – relief refused

Corporations Act 2001 (Cth) ss 51C, 60, 435A, 436DA, 437A, 438A, 439A, 440B, 442B, 443D, 443E, 443F, 445D, 444DA, 444GA 447A, 556, 561, 563A, 588FA, 588FB, 588FC, 588FE, 588FJ, 588FL, 588GA and 600H; schedule 2 ss 5-30, 75-42, 75-43, 80-55, 90-15 and 90-20

Insolvency Practice Rules (Corporations) 2016 (Cth) ss 75-140 and 75-225

Personal Property Securities Act 2009 (Cth) ss 12, 267 and 340

[Ozito Industries Pty Ltd v Australian Securities and Investments Commission, in the matter of Ozito Industries Pty Ltd \[2020\] FCA 1432](#)

CORPORATIONS – financial reporting and lodging requirements under Part 2M.3 of the Corporations Act 2001 (Cth) – inadvertent failure to comply with conditions of exemption under ASIC Corporations (Wholly-owned Companies) Instrument 2016/785 – relief from non-compliance under s 1322 – requirements of ss 1322(4) and (6) – appropriate form of orders – relief to be limited to a contravention arising by reason of identified acts or omissions

[Arundell & Ors v Macquarie Bank Ltd \[2020\] FCCA 2720](#)

INDUSTRIAL LAW – application for civil remedies – whether or not applicants who executed deeds of release following the cessation of their employment are precluded from being able to pursue their claims – whether or not the applicants received remuneration in satisfaction of an entitlement to minimum rates of pay as contained in cl 13.1(a) of the Banking, Finance and Insurance Award 2010 – contraventions of cl 24.3(a) of the Award and National Employment Standards made out – overpayment to one applicant found to be recoverable – declarations made – compensation orders made. Banking, Finance and Insurance Award 2010, cls 13.1, 14, 24.3

[Wardman & Ors v Macquarie Bank Limited and Briody & Ors v Macquarie Bank Limited \[2020\] FCCA 2725](#)

INDUSTRIAL LAW – Application for civil remedies – whether or not applicants who executed deeds of release following the cessation of their employment are precluded from being able to pursue their claims – whether or not the applicants received remuneration in satisfaction of an entitlement to minimum rates of pay as contained in cl 13.1(a) of the Banking, Finance and Insurance Award 2010 – contraventions of cl 24.3(a) of the Award and National Employment Standards made out – declarations made – compensation orders made. Banking, Finance and Insurance Award 2010, cls 13.1, 14, 24.3

[Arab Bank of Australia Limited v Ali Alaouie & Ors \[2020\] NSWSC 1386](#)

CIVIL PROCEDURE – application to strike out defence – application for default judgment – home loans and purchase of taxi plates – six defendants – multiple securities – first defendant bankrupt – relevant principles

Real Property Act 1900 (NSW), s 57(2)(b); Bankruptcy Act 1966 (Cth), s 58; Uniform Civil Procedure Rules 2005 (NSW), r 14.28, r 14.3, 16.2, 16.4, r 16.5 and r 16.8

[Dimarti v Westpac Banking Corporation \[2020\] NSWSC 1342](#)

CIVIL PROCEDURE – Pleadings – Fraud – Amendment – Form and Content of Pleadings – Non-compliance with Rules relating to personal injury – lack of specificity in fraud allegation – leave granted to file amendment over objection. LIMITATION OF ACTIONS – Fraud and personal injury – amendment to allege different cause of action – same or similar facts – operation of Civil Procedure Act – leave granted.

Substantive proceedings concern the discharge by the defendant of a mortgage over a property

[National Australia Bank Limited v Sayed \[2020\] NSWSC 1316](#)

COSTS – Costs assessment – Order for gross sum costs  
Therefore order, pursuant to s 98(4)(c) of the Civil Procedure Act, that the plaintiff's costs of these proceedings be paid by the defendant and be fixed on a gross sum costs basis in the amount of \$31,000 (noting that the costs of the present notice of motion form part of the costs so fixed).

[Rheem Australia Pty Ltd v McInnes \[2020\] NSWSC 1313](#)

RESTITUTION – restitution for wrongdoing – monies obtained by fraud – claim against volunteer recipient under Heperu Pty Ltd v Belle [2009] NSWCA 252; (2009) 76 NSWLR 230 – disposition with intent to defraud creditors – Conveyancing Act 1919 (NSW), s 37A

EQUITY – tracing – mixed funds – multiple bank accounts – whether tracing should be undertaken on aggregated basis – residential property – building work expenditure – mortgage repayments – proprietary claim – subrogation – indefeasibility

Conveyancing Act 1919 (NSW), s 37A; Corporations Act 2001 (Cth), ss 1317H, 1041I

[White v Arambasic \[2020\] NSWSC 1376](#)

LAND LAW – caveats – where prior caveat lapsed – lodgment of caveat claiming same interest as previous caveat – lodgment with leave of court – where leave necessary to preserve interest of mortgagee

CIVIL PROCEDURE – default judgment – default in filing defence – where defendant may have arguable defence – where defendant must file a defence

CIVIL PROCEDURE – stay of proceedings – pending proceedings in other court – common issues in both proceedings – risk of inconsistent judgments – where proceedings in Federal Circuit Court are further developed

[McLeod & Anor v Alokaily \[2020\] QSC 308](#)

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – PREFERENCES AND VOIDABLE TRANSACTIONS – UNREASONABLE DIRECTOR-RELATED TRANSACTIONS – where the respondent is the sole director and shareholder of a company in liquidation – where the company has no assets or other funds to satisfy its creditors – where, prior to the appointment of the liquidators, the company made payments to the director's personal bank account, credit card account and another bank account controlled by the director, with no records kept to substantiate the purpose of the payments being for the benefit of the company's business – whether the payments are unreasonable director-related transactions within the meaning of s 588FDA(1) of the Corporations Act 2001 (Cth) – whether the court should make an order directing the director to pay an amount equal to some or all of the money the company paid under the transactions

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – COLLECTING THE ASSETS – where the financial records of the company record a director's loan, which remains outstanding – whether an order should be made requiring the director to repay the amount of the loan

Corporations Act 2001 (Cth) ss 588FB, 588FDA, 588FF, 588FE

[SEQ Tourism Projects Pty Ltd v Pioneer Australia Pty Ltd \[2020\] QSC 310](#)

ESTOPPEL – ESTOPPEL BY JUDGMENT – ISSUE ESTOPPEL – OTHER PARTICULAR CASES – where judgment entered in favour of defendants in previous proceedings – where claim of sale of undervalue unsuccessful – where plaintiff not a party – where cause of action brought by plaintiff on basis of second mortgage claims sale at undervalue – whether plaintiff privy in interest of plaintiff by counterclaim based on legal interest in separate proceedings – whether plaintiff should be estopped from bringing proceedings

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – OTHERWISE ABUSE OF PROCESS – where previous proceedings claimed defendants sold property at undervalue – where plaintiff not involved in previous proceedings – where sole director and shareholder of plaintiff personally involved in previous proceedings – where sole director and shareholder of plaintiff acquired second mortgage shortly after previous proceedings commenced – where cause of action similar to previous proceeding – where plaintiff offered undertaking not to proceed until previous proceeding set aside – whether proceedings an abuse of process

[CIFG \(Australia\) Pty Ltd v Perna \[2020\] VSC](#)

FUNDS IN COURT – Surplus proceeds from sale of land paid into court – Application for payment out – Plaintiffs claim equitable charge under guarantees given to secure principal debtor's indebtedness to the plaintiffs – First defendants claim equitable charge under a security agreement – Whether liability of the principal debtor to plaintiffs joint or several – Whether guarantors liable to a plaintiff or the plaintiffs under guarantees – Whether plaintiffs' charge enforceable – Adaz Nominees Pty Ltd v Castleway Pty Ltd [2020] VSC 201 applied – Whether first defendants' security agreement a sham transaction – Whether first defendants charge enforceable

[Re Balmz Pty Ltd \(in liq\) \[2020\] VSC 652](#)

CORPORATIONS – External administration – Company trading whilst insolvent – Section 588G of the Corporations Act 2001 (Cth) – Company is presumed to be insolvent pursuant to s 588E(4) of the Corporations Act 2001 (Cth) if it has failed to keep financial records – Directors' failure to prevent the company trading whilst insolvent – Defences to insolvent trading pursuant to s 588H of the Corporations Act 2001 (Cth) – Section 588GA Safe harbour provisions – Relief from liability under s 1317S of the Corporations Act 2001 (Cth) – Liquidator seeks recovery of compensation from the company directors pursuant to s 588M(2) of the Corporations Act 2001 (Cth)

Better Business loans

**LEGISLATION**

Commonwealth

Regulation

[PAYG Withholding variation for foreign resident capital gains withholding payments – no residue after a mortgagee exercises a power of sale 2020](#)

09/10/2020 - This instrument varies to nil the amount that would otherwise have to be paid to the Commissioner when an authorised deposit-taking institution exercises the power of sale of Australian real property owned by a foreign resident and the proceeds of sale are insufficient to discharge the mortgage.

[National Consumer Credit Protection Amendment \(Responsible Lending Obligations\) Regulations 2020](#)

01/10/2020 - This instrument amends the National Consumer Credit Protection Regulations 2010 to make a targeted adjustment to the regulatory settings pertaining to the responsible lending obligations contained in the National Consumer Credit Protection Act 2009.

[ASIC Credit \(Repeal\) Instrument 2020/836](#)

30/09/2020 - This instrument repeals the ASIC Class Order [CO 10/381] and ASIC Class Order [CO 10/1230] which are class orders that currently implement the policy underlying the Unlicensed COI Lenders Instrument and the Electronic Precontractual Disclosure Instrument.

[ASIC Credit \(Electronic Precontractual Disclosure\) Instrument 2020/835](#)

30/09/2020 – This instrument allows credit licensees and representatives to give pre-contractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents.

[ASIC Credit \(Notice Requirements for Unlicensed Carried Over Instrument Lenders\) Instrument 2020/834](#)

30/09/2020 – This instrument ensures carried over instrument lenders must continue to notify ASIC if they become unlicensed. This allows ASIC to maintain an up-to-date register of unlicensed COI lenders as required by the National Consumer Credit Protection Act 2009, the National Consumer Credit Protection Regulations 2010 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009.

[Accounting Standard AASB 2020-8 Amendments to Australian Accounting Standards – Interest Rate Benchmark Reform – Phase 2](#)

29/09/2020 - This instrument amends Accounting Standards AASB 4, AASB 7, AASB 9, AASB 16 and AASB139 to address the effect of interest rate benchmark reforms in accounting for financial instruments.

## THIS EDITION'S EDITOR



**Phil Kaunitz**

Partner

+61 7 3166 4511

+61 402 844 833

[pkcaunitz@tglaw.com.au](mailto:pkcaunitz@tglaw.com.au)

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**SYDNEY** | Sixty Martin Place, Level 14, 60 Martin Place | Sydney NSW 2000  
**MELBOURNE** | Rialto South Tower, Level 39, 525 Collins Street | Melbourne VIC 3000  
**BRISBANE** | Waterfront Place, Level 28, 1 Eagle Street | Brisbane QLD 4000  
**PERTH** | Exchange Tower, Level 27, 2 The Esplanade | Perth WA 6000  
**ADELAIDE** | Level 7, 19 Gouger Street | Adelaide SA 5000

[tglaw.com.au](http://tglaw.com.au)

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