

3 NOVEMBER 2020

ISSUE 70



BANKING SECTOR NEWSLETTER

Welcome to Issue 70 of our fortnightly Banking Sector Newsletter.

In this issue, Australian banks continue their support of small businesses with the flow of credit remaining strong. AFCA reminds firms the extension during COVID-19 for handling and responding to complaints ended on 1 November 2020.

In other news, the Financial Services Counsel (FSC) has launched a research report proposing a future financial advice model which is likely to start a policy debate on how to make advice more affordable and accessible.

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

IN THE MEDIA

Over 80% want a merger of FPA and AFA

Amid increasing concern about the cost of regulation and the continuing exodus of financial advisers, a survey has revealed strong support for a united voice for the financial planning industry and a merger of the Financial Planning Association (FPA) and the Association of Financial Advisers (AFA). <https://www.moneymanagement.com.au/news/financial-planning/over-80-want-merger-fpa-and-afa>

Accountants supportive of pandemic response but urge greater national unity

The accounting profession supports the way Australian governments have managed COVID-19, but urges greater national unity and transparency, according to CPA Australia. In October, an online survey of 644 members ranked public health as the single highest priority, followed by long-term economic recovery planning. <https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/media/media-release/cpa-australia-media-release.pdf>

Economics committee to grill regulators

The standing committee on economics has called ASIC, APRA, and the ACCC for its first post-budget hearing to ensure the regulators are keeping a close watch on Australia's financial system. <https://www.investordaily.com.au/regulation/48081-economics-committee-to-grill-regulators>

ASIC confirms focus on advice which is 'limited and affordable'

The Australian Securities and Investments Commission (ASIC) has signalled it believes a key objective in making advice more attractive to consumers is the provision of advice which is "limited and affordable". <https://www.moneymanagement.com.au/news/financial-planning/asic-confirms-focus-advice-which-limited-and-affordable>

Imminent Hayne reform has major ramifications for affordability of financial advice and the future of financial planning

The FPA has warned that the establishment of a single disciplinary body must be used to reduce red tape and untangle an unreasonably complex regulatory framework that is stifling the financial planning profession and driving up the cost of advice. <https://fpa.com.au/news/imminent-hayne-reform-has-major-ramifications-for-affordability-of-financial-advice-and-the-future-of-financial-planning/>

FSC Media Release: Future of Advice Report

The Financial Services Council (FSC) has launched a research report by Rice Warner which offers some radical ideas for restructuring the model for financial advice which will start a policy debate on how to make advice more affordable and accessible. <https://www.fsc.org.au/resources/2099-fsc-media-release-future-of-advice-report/file>

ABA: Flow of credit to small business remains strong

During the COVID-19 pandemic, Australian banks have continued their strong support for small and medium businesses across the country. Approval rates for loans have remained high throughout the crisis, at around 70% of loan applications received. <https://www.ausbanking.org.au/flow-of-credit-to-small-business-remains-strong/>

Societe Generale Securities Australia Pty Ltd receive \$30,000 penalty for breaching client money rules

SGSAPL was sentenced in relation to two counts of breaching s993B(1) of the Corporations Act (the Act) by receiving client money in connection with financial services but failing to deposit that money into an Australian Authorised Deposit-taking Institution. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-252mr-societe-generale-securities-australia-pty-ltd-receive-30-000-penalty-for-breaching-client-money-rules/>

Royal Commission witness and former financial adviser Sam Henderson sentenced

Mr Sam Maxwell Henderson, former chief executive officer, director and senior financial adviser of Henderson Maxwell Pty Ltd (Henderson Maxwell), has been sentenced in the NSW Local Court, convicted of charges relating to issuing defective disclosure documents and dishonest conduct. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-249mr-royal-commission-witness-and-former-financial-adviser-sam-henderson-sentenced/>

ASIC succeeds in obtaining orders against Debt Wipeout

ASIC has obtained interim orders and injunctions from the Federal Court of Australia against Mr David Murphy, Mr Anastasios Mavroulis, Mrs Kewa Ruwhiu and Mr Mathew Ruwhiu (the defendants) and Debts Knockout Pty Ltd (Debts Knockout) in relation to unlicensed financial services. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-243mr-asic-succeeds-in-obtaining-orders-against-debt-wipeout/>

ABA: Repayments have resumed on almost half of deferred loans

New Australian Banking Association data reveals that almost half of deferred loans are now being repaid again as Australians recover from the pandemic. Based on data collected by the ABA from seven of Australia's largest banks, the number of deferred mortgages had dropped to 270,000. <https://www.ausbanking.org.au/repayments-have-resumed-on-almost-half-of-deferred-loans/>

ABA: Protecting Critical Infrastructure and Systems of National Significance

A single regulator having a clear mandate and a transparent system in place for regulatory co-ordination for banks - a model that may be relevant for other parts of the banking and financial services sector and other sectors. <https://www.ausbanking.org.au/submission/protecting-critical-infrastructure-and-systems-of-national-significance/>

ASIC suspends the AFS licence of Ballast Financial Management Pty Ltd

ASIC has suspended the Australian Financial Services (AFS) licence of Perth-based financial advice provider Ballast Financial Management Pty Ltd. Ballast ceased carrying on a financial services business when it was unable to obtain professional indemnity insurance to comply with its obligation to have adequate compensation arrangements. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-242mr-asic-suspends-the-afs-licence-of-ballast-financial-management-pty-ltd/>

Licensees cautious amid continuing FASEA code uncertainty

Licensees are urging caution on the part of their advisers because of the still-unsettled nature of the Financial Adviser Standards and Ethics Authority (FASEA) code of ethics and the reality that it will be up to nine months before the new single disciplinary body is put in place. <https://www.moneymanagement.com.au/news/financial-planning/licensees-cautious-amid-continuing-fasea-code-uncertainty>

Regulators urge Australian institutions to adhere to the ISDA IBOR Fallbacks Protocol and Supplement

The International Swaps and Derivatives Association (ISDA) [announced](#) that it will launch the 2020 IBOR Fallbacks Protocol and associated Supplement to the 2006 ISDA Definitions on 23 October 2020. <https://www.apra.gov.au/news-and-publications/regulators-urge-australian-institutions-to-adhere-to-isd-ibor-fallbacks>

PPSR: New data shows importance for businesses to manage risk when providing goods on credit

Specialist data from the AFSA released shows just how important it is for businesses that provide goods on credit to manage their risk. In the September quarter, people in businesses who entered into a personal insolvency owed 32% of their debts to a business, sole trader or individual. In contrast, 35% of their debts were to banks. <https://www.ppsr.gov.au/newsroom/new-data-shows-importance-businesses-manage-risk-when-providing-goods-credit>

IN PRACTICE AND COURTS**ATO Updates**

23/10/2020 [Serious Financial Crime Taskforce](#)

The Serious Financial Crime Taskforce (SFCT) is a joint-agency taskforce dedicated to tackling the most serious and complex financial crime.

ASIC Regulatory Updates

22/10/2020 [INFO 101](#); [INFO 103](#); [INFO 104](#); [INFO 105](#); [INFO 109](#); [INFO 126](#); [INFO 128](#); [INFO 140](#); [INFO 146](#); [INFO 185](#) (reissued)

Information sheets related to consumer credit have been updated to: reflect current ASIC guidance and information; remove references to transitional arrangements; update penalties information (to account for [legislative amendments](#)) and replace references to EDR schemes with AFCA, and in INFO 105, clarify our guidance regarding hardship notices and variations.

22/10/2020 [RG 204 Applying for and varying a credit licence](#) (reissued)

Internal dispute resolution requirements updated to reflect the release of [RG 271](#). Licence application fees information also updated.

[APRA: Points of presence statistics for authorised deposit-taking institutions](#)

The APRA has released its annual points of presence statistics for authorised deposit-taking institutions (ADIs), a detailed listing of the banking service channels provided to Australians by ADIs, as of 30 June 2020.

[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 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.

[PPSR: Are you holidaying at home this year?](#)

The Personal Property Securities Register (PPSR) is a national online register that provides important information to help protect consumers when they are buying personal property like cars, boats, caravans and trailers. The PPSR does not include land or buildings. A PPSR search costs just \$2 and is a service provided by the Australian Government.

[Australia's Personal Property Securities Register – AFSA statistics release September quarter 2020](#)

PPSR statistics for the [September quarter 2020](#). (released 22 October 2020)

[APRA letter to RSE licensees on controlling stake obligations and updated application kit](#)

APRA advises licensees to review their current ownership structures in regard to the requirements that have been in place since July 2019. An updated application form and instruction guide to own or control a registrable superannuation entity (RSE) licensee is now available.

The application form and instruction guide is available on the APRA website at: [Apply to own or control an RSE licensee](#).

[AFCA: Six-month temporary time extension ceased on 1 November](#)

The Australian Financial Complaints Authority (AFCA) is reminding firms that on 1 November 2020, the six-month temporary time extension for firms to provide responses to financial difficulty complaints and complaints that have already been through internal dispute resolution will come to an end.

AFCA Current Matters

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

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

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](#).

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.

[AASB: Exposure Draft: Interest Rate Benchmark Reform – Phase 2: Tier 2 Disclosures](#)

ED 304 *Interest Rate Benchmark Reform – Phase 2: Tier 2 Disclosures* proposes amendments to AASB 1060 *General Purpose Financial Statements - Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 Entities*, to provide relief for entities applying AASB 1060 from disclosing the financial effects of their initial application of the amendments in AASB 2020-8 *Amendments to Australian Accounting Standards – Interest Rate Benchmark Reform – Phase 2*.

[Deadline Extended for the IAASB'S Auditor Reporting Post-Implementation Review Stakeholder Survey](#)

In light of the continuing effect of the COVID-19 pandemic on the International Auditing and Assurance Standard Board (IAASB)'s work plan and the capacity of our stakeholders, including recent requests to participate in consultations and events, the closing date for responses to the Auditor Reporting Stakeholder Survey has been extended to November 23, 2020.

[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*.

[Austrac Reminder: Rule extended to support COVID-19 early release of superannuation initiative](#)

AUSTRAC has extended the Rule for streamlined customer verification under the COVID-19 early release of superannuation initiative until 31 December 2020.

CASES

[Australian Securities and Investments Commission v Commonwealth Bank of Australia \[2020\] FCA 1543](#)

CONSUMER LAW – agreed contraventions of the National Consumer Credit Protection Act 2009 (Cth) – principles applicable to making declarations and imposition of a civil penalty – appropriateness of agreed orders and declarations – declarations made and civil penalty imposed

Competition and Consumer Act 2010 (Cth) s 75(1); Fair Work Act 2009 (Cth) s 499, 500, 556; Federal Court of Australia Act 1976 (Cth) s 21; National Consumer Credit Protection Act 2009 (Cth) ss 5, 47, 115, 117, 128, 129, 130(1), 131, 133(1)(b), 133(2)(b), 166(1), 166(3), 167, 175

[Australian Securities and Investments Commission v National Australia Bank Limited \[2020\] FCA 1494](#)

BANKING AND FINANCIAL INSTITUTIONS – National Consumer Credit Protection Act 2009 (Cth) – prohibition under s 31 on holder of Australian Credit Licence from conducting business with an unlicensed person – obligation on licensee under s 47(1)(a) and (d) to do all things necessary to ensure authorised credit activities engaged in efficiently, honestly and fairly – NAB’s “spot and refer” programme – unlicensed “Introducers” received commission payments to “spot” prospective customers and “refer” them to bankers – admitted contraventions – where investigation by ASIC limited to very small segment of programme – where investigation and proceeding brought in relation to conduct self-reported by NAB – where declaratory relief sought – consideration of inutility of repetitive declarations sought by ASIC – pecuniary penalties – consideration of relevant principles – consideration of course of conduct principle and totality principle

[Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation \[2020\] FCA 1538](#)

CORPORATIONS – Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) – pecuniary penalties – failing to give reports of international funds transfer instructions (IFTIs) to AUSTRAC – failing to pass on transfer information and payer information to another institution in relation to ITFIs – preliminary risk

assessments and due diligence assessments in respect of correspondent banking relationships – joint anti-money laundering and counter-terrorism financing program – requirements of Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1) (Cth) – failing to conduct appropriate ongoing customer due diligence – child exploitation material – contraventions of ss 36(1), 45(2), 64(6) and (7), 81(1), 98(1) and (2) and 115(2) of the Act – fixing of a pecuniary penalty under s 175 of the Act – declarations – orders made

[Commonwealth Bank of Australia v State of Western Australia, in the matter of Arbidans \(a Bankrupt\) \[2020\] FCA 1514](#)

BANKRUPTCY – disclaimer of real property under s 133 of the Bankruptcy Act 1966 (Cth) – application under s 133(9) by mortgagee for vesting of bankrupt’s property in mortgagee for the purpose of sale effect of disclaimer by trustee in bankruptcy – where mortgagee seeks to utilise powers as if mortgagee in possession – application successful. Bankruptcy Act 1966 (Cth) ss 58, 133 National Consumer Credit Protection Act 2009 (Cth) Schedule 1 (National Credit Code)

[Curo Capital Pty Ltd v Registrar of Personal Property Securities \[2020\] FCA 1515](#)

ADMINISTRATIVE LAW – application for judicial review under Administrative Decisions (Judicial Review) Act 1977 (Cth) – application to have data restored to Personal Property Securities Register under Personal Property Securities Act 2009 (Cth) s 186 – where applicant claims its solicitors incorrectly discharged security registrations – where grantors of some of the securities opposed restoration of data – Personal Property Securities Registrar decided not to restore data – Registrar concerned not to exercise discretionary power to restore data if grantors expressed opposition – Registrar adhered to policy without regard to the merits of the particular case – exercise of discretions unreasonable – application allowed – decision set aside and matter referred back to the Registrar for further consideration according to law

[Reilly v Australia and New Zealand Banking Group Limited \(No 2\) \[2020\] FCA 1502](#)

PRACTICE & PROCEDURE – representative proceeding – consumer credit insurance policy – strike out application – principles to be applied – whether summary dismissal application should be determined prior to opt out

CONSUMER LAW – statutory limitation periods in the Australian Securities and Investments Commission Act 2001 (Cth) – breadth of statutory injunction power – whether mandatory injunction to pay refunds within power

CONTRACTS – unilateral mistake – principles governing equitable rescission for unilateral mistake – whether rescission limited to a mistake concerning contractual terms – proper characterisation of alleged mistake

UNCONSCIONABLE CONDUCT – whether pleaded allegations of unconscionable conduct vague or embarrassing

[Davidson v Suncorp-Metway Ltd \[2020\] QSC 315](#)

MORTGAGES – MORTGAGEE’S REMEDIES – POSSESSION – where the respondent mortgagee obtained an order for recovery of possession of mortgaged property in February 2019, and an enforcement warrant for possession of the property is due to be executed on 16 October 2020 – where the applicant applies for a stay of execution of the enforcement warrant, pending delivery of judgment on an application he has made in the Federal Court of Australia, in which he purports to challenge the validity of the mortgage on the basis that it does not comply with s 78(2)(c) of the Land Title Act 1994 (Qld) because it does not specify a dollar amount as the debt secured, and because the form of the covering page of the standard conditions incorporated by reference into the mortgage includes the words “not applicable” in certain parts of it – where there has been no appeal from the order for recovery of possession, and no basis shown to set aside that order – whether any basis to stay execution of the enforcement warrant, by reference to the application in the Federal Court of Australia, has been established

[LM Investment Management Limited \(in liq\) v EY & Ors \(No 5\) \[2020\] QSC 264](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – PROCEDURAL MATTERS – where the plaintiff sues its former auditors for breach of contract, breach of tortious duty, misleading and deceptive conduct and contravention of the Corporations Act and the ASIC Act – where in paragraphs of the defence the defendants claim privilege against self-incrimination or exposure to a civil penalty – where the plaintiff seeks to strike out these paragraphs – whether the defendants are likely ever to be prosecuted for an offence or civil penalty – whether the claims of privilege are justifiable – whether the defendants may delay their election to waive privilege – whether the defendants may make blanket claims of privilege

Statement of claim the plaintiff alleges that the fund’s Constitution provided for the responsible entity to receive a management fee for, inter alia, loan management.

[MA 46 Pty Ltd v Paglia Properties Pty Ltd \[2020\] VSC 695](#)

STATUTES – No inconsistency between provisions – Galloway v National Australia Bank Limited [2016] VSCA 330 applied – PRACTICE AND PROCEDURE – Summary judgment granted in favour of mortgagee including against tenant under residential tenancy agreement As alleged in the statement of claim, it was a term of the Loan Agreement that Paglia must pay the Lenders the aggregate of the Advances outstanding and the balance, if any, of the Secured Money on the Termination Date being nine months from the date of the initial advance

[Pitard v One Managed Investment Funds Ltd \[2020\] VSC 666](#)

REMEDIES – Declaratory relief – Plaintiff a beneficiary of discretionary trust – Trustee placed in liquidation – Plaintiff claiming a declaration that her loan account balance and unpaid present entitlements do not constitute collateral under security deed – Insufficient evidence of plaintiff’s entitlement to loan account balance or unpaid present entitlement – Insufficient evidence that funds will be available for distribution to the plaintiff as an unsecured creditor – Lack of utility in granting relief – Application dismissed – Constitution Act 1975 (Vic) s 85 – Supreme Court Act 1986 (Vic) s 36 – Corporations Act 2001 (Cth) s 1305.

LEGISLATION**Commonwealth****Act Compilation**[Reserve Bank Act 1959](#)

21/10/2020 - Act No. 4 of 1959 as amended

Regulation[ASIC Credit \(Amendment\) Instrument 2020/963](#)

23/10/2020 - This instrument amends the ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487 to extend the deferral to benefits paid in relation to credit services provided before 1 January 2021.

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