

13 NOVEMBER 2020

ISSUE 71



BANKING SECTOR NEWSLETTER

Welcome to Issue 71 of our fortnightly Banking Sector Newsletter.

In this issue, the RBA Board announced plans to not increase cash rate until 'actual inflation' is sustainable between the target range of 2 per cent to 3 per cent. The Australian Bureau of Statistics reported a rise in owner occupier home loan commitments attributing the rise to low interest rates and government incentives.

In other news, AFSA launched a campaign raising awareness of dodgy insolvency advisors who exploit people when they seek help to manage debt.

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

IN THE MEDIA

Risks mounting at major banks: KPMG report

While Australia's major banks have undoubtedly demonstrated resilience through the COVID-19 pandemic to date, several key areas of risk have become clear for the year ahead, according to KPMG's Major Australian Banks Full Year Analysis Report 2020. <https://www.brokernews.com.au/news/breaking-news/risks-mounting-at-major-banks-kpmg-report-274023.aspx>

Open banking: The high value/low usage paradox

As open banking moves into Phase 2, fintech Frolo and NextGen.Net have jointly published the first industry report on the new system, illuminating where the regime is headed and where the most immediate challenges and opportunities for mortgage brokers lie. <https://www.brokernews.com.au/news/breaking-news/open-banking-the-high-valuelow-usage-paradox-274024.aspx>

AFSA warns people to steer clear of dodgy insolvency advisors

The Australian Financial Security Authority (AFSA) is launching a campaign to raise awareness of dodgy insolvency advisors who exploit people when they seek help to manage debt. <https://www.afsa.gov.au/about-us/newsroom/afsa-warns-people-steer-clear-dodgy-insolvency-advisors>

Senate inquiry asks whether Facebook, Google should be regulated like banks

Technology giants including Google and Facebook are disrupting financial services by steadily moving into the banking space. The tech giants already have detailed data on their users and it has Liberal senator Andrew Bragg worried. <https://www.abc.net.au/news/2020-11-09/google-facebook-banking-senate-inquiry-fintech/12856080>

APRA issues letter to ADIs announcing \$35 billion reduction in aggregate amount in Committed Liquidity Facility

The APRA has announced a \$35 billion reduction in the aggregate amount in the Committed Liquidity Facility (CLF) established between the Reserve Bank of Australia (RBA) and certain locally incorporated authorised deposit-taking institutions (ADIs) that are subject to the Liquidity Coverage Ratio (LCR) from the amount at the start of 2020. <https://www.apra.gov.au/news-and-publications/apra-issues-letter-to-adis-announcing-35-billion-reduction-aggregate-amount>

Supporting competition and innovation in payment services

The Morrison Government has released the report of the Council of Financial Regulators' (CFR) review of the regulation of Stored-Value Facilities (SVFs) in Australia. The CFR's 11 recommendations prioritise innovation, competition and robust protections for consumers. <https://ministers.treasury.gov.au/ministers/jane-hume-2019/media-releases/supporting-competition-and-innovation-payment-services>

The report can be found at the [Council of Financial Regulators website](#).

ABA CEO Anna Bligh was interviewed by ABC News Breakfast on 2 November 2020

An interesting feature of 2020 that in fact, we've seen a record high number of Australians switch their loans, either to another bank or gone to their own bank and got a better deal. <https://www.ausbanking.org.au/covid-19-refinancing-breaks-records-anna-bligh-on-abc-news-breakfast/>

The Reserve Bank's plan for interest rates looks to the future – and home owners can breathe a sigh of relief

The most important of the five measures the Reserve Bank announced is the one that won't whirr into place for a very long time. The board will not increase the cash rate until "actual inflation" is sustainably within the 2 per cent to 3 per cent target range. <https://www.abc.net.au/news/2020-11-03/rba-interest-rates-quantitative-easing/12844996>

Reserve Bank slashes rates to 0.1pc, pledges to buy \$100 billion in government debt

The Reserve Bank of Australia cuts interest rates to a record low and says the rate is not expected to increase for another three years as the country navigates its way out of a recession the RBA governor says "is not over". <https://www.abc.net.au/news/2020-11-03/rba-cuts-interest-rates-record-low-coronavirus-pandemic/12838760>

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

The Commonwealth Bank has given homeowners struggling with repayments until September 2021

The Commonwealth Bank has become the first and only Australian bank to implement a moratorium on forced sales. To be eligible, they must be an owner-occupier who hadn't fallen behind on their repayments for at least 12 months before they began deferring repayments. <https://www.businessinsider.com.au/commonwealth-bank-moratorium-forced-sales-mortgage-deferrals-2020-11>

Open Banking: Customers of Australia's Big Four Banks Now Able to Effectively Share

Customers of Australia's four major banks are now able to share their home loan and mortgage offset data with accredited or approved recipients. This option is being offered after the introduction of Australia's Consumer Data Right legislation. <https://www.crowdfundinsider.com/2020/11/168714-open-banking-customers-of-australias-big-four-banks-now-able-to-effectively-share-financial-data-with-home-loan-providers/>

Construction loan commitments surge

The total value of new loan commitments for housing rose 5.9 per cent in September, seasonally adjusted, according to the latest (AB) figures released. Approximately half of the rise in September's owner occupier housing loan commitments was for the construction of new dwellings, which rose 25.3 per cent. <https://www.abs.gov.au/media-centre/media-releases/construction-loan-commitments-surge>

View the ABS Key Statistics: Lending indicators 2020

This release is about new borrower-accepted finance commitments for housing, personal and business loans. <https://www.abs.gov.au/statistics/economy/finance/lending-indicators/sep-2020>

Reserve Bank Purchases of Government Securities

Starting 5 November 2020, the Reserve Bank will begin purchasing Australian Government securities (AGS) and securities issued by the state and territory

central borrowing authorities (semis) in the secondary market under the \$100 billion bond purchase program set out in the Governor's Statement of 3 November 2020. <https://www.rba.gov.au/mkt-operations/announcements/rba-purchases-of-government-securities-2020-11.html>

Reserve Bank partners with Commonwealth Bank, National Australia Bank, Perpetual and ConsenSys Software on Wholesale Central Bank Digital Currency Research Project

The Reserve Bank announced that it is partnering with Commonwealth Bank, National Australia Bank, Perpetual and ConsenSys Software, a blockchain technology company, on a collaborative project to explore the potential use and implications of a wholesale form of central bank digital currency (CBDC) using distributed ledger technology (DLT). <https://www.rba.gov.au/media-releases/2020/mr-20-27.html>

Term Funding Facility – Reduction in Interest Rate to Further Support the Australian Economy

The Reserve Bank is now providing further support to lending and low interest rates by reducing the interest rate on new drawdowns under the TFF. The interest rate on new drawdowns under the TFF is reduced to 0.1 per cent per annum, effective from 4 November, down from 0.25 per cent previously. All other parameters of the TFF remain unchanged. <https://www.rba.gov.au/mkt-operations/announcements/reduction-in-interest-rate-to-further-support-the-australian-economy.html>

Bushfire Royal Commission to improve disaster coordination

"Banks play a vital role in helping Australians survive and recover from bushfires and other disasters", said ABA CEO Anna Bligh. The banking industry has already been engaging with state and territory governments to improve consistency of emergency payments and financial assistance – issues identified in Recommendations 22.1 – 22.4. <https://www.ausbanking.org.au/bushfire-royal-commission-to-improve-disaster-coordination/>

It could soon be easier to get a loan, so why are financial counsellors racing to stop that from happening?

The Government wants to reform responsible lending laws to help boost borrowing, but a coalition of financial counsellors want to stop it, fearing consumers will be more vulnerable to exploitation. <https://www.abc.net.au/news/2020-10-29/responsible-lending-laws-to-change-financial-counsellors-worried/12825482>

Bankruptcies fall 54.6% in the September quarter 2020

Total personal insolvencies fell 50.9% in the September quarter 2020 compared to the September quarter 2019. They fell in all states and territories. In the September quarter 2020, 26.3% of bankrupts entered a business related personal insolvency. <https://www.afsa.gov.au/about-us/newsroom/bankruptcies-fall-546-september-quarter-2020>

Unlicensed SMSF business ordered to windup

Secure Investments and Aquila Group have been ordered to wind up by the Federal Court after issuing financial products to investors without holding an Australian financial services licence (AFSL). <https://superreview.moneymanagement.com.au/news/superannuation/unlicensed-smsf-business-ordered-windup>

IN PRACTICE AND COURTS

ATO Advice

Completed issues 2020 – 06 November 2020

[\[3908\] Thin capitalisation – bifurcation of financial instruments](#)

[\[3910\] Thin capitalisation – arms' length debt test](#)

[Foreign exchange rates – 06 November 2020](#)

List of daily, monthly and annual foreign exchange rates. Updated to include monthly rates from the Reserve Bank of Australia for October 2020.

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

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

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

The APRA has published the latest monthly data for ADIs' temporary loan repayment deferrals due to COVID-19, which includes data at both the industry and entity level.

[APRA issues letter to ADIs on alignment of credit risk management reporting standard with prudential standard](#)

The APRA has released a consultation on draft Reporting Standard ARS 220.0 Credit Risk Management (ARS 220.0). APRA has proposed updating ARS 220.0 to align it with the final version of Prudential Standard APS 220 Credit Risk Management released in December 2019.

[AFCA 2019-20 Annual Review](#)

The Australian Financial Complaints Authority (AFCA) has released its 2019-20 Annual Review, revealing the number of complaints received and closed, the amount awarded to consumers in compensation and refunds, and the ombudsman's approach to the COVID-19 pandemic.

[AFCA proposes Rules change to transfer unfinished complaints from Superannuation Complaints Tribunal](#)

Following a public consultation and submissions from industry and consumer bodies, an amendment to the Australia Financial Complaints Authority (AFCA) Rules to facilitate the transition of any unresolved complaints from the Superannuation Complaints Tribunal (SCT) prior to ceasing operations will be submitted to the Australian Securities and Investments Commission (ASIC) for approval.

[FASEA Opening Statement – Senate Estimates Economics Legislation Committee](#)

FASEA appeared at the Senate Estimates Economics Legislation Committee on the 27 October 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.

AFCA Current Matters

[Union Standard International Group Pty Ltd](#)

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

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: Updated AASB Standard-Setting Framework Documents](#)

The AASB has updated its Standard-Setting Frameworks, which set out the principles followed in setting the requirements of Standards.

[AASB COVID-19 Resources](#)

The AASB has created a dedicated web page that houses various internal and external resources as they pertain to COVID-19 and its effects on the financial reporting process.

[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.

[IFRS Consultation: Open for comment](#)

Tentative Agenda Decision and comment letters: Sale and Leaseback of an Asset in a Single-Asset Entity (IFRS 10 and IFRS 16). Comments due by 23 November 2020.

[RBA: Statement on Monetary Policy November 2020](#)

The Statement on Monetary Policy sets out the Bank's assessment of current economic conditions, both domestic and international, along with the outlook for Australian inflation and output growth. A number of boxes on topics of special interest are also published. The Statement is issued four times a year.

[Payments Monitor – 03 November 2020](#)

Highlighted in this special feature is the 2020 Annual Review published on 29 October 2020. The next edition of Payments Monitor will be available by mid-December.

ABA Submissions

[Corporations Amendment \(Virtual Meetings and Electronic Communications\) Bill 2020](#)

30 October 2020 - The ABA considers:

- Deeds should be able to be created and signed electronically by companies and individuals.
- Electronic signatures rather than wet signatures should be able to be used for a broader range of legal and business documents.
- Remote witnessing should be legally valid.

[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*.

FPA Submissions

[FASEA Code of Ethics guidance](#)

FASEA - 2 November 2020

[FPA 2019/2020 Annual Report](#)

The FPA released its 2019/20 Annual Report on Friday 30 October, 2020.

CASES

[Aquamore Credit Equity v Von Somogy \[2020\] NSWSC 1493](#)

In relation to the Notice of Motion filed on 28 August 2020: (1) Refuse leave to the first and second defendants to file and serve the proposed further amended defences;

CIVIL LAW – proceedings for debt – application for summary judgment – application to file further amended defence – question of viability of defence – joinder of proceedings

Through one of his corporate entitles, Pamada, Mr Sydney negotiated a short term loan from the plaintiff for the purpose of allowing him to meet the terms of the Deed and pay Tianrong the agreed monies

[Liu v Gu \[2020\] NSWSC 1469](#)

GUARANTEE AND INDEMNITY – Contract of guarantee – where defendants jointly and severally guaranteed payment of amounts to plaintiff – where those amounts have not been paid by principal debtor or defendants –

where plaintiff reached settlement agreement with first and second defendants and principal debtor – where orders by consent made for judgment against the first and second defendants for those amounts – where judgment sought against third defendant – whether terms of settlement agreement operated as a release of first and second defendants' and principal debtor's liabilities under the guarantee or as a covenant not to sue – whether third defendant remained liable under guarantee – whether guarantee contained a reservation of rights clause – whether guarantee should be interpreted as an indemnity

[Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd \[2020\] NSWSC 1517](#)

LAND LAW – Caveats – Removal of caveat – Removal by order of court – where the plaintiffs have not demonstrated any real likelihood of establishing the interest in the property that they claim – where, in those circumstances, significant weight is to be given to the proposition that a registered proprietor is entitled have title free from any blot that interferes with rights to use the property in any legally permissible way – order for removal of caveat made

The factoring agreement dated 24 August 2015, between the second plaintiff and the debtor, contained in clause 13.8 a term whereby the debtor and the guarantor charged in favour of the second plaintiff "all of their respective right, title and interest in any real property and/or personal property and assets". By clause 13.7, both the debtor and the guarantor consented to the second plaintiff lodging a caveat to protect the charge

[Laverick v Westpac Banking Corporation \[2020\] QSC 333](#)

1. The whole of the statement of claim filed on 18 August 2020 is struck out, pursuant to r 171(1)(a) and (b) of the Uniform Civil Procedure Rules 1999.

2. The plaintiff has leave to replead, subject to the limitations expressed in paragraph [59] of these reasons.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – APPEARANCE OR NOTICE TO DEFEND – CONDITIONAL APPEARANCE – where the plaintiff brings proceedings against the defendant on the basis of an assignment, recorded in consent orders made by the Family Court of Australia, to him from the estate of his late de facto partner, of "any potential claim or action" she may have had against the defendant "in respect of the mortgage on" certain property – where the proceedings seek to challenge the validity of the loan agreement between the defendant bank and the plaintiff's late former partner, on the basis of allegations of wrongful conduct on the part of the mortgage broker and the defendant bank at the time of approving and entering into the loan agreement – whether a claim in relation to the validity of the loan agreement falls within the scope of the assignment – whether the plaintiff has standing to bring the proceeding

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – whether the statement of claim should be struck out on the basis that it discloses no reasonable cause of action

Uniform Civil Procedure Rules 1999 (Qld), r 16, r 144, r 171

[Westpac v Hines \[2020\] VSC 715](#)

PRACTICE AND PROCEDURE – Application by plaintiff for summary judgment against first defendant – Civil Procedure Act 2010 (Vic) ss 61 and 63 – Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158; (2013) 42 VR 27 – First defendant an undischarged bankrupt – No standing to defend proceeding – Bankruptcy Act 1966 (Cth), s 58(1)(a) – Westpac v Webb [2019] VSC 180 – Application for summary judgment for possession of mortgaged property granted.

[Heritage Bank Limited v Gleeson & Anor \(No. 5\) \[2020\] QDC 270](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SERVICE – where the defendants have defaulted on mortgage repayments – where substituted service orders were made against both defendants – where default judgment was entered against the defendants in respect of the default – where the defendants seek to set aside the default judgment by challenging the validity of the substituted service order – where the defendants argue the default judgment should be set aside because the substituted service orders upon which it was based were obtained by fraud – where the defendants argue the default judgment should be set aside because the Bank breached its duty of disclosure arising from the ex parte nature of the substituted service application – where the defendants argue the default judgment should be set aside because the defendants have defences on the merits to the Bank's claims – whether fraud alone (if established) is sufficient to set aside default judgment as of right – whether the alleged fraud was material to any defence – whether the non-disclosure was material – whether there is any defence on the merits – where the plaintiff assigned the benefit of the mortgage and debt in equity but remains the legal owner – whether plaintiff has standing to sue on the mortgage to recover the debt notwithstanding equitable assignment

[Metroll Roofing Pty Ltd v Tempest \[2020\] QDC 273](#)

GUARANTEE AND INDEMNITY – ASSIGNMENT – where the plaintiff was assigned a judgment debt from Metroll Queensland Pty Ltd who obtained default judgment against the defendant's company MCT Roofing (Qld) Pty Ltd – where the defendant entered into a credit application on behalf of his company with Metroll Queensland Pty Ltd in 2006 - where the defendant entered into a credit application on behalf of his company with the plaintiff in 2013 – where the defendant provided a personal guarantee and indemnity in the 2013 credit application but not in the 2006 credit application - whether the guarantee given by the defendant in 2013 in favour of the plaintiff answers a judgment debt assigned to it by Metroll Queensland Pty Ltd

LEGISLATION

Commonwealth

Act Compilation

[Banking Act 1959](#)

27/10/2020 - Act No. 6 of 1959 as amended

THIS EDITION'S EDITOR



Phil Kaunitz

Partner

+61 7 3166 4511

+61 402 844 833

pkunitz@tglaw.com.au

This Alert is produced by Thomson Geer. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under Professional Standards Legislation.

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

Thomson Geer

@ThomsonGeer