

3 DECEMBER 2020

ISSUE 72



## BANKING SECTOR NEWSLETTER

Welcome to Issue 72 of our fortnightly Banking Sector Newsletter.

In this issue, the Australian Banking Association has released new data revealing the number of deferred loans has reduced by almost 70% and is expected to fall further in coming weeks.

In other news, AFCA has reported on complaints, compensation and refund figures of its first 24 months of operation.

Australian banks are preparing for the next phase of implementation of recommendations from the Hayne Royal Commission including further protections for consumers and small businesses.

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

### IN THE MEDIA

#### Responsible lending removal: The pros and cons

The proposal to overhaul responsible lending obligations has been met with mixed reaction, with many welcoming its ability to speed up the flow of credit while others have warned against potential harm to consumers. <https://www.mortgagebusiness.com.au/breaking-news/15153-responsible-lending-removal-the-pros-and-cons>

#### Committed Liquidity Facility

Following a review, the Reserve Bank has assessed that Authorised Deposit-taking Institutions (ADIs) using the Committed Liquidity Facility (CLF) can increase their reasonable holdings of high-quality liquid assets (HQLA) from 26 to 27 per cent of the stock of HQLA securities by the end of 2020, and to 30 per cent of the stock of HQLA securities by the end of 2021. <https://www.rba.gov.au/media-releases/2020/mr-20-29.html>

#### South Pacific Central Bank Governors Committed to Cost Effective Remittances

At the South Pacific Central Bank Governors' Meeting on 17–18 November 2020, the South Pacific Governors agreed that access to cost-effective remittances remains a high priority focus for the region. A key focus has been their collective effort to develop a regional 'Know Your Customer' (KYC) facility. <https://www.rba.gov.au/media-releases/2020/mr-20-31.html>

#### APRA reduces CBA's operational risk capital add-on by \$500 million

The APRA will reduce the \$1 billion capital add-on applied to Commonwealth Bank of Australia (CBA) by \$500 million in response to the bank's progress in addressing concerns over its governance, accountability and risk culture frameworks and practices. <https://www.apra.gov.au/news-and-publications/apra-reduces-cba%E2%80%99s-operational-risk-capital-add-on-by-500-million>

#### AFCA Member Forums: Two years of operations, future of membership experience

Acting Chief Ombudsman and CEO Justin Untersteiner told AFCA members the ombudsman had received more than 153,000 complaints in its first 24 months, resolving around 135,000 disputes and awarding more than \$474.5 million in compensation and refunds to consumers and small businesses. <https://www.afca.org.au/news/media-releases/afca-member-forums-two-years-of-operations-future-of-membership-experience>

#### APRA move to consult on capital framework welcomed

The Customer Owned Banking Association (COBA) looks forward to engaging with APRA again soon on reforms to the banking capital framework. APRA has disclosed that it is putting the finishing touches to the next consultation package on capital for release in the next few weeks. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1481-apra-move-to-consult-on-capital-framework-welcomed>

### ASIC consults on reference checking and information sharing protocol

ASIC released a consultation paper seeking feedback on a new reference checking and information sharing protocol for financial advisers and mortgage brokers. Mandating reference checking for financial advisers and mortgage brokers was a recommendation of the Financial Services Royal Commission (Royal Commission). <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-291mr-asic-consults-on-reference-checking-and-information-sharing-protocol/>

### ASIC consults on promoting access to affordable advice for consumers

ASIC has issued Consultation Paper 332 Promoting access to affordable advice for consumers (CP 332). A particular focus of this paper is on promoting access to quality 'limited advice'. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-285mr-asic-consults-on-promoting-access-to-affordable-advice-for-consumers/>

### Insurers urged to respond to new accounting standard

ASIC is calling on insurers to respond to a new accounting standard for insurance contracts. Accounting Standard AASB 17 Insurance Contracts (AASB 17) which is effective for reporting periods beginning on or after 1 January 2023. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-286mr-insurers-urged-to-respond-to-new-accounting-standard/>

### ABA: Majority of deferred loans back on track

New data released by the Australian Banking Association reveals the number of deferred loans has fallen below 300,000 – a reduction of almost 70% since the peak earlier this year. The data shows that the economic recovery is gathering pace. <https://www.ausbanking.org.au/majority-of-deferred-loans-back-on-track/>

### AUSTRAC releases Fintel Alliance operational results for 2019-20

The Fintel Alliance Performance Report 2019-20 outlines the impact the Fintel Alliance is having on protecting the Australian financial system and community from serious and organised crime. <https://www.austrac.gov.au/news-and-media/media-release/fintel-alliance-operational-results-2019-20>  
View the [Fintel Alliance performance report 2019-20](#).

### FPA launches Aged Care Specialist designation for financial planning professionals

The Financial Planning Association of Australia (FPA) has announced the launch of the FPA Aged Care Specialist professional designation in collaboration with Aged Care Steps' Accredited Aged Care Professional TM program. <https://fpa.com.au/news/fpa-launches-aged-care-specialist-designation-for-financial-planning-professionals/>

### ABA Response to Pottinger Review

The Review is an important measure in clarifying the definition of small businesses in Australia and the ABA accepts all nine recommendations. <https://www.ausbanking.org.au/wp-content/uploads/2020/11/ABA-response-to-Pottinger-Review.pdf>

### ABA: Banks to continue Royal Commission reform

Australia's banks are ready for the next phase of implementation of Royal Commission recommendations, after the introduction of legislation into federal parliament. <https://www.ausbanking.org.au/banks-ready-for-next-phase-of-rc-reform/>

### Legislation to implement further recommendations of the Banking, Superannuation & Financial Services Royal Commission

Consumers and small businesses will be further protected under a package of legislation introduced into the Parliament by the Morrison Government. The package of legislation addresses 20 recommendations and one additional commitment from the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/legislation-implement-further-recommendations-banking>

### Licensing and professional registration activities: 2020 update

Between July 2019 and June 2020, ASIC received 1,500 licensing and professional registration applications (a slight decrease from 1,504 the previous year). <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-275mr-licensing-and-professional-registration-activities-2020-update/>

### 79% of Australian ASX200 companies adopt integrated reporting, KPMG study finds

KPMG published their seventh [annual survey](#) of corporate reporting trends in Australia on 10 November 2020, which is particularly interesting in light of the impact of COVID-19 and the push from regulators and investors for enhanced reporting disclosures on climate and pre/non-financial risks. <https://integratedreporting.org/news/79-of-australian-asx200-companies-adopt-integrated-reporting/>

### Customer owned banking institutions lead the way in brand authenticity as sector experiences growth

The Customer Owned Banking Association (COBA) is celebrating their members Heritage Bank, People's Choice Credit Union and CUA for being among the top four banking institutions in Australia for brand authenticity, as reported by the new J.D. Power Banking Industry Insight report. <https://www.customerownedbanking.asn.au/media-a-resources/media-release-alerts/1480-customer-owned-banking-institutions-lead-the-way-in-brand-authenticity>  
View the [J.D. Power Banking Industry Insight report](#).

## IN PRACTICE AND COURTS

### [RBA: Payments System Board Update: November 2020 Meeting - Number 2020-30 Date 20 November 2020](#)

The Payments System Board discussed a number of issues, including: The Bank's Review of Retail Payments Regulation; Treasury's recently announced review of the Australian payments system; The involvement of multinational technology firms (bigtechs) in payments; The Bank's 2020 assessment against the Financial Stability Standards of LCH Limited's SwapClear Service; ASX's project to replace the CHESSE clearing and settlement system for cash equities.

### ASIC Papers open for public comment

#### [CP 333 Implementing the Royal Commission recommendations: Reference checking and information sharing](#)

Released 19 November 2020. Comments close 29 January 2021.

Seeks feedback on ASIC's proposed approach to implementing aspects of the law reform arising from Royal Commission Recommendations 1.6 and 2.7. relating to the reference checking and information sharing protocol for financial advisers and mortgage broker.

#### [CP 332 Promoting access to affordable advice for consumers](#)

Released 17 November 2020. Comments close 18 January 2021.

Seeks information from financial advice industry participants and other stakeholders on impediments to the delivery of good-quality affordable personal advice, particularly access to quality 'limited advice': see [20-285MR](#).

#### [Addendum to CP 330 Using the product intervention power: Continuing credit contracts](#)

Released 10 November 2020. Comments close 24 November 2020.

### ASIC Regulatory Updates

20/11/2020 [RG 36 Licensing: Financial product advice and dealing](#) (updated)

11/11/2020 [REP 671 Licensing and professional registration activities: 2020 update](#)

Annual report for AFS licensees, credit licensees, lawyers, application service providers and professionals working in financial services that are interested in the licensing and professional registration functions of ASIC, including the impact of COVID-19: see [20-275MR](#).

#### [ASIC REP 671 Licensing and professional registration activities: 2020 update](#)

The report outlines key issues, new and proposed changes to licensing processes, and other work we have undertaken that affects licensees. It also provides information and data on licensing and registration applications from the 2019-20 financial year.

### [New PPSR resource to help small business](#)

The new guide aims to assist users of the Personal Property Securities Register (PPSR) to identify how common business transactions they perform (such as hiring equipment or receiving goods on a trade credit account) might link to a PPSR registration.

### [APRA publishes new FAQ for ADIs on loans covered by the Coronavirus SME Guarantee Scheme](#)

The APRA has published a new frequently asked question (FAQ) for authorised deposit-taking institutions (ADIs) on the credit risk capital treatment of loans covered by the Coronavirus SME Guarantee Scheme.

### [APRA publishes new frequently asked questions to support RSE licensees on outcomes assessment](#)

The APRA has published new frequently asked questions (FAQs) to support registrable superannuation entity (RSE) licensees to complete their outcomes assessment by the end of February 2021. The FAQs address common areas of weakness identified from APRA's targeted review of trial outcomes assessments.

### [APRA Consultation: Revised remuneration standard](#)

The APRA has released for consultation a revised remuneration prudential standard designed to strengthen market practice, underpin sound remuneration practices and enhance accountability in the institutions it regulates. The consultation period for revised CPS 511 will close on 12 February 2021. The response paper, revised standard and non-confidential submissions to the previous consultation are available here [Consultation on remuneration requirements for all APRA-regulated entities](#).

### [APRA releases letter to ADIs on interim capital treatment of new or additional equity investments in banking and insurance subsidiaries](#)

The APRA has released a letter to all authorised deposit-taking institutions (ADIs) to advise of an interim change to the capital treatment of new or additional equity investments in banking and insurance subsidiaries.

### [APRA reminder: Superannuation licensees on upcoming legislative obligations](#)

Registrable superannuation entity (RSE) licensees are reminded of two key regulatory requirements - to undertake a Business Performance Review by 31 December 2020, and an outcomes assessment by 28 February 2021.

### [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 Current Matters

[Business interruption insurance test case outcome](#)  
(Updated November 2020)

[Union Standard International Group Pty Ltd](#)

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

## AFSA: Guidelines for debt agreement administrators

The 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](#).

## ASFA Research and Papers

[Superannuation and Australians' expectations: Polling Project](#), ASFA (November 2020)

## IAASB

[Deadline Extended for IAASB's Discussion Paper on Fraud and Going Concern](#) (16 November 2020)

## AASB Action Alert

The Action Alert for the 178th AASB Board Meeting held on 11-12 November 2020 is now available. The Board made key decisions in relation to: Not-for-Profit Private Sector Financial Reporting Framework; Fair Value Measurement for Not-for-Profit Entities; Goodwill and Impairment; Minimum Disclosures in SPFS of Certain For-Profit Private Sector Entities; Sustainability Reporting.

## 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).

## [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

## FSC Submissions

[FSC Submission - Miscellaneous amendments to Treasury portfolio laws 2020](#) (23 November 2020)

[FSC Submission - Foreign Investment Reform \(Protecting Australia's National Security\) Bill 2020](#) (18 November 2020)

[FSC Submission - Financial Planners and Advisers Code of Ethics 2019 Guide](#) (10 November 2020)

## CASES

[Condon, in the matter of Rayhill v Australia and New Zealand Banking Group Ltd \[2020\] FCA 1674](#)

EQUITY – where trustee in bankruptcy had an equitable lien over real property in respect of bankrupt's claims as trustee of a trust that owned the property – where trustee claims in equity against the mortgagee bank that sold the property as mortgagee in possession for breach of its equitable duty of good faith or to act bona fide and honestly by selling property at undervalue – whether applicant as equitable lienee can make such a claim – whether claim restricted to mortgagor, lower-ranking mortgagees and guarantors – whether grounds for summary dismissal

REAL PROPERTY – where trustee in bankruptcy had an equitable lien over real property in respect of bankrupt's claims as trustee of a trust that owned the property – where trustee claims against the mortgagee bank that sold the property as mortgagee in possession for breach of duty under s 111A(1) of the Conveyancing Act 1919 (NSW) to take reasonable care to ensure that the property is sold for market value – whether applicant as equitable lienee can make such a claim under s 111A(4) as "a person who suffers loss or damage as a result of the breach of the duty" – whether grounds for summary dismissal

PRACTICE AND PROCEDURE – doctrine of election – where applicant at one time said on his then present knowledge he had no claim and subsequently pursues a claim – whether such conduct constitutes an election between inconsistent rights – where applicant is a party to the mortgagor's release of the respondent from a claim and later pursues his own claim based on the same conduct by the respondent – whether such conduct by the applicant constitutes an election between inconsistent rights – whether grounds for summary dismissal

[Zhao v Ausin Group \(Australia\) Pty Ltd \[2020\] FCA 1659](#)

PRACTICE AND PROCEDURE – application for summary judgment under s 31A of the Federal Court of Australia Act 1976 (Cth) and r 26.01(1) of the Federal Court Rules 2011 (Cth) – whether any real issues of fact or law require proper determination at trial – summary judgment granted in part

CONTRACTS – loan agreement – whether no reasonable prospect of establishing consideration – principles of *Foakes v Beer* [1884] UKHL 1; (1884) 9 App Cas 605 – whether “practical benefit” consideration available in context of loan agreement – *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 considered – principles of novation of contract considered – substitution for prior agreement

PRACTICE AND PROCEDURE – application for leave to amend originating process and statement of claim – where application opposed on the same basis as summary judgment sought – application allowed in part

[Queenfield Pty Ltd v Gordon Finance Pty Ltd \[2020\] VSCA 282](#)

CONTRACT – Rectification for common mistake – Sale of units deed omitted proposed term transferring intercompany loans on books of corporate trustee to related entity borrower – Whether omission common mistake permitting rectification – Whether judge erred in finding sufficiently clear common intention to exclude loans from sale – No error shown – Common intention sufficiently specific to be capable of reduction to legal form – Differences in form of pleaded term, proposed term, and ultimate formulation insignificant – Whether term involved legal impossibility because provided for assignment of debt to creditor – No impossibility – Assignment of debt to creditor would have legal operation as release – Appeal dismissed.

[Kaji Australia Pty Ltd v Glover \(No. 5\) \[2020\] NSWSC 1576](#)

COSTS - party/party – judgment for possession and for the amount owing under a loan agreement and mortgage – where defendant’s claims of fraud and conspiracy were dismissed by trial judge and later by Court of Appeal – where plaintiffs sought judgment for amount owing in District Court unnecessarily - where costs arising from separate proceedings excluded from costs order Held: the defendant and his solicitors should not have alleged fraud, conspiracy or other criminality on the evidence they had available

[Laverick v Westpac Banking Corporation \(No 2\) \[2020\] QSC 340](#)

The plaintiff pay 70% of the defendant’s costs of the application filed on 11 September 2020, assessed on the standard basis.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – GENERAL PRINCIPLES

AND EXERCISE OF DISCRETION – costs of application to set aside the claim, or alternatively strike out the statement of claim

Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684

[Moreton Resources Ltd \(in liq\) & Ors v First Samuel Ltd & Ors \[2020\] QSC 339](#)

1. The amended originating application filed 21 October 2020 is dismissed.

MORTGAGES – RECEIVERS – APPOINTMENT – GENERALLY – where the first respondent, as security trustee, did not appoint receivers pursuant to instructions given by beneficiaries including the second respondent – where the security trust deed provided that if the security trustee failed to exercise a power as instructed within a reasonable time, a beneficiary could exercise the power – where the second respondent purported to appoint the fifth respondents as receivers – whether the appointment of the fifth respondents as receivers was valid

[Commercial Funds Pty Ltd v Fraval & Anor \[2020\] VCC 1787](#)

BANKING AND FINANCE: Application for summary judgment – application of the National Credit Code (“Code”) – construction of memorandum of common provisions including definition of “guarantor” – whether a guarantor who is primarily liable is a “debtor” within the meaning of the Code – definitions of “debtor” under the Code – purpose of lending for the purposes of the Code – statutory unconscionability – whether higher rate of interest is a penalty – application of the “no penalty rule”

**LEGISLATION****Commonwealth****Bills**[Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020 and Corporations \(Fees\) Amendment \(Hayne Royal Commission Response\) Bill 2020](#)

HR 12/11/2020 - The amendments address conflicts between the interests of financial institutions and their customers, ensure consumers are treated fairly in their dealings with the financial sector, and ensure regulators have the powers and resources needed to be effective in their enforcement and supervision roles.

[Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020 and Corporations \(Fees\) Amendment \(Hayne Royal Commission Response\) Bill 2020](#)

12/11/2020 - The amendments address conflicts between the interests of financial institutions and their customers, ensure consumers are treated fairly in their dealings with the financial sector, and ensure regulators have the powers and resources needed to be effective in their enforcement and supervision roles.

## Regulations

### [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Amendment Rules 2020](#)

13/11/2020 - This instrument amends the Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 to increase the monetary threshold for annual turnover from \$50 million to \$120 million.

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