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ISSUE 79



## BANKING SECTOR NEWSLETTER

Welcome to Issue 79 of our Banking Sector Newsletter.

In this issue, we refer to an article on APRA commencing consultation on an updated approach to licensing and supervising new authorised deposit-taking institutions.

In other news, Australian banks have in place a range of measures to support communities affected by the torrential rain and flooding in New South Wales.

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

### IN THE MEDIA

**ASIC says the levy is mechanical, Hume says ASIC has discretion**

ASIC insists the industry funding model which drives the adviser levy is mechanical and it has little control over the outcome, but the Minister for Superannuation, Financial Services and Financial Technology, Senator Jane Hume says the regulator does have discretion.

<https://www.moneymanagement.com.au/news/financial-planning/asic-says-levy-mechanical-hume-says-asic-has-discretion>

**Presenting advice fees eight ways looks ridiculous to clients**

The corporate regulator's advice fee disclosure requirements is the biggest issue for advisers at the moment as having to present fees to clients eight different ways from a client's perspective looks ridiculous, according to an adviser. <https://www.moneymanagement.com.au/news/financial-planning/presenting-advice-fees-eight-ways-looks-ridiculous-clients>

**AFCA publishes details of non-compliant members**

The Australian Financial Complaints Authority (AFCA) has published the details of 34 financial firms who have failed to pay their AFCA membership levy and/or other fees. <https://www.afca.org.au/news/latest-news/afca-publishes-details-of-non-compliant-members-1>

**AFCA releases its submission to Independent Review**

The Australian Financial Complaints Authority (AFCA) has released its submission to the scheduled Independent Review of its first two years of operations.

<https://www.afca.org.au/news/latest-news/afca-releases-its-submission-to-independent-review>

**ASIC releases advice fee consent and lack of independence disclosure legislative instruments**

ASIC has made three legislative instruments that deal with advice fee consents and independence disclosure following Royal Assent of the Financial Sector Reform (Hayne Royal Commission Response No.2) Act 2021 (the Act).

<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-058mr-asic-releases-advice-fee-consent-and-lack-of-independence-disclosure-legislative-instruments/>

**Scammers follow flood-impacted communities**

The Customer Owned Banking Association is urging flood-impacted Australians to be on the lookout for scammers posing as government employees, insurers or charity groups working hard to restore impacted communities. <https://www.customerownedbanking.asn.au/news-and-resources/media-releases/flood-impacted-communities>

**Mayfair bites back after Federal Court ruling**

Mayfair 101 managing director James Mawhinney has accused ASIC of a "senseless abuse of power" following the Federal Court's ruling that it misled investors. James Mawhinney said that he "expected" the Federal Court's ruling and that Mayfair had chosen not to contest the matter, instead focusing its resources on restructuring the group to "minimise any further damage caused by proceedings brought by ASIC". <https://www.investordaily.com.au/regulation/48963-mayfair-bites-back-after-federal-court-ruling>

### ASIC succeeds in Court action against Mayfair 101 for misleading and deceptive advertising

The Federal Court has found companies in the Mayfair 101 Group made statements that were false, misleading or deceptive in advertisements for its debenture products, following proceedings brought by ASIC in April 2020. ASIC is seeking pecuniary penalties, injunctions and corrective advertising. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-055mr-asic-succeeds-in-court-action-against-mayfair-101-for-misleading-and-deceptive-advertising/>

### Housing lending may be cheap, but regulators argue it is not yet risky

New data suggests changes to mortgage lending rules in the near future are unlikely, despite rapidly rising home values. Recent data from the APRA suggests that while the proportion of loan originations that could be 'higher risk' showed a slight increase through the December quarter, the regulator saw no evidence of a "material relaxation in lending standards". <https://www.corelogic.com.au/news/housing-lending-may-be-cheap-regulators-argue-it-not-yet-risky>

### ABA: Support available for customers affected by NSW floods

Australian banks are supporting communities in New South Wales after torrential rain and floods in parts of the state. ABA member banks offer a range of services to help farmers and small businesses affected by natural disasters, which are outlined here. <https://www.ausbanking.org.au/support-available-for-customers-affected-by-nsw-floods/>

### ASIC takes aim at big banks for remediation failures

ASIC deputy chair Karen Chester said that she "rejects completely" arguments that the banks had not paid billions in remediation due to fears of overreach. Large institutions had "systemically under-invested" in their remediation programs and must "err on the side of generosity" when paying back customers. <https://www.investordaily.com.au/regulation/48941-asic-takes-aim-at-big-banks-for-remediation-failures>

### APRA updates licensing approach for new banking entrants

The Australian Prudential Regulation Authority (APRA) has commenced consultation on an updated approach to licensing and supervising new authorised deposit-taking institutions (ADIs). <https://www.apra.gov.au/news-and-publications/apra-updates-licensing-approach-for-new-banking-entrants>

### ASIC bans Forex Capital Trading director Shlomo Yoshai for 10 years

The ASIC has handed lengthy bans to the director and former employees of an online foreign currency trader. In May last year, ASIC cancelled ForexCT's financial services licence after finding it had engaged in "unconscionable conduct, misleading and deceptive conduct and a failure to manage conflicts of interest". <https://www.abc.net.au/news/2021-03-17/asic-bans-forex-capital-trading-director-shlomo-yoshai/13256166>

### ABA: 97% of all deferred loans had resumed repayments by the end of February

Latest data shows that almost 97% of all deferred loans had resumed repayments by the end of February, almost one year on from the start of the key support measure to help Australians through the COVID-19 crisis. <https://www.ausbanking.org.au/one-year-on-banks-ready-to-support-customers-as-more-resume-repayments/>

## IN PRACTICE AND COURTS

### ASIC Regulatory Updates

23/03/2021 [ASIC Corporations \(Disclosure of Lack of Independence\) Instrument 2021/125](#)

The disclosure of lack of independence that an Australian Financial Services (AFS) licensee or authorised representative must give clients where they would breach s923A of the Corporations Act if they used words such as 'independence', 'impartial', or 'unbiased', and

23/03/2021 [ASIC Corporations \(Consent to Deductions—Ongoing Fee Arrangements\) Instrument 2021/124](#)

Written consent that a fee recipient must obtain from a client before deducting, or arranging to deduct, advice fees from a client account as part of an ongoing fee arrangement.

22/03/2021 [INFO 250 Giving AFS and credit licensees information about their representatives](#)

Outlines ASIC's approach to giving AFS and credit licensees information about their representatives including: ASIC's powers and when ASIC may exercise them; the kind of information ASIC may give licensees; and ASIC's procedural fairness obligations and processes: see [news item](#).

[Senate economics legislation committee: Final report for its inquiry into the National Consumer Credit Protection Amendment \(Supporting Economic Recovery\) Bill 2020](#)

Report: Released 12 March 2021

The bill largely focuses on amending the credit laws so that they remove responsible lending obligations (RLOs) and extend the best interests duty to more credit assistance providers, among other changes.

[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 Information Paper: Licensing approach for new banking entrants](#)

In an information paper published, APRA has outlined stronger requirements for being granted a banking licence, and closer supervision of new entrants as they seek to establish themselves. APRA is seeking feedback on the information paper. The consultation closes on 30 April 2021.

### [APRA quarterly authorised deposit-taking institution statistics for December 2020](#)

APRA has released the Quarterly Authorised Deposit-taking Institution (ADI) Performance and the Quarterly Authorised Deposit-taking Institution Property Exposures publications for the quarter ending December 2020.

### [APRA consultation paper: Implementation of AASB 17 for insurance capital and reporting](#)

The APRA consultation to update the insurance capital and reporting frameworks in recognition of the implementation of Australian Accounting Standards Board 17 Insurance Contracts (AASB 17). The consultation closed on 31 March 2021.

Information regarding the regulatory responsibilities and approach of ASIC to AASB 17 implementation is available [here](#).

### **RBA Bulletin 18 March 2021**

#### [Cash Demand during COVID-19](#)

#### [Property Settlement in RITS](#)

#### [Australia's Economic Recovery and Access to Small Business Finance](#)

#### [Developments in Banks' Funding Costs and Lending Rates](#)

#### [Developments in the Buy Now, Pay Later Market](#)

#### [The Response by Central Banks in Emerging Market Economies to COVID-19](#)

### [AUSTRAC: Proposed amendments to Chapters 3, 6, 7 and 10 of the AML/CTF Rules](#)

AUSTRAC has released proposed amendments to the following chapters of the Anti-Money Laundering and Counter-Terrorism Financing Rules for public consultation: Chapter 3 – Correspondent banking; Chapter 6 – Customer identification and verification; Chapter 7 – Reliance on customer identification carried out by another reporting entity and Chapter 10 – Gambling services.

The proposed changes are to support reforms to the AML/CTF Act made by the [Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020](#) (Phase 1.5 reforms).

The consultation period for these amendments is 27 January 2021 until 11 March 2021.

### **CPA Current Consultations**

CPA are seeking comments from members to be considered as part of the submissions in response to the following major consultations.

#### [IPSASB Exposure draft: ED 75 Leases](#)

Comments due by: 17 May 2021.

#### [IPSASB request for information: Concessionary leases and other arrangements similar to leases](#)

Comments due by: 17 May 2021.

#### [IAASB Exposure Draft: Changes to standards and framework resulting from the quality management standards](#)

Comments due: 17 May 2021.

### **AFCA Current Matters**

#### [Business interruption insurance test cases](#)

(Updated March 2021)

### **FSC Submissions**

#### [FSC Submission YFYS Bill Senate Economics Committee March 2020](#) (26 March 2021)

### [AASB: Invitation to Comment 42 Business Combinations under Common Control](#)

Comments are invited on possible new accounting requirements for business combinations under common control – where mergers and acquisitions occur involving entities within the same group. The aim of the possible requirements would be to reduce diversity in practice and to improve transparency and comparability in reporting these transactions. Please have your say and send your comments to the AASB by 17 July 2021.

### [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*.

### [IAASB Seeks Public Comment on Exposure Draft Aligning Existing Standards with New, Revised Quality Management Standards](#)

The International Auditing and Assurance Standards Board (IAASB) is requesting public comments on its Exposure Draft addressing changes in some of its standards and framework resulting from the new and revised [quality management](#) standards. Comments are requested by May 24, 2021. Please submit your comments via the [IAASB website](#).

### **IASB reviews package of IFRS Standards for group accounting**

The International Accounting Standards Board (IASB) is calling for feedback on the IFRS Standards for group accounting—IFRS 10 *Consolidated Financial Statements*, IFRS 11 *Joint Arrangements* and IFRS 12 *Disclosure of Interests in Other Entities*. Further information about post-implementation reviews can be found in the [Due Process Handbook](#). The deadline for comments is 10 May 2021.

### [IASB to extend the comment period for Exposure Draft Regulatory Assets and Regulatory Liabilities](#)

IASB decided to extend by 30 days the comment period for the Exposure Draft Regulatory Assets and Regulatory Liabilities to give stakeholders more time to respond. The comment period will now end on 30 July 2021.

### [IASB consults on possible new accounting requirements for mergers and acquisitions within a group](#)

IASB has launched a public consultation on possible new accounting requirements for mergers and acquisitions involving companies within the same group—business combinations under common control. Access the Discussion Paper [Business Combinations under Common Control](#). The deadline for comments is 1 September 2021. Access a [fact sheet](#) about the Board's project.

## CASES

### [Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd \[2021\] FCAFC 33](#)

CONSUMER LAW – appeal – where appellants provided security for bank guarantee required by lease between a related company and the respondents – where respondents called on bank guarantee prior to entry into deed of settlement and release – where respondents were unaware that appellants had provided security – where respondents received and retained moneys provided after bank guarantee was called – whether the calling on and collecting of money the subject of the bank guarantee constituted unconscionable conduct in contravention of s 20 and s 21 of Sch 2 to the Competition and Consumer Act 2010 (Cth) – whether primary judge erred in not finding unconscionable conduct – whether primary judge erred in analysis of s 20 and s 21 – whether primary judge failed to consider pleaded case – whether the primary judge erred in not finding special disadvantage – whether the primary judge erred by not finding entitlement to relief – appeal dismissed

### [Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd \(No 2\) \[2021\] FCA 247](#)

CORPORATIONS – representations made to investors in promissory notes – representations made in promotional and marketing materials – representation that notes were comparable to, and of similar risk profile to, bank term deposits – representation that principal would be repaid in full – representation that notes were specifically designed for investors seeking certainty and confidence in investments and notes therefore carried no risk of default – representation that the “M Core Fixed Income Notes” were fully secured financial products – assessment of the terms of the promissory notes – assessment of expert evidence as to security position – assessment of report of provisional liquidators of the third defendant

CORPORATIONS – false, misleading or deceptive conduct – representations contravened s 1041H(1) of the Corporations Act 2001 (Cth) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the Australian Securities and Investments Commission Act 2001 (Cth) – relevant principles concerning false, misleading or deceptive conduct – principles relevant to declarations – declarations made that conduct was in contravention of s 1041H(1) of the Corporations Act 2001 (Cth) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the Australian Securities and Investments Commission Act 2001 (Cth)

Australian Securities and Investments Commission Act 2001 (Cth), ss 12BB(1), 12DA(1), 12DB(1)(a), 12DB(1)(e), 12BAB(1)(b), 12BAB(7)(b), 12GBA, 12GD, 12GLA(2)(c), 12GLA(2)(d) and 12GLB

Corporations Act 2001 (Cth), ss 766C(1)(b), 769C, 1101B(1)(a), 1041H(1), 1041H(2)(a) and 1324

Federal Court of Australia Act 1976 (Cth), s 21

### [GFIN Pty Limited v Gooden, in the matter of GFIN Pty Limited \(No 3\) \[2021\] FCA 227](#)

CORPORATIONS – application for orders for payment of compensation and declaratory relief as to breaches of director's duties by managing director and knowing involvement in director's breaches of duty by second defendant – where managing director is sole shareholder and director of second defendant – where managing director effectively had sole control over day to day activities of company – where company involved in business of derivatives trading – where company retained funds of contract traders in company's omnibus account to cover trading risks and maintain minimum balance with Clearing Participant banks – whether managing director misappropriated company's funds for personal benefit by making consultancy payments to second defendant where no consultancy arrangement made – whether managing director misappropriated company's funds by causing overpayment in own salary – whether managing director operated omnibus account by causing company to borrow substantial amounts of money from third parties which he then misappropriated – claims made out in part

Australian Consumer Law s 18; Corporations Act 2001 (Cth) ss 79, 180, 181, 182, 183, 236, 237, 798G, 1317, 1317E, 1317H

### [Murray Goulburn Co-operative Co. Limited v AIG Australia Limited \[2021\] FCA 288](#)

INSURANCE – indemnity policy for liability concerning securities class action exposure – side C cover – claim for indemnity – settlement sums paid to settle two class actions – alleged contraventions of continuous disclosure provisions – construction of policy – meaning of “securities” – meaning of “securities claim” – units in a listed unit trust – equity interest – relevance of meaning of “securities” under s 92 of the Corporations Act 2001 (Cth) – exclusions – scope of endorsements – whether claims in class actions arose out of product disclosure statement concerning the MG Unit Trust – acquisition of units in the MG Unit Trust on secondary market rather than primary market – causal nexus of class action claims to the product disclosure statement – meaning and scope of “arising out of, based upon, attributable to” – “professional services” exclusion meaning and scope – indemnification available under side C cover

Corporations Act 2001 (Cth), s 79(c), s 1317H; Corporations Regulations 2001 (Cth)

[Deen v Harburg Nominees Pty Ltd & Anor \[2021\] QCA 44](#)

Appeal dismissed with costs to be assessed on an indemnity basis.

**GUARANTEE AND INDEMNITY – ACTIONS AGAINST SURETY – GENERALLY – OTHER CASES** – where the appellant signed a guarantee in favour of the respondents – where the appellant alleges that the respondents, by their duly appointed agent ('Mr Harburg'), represented to the appellant that the respondents would not enforce the guarantee or any earlier guarantees and the respondents would fund sufficient monies and provide sufficient support to see the debtor ('Warapar') cause the development completed ('alleged representations') – whether the trial judge erred in finding that such representations were not made

Issues raised from the judgment was given pursuant to a guarantee dated 3 June 2016 by which the appellant guaranteed Warapar's performance of its obligations to the respondents under a loan agreement of the same date. The loan was secured by a mortgage over land Warapar was in the process of developing using money advanced to it by the respondents.

[ENGLISH -v- VANTAGE HOLDINGS GROUP PTY LTD \[2021\] WASCA 47](#)

Practice and procedure - Pleadings - Auditor of company carrying on business with AFSL - Whether statement of claim discloses reasonable cause of action on statutory accessorial liability claims under corporations legislation - Whether statement of claim discloses reasonable cause of action on breach of contractual or tortious duties claims - Whether plaintiffs should have leave to replead - Turns on own facts

[Integrated Securities No 3 Pty Ltd v Oceans 5 Ultimate Getaways Pty Ltd \[2021\] NSWSC 278](#)

a. A declaration that the Second Defendant has in equity mortgaged the property

g. An order that the Plaintiff pay the proceeds of the sale of 205 Rochford Street

**LAND LAW – mortgages – possession of land – unregistered second mortgage – claim for possession – where mortgagor subsequently bankrupt – whether s 58 Bankruptcy Act precluded order for possession**

Bankruptcy Act 1966 (Cth) s 58; Contracts Review Act 1980 (NSW) s 7; Real Property Act 1900 (NSW) ss 57, 60

[Sergei Sergienko v AXL Financial Pty Limited \[2021\] NSWSC 297](#)

Judgment for the plaintiff for money amounts

**EQUITY – CONTRACT – equitable interests in real property – priorities – specific performance of a Deed of Settlement (the Deed) requiring the granting of a legal mortgage – construction – parties entered into the Deed settling earlier litigation which required the defendant in that litigation to pay certain amounts and secure its obligations by granting a mortgage over unencumbered real property owned by it – property was held in trust for**

another party – where the parties to the earlier litigation had agreed outside the terms of the Deed not to report or make any complaint about illegal conduct – construction of provisions of the Deed requiring payment and extent of the obligations secured – whether the Court should withhold specific performance of the Deed – who as between the plaintiff and the beneficial owner of the property has priority – claim by the owner of the land against its trustee for equitable compensation for breach of trust

**LEGISLATION****Commonwealth****Bills**[National Consumer Credit Protection Amendment \(Small Amount Credit Contract and Consumer Lease Reforms\) Bill 2019 \(No. 2\)](#)

Senate Second reading debate 15 March 2021 - Amends the National Consumer Credit Protection Act 2009 to: impose a cap on the total payments that can be made under a consumer lease (known as rent-to-buy schemes); require small amount credit contracts (SACCs) (known as payday loans) to have equal repayment and payment intervals; remove the ability for SACC providers to charge monthly fees in respect of the residual term of a loan where a consumer fully repays the loan early; prevent lessors and credit assistance providers from undertaking door-to-door selling of leases at residential homes; introduce anti-avoidance protections; and increase penalties.

[National Consumer Credit Protection Amendment \(Supporting Economic Recovery\) Bill 2020](#)

HR Second reading moved 16 March 2021 - Amends the: National Consumer Credit Protection Act 2009 to: provide that responsible lending obligations apply only to small amount credit contracts, small amount credit contract-equivalent loans provided by authorised deposit-taking institutions (ADIs) and consumer leases; provide the minister with the power to determine standards specifying requirements for a credit licensee's systems, policies and processes in relation to certain non-ADI credit conduct; impose a cap on the total payments that can be made by a lessee in connection with a consumer lease; extend the protected earnings requirement for small amount credit contracts to cover all consumers and introduce a similar protected earnings requirements for consumer leases for household goods; restrict the use and disclosure of account statements; amend requirements for licensees to disclose information to consumers; introduce broad anti-avoidance protections to prohibit schemes that are designed to avoid the application of the Act in relation to small amount credit contracts and consumer leases; and make consequential amendments; and Age Discrimination Act 2004 to exempt the reverse mortgage scheme from the application of the Act.

## Regulations

### [ASIC Corporations \(Short Term Trading Market\) Instrument 2021/218](#)

25/03/2021 - This instrument provides relief from the requirement to hold an AFSL for AEMO and participants of AEMO in relation to ex ante rights on AEMO's short term trading market.

### [ASIC Corporations \(Disclosure of Lack of Independence\) Instrument 2021/125](#)

23/03/2021 - This instrument is prescribing lack of independence disclosure in Financial Services Guide.

### [ASIC Corporations \(Consent to Deductions—Ongoing Fee Arrangements\) Instrument 2021/124](#)

23/03/2021 - This instrument prescribes requirements for written consent in relation to an ongoing fee arrangement.

### [Classes of Electronic Payment System Transactions Exempt from Being Reported in Third Party Reports Determination 2021](#)

22/03/2021 – This instrument exempts administrators of payment systems (within the meaning of the Payment Systems (Regulation) Act 1998) from having to include specified classes of transactions in reports prepared and lodged in relation to item 9 in the table included in section 396-55 of Schedule 1 to the Taxation Administration Act 1953.

### [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Regulations 2021](#)

22/03/2021 - These regulations prescribe circumstances in which the ban on conflicted remuneration for mortgage brokers and mortgage intermediaries applies. In particular, they prescribe that the ban applies to any benefit given or received after the regulations commence, even if the benefits are given under an arrangement made prior to 1 July 2020.

### [Insolvency Practice \(Bankruptcy\) Amendment \(Consequential Amendments\) Rules 2021](#)

19/03/2021 - This instrument amends the Insolvency Practice Rules (Bankruptcy) 2016 to reflect that the Bankruptcy Regulations 2021 replaced the Bankruptcy Regulations 1996 on 1 April 2021.

### [Bankruptcy \(Fees and Remuneration\) Amendment \(Consequential Amendments\) Determination 2021](#)

19/03/2021 - This instrument amends the Bankruptcy (Fees and Remuneration) Determination 2015 to reflect that the Bankruptcy Regulations 1996 sunset on 1 April 2021 and were replaced by the Bankruptcy Regulations 2021.

### [Bankruptcy Regulations 2021](#)

19/03/2021 - These regulations give form to many administrative requirements of the Bankruptcy Act 1966, are procedural in nature, and are essential for the efficient administration of bankruptcies, debt agreements and other formal insolvency options governed by the Bankruptcy Act 1966.

### [Bankruptcy and Other Legislation Amendment \(Repeal and Consequential Amendments\) Regulations 2021](#)

19/03/2021 - This instrument amends the National Consumer Credit Protection (FinTech Sandbox Australian Credit Licence Exemption) Regulations 2020 and facilitates the repeal of the Bankruptcy Regulations 1996.

### [Currency \(Australian Coins\) Amendment \(2021 Royal Australian Mint No. 1\) Determination 2021](#)

19/03/2021 - This instrument amends the Currency (Australian Coins) Determination 2019 to determine the characteristics of one new circulating and 19 new non-circulating coins proposed to be issued by the Royal Australian Mint.

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