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ISSUE 84



BANKING SECTOR NEWSLETTER

Welcome to Issue 84 of our Banking Sector Newsletter.

In this issue we refer to an article on Australian financial regulators reiterating the importance of a timely transition away from the London Interbank Offered Rate (LIBOR) and that the use of LIBOR in new contracts must end by the end of 2021.

We also refer to an Australian Banking Association article that explores how COVID-19 has changed the way people pay for their goods. It analyses Reserve Bank of Australia data and finds the use of debit cards has jumped by 17% in 2020 while cash withdrawals have fallen.

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

IN THE MEDIA

ACCC trips payments merger

The planned amalgamation of BPAY, eftpos and the New Payments Platform has fallen foul of the ACCC, with questions over future investment roadmaps and contestability. <https://www.bankingday.com/accc-trips-payments-merger>

COBA: Coordinating regulatory change

Customer owned banks are facing an unprecedented wave of regulatory change. The current tsunami of regulatory change increases operational risk in financial services because so many resources must be allocated to preparing for, implementing, and monitoring compliance with additional requirement. <https://www.customerownedbanking.asn.au/news-and-resources/sector-news/regulatory-change>

New Advisory Council Will Help Usher in Enhanced Cross-Border Payments

AusPayNet is working with the international community to make cross-border payments faster, cheaper, safer, and more transparent. <https://www.auspaynet.com.au/insights/blog/Cross-BorderPayments2021>

Regulators expect Australian institutions to cease the use of LIBOR in new contracts before the end of 2021

Regulators in Australia are reiterating the importance of ensuring a timely transition away from the London Interbank Offered Rate (LIBOR). This requires ceasing the use of LIBOR in new contracts before the end of 2021. <https://www.apra.gov.au/news-and-publications/regulators-expect-australian-institutions-to-cease-use-of-libor-new-contracts>

Responsible lending hasn't blocked consumer credit: ASIC

Lenders have given no indication that responsible lending obligations have clogged the supply of consumer credit, an ASIC commissioner has said, as the regulator eagerly awaits the fate of the laws. Responsible lending obligations also have not applied to mixed-purpose loans since Treasury introduced an easing provision last year. <https://www.mortgagebusiness.com.au/breaking-news/15703-responsible-lending-hasn-t-blocked-consumer-credit-asic>

International Federation of Accountants (IFAC) Continues Drive Against Financial Crime

The IFAC welcomes the work of the World Economic Forum's Unifying Framework, for the important added visibility it provides in the fight against financial crime from a cross-sectoral perspective (gatekeepers – individuals including accountants, bankers and lawyers). <https://www.ifac.org/news-events/2021-06/international-federation-accountants-ifac-continues-drive-against-financial-crime>
View the [Unifying Framework](#).

New financial crime guide warns the finance sector and Australians about 'cuckoo smurfing'

AUSTRAC has released a new financial crime guide to warn businesses and their customers about the dangers of a money laundering method known as 'cuckoo smurfing'. It generally relies on exploiting the legitimate bank accounts of individuals and businesses here in Australia. <https://www.austrac.gov.au/news-and-media/media-release/new-financial-crime-guide-cuckoo-smurfing>

Australian banks, led by CBA, set to return record \$15 billion cash to investors

Australia's big banks are likely to return a record \$15 billion or more of cash to investors over the next two years, with investors betting Commonwealth Bank (CBA.AX) will move first and helping drive shares of the top lender to all-time highs. <https://www.reuters.com/world/asia-pacific/australian-banks-led-by-cba-set-return-record-15-bln-cash-investors-2021-06-01/>

Director of derivatives issuer cops double ban

ASIC has banned the former director of an over-the-counter derivatives issuer from financial services and from managing corporations as a result of his "serious" lack of regard for compliance. In a statement, the regulator said it had banned John Martin from providing financial services for 10 years and from managing corporations for five years. <https://www.investordaily.com.au/regulation/49352-director-of-derivatives-issuer-cops-double-ban>

AFCA publishes details of non-compliant members

The Australian Financial Complaints Authority has published the details of five financial firms who have failed to pay their AFCA membership levy and/or other fees. These financial firms and authorised credit representatives have been expelled from membership of AFCA. <https://www.afca.org.au/news/latest-news/afca-publishes-details-of-non-compliant-members-2>

ABA: COVID-19 accelerates debit card use, cash decline

COVID-19 continues to influence payment trends across Australia, with new data showing debit cards are the clear choice of payment, outweighing second-placed credit cards by almost three times, while the use of cash has significantly declined. <https://www.ausbanking.org.au/covid-19-accelerates-debit-card-use-cash-decline/>

Consultation on Preliminary Conclusions to the Review of Retail Payments Regulation

At the meeting on 21 May, the Payments System Board approved a consultation on a proposed package of policy actions related to the Bank's retail payments regulation. In general, the Board is not proposing major reforms to the Bank's retail payments regulation. <https://www.rba.gov.au/media-releases/2021/mr-21-08.html>

ASIC files charges against ME Bank

In a statement, ASIC said it had filed charges against ME Bank on 25 May. These charges relate to alleged contraventions of sections 12DB(1)(g) and 12GB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) and sections 64(1) and 65(1) of the National Credit Code (Cth), between 2 September 2016 and 3 September 2018. <https://www.investordaily.com.au/regulation/49335-asic-files-charges-against-me-bank>

Former Sydney financial adviser sentenced to six years imprisonment

Mr Hopkins, a former financial adviser, was convicted of 15 dishonesty offences under the Corporations Act, committed when he was the sole director of QWL Pty Ltd (QWL). Mr Hopkins was a financial adviser entrusted by his clients to manage their self-managed superannuation accounts. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-114mr-former-sydney-financial-adviser-sentenced-to-six-years-imprisonment/>

AUSPAYNET: Reform and innovation could offer ways forward for combatting financial crime

An increasingly important part of efforts to combat financial crime will be the development of information-sharing partnerships between financial institutions. <https://www.auspaynet.com.au/insights/blog/FinancialCrime2021>

IN PRACTICE AND COURTS

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

FASEA appeared at the Senate Estimates Economics Legislation Committee on the 2 June 2021.

[Financial Stability Board \(FSB\) Statement on LIBOR](#)

The FSB announced that all new use of LIBOR benchmarks should cease as soon as practicable and no later than the timelines set out by home authorities and/or national working groups in the relevant currencies. The FSB has released an updated [Global Transition Roadmap for LIBOR](#) incorporating the confirmed LIBOR cessation dates and transition milestones set across the different LIBOR jurisdictions.

[Navigating the financial reporting requirements in for-profit private sector client documents – what you need to know](#)

This AASB key facts summary has been prepared by the staff of the AASB for information purposes only and is not authoritative.

[ASIC CP 341 Review of the ePayments Code: Further consultation](#)

Seeks feedback on proposed updates to the ePayments Code that are designed to modernise the Code and ensure it continues to be effective and relevant to consumers and subscribers: see [21-108MR](#). Submissions are due by 2 July 2021.

[ASIC Corporations \(Amendment\) Instrument 2021/381](#)

Amends the [ASIC Corporations \(Auditor Independence\) Instrument 2021/75](#) and [ASIC Corporations \(Parent Entity Financial Statements\) Instrument 2021/195](#) to change the repeal dates from April 2026 to April 2024.

[INFO 254 Debt management services: Applying for a credit licence or variation](#)

Explains new regulatory obligations under the [National Consumer Credit Protection Amendment \(Debt Management Services\) Regulations 2021](#) (for providers of debt management services including the requirement to be licensed from 1 July 2021: see [21-094MR](#)).

[ASIC Corporations \(COVID-19—Advice-related Relief\) Instrument 2021/268](#)

Extends until 15 October 2021 the relief measure that allows financial advisers to provide a record of advice rather than a statement of advice to existing clients requiring financial advice due to the impact of the COVID-19 pandemic: see [21-072MR](#) and [FAQs](#).

[ASIC Consultations: CP 340 Breach reporting and related obligations](#)

Comments closed 3 June 2021. This consultation paper sets out proposals for providing guidance to Australian financial services (AFS) licensees and Australian credit licensees (credit licensees) on the breach reporting obligation that applies from 1 October 2021. The obligations require these licensees to notify, investigate and remediate breaches of the law in certain circumstances.

[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 releases letter to ADIs on implementation of capital framework reforms](#)

APRA is now writing to ADIs to set out a clear timeline to finalise the consultation phase, and to support the banking industry's implementation of the reforms.

[APRA Monthly Authorised Deposit-taking Institution Statistics April 2021](#)

The APRA has released its Monthly Authorised Deposit-taking Institution Statistics (MADIS) publication for April 2021.

[APRA consultation on guidance in support of prudential standard on remuneration](#)

The draft *Prudential Practice Guide CPG 511 Remuneration* sets out principles and examples of better practice to assist banks, insurers and superannuation licensees comply with prudential standard CPS 511 Remuneration, which will be finalised later this year. The closing date for submissions on the draft CPG 511 is 23 July 2021.

Copies of the draft CPG 511 and a consultation letter can be found [here](#).

[APRA draft Prudential Practice Guide CPG 229 Climate Change Financial Risks \(CPG 229\)](#)

The guide is designed to assist APRA-regulated entities in managing climate-related risks and opportunities as part of their existing risk management and governance frameworks. APRA feedback on the draft CPG 229 closes 31 July 2021.

ABA Submissions

[Opt-Out Joint Account Data Sharing Model](#)

Whilst the ABA supports the principle of a simple CDR, we question the ability to develop a 'one-size-fits-all-sectors' approach to joint accounts. (26 May 2021)

[Inquiry into mobile payment and digital wallet financial services](#)

While existing inquiries or reform initiatives touch on these policy issues, the issues are not confined to any single legislative framework or the responsibility of any single agency. They need a holistic assessment of potential policy solutions and their impact on consumers and the economy as a whole. (25 May 2021)

[RBA: Consultation on Preliminary Conclusions to the Review of Retail Payments Regulation](#)

RBA has released a [Consultation Paper](#) setting out the proposed policy actions, together with draft variations to the standards for card payment systems. This follows extensive stakeholder consultation by the Bank on the matters raised in the [Issues Paper](#) for the review. A summary of the key policy proposals is provided in the [Executive Summary](#).

PPSR Notices

The end of financial year is fast approaching – is it time for you to review your registrations?

Many businesses use the end of a financial year as an opportunity to review their existing PPSR registrations. Failing to maintain a registration could result in it becoming invalid. More information about the maintenance of PPSR registrations is available in our guide, [Responsible PPSR Registration Management](#).

Resources for Advisors: How you can help your small business clients

Important resources such as [Trying to get your invoices paid](#) guide and understanding your grantor search results guide, [Accessing finance or credit - do you know what's listed on the PPSR?](#) are available now at [ppsr.gov.au](#).

Timing is incredibly important in PPSR registrations

Timing is incredibly important in PPSR registrations, and there are different timing requirements for different types of registrations. More information, including relevant timing for different types of transactions, is available in the [PPSR Timing Rules table](#).

CPA Current Consultations

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

[APESB consultation on changes to the Code of Ethics: Objectivity of engagement quality reviewers](#)

Comments due 14 June 2021.

[IASB Exposure Draft: Regulatory Assets and Regulatory Liabilities](#)

Comments due 30 June 2021.

[Proposals for International Financial Reporting for Non-Profit Organisations](#)

The closing date for feedback on the Consultation Paper – Part 1 is 30 July. The closing date for feedback on the Consultation Paper – Part 2 is 24 September 2021.

[AASB Exposure Draft 310 Lack of Exchangeability](#)

The AASB is proposing to amend AAS 121 The Effects of Changes in Foreign Exchange Rates to help companies determine whether a currency can be exchanged into another currency and what accounting requirements to apply if the currency cannot be exchanged. Please submit your comments to the AASB by 23 July 2021, via the [AASB website](#).

[AASB Invitation to Comment ITC 44 Request for Comment on the IASB Request for Information on Third Agenda Consultation](#)

Feedback is requested to inform the IASB's Request for Information on the Third Agenda Consultation. Please submit your comments on ITC 44 Request for Comment on the IASB Request for Information on Third Agenda Consultation to the AASB by 16 August 2021, via the [AASB website](#).

[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.

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

IASB extends 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.

FSCA Submissions

[Single Disciplinary Body for Financial Advisers](#)

26 May 2021

CASES

[Australia and New Zealand Banking Group Limited v State of South Australia \[2021\] FCA 609](#)

BANKRUPTCY – disclaimed property subject to a registered mortgage – application for an order that the estate in fee simple be vested in the mortgagee and ancillary orders – bankrupts afforded an opportunity to be heard – application allowed

[Liberty Financial Pty Ltd v Jugovic \[2021\] FCA 607](#)

CORPORATIONS – employment contract – finance industry – non-authorized deposit taking institution – restraint of trade clause – reasonableness of restraint – breach of restraint – interlocutory injunction – restraint on acting for potential competitor – confidential information – risk of misuse – threatened breach of equitable and contractual duties of confidence – potential contravention of s 183(1) of Corporations Act 2001 (Cth) – springboard doctrine – US doctrine of inevitable disclosure – whether US doctrine part of Australian law – balance of convenience – whether damages an adequate remedy

[Charlton v National Australia Bank Limited \[2021\] NSWCA 111](#)

MORTGAGES AND SECURITIES – debt owed under financial facilities – when liability for debt incurred – whether liability for debt only arises once debt becomes payable

MORTGAGES AND SECURITIES – proceedings for recovery of a debt secured by a mortgage – Farm Debt Mediation Act 1994 (NSW) – whether mortgagor was the only relevant “farmer” – whether a “satisfactory mediation” was undertaken for the purpose of s 11

MORTGAGES AND SECURITIES – proceedings for recovery of a debt secured by a mortgage – Farm Debt Mediation Act 1994 (NSW) – what constitutes “enforcement action” under s 10 – whether bank enforcing debt owed under financial facilities constituted “enforcement action”

[Scriven v Queensland Rural and Industry Development Authority \[2021\] QCA 121](#)

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN GRANTED – where the delay was not extensive – where the applicant was without legal representation – whether to grant an extension of time

PRIMARY INDUSTRY – GENERALLY – FARM DEBT MEDIATION – where mediation occurred and no agreement was reached – where respondent approved an exemption certificate pursuant to s 52 of the Farm Business Debt Mediation Act 2017 (Qld) – where the applicant sought a review of the respondent's decision pursuant to s 81 of the Farm Business Debt Mediation Act 2017 (Qld) – where the respondent's decision was

confirmed on review – where the applicant sought judicial review – where the application for judicial review was dismissed – whether the primary judge erred in refusing to admit additional evidence

PRIMARY INDUSTRY – GENERALLY – FARM DEBT MEDIATION – where the mediator was satisfied that a document/information exchange had occurred sufficiently – where the applicant contended that there had not been sufficient disclosure – where a review decision maker found that the mortgagee had complied with s 21 of the Farm Business Debt Mediation Act 2017 (Qld) – whether the primary judge erred in misconstruing s 21 and s 22 of the Farm Business Debt Mediation Act 2017 (Qld) – whether the mortgagee took part in the mediation in good faith

[Thalanga Copper Mines Pty Ltd v Cromarty Resources Pty Ltd; Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd \[2021\] NSWSC 640](#)

The defendant repudiated its obligations under the Asset Sale Agreement; the plaintiff was entitled to terminate the Asset Sale Agreement and is entitled to the Outstanding Royalties and loss of bargain damages calculated by reference to the Projected Royalties

CONTRACTS – construction – mining tenements – royalty payable as percentage of net sales realisation – proper construction of that expression – whether defendant repudiated contract – whether plaintiff entitled to terminate – accrued rights – calculation of loss of bargain damages

By a Deed of Covenant, Assignment and Release (the "Deed of Covenant"), dated 24 March 2015, Cromarty agreed to assume the rights and obligations of Kagara under the Asset Sale Agreement and Red River agreed to guarantee Cromarty's obligations

[Thompson v Perpetual Trustees Victoria Ltd \[2021\] NSWSC 622](#)

Dismiss proceedings against first defendant

LIMITATION ACT – lender advances loan 14 years ago – fraudulent broker mis-directs funds to girlfriend – fraud discovered 12 years ago – broker imprisoned – plaintiffs repay lender 9 years ago – equitable claim against lender for unconscionable conduct – s 12GF(2), ASIC Act applies by analogy – whether unjust to apply – not unjust if applied from when plaintiffs aware of fraud

[Bashir v Australia And New Zealand Banking Group Limited \(Civil Claims\) \[2021\] VCAT 516](#)

Debt collection for credit facilities in default, whether misleading and deceptive conduct, sections 4 and 18 of the Australian Consumer Law, whether respondent engaged in prohibited debt collection practice, section 45 of the Australian Consumer Law and Fair Trading Act 2012 (Vic), application dismissed.

[Reid v Commonwealth Bank of Australia \[2021\] NSWDC 225](#)

See paragraphs 96, 97, and 98

CONTRACT – deed of settlement – compromise of multiple legal proceedings involving company debtors and guarantors and creditor – construction of release – applicability of Grant v John Grant equitable doctrine

CONSUMER LAW – credit contract – National Credit Code – standing requirement in application to re-open contract PRACTICE AND PROCEDURE – summary dismissal application

LEGISLATION

Commonwealth

[Farm Household Support Amendment \(Debt Waiver\) Bill 2021](#)

HR 02/06/2021 - The Farm Household Support Amendment (Debt Waiver) Bill 2021 (the Bill) would waive the repayment of certain classes of debts in relation to the Farm Household Allowance (FHA) program through amendments to the Farm Household Support Act 2014 (the FHS Act).

[Financial Regulator Assessment Authority \(Consequential Amendments and Transitional Provisions\) Bill 2021](#)

26/05/2021 - Introduced with the Financial Regulator Assessment Authority Bill 2021, the bill amends five Acts to make amendments consequential on the establishment of the Financial Regulator Assessment Authority.

[Financial Regulator Assessment Authority Bill 2021](#)

26/05/2021 - Introduced with the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021, the bill: establishes the Financial Regulatory Assessment Authority to assess and report on the effectiveness and capability of the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission; and prohibits the unauthorised use or disclosure of protected information provided to the Authority.

[Treasury Laws Amendment \(2021 Measures No. 4\) Bill 2021](#)

HR 26/05/2021 - Amendments to product intervention regime - to provide that ASIC is not prohibited from making a product intervention order that has conditions relating to fees, charges or other consideration paid or payable as remuneration by a retail client or consumer to a person, including the provider (or their associates) of a financial product or a credit product.

Regulations

[Banking exemption No. 1 of 2021](#)

28/05/2021 - This instrument revokes Banking exemption No. 1 of 2017 and continues the exemptions provided under it. It also makes a minor update to correct the name of an entity in the schedule.

Corporations Amendment (Statutory Minimum) Regulations 2021

28/05/2021 - This instrument amends the Corporations Regulations 2001 to increase the permanent minimum statutory threshold at which creditors of a company can issue a statutory demand for the purposes of the Corporations Act 2001.

National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2021

27/05/2021 - This instrument amends the National Consumer Credit Protection Regulations 2010 to support amendments made by the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021, which established a mandatory credit reporting regime in Australia.

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