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ISSUE 87



BANKING SECTOR NEWSLETTER

Welcome to Issue 87 of our Banking Sector Newsletter.

In this issue, we refer to a submission by the Australian Banking Association supporting legislation to make permanent the temporary reforms that were introduced to enable businesses to use technology for sending and signing documents and holding meetings due to COVID-19.

We also refer to the Federal Government releasing for consultation draft legislation addressing recommendations from the Banking, Superannuation and Financial Services Royal Commission. The draft laws will establish the Compensation Scheme of Last Resort and the Financial Accountability Regime.

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

IN THE MEDIA

Budgeting provider MyBudget applies for ASFL

The application follows an investigation by the corporate regulator after concerns unlicensed financial services were being conducted during the COVID-19 pandemic when more consumers may face financial hardship.

<https://www.moneymanagement.com.au/news/policy-regulation/budgeting-provider-mybudget-applies-asfl>
[ASIC 21-174MR MyBudget applies for AFS licence following ASIC investigation](#)

Using technology to hold meetings and sign and send documents

The Australian Banking Association supports legislation being technology neutral and facilitating innovation in how companies and businesses engage with shareholders and other stakeholders. <https://www.ausbanking.org.au/submission/using-technology-to-hold-meetings-and-sign-and-send-documents/>

Regulatory burden a python squeeze on banking competition

COBA says policymakers and regulators need to recognise and respond to the impact on competition, innovation and consumer choice of constantly ratcheting up regulatory compliance costs. The regulatory compliance burden is applying a python squeeze to competition in retail banking. <https://www.customerownedbanking.asn.au/news-and-resources/media-releases/python-squeeze-on-banking-competition>

Reporting Standard ARS 220.0 Credit Exposures and Provisions (APRA)

The ABA and members are supportive of APRA's move to data collection based on a concept-dimension data model. ABA members broadly support the approach APRA has outlined in their letter of June 8. <https://www.ausbanking.org.au/submission/reporting-standard-ars-220-0-credit-exposures-and-provisions-apra/>

Government releases new royal commission bills

Treasurer Josh Frydenberg said new legislation released by the government would implement a further seven recommendations of the royal commission, including the establishment of a compensation scheme of last resort. The laws would also address the establishment of the Financial Executive Accountability Regime, which extended the government's existing BEAR framework to all APRA-related entities. <https://www.investordaily.com.au/regulation/49560-government-releases-new-royal-commission-bills>

Government statement [Taking action on the Banking, Superannuation & Financial Services Royal Commission](#)

FASEA approves ASIC guidance on COVID-19 relief ROAs

The corporate regulator has released guidance on how advisers should be giving records of advice provided under the temporary COVID-19 relief measure. <https://www.moneymanagement.com.au/news/financial-planning/fafea-approves-asic-guidance-covid-19-relief-roas>

ASIC finalises investigation into AMP Financial Planning 'fees for no service' criminal conduct

ASIC has finalised its investigation into the alleged fees-for-no-service conduct by AMP Financial Planning Pty Limited (AMP Financial Planning) arising from its Buyer of Last Resort Policy (BOLR Policy). This conduct was the subject of inquiry and evidence at the Financial Services Royal Commission. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-173mr-asic-finalises-investigation-into-amp-financial-planning-fees-for-no-service-criminal-conduct/>

No charges for AMP FP alleged fee-for-no-service conduct

The Commonwealth Director of Public Prosecutions has determined that no charges should be brought to AMP Financial Planning for its conduct into the alleged fees-for-no-service conduct arising from its buyer of last resort policy. <https://www.moneymanagement.com.au/news/financial-planning/no-charges-amp-fp-alleged-fee-no-service-conduct>

ASIC provides relief for litigation funders

The corporate regulator has released guidance around how funders of class actions will fit into the financial services licensing regime that it hopes will "address industry concerns about the workability" of the government's moves to further restrict litigation funding. <https://www.investordaily.com.au/regulation/49522-asic-provides-relief-for-litigation-funders>

[ASIC 21-168MR ASIC consults on guidance and relief for litigation funding schemes](#)

FASEA announces relief from 3 month registration requirement for November 2021 Financial Advisers

FASEA announces its decision to provide all financial advisers who have yet to pass the exam, the option to sit the November Exam irrespective of the timing of their last sitting. To give effect to this, the *Corporations (Relevant Providers Exam Standard) Determination 2019* will be amended to provide relief from the 3 month registration requirement. <https://www.fasea.gov.au/fasea-announces-relief-from-3-month-registration-requirement-for-november-2021-financial-advisers-exam/>

COBA welcomes greater certainty on Royal Commission measures

The Customer Owned Banking Association has welcomed the announcement by Treasurer Josh Frydenberg about exemptions from the deferred sales model for add-on insurance products and the anti-hawking regime. <https://www.customerownedbanking.asn.au/news-and-resources/media-releases/greater-certainty-RC-measures>

Phone with tap and pay credit card

As consumer payment behaviour evolves, new payment technologies are being introduced in the market, we look at the Quest AirPay Tap solution, a Tap-to-Phone with PIN payments solution, that is set to pilot in Australia. <https://www.auspaynet.com.au/insights/blog>

Industry collaborates to produce design and distribution obligations templates 1.0

In an unprecedented collaborative project across financial services in Australia, the FSC and more than 60 of its members have designed products to enable the aligned implementation of a new mandatory regime. This includes industry data standards across life insurance, super, managed funds and managed accounts – what it called "version 1.0" of the templates. <https://www.fsc.org.au/resources/2225-fsc-media-release-industry-collaborates-to-produce-design-and-distribution-obligations-templates-1-0/file>

IN PRACTICE AND COURTS

Treasury Consultations

Exposure draft legislation to implement a further seven recommendations of the Banking, Superannuation and Financial Services Royal Commission. The legislation will establish the Compensation Scheme of Last Resort (recommendation 7.1) and the Financial Accountability Regime (recommendations 3.9, 4.12, 6.6, 6.7 and 6.8).

[Financial Accountability Regime – July 2021](#)

16 July 2021 - 13 August 2021

[Financial Services Royal Commission – Compensation Scheme of Last Resort](#)

16 July 2021 - 13 August 2021

Consultations

[Financial Sector Reform \(Hayne Royal Commission Response—Better Advice\) Bill 2021 \[Provisions\]](#)

Status: Accepting Submissions;

Date Referred: 24 June 2021;

Submissions Close: 09 July 2021;

Reporting Date: 28 July 2021.

ASIC Example Record of Advice (ROA): COVID-19 relief measure

This annotated example ROA was prepared in consultation with the Financial Adviser Standards and Ethics Authority (FASEA) to help advisers understand the relevant requirements when providing advice under [ASIC Corporations \(COVID-19—Advice-related Relief\) Instrument 2021/268](#): see [21-072MR](#) (Editor's note).

ASIC CP 344 Remaking ASIC class order on when debentures can be called secured notes: [CO 12/1482]

Sets out ASIC's proposals to remake Class Order [\[CO 12/1482\]](#) *When debentures can be called secured notes*, which is due to expire ('sunset') on 1 April 2022: see [21-156MR](#).

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.

[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](#)

This consultation paper set out the 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.

[APRA consultation letter on contingent liquidity to locally-incorporated ADIs subject to LCR requirements](#)

The APRA has released a consultation letter on contingent liquidity to locally-incorporated authorised deposit-taking institutions (ADIs) subject to APS 210 Liquidity Coverage Ratio (LCR) requirements.

[APRA consultation to ADIs on preparedness for zero and negative interest rates](#)

The APRA has released for consultation a letter to authorised deposit-taking institutions (ADIs) on its draft expectations regarding ADIs' preparedness for the possibility of zero and negative interest rates.

APRA grants new restricted authorised deposit-taking institution licence to Alex Bank

The APRA has granted Alex Bank Pty Ltd a licence to operate as a restricted authorised deposit-taking institution (Restricted ADI) and Alex Corporation Limited as a non-operating holding company, under the [Banking Act 1959](#). The updated lists of all APRA-authorised ADIs and all non-operating holding companies are on the APRA website at: [Register of authorised deposit-taking institutions](#) and [Register of non-operating holding companies](#).

[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.

[FSC: Target Market Determination \(TMD\) Templates – 08 July 2021](#)

The templates and data standards are voluntary for industry participants. The new Design Distribution and Obligations (DDO) come into effect on 5 October 2021, and require product issuers to develop Target Market Determinations (TMDs) for the products they issue to retail clients.

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 Consultation ED 78 Property, Plant, and Equipment](#) Comments due 25 September 2021.

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

Comments on the Consultation Paper – Part 1 is due 30 July 2021. Comments on Part 2 is due 24 September 2021.

[IPSASB Consultation ED 76 Conceptual Framework Update: Chapter 7, Measurement of Assets and Liabilities in Financial Statement](#)

Comments due 25 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 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 the 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*.

[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.

AFCA Current Matters

[Information for small businesses about the collapse of Digital Rebl Pty Ltd and Media Rebl Pty Ltd](#) (Updated July 2021)

[FASEA Consultation – relief from 3 month registration requirement for November 2021 Financial Advisers Exam](#)

The draft amendment proposes relief from the 3 month registration requirement for November 2021 exam sitting. All feedback and submissions on the Legislative Instrument can be submitted through FASEA's dedicated consultations email consultation@fasea.gov.au by 28 July 2021.

[PPSR statistics for the June quarter 2021](#)

Personal Property Securities Register (PPSR) statistics for the June quarter 2021 are now available.

CASES[5G Developments Pty Ltd \(in liq\) v Massie, in the matter of 5G Developments Pty Ltd \(in liq\) \[2021\] FCA 791](#)

CORPORATIONS – insolvency – application pursuant to ss 90-15 and 90-20 of Sch 2 to the Corporations Act 2001 (Cth) to set aside adjudication of proof of debt by a special purpose liquidator – application by a director of the corporation in liquidation – onus on the application – nature of review of the adjudication – de novo hearing – whether financial statements were impermissibly altered – timing of a payment that purportedly discharged a debt – whether joint ventures existed to develop properties

CONTRACTS – guarantee – whether guarantor was a principal debtor or guarantor pursuant to variations of the agreement

[Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited \(No 1 – Indictment\) \[2021\] FCA 757](#)

CRIMINAL LAW – federal crime – indictment filed pursuant to s 23BF of the Federal Court of Australia Act 1976 (Cth) and r 3.01 of Federal Court (Criminal Proceedings) Rules 2016 (Cth) – where accused investment banks are alleged to have made an arrangement or arrived at an understanding containing a cartel provision contrary to s 44ZZRF(1) of the Competition and Consumer Act 2010 (Cth) – where accused investment banks are alleged to have given effect to a cartel provision contained in an arrangement or understanding contrary to s 44ZZRG(1) of the Competition and Consumer Act 2010 (Cth) – where officers, employees or representatives of the investment banks are alleged to have been knowingly concerned in, or a party to, the contraventions of s 44ZZRF(1) and s 44ZZRG(1) of the Competition and Consumer Act 2010 (Cth) pursuant to s 79(1)(c) – where a bank and its officer, employee or representative are accused to have aided, abetted, counselled or procured one of the investment banks to contravene s 44ZZRG(1) of the Competition and Consumer Act 2010 (Cth) pursuant to s 79(1)(a)

PRACTICE AND PROCEDURE – interlocutory application – application objecting to indictment on the basis of formal defects apparent on the face of indictment pursuant to s 23CP(1)(a) of the Federal Court of Australia Act 1976 (Cth) – application seeking to quash each count in indictment and to discharge accused on each charge pursuant to ss 23, 23CB(1), 23CP(2)(a)(i)-(iv) of the Federal Court of Australia Act 1976 (Cth) – whether statements of offences in indictment are sufficient – whether nature of alleged offences described with “reasonable particularity” in accordance with r 3.01(4) of the Federal Court (Criminal Proceedings) Rules 2016 (Cth) – whether statements or particulars of offences in indictment sufficiently identify the essential factual ingredients of alleged offences – whether formal defects were apparent on face of indictment – where indictment was found to have not identified the essential factual ingredients of alleged offences – where deficiencies in

indictment can be remedied without causing significant prejudice to the accused – prosecutor to file new indictment to remedy identified deficiencies pursuant to s 23BH of the Federal Court of Australia Act 1976 (Cth)

[Westpac Banking Corporation v Forum Finance Pty Limited \[2021\] FCA 807](#)

CORPORATIONS – appointment of liquidator – allegations of an elaborate fraud by company in excess of \$250 million – evidence led by Westpac unchallenged by company – purported mastermind Mr Papas located somewhere in Europe – Delphic details of his whereabouts and questionable whether he will return – application for appointment of liquidator ultimately consented to by company – just and equitable that company be wound up – consideration of appropriate liquidators

[Ryan and Registrar of Personal Property Securities \[2021\] AATA 2348](#)

PERSONAL PROPERTY SECURITIES REGISTER – register amendment – costs agreement – whether decision of Registrar not to remove the registration in accordance with the registration demand was the correct decision – decision affirmed Personal Properties Securities Act 2009 ss 10, 12, 178, 181

[Murray Moama Pty Ltd v Vie De L'eau Trading Co Pty Ltd \[2021\] NSWSC 841](#)

COSTS – application for removal of caveats – plaintiff a mortgagee in possession exercising powers of sale – defendants’ caveats preventing completion of contracts for sale – agreement reached for caveats to be withdrawn on settlement with net proceeds to be held in a trust account – following settlement defendants did not press claims to proceeds in priority to plaintiff – not unreasonable for plaintiff to commence proceedings – clear that plaintiff would have almost certainly succeeded in obtaining removal of caveats had matter been contested – appropriate to make costs order in favour of plaintiff

[Priority Lending Australia Pty Ltd v Martinsville Pty Ltd \(No 2\) \[2021\] NSWSC 850](#)

CIVIL PROCEDURE – Notice of motion – Default judgment for plaintiffs on liquidated claim and on the claim for possession – Plaintiffs granted leave to issue a writ of possession – Borrower and guarantors seeking that the judgments be set aside and a stay of the writ – Application to set aside turn on whether there exists a defence on the merits or a triable issue – Whether interest clause is void for uncertainty and its construction are triable issues – Whether interest rate provision qualifies as a penalty is a triable issue – Whether second loan was unconscionable and unjust are defences that raise triable issues – Explanation for delay given – Default judgments ought be set aside

CONTRACTS – Construction of loan agreements – Whether terms of the first loan are unconscionable and the second loan is unjust by reason of its terms and surrounding circumstances – Considered in the context of whether there exist triable issues

[Secured Lending 1 Pty Ltd v Mahmassani \[2021\] NSWSC 811](#)

OCCUPATIONS – legal practitioners – duties and liabilities – duties to client – cross-claimants asked by son to help repay his debts by using cross-claimants' home as security – short term loan where exit strategy was sale of security property to son - default under loan agreement and mortgage – where proceedings by lender compromised – cross-claim against solicitor - whether solicitor failed to explain loan agreement and mortgage to cross-claimants – whether solicitor was negligent and breached retainer – where in absence of a letter written following client conference solicitor recorded advice in a file note – where satisfied that solicitor explained nature of loan and consequences if loan not repaid – where failure to complete documents in approved form not evidence of negligence – where even if breach of duty, causation not established as cross-claimants would have gone ahead with arrangement – whether conduct of solicitor was unconscionable – where conduct not unconscionable simply because clients were in disadvantaged position – whether conduct of solicitor was misleading and deceptive – cross-claim dismissed

[Commonwealth Bank of Australia v Fanning \[2021\] VCC 924](#)

PADRAIG JOSEPH FANNING Summary judgment – Loan agreement – Promissory note – Mortgage

In my judgment neither Fanning's defence nor his counterclaim has a real prospect of success. Accordingly, I make the following orders: (a) there be judgment for the plaintiff in the sum of \$552,772.99 inclusive of principal and interest; (c) judgment for the plaintiff on the counterclaim and the counterclaim be dismissed

LEGISLATION

Commonwealth

Regulations

[Accounting Standard AASB 2021-5 Amendments to Australian Accounting Standards – Deferred Tax related to Assets and Liabilities arising from a Single Transaction](#)

07/07/2021 - This instrument amends AASB 112 Income Taxes (August 2015) to clarify the accounting for deferred tax on transactions that, at the time of the transaction, give rise to equal taxable and deductible temporary differences and also amends AASB 1 First-time Adoption of Australian Accounting Standards (July 2015) to require deferred tax related to leases and decommissioning, restoration and similar obligations.

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