

27 AUGUST 2021

ISSUE 89



## BANKING SECTOR NEWSLETTER

Welcome to Issue 89 of our Banking Sector Newsletter.

In this issue, APRA has finalised its approach to licensing and supervising new authorised deposit-taking institutions. APRA's updated approach includes stronger requirements for being granted a banking licence and closer supervision of new entrants.

Also in this issue, Federal Parliament has passed new laws allowing digital signatures on documents until 31 March 2022 in response to the COVID-19 pandemic. The laws enable, among other things, companies to sign and execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means or other alternative technologies. The changes are similar to the temporary measures introduced in 2020. The government has said that it will look to bring in permanent reforms later this year.

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

### IN THE MEDIA

**Australia's peak finance, banking groups say government needs to close loophole to prevent online gambling using credit**

The Australian Banking Association and the Australian Finance Industry Association are pleading for the government to update payment laws to stop allowing credit cards to be used for online gaming services such as SportsBet and Bet365. <https://www.canberratimes.com.au/story/7386778/banks-plea-for-credit-gambling-loophole-to-be-closed/?cs=14230>

**Red tape choking small-bank lending: BOQ**

Bank of Queensland has called for an array of regulatory reforms, in order to equalise smaller banks against the majors and improve credit access. <https://www.mortgagebusiness.com.au/breaking-news/15943-red-tape-choking-small-bank-lending-boq>

**AFSA trials use of Digital Identity for individuals accessing Online Services**

From 11 August 2021, AFSA has introduced Digital Identity as a public beta; a simple, safe and fast way to access government services. This means people can use their Digital Identity to access a range of government services including logging into AFSA's Online Services. <https://www.afsa.gov.au/about-us/newsroom/afsa-trials-use-digital-identity-individuals-accessing-online-services>

**Compensation scheme of last resort may be last straw for financial advice industry**

Eight of Australia's largest financial advice industry associations have united to oppose the design of the compensation scheme of last resort, contained in draft legislation released for public consultation, with concerns compensation scheme will become a go-to option rather than last resort. <https://fpa.com.au/news/compensation-scheme-of-last-resort-may-be-last-straw-for-financial-advice-industry/>

**ASIC's approach to new laws reforming financial services sector**

Six reforms arising out of recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) and other inquiries will commence in October. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-213mr-asic-s-approach-to-new-laws-reforming-financial-services-sector/>

**New banks must have money-maker: APRA**

New banking entrants will need to launch both an income-generating asset product and a deposit product before they can secure a full licence, under APRA's new standards. <https://www.mortgagebusiness.com.au/breaking-news/15934-new-banks-must-have-money-maker-apra>

### **APRA finalises new approach to licensing and supervising new banks**

The APRA has finalised its revised approach to licensing and supervising new authorised deposit-taking institutions (ADIs). APRA's final position remains largely consistent with its original proposals, with the most significant clarifications relating to milestones in the progression of a licence application. <https://www.apra.gov.au/news-and-publications/apra-finalises-new-approach-to-licensing-and-supervising-new-banks>

The response paper, final information paper and the two guidelines are available on the [APRA website](#).

### **Law passes to extend digital signature usage**

The Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 finally passed both Houses (10 August), enabling companies to sign and execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means or other alternative technologies until the end of March next year. The change enabled many lenders to accept digital signatures on home loan documents. <https://www.mortgagebusiness.com.au/breaking-news/15933-law-passes-to-extend-digital-signature-usage>

### **Royal commission fines top \$100m**

In the two years since the Royal Commission's final report, the corporate regulator has handed out more than \$100 million in fines to Australia's banks, according to new figures. The news comes as ASIC is poised to retire its 'why not litigate' stance adopted since the Royal Commission, with the appointment of new chair Joe Longo. <https://www.investordaily.com.au/regulation/49688-royal-commission-fines-top-100m>

### **Govt seeks feedback on FSCP and FAR**

The Federal Government is seeking feedback on when the corporate regulator should convene a Financial Services and Credit Panel (FSCP) and what sanctions should be included on the Financial Advisers Register (FAR), as part of consultation released on the Better Advice Bill. <https://www.moneymanagement.com.au/news/policy-regulation/govt-seeks-feedback-fscp-and-far>

### **ABA: Banks offer loan deferrals as lockdowns continue**

More than 20,000 customers have received hardship assistance during recent lockdowns, including just over 15,000 repayment deferrals on home and business loans. <https://www.ausbanking.org.au/banks-offer-loan-deferrals-as-lockdowns-continue/>

### **NAB launches Sharia loan product into Australian Islamic finance market tipped to be worth \$250b**

Australia's finance sector is tapping into the Islamic market, with one of the country's biggest lenders launching a Sharia-compliant loan and smaller institutions vying to become the first bank for the nation's Muslim population. <https://www.abc.net.au/news/2021-08-05/islamic-banking-nab-home-loans-finance-superannuation-sharia/100350444>

### **FASEA believes exam is 'fair'**

While the authority argues the high pass rate shows it is an achievable exam for "competent" advisers and has been a boost for consumer confidence in the industry, data shows a different side. <https://www.moneymanagement.com.au/news/financial-planning/fasea-believes-exam-fair>

### **AFCA outlines latest efficiency measures**

A pilot project aimed at identifying complaints without merit earlier in its process is among the initiatives the Australian Financial Complaints Authority (AFCA) has under way to support efficient and timely handling of the 70,000 complaints it receives annually. <https://www.afca.org.au/news/latest-news/afca-outlines-latest-efficiency-measures>

### **Statement by Philip Lowe, Governor: Monetary Policy Decision**

The RBA Board has decided to: maintain the cash rate target at 10 basis points and the interest rate on Exchange Settlement balances of zero per cent and maintain the target of 10 basis points for the April 2024 Australian Government bond, and continue to purchase government securities at the rate of \$5 billion a week until early September. <https://www.rba.gov.au/media-releases/2021/mr-21-14.html>

### **Housing loan commitments fell in June but remained high**

The value of new housing loan commitments fell 1.6 per cent in June 2021 (seasonally adjusted) but remained at an historically elevated level of \$32.1 billion, according to statistics released by the ABS. The largest contribution to the fall in owner-occupier loan commitments was a fall of 17 per cent in the value of loan commitments for the construction of new dwellings. <https://www.abs.gov.au/media-centre/media-releases/housing-loan-commitments-fell-june-remained-high>

## **IN PRACTICE AND COURTS**

### **PPSR: Resources for Advisors: Addressing misuse of the PPSR**

Advisors are often in a position to highlight trends or issues, and this intelligence is invaluable in protection of the PPSR. If you suspect someone has breached the rules, you can report it. For more information or to report suspected misuse, visit [ppsr.gov.au](https://ppsr.gov.au).

### **PPSR: New and improved Amendment Statement form now available**

PPSR have improved their web content and included new tools such as a [business days calculator](#) to help you meet the waiting periods for this process, a [sample amendment demand](#) and a [guide](#) for the dispute process. They are also launching a new amendment statement form, to help simplify the strict legal process required when disputing a PPSR registration, which can be found [here](#). More information about the amendment demand process is available at [ppsr.gov.au](https://ppsr.gov.au).

### [APRA consultation: On further updates to Reporting Standard ARS 720.1 ABS/RBA Loans and Finance Leases](#)

APRA, the ABS and the RBA propose to amend ARS 720.1 to accurately align with the latest version of APS 220 Credit Risk Management (APS 220). ARS 720.1 currently collects data on impaired exposures, which will no longer be used in APS 220, and proposes to replace this item with the collection of data on non-performing exposures.

### [APRA releases response to submissions and final Prudential Standard APS 111 Capital Adequacy: Measurement of Capital](#)

The revised APS 111 will come into effect from 1 January 2022.

### [ASIC 13/08/2021 ASIC Corporations and Credit \(Breach Reporting—Reportable Situations\) Instrument 2021/716 and Explanatory Statement to ASIC Instrument 2021/716](#)

Amends licensees' breach reporting obligation contained in s 912DAA of the Corporations Act and 50B of the National Consumer Credit Protection Act so that individual breaches of the enforceable IDR standards contained in Regulatory Guide 271 Internal Dispute Resolution (RG 271) are not deemed to be 'significant' and so not automatically reportable. This amendment has been made so that licensees are not obliged to report minor and technical breaches of the IDR standards to us that are unlikely to cause consumer detriment, alleviating unnecessary reporting. Licensees will still have to consider the general 'significance' test as well as the other deeming provisions (such as where the breach results in material loss to consumers) where they breach the IDR standards.

### [ASIC 10/08/2021 INFO 226 Complying with the ASIC Client Money Reporting Rules 2017 \(reissued\)](#)

Updated guidance for AFS licensees that hold reportable client money to clarify the correct designation of client money accounts under section 981B of the Corporations Act, and an AFS licensees' obligations relating to the use of buffers.

### [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.

### [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 consultation: Draft guidance for the hawking reforms**

ASIC's guidance gives additional clarity on how the changes may affect commercial practices, systems and processes. All interested stakeholders have until 17 August to provide feedback on CP 346. ASIC will publish its final guidance in September 2021, ahead of the revised hawking prohibition commencing on 5 October 2021.

[Consultation Paper 346: Update to RG 38](#)

[Draft Regulatory Guide 38: The hawking prohibition](#)

### [AUSPAYNET: New Stakeholder Advisory Council](#)

One of the recent recommendations arising from the review is the creation of the AusPayNet Stakeholder Advisory Council (ASAC). The ASAC, which will include members from consumer groups, fintechs, and retailers, was developed as a way of ensuring that wider stakeholder perspectives are shared with the Board. The first ASAC meeting will be held in August 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 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 are 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 Consultations**

The following AASB documents are open for comment:

*ED 309 Disclosure Requirements in Australian Accounting Standards—A Pilot Approach*  
Comments due by 16 August 2021.

*ITC 44 Request for Comment on the IASB Request for Information on Third Agenda Consultation*  
Comments due by 16 August 2021.

*ED 311 Management Commentary*  
Comments due by 1 October 2021.

Please have your say and send your comments to the AASB 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 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*.

### IFRS Foundation

The International Accounting Standards Board has published the exposure drafts:

[Subsidiaries without Public Accountability: Disclosures](#), with a deadline for submitting comments of 31 January 2022;

[Initial Application of IFRS 17 and IFRS 9 – Comparative Information](#), with a deadline for submitting comments of 27 September 2021.

### AFCA Current Matters

[Important information for consumers about Forex Capital Trading Pty Ltd](#)

### [FSC: Target Market Determination \(TMD\) Templates](#)

The new Design Distribution and Obligations 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. For more information on the reforms and the FSC's template TMDs and data standards.

### CASES

#### [Australian Securities and Investments Commission v RI Advice Group Pty Ltd \(No 2\) \[2021\] FCA 877](#)

CORPORATIONS LAW – financial services and markets – best interests obligations – responsibilities of holder of Australian financial services licence – obligation of licensee to take reasonable steps to ensure that its representatives comply with the best interests obligations – obligation of licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly – whether the first defendant, a licensee, contravened these obligations

#### [Almona Pty Ltd v Parklea Corporation Pty Ltd \[2021\] NSWCA 171](#)

MORTGAGES AND SECURITIES – mortgages – duties, rights and remedies of mortgagee – power of sale – mortgagee's duty to exercise power of sale in good faith – effect of contract of sale upon mortgagor's rights – whether attempt to refinance and discharge mortgage prior to transfer of title can prevent sale – where mortgagor's attempts to refinance accelerated the sale process

MORTGAGES AND SECURITIES – mortgagee exercising right of sale – price higher if vacant possession given – requirement of vacant possession not communicated to occupant – damages awarded for failure to communicate occupation condition

#### [Bendigo and Adelaide Bank Ltd v Prichard \[2021\] QSC 179](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the plaintiff granted mortgage - secured loans to the defendant – where the defendant defaulted – where the plaintiff seeks recovery of unpaid sums of the loans and possession of the mortgaged property – where the defendant defends the claim on the basis that the plaintiff has no standing to enforce the instruments because the plaintiff has "securitised" them – whether the defendant has no real prospect of defending the claim and whether there is no need for a trial

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GENERAL MATTERS – SUBPOENAS

#### [Saafin Constructions Pty Ltd \(in liq\) & Ors v MAG Financial and Investment Ventures Pty Ltd & Ors \[2021\] VSC 489](#)

CREDIT LAW – Whether loan agreement unenforceable under s 39 of the Consumer Credit (Victoria) Act 1995 (Vic) – Whether loan agreement a 'credit contract' as defined in the National Credit Code – Whether credit provided to improve residential property – Principles for determining the purpose for which credit was provided – Whether credit provided in the course of or incidentally to business – Whether relevant purpose of the provision of credit was to on-lend to a company

CREDIT LAW – Whether security void under s 40 of the Consumer Credit (Victoria) Act 1995 (Vic) – Whether security provided was a mortgage that related to the relevant credit contract – Whether later agreement superseded the relevant credit contract – Whether the meaning of mortgage in s 40 of the Consumer Credit (Victoria) Act 1995 (Vic) should be limited by the definition of mortgage in the National Credit Code

LOAN AGREEMENTS – Whether company a party to loan agreement – Whether validity of purportedly executed loan agreement proved – Whether amount due under loan agreement had been repaid – Application of Clayton's Case [1816] EngR 677; (1816) 1 Mer 529 considered

UNCONSCIONABLE CONDUCT – Whether mortgagee's conduct in effecting the mortgagee's sale was unconscionable within the meaning of s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) – Principles of statutory unconscionability considered – Assessment of damage under s 12GF of the Australian Securities and Investments Commission Act 2001 (Cth)

MORTGAGES – Whether sale by mortgagee was in breach of its duty of good faith under s 77 of the Transfer of Land Act 1958 (Vic) and at common law – Whether mortgagor entitled to have sale set aside

MORTGAGES – Whether mortgagor effectively tendered the amount due under the mortgage – Whether mortgagee's conduct showed tender would not be accepted – Whether proffering of cash dispensed with – Whether mortgagor ready, willing and able to tender – Presumption against wrongdoers in assessing past hypotheticals – Whether equity of redemption extinguished by mortgagee entering into contract of sale – Principles of tender considered – Consequences of refusal of tender on mortgagee's entitlement to continuing interest considered

MORTGAGES – Whether proceeds of mortgagee's sale had been allocated in accordance with s 77 of the Transfer of Land Act 1958 (Vic)

SECURITIES – Secured credit facility included an 'all moneys' clause – Whether unsecured debts assigned to creditor became secured under the secured credit facility – Principles in the interpretation of 'all moneys' clauses considered

GUARANTEES – Whether guarantor discharged by creditor's refusal to accept tenders

#### [CULLETON -v- AUSTRALIAN FINANCIAL SECURITY AUTHORITY \[2021\] WASC 274](#)

Appeal against conviction - Jurisdiction of court - Standing of prosecutor - No merit in appeal

## LEGISLATION

### Commonwealth

#### Bills

#### [Treasury Laws Amendment \(2021 Measures No. 1\) Bill 2021](#)

Assent Act no: 82 Year: 2021 13 August 2021

Amends the: Corporations Act 2001 to: allow companies to execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means or other alternative technologies until 16 September 2021; and make contingent amendments; and Australian Securities and Investments Commission Act 2001 and Corporations Act 2001 to: provide that all civil penalty proceedings commenced under the continuous disclosure and misleading and deceptive conduct provisions must prove that an entity or officer acted with 'knowledge, recklessness or negligence' in respect of an alleged contravention; and make consequential amendments.

#### Regulations

#### [Financial Sector Reform \(Hayne Royal Commission Response\) \(Hawking of Financial Products\) Regulations 2021](#)

06/08/2021 - This instrument amends the Corporations Regulations 2001 to partially implement recommendations 3.4 and 4.1 of the Financial Services Royal Commission in relation to the hawking of financial products.

#### [Financial Sector Reform \(Hayne Royal Commission Response—Breach Reporting and Remediation\) Regulations 2021](#)

05/08/2021 - This instrument amends four instruments to support the breach reporting amendments in Schedule 11 to the Financial Sector Reform (Hayne Royal Commission Response) Act 2020.

## THIS EDITION'S EDITOR



**Phil Kaunitz**

Partner

+61 7 3166 4511

+61 402 844 833

[pkunitz@tglaw.com.au](mailto:pkunitz@tglaw.com.au)

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

**SYDNEY** | Sixty Martin Place, Level 14, 60 Martin Place | Sydney NSW 2000

**MELBOURNE** | Rialto South Tower, Level 39, 525 Collins Street | Melbourne VIC 3000

**BRISBANE** | Waterfront Place, Level 28, 1 Eagle Street | Brisbane QLD 4000

**PERTH** | Exchange Tower, Level 27, 2 The Esplanade | Perth WA 6000

**ADELAIDE** | Level 7, 19 Gouger Street | Adelaide SA 5000

[tglaw.com.au](http://tglaw.com.au)

Thomson Geer

@ThomsonGeer 5