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ISSUE 91



BANKING SECTOR NEWSLETTER

Welcome to Issue 91 of our Banking Sector Newsletter.

In this issue, ASIC has released guidance around new breach reporting obligations for Australian Financial Services licensees. The reforms take effect from October 1.

Also in this issue, AUSTRAC has released four new risk assessments for the Australian banking sector covering money laundering and terrorism financing. The risk assessments are the latest in a series of money laundering and terrorism financing risk assessments developed to assist the Australian financial services sector to identify, understand and disrupt serious criminal activity targeting Australia's financial system and community.

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

IN THE MEDIA

Inaugural Financial Regulator Assessment Authority members appointed

The Federal Government has appointed the inaugural members to the Financial Regulator Assessment Authority (FRAA). Nicholas Moore has been appointed Chair along with Gina Cass-Gottlieb and Craig Drummond. In its first year, the FRAA will assess the effectiveness and capability of ASIC to assist recently appointed ASIC Chair Joseph Longo. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/inaugural-financial-regulator-assessment-authority>

Banks support summit to end violence against women and children

The CEO of the ABA, said she was pleased the industry had been asked to contribute to the summit and share efforts made by the banking sector to assist customers, particularly in the area of financial abuse. Domestic violence takes many forms, including financial abuse. <https://www.ausbanking.org.au/banks-support-summit-to-end-violence-against-women-and-children/>

APRA phases out reliance on Committed Liquidity Facility

The Australian Prudential Regulation Authority (APRA) expects locally-incorporated ADIs subject to the Liquidity Coverage Ratio (LCR) to reduce their reliance on the Committed Liquidity Facility (CLF) to zero by the end of 2022 subject to financial market conditions. <https://www.apra.gov.au/news-and-publications/apra-phases-out-reliance-on-committed-liquidity-facility>

ASIC publishes guidance on breach reporting

ASIC released regulatory guidance to help credit and Australian Financial Services (AFS) licensees to meet new breach reporting obligations, set to commence on 1 October 2021. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-235mr-asic-publishes-guidance-on-breach-reporting/>

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

The APRA has granted Avenue Bank Limited a licence to operate as a restricted authorised deposit-taking institution (Restricted ADI) and Avenue Hold Limited as a non-operating holding company, under the Banking Act 1959. <https://www.apra.gov.au/news-and-publications/apra-grants-new-restricted-authorised-deposit-taking-institution-licence-to-1>

ABA statement on AUSTRAC risk assessment report

Australia's banks have strong relationships with law enforcement authorities and regulators like AUSTRAC, and work together to detect, deter and prevent money laundering and other serious crime. <https://www.ausbanking.org.au/aba-statement-on-austrac-risk-assessment-report/>

APRA watches for lockdown impact on mortgage rise

The housing market boom and economic rebound grew loan books in the three months to June, but APRA has warned the ongoing lockdowns have made the outlook "uncertain". <https://www.mortgagebusiness.com.au/breaking-news/16022-apra-watches-for-lockdown-impact-on-mortgage-burst>

APRA releases latest biennial stakeholder survey

The APRA's 2021 Stakeholder Survey has found that APRA's regulatory and supervisory approaches have positively impacted the banking, insurance and superannuation industries during COVID-19. <https://www.apra.gov.au/news-and-publications/apra-releases-latest-biennial-stakeholder-survey-0>

The full 2021 Stakeholder Survey results can be found on the [APRA website](#).

AUSTRAC releases four new Australian banking sector risk assessments

AUSTRAC has released four new Australian banking sector money laundering and terrorism financing (ML/TF) risk assessments. The four assessments examine the threats criminals pose to Australia's major banks, other domestic banks, foreign subsidiary banks and foreign bank branches operating in Australia. <https://www.austrac.gov.au/news-and-media/media-release/austrac-releases-four-new-australian-banking-sector-risk-assessments>

BIS Innovation Hub and central banks of Australia, Malaysia, Singapore and South Africa will test CBDCs for international settlements

Project Dunbar will develop prototypes for shared platforms that will enable international settlements with digital currencies issued by multiple central banks. The System aims to allow direct transactions between institutions, reducing costs and increasing speed. <https://www.rba.gov.au/media-releases/2021/mr-21-18.html>

AusPayNet welcomes the final report of the Federal Government's Review of the Australian Payments System

Australian Payments Network welcomed the final report and recommendations of the Federal Government's Review of the Australian Payments System, which will benefit consumers and businesses and enable innovation. <https://www.auspaynet.com.au/insights/Media-Release/FinalReport-Review2021>

Over 16,000 pass the Financial Adviser Exam

FASEA has released exam results from the 13th Financial Advisers Exam held in July 2021. Over 16,030 advisers have passed the adviser exams held to date, with 14,070 are recorded as active financial advisers on ASIC FAR. <https://www.fasea.gov.au/over-16000-pass-the-financial-adviser-exam/>

Payments system review proposes new role and powers for federal Treasurer

A report on Australia's payment processing systems has advocated the introduction of new powers that would allow the federal Treasurer to influence tech giants like Apple and Google in the name of national interest. <https://www.investordaily.com.au/regulation/49777-payments-system-review-proposes-new-role-and-powers-for-federal-treasurer>

FPA welcomes the Government's decision to review the ASIC industry funding model

The FPA welcomes the announcement from the Federal Government on its decision to implement a temporary reduction in cost recovery levies for the next two years and review the ASIC industry funding model charged by the Australian Securities and Investments Commission. <https://fpa.com.au/news/fpa-welcomes-the-governments-decision-to-review-the-asic-industry-funding-model/>

Accountants grateful but baffled by inequitable ASIC fee relief

Australia's professional accounting bodies are grateful for the temporary ASIC fee relief for financial advisers announced by the Federal Government. However, they can't understand why other parts of the accounting profession, which have also been hit by steep fee increases, have been ignored. <https://www.cpaaustralia.com.au/about-cpa-australia/media/media-releases/accountants-grateful-but-baffled-by-inequitable-asic-fee-relief>

IN PRACTICE AND COURTS

[Final report of the Payments System Review](#)

Considered whether the regulatory architecture of the Australian payments system is fit-for-purpose and responsive to advances in payments technology and changes in business models and consumer demand. The final report makes 15 recommendations in three key areas.

[ABA: Payments system review is necessary and constructive](#)

ASIC Updates – 07 September 2021

[RG 78 Breach reporting by AFS licensees and credit licensees](#)

NOTE: [Superseded SRG 78](#) continues to apply with respect to certain breaches before 1 October 2021.

[INFO 259 Complying with the notify, investigate and remediate obligations](#)

[REP 698 Response to submissions on CP 340 Breach reporting and related obligations](#)

New regulatory guidance to help credit and Australian financial services (AFS) licensees meet new breach reporting obligations commencing 1 October 2021: see [21-235MR](#).

[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](#)

[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 new details on Climate Vulnerability Assessment](#)

The APRA has published an information paper outlining the purpose, design and scope of the Climate Vulnerability Assessment (CVA) that is underway with Australia's largest five banks. Along with its [draft prudential guidance on climate risk](#), the CVA forms a core plank of APRA's efforts to help its regulated entities understand and manage the financial risks associated with climate change.

The CVA information paper is available on the [APRA website](#).

PPSR: Resources for advisors: the importance of registering on the PPSR when selling on credit terms

If your client's business supplies goods and gives customers a payment timeframe (such as 30, 60 or 90 days) – they are offering credit. The PPSR is one way to help get those invoices paid, or the goods back, if their customer can't pay. Looking for more information for your clients? Visit ppsr.gov.au/COVID19 for a range of resources on how the PPSR can help protect businesses from risk.

[Statement by Philip Lowe, Governor: Monetary Policy Decision](#)

7 September 2021 Media Release 2021-19

Maintain the cash rate target at 10 basis points and the interest rate on Exchange Settlement balances of zero per cent; maintain the target of 10 basis points for the April 2024 Australian Government bond.

[RBA: Robust Fallbacks Required for BBSW Securities](#)

The Reserve Bank is introducing new eligibility criteria for securities to be accepted as collateral in the Reserve Bank's market operations. Eligibility criteria for FRNs and marketed asset-backed securities issued before 1 December 2022 are unchanged. However, issuers should strongly consider including robust fallbacks for such securities.

[ABA Submissions - Draft AML/CTF Rules Consultation – Chapter 79, 80, 21 and 48](#)

While generally in support of this Chapter, the ABA seeks additional clarity over the scope of the proposed special circumstances, particularly in relation to opening an account and the initial deposit. The submission puts forward a proposal regarding Chapter 80 on the basis that there may be unintended consequences with the current drafting, such as exempting a broader range of activities.

AFSA feedback on guidance resources

AFSA is seeking your feedback on proposals to improve the accessibility of our guidance resources for stakeholders including Inspector-General Practice Statements, Inspector-General Practice Directions, Official Receiver Practice Statements and Official Trustee Practice Statements. AFSA have set up a consultation on [AFSAsandpit](#) and invite you to submit your feedback before 1 October.

IFRS Foundation

The International Accounting Standards Board has published the below 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.

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 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*.

AFCA Current Matters

[Sterling group investors](#) (Updated September 2021)

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

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.

CASES

[Australian Securities and Investments Commission v Allianz Australia Insurance Limited \[2021\] FCA 1062](#)

CORPORATIONS – misleading or deceptive conduct – financial products – insurance – allegation that defendants had misled insureds by making four discrete representations about the Integrated Product – where first defendant represented that the premium of the Integrated Product was calculated by reference to matters having no bearing on the calculation – where defendants represented that the Integrated product provided coverage for journeys which were not covered – where defendants represented that the Integrated product provided coverage for customers of a demographic who were not covered – where defendants represented that travel insurance covering medical expenses was an essential part of travel in circumstances where the Integrated Product did not cover medical expenses – where liability admitted

CORPORATIONS – misleading or deceptive conduct – financial products – insurance – penalty – principles relating to the determination of penalty – where parties are in agreement as to the appropriate range

[Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited \[2021\] FCA 1008](#)

Publication of reasons: 9 September 2021

BANKING AND FINANCIAL INSTITUTIONS – enforcement and remedies – pecuniary penalties for contraventions of s 961K of the Corporations Act 2001 (Cth) – penalties sought by plaintiff not opposed by defendants – whether quantum of penalty appropriate

[‘XM’ and Australian Financial Security Authority \(No 2\) \(Freedom of information\) \[2021\] AICmr 41](#)

Freedom of Information – Whether reasonable steps taken to find documents – (CTH) Freedom of Information Act 1982 s 24A

[First Mortgage Capital Pty Ltd v Westpac Banking Corporation Ltd \[2021\] NSWSC 1143](#)

MORTGAGES AND SECURITIES – powers of mortgagee – clogs on equity of redemption – collateral advantages – plaintiff advanced \$289,915 to mortgagors – second ranking mortgages held over various properties – mortgage charged Lower Rate of Interest at 30% p.a. and Higher Rate of Interest at 60% p.a. in event of default – clause 18.3(h) which operates following default allowed plaintiff to pay out other mortgages

– any money so paid to form part of the “Secured Money” – plaintiff pays out first ranking mortgages over three of mortgagors’ properties for total of \$487,000 – plaintiff seeks to pay out first ranking mortgages over a further two properties – whether clause 18.3(h) provides a collateral advantage and is an impediment to redemption – held that plaintiff’s power to pay out first mortgages and charge interest at 60% p.a. on amounts paid out can be regarded as a collateral advantage and an impediment to redemption – whether clause 18.3(h) is unfair and unconscionable – held that reliance on power to charge interest at 60% p.a. on amounts paid out to first mortgagees is unfair and unconscionable – reliance on clause 18.3(h) in that fashion amounts to an unconscientious exercise of a contractual right – plaintiff entitled to rely upon clause 18.3(h) to redeem or acquire first mortgages but is confined to charging interest at the rate provided for in the first mortgage

[In the matter of Antqip Hire Pty Ltd \(in liq\) \[2021\] NSWSC 1122](#)

MORTGAGES AND SECURITIES – Personal Property Securities Act 2009 (Cth) – Vesting – Extension of time – Companies in voluntary administration – Deeds of Company Arrangement entered into – Security interest registered on Personal Property Securities Register – Registration lapsed – Further registrations made eighteen months later – Companies subsequently went into liquidation – Application by secured creditor under Corporations Act 2001 (Cth), s 588FM, to fix later time for the purposes of vesting of security interest under s 588FL(2)(b)(iv) – Identification of “critical time” as date when administration which ended when Deeds of Company Arrangement executed began – Whether s 588FL applicable to security interests granted by security agreement made after critical time – Section 588FL not so applicable – No utility in s 588FM order

CORPORATIONS – Voluntary administration – Deed of company arrangement – Effect on vesting of Personal Property Securities Act 2009 (Cth) security interests – Relevance of subsequent voluntary winding up

MORTGAGES AND SECURITIES – Personal Property Securities Act 2009 (Cth) – Vesting – Extension of time – Whether just and equitable to fix later time in the alternative that s 588FL applicable – Prejudice to unsecured creditors and Deputy Commissioner of Taxation – Relevance of delay – Avoidance of unintended windfall to unsecured creditors to detriment of secured creditor – Intentions of parties – Inadvertence

(CTH) Corporations Act 2001, ss 459P, 468, 500, 513A, 513B, 513C, 566(1)(e), 588FL, 588FM; Pts 5.3A, 5.7B

(CTH) Personal Property Securities Act 2009, ss 18(3), 19, 20, 21(2)(a), 163(1)(a), 267, 267A

[Mao v Bao \[2021\] NSWSC 1096](#)

CONTRACTS – payment of sum of money by the plaintiff to the defendant – whether the payment constituted a loan repayable by the defendant – identity of borrower

EQUITY – equitable remedies – account – purchase of the property funded in part by a bank loan obtained by the cross-defendant and in part by remittances by the cross-claimant – cross-defendant borrows additional sum largely for his own purposes, and lets property to tenant – scope of account to which cross-claimant entitled

LIMITATION OF ACTIONS – equitable defence of laches and acquiescence – whether inordinate delay in commencing the cross-claim – prejudice to cross-defendant

[VicBeef Holdings Pty Ltd & Anor v Chen & Anor \[2021\] VSC 546](#)

DIRECTOR'S AND OFFICER'S DUTIES – Sections 180, 181 and 182 of the Corporations Act 2001 (Cth) – Fiduciary Duties – Duties of company directors – Duty to act in good faith in the best interests of the company – Whether subjective or objective test to be applied – Duty to act for a proper purpose – Duty to not improperly use position – No conflict rule – Relevance of a group context – Whether defendant director breached duties by providing security to a creditor over company assets - Whether entities sufficiently related for grant of security to be considered in interest of the company - Whether director considered interests of wider group of companies or specific interests of the company concerned – Equitable rescission – Whether counterparty a bona fide purchaser without notice – Whether entitlement to rescission dependent on Baden categories 1 to 4 – Knowledge of matters giving rise to breaches of fiduciary duties – VicBeef and Tabro were party to security agreements with the National Australia Bank ('NAB')

[COMMONWEALTH BANK OF AUSTRALIA -v- CHENG \[No 2\] \[2021\] WASC 291](#)

Practice and procedure - Strike out - Abuse of process - The plaintiff, the Commonwealth Bank (the Bank), commenced these proceedings by writ on 15 October 2013. It claims against the first defendants (Mary Yeun Shan Cheng, Francis Hung Lam (Frank) and Andrea Man Yee Cheng) and the second defendant (Chan Thanh Lam) amounts owing pursuant to loan agreements and mortgages

LEGISLATION

Commonwealth

Act Compilation

[Bankruptcy \(Estate Charges\) Act 1997](#)

31/08/2021 - Act No. 12 of 1997 as amended

[Corporations Act 2001](#)

09/09/2021 - Act No. 50 of 2001 as amended

Volume 4 Chapter 7—Financial services and markets

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[Authority to carry on banking business for a limited time 2021 – Avenue Bank Limited](#)

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