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ISSUE 92



BANKING SECTOR NEWSLETTER

Welcome to Issue 92 of our Banking Sector Newsletter.

In this issue, ASIC has published updated guidance on the prohibition of hawking financial products. The reforms mean a person must not offer a financial product to a retail client during unsolicited, real time contact. The changes are aimed at preventing people being sold products they don't want or need.

Also in this issue, a South Australian man has been convicted and fined over falsifying registrations on the Personal Property Securities Register. The man made false representations against the property of a bankruptcy trustee, a member of the judiciary and a range of public institutions. The man made the registrations not based on business dealings, but as payback against the public figures and institutions he believed had slighted him. In a statement, AFSA noted that where it sees that people are using the PPSR to frustrate others, it will take action.

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

IN THE MEDIA

Report on competition in the Australian funds management industry released

ASIC commissioned independent research by Deloitte Access Economics to examine competition between fund managers with a focus on outcomes delivered to investors in retail managed investment products. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-258mr-report-on-competition-in-the-australian-funds-management-industry-released/>

Threats and charms: how to avoid scammers and their tricks

As more Australians experience financial scams, the ABA has launched a new campaign to raise awareness on the increasing threat of scams, warning Australians to be on the lookout for scam phone calls, texts and emails. <https://www.ausbanking.org.au/threats-and-charms-how-to-avoid-scammers-and-their-tricks/>

ASIC publishes guidance on hawking reforms

These reforms flow from recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and are designed to tackle consumer harms arising from consumers being approached with unwanted products through cold-calls or other unsolicited contact. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-257mr-asic-publishes-guidance-on-hawking-reforms/>

ASIC to take 'practical' and 'reasonable' approach to disciplinary body

The Australian Securities and Investments Commission expects to take a "practical and reasonable" approach to the single disciplinary body (SDB) which is due to take effect on 1 January, 2022. <https://www.moneymanagement.com.au/news/financial-planning/asic-take-%E2%80%98practical%E2%80%99-and-%E2%80%98reasonable%E2%80%99-approach-disciplinary-body>

Mosaic Brands increases lease make good provision

ASIC notes the decision by Mosaic Brands Limited (Mosaic Brands) to increase its lease make good provision to \$8.3 million in its financial report for the year ended 27 June 2021. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-255mr-mosaic-brands-increases-lease-make-good-provision/>

Ex-winemaker convicted and fined after pleading guilty to misusing the PPSR

A South Australian man has been convicted and fined after falsifying registrations on the Personal Property Securities Register, the Australian Government's public noticeboard of security interests in personal property. <https://www.afsa.gov.au/about-us/newsroom/ex-winemaker-convicted-and-fined-after-pleading-guilty-misusing-ppsr>

ASIC releases DDO FAQ for advisers and licensees

Financial advisers providing personal advice will still need to consider the reasonable steps obligations under Design and Distribution Obligations (DDO) to meet the best interest duty, with the DDO regime set to begin in less than three weeks. <https://www.moneymanagement.com.au/news/financial-planning/asic-releases-ddo-faq-advisers-and-licensees>

Statement in response to Treasury’s updates to proposed amendments to DDO

The FPA welcomes the Treasury’s announcement of further updates to the Design and Distribution Obligations (DDO regime) by removing the requirement for financial planners to report nil complaints or nil information to product manufacturers. Given this would have been the vast majority of reporting required by financial planners in relation to target market determinations (TMD). <https://fpa.com.au/news/statement-in-response-to-treasurys-updates-to-proposed-amendments-to-ddo/>

Halifax auditor’s registration cancelled

The CADB found that had Mr Evett performed his duties as required, errors in Halifax’s 2017 financial statements would have been identified and Halifax would have been required to cease trading until it could demonstrate that it met the capital requirements of its financial services licence. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-250mr-halifax-auditor-s-registration-cancelled/>

ASIC plays coy on crypto ETFs

Australia’s corporate regulator says that it’s keeping an eye on crypto-based derivatives, but is limited by a lack of regulation. The ASIC is weighing up the risks of allowing more crypto-based assets into Australia’s financial system, but it’s wary of the lack of regulation and legislation in the area. <https://www.investordaily.com.au/regulation/49874-asic-plays-coy-on-crypto-etfs>

Lawyer and former company officers associated with Members Alliance and Benchmark groups facing 72 criminal charges

The Members Alliance and Benchmark groups allegedly operated property investment vehicles on the Gold Coast, offering financial advice to retail investors. The charges follow an ASIC-led Serious Financial Crime Taskforce (SFCT) investigation into the collapse of the groups and alleged associated phoenix activity. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-242mr-lawyer-and-former-company-officers-associated-with-members-alliance-and-benchmark-groups-facing-72-criminal-charges/>

IN PRACTICE AND COURTS

ASIC Updates

24/09/2021 [REP 702 Competition in funds management](#)
Independent report prepared by Deloitte Access Economics, engaged by ASIC to examine competition between fund managers with a focus on outcomes delivered to investors in retail managed investment products: see [21-258MR](#) and [Terms of Reference](#).

23/09/2021 [RG 38 The hawking prohibition](#) (reissued); [REP 701 Response to submissions on CP 346 The hawking prohibition: Update to RG 38; ASIC Corporations \(Amendment and Repeal\) Instrument 2021/799](#). Updated to reflect reforms to the anti-hawking regime under the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*, commencing 5 October 2021: see [21-257MR](#) and [21-213MR](#).

22/09/2021 [INFO 260 FAQs: Timeframe for passing the financial adviser exam](#)

16/09/2021 [INFO 264 FAQs: Design and distribution obligations for advice licensees and financial advisers](#)

Explains how the design and distribution obligations for issuers and distributors of financial products in Part 7.8A of the Corporations Act apply to advice licensees and financial advisers when providing personal advice: see [news item](#).

16/09/2021 [INFO 259 Complying with the notify, investigate and remediate obligations](#)

Technical amendments to provide clarity.

15/09/2021 [REP 700 Licensing and professional registration activities: 2021 update](#)

This report is for AFS licensees, Australian credit licensees, lawyers, application service providers and professionals working in financial services that are interested in the licensing and professional registration functions of ASIC: see [21-248MR](#).

15/09/2021 [INFO 45 Liquidation: A guide for creditors](#)

Information about the simplified liquidation process added with minor technical updates.

[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 updated schedule of policy priorities for 2021](#)

The APRA has released a letter providing an updated schedule of policy priorities for the remainder of 2021, focusing on key reforms to strengthen financial resilience.

[APRA publishes FAQs on Prudential Standard APS 120 Securitisation](#)

The APRA has published a new set of frequently asked questions (FAQs) to provide guidance for authorised deposit-taking institutions (ADIs) on the interpretation of [Prudential Standard APS 120 Securitisation](#) (APS 120).

[APRA publishes new FAQs on capital treatment of overseas deposit-taking and insurance subsidiaries](#)

The FAQs are relevant to authorised deposit-taking institutions (ADIs) that hold these investments via holding companies and confirm that ADIs can use the indirect equity investment provisions in Prudential Standard APS 111 Capital Adequacy: Measurement of Capital (APS 111) to determine the capital treatment for these exposures.

RBA Bulletin – 16 September 2021

Insights into the economy and financial system from teams throughout the Reserve Bank of Australia.

[An Assessment of the Term Funding Facility](#)

[Small Business Finance and COVID-19 Outbreaks](#)

[Climate Change Risks to Australian Banks](#)

[Towards Net Zero: Implications for Australia of Energy Policies in East Asia](#)

[The Financial Cost of Job Loss in Australia](#)

[Government Bond Markets in Advanced Economies During the Pandemic](#)

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.

AFSA feedback on guidance resources

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

ABA Submissions

[Improving Schemes of Arrangement](#)

The ABA suggests that in finalising the proposal an updated analysis of the existing Scheme regime would be of benefit to consider current market practices which may have evolved since the Productivity Commission's 2015 report 'Business Set-up, Transfer and Closure'. (22 September 2021)

AASB Consultations

The following AASB documents are open for comment:

[ED 312 Disclosure of Accounting Policies – Proposed Amendments to Tier 2 and Other Australian Accounting Standards](#)

Comments due by 4 October 2021.

[ED 309 Disclosure Requirements in Australian Accounting Standards—A Pilot Approach](#)

Comments due by 15 October 2021.

Please have your say and send your comments to the AASB via the [AASB website](#).

AASB Exposure Draft ED 314 Subsidiaries without Public Accountability: Disclosures

ED 314 incorporates IASB ED/2021/7, which proposes a reduced set of disclosure requirements for eligible subsidiaries without public accountability that apply IFRS Standards.

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](#).

AFCA Current Matters

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

FSC Submissions

[FSC SUBMISSION - Compensation Scheme of Last Resort](#) (17 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

[Getakate Pty Ltd v Beniki Finance Pty Ltd \(formerly LSP Finance Pty Ltd\) \[2021\] FCA 1118](#)

CONTRACT – consideration of an application for an order under the Personal Property Securities Act 2009 (Cth) requiring the Registrar to register a financing change statement amending the registration of a security interest, under s 182(4) of that Act - Personal Property Securities Act 2009 (Cth), ss 178, 182, 286, 287

[Westpac Banking Corporation v State of Western Australia \[2021\] FCA 1097](#)

BANKRUPTCY - application by mortgagee for order vesting bankrupt's property in mortgagee - property disclaimed by trustee in bankruptcy - mortgagee seeks to utilise powers as if mortgagee in possession - just and equitable that property be vested in mortgagee

[De Vries v Timbercorp Finance Pty Ltd \(in liq\) \[2021\] VSCA 265](#)

CORPORATIONS – Managed investment scheme – Initial loans by lending entity to members in respect of scheme application fees due to responsible entity – Lending entity seeking recovery of loans from scheme members – Application fees required to be held in trust – Book entries recorded payment of fee amounts by lending entity to responsible entity – Money paid from holding company account to trust company to hold on behalf of responsible entity – Further book entries recorded that amount as owed by responsible entity to holding company – Whether responsible entity borrowed money from holding company in contravention of Corporations Act 2001 (Cth) s 601GA(3) – Holding company in position of net indebtedness to responsible entity at all relevant times – No borrowing within meaning of s 601GA(3) – Loans recoverable

CONTRACT – Inferred contract – Stage loans in respect of ongoing managed investment scheme costs – Lending entity seeking recovery of loans from scheme members – Ongoing costs due from members allegedly paid by lending entity to related responsible entity by means of book entries in accounts – Whether failure of consideration on part of lending entity by virtue of it making no payment to responsible entity – Whether agreement inferred between related companies to make payment by book entries – Whether inference of agreement open without movement of money – No requirement of movement of money – Inferred agreement to pay by book entries – Loans recoverable

[Aboughattas v Oak Capital Mortgage Fund Pty Ltd \[2021\] VSC 577](#)

CORPORATIONS – Defence of counterclaim by company in receivership – Where company in receivership one of numerous defendants to the counterclaim – Receiver and manager consenting to the counterclaim – Where sole director seeking to defend the counterclaim – Whether director should provide satisfactory indemnity to company for costs – Whether security required for indemnity – Amount of security

CHARGE – Equitable interest under unregistered mortgage – Position of registered first mortgagee – Effect of complaint to the Australian Financial Complaints Authority – Whether judicial sale of property appropriate

[Atanasovski & Anor v Huu Loi Yarra Valley Pty Ltd & Ors \[2021\] VSC 594](#)

DECLARATIONS – Injunctions – Real property – Priorities – Application by purchaser for declaration that mortgagee vendor not entitled to refuse to perform settlement obligations – Oral application for interlocutory injunction restraining completion of contract of sale by different purchaser under earlier contract with registered proprietor – Availability of specific performance where registered proprietor has lost right to redeem mortgage – Prima facie case – Balance of convenience

[Porter & Anor v Mulcahy & Co Accounting Services Pty Ltd & Ors \[2021\] VSC 572](#)

CONTRACT – Implied contract of retainer – Novation – Whether retainer of accountant by the plaintiffs or either of them – Implied terms – Good faith – Duty not to disclose or use confidential information – Duty not to make improper use of position to gain advantage or to cause detriment – APES 110 Code of Ethics for Professional Accountants – Retainer by second plaintiff – Breach – Opportunity usurped by accountant for own benefit and third party incorporated for that purpose – EQUITY – Fiduciary relationship – Client and accountant not established category – Relationship of trust and confidence – One plaintiff vulnerable – Confidential information disclosed – Accountant in position to affect interests of the client in a practical sense – Scope of duty – Breach

EQUITY – Accessorial liability – Knowing assistance – Requisite degree of knowledge – Fiduciary the directing mind of third party corporation – Third party the alter ego of fiduciary – Corporation knowingly assisted breach of fiduciary duty

[Hume Plasterboard Pty Ltd v Best Interiors Aust Pty Ltd & Ors \[2021\] NSWDC 484](#)

EQUITY – husband and wife – credit facility in favour of company managed and controlled by the husband – credit facility secured by guarantee by the wife – whether guarantee enforceable against wife – whether wife understood the purport and effect of the transaction – whether wife in the position of being a volunteer – whether creditor took steps to have transaction explained

[King v Nguyen \[2021\] NSWDC 495](#)

(1) Judgment for the plaintiff for \$156,711.60

Contracts – National Credit Code – loan sought for, and used for, business purposes – whether the National Credit Code applied notwithstanding the obtaining and using of the loan for business purposes

Civil Procedure Act 2005 (NSW) s 22

LEGISLATION

Commonwealth

Act Compilation

[Australian Securities and Investments Commission Act 2001](#)

14/09/2021 - Act No. 51 of 2001 as amended

[National Consumer Credit Protection Act 2009](#)

14/09/2021 - Act No. 134 of 2009 as amended

Regulations

[ASIC Corporations \(Amendment and Repeal\) Instrument 2021/799](#)

22/09/2021 - This instrument provides consequential amendments to a number of existing Australian Securities and Investments Commission (ASIC) legislative instruments and class orders by updating statutory references to the prohibition on the hawking of financial products. The instrument also repeals two ASIC legislative instruments, ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184 and ASIC Corporations (Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839, the function of which are made redundant by the new amendments made by the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 and amendments made to the Corporations Regulations 2001.

[Auditing Standard ASA 2021-4 Amendments to Australian Auditing Standard ASA 800 Special Considerations – Audits of Financial Reports Prepared in Accordance with Special Purpose Frameworks](#)

20/09/2021 - This instrument amends the Australian Auditing Standard ASA 800 Special Considerations – Audits of Financial Reports Prepared in Accordance with Special Purpose Frameworks as a result of changes to the Australian Accounting Standards impacting the ability for certain for-profit entities to prepare Special Purpose Financial Statements.

[Auditing Standard ASA 2021-2 Amendments to Australian Auditing Standard ASA 560 Subsequent Events](#)

20/09/2021 - This instrument amends the Australian Auditing Standard ASA 560 Subsequent Events to clarify the timing of communications and possible actions the auditor may take when facts become known to the auditor after the financial report has been issued that, had it been known to the auditor at the date of the auditor's report, may have caused the auditor to amend the auditor's report.

[Banking \(prudential standard\) determination No. 3 of 2021](#)

20/09/2021 - This instrument determines Prudential Standard APS 111 Capital Adequacy: Measurement of Capital and revokes Banking (prudential standard) determination No. 4 of 2017 including Prudential Standard APS 111 Capital Adequacy: Measurement of Capital.

[Auditing Standard ASA 101 Preamble to AUASB Standards](#)

20/09/2021 - This Auditing Standard sets out how the Auditing and Assurance Standards Board (AUASB) Standards are to be understood, interpreted and applied. AUASB Standards are to be read and applied in conjunction with this Auditing Standard.

[Auditing Standard ASA 2021-3 Amendments to Australian Auditing Standards](#)

17/09/2021 - This instrument amends the requirements and application and other explanatory material of Auditing Standards ASA 200 Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards and ASA 700 Forming an Opinion and Reporting on a Financial Report. These amendments are consequential and conforming amendments arising from the issuance of the revised ASA 101 Preamble to AUASB Standards.

Victoria

Statutes

No 115 [Courts \(Case Transfer\) Rules 2021](#)

No 117 [Sheriff Amendment Regulations 2021](#)

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