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ISSUE 93



## BANKING SECTOR NEWSLETTER

Welcome to the latest issue of our Banking Sector Newsletter.

Some of the most wide ranging regulatory reforms affecting the Australian banking industry have been introduced this month. The Australian Banking Association has highlighted six key changes which will provide important protections for customers.

The Financial Planning Association's annual Money & Life Tracker: Freedom Edition survey has revealed Australians are making healthy financial choices as they endure a second year of the COVID-19 pandemic. The survey found 52.4% of respondents said hitting a savings goal was their top financial goal over the next 12 months.

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

### IN THE MEDIA

#### APRA tightens home loan rules, raises interest rate benchmark

The banking regulator announces tougher serviceability tests for home loans, which will make it harder for some borrowers to get a mortgage, on the same day the Reserve Bank of New Zealand starts lifting its benchmark interest rate. <https://www.abc.net.au/news/2021-10-06/apra-tightens-home-loan-rules/100516758>

#### Saving money trumps taking a holiday: COVID-19 gives Australians a financial health check

Financial Planning Association's (FPA) annual Money & Life Tracker: Freedom Edition reveals a snapshot of how 2,000 Australians have fared since COVID-19. A majority of Australians' top financial goal over the next 12 months is to hit a savings goal (52.4%), followed by going on a holiday (44.4%). <https://fpa.com.au/news/saving-money-trumps-taking-a-holiday-covid-gives-australians-a-financial-health-check/>

#### FSC: Capital concentration and competition policy – serious issue or tilting at windmills?

The House of Representatives Standing Committee on Economics is currently holding an inquiry into the implications of common ownership and capital concentration in Australia. <https://www.fsc.org.au/news/capital-concentration-and-competition-policy>

#### Lending rules slowly tighten affecting first home buyers

The Australian Banking regulator has tightened home loan rules reducing the maximum amount most people can borrow by around five percent. <https://www.abc.net.au/news/2021-10-07/lending-rules-slowly-tighten-affecting-first-home/13574016>

#### Govt makes CDR changes

The Federal Government has made amendments to the consumer data right (CDR) rules to support increased participation in the new regime. The changes followed consult during July which: Empowered consumers to share their data easily and securely with certain trusted professional advisers, including their accountant, tax agent, financial counsellor, financial adviser or mortgage broker.

<https://www.moneymanagement.com.au/news/policy-regulation/govt-makes-cdr-changes>

<https://ministers.treasury.gov.au/ministers/jane-hume-2020/media-releases/new-rules-support-participation-australias-consumer-data>

#### New reforms provide big step forward for banking industry and customers

Australia's banking industry is introducing six new reforms in the space of one week, making it one of the largest regulatory reforms the industry has seen in decades.

<https://www.ausbanking.org.au/new-reforms-provide-big-step-forward-for-banking-industry-and-customers/>

### 15 consumer groups and professional associations call for stronger compensation scheme

A diverse coalition of 15 organisations, including consumer groups, professional financial advice associations, financial counsellors, professional accounting associations and community legal centres are calling on the Federal Government to expand the proposed compensation scheme of last resort (CSLR). <https://www.cpaaustralia.com.au/about-cpa-australia/media/media-releases/15-consumer-groups-and-professional-associations-call-for-stronger-compensation-scheme>

### Leading the development of solutions to reduce compliance burdens – one of the biggest differences industry bodies can make

The FSC has made no secret of the need to reduce the regulatory burden on the financial services industry, particularly financial advice, in its advocacy to Government and regulators. <https://www.fsc.org.au/news/reduce-compliance-burdens>

### RBA makes October cash rate call

The Reserve Bank of Australia has made its latest call on the official cash rate. With lockdowns still in place in Australia's most populated cities, the RBA has decided to hold the official cash rate at a record low 0.1 per cent for the 10th consecutive month. <https://www.investordaily.com.au/regulation/50024-rba-makes-october-cash-rate-call>

### FSC: Financial Services implementing major regulatory changes

The financial services industry is implementing one of the most significant and wide-ranging set of reforms ever for the sector. <https://www.fsc.org.au/resources/2279-fsc-media-release-industry-implementing-major-regulatory-changes/file>

### Better Advice Bill – Exposure Draft Regulations

The Federal Government has released for consultation exposure draft regulations and a draft legislative instrument underpinning the Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021. The Bill establishes a single disciplinary body and new registration system for financial advisers, including tax (financial) advisers. <https://ministers.treasury.gov.au/ministers/jane-hume-2020/media-releases/better-advice-bill-exposure-draft-regulations>

### Consult & think twice about macroprudential measures

COBA urges regulators to take care to avoid anti-competitive impacts on smaller banks with any potential macroprudential intervention. Any measures must be carefully targeted at a clearly identified problem so they do not disadvantage smaller banks and first home buyers. <https://www.customerownedbanking.asn.au/news-and-resources/media-releases/Consult%20&%20think%20twice%20about%20macroprudential%20measures>

### Still issues with single disciplinary body legislation

The Financial Services and Credit Panel (FSCP) will only convene for serious issues, but there are still issues with the single disciplinary body (SDB) legislation according to the Association of Financial Advisers. <https://www.moneymanagement.com.au/news/policy-regulation/still-issues-single-disciplinary-body-legislation>

### Advisers' code of ethics offers a wider opportunity

The Code of Ethics for financial advisers is not all about catching out bad players, or about trading profit for "doing good", says Australian Financial Complaints Authority, Deputy Chief Ombudsman June Smith. <https://www.afca.org.au/news/latest-news/advisers-code-of-ethics-offers-a-wider-opportunity>

## IN PRACTICE AND COURTS

### Consultation: Better Advice Bill – Exposure Draft Regulations

The Better Advice Bill establishes a single disciplinary body and new registration system for financial advisers, including tax (financial) advisers. The exposure draft regulations and legislative instrument will implement key elements to support the operation of the Better Advice Bill. Submissions are invited by Friday 15 October 2021 and can be sent to [SDBconsultation@treasury.gov.au](mailto:SDBconsultation@treasury.gov.au).

### ASIC Updates

#### 08/10/2021 - Updated - issue date unchanged

[RG 21 How ASIC charges fees for relief applications](#); [RG 51 Applications for relief](#); [RG 234 Advertising financial products and services \(including credit\): Good practice guidance](#); [RG 275 The deferred sales model for add-on insurance](#); [INFO 82 Apply for relief](#); [INFO 198 Extended warranties](#).

#### 01/10/2021 - [ASIC Corporations \(Design and Distribution Obligations Interim Measures\) Instrument 2021/784](#); [ASIC Corporations \(Amendment\) Instrument 2021/785](#); [INFO 264 FAQs: Design and distribution obligations for advice licensees and financial advisers \(reissued 6/10/2021\)](#)

Provides interim relief so that advice licensees and financial advisers are no longer required to report to issuers if they have received nil complaints during the reporting period (ahead of the Australian Government's stated policy intent to make this change in the legislation).

Amended: [Class Order \[CO 14/1262\]](#); [ASIC Instrument 2015/682](#)

#### 30/09/2021 - [INFO 213 Marketplace lending \(peer-to-peer lending\) products \(reissued\)](#); [INFO 229 Limited AFS licensees: Complying with your licensing obligations \(reissued\)](#); [INFO 250 Giving AFS and credit licensees information about their representatives \(reissued\)](#)

Updated to reflect the new requirement for AFS and credit licensee to submit reportable situations (previously 'breach reports') to ASIC via the [ASIC Regulatory Portal](#) commencing 1 October 2021: see [Reportable situations for AFS and credit licensees](#).

**[01/10/2021 - ASIC Credit \(Mandatory Credit Reporting—Auditor Appointment\) Instrument 2021/829 \(notifiable instrument\)](#)**

Appoints persons as auditors for the purposes of Division 4 of Part 3-2CA of the *National Consumer Credit Protection Act 2009*.

**[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](#).

**[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.

**[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 increases banks' loan serviceability expectations to counter rising risks in home lending](#)**

In a letter to authorised deposit-taking institutions (ADIs), APRA has told lenders it expects they will assess new borrowers' ability to meet their loan repayments at an interest rate that is at least 3.0 percentage points above the loan product rate. A copy of the letter to ADIs is available on the APRA website at: [Strengthening residential mortgage lending assessments](#).

**[APRA monthly data on temporary loan repayment deferrals](#)**

30 September 2021 - The Australian Prudential Regulation Authority (APRA) has published the latest monthly data for ADIs' temporary loan repayment deferrals due to COVID-19, which includes data at both the industry and entity level.

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

30 September 2021 - Copies of the August 2021 monthly publication are available on the APRA website.

**[APRA updated FAQs on the capital framework for COVID-19 related disruptions](#)**

27 September 2021 - The FAQs replace the version of the FAQs issued in March 2021 and are available on the APRA website.

**[Assessment of ASX Clearing and Settlement Facilities – September 2021](#)**

Number 2021-21: 29 September 2021 - The Reserve Bank released the 2021 Assessment of the ASX Clearing and Settlement Facilities. The Bank concluded that ASX's clearing and settlement (CS) facilities have conducted their affairs in a way that promotes overall stability in the Australian financial system. However, ASX will need to place a high priority on addressing recommendations related to operational risk and margin standards.

**[ABA: Banking Code of Practice Version: Oct 5 2021](#)**

The October 5 2021 revision of The 1 March 2020 Banking Code of Practice. A new version of the code is now available for download. It removes the COVID-19 Special Note and contains updates in Chapter 48.

**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 Invitation to Comment ITC 47 on the IASB Request for Information on Post-implementation Review of IFRS 9 Financial Instruments – Classification and Measurement](#)**

IFRS 9 specifies how an entity is required to classify and measure financial assets and financial liabilities as well as some contracts to buy or sell non-financial items. Reviews of the impairment and hedge accounting requirements in IFRS 9 will follow later. Please submit your comments to the AASB by 31 December 2021.

### [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. Please submit your comments to the AASB by 1 November 2021.

### [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 Datacube updated with latest complaint statistics](#)

The Australian Financial Complaints Authority (AFCA) has updated its online comparative reporting tool, the AFCA Datacube, to include information about financial complaints lodged from 1 July 2020 to 30 June 2021.

### [AFCA 2020–21 Annual Review](#)

The 2020–21 AFCA Annual Review is now available. (07 October 2021)

### [AFCA updates processes to align with ASIC Regulatory Guide 271](#)

AFCA has updated its process map and Operational Guidelines to reflect the changes outlined in ASIC RG 271 (new timelines and requirements). See the process map [here](#) and AFCA's Operational Guidelines [here](#).

### [AFCA updates Operational Guidelines](#)

The changes include: Aligning AFCA's processes with ASIC Regulatory Guide 271 Internal Dispute Resolution (RG 271), which comes into effect on 5 October 2021 and Updating guidelines regarding the death benefit decision objection process, removing the requirement that an objection must be in writing. The new Operational Guidelines, as well as previous versions, can be read [here](#).

### **AFCA Current Matters**

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

### **FSC Submissions**

[FSC submission - Super Guarantee Australia](#) (21 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. For more information on the reforms and the FSC's template TMDs and data standards.

### **FPA Submissions**

[Retirement Income Covenant – draft legislation](#)  
Treasury 29 September 2021.

[Second round of miscellaneous amendments to Treasury portfolio laws 2021](#)

Treasury 28 September 2021.

[Proposed updated amendments to the design and distribution obligations](#)

ASIC 27 September 2021.

### **CASES**

#### [Australian Securities and Investments Commission v Membo Finance Pty Limited \[2021\] FCA 1166](#)

CORPORATIONS – application by the respondents seeking to strike out parts of the applicant's further concise statement pursuant to r 16.21 of the Federal Court Rules 2011 (Cth) (the Rules) – application by the respondents, in the alternative, for an order that the applicant provide the "usual particulars" of the further concise statement pursuant to r 16.45 of the Rules – where applicant seeks relief under the National Consumer Credit Protection Act 2009 (Cth) and the Federal Court of Australia Act 1976 (Cth)

#### [Commonwealth Bank of Australia v State of Western Australia \[2021\] FCA 1186](#)

BANKRUPTCY - application for orders vesting fee simple in property in applicant to exercise powers as mortgagee - where sequestration orders made against registered proprietors of property - where trustees in bankruptcy disclaimed interest in property - where applicant holder of registered mortgage over property - whether necessary for trustees in bankruptcy to be joined as parties - where trustee in bankruptcy has caveat on property - whether surplus funds from sale of property to be paid into court - application allowed

#### [Schroeder and Australian Securities and Investments Commission \[2021\] AATA 3519](#)

CORPORATIONS – banning order – where applicant banned from providing financial services for a period of six years – where scope of Tribunal review changed as a result of legislative amendments – whether applicant should be banned from providing financial services on the basis that he is not a 'fit and proper person' – whether other grounds for a banning order in s 920A of the Corporations Act 2001 (Cth) enlivened – decision under review varied

#### [Yue v CN-AU Capital Pty Ltd & Anor \[2021\] QSC 248](#)

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the plaintiff and first defendant are parties to a deed of agreement – where the deed of agreement provides that "Mr Yue shall cause the Second Payment to be made to [Capital] on or before 24 May 2021, made payable to the JCL Trust Account" – where the central issue of construction concerns what was required of Mr Yue for him to "cause the Second Payment to be made to [Capital] on or before 24 May 2021"

PROCEDURE – STATE AND TERRITORY COURTS:  
JURISDICTION, POWERS AND GENERALLY –  
DECLARATIONS – APPROPRIATE FORM OF RELIEF –  
DISCRETION OF COURT – OTHER CASES –

EQUITY – EQUITABLE REMEDIES – SPECIFIC  
PERFORMANCE – ENFORCEMENT –

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES –  
CONSTRUCTION AND INTERPRETATION OF CONTRACTS  
– PENALTIES AND LIQUIDATED DAMAGES – GENERAL  
PRINCIPLES – where the plaintiff contends that the default  
consequences contained in the deed of agreement  
sought to contract out equity's jurisdiction, in compelling  
to not resist sale to another party, and to allow it to have  
the benefit of the \$2,600,000 payment without a trial to  
determine the validity of the Mortgages

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS –  
INTERLOCUTORY INJUNCTIONS – GENERALLY – where  
the plaintiff contends for a serious question or prima facie  
case to arise out of the validity or enforceability of the deed  
of agreement as well as in relation to the claims made by  
him in the proceeding

[Lacen Belder Pty Ltd v Leather Living \(Vic\) Pty Ltd  
\(Building and Property\) \[2021\] VCAT 1128](#)

Domestic building – AS4902-2000 form of contract – role  
of superintendent – agent of principal – whether duty to  
act in good faith – duty to assess claims – may take advice  
- must make own assessment - form of payment schedule  
-- claim by principal for over-payment – no claim for  
restitution without vitiating factor affecting payment – bank  
guarantees – purpose of – principal cashing guarantees  
without valid ground– whether cashing guarantees or  
retention of the proceeds unconscionable – whether  
proceeds held upon resulting trust for the builder

## LEGISLATION

### Commonwealth

#### Regulations

[Competition and Consumer \(Consumer Data Right\)  
Amendment Rules \(No. 1\) 2021](#)

05/10/2021 - This instrument amends the Competition and Consumer (Consumer Data Right) Rules 2020 to facilitate greater participation in the Consumer Data Right (CDR) regime by participants and consumers, provide greater control and choice to consumers in sharing their data, promote innovation of CDR offerings including intermediary services, and enable services to be more effectively and efficiently provided to customers.

[ASIC Corporations \(Amendment\) Instrument 2021/785](#)

01/10/2021 - This instrument amends the ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682 and the ASIC Class Order [CO 14/1262] to put in place interim measures to provide certainty on the application of the design and distribution obligations regime.

[ASIC Credit \(Breach Reporting—Prescribed  
Commonwealth Legislation\) Instrument 2021/801](#)

30/09/2021 - This instrument provides temporary relief to limit the Commonwealth legislation in relation to which the breach reporting obligation in the National Consumer Credit Protection Act 2009 applies.

[ASIC Corporations \(Securities Lending Arrangements\)  
Instrument 2021/821](#)

29/09/2021 - This instrument modifies sections 608, 609 and 671B of the Corporations Act 2001 granting relief in relation to reporting substantial holdings, for certain entities involved in securities lending as part of their financial service business.

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