

8 DECEMBER 2021

ISSUE 97



BANKING SECTOR NEWSLETTER

Welcome to the latest edition of our Banking Sector Newsletter, our last for 2021.

The Reserve Bank of Australia may need to increase interest rates earlier than it anticipates, the Organisation for Economic Cooperation and Development (OECD) has warned. The OECD says the RBA needs to be vigilant to signs of rising inflation.

Meanwhile the Australian Prudential Regulation Authority has released its final prudential practice guide on climate change financial risks. While not imposing any new regulatory requirements, the guide aims to assist banks, insurers and superannuation trustees to manage the financial risks of climate change.

We would like to take this opportunity to wish all our readers a happy and safe holiday period and a healthy 2022. We will resume again in early February, with an edition summarising any significant news arising over the holiday period.

IN THE MEDIA

ABA welcomes Banking Code Final Report

The Australian Banking Association (ABA) has welcomed the release of the Final Report of the Independent Review of the Banking Code of Practice 2021, conducted by Mike Callaghan AM PSM. <https://www.ausbanking.org.au/aba-welcomes-banking-code-final-report/>

The final Banking Code of Practice Review Report can be accessed [here](#).

OECD tells RBA to keep a close eye on inflation

The Reserve Bank of Australia has been advised to exercise vigilance in respect to signs of rising inflation, with the OECD cautioning the country's central bank may need to tighten monetary policy faster than it is currently anticipating. <https://www.investordaily.com.au/regulation/50416-oecd-tells-rba-to-watch-rising-inflation-closely>

Sustainability reporting leaps forward with launch of global standard setter

CPA Australia, says the launch of the International Sustainability Standards Board (ISSB) will elevate the status of sustainability reporting, and is urging Australia to "get on board". It will sit alongside the International Accounting Standards Board, the body that develops and issues international financial reporting standards. <https://www.cpaaustralia.com.au/about-cpa-australia/media/media-releases/sustainability-reporting-leaps-forward-with-launch-of-global-standard-setter>

APRA adjusts requirements for banks in anticipation of future financial crises

The APRA is looking to protect the financial sector against crises and shocks with new loss-absorption requirements and proposed planning standards. The APRA deputy chair said that crisis preparedness sat at the very heart of APRA's purpose as a regulator within the financial services sector. <https://www.investordaily.com.au/regulation/50415-apra-adjusts-requirements-for-banks-in-anticipation-of-future-financial-crises>

ASIC releases guidance and examples on limited advice

ASIC has released an information sheet on limited advice and an example statement of advice (SOA) to assist financial advisers and advice licensees comply with their obligations when providing limited personal advice to retail clients. <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-325mr-asic-releases-guidance-and-examples-on-limited-advice/>

AFCA appoints new head of code compliance

The Australian Financial Complaints Authority (AFCA) has appointed a new leader of its Code Compliance and Monitoring Team. <https://www.afca.org.au/news/media-releases/afca-appoints-new-head-of-code-compliance>

Australia banking watchdog publishes long-awaited capital rules

Australia's banking regulator has published a final set of rules asking banks to hold more capital against investor and interest-only home loans but less for business loans, in a move expected to affect loan pricing. The new Basel III-aligned set of standards change the models used by banks to work out how much capital they need to hold, effective from January 2023. <https://www.reuters.com/markets/rates-bonds/australia-banking-watchdog-publishes-long-awaited-capital-rules-2021-11-29/>

Financial Regulator Assessment Authority reviews the effectiveness and capability of ASIC

The FRAA's first review will be a targeted assessment of ASIC's effectiveness and capability in strategic prioritisation, planning and decision-making, ASIC's surveillance function, and ASIC's licensing function. <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/financial-regulator-assessment-authority-reviews>

Learn the warning signs of an untrustworthy advisor

The AFSA is concerned that vulnerable SMEs may fall prey to unscrupulous and untrustworthy advisors. Such advisors could give you misleading or illegal advice that has serious consequences, including convictions. <https://www.afsa.gov.au/about-us/newsroom/learn-warning-signs-untrustworthy-advisor>

A stronger and more resilient industry

The financial services industry is closing out a challenging 2021, not only as a result of the continuing reverberations from COVID-19, but due to the significant waves of regulation that were implemented or commenced operation. <https://www.fsc.org.au/news/a-stronger-and-more-resilient-industry>

APRA finalises prudential guidance on managing the financial risks of climate change

The APRA has released its final prudential practice guide on climate change financial risks, following consultation on the draft Prudential Practice Guide CPG 229 Climate Change Financial Risks (CPG 229) released in April this year. The guide imposes no new regulatory requirements or obligations. <https://www.apra.gov.au/news-and-publications/apra-finalises-prudential-guidance-on-managing-financial-risks-of-climate>

View the Final Prudential Practice Guide [here](#).

APRA urges businesses to begin using its climate risk guide 'immediately'

The APRA has released its final guidance on climate change financial risks for banks, insurers and superannuation trustees. The guide covers the prudential regulator's view of sound practice in areas including governance, risk management, scenario analysis and disclosure of climate-related financial risks. <https://www.investordaily.com.au/regulation/50375-apra-urges-business-to-begin-using-its-climate-risk-guide-immediately>

Inaugural roundtable paves small business road to recovery

The Australian Banking Association (ABA) has released its 2021 SME Lending Report, highlighting how important Australian Small and Medium Enterprises (SMEs) are to the country's economic recovery. <https://www.ausbanking.org.au/inaugural-roundtable-paves-small-business-road-to-recovery/>

View the Small business in Australia 2021 report [here](#).

AFCA welcomes release of Independent Review's report

The Australian Financial Complaints Authority (AFCA) welcomes the release of the report of the Independent Review into its financial dispute resolution service. AFCA agrees in principle with the report's 14 recommendations. <https://www.afca.org.au/news/media-releases/afca-welcomes-release-of-independent-reviews-report>

Review of the Australian Financial Complaints Authority

The Federal Government has tabled the Review of the Australian Financial Complaints Authority (AFCA) in Parliament, and welcomes its findings that AFCA is operating effectively and meeting its statutory requirements. <https://ministers.treasury.gov.au/ministers/jane-hume-2020/media-releases/review-australian-financial-complaints-authority-0>

View the [final report of the AFCA Review](#), and the [Government's response](#).

AASB Issues proposed climate change standards framework for discussion

The Australian Accounting Standards Board has released a proposed interim climate change reporting standards framework for industry feedback. The AASB's voluntary framework adopts the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD). https://www.aasb.gov.au/media/ea4apdzl/aasbmr-climatechange-proposed-stds-framework-11_21.pdf

IN PRACTICE AND COURTS

Current Inquiries: Economics Legislation Committee [Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 \[Provisions\]](#)

Date Referred: 02 December 2021; Submissions Close: 07 January 2022; Reporting Date: 03 February 2022.

[Corporations Amendment \(Improving Outcomes for Litigation Funding Participants\) Bill 2021](#)

Status: Accepting Submissions; Date Referred: 02 December 2021; Submissions Close: 17 December 2021; Reporting Date: 03 February 2022.

[Financial Accountability Regime Bill 2021 \[Provisions\] and Financial Services Compensation Scheme of Last Resort Levy Bill 2021 \[Provisions\] and related bills](#)

Date Referred: 25 November 2021; Submissions Close: 17 December 2021; Reporting Date: 15 February 2022.

RBA Consultations

[Review of Banknote Distribution Arrangements](#)

15 November 2021

The Bank is seeking views from interested parties on what changes might be required to ensure that banknote distribution is effective, efficient, sustainable and resilient. Submissions close on 21 January 2022.

[Regional Banking Taskforce - Issues Paper](#)

Consultation 18 November 2021 - 18 December 2021

This consultation seeks comments on the impacts of regional branch closures, how Australians are accessing banking services and potential solutions for maintaining and improving banking services and accessibility where branches have been closed. You can submit responses to this consultation up until 18 December 2021.

ASIC Updates

1/12/2021 [INFO 267 Tips for giving limited advice](#) (new) and [Example Statement of Advice \(SOA\): Limited advice](#)

Provides tips to help advice providers comply with their legal obligations – including the best interests duty and related obligations in Division 2 of Part 7.7A of the *Corporations Act 2001* (Corporations Act), and the [FASEA Financial Planners and Advisers Code of Ethics](#) (Code of Ethics) – when giving limited advice: see [21-325MR](#).

[ASIC Industry funding: 2020-21 Cost Recovery Implementation Statement \(CRIS\)](#)

The statement details ASIC's estimated levies by industry sector and subsector. ASIC released the draft CRIS in July 2021 (ASIC [MR21-185](#)) for industry feedback. The final statement summarises the feedback we received. The actual levies will be published in December 2021 and invoiced in January 2022.

[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.

APRA moves to strengthen crisis preparedness in banking, insurance and superannuation

The two proposed standards are aimed at ensuring entities are prepared to deal with threats to their viability, thereby reducing the negative consequences resulting from failure.

A discussion paper on strengthening crisis preparedness, and the two draft prudential standards CPS 190 and CPS 900) is now underway. The consultation closes on 29 April 2022. APRA proposes that the new prudential standards would come into force from 1 January 2024 are available [here](#).

A letter to the major banks announcing the finalisation of the LAC requirements to be met from 1 January 2026 is available [here](#).

[APRA monthly data on temporary loan repayment deferrals for October 2021](#)

30 November 2021

[APRA monthly Authorised Deposit-taking Institution Statistics for October 2021](#)

30 November 2021 - Copies of the October 2021 monthly publication are available on the APRA website.

[AUSPAYNET: Payments Monitor – 26 November 2021](#)

In this issue of the quarterly newsletter, CEO Andy White discusses key resolutions on the membership, Board representation, and funding that were unanimously passed at the recent AGM. Also discussed is the upcoming summit and updates on the Economic Crime Forum, review of the approach to payments acceptance governance, the regulatory environment, and more.

AUSPAYNET Submissions – 25 November 2021

[Justice Legislation \(COVID-19 Emergency Response – Permanency\) Amendment Bill 2021](#)

In October 2021, AusPayNet responded to the consultation on Queensland's Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021 (the Bill).

[Strengthening Australia's cyber security regulations and incentives](#)

In September 2021, AusPayNet responded to the Department of Home Affairs' (DHA) 'Strengthening Australia's cyber security regulations and incentives' discussion paper.

[Review of Banking Code of Practice](#)

In August 2021, AusPayNet responded to the 2021 Independent Review of the Banking Code of Practice – Consultation Note.

[IASB proposes narrow-scope amendments to IAS 1](#)

The International Accounting Standards Board (IASB) has [proposed amendments to IAS 1 Presentation of Financial Statements](#) to improve the information companies provide about long-term debt with covenants. The Exposure Draft Non-current Liabilities with Covenants is open for comment until 21 March 2022.

[AASB Exposure Draft ED 316 Non-current Liabilities with Covenants](#)

ED 316 proposes amendments to AASB 101 Presentation of Financial Statements to improve the information entities provide about long-term debt with covenants. The ED incorporates IASB ED/2021/9. Please submit your comments to the AASB by 3 February 2022.

[AASB Exposure Draft ED 317 Supplier Finance Arrangements](#)

ED 317 proposes disclosure-only amendments to AASB 107 Statement of Cash Flows and AASB 7 Financial Instruments: Disclosures. The proposed amendments are intended to complement the existing requirements in AASB Standards that apply to supplier finance arrangements. Please submit your comments to the AASB by 3 February 2022.

[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. Comments to the AASB close on by 31 December 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*.

[FASEA releases consultation – Financial Planners & Advisers Code of Ethics 2019 – Standard 3](#)

To guide stakeholders in interpreting and implementing the Code, FASEA released guidance in October 2019, December 2019 and further released the Financial Planner and Advisers Code of Ethics 2019 – Guide in October 2020 (the Guide). The Consultation Paper on proposed options for amendment to Standard 3 of the Financial Planners and Advisers Code of Ethics 2019 can be accessed [here](#).

FSC Submissions

[FASEA Consultation Standard 3 Code of Ethics](#)

[Review of the Australian Financial Complaints Authority: Final Report](#)

Treasury: 24 November 2021

The Review makes 14 recommendations, of which 13 are directed to AFCA. The recommendations primarily focus on enhancements to AFCA's transparency and to its decision-making processes. The Review makes one recommendation directed to Government, which is to remove the legislative requirement for authorised credit representatives to be members of AFCA.

AFCA Current Matters

[Union Standard International Group Pty Ltd](#)

[APRA releases final expectations regarding ADIs' preparedness for zero and negative interest rates](#)

Letters to all authorised deposit-taking institutions (ADIs) outlining its final expectations regarding ADIs' preparedness for the possibility of zero and negative market interest rates and cash rate. APRA has also extended the timeframe for the development of tactical solutions to 31 July 2022.

CASES

[Australian Securities and Investments Commission v Caddick \[2021\] FCA 1443](#)

CORPORATIONS – application for declarations of contravention by defendants of s 911A of the Corporations Act 2001 (Cth) (Corporations Act) – where defendants' contravening conduct established – where utility in making declarations sought – application to appoint interim receivers as receivers of the first defendant's property pursuant to s 1101B of the Corporations Act – whether Court has power to appoint receivers

CORPORATIONS – application by interim receivers for payment of remuneration – where prior orders of the Court capped the interim receivers' remuneration – where remuneration sought exceeds capped amount – where substantial work had to be undertaken that could not have been reasonably anticipated

Most recently, ASIC sought declarations that Ms Caddick and Maliver contravened s 911A of the Corporations Act 2001 (Cth), which requires a person carrying on a financial services business in this jurisdiction to hold an Australian Financial Services Licence (AFSL) covering the provision of the financial services, as well as orders, among other things, for the appointment of receivers over Ms Caddick's property pursuant to s 1101B of the Corporations Act and for Maliver to be wound up pursuant to s 461(1)(k) of the Corporations Act

[Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd \[2021\] FCA 1417](#)

CONSUMER LAW – misleading conduct – admitted contraventions of ss 12DA(1) and 12DB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) and s 1041H(1) of the Corporations Act 2010 (Cth) – pecuniary penalties sought by plaintiff not opposed by defendant – whether quantum of penalty appropriate – whether form of declarations appropriate

3. The defendant pay to the Commonwealth of Australia an aggregate pecuniary penalty in the amount of \$750,000 in respect of the contraventions of s 12DB(1) of the ASIC Act referred to in declarations 1 and 2

4. The defendant pay the plaintiff's costs of the proceeding, fixed in the sum of \$120,000

[Macalister, in the matter of an application by Macalister \[2021\] FCA 1455](#)

CORPORATIONS - application by undischarged bankrupts for leave to manage corporation under s 206G(1) Corporations Act 2001 (Cth) - application for order that applicants not disqualified persons under s 126J(1)(b) Superannuation Industry (Supervision) Act 1993 (Cth) - business of corporation limited to acting as trustee of self-managed superannuation fund of which applicants are only members - weighing of relevant factors - no contradictor - orders made subject to condition offered by applicants

[Stack v AMP Financial Planning Pty Limited \(No 2\) \[2021\] FCA 1479](#)

CORPORATIONS – representative proceeding – practice and procedure – de-classing action – s 33N of the Federal Court of Australia Act 1976 (Cth) – s 33N(1)(c) – whether representative proceeding an efficient and effective means of dealing with claims – commonality concerning claims under ss 961B, 961J, 961L and 965 of the Corporations Act 2001 (Cth) – nature of AMP authorised representatives – relationship with AMP licensees – personal advice – breach of fiduciary duty – sufficient commonality – balance between individual issues and common issues – application refused

[11 Oonoonba Road Pty Ltd & Anor v ACP Properties \(Townsville\) Pty Ltd & Ors \[2021\] QCA 254](#)

1. Appeal allowed. MORTGAGES – ESTATE, RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE – DISCHARGE OR RECONVEYANCE – ASSIGNMENT OR TRANSFER TO THIRD PARTY – where the first appellant and second respondent entered into an agreement to purchase and develop land – where the first appellant and second respondent owned the land as tenants in common in equal shares – where the second respondent loaned the first appellant \$1,647,500 to enable it to pay one half of the purchase price and anticipated costs of completing works on the land – where the first appellant was not able to repay the loan when it became due – where the first appellant and second respondent were provided a finance facility of \$1,600,000 under guarantee from each of the third respondent and the second appellant, and a registered mortgage over the land

[Bonanno v Finamore \[2021\] NSWSC 1558](#)

CONTRACTS – Termination – Breach of term – Where the plaintiff sought enforcement of a deed

MORTGAGES AND SECURITIES – Mortgages – Whether a deed recorded a transaction that was in substance a mortgage – Where the plaintiff argued that the transaction was not a mortgage but rather a loan document with an added facility similar to an option – Where on its face the deed was an amalgam of a loan secured by an option granted to the plaintiff to call for a transfer of a one third interest in property, plus a collateral right to receive one third of the net price of the property on sale – Where the Court found that the transaction was in substance a mortgage – Where the Court held that the obligation to transfer the one third interest in property was a collateral advantage

MORTGAGES AND SECURITIES – Mortgages – Mortgage contracts – Clogs on equity of redemption – Where the plaintiff and defendants executed a deed which would give the plaintiff a one third interest in property in consideration of the plaintiff lending the defendants money – Where the deed contained a term that allowed the plaintiff to compel the transfer of the one third interest by way of notice – Where the deed did not provide for the defendants being able to repay the plaintiff the loan

without the sale of the property – Where the plaintiff brought proceedings to enforce the transfer provisions in the deed – Where the defendants resisted the claim on several grounds including on the basis that the transfer provisions were a clog on the equity of redemption – Where the Court found that the transfer provisions were a clog on the equity of redemption – Where the Court held that the transfer provisions were void

[Hutchinson v AD Securities America LLC \[2021\] NSWSC 1573](#)

1. Judgment, pursuant to rule 16.6 of the Uniform Civil Procedure Rules 2005 (NSW), for the plaintiff in the sum of \$500,000 (Loan Amount)

3. Judgment, pursuant to rule 16.6 and rule 16.10 of the Uniform Civil Procedure Rules 2005 (NSW), for the plaintiff in the sum of \$1,000,000 (Share Amount)

CIVIL PROCEDURE – Default judgment – Default in entering appearance – Default in filing defence

CIVIL PROCEDURE – Service outside Australia – Proceedings in which permitted – Application for leave to proceed

[Tycho Pty Ltd & Anor v Trustworthy Nominees Pty Ltd & Ors \(No 2\) \[2021\] QSC 302](#)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the second third party (Fraser) seeks to strike out certain parts of the first defendant's (Trustworthy) third party notice – where Fraser was engaged as solicitors for Trustworthy in respect of the preparation of a mortgage instrument – where the mortgage instrument and loan agreement was executed fraudulently and declared void by the Court in a previous decision – where Trustworthy's failure to comply with s 11A of the Land Title Act 1994 meant the mortgage did not obtain indefeasibility under the Act – where Trustworthy claims Fraser breached a duty of care and breached a statutorily implied guarantee in the drafting of the mortgage instrument – where Trustworthy contends that but for Fraser's alleged breach, they would be secured repayment of a fixed sum advanced under the loan agreement and on the security of the mortgage – whether Fraser's alleged breach was a sufficient cause of the damages claimed by Trustworthy – whether the pleading fails to disclose a cause of action, in light of the Court's previous decision, and ought to be struck out

[Perpetual Limited v Silvan Park Holdings Pty Ltd & Ors \[2021\] QDC 271](#)

COURT PRACTICE AND PROCEDURE – QUEENSLAND CIVIL PROCEDURE – SUMMARY JUDGMENT – where the application is to recover possession of land – where the respondents have not provided evidence resisting the claim – where the contract was for a loan to purchase land – where the first defendant failed to make mortgage repayments and was in default – where the defendant

submits that the contract and mortgage were not lawful and thus not binding – where the applicant submits that the conclusions of law pleaded are not supported by pleaded facts – where the applicant submits there is no evidence to support the matters pleaded in the defence and counterclaim

LEGISLATION

Commonwealth

Regulations

[Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 \(No. 2\)](#)

30/11/2021 - This instrument amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) to specify the conditions that must be met so an issue of an interest in a litigation funding scheme is exempt from the operation of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and to define the term litigation funding scheme.

[Banking, Insurance, Life Insurance, Health Insurance and Superannuation \(prudential standard\) determination No. 1 of 2021](#)

30/11/2021 - This instrument aims to ensure that APRA-regulated entities maintain remuneration arrangements which appropriately incentivise individuals to prudently manage the risks they are responsible for, and that there are appropriate consequences for poor risk outcomes.

[Banking \(prudential standard\) determination No. 2 of 2021](#)

29/11/2021 - This instrument determines Prudential Standard APS 220 Credit Risk Management. APRA made Banking (prudential standard) determination No. 2 of 2021, which revokes Prudential Standard APS 220 Credit Quality made under Banking (prudential standard) determination No. 8 of 2014 and Prudential Standard APS 220 Credit Quality made under Banking (prudential standard) determination No.1 of 2021 and determines Prudential Standard APS 220 Credit Risk Management (APS 220). The instrument commences on 1 January 2022.

Bills

[Corporations Amendment \(Improving Outcomes for Litigation Funding Participants\) Bill 2021](#)

Senate 25/11/2021 - Implements the government's response to the report of the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into litigation funding and the regulation of the class action industry by amending the Corporations Act 2001 to: establish a new kind of managed investment scheme called a class action litigation funding scheme; and introduce additional requirements for the constitutions of managed investment schemes that are class action litigation funding schemes.

THIS EDITION'S EDITOR



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