

# Gadens Connect

2021 - Edition One

Welcome to our first edition for 2021. What a different festive season it was for most of us – some endured lockdown, others had travel plans cancelled, and some ended up locked out of their own state! That aside, we hope that you had an opportunity (whatever that looked like) to celebrate the festive season and have a little break.

Like with previous editions we will be focusing on moving forward with COVID – what does the industry look like and how can we help you and your customers.

Please share this edition with your team and business partners and if there is anything in particular you'd like to see in future editions of *Gadens Connect*, please let us know [here](#). For other great content you can also visit: [www.gadens.com/latest-insights](http://www.gadens.com/latest-insights).

## COVID-19 update

Most banks are now well underway with their resumption activities across all states and territories with a focus on reducing arrears and delinquency for those customers coming off COVID deferrals. New instructions are starting to pick up again, with projected volumes increasing throughout the year ahead.

### Aged inventory

Median age of our industry portfolio:

**Oct – Dec 2020 - 342 days**

(Compared with Jul – Sept - 359 days)

Portfolios sitting greater than 400 days:

**Oct – Dec 2020 - 59%**

(Compared with Jul – Sep - 45%)

Even though the median age of our industry portfolio has dropped a little, it still remains quite high but we are expecting this will start to reduce in the coming months with increased enforcement activity.

### Current matters affected by a COVID hold

**66%** of the portfolio remains on hold for COVID-19.



Whilst this number is still relatively high, we are expecting this to drop significantly over the coming months as we move forward with legal action again.

## Did you know?



We have a GPSR release bi-monthly and are always looking for ideas and suggestions on how we can improve the application and your user experience. If you'd like to share your feedback, [click here](#).

If you'd like to explore how GPRS can assist your business please reach out to us [here](#).

## COVID insights: Deferrals and defaults – The way forward in 2021

In the wake of the COVID-19 pandemic many authorised deposit-taking institutions granted temporary relief to borrowers who were suffering financial hardship caused by the pandemic. With Australia faring better than many countries, it has managed to regain control of the number of deferrals and defaults of all loans (housing and SME), this is in contrast to countries such as the US and the UK whose struggle to manage COVID outbreaks has led to ongoing payment holidays and prolonged uncertainty.

In Australia in May 2020, \$45bn of loans were approved for deferral with \$2bn of loans expired or exited from deferral, yet by November 2020 this had reduced to \$7bn of loans being approved for deferral and \$32bn of loans expiring or exiting from deferral, dropping further by December 2020 to \$3bn of loans approved for deferral, with \$12bn of loans expiring or exiting from deferral. This means that exits from deferrals outweighed new entries for the six straight months to 31 December 2020. As of 31 December 2020, the progressive total of loans subject to deferral was \$51bn, representing 2% of total loans.

Month	Loans approved for deferral	Loans expired or exited for deferral
May	\$45bn	\$2bn
June	\$40bn	\$33bn
July	\$20bn	\$40bn
August	\$12bn	\$24bn
September	\$17bn	\$66bn
October	\$12bn	\$102bn
November	\$7bn	\$32bn
December	\$3bn	\$12bn

Monthly movements in Australia

In the UK, with it entering 2021 in lockdown it means the road to economic recovery is likely to be a much slower process than in Australia. Since April 2020, lenders working with the Financial Conduct Authority, have been able to offer deferrals for a period of up to six months, as it stands you can apply for a payment deferral up until 31 March 2021. This will mean that the number of deferrals is likely to continue to increase as the impact of lockdown causes further economic damage.

Meanwhile, in the US the challenges of political and economic turmoil have left many American struggling financially. Since taking office on 20 January 2021, President Biden has extended the moratorium on foreclosures and evictions for homeowners with mortgages insured by the Federal Housing Administration until at least March 2021. This will mean the number of loan deferrals and defaults will continue in the US indefinitely as the new Administration looks to provide more certainty for Americans. The new administration could face a challenging situation which mirrors the GFC if they don't provide assistance to those in need and maintain confidence in the market.

As we start 2021 APRA is no longer giving ADI's the ability to pause the count on arrears and there is the need again to hold more capital against a defaulting loan. The risk is that at the end of their repayment deferral periods, many borrowers may still be unable to make loan repayments, which could lead to an increase in loan defaults, impacting both the borrower and the lender.

Publishing the loan repayment deferral data enables market participants and the general public to develop a greater understanding of the scale and nature of this credit risk. Whilst this is valuable, it highlights the risk to the market and investor confidence, as at peak levels, \$266bn, over 10 per cent of all ADI lending, was subject to repayment deferral, mostly loans to small and medium businesses and home loan customers. So whilst Australia is faring better than other nations there are still risks to our banking sector and economy. Gadens, through its technology and knowledge, can assist ADI's in reducing arrears count. If you would like to discuss this further please ask us [here](#).

### Concealment and Sale of Land - Victoria

Disputes concerning non-disclosure preceding entering in Contracts of Sale chiefly involve Section 32 Statements in Victoria. However:

- a non-disclosure inducing a sale of land, falling outside of section 32 of the *Sale of Land Act (the Act)* can give rise to a civil or criminal liability; and
- the essential provision creating criminal liability, section 12 of the Act, was amended in 2019 to create the crime of 'knowing concealment of a material fact inducing a sale'.

#### What is material fact?

Guidelines as to what is a material fact have been issued by the Director of Consumer Affairs (Victoria). The guidelines can be accessed [here](#).

## Variations to Banking Code of Practice

---

On Friday, 8 January 2021 ASIC approved variations proposed by the Australian Banking Association to existing provisions of the Banking Code of Practice (**Code**). The variations commenced on 12 January 2021.

We have set out below a very brief description of the impact of the five variations which do the following:

1. Extend the application of the Code's COVID-19 Special Note for a further six months until 1 September 2021. In recognition of and in light of the significant impact of COVID-19 on banks' internal resources, capacity, and their customers, the Special Note allows for a flexible application of timing requirements under the Code. Where banks are unable to comply with the timing requirements for specific notice and communication obligations but have made attempts in good faith to do so, this will not constitute a breach of the Code.
2. Amend the definition of 'Banking service' under the Code so that it extends to certain types of small business banking customers unintentionally excluded by the previous wording of the Code, such as wholesale small business clients by virtue of s 761G(7)(b) of the *Corporations Act 2001* (Cth).
3. Make minor amendments to the definition of 'small business' to include a clarification on what business is not a 'small business'.
4. Specify that a bank may deal directly with a customer experiencing financial difficulty rather than the appointed representative when:
  - requested to do so;
  - reasonable attempts to contact the representative have proven to be unsuccessful;
  - the bank reasonably believes that the representative is not acting in the customer's best interest; or
  - it is reasonable in the circumstances to do so.
5. Amend the timeframes for handling and responding to a customer's complaint such that it aligns with ASIC's updated Regulatory Guide 271 *Internal Dispute Resolution* (due to commence on 5 October 2021).

## Australian Banking Association (ABA) Debt Management Firms Guiding Principles

---

Complementing the approved variation to the Banking Code of Practice, is the ABA recently released guiding principles for dealing with Debt Management Firms (**DMFs**).

DMFs, described as firms assisting customers in financial hardship or with listings on credit reports but excluding financial counsellors, have been subject to criticism by banks, AFCA, ASIC and consumer organisations for their failure to act in the best interest of their customers, including by charging high fees for services of little value and providing inappropriate services that leave consumers in worse off positions.

While a bank may not directly contact a customer where the customer has appointed a DMF, the guiding principles provide for circumstances in which a bank may make direct contact. These circumstances include where direct communication is requested, or the bank has a reasonable belief that the DMF or any of its agents:

- does not respond to communication within a timely manner;
- is providing 'credit assistance' under the *National Consumer Credit Protection Act 2009* (Cth) or 'financial services' under the *Corporations Act 2001* (Cth) without being licensed to do so;
- is banned from lodging disputes with AFCA;
- is not acting in the best interests of the customer;
- has not provided the customer with all communication with the bank and informed the customer of all available options, offers of settlement/hardship assistance and potential risks and consequences of a course of action it is pursuing;
- has failed to provide reasonably required information to the bank or unreasonably refused a request for information;
- has engaged in a misleading and deceptive manner with the bank and/or customer;
- has behaved in an aggressive, intimidating and threatening manner.

Of note, the guiding principles assert that a bank is not prevented from continuing to contact a customer directly in the future, if any of the above circumstances continue to apply, even where the customer confirms that the DMF is to be the point of contact.

The guiding principles also provide an approach for how Banks may deal with DMFs in circumstances where they are failing to act in a customer's best interest, namely by reporting 'unscrupulous or inappropriate' behaviour to the relevant regulator or an appropriate professional body.

If you would like any further information regarding the variations or the guiding principles please feel free to [contact us](#).

## Success stories

**Story 1** – Gadens is advising a bank in a County Court proceeding commenced against it by the administrator of the deceased estate of the bank’s customer, in which damages are claimed in respect of alleged unauthorised withdrawals from the customers accounts. In November 2020, Gadens was successful in a court application made on behalf of the bank to join the two alleged fraudsters as concurrent wrongdoers under the apportionment of liability provisions of the *Wrongs Act 1958* (Vic), despite opposition from the plaintiff. This was a positive outcome, as it provides a legal basis to seek to limit the bank’s liability which will assist mediation discussions.

**Story 2** – The bank commenced proceedings in 2017 in respect of a lo-doc, unregulated facility. The customer filed a defence and joined, by way of Counterclaim, the financier of an unrelated facility and property and others.

The matter was heard by the Court on numerous occasions as each of the parties joined by the customer looked to extricate themselves from the proceedings, and to allow the customer to seek proper legal advice and file further amended defences and counterclaims. The customer alleged that the broker had been negligent and that the bank had been fraudulent in advancing funds to her when the loan application documents were inconsistent and had engaged in unconscionable and misleading conduct. She also alleged that the lawyer she had obtained advice from before signing the mortgage and loan documents had falsely signed a declaration that he had provided her with independent advice. The bank’s documents came under some scrutiny and criticism as the Court observed some mistakes and inconsistencies in the loan application.

Ultimately, the Court found that despite many grounds and concerns raised by the customer, she did not disclose any prospects of success against the bank and judgment was granted in favour of the bank.

## Key contacts

If you would like to discuss the contents of this newsletter or any other recovery-related matter, please contact one of our regional legal experts...

### Adelaide



#### Fidelis McGarrigan

Partner

+61 8 8456 2410

+61 412 404 323

[fidelis.mcgarrigan@gadens.com](mailto:fidelis.mcgarrigan@gadens.com)

### Brisbane



#### Susan Forrest

Partner

+61 7 3231 1586

+61 413 752 584

[susan.forrest@gadens.com](mailto:susan.forrest@gadens.com)

### Melbourne



#### Sonia Apikian

Partner

+61 3 9252 2508

+61 405 151 328

[sonia.apikian@gadens.com](mailto:sonia.apikian@gadens.com)

### Perth



#### Dean Hely

Partner (Lavan)

+61 8 9288 6772

+61 419 947 646

[dean.hely@lavan.com.au](mailto:dean.hely@lavan.com.au)

### Sydney



#### James Roland

Partner

+61 2 9163 3012

+61 408 848 959

[james.roland@gadens.com](mailto:james.roland@gadens.com)

Adelaide

Level 1

333 King William Street

Adelaide SA 5000

T + 61 8 8456 2433

Brisbane

Level 11, ONE ONE ONE

111 Eagle Street

Brisbane QLD 4000

T + 61 7 3231 1666

Melbourne

Level 13, Collins Arch

447 Collins Street

Melbourne VIC 3000

T + 61 3 9252 2555

Perth (Lavan)

Level 20, The Quadrant

1 William Street

Perth WA 6000

T +61 8 9288 6000

Sydney

Level 20, MLC Centre

19 Martin Place

Sydney NSW 2000

T +61 2 9231 4996

[gadens.com](http://gadens.com)

Gadens is an association of independent firms