

# Gadens Connect

2021 – Edition Two

## Welcome to Q2 of 2021! We hope you all enjoyed Easter and the extra-long weekend.

With Q1 of the new year under our belts, we are pleased to bring you our next edition of Gadens Connect.

In this publication, we reflect on key performance indicators, with a breakdown of new instructions received and exits from January to March 2021. The team also provides important updates on changes to the *Residential Tenancies Amendment Act 2018* (Vic) and AFCA determinations on Early Release of Superannuation, a look at our recent GPSR update, and we address some mortgagee in possession FAQs.

To stay in the know, keep an eye out for our quarterly updates, and make sure you share them with your team and business partners. For other great content you can also visit: [www.gadens.com/latest-insights](http://www.gadens.com/latest-insights), and if there is anything in particular you would like to see in future editions of Gadens Connect, please let us know [here](#).

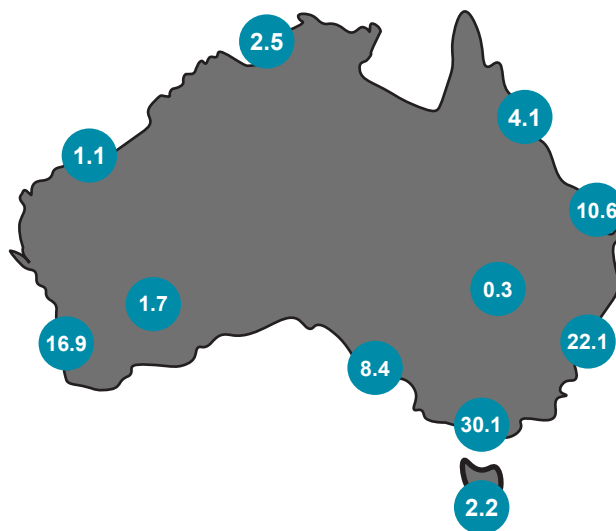
## Key performance indicators

As we move out of COVID and Christmas moratoriums, we are seeing new instructions start to increase again, with the majority of new instructions in VIC and NSW, closely followed by WA.

However, in comparison to same time last year volumes overall are down by about 60%.

### Instructions Received

This map shows the percentage breakdown of new instructions received January to March 2021.

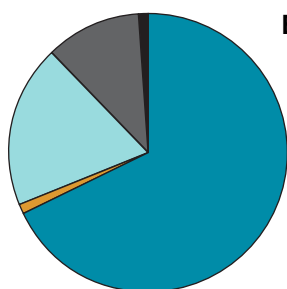


As we would expect to see, most instructions are in major metro areas, with Sydney and Melbourne experiencing the higher volumes.

### Cycle Times

The average cycle time across the industry is sitting at 429 days – we have seen this increase significantly as a result of COVID moratoriums, with same time last year comparison at 173 days.

Of the files exited during the last quarter, 68% were returned to order.



### Exits - last quarter (shown as a %)

- Returned to order no exit - 68
- Refinance - 1
- Property sales in possession - 19
- Property sales customer initiated - 11
- Other - 1

### 429 days

The median cycle time of a recoveries file



If you'd like to know more about your own portfolio's key performance metrics [click here](#).

## GPSR Update

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With the new year upon us we are picking back up our BAU operating rhythm for GPSR and with that comes enhancements!

First cab off the rank is some updates to our exit reasons, and added descriptions for sensitivity. This means we can provide you with more valuable insights and reporting to give you a better understanding of your portfolios.

We are always interested to know what you think about GPSR, so please share any feedback [here](#).



### Success story

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Gadens has successfully negotiated an early resolution of Supreme Court proceedings issued against a bank which raised allegations of spousal mortgage fraud. A loan had been taken out in the joint names of a husband and wife (now deceased), secured by a mortgage over their home. The husband borrower was seeking orders that the mortgage and loan agreement be set aside as he alleged he did not execute the loan agreement and mortgage. After investigation, the bank accepted that the husband did not sign the documents, though the mortgage remained valid over the deceased wife's interest in the property to secure the debt for which the wife's estate was still liable. An early solution was achieved which enabled the surviving husband to salvage the property. By Gadens identifying the key issues and risks early in the proceedings (before pleadings closed, and before any discovery or mediation was required), the bank was able to save significant legal costs.

## Changes to the *Residential Tenancies Amendment Act 2018* (Vic)

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Temporary changes to renting laws due to COVID-19 expired on 28 March 2021, which prohibited the issuing of notices to vacate. From 29 March 2021, Victoria's rental rules are changing, permitting the issuing of notices to vacate again.

The *Residential Tenancies Amendment Act 2018* (Vic) was due to come into effect progressively and completely by 1 July 2020 to amend the *Residential Tenancies Act 1997* (Vic). These reforms were deferred for implementation to 29 March 2021 as a result of COVID-19, read our previous article for full details of the reforms [here](#).

Important changes under the *Residential Tenancies Amendment Act 2018* (Vic) to note:

1. A bank or other mortgage provider who wants vacant possession of the rented property must give the renter at least 60 days' notice to vacate (was previously 28 days).
2. If a bank or other mortgage provider applies to VCAT for a possession order of a rented property, it must attach a court order which shows its entitlement to the property and to sell the rented premises (previously it was just preferred).
3. The new rental laws refer to landlords as 'rental providers', tenants as 'renters', and tenancy agreements as 'rental agreements'.
4. An owner of premises (including a mortgagee) must:
  - a. take reasonable steps to give a notice, in the form approved by the Director, to the former renter that the goods have been left behind; and
  - b. store the goods for a period of at least 14 days, beginning on the day on which the owner of premises gave the notice to the former renter.

NB: Further detailed requirements apply for the storage, disposal, sale and reclamation of goods left behind by renters.

A full list of the reforms can be found [here](#).

## FAQs – Mortgagee in possession

Often we are asked whether a mortgagee is liable to pay council rates, owners corporation fees (Body Corporate fees) or Land Tax Notices. To test your knowledge, we ask the following questions:

1. Is a Mortgagee (Lender) generally liable to pay the following:
  - a. Council Rates;
  - b. Water Rates;
  - c. Body Corporate (Owners Corporation) fees; or
  - d. Land Tax Notices?
2. Does the answer differ whether the Mortgagee/Lender is in possession of the property?
3. Does the location of the property in a State or Territory matter?

In our next edition of Gadens Connect we will provide the answers and in the meantime if you have any queries or concerns regarding payment of council rates, owners corporation fees or Land Tax Notices, please contact [Malcolm Watson](#) (Partner, Melbourne).

## AFCA Determinations on Early Release of Superannuation

Given the current financial climate, financial institutions can expect their customers to be making further requests for Early Release of Superannuation (**ERS**). As such, we consider it is important for financial institutions to be aware of the position of the Australian Financial Complaints Authority (**AFCA**) in considering whether to support a customer's application.

In a 2019 determination, AFCA considered that a bank acted appropriately in declining to support a customer's ERS application. This conclusion was reached on the basis that the relevant loan would have fallen back into arrears following the customer's ERS and ERS would have put the customer in a worse financial position; considerations which the bank had regard to.

In a 2020 determination, AFCA found that a financial firm had acted inappropriately in supporting a customer's second ERS application as it:

- failed to ensure that the customer could meet his ongoing repayment obligations if it supported ERS;
- did not obtain information to support that there would be an improvement to the customer's financial situation following the ERS; and
- failed to explore alternative options to assist the customer without jeopardising his superannuation.

What is evident from AFCA's two decisions, is that their approach to determining whether a financial institution has correctly supported an application for ERS is consistent. AFCA will not compel a financial institution to support a customer's ERS, but it will expect the following:

- that the financial institution has considered alternative courses of action to assist the customer in resolving their financial difficulty and to meet their financial obligations;
- that a financial institution will not support a customer's ERS where it is apparent that the customer will be unable to meet their ongoing repayment obligations; and
- that a financial institution will only support ERS if there is a reasonable expectation that the customer will be able to meet their future ongoing loan obligations.

AFCA has also ruled that where previous ERS applications have been made and have failed to assist a customer overcome their financial difficulty, the financial institution must exercise a greater degree of diligence when considering whether to support a further ERS. This includes taking steps to fully understand the customer's current financial circumstances and how that will change following the ERS.

We do not believe that AFCA will waiver from this approach when making future determinations and expect that financial institutions will continue to be held to the above AFCA expectations.

If you would like further information regarding these AFCA determinations on ERS, please feel free to [contact us](#).

# Back to the office!

As states remain (almost) COVID-free and restrictions continue to ease we have been excited to see a return to the physical workplace across our offices.

With the lift on capacity quotas for Victoria (the final state with caps in place) last month, all our offices are enjoying being able to have coffee catch-ups with our clients in person. This is something we very much missed during the lockdowns and look forward to continuing over the coming weeks and months.

## 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...

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