FINANCIAL SERVICES AND CREDIT

QUARTERLY UPDATE

October 2016

CONSUMER CREDIT

Flex commissions

ASIC has been working with the automotive finance industry in relation to "flex commissions" with a view to implementing controls on this practice.

Flex commissions allow the car dealer writing a finance contract to set the interest rate for the contract (subject to any limits imposed by the financier). The dealer has the potential to earn higher commission if there is a higher interest rate above the base rate.

ASIC released a consultation paper in December 2015 and followed up with second consultation paper in June 2016. It is expected that ASIC will introduce its final position within the next few months.

ASIC's view is that flex commissions impose an inherent conflict of interest and has also suggested that they may be in breach of the obligations of credit licensees to engage in credit activities fairly.

Some of the options which have been explored include a complete prohibition of flex commissions, or alternatively introducing a limit on the extent to which dealers can apply a margin.

Google ban on payday advertising

Google recently updated its global advertising policy by prohibiting the advertising of any personal loan product where repayment in full is required within 60 days.

The policy also requires that the personal loan advertiser include on its landing page the minimum and maximum period for repayment, the maximum annual percentage rate (which includes the interest rate plus fees and other costs for a year), and a representative example of the total cost of the loan, including all applicable fees.

It has been reported that as a result of the implementation of this policy, some lenders that previously allowed for repayments within a shorter period of 60 days have now implemented longer minimum repayment periods, which may cause some consumers to have to pay additional interest or credit fees by forcing the loan to

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extend for a longer term.

Under the credit legislation, the minimum permitted loan term is 16 days.

ASIC report on mortgage brokers and interest only home loans

ASIC has released the results of its inquiry into responsible lending practices of mortgage brokers in relation to interest only home loans.

Report 493 released on 14 September 2016 is a follow-up to an earlier Report 445 on interest only home loans issued in August 2015.

ASIC had concerns about the rising number of interest only loans and whether these loans were meeting the requirements and objectives of consumers, particularly for owner occupiers. ASIC notes that the banks' exposure to interest only home loans continues to increase, despite the reduction in new interest only home loans being funded. This is partly due to the fact that interest only home loans do not reduce through amortisation.

For its review ASIC obtained records of 20 interest only home loan applications from each of 11 major mortgage broker groups.

In more than half of all applications, it appears that the consumer had specifically sought an interest only home loan.

The intention to convert an owner occupied property into an investment property in the future was the second most common reason given by consumers for seeking an interest only loan for an owner occupied property.

ASIC found that in about 20% of files there was no statement summarising how the interest only feature specifically met the requirements and objectives of the consumer. Records did not always show why a particular loan was selected. Even where there was an identification or explanation of the requirement for an interest only home loan, often there was no record of the specific interest only period applied for and what was intended after the interest only period concluded.

ASIC found that the best files were those which logically set out and included a detailed narrative account of the consumer's short and longer term requirements and objectives, drawing together the consumer's responses to various questions. These accounts also described in detail the reasoning behind selecting a loan with particular features, terms and costs from a particular lender.

COMMERCIAL FINANCE

Small business loans inquiry

On 31 August 2016 the Federal Government announced that the Australian Small Business and Family Enterprise Ombudsman had been directed to undertake an inquiry into the adequacy of the law to address concerns about loans to small business that were raised in the *Impairment of Customer Loans* report released in May 2016 by the Parliamentary Joint Committee on Corporations and Financial Services (the **PJC**).

The terms of reference for the inquiry include:

- reviewing some of the cases that were identified by the PJC in its report as unfair and ascertain whether there are any deficiencies in the regulation of ADIs in lending to small business;
- refer any matters identified in the review to the relevant authority for further consideration as necessary;
- determine whether the regulatory deficiencies identified by the PJC, or additional deficiencies identified through the inquiry, are being addressed by Government and industry reforms; and
- recommend whether additional reform measures should be implemented "to ensure products perform in the way they should". However this must take into account that "consumers have a responsibility to accept their financial decisions, including market losses, when they have been treated fairly", and also take into account any impact on the availability and cost of credit to small business.

FINANCIAL ADVICE

ASIC guidance on client review and remediation

ASIC Regulatory Guide RG 256 published on 15 September 2016 sets out guidance on client review and remediation by financial services licensees who provide personal advice to retail clients.

Review and remediation is used to address systemic issues arising from conduct of the licensee or its representatives when giving personal advice.

The regulatory guide discusses when review and remediation is appropriate, interaction with IDR and EDR obligations, design and implementation of a review and remediation process, communicating with clients, and ensuring that clients have access to external review of decisions.

ABA reference checking protocol

The Australian Bankers' Association (**ABA**) has announced an industry reference checking and information sharing protocol in relation to the recruitment and termination of financial advisers.

The protocol is intended to improve reference checking during the recruitment of financial advisers and to promote better information sharing about the performance history of financial advisers.

Published on 20 September 2016, the protocol requires subscribing Australian financial services licensees to implement the protocol by 1 March 2017.

The protocol creates a Standardised Reference Checking Form that subscribers will be able to use for reference checking potential financial adviser hires. Subscribers who are existing or former licensees of the adviser will be required to respond in writing using the form if they receive a reference check request from another subscriber licensee.

FINANCIAL MARKETS

BBSW changes

A change to the calculation of the BBSW has been announced by the Australian Financial Markets Association in response to the discussion paper on BBSW methodology published by the Council of Financial Regulators in February 2016.

The main feature of the BBSW methodology change is the establishment of a sequentially staged calculation waterfall:

- **Stage 1**: Volume Weighted Average Price (**VWAP**) of primary issuance and secondary trading of eligible securities within a trading window defined as 9:00am – 10:10am;
- **Stage 2**: National Best Bid and Offer (**NBBO**) – the current methodology, which uses live executable bids and offers to calculate BBSW, will operate only if Stage 1 fails to form BBSW; and
- **Stage 3**: Algorithmic calculation – drawing on relevant market pricing information that is available only when both Stage 1 and Stage 2 fail to form BBSW.

The 1, 2, 3 and 6 month BBSW tenors will continue to be published but the 4 and 5 month tenors will be phased out when Stage 1 goes live.

Regulation of financial benchmarks

Adopting the advice of the Council of Financial Regulators, the Federal Government has announced that it will introduce measures to increase regulation of financial benchmarks such as the BBSW. The changes will include a requirement that administrators of systemically important benchmarks hold a new "benchmark administration licence" issued by ASIC (unless granted an exemption). ASIC will be empowered to develop enforceable rules for the administrators and for entities that make submissions to those benchmarks, including a power to compel submissions to benchmarks if other calculation mechanisms fail. In addition, manipulation of any financial benchmark or a financial product used to determine a financial benchmark will be made a specific criminal and civil offence. The changes will be implemented over the next 18 months.

Due diligence practices in initial public offerings

ASIC's Report 484 on *Due diligence practices in initial public offerings* released in July 2016 outlines key findings from reviews undertaken by ASIC of the due diligence practices of IPO issuers. ASIC's concerns relate generally to the quality of due diligence conducted by small to mid-sized issuers.

The key findings in the report include:

- issuers that demonstrated poor due diligence practices produced prospectuses with defective disclosure;
- there was considerable variation in due diligence processes, with small to mid-sized issuers adopting fewer due diligence processes;
- a number of issuers adopted a "box ticking" approach to due diligence;
- in some cases directors had little involvement in the preparation of the prospectus before signing off on the document;
- there were examples of poor oversight

by the Australian legal advisers of due diligence inquiries conducted by foreign advisers;
- investigating accountants had sufficient financial due diligence procedures and generally provided a high standard of reporting, whereas legal advisers demonstrated a less consistent standard in terms of conducting due diligence; and
- proper due diligence will place an issuer in a better position to mitigate the risk of added delays and related costs, future liability and reputational damage from a poor quality prospectus.

ASIC reports on confidential information and conflicts in research and corporate advisory

ASIC's Report 486 *Sell-side research and corporate advisory: Confidential information and conflicts* was released on 9 August 2016. The report includes findings from a review of several transactions as well as a thematic review of large and mid-sized firms, and an examination of four transactions to see how market practice is applied. The report looked at how material, non-public information (**MNPI**) is handled and how conflicts of interest are managed.

ASIC found that many firms have policies and procedures to address the handling of MNPI and conflicts management, but some do not have appropriate arrangements to handle situations where staff come into possession of MNPI. ASIC also identified inconsistent practices in how conflicts are managed, including a lack of research independence and appropriate separation of research and corporate advisory activities.

ASIC found that it was common practice among mid-sized firms for the staff to get allocations of securities of the companies they manage and arrange capital raisings for, and to trade in those securities. ASIC has concerns that such trading could lead to conflicts of interest and poor advice and outcomes for clients.

ASIC intends to follow up its report with industry consultation on proposed guidance.

ASIC review of marketing practices in IPOs

ASIC's Report 494 released on 16 September 2016 reports on its survey of marketing practices in initial public offerings (**IPOs**).

In summary, ASIC's recommendations for firms and issuers call for greater controls over marketing processes.

ASIC says that firms should apply tighter controls over the marketing and selling of IPOs by telephone. One suggestion made is that compliance staff routinely sit at the sales desk when telephone calls are made to clients.

It also calls for controls on social media posts similar to those in place for other marketing, including reviews of social media posts before posting.

Marketing should based on the merits of the IPO itself and not based primarily on asking investors to assist with meeting spread requirements, or on comparisons with other successful IPOs conducted by the firm.

When forecasts are used, ASIC says that care should be taken. Undue weight should not be given to forecasts in marketing messages and the assumptions and risks of the forecasts should be included in marketing material.

If targeting investors from a non-English speaking background, ASIC says that communications should be clear and accurate and marketing material in other languages must be fully understood by the firm or issuer.

ASIC also notes that video content used to market IPOs should be accurate and consistent with disclosure in the prospectus and kept current after any changes or updates are made to a prospectus.

Tighter controls and education are required in ASIC's view to ensure that employees limit access to institutional roadshows to AFS licensees and their representatives and so that access to restricted material (including pathfinder prospectuses) is limited to sophisticated or professional investors.

If marketing is given to persons before a prospectus is lodged with ASIC, on the basis of those persons being a sophisticated or professional investor, ASIC says that firms and issuers should ensure that the recipient qualifies, and must not rely on self-certification.

FINANCIAL PRODUCTS

PDS update for Financial Claims Scheme

As a result of a new website for the Financial Claims Scheme (**FCS**), www.fcs.gov.au, ASIC has updated its Class Order CO 11/1340, which sets out details for disclosure of the FCS in a product disclosure statement (**PDS**) or as a condition of not having to give a PDS.

The change requires deletion of the words "the APRA website at http://www.apra.gov.au and the APRA hotline on 1300 13 10 60" and substituting "http://www.fcs.gov.au".

FINANCIAL SERVICES

Foreign financial services providers

ASIC has repealed a number of class orders which provided an exemption from licensing for financial services providers holding licences or authorisations under the laws of the US, UK, Singapore, Hong Kong and Germany. However the repeal instrument continues the relief under those class orders for a further period of two years until 28 September 2016. The instrument imposes a new condition that the provider must comply with any written notice from ASIC directing it to give ASIC a written statement containing specified information about its financial services business operated in Australia.

Legislative instruments such as class orders are repealed automatically after 10 years unless action is taken to exempt or preserve them.

In conjunction with the new instrument ASIC released a consultation paper CP 268 on licensing relief for foreign financial services providers. ASIC is seeking to determine whether replacement relief is required or whether existing exemptions from the financial services licensing regime could be relied upon by the foreign financial services providers.

ASIC mentions in the paper that it has "a deregulatory focus."

FINANCIAL SYSTEM

Major banks face Parliament

In what seems to be another attempt to stave off continued calls for a banking royal commission, the Federal Government announced on 4 August 2016 that the major banks would be asked to appear at least annually before the House of Representatives Standing Committee on Economics.

The first hearings took place from 4 to 6 October 2016.

The purpose of this exercise is to enable the Committee to report to the Treasurer and the Parliament on Australia's banking and financial system.

In a press release announcing the initiative, the Treasurer said that the banks will be required to explain:

- international economic and financial market developments and how they are affecting Australia;
- developments in prudential regulation, including capital requirements, and how these are affecting the policies of Australian banks;
- the costs of funds, impacts on margins and the basis for bank interest rate pricing decisions;
- how individual banks and the banking industry as a whole are responding to issues previously raised in Parliamentary inquiries through the package of reforms announced in April 2016; and
- bank perspectives on the performance of the Australian economy, including strengths and risks.

FINTECH

Digital advice: ASIC guidance

In August 2016, ASIC released RG 255, its Regulatory Guide on providing digital financial product advice to retail clients.

ASIC defines digital advice (also known as robo advice or automated advice) as the provision of automated financial product advice using algorithms and technology and without the direct involvement of a human adviser.

ASIC says that for a digital advice licensee to meet the organisational competence obligations in RG 105, the licensee must have at least one responsible manager who meets the training and competence standards.

In terms of general obligations applying to licensees, ASIC says that a digital advice licensee should ensure that there are people in the business who have an understanding of the technology and algorithms used to provide digital advice and who are able to review the digital advice generated by algorithms. ASIC says that a regular review should be conducted of the digital advice generated.

In terms of technological resources, ASIC says digital advice licensees should have sufficient technological resources to maintain client records and data integrity, protect confidential and other information, meet current and anticipated future operational needs, and to comply with all legal obligations. They should also have adequate business continuity, backup and disaster recovery plans for any systems that support the delivery of digital advice to clients.

ASIC says that as part of their risk management systems, digital advice licensees should regularly monitor and test the algorithms that underpin the advice.

It also expects digital advice licensees to assess their cyber security using recognised frameworks such as the NIST Framework for improving critical infrastructure cyber security.

ASIC has set out in the guide its minimum expectations where the digital advice provider is offering scaled personal advice.

INSURANCE

ASIC pushes for changes to add-on insurance sold by car dealers

ASIC has called on insurers to change the products they sell through car dealers, or otherwise face regulatory action.

ASIC delivered its ultimatum in Report 492, *A market that is failing consumers: The sale of add-on insurance through car dealers,* released on 12 September 2016.

The report looked at 5 add-on insurance products commonly sold by car dealers, including CCI, GAP, loan termination insurance, tyre and rim insurance, and mechanical breakdown insurance (also known as extended warranty).

Report 492 follows two other reports released in February 2016 which looked at insurance sold in the car industry, Report 470 *Buying add-on insurance in car yards: Why it can be hard to say no*, and Report 471 *The sale of life insurance through car dealers: Taking consumers for a ride*.

In ASIC's view, add-on products sold through car dealers lead to "significantly poor" outcomes for consumers. Claim payouts are low compared to premiums, and claims paid are less than what dealers receive in commissions. ASIC believes there is a lack of price competition and that the products sold are poorly designed. In particular, single premium policies substantially increase the cost when bundled into a car loan. ASIC also considers that the sales process used by insurers is complex and opaque.

ASIC's conclusion is that there are "structural failings" in the add-on insurance market and says that insurers who fail to address its findings will be subject to further regulatory action by ASIC, which may include:

- taking targeted enforcement action against insurers or their authorised representatives selling the products;
- pursuing remediation for consumers who have been missold add-on insurance policies;
- naming individual insurers who fail to deliver significantly improved outcomes for consumers; and
- exploring law reform options to ensure fair and appropriate outcomes for consumers.

ASIC supports the recommendation in the Financial System Inquiry that ASIC be given a product intervention power to help enhance its ability to improve market conduct where there is risk of significant consumer detriment. Such a power could enable ASIC to intervene to require or impose:

- amendments to marketing and disclosure materials;
- warnings to consumers, and labelling or terminology changes;
- distribution restrictions; and
- product banning.

ASIC says that it will continue to closely monitor the practices of insurers who sell add-on insurance products through car dealers and work with industry to improve outcomes for consumers.

Parliamentary inquiry into life insurance industry

The Senate has referred an inquiry into the life insurance industry to the Joint Parliamentary Committee on Corporations and Financial Services for report by 30 June 2017. The terms of reference include the following:

- the need for further reform and improved oversight of the life insurance industry;
- assessment of the relative benefits and risks to consumers of the different elements of the life insurance market, being direct insurance, group insurance and retail advised insurance;
- whether entities are engaging in unethical practices to avoid meeting claims;
- the sales practices of life insurers and brokers, including the use of approved product lists;
- the effectiveness of internal dispute resolution in life insurance;
- the roles of ASIC and APRA in reform and oversight of the industry; and
- any related matters.

PAYMENT SYSTEMS

Apple Pay – collective bargaining

A consortium of banks is seeking approval from the Australian Competition and Consumer Commission (**ACCC**) to collectively bargain with Apple over the use of Near Field Communication (**NFC**) on Apple devices.

The group of banks includes Commonwealth Bank, Westpac, NAB and Bendigo and Adelaide Bank.

The banks want to be able to use NFC on Apple devices for their own banking apps when installed on Apple devices, so that customers can tap and pay using those apps.

Apple Pay is a closed system that does not allow tap and pay through other apps on the device.

The ACCC has refused to grant interim authorisation to the banks and says that it expects to release a draft decision in October 2016.

PRIVACY

FOS decision on repayment history information

In case number 422745, the Financial Ombudsman Service (**FOS**) considered a complaint by a customer with a car loan where the customer had entered into a payment arrangement with the lender after she had gone into default.

The lender was supplying repayment history information (**RHI**) to a credit reporting body.

The customer did not make any payments in July and August 2015 and then entered into the payment arrangement in September 2015, which lasted until early November 2015. The customer complied with the payment arrangement.

The lender listed missed payments for July, August, September and October 2015 with the credit reporting body.

FOS took the position that the payment arrangement varied the contract between the customer and the lender and decided that the lender should update the RHI so that the customer was not recorded as having missed payments while the arrangement was in place.

PRUDENTIAL STANDARDS

APRA releases prudential practice guide on capital buffers

On 30 August 2016 APRA released a new prudential practice guide on the operation of capital buffers for ADIs.

Prudential Practice Guide APG 110 *Capital Buffers* deals with the operation of the capital conservation buffer and the countercyclical capital buffer.

SUPERANNUATION

Changes to Budget super reforms

Following pressure from the backbench, Coalition supporters and others, the Treasurer on 15 September 2016 announced modifications to the superannuation reforms that were included in the 2016 Budget.

- The $500,000 lifetime non-concessional cap is being scrapped and the existing annual non-concessional contributions cap will be reduced from $180,000 per year to $100,000 per year.
- Individuals aged under 65 will continue to be able to bring forward 3 years' worth of non-concessional contributions.
- Individuals with a superannuation balance of more than $1.6 million will no longer be eligible to make non-concessional (after tax) contributions

from 1 July 2017. This limit will be tied and indexed to the transfer balance cap.

- The harmonisation of contribution rules for those aged 65 to 74 has been shelved. Individuals aged 65 to 74 who satisfy the work test will still be able to make additional contributions to superannuation.
- The commencement date of the proposed catch-up concessional superannuation contributions will be deferred by 12 months to 1 July 2018.

The objective of superannuation

Treasury has released an exposure draft of the *Superannuation (Objective) Bill 2016 (Cth)*, which states that the primary objective of the superannuation system is to provide income in retirement to substitute or supplement the age pension.

The Bill also requires that any Bill or regulation proposed relating to superannuation must be accompanied by a statement of compatibility with the primary objective of the superannuation system.

TAXATION

Australian ADIs are getting ready for the implementation of the new Common Reporting Standard (CRS) for the international exchange of account information.

The CRS was approved by the OECD Council on 15 July 2014. It requires tax authorities of participating jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. The CRS sets out:

- financial account information to be exchanged;
- the financial institutions required to report;
- the different types of accounts and taxpayers covered; and
- common due diligence procedures to be followed by financial institutions.

The international legal framework for the implementation of the CRS is based on treaty agreements. The CRS Multilateral Competent Authority Agreement is the principal treaty. Australia is a signatory. The intended first information exchange for Australia is scheduled for September 2018.

AML/CTF

Customer ID changes commence

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2016 (No. 1)* amends Chapter 4 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules 2007*, which deals with customer identification. The changes are effective from 15 September 2016.

The amendments remove the word ‘from’ and replace it with ‘about’ in Chapter 4 with regard to customer identification. The effect of this amendment is that reporting entities will have the option of collecting information about the customer from either the customer or from sources other than the customer.

There are also amendments to the electronic safe harbour provisions for individual customers. Previously these stated that two verification components were mandatory (customer name and residential address) and two were discretionary (customer date of birth or customer transaction history). The amendments require one mandatory verification component (name) and allow for three discretionary components (residential address, date of birth or customer transaction history).

Draft rules

AUSTRAC has released for comment draft rules on the following:

- a partial exemption from the AML/CTF Act for licensed trustees;
- to exempt from the AML/CTF Act, Registered Plan Management Providers who are part of the National Disability Insurance Scheme; and
- the Western Union and MoneyGram account-based money transfer systems. These systems enable ADIs to offer their customers remittance transfer services through the Western Union or MoneyGram platforms.

DISPUTES AND ENFORCEMENT

Late fees are not penalties

In *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, the High Court dismissed the last appeal by the ANZ bank fees class action plaintiffs.

In their class action launched in 2010, the plaintiffs challenged a range of ANZ's fees including late payment fees as well as dishonour fees, honour fees, over-limit fees and non-payment fees.

The main argument of the plaintiffs was that the fee obligations were void as "penalties". Courts will not enforce a provision of an agreement that is a penalty. The long standing test of whether a fee or other sum is a penalty is that it must be "extravagant and unconscionable".

Claims were also made under consumer protection legislation dealing with unconscionable conduct, unjust transactions and unfair contract terms.

The original Federal Court decision found that only the late payment fees were penalties and all the others were not. ANZ appealed that finding on the late payment fees to the Full Court of the Federal Court and the Full Court decided that the late payment fees were not penalties. The class action plaintiffs then appealed to the High Court and lost the appeal in the decision handed down on 27 July 2016. The High Court also threw out the claims of the class that ANZ had acted in breach of legislative provisions on unconscionable conduct, unjust transactions and unfair terms.

Each of the five High Court justices gave their own judgment. Justice Nettle was the only one who thought that the appeal should be allowed on the question of late payment fees.

The judges in the majority approached the issue of penalties in slightly different ways.

Justice Kiefel said that the relevant question was whether the late payment fee was out of all proportion to ANZ's interest in receiving timely payment. She concluded that it wasn't. Chief Justice French agreed with her.

Justice Gageler emphasised the purpose of the late payment fee and thought that it would be a penalty if it was levied only to punish the account holder. He found that it was not such a fee.

Justice Keane framed the issue as whether the fee for a breach of contract (late payment) was exorbitant or unconscionable having regard to the legitimate interest if the innocent party (the bank) in the performance of the contract (being paid on time). He concluded it was not.

It was clear that the representative plaintiff in the class action, Mr Paciocco, was aware of the fee. Justice Gageler said that Paciocco "found it convenient to manage his credit card accounts close to their limits, choosing to accept the risk of incurring fees associated with that course of conduct" and that Paciocco "freely chose to enter into the two credit card contracts with ANZ and could have terminated those contracts at any time at will."

Justice Keane observed that there was "no reason to regard Mr Paciocco's choice to incur the fee as other than a rational economic choice on his part. A voluntary and self-interested choice of this kind is the opposite of the rational response which one might expect to be generated by a penal provision, given that the characteristic purpose of a penalty is to deter non-compliance."

Guarantor avoids liability under guarantees by raising Banking Code breach

Mr Rose was a successful businessman who signed guarantees in favour of National Australia Bank (**NAB**) as security for loans for a property investment joint venture. NAB sought to enforce the guarantees.

In the original decision, *National Australia Bank Ltd v Rice* [2015] VSC 10, the judge upheld Rose's claim for a set off for loss based on breaches of the Banking Code of Practice by NAB. NAB appealed the decision and in *National Australia Bank Ltd v Rose* [2016] VSCA 169, the Court of Appeal found in favour of Rose.

The Banking Code of Practice as in force at the time required a bank to give prominent notice to the guarantor that the guarantor should seek independent legal and financial advice, that he or she could refuse to enter the guarantee, that there were financial risks involved, and that the guarantor could limit liability and request information about the facility. It also required the bank not to ask the guarantor to sign unless it had provided the required information and allowed the person until the next day to consider the information.

The trial judge found that these requirements were contractual warranties by the bank.

The bank's form of guarantee contained the required disclosures on the front page of the guarantee document. However the manager who visited Mr Rose for signing of the documents did not verbally state these matters. He also signed up Mr Rose at the same time as he delivered the documents to him – he did not leave the documents until the next day for Mr Rose to consider the information.

The trial judge believed Mr Rose's claim that if he had been told by the bank manager that he should obtain legal advice before signing, he would have done so, and that if he had known his liability, he would never have signed any of the guarantees.

The Court of Appeal (in a 2 to 1 majority) agreed with the trial judge's findings that the Banking Code of Practice had not been complied with.

The judge in the minority thought that sufficient written notice was given and that even if the bank had given Mr Rose until the next day to sign the documents, it was highly probable that he would not have bothered to read them.

Directors' liability for compliance breaches

In *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, Justice Edelman considered the liability of the former directors of Storm Financial, Emmanuel and Julie Cassimatis.

ASIC alleged that the directors had breached their duties of care and diligence under section 180(1) of the Corporations Act during a period when they were the only shareholders of Storm Financial and the company was solvent. The alleged breaches were that the directors had caused or permitted Storm Financial to provide advice to investors using a model that caused Storm Financial to breach the Corporations Act, and that caused or permitted Storm Financial to provide financial advice in a manner that breached the Act.

The judge found that the directors had breached their duties because a reasonable director of a company in Storm Financial's circumstances and with Mr and Mrs Cassimatis' responsibilities would have been aware of a strong likelihood of a contravention of the Corporations Act if he or she exercised his or her powers to cause or permit the Storm Financial investment model to be applied to clients, particularly those in retirement or near retired with few assets and limited income.

The judge held that the course of conduct by the directors was a single contravention by each director and not a contravention for each investor.

Under section 1317S of the Corporations Act, conduct of a director may be excused. The judge declined to excuse the directors, even though he thought that they acted honestly, because of their significant roles and the seriousness of the contraventions.

ASIC argued that a breach of the Corporations Act by the company was required to establish a breach by the directors of their duties under section 180(1) of the Act. The judge expressed doubts about this but also found that a breach of the Corporations Act by Storm Financial was not in itself sufficient to establish a breach by the directors ("stepping stone" liability).

The judge also rejected ASIC's submission that under section 180(1), directors owe a duty not only to the company but to the public at large.

The directors argued that where the directors and the shareholders were the same and the company was solvent (as was the case with Storm Financial), ratification of the actions of the directors by the shareholders was implicit, and so the directors could not be in breach of section 180(1). The judge did not agree, finding that shareholders could authorise acts which are breaches of the Corporations Act but cannot ratify them.

Consumer law enforcement issues paper

The Productivity Commission has released an issues paper on the enforcement and administration of Australian consumer laws. The paper was issued pursuant to an inquiry which was referred to the Commission by the Treasurer in April 2016. Submissions closed on 30 August 2016 and a draft report is due in November 2016.

EDI framework issues paper

On 9 September 2016 Treasury released an issues paper as part of the review of the financial system's external dispute resolution and complaint schemes. The review was announced in April 2016.

The issues paper includes questions about the effectiveness of current schemes and regulation of the schemes. It specifically asks whether ASIC should be given oversight of the Superannuation Complaints Tribunal and also whether there would be any benefit in having a single scheme. It also asks whether there should be an additional forum in the form of a "tribunal" to improve user outcomes.

FOS small business jurisdiction

The Financial Ombudsman Service issued a consultation paper on 12 August 2016 seeking views on proposals to extend its small business jurisdiction. The proposals in the paper include:

- increasing the upper limit on claims from $500,000 to $2 million;
- raising the cap on compensation from $309,000 to $2 million;
- enabling FOS to consider debt related disputes up to $10 million for a single loan contract (an increase from the current $2 million); and
- increasing the size of credit facilities subject to a prohibition on debt recovery action against the small business debtor while FOS is considering the dispute from the current $2 million up to $10 million.

Submissions were due by 23 September 2016.

ASIC market supervision regulatory priorities for 2016-2017

ASIC released its market supervision regulatory priorities letter on 27 July 2016. It identifies the key regulatory priorities over the 2016-2017 period as:

- cyber resilience and technology disruption;
- firm culture and conduct; and
- handling of confidential information and managing conflicts of interest in research and corporate advisory.

ASIC enforcement report for the first half of 2016

ASIC released its six-monthly enforcement report on 8 August 2016. During this period ASIC has commenced 101 investigations and completed 93 investigations. It has laid 96 criminal charges, issued 75 infringement notices and secured $13.4 million in compensation and remediation for consumers and investors.

In the next six months, the focus of ASIC enforcement activity will be market integrity, corporate governance and financial services.

In financial services, ASIC says that it will concentrate on enforcement of the Future of Financial Advice reforms, lifting the standards of financial advice providers, responsible lending practices in the credit industry, and ensuring that responsible entities of managed investment schemes comply with disclosure and conduct obligations.

ASIC investigates Youi

ASIC is investigating Youi insurance following allegations made by five whistleblowers to Fairfax Media. The Fairfax report alleges that customers were billed for policies they never signed for.

Cash Converters and ASIC

In late August 2016, Cash Converters announced that it had been co-operating with an ASIC investigation into its compliance with the responsible lending provisions for small amount credit contracts and that its board had decided to book a provision in the range of $12-13 million in its 2016 financial year statements in respect of any potential compliance issue.

Westpac refund of foreign transaction fees

ASIC has announced that Westpac has refunded approximately $20 million in credit card foreign transaction fees on the basis that they were incorrectly charged for Australian dollar transactions processed by overseas merchants. Westpac's terms and conditions did not clearly state that foreign transaction fees would be charged for such transactions.

ANZ refunds periodic payment fees

ANZ is refunding $28.8 million to nearly 400,000 accounts because of incorrectly disclosing when periodical payment fees applied. ANZ's account terms and conditions defined periodical payments as transactions to another person or business. Therefore transactions by customers to another account in the customer's own name at ANZ or another institution were not covered by this definition and could not be charged periodical payment fees.

When ANZ discovered it was charging fees to customers for transactions on their own accounts, it reported the matter to ASIC, and it is now conducting a refund program. ANZ is also amending its terms and conditions to clarify when periodical payment fees will apply.

The ANZ refund was reported by ASIC on 5 September 2016.

CommSec infringement notice penalties

Commonwealth Securities Limited (**CommSec**) has paid a penalty of $700,000 to comply with two infringement notices issued by the Markets Disciplinary Panel and refunded $1.1 million in brokerage to more than 25,000 clients.

ING Bank compensation for super customers

ASIC has announced that ING Bank will compensate nearly 25,000 members of the ING Direct Superannuation Fund (**Living Super**) approximately $5.3 million because of ASIC concerns that statements in promotional material about fees for Living Super were potentially misleading.

Living Super was promoted as having no fees for a Cash Investment Option, no investment or administration fees for a Balanced Option, and as having low fee options. However customers were paid a lower interest rate on the cash portion invested with ING Bank than the rate paid by ING Bank to its Saving Maximiser customers for the relevant investment options. The promotions also did not indicate that the no fees or low fees features might not continue if ING Bank was no longer the investment manager.

CBA pays responsible lending infringement notices

On 14 September 2016, ASIC announced that Commonwealth Bank of Australia (**CBA**) paid infringement notices totalling $180,000 in relation to personal overdraft facilities. As a result of a programming error in the automated serviceability calculator used to assess applications for personal overdrafts, CBA failed to take into account declared housing and living expenses of some applicants during the period from July 2011 to September 2015. The calculator substituted $0 for housing expenses and living expenses were based on a benchmark which in some cases was substantially less than the declared living expenses of the consumer. The issue affected approximately 10,500 customers. CBA is also writing off a total of $2.5 million in personal overdraft balances.

Optus refunds mobile phone insurance customers

ASIC has reported that Optus Insurance Services Pty Ltd (**Optus**) is refunding approximately $2.4 million to about 175,000 customers.

Optus notified ASIC that it had failed to provide certain customers with a product disclosure statement and financial services guide.

Further breaches were later found. For example, some customers did not receive one month's free insurance under a promotional offer and other customers were given the wrong cover.

Optus has appointed an independent firm to conduct a comprehensive review of its compliance functions.

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