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In this double edition's first article, Andrea Beatty and Gabor Papdi discuss the Full Federal Court's decision in *ASIC v Westpac Securities Administration Ltd* (2019) 373 ALR 455; [2019] FCAFC 187; BC201909716. The case concerned whether two Westpac subsidiaries had given personal advice about financial products when it contacted customers to persuade them to consolidate their non-Westpac superannuation into their Westpac superannuation account. The subsidiaries' financial services licences only permitted them to give general advice. The Court (Allsop CJ, Jagot and O'Bryan JJ), in three separate judgments, unanimously held that personal advice had been provided, overturning the finding of the trial judge (Gleeson J). In the phone calls, the subsidiaries had impliedly recommended that the customers consolidate their superannuation into their Westpac superannuation account in circumstances where a reasonable person would expect the subsidiaries to have considered the customers' objectives, financial situation or needs. As a result, personal advice had been given within the definition of s 766B(3)(b) CA. The subsidiaries were held to have contravened the obligations imposed by ss 946A (to give statement of advice), 961B (to act in the customer's best interests), 912A(1)(b) (to comply with conditions of licence) and 912A(1)(c) (to comply with financial services laws). The Court also rejected the subsidiaries' cross-appeal against the finding that they had contravened s 912A(1)(a) in failing to do all things necessary to ensure that the financial services were provided efficiently, honestly and fairly.

In the second article, the same authors consider the decision of Perram J in *ASIC v Westpac Banking Corp (Liability Trial)* (2019) 139 ACSR 25; [2019] FCA 1244; BC201907218, referred to in some places as the wagyu and shiraz case. ASIC originally brought a civil penalty proceeding against Westpac in relation to alleged breaches of responsible lending obligations in home loan application processes from 2011 to 2015. The primary alleged breach was the use of the Household Expenditure Measure (a generic benchmark), instead of the customer's declared living expenses in their loan application, in working out the customer's monthly available cash to service the loan. The breaches concerned over 250,000 loans. ASIC and Westpac agreed on a $35 million penalty. Perram J declined to make the order as the statement of agreed facts did not disclose a contravention of the National Consumer Credit Protection Act 2009 (Cth) (**NCCP Act**): *ASIC v Westpac Banking Corp* (2018) 132 ACSR 230; [2018] FCA 1733; BC201810662. As a result, the liability trial was then conducted in respect of the same breaches. The breaches were alleged to be in contravention of the obligation under ss 128(c) and 129 of the NCCP Act to assess whether the credit contract will be unsuitable for the consumer. A credit contract is unsuitable if, at the time of assessment, it is likely the consumer could not comply with the financial obligations or only do so with substantial hardship: s 131(2). ASIC's case was that, because of the alleged breaches, each of Westpac's impugned loan assessments was not an "assessment" within the meaning of the Act; as a result, the obligation to assess under s 128(c) was not met when the credit contracts were entered into. ASIC did not allege that the loans were unsuitable or that the assessments dealt with irrelevant matters. Perram J held that ASIC had failed to make out the alleged breaches on the facts. Further, as a matter of statutory construction, the bank did not have to use the consumer's declared living expenses when assessing unsuitability. The bank had to ask and answer the unsuitability questions; but it had a discretion as to how it did so. Nor was there any minimum quality of assessment for it to be an "assessment" under the Act.

In *Yeo v Alpha Racking Pty Ltd, in the matter of Alpha Racking Pty Ltd* [2019] FCA 1338; BC201907962, O'Bryan J made orders placing the defendant company in provisional

liquidation on the basis of a strong prima facie case of phoenixing. The phoenixing was effected by a sham agreement between the defendant and a company already in liquidation, entered into a day before that company was wound up by the Court, pursuant to which the defendant was to take on that company's assets and business.

In *Scott Russell Constructions Pty Ltd (in liq) v Queensland Building and Construction Commission* (2019) 139 ACSR 79; [2019] FCA 1378; BC201908069, Greenwood J refused a director's application for leave to bring a derivative suit on behalf of the company in circumstances where the liquidator did not consent. His Honour accepted, with some pause, authority that the equitable jurisdiction to grant leave survives the statutory provisions of the Corporations Act, even if a liquidator has been appointed: at [51], applying *Chahwan v Euphoric Pty Ltd* (2008) 245 ALR 780; 227 FLR 43; [2008] NSWCA 52; BC200802354 at [124(j)]. His Honour was also satisfied that the Federal Court had that jurisdiction: at [59]. However, the proposed cause of action based on unconscionable conduct in trade or commerce by a statutory home warranty insurance building authority was not sufficiently arguable. The Queensland Fair Trading Act applied to render state authorities liable for misleading conduct in trade or commerce in respect of the carrying on of a business. However, the allegations the basis of the proposed suit did not relate to the authority's insurance-related business but rather its regulatory functions of recovering money paid out to homeowners.

In *Re Kelly, Halifax Investment Services Pty Ltd (in liq) (No 5)* (2019) 139 ACSR 56; [2019] FCA 1341; BC201907543, Gleeson J refused an application to issue a letter of request to a New Zealand Court in in respect of two related companies in Australia and New Zealand that had commingled funds. Her Honour declined to issue the letter of request as in the circumstances it was premature to do so as interested parties had not had sufficient opportunity to respond to the application. Her Honour gave judicial advice to the effect the liquidators of the Australian company were justified in continuing to use the commingled funds to conduct the companies' business.

In *Re Banksia Securities Ltd (in liq) (recs and mgrs apptd)* [2019] NSWSC 136; BC201901213, Black J approved the remuneration of special purpose receivers in quite particular circumstances involving previous litigation, holding that there was no disentitling conduct.

Articles

[327] Walking the line between general and personal advice: Australian Securities and Investments Commission v Westpac Securities Administration Ltd

Andrea Beatty, *PARTNER and* **Gabor Papdi**, *LAWYER, PIPER ALDERMAN*

A landmark decision[1] has been handed down on the distinction between "general advice" and "personal advice". On 28 October 2019, the Full Court of the Federal Court of Australia (Allsop CJ, Jagot and O'Bryan JJ) gave its judgment in the appeal of the Federal Court's decision[2] in civil penalty proceedings brought against two Westpac Group subsidiaries — Westpac Securities Administration Ltd and BT Funds Management Ltd (collectively, Westpac) — in respect of sales practices employed in a campaign to encourage customers to consolidate their superannuation into their Westpac superannuation account.

The Full Federal Court upheld the Australian Securities and Investments Commission's (ASIC) appeal on the main issue of whether Westpac provided personal advice to customers that it contacted to persuade them to consolidate their superannuation in their Westpac superannuation account. It dismissed Westpac's cross-appeal in relation to the finding that Westpac contravened its obligation under s 912A(1)(a) of the Corporations Act 2001 (Cth) to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (the *efficiently, honestly and fairly* obligation).

Material facts

The proceedings concerned a sample of 15 calls to customers made during campaigns in 2014 and 2015 to increase Westpac's superannuation funds under management by persuading customers to consolidate their non-Westpac superannuation into their Westpac superannuation account. The first communication to customers was a written communication offering to conduct a free search for other superannuation accounts held by those customers. Follow up telephone calls were then made to customers in which Westpac offered to arrange to consolidate (ie, transfer the balance of) the customer's non-Westpac accounts into their Westpac account.

In the telephone calls, Westpac employees, as per their training under the "QM [Quality Monitoring] Framework":

- gave a "general advice warning" to the customer together with an offer to refer the customer to a Westpac-licensed financial adviser if the customer wished to get personal advice
- asked questions about what the customer considers to be important to them in relation to superannuation — questions were a mixture of open-ended questions and leading questions focusing on fees, investment options, insurance and administrative convenience
- asked leading questions about what benefits the customer perceives in relation to combining their superannuation accounts
- used "social proofing" techniques to reassure the customer that their concerns and objectives are logical and widely held
- linked the features of consolidating superannuation into the Westpac superannuation account to the customer's stated concerns and objectives
- questioned and attempted to overcome objections or hesitation by the customer
- sought to obtain the customer's agreement to Westpac arranging for non-Westpac superannuation account balances to be transferred into the customer's Westpac superannuation account before the end of the call

The Westpac subsidiaries' Australian Financial Services (AFS) licences permitted them to give general advice only in relation to

financial products. Westpac provided the employees with training which included the need to be careful to not give personal advice and on how to deliver the sales message whilst giving general advice only.

First instance decision

ASIC commenced proceedings against Westpac in December 2016 and the first instance decision was given on 21 December 2018. In the first instance decision, Gleeson J held that:

- Westpac did not provide personal advice to customers in the 15 calls the subject of the proceedings.
- However, if the conclusion above is incorrect, Westpac contravened the duty to act in the customers' best interests in s 961B(1) of the Corporations Act, and further contravened ss 946A (obligation to give a statement of advice), 961B(1) (civil penalty provision consequent on contravening s 961B), 912A(1)(b) (obligation to comply with the conditions on its licence) and 912A(1)(c) (obligation to comply with the financial services laws).
- In adopting and implementing the QM Framework to encourage customers to consolidate either superannuation in a Westpac superannuation account, Westpac contravened the efficiently, honestly and fairly obligation.[3]

Appellate decision

The Full Federal Court allowed ASIC's appeal on the personal advice issue and therefore found consequential contraventions of ss 946A, 961B, 912A(1)(b) and 912A(1)(c). It dismissed Westpac's cross-appeal and upheld Gleeson J's finding that Westpac had contravened the efficiently, honestly and fairly obligation. Though each judge gave separate reasons, their conclusions were unanimous on each issue.

Reasons for decision

For substantially similar reasons, each judge held that the implied recommendation to customers to consolidate their superannuation in their Westpac superannuation account were given in circumstances where a reasonable person might have expected Westpac to have considered one or more of the person's objectives, financial situation or needs, and therefore personal advice as defined in s 766B(3)(b) of the Corporations Act.

Allsop CJ held that the recommendation must be characterised in the context in which it is made — it cannot be assessed in isolation from the rest of the exchange between the caller and the customer. The recommendation to accept Westpac's offer to arrange the consolidation of the customer's superannuation was made after the caller had elicited information about the customer's objectives and financial situation, and carried with it an implied statement of opinion that consolidating one's superannuation would meet the customer's objectives. In other words, a reasonable person would expect what they told the caller to be taken into account by the caller in the making of the recommendation. Allsop CJ also held that the level of intellectual engagement with the customer's circumstances that will amount to "consideration" will depend on the context in which the advice is given, and does not necessarily require the high level of intellectual engagement that Gleeson J held was required in the first instance decision.

Jagot J held that the following characteristics of the recommendations in the calls caused them to be made in circumstances where a reasonable person might expect that the caller would have taken into account their objectives, financial situation and/or needs:

- the ostensible purpose of the call, as represented to the customer, was to help the customer
- there was an existing relationship between Westpac and the customer
- superannuation is a significant financial matter and of utmost importance for most persons
- Westpac elicited information about the customer's objectives during each call
- no reasonable customer would expect that their current superannuation provider would recommend that they consolidate their superannuation in their Westpac superannuation account if it was contrary to their interests.

Jagot and O'Bryan JJ also expressly rejected Westpac's arguments seeking to establish a distinction between "mere marketing" and advice, holding that there is no threshold requirement for a statement of

opinion or recommendation to be of an advisory character before it is capable of being financial product advice.

O'Bryan J held that the recommendations in the calls were given in circumstances where a reasonable person might expect that the caller would have taken into account their objectives, financial situation and/or needs because:

- the call concerned a very significant financial decision from the customer's perspective
- the call was made in the context of an existing customer relationship
- Westpac is a trustee in respect of the customer's Westpac superannuation account, meaning that the customer would reasonably expect Westpac to act for the customer's benefit and in the customer's interest
- the caller asked the recipient about their objectives in relation to superannuation and the social proofing language would reinforce the customer's belief that the caller was taking the customer's responses into account
- the call conveyed an implied recommendation for the customer to take action to consolidate their superannuation, as opposed to a mere statement of opinion that doing so would be advantageous,

and the effect of these factors outweighed the general advice warning, the fact that the advice was given free of charge and that, in some cases, the callers admitted a lack of knowledge about the customer's personal circumstances.

All three judges held that s 766B(3) does not require the advice to be based on the personal circumstances considered, or reasonably expected to have been considered, in order to be financial product advice. Advice can be financial product advice even if the adviser disregards the customer's personal circumstances in giving the advice. Though the result on this point was unanimous, Allsop CJ and O'Bryan J held that the words "in circumstances where" do not require a causal connection between the circumstances considered and the advice, whereas Jagot J held that those words are themselves capable of conveying the causal connection required.

Once it was found that the calls involved Westpac giving personal advice to customers, findings of breaches of ss 946A, 961B(1) and 912A(b) and (c) followed as a matter of course. No statement of advice was given to any customer, thereby breaching s 946A. In relation to s 961B, it was found that Westpac neither considered the customers' interests when advising them to consolidate their superannuation into their Westpac superannuation account nor attempted to advise customers whether it was in their interests to follow the advice. Acting on the belief that they were giving only general advice, the callers did not take the safe harbour steps in s 961B(2). Nor did Westpac otherwise consider customers' interests — the evidence showed that it acted in its own interest to increase funds under management, and if consolidating superannuation into their Westpac superannuation account happened to be in the customer's best interest, this was a fortuitous coincidence. Breaches of s 912A(b) and (c) — to comply with the conditions on the AFS licence and to comply with the financial services laws respectively — followed automatically from providing personal advice when not authorised to do so by their AFS licence.

All three judges upheld Gleeson J's finding in the first instance decision that Westpac's use of the QM Framework, including the social proofing techniques, during the calls contravened the efficiently, honestly and fairly obligation. Material to this conclusion was that Westpac pursued its own interests, regardless of whether they were also its customers' interests, and failed to warn about or bring to customers' attention issues that would be material to any decision to consolidate superannuation in their Westpac superannuation account.

Significance of the decision

Whilst at the time of writing the deadline for Westpac to seek to appeal the decision of the Full Federal Court had not yet passed, the decision is significant because it provides greater clarity on the distinction between general and personal advice in the marketing context. It makes clear that if one or more of the customer's objectives, one or more of their needs or one or more aspects of their financial situation are considered in the giving of a recommendation or statement of opinion; or the recipient of the advice (ie, the customer) would reasonably expect the adviser to consider such things, then the advice will be personal advice. A common-sense approach is

required to determining the question of whether the circumstances in which advice is given are such that a reasonable recipient would expect their personal circumstances to be taken into account. A general advice warning cannot operate to turn what is otherwise personal advice into general advice.

Whilst not all marketing will amount to financial product advice and it will remain possible to sell financial products under a general advice model, the sales techniques that can be employed under a general advice model are much more restricted than may previously have been understood. Sales techniques that seek to make a personal connection with the customer will result in personal advice being given if they would result in a reasonable person expecting the salesperson to take into account the customer's circumstances in giving the advice. The notion that one can ask a customer about their objectives, needs or financial circumstances without creating an expectation that it will be taken into account has been comprehensively rejected by the Full Federal Court (except, perhaps, if one tells the customer that their answers will be ignored and the advice will be the same regardless of how they responded).

The distinction between a statement of opinion and a recommendation also takes on greater significance, with a recommendation more likely to give rise to an expectation that the customer's circumstances are taken into account than a mere statement of opinion.

In relation to the best interests duty in s 961B(1), the decision makes clear that it is concerned with the conduct of the adviser in formulating the advice, rather than the substance of the advice given. It is concerned with the process of providing advice. It is therefore not possible to "get lucky" with the best interests duty by not considering the client's interests but nevertheless fortuitously giving advice that is in the recipient's best interests to act on. Section 961B(1) requires the process of providing the advice must be directed to the recipient's interests rather than the adviser's interests, making it difficult to comply with in a pure marketing scenario where the primary objective is to sell a product to the recipient of the advice.

Conclusion

In its decision in this case, the Full Federal Court provided much-needed appellate court authority about the distinction between general and personal advice. Following this decision, providers of financial advice should take a common-sense approach to the issue — if the adviser asks about the customer's objectives, financial situation or needs and/or the customer provides information about those things, one would naturally expect it to be taken into account when formulating the advice, resulting in personal advice being given. This decision makes it considerably harder to sell financial products under a general advice-only model and sellers of financial products must take greater care that they do not unwittingly provide personal advice.

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Footnotes

1. *ASIC v Westpac Securities Administration Ltd* (2019) 373 ALR 455; [2019] FCAFC 187; BC201909716.
2. *ASIC v Westpac Securities Administration Ltd* (2018) 133 ACSR 1; [2018] FCA 2078; BC201812686.
3. A declaration to this effect was made. As the contravening conduct occurred prior to the commencement of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth), a penalty could not be imposed for contravention of s 912A(1)(a).

[328] Australian Securities and Investments Commission v Westpac Banking Corp (Liability Trial)

Andrea Beatty, *PARTNER and* **Gabor Papdi**, *LAWYER, PIPER ALDERMAN*

On 13 August 2019, the Federal Court of Australia (Perram J) delivered its decision in the civil penalty proceedings brought by the Australian Securities and Investments Commission (ASIC) against Westpac Banking Corp (Westpac) in respect of alleged contraventions of s 128 of the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act). ASIC's application was dismissed with costs, Perram J having found against ASIC both on its proffered construction of the NCCP Act and the facts it alleged amounted to the contravention.[1]

Procedural history

ASIC commenced civil penalty proceedings against Westpac in March 2017 in relation to alleged breaches of responsible lending obligations in respect of Westpac's home loan application assessment processes between December 2011 and March 2015. Specifically, the following conduct was alleged to have breached responsible lending obligations:

- In applying the Serviceability Rule in its automated decision system, Westpac used the Household Expenditure Measure (HEM) benchmark value, instead of the amount of living expenses that the consumer stated in their loan application, in computing the consumer's monthly cash surplus or shortfall (living expenses issue).
- In relation to loans with an initial interest-only period, Westpac computed monthly repayments for use in the serviceability calculation on the basis that the principal amortised over the entire term of the loan, rather than the residual term of the loan after the expiry of the initial interest-only period (interest-only loans issue).

The alleged contraventions concerned 261,987 loans. ASIC and Westpac agreed on a settlement in which Westpac would pay a pecuniary penalty of $35 million plus ASIC's costs. However, in a decision on 13 November 2018,[2] Perram J refused to make the orders sought by Westpac and ASIC, as the statement of agreed facts submitted by ASIC and Westpac did not disclose any contravention of the NCCP Act. That decision is explained in an earlier case note.[3]

The case was then argued on its merits before Perram J, leading to the decision that is the subject of this case note.

Issues

At the core of both the living expenses issue and the interest-only loans issue is the allegation that Westpac contravened its obligation under s 128(c) of the NCCP Act to make an assessment in accordance with s 129 covering the day on which the credit contract is entered into. Section 129 requires such an assessment to specify the period that it covers and assess whether the credit contract will be unsuitable for the consumer if the contract is entered into or its credit limit increased during that period. Section 131(2) sets out the circumstances in which a credit contract will be unsuitable for a consumer. Relevantly for the living expenses issue and the interest-only loans issue, a credit contract will be unsuitable for a consumer if, at the time of assessment, it is likely that the consumer could not comply with their financial obligations under it or could only comply with substantial hardship.[4] ASIC's case rested on the proposition that Westpac's assessments of the 261,987 loans were so defective that they did not amount to an "assessment" under s 129, leaving the s 128(c) obligation unfulfilled at the time of entry into the credit contract. This turned on the proper construction of ss 128(c), 129 and 131(2)(a) of the NCCP Act.

Important to understanding the decision are the things that ASIC did not plead in these proceedings. ASIC did not allege that any of the 261,987 loan contracts entered into by Westpac were unsuitable for those consumers. ASIC also did not allege that Westpac's assessment attempted to consider something other than whether the consumer could likely comply with their financial obligations under the home loan or that they could only do so with substantial hardship (referred to as "the s 131(2)(a) Questions" throughout the judgment).

Decision

On the living expenses issue, it was held that the NCCP Act does not require a licensee to use the consumer's declared living expenses when assessing whether or not the credit contract will be unsuitable under s 131(2)(a). On the interest-only loans issue, it was held that the NCCP Act does not require a licensee to use expected repayment amounts at the expiry of the initial interest-only period in preference to any other amount in determining whether or not the credit contract will be unsuitable under s 131(2)(a). All that is required under s 129 is for the licensee to ask and answer the s 131(2)(a) Questions and, in relation to both issues, Westpac did ask and answer those questions.[5]

It was also held that the assessment under s 129 is a "thing" resulting from the process of assessment, rather than a legal construct. Consequently, the NCCP Act does not impose any threshold conditions on an assessment of unsuitability (other than those set out in the text of s 129), below which the assessment is invalid and therefore not an assessment for the purposes of s 128. How the credit provider carries out that assessment is a matter within its discretion.[6]

ASIC's case also failed on the facts on the living expenses issue. Central to that case was that by using the HEM value instead of the consumer's declared living expenses in the Serviceability Rule, Westpac failed to have regard to the consumer's financial situation in carrying out that assessment. However, in another rule in its automated decision system — the "70% Ratio Rule" — Westpac did take into account the consumer's declared living expenses.[7]

Reasons

Living expenses issue

Section 129(b) of the NCCP Act requires a licensee to assess whether the credit contract will be unsuitable for the consumer — that is, whether it will satisfy any of the criteria in s 131(2). Section 130(1) requires a licensee to, *before the making of the assessment*, make reasonable inquiries about the consumer's financial situation (among other things). It was noted that each of the things that a credit provider must inquire into under s 130(1) link directly to particular criteria for unsuitability in s 131(2) — specifically, the requirement to make reasonable inquiries about the consumer's financial situation links directly to whether the consumer will be unable to comply with their financial obligations under the contract or only able to comply with substantial hardship.[8]

However, all that follows from the links between information items in s 130(1) and unsuitability criteria in s 131(2) is that the NCCP Act requires a licensee to collect information for the purpose of assessing whether or not a credit contract is unsuitable, rather than for its own sake. It does not follow that that purpose can only be achieved by taking into account all information collected, regardless of its relevance or materiality to the assessment of unsuitability.[9] Perram J gave examples of the other kinds of information, such as irregular income or capital assets, which are no less "about the consumer's financial situation" than declared living expenses, but which can rightly be disregarded in considering the s 131(2)(a) Questions because of their low relevance to loan serviceability. So far as Pt 3-2 Div 3 of the NCCP Act prescribes any mandatory matters to be taken into account in an assessment under s 129(b), it is only those aspects of a consumer's financial situation that are necessary to determine whether or not the credit contract will be unsuitable.[10]

It was not accepted that the consumer's declared living expenses are necessary to determine whether or not the consumer could comply with their financial obligations under the credit contract or could only comply with substantial hardship. Simply labelling something as a living expense, and the fact that the consumer incurs that expense on their current lifestyle, does not make them an unchangeable aspect of the consumer's financial situation. Some expenses are entirely discretionary in nature, and represent a standard of living significantly above any objective concept of "substantial hardship". A consumer may choose to, and can be expected to, forgo particular living expenses in order to meet their financial obligations under a credit contract.[11]

Perram J held that the only way that a consumer's declared living expenses can be necessary to answer the s 131(2)(a) Questions is if there are some living expenses which cannot be forgone or reduced below some minimum value. However, this is again not determined by the mere labelling of an expense item. Perram J illustrated the

reasoning with the "Wagyu beef … washed down with the finest shiraz"[12] example that made headlines in the immediate aftermath of the judgment. Everyone has to eat so there is a minimum amount that a consumer must spend on food. However, it does not follow that all food expenses declared by the consumer must be used in the assessment at their stated values. If a consumer currently dines extravagantly, they can reduce their expenditure on food without suffering substantial hardship. Whilst the Wagyu beef and shiraz example is an extreme one (and lightens up otherwise dry, technical analysis of Ch 3 of the NCCP Act), the reasoning is equally applicable to less opulent discretionary expenditure. The mere labelling of expenditure of being a particular category is not determinative; more information is needed to assess whether or not it can be forgone or reduced by the consumer.[13] The HEM benchmark, as "an estimate of the level of household expenditure that [a] consumer could reasonably be expected to spend to participate fully in society with a reasonable standard of living",[14] could be relevant to this inquiry, but this did not need to be decided because of the finding that an assessment under s 129 is a "thing" that cannot be invalid.

Interest-only loans issue

On this construction of the NCCP Act, ASIC's case on the interest-only loans issue also fell away. First, except in the case of a fixed rate loan, the actual amount of repayments at the end of the initial interest-only period are not known, as interest rates may change in the intervening period. To use the interest rate at the time of loan inception would be to assume that they are functionally equivalent to fixed rate loans, and to require one estimate of future repayments to be used in preference to another estimate. Though the consumer's entire financial position is not a mandatory consideration for answering the s 131(2)(a) Questions as part of the s 129 assessment, ASIC's position would have required Westpac to disregard one part of the consumer's financial situation (repayments during the initial interest-only period) in favour of another, more uncertain, part of the consumer's financial situation (the expected repayments at the expiry of the initial interest-only period). This position is internally inconsistent unless there is some implied requirement of conservatism in the s 129 assessment obligation. Once it was accepted that the manner of conducting an assessment was within the credit provider's discretion, this position could not succeed.

An assessment as a "thing" rather than a legal construct

Though the question did not arise because Westpac was found to have taken into account the consumers' declared living expenses and considered the s 131(2)(a) Questions in its assessment, Perram J gave obiter dicta reasons for why an assessment under s 129 is a "thing" rather than a legal construct capable of invalidity.

Section 132(1) requires a licensee to give the consumer a copy of the assessment on request by the consumer, with non-compliance punishable by a civil penalty. If it follows that a defective assessment is invalid and therefore not an assessment, there would be nothing that a consumer would be entitled to in the case that the licensee carried out a defective assessment, or that it would be impossible for the licensee to comply with their obligation under s 132(1).[15] Rather, what s 132(1) requires a licensee to give to a consumer is a copy of the thing that results from the process of assessment. That an assessment can be copied also supports the view that it is a thing rather than a legal construct.

Perram J also held that construing an assessment as a "thing" rather than a legal construct is also more consistent with the text of ss 128 and 129, specifically the lack of any civil penalty attached to s 129. Construing "assessment" as a legal construct capable of invalidity would transform failure to comply with s 129, which does not carry a civil penalty, into contravention of a civil penalty provision. An intention to make contravention of s 129 punishable by a civil penalty could be more naturally expressed by making s 129 a civil penalty provision.[16]

Significance of the case

The authors consider the case to be less significant than what some of the commentary that immediately followed the decision suggests. Perram J applied orthodox approaches to statutory interpretation to determine the proper construction of s 129, and then applied them to Westpac's conduct.

It does not follow that this represents any lessening of responsible lending obligations. Rather, it recognises that the legislation allows credit providers considerable discretion in how they assess whether or not a credit contract is unsuitable for a potential debtor.

On the living expenses issue, it would appear to be a common-sense position (to the authors at least) that a consumer can be expected to forgo or reduce discretionary expenses in order to be able to afford repayments under a credit contract. This is particularly the case where the credit finances a necessity such as housing. Whether the reasoning in this decision applies in as strong terms to other kinds of credit, particularly personal lending financing discretionary expenditure, is a question for a future case. The reference to Wagyu beef and shiraz is illustrative and does not purport to represent the average consumer — it would have similar force if Wagyu beef and shiraz were replaced with takeaway food and mass-market beer.

On the interest-only loans issue, it is unobjectionable to acknowledge that future repayments under a variable rate loan are uncertain and any incorporation into a present assessment of unsuitability necessarily involves forecasts and estimates. It would be a very interventionist interpretation of the NCCP Act to imply into it a requirement to use a particular forecast of the future, or the most conservative foreseeable estimate of the future. Followed through to its logical end, requiring repayments at the end of the initial interest-only period based on present interest rates to be used in the serviceability calculation would also justify using expected income at the end of the interest-only period, with adjustments for expected wage growth and industry-specific information, to be used in the calculations answering the s 131(2)(a) Questions. However, nobody of note appears to be promoting this approach, and justifiably so as forecasts of the future are inherently uncertain.

Lastly, this case does not necessarily render responsible lending laws unenforceable. Any consideration of the Federal Court's decision must acknowledge that ASIC did not plead that any of the 261,987 loans in question were unsuitable in contravention of s 133(1) of the NCCP Act. ASIC also did not plead that Westpac failed to make reasonable inquiries into the consumers' financial situations or take reasonable steps to verify their financial situations before entering into the loans. The essence of ASIC's case was that the assessment process was defective and therefore any purported assessment was invalid, even though it did not result in an unsuitable credit contract being entered into. The main consequence is that, going forward, ASIC will likely need to pursue a similar case by identifying failures to make reasonable inquiries or take reasonable steps to verify information and seeking penalties for contravention of ss 128(d) and 130(1), or to identify unsuitable credit contracts entered into and seeking penalties for contravention of s 133(1). This is not necessarily undesirable, as it would result in ASIC's enforcement activities being focused on cases of genuine harm, rather than merely suboptimal conduct or reasonable exercises of discretion.

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This article was first published in the LexisNexis *Financial Services Newsletter* (newsletter), Vol 18 No 9 — October 2019. Authors' note: Subsequent to initial publication of this case note, ASIC has filed a Notice of Appeal to appeal this decision. At the time of republication here, the appeal has not yet been determined by the Full Federal Court.

Footnotes

1. *ASIC v Westpac Banking Corp (Liability Trial)* (2019) 139 ACSR 25; [2019] FCA 1244; BC201907218 at [6], [8] and [11].
2. *ASIC v Westpac Banking Corp* (2018) 132 ACSR 230; [2018] FCA 1733; BC201810662.
3. A Beatty and G Papdi "Responsible lending update: ASIC v Westpac Banking Corp" (2019) 34(10) *BLB* 180.
4. NCCP Act, s 131(2)(a).
5. Above n 1, at [8].
6. Above n 1, at [89]–[91].
7. Above n 1, at [86].
8. Above n 1, at [61].
9. Above n 1, at [62].
10. Above n 1, at [70]–[71].
11. Above n 1, at [74]–[75].
12. Above n 1, at [76].
13. Above n 1, at [77]–[79].
14. Above n 1, at [46].
15. Above n 1, at [88].
16. Above n 1, at [90].

Recent Cases

[329] Court makes orders to prevent phoenixing activities

Nicholas Bentley, Barrister at New Chambers

Yeo v Alpha Racking Pty Ltd, in the matter of Alpha Racking Pty Ltd [2019] FCA 1338; BC201907962 (5 September 2019, O'Bryan J)

[CA ss 461(1)(k), 472(2), 530C]

Court considers whether liquidators should be appointed as provisional liquidators of further company where strong prima facie case of phoenixing.

Facts

The first and second plaintiffs (**Liquidators**) were appointed as liquidators of the third plaintiff, Alpha Storage & Equipment Pty Ltd (**Alpha Storage**), by an order of the Court. The Court subsequently ordered under s 530C CA that the Liquidators be issued warrants to search and seize books and property of Alpha Storage. The Liquidators sought the warrants as they suspected that the business of Alpha Storage was being wrongfully transferred to the defendant, Alpha Racking Pty Ltd (**Alpha Racking**), a process referred to as phoenixing.

The Liquidators commenced proceedings seeking to wind up Alpha Racking on the "just and equitable" ground in s 461(1)(k) CA and for them to be appointed provisional liquidators per s 472(2). The application was heard urgently, with Alpha Racking represented by a solicitor. Since the solicitor had only been instructed on the day of the hearing, the application was heard as if it had been made ex parte.

Decision

O'Bryan J first considered the evidence. His Honour noted that Alpha Storage and Alpha Racking had purported to enter into a joint venture agreement whereby Alpha Storage would grant a charge and assignment of lease in favour of Alpha Racking. The assignment was dated the day before the liquidation occurred. Correspondence seized by the Liquidators showed an intention to liquidate Alpha Storage and start the business afresh through Alpha Racking, which up to that point had not carried on any business. His Honour found that there was a strong prima facie case that the joint venture agreement was a sham, that Alpha Racking knowingly engaged in "phoenixing" and that such conduct posed a real risk to the public interest.

His Honour then considered the principles governing the appointment of a provisional liquidator. An applicant seeking such an order generally needs to satisfy the Court that there is a reasonable prospect that a winding up order will be made, there is some good reason for intervention prior to the final hearing and such an appointment will be in the public interest, to maintain the status quo or to protect the company's assets.

Having regard to the evidence, his Honour was satisfied (1) that there was a reasonable prospect that an order for the winding up of Alpha Racking would be made and (2) that the appointment of the Liquidators as provisional liquidators was warranted.

[330] Proceedings against state authority not arguable under ACL

Nicholas Bentley, Barrister at New Chambers

Scott Russell Constructions Pty Ltd (in liq) v Queensland Building and Construction Commission (2019) 139 ACSR 79; [2019] FCA 1378; BC201908069 (26 August 2019, Greenwood J)

[CA ss 236, 237, 471B, 474, 477; *Competition and Consumer Act 2010* (Cth) Sch 2 ss 21, 22; *Fair Trading Act 1989* (Qld) s 24; *Queensland Building and Construction Commission Act* 1991 (Qld)]

Court considers whether individual director can bring proceedings on behalf of company in liquidation.

Facts

Scott Russell Constructions Pty Ltd (in liq) (**Company**) engaged in the business of residential construction in Brisbane. It entered into a contract with two homeowners to renovate their house. A dispute arose which was settled under a deed providing that the homeowners owed the Company $66,000 and that if the Queensland Building and Construction Commission (**QBCC**) issued the Company with a rectification order, the Company was liable for the costs of any rectification. The homeowners defaulted on their payments to the Company. However, QBCC also inspected the house and issued a rectification order for works costing up to $320,000.

QBCC paid $200,000 to the homeowners pursuant to the Home Warranty Scheme established under the Queensland Building and Construction Commission Act 1991 (Qld). QBCC subsequently issued the Company and its director, Mr Russell, with a Notice of Potential Debt and Scope of Works (**Decision**).

The Company and Mr Russell commenced proceedings in the Queensland Civil and Administrative Tribunal challenging the Decision. After allegedly being threatened by a representative of QBCC (**Alleged Conduct**), the Company, Mr Russell and his wife entered into a settlement deed with QBCC pursuant to which $130,000 was paid to QBCC.

The Company (now in liquidation) and Mr Russell subsequently commenced proceedings in the Federal Court asserting, inter alia, that the Alleged Conduct amounted to unconscionable conduct within the meaning of either ss 21 or 22 of the Australian Consumer Law (**ACL**). An application was filed by Mr Russell seeking leave to bring the proceedings on behalf of and in the name of the Company. QBCC and its former employee named in the proceeding made their own application, among others, seeking that the Statement of Claim be struck out with an order for costs.

Decision

Greenwood J was satisfied that the Court had inherent jurisdiction to determine whether Mr Russell should be granted leave to maintain the proceeding on behalf of the Company. However, his Honour did not agree that the Alleged Conduct involved a sufficiently arguable contravention of the ACL to warrant making the order sought by Mr Russell. Section 24 of the Fair Trading Act 1989 (Qld) provides that the ACL applies to the State of Queensland so far as the state carries on a business either directly or by an authority of the state. In reviewing the authorities on what constitutes "carrying on a business" and considering the provisions that establish the QBCC, Greenwood J concluded, for the purposes of the application, that QBCC carried on an insurance undertaking. However, his Honour noted that the Alleged Conduct did not occur in the course of QBCC conducting any insurance activities, but rather in the course of regulatory functions and in connection with the recovery of monies paid by QBCC to the homeowners.

Accordingly, Greenwood J was not satisfied that the causes of action under the ACL were arguable. His Honour refused the application for leave to bring the proceedings on behalf of the Company and dismissed the proceedings with costs.

[331] Letter of request to High Court of New Zealand to facilitate liquidations

Nicholas Bentley, Barrister at New Chambers

Re Kelly, Halifax Investment Services Pty Ltd (in liq) (No 5) (2019) 139 ACSR 56; [2019] FCA 1341; BC201907543 (22 August 2019, Gleeson J)

[CA ss 436A, 581; Sch 2 s 90-15; *Trustee Act 1925* (NSW) ss 63, 81; *Companies Act 1993* (NZ) s 239(I)]

Court considers whether letter of request should be sent to High Court of New Zealand to facilitate liquidation of two companies with commingled assets and whether such assets may be used in liquidation of the Australian company.

Facts

The third plaintiff (**Halifax AU**) provided broking and investment services through online trading platforms. Halifax New Zealand Ltd (**Halifax NZ**) was a New Zealand company licensed as a derivatives issuer and was primarily an introducing broker, receiving commissions for referrals to Halifax AU. The first and second plaintiffs (**Liquidators**) were appointed to Halifax AU pursuant to a resolution of the board in accordance with s 436A CA. They were also appointed administrators of Halifax NZ pursuant to s 239(I) of the Companies Act 1993 (NZ). Both companies were subsequently wound up in their respective jurisdictions and the Liquidators were appointed to both companies.

Investigations revealed that up to 98% of the funds held by both companies were commingled, with the result that Halifax AU creditors may have claims in relation to funds held by Halifax NZ and vice versa. The Liquidators sought substantive relief pursuant to s 90-15(1) of the Insolvency Practice Schedule (Corporations) and ss 63 and 81 of the Trustee Act 1925 (NSW) in the nature of judicial directions concerning how the commingled funds should be distributed. Largely identical relief was also proposed to be sought in New Zealand. The Liquidators sought pursuant to s 581(4) CA an order that the Court issue a letter of request to the High Court of New Zealand requesting that it act in aid of and be auxiliary to the Court in relation to the liquidations. The Liquidators also sought directions and judicial advice in respect of using the commingled funds in the meantime to continue to operate and utilise Halifax AU's trading platforms.

Decision

Gleeson J first noted that s 581(4) CA provides that the Court may request a court of an external territory or country to act in aid of and be auxiliary to an external administration. However, the Court must have power to issue the request, the foreign court must have power to act on the request and the power must be exercised with regard to considerations of utility and comity. After analysing when it may be appropriate to issue such a request, her Honour concluded that, though likely appropriate, it would be premature to order the request. Gleeson J reasoned that parties who may wish to respond to the application should first be identified. This would enable any issues in dispute to be defined so that the request would be confined to the specific issues to be addressed by both courts. Her Honour was nevertheless satisfied that orders should be made to permit the liquidators to use the commingled funds to continue to operate the trading platforms as such costs were proportional to the benefits that would accrue to the investors in maintaining the funds held by those platforms.

[332] Court approves special purpose receivers' remuneration when backing funded proceedings

Owen Lunney, Solicitor

Re Banksia Securities Ltd (in liq) (recs and mgrs apptd) [2019] NSWSC 136; BC201901213 (21 February 2019, Black J)

[CA ss 283F, 283BB, 283HB, 425; *Uniform Civil Procedure Rules 2005* (NSW) r 26.4]

Court approves special purpose receivers' remuneration.

Facts

Banksia Securities Ltd (in liq) (recs and mgrs apptd) (**BSL**) operated as a non-bank lender and raised monies from the public by issuing debentures to investors pursuant to prospectuses and product disclosure statements, and advanced funds raised from debenture holders to third party borrowers for property investment and development purposes. BSL failed following a merger with another non-bank lender. Representative proceedings were subsequently brought by Mr Laurence Bolitho against, inter alia, BSL (**Bolitho Proceedings**) which, inter alia, claimed damages in respect of misleading statements and omissions in various prospectuses issued by BSL.

The receivers of BSL also brought proceedings (**BSL Proceedings**) against, inter alia, The Trust Company (Nominees) Ltd (**TrustCo**) in the Supreme Court of Victoria. By orders made by the Court, Messrs Lindholm and McCluskey were appointed as joint and several special purpose receivers (**SPRs**) of specified property of BSL, and particularly BSL's rights and entitlements in proceedings in the BSL proceedings.

The BSL Proceedings and the Bolitho Proceedings were subsequently settled as against TrustCo. However, an appeal (**Approval Appeal**) was subsequently brought by a debenture holder, Ms Botsman, in the Court of Appeal of the Supreme Court of Victoria. Ms Botsman sought orders setting aside the approval of that settlement, including the approval for the SPRs to settle the BSL proceedings. There was also an application relating to settlement with several other parties arising out of the BSL Proceedings and Bothilo Proceedings (**Approval Application**).

The Approval Appeal did not totally succeed, however, the Court of Appeal of the Supreme Court of Victoria allowed in part Ms Botsman's appeal against the commission payable to the funder and the legal costs payable in the Bolitho Proceedings, and relevantly, that the significance of the SPRs' proceedings against TrustCo and the work performed by the SPRs and their advisers in connection with the BSL Proceedings had not been sufficiently addressed with regard to determining an appropriate funding commission for the funder of the Bolitho Proceedings and that there was a further issue with there being no contradictor in the Approval Application.

The above matters gave rise to the issue in these proceedings of whether there should be any adjustment to the SPRs' remuneration in respect of the role of the funder in the Approval Appeal and the Approval Application.

Decision

Black J considered whether or not there was any disentitling conduct arising from the Approval Application and Approval Appeal with respect to the fixing of the SPRs' remuneration.

The issue raised in argument was whether the SPRs' agreement to support the application by the funder of the Bolitho Proceedings for commission and reimbursement of legal costs, neglected the interests of debenture holders. This included circumstances where in the Approval

Application, there was an absence of a contradictor, which according to the Court of Appeal of the Supreme Court of Victoria did not adequately address the risk of conflict and the difficulty for the Court in assessing the appropriateness of the commission claimed by the funder and legal costs in the Bolitho Proceedings.

Black J took the view that the SPRs did not neglect the interests of the debenture holders and the SPRs' position in respect of the appointment of a contradictor was not causative of subsequent events, and that the appointment of a contradictor would not have avoided the need for an appeal, which was likely to have occurred in any event. Accordingly, Black J approved the remuneration of the SPRs — which he viewed to be modest in the circumstances.

Recent Developments

[333] ACCC digital platforms and ad-tech inquiries

The Government has directed the Australian Competition and Consumer Commission (ACCC) to undertake a long term inquiry into digital platforms and to undertake an 18 month inquiry into advertising technology ('ad tech') as part of its response to the ACCC's Digital Platforms Report.

In December 2017, the ACCC was directed by the Government to inquire into the impact of digital platform services on the state of competition in media and advertising services markets. The Inquiry formed part of a package of reforms to modernise and update Australia's media laws.

The ACCC conducted an extensive and detailed inquiry over 18 months and provided the Government with a substantial Final Report setting out 23 recommendations to respond to the substantial market power that had arisen through the growth of digital platforms, their impact on competition, and implications for news media businesses, advertisers and consumers.

As part of the Government's response to the ACCC's report on 12 December 2019, the Government agreed that the ACCC will continue to inquire into digital platforms until 31 March 2025. An interim report will be provided to the Treasurer on 30 September 2020.

The ad-tech inquiry will focus on technologies facilitating the supply of online advertising to Australian consumers. These technologies gather information about consumers and use it to target them with highly personalised advertising. The inquiry will be completed by 31 August 2021, with an interim report to be released by 31 December 2020.

Digital technologies are going to be an increasingly important part of our economic and social landscape. Our reforms will ensure we get the balance right and position Australia as a leading digital economy.

The Government is delivering a regulatory framework that is fit for purpose and better protects and informs Australian consumers, addresses bargaining power imbalances between digital platforms and media companies, and ensures privacy settings remain appropriate in the digital age.

The terms of reference for both inquiries are available on the ACCC's website.

Treasurer, Media Release — 15 February 2020

treasury.gov.au

[334] National Accounts — December Quarter 2019

Today's National Accounts confirm that the Australian economy continues to grow. We are in our 29th consecutive year of economic growth — a record unmatched by any other developed nation.

The Australian economy grew by 0.5 per cent in the December quarter to be 2.2 per cent higher through the year. This is a step up from 1.8 per cent growth through the year to the September quarter.

This puts to rest the claim by some that the Australian economy was softening at the end of last year.

The Australian economy remains remarkably resilient in the face of significant economic shocks, which are outside the Government's control.

The bushfires have not had a significant effect on the National Accounts in the December quarter, but we know that the fires

have had a devastating impact on human life and communities. Most of the economic effect of the bushfires is expected to be felt in the March quarter.

The impact of the Coronavirus is serious and ongoing and is affecting economies the world over.

The Coronavirus is impacting on the tourism, education and export sectors, but also disrupting end-to-end supply chains.

The measures the Government has already put in place are designed to keep Australians safe and that remains our priority.

As the Prime Minister has foreshadowed, the Government is working on a targeted, measured and scalable fiscal response that is designed to keep businesses in business and Australians in jobs.

Our responsible fiscal management has given the Government the flexibility to respond to these economic shocks. We have already announced the $2 billion National Bushfire Recovery Fund, $1.3 billion in additional assistance in relation to the drought and $4.2 billion in infrastructure spending brought forward.

This comes on top of providing the biggest tax cuts in 20 years to hard working Australians, our $100 billion infrastructure plan and record spending on health, education and disability services. Having a strong budget position has allowed us to provide this support without raising taxes or cutting essential services.

Just this week, the OECD singled out Australia and Germany as two countries that are in a position to undertake additional fiscal measures in response to the Coronavirus without endangering debt sustainability.

The Australian labour market continues to perform well, with more than 1.5 million jobs created since we came to Government and the participation rate sitting around record highs. Annual jobs growth is 1.9 per cent — almost double the OECD average and almost three times what it was when we came to Government.

The housing market continues to stabilise with housing prices up 7.3 per cent through the year to February 2020 and the value of new housing finance commitments up 14.0 per cent through the year to December 2019.

The IMF continues to forecast that Australia will grow faster than the US, UK, Japan, France and Germany in 2020 and 2021.

We have maintained our AAA credit rating from all three major rating agencies — one of only 10 countries to do so.

In today's National Accounts numbers, growth over the quarter was driven by household consumption, public final demand and net exports, with inventories also contributing positively to growth.

Household consumption increased by 0.4 per cent in the December quarter. Expenditure increased in 13 out of 17 consumption categories with stronger growth recorded in discretionary goods and services, including furnishings and household equipment. Clothing and footwear also increased strongly.

Growth in household consumption continues to be supported by solid growth in household disposable income, which increased by 2.6 per cent over the second half of 2019, the strongest six monthly increase in five and a half years. This follows the Government's low and middle income tax offset which is putting more money into the pockets of hardworking Australians benefiting over 8 million people. Continued growth in labour income, low interest rates and an increase in housing prices are also supporting consumption.

Government consumption increased by 0.7 per cent in the December quarter 2019, and 5.3 per cent through the year, supported by the continued rollout of the National Disability Insurance Scheme, an increase in Pharmaceutical Benefits Scheme listings, as well as ongoing Aged Care initiatives such as home care packages. These initiatives are supporting Australians and ensuring that they have access to the essential services that they deserve.

Government investment is 2.4 per cent higher through the year. As has been the case for a number of years, government investment has been an important driver of growth and this is expected to continue. Government investment has been and will continue to be driven by strong growth in transport infrastructure investment which is supported by the Commonwealth's $100 billion 10 year pipeline. This will add the critical infrastructure which we need and also generate jobs and support private investment.

Net exports contributed 0.1 percentage points to GDP growth in the December quarter. A lower Australian dollar and strong international demand for Australian exports is supporting growth. Exports are also being supported by Free Trade Agreements which now cover around 70 per cent of our two way trading relationships compared to just 26 per cent when we came to Government. In the December quarter, the current account surplus was $1.0 billion and is the third consecutive current account surplus — the longest consecutive period of current account surpluses since the 1970s.

While new business investment fell by 0.8 per cent over the quarter there are positive signs emerging in the mining sector with mining investment increasing by 5.0 per cent. Investment intentions from the capital expenditure survey indicate that mining investment will continue to grow solidly in 2019–20 and 2020–21. Non-mining investment fell over the quarter, but is expected to be supported going forward by the elevated pipeline of non-residential building work.

Dwelling investment fell by 3.4 per cent in the December quarter. However, the established housing market has stabilised in recent months, with housing prices and turnover having picked up following significant declines in recent years. National auction clearance rates are back above their 10-year average and, in trend terms, the total value of new housing finance commitments has been rising since May 2019 after declining for more than two years.

Reflecting the pick-up in housing prices and turnover in the established housing market, ownership transfer costs partly offset the fall in dwelling and non-dwelling investment, contributing 0.2 percentage points to growth.

Turning to the income side, growth in compensation of employees (COE), which measures the national wage and salary bill, was up 1.0 per cent in the December quarter to be 5.1 per cent higher through the year. Through-the-year growth has been above 4.0 per cent for over two years — the strongest run of growth since 2012 and above the 10-year average of 4.6 per cent.

Average earnings grew by 0.5 per cent in the quarter to be 3.0 per cent higher through the year. This broader measure of average wage growth has been running at a faster rate than narrower measures of wage growth such as the Wage Price Index. Real wages, as measured by average earnings, are above their 20-year average in through-the-year terms.

Company profits decreased by 1.7 per cent in the quarter, reflecting the impact of the falling terms of trade on mining profits, but remain 5.8 per cent higher compared to a year ago. Company profits excluding mining grew by 3.3 per cent through the year.

The drought continues to have a devastating impact on regional communities and on the farm sector, with farm GDP 2.2 per cent lower through the year to the December quarter. Over the past 2 years, farm incomes have fallen by over 30 per cent.

Living standards, as measured by the ABS's preferred measure of real net national disposable income per capita, are 1.2 per cent higher through the year.

Productivity growth increased modestly by 0.2 per cent in the quarter to be 0.4 per cent higher through the year in trend terms.

I have spoken numerous times in recent months about the need for all levels of government and business to address Australia's productivity challenge. To this end, the Morrison Government has legislated the biggest tax cuts in two decades, committed to a $100 billion infrastructure pipeline, invested in 80,000 new apprenticeships, and announced a new wave of deregulation reforms to boost business investment and create jobs.

As the RBA Governor has said, "Australia's economic fundamentals remain very strong and they provide a solid foundation for us to be optimistic about the future". But we are confronted by significant domestic and international challenges with the full economic impact of the bushfires and coronavirus still ahead of us.

Australia is well placed to navigate these challenges with our economic plan and responsible budget management contributing to the resilience of the Australian economy which is reinforced in today's National Accounts.

Treasurer, Media Release — 4 March 2020

treasury.gov.au

ASIC News

[335] ASIC consults on relief for companies planning an initial public offering

ASIC is seeking feedback on proposals to grant conditional relief for voluntary escrow arrangements and pre-prospectus communications in connection with an initial public offer (IPO).

We are seeking feedback on our proposals to grant relief through a legislative instrumentin the context of an IPO to:

- allow public companies, professional underwriters and lead managers who have obtained relevant interests as a result of voluntary escrow arrangements to disregard them for the purposes of the takeover provisions (but not substantial holding provisions); and
- permit companies to communicate certain factual information to security holders and employees before the company lodges an IPO prospectus.

Currently companies that are considering undertaking an IPO must apply to ASIC for individual relief and pay application fees. We are seeking feedback on proposals to reduce and simplify the regulatory costs for companies undertaking an IPO while maintaining investor protection and market integrity.

ASIC Commissioner John Price said, 'It is important that voluntary escrow arrangements and pre-prospectus communications continue to be appropriately regulated so that our market remains orderly and transparent. The proposals strike a balance between reducing red-tape for an IPO and managing the risks that might otherwise occur in the absence of regulation', he said.

Consultation Paper 328 *Initial public offers: Relief for voluntary escrow and pre-prospectus communications* seeks feedback on the proposed relief and the specific terms that should apply.

ASIC will accept submissions on CP 328 until 06 April 2020.

A copy of CP 328 is available at www.asic.gov.au

ASIC MR — 24 February 2020

www.asic.gov.au

[336] ASIC releases information sheet on document production guidelines

ASIC has released an information sheet covering document production guidelines for people who produce books, including documents and any other record of information, to ASIC in connection with investigations or surveillance activities.

Information Sheet 242 *Document production guidelines* (INFO 242) will help people understand how to produce documents to ASIC. This can be in response to a notice to produce or on a voluntary basis.

INFO 242 explains:

- the preferred methods for producing books to ASIC in electronic and hard copy form
- the benefits of producing books in accordance with the guidelines
- the consequences of not following the guidelines, and
- how ASIC requests books to be produced when using a litigation support system.

INFO 242 addresses requirements in the Australian Securities and Investments Commission Act 2001 (ASIC Act); the National Consumer Credit Protection Act 2009; the Superannuation Industry (Supervision) Act 1993; and the Insurance Contracts Act 1984 when ASIC issues a notice to produce books and was developed following consultation with law firms and financial institutions.

A copy of INFO 242 is available at www.asic.gov.au

ASIC MR — 2 March 2020

www.asic.gov.au

Legislation

ACTS

[337] Treasury Laws Amendment (2018 Measures No 2) Act 2020 (Act 8 of 2020)

An Act to amend the law relating to corporations, consumer credit and taxation, and for related purposes.

Registered: 2 March 2020

Date of Assent: 26 Februrary 2020

Commencement: 26 February 2020; Sch 1 commenced on 27 February 2020; Sch 2 will commence on 1 April 2020.

[338] Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Act 6 of 2020)

An Act to amend the law relating to corporations and taxation, and for related purposes.

Registered: 20 February 2020

Date of Assent: 17 February 2020

Commencement: 17 February 2020; Schedules 1 and 2 commenced on 18 February 2020; Schs 3 and 4 will commence on 1 April 2020.

[339] Financial Sector Reform (Hayne Royal Commission Response — Stronger Regulators (2019 Measures)) Act 2020 (Act 3 of 2020)

An Act to amend the law in relation to ASIC, and financial sector regulation, and for related purposes.

Registered: 19 February 2020

Date of Assent: 17 February 2020

Commencement: 18 February 2020

[340] Financial Sector Reform (Hayne Royal Commission Response — Protecting Consumers (2019 Measures)) Act 2020 (Act 2 of 2020)

An Act to amend the law relating to unfair contract terms and insurance contracts, funeral expenses facilities, funeral benefits, mortgage brokers and mortgage intermediaries, and for related purposes.

Registered: 19 February 2020

Date of Assent: 17 February 2020

Commencement: 17 February 2020; Sch 1 will commence on 5 April 2020; Schs 2 and 3 commenced on 18 February 2020.

[341] Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019 (Act 87 of 2019)

An Act to amend the Corporations Act 2001 in relation to grandfathered conflicted remuneration, and for related purposes.

Registered: 29 October 2019

Date of Assent: 28 October 2019

Commencement: 1 January 2021

[342] Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Act 50 of 2019)

An Act to amend the law relating to corporations and consumer credit protection, and for related purposes.

Registered: 10 April 2019

Date of Assent: 5 April 2019

Commencement: Schedule 1 will commence on 5 April 2021; Sch 2 commenced on 6 April 2019.

[343] Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Act 17 of 2019)

An Act to amend the law in relation to penalties and other enforcement mechanisms within legislation administered by ASIC, and for related purposes.

Registered: 14 March 2019

Date of Assent: 12 March 2019

Commencement: Schedules 1 and 2 commenced on 13 March 2019; Sch 5 Pts 1 and 5 commenced on 6 April 2019; Sch 5 Pt 4 Div 2 commenced on 6 April 2019; Sch 5 Pt 4 Div 1 will commence on 5 April 2021.

[344] Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Act 13 of 2018)

An Act to amend the Corporations Act 2001 and repeal the Superannuation (Resolution of Complaints) Act 1993, and for related purposes

Registered: 7 March 2018

Date of Assent: 5 March 2018

Commencement: Sch 1 Pts 1, 2, 3, and 5 have commenced on 6 March 2018, Sch 3 will commence on a day or days to be fixed by Proclamation.

REGULATIONS

[345] Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019 (F2019L01641)

These regulations make minor and technical amendments to multiple regulations in the Treasury portfolio, including tax laws, corporations laws, superannuation laws and credit laws.

Made: 12 December 2019

Registered: 17 December 2019

Commencement: 18 December 2019; Sch 1 Part 2 does not commence at all if item 48 of Sch 3 to the Treasury Laws Amendment (2019 Measures No 3) Bill 2019 does not commence.

[346] Corporations Amendment (Design and Distribution Obligations) Regulations 2019 (F2019L01626)

These regulations amend the Corporations Regulations 2001 to enhance the design and distribution obligations regime by altering the products and persons in relation to which the regime applies and extend the regime to additional persons and products and exclude certain persons and products from its operation.

Made: 12 December 2019

Registered: 16 December 2019

Commencement: 5 April 2021

[347] Treasury Laws Amendment (Financial Services Improved Consumer Protection) (Funeral Expenses Facilities) Regulations 2019 (F2019L01533)

These regulations amend the Corporations Regulations 2001 to implement recommendation 4.2 of the Financial Services Royal Commission.

Made: 28 November 2019

Registered: 29 November 2019

Commencement: 1 April 2020

[348] Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019 (F2019L01526)

These regulations amend the Corporations Regulations 2001 to provide for a scheme by which conflicted remuneration in relation to financial product advice that remains payable on or after 1 January 2021 will be rebated to affected retail customers by means of payments or other monetary benefits. The Regulations also place record-keeping requirements on Australian financial services licensees who are required to rebate conflicted remuneration. These regulations also repeal provisions that grandfather conflicted remuneration that are contained in the Corporations Regulations 2001.

Made: 28 November 2019

Registered: 29 November 2019

Commencement: 1 January 2021

[349] Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Regulations 2018 (F2018L00515)

This instrument makes consequential amendments to seven regulations as a result of the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018.

Made: 19 April 2018

Registered: 24 April 2018

Commencement: Schedule 1 pts 1 and 3 commenced on 25 April 2018, Sch 3 will commence on a later date.

CURRENT BILL

[350] Corporations (Fees) Amendment (Registries Modernisation) Bill 2019

Introduced with the Commonwealth Registers Bill 2019, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019 and National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019 to create a new Commonwealth business registry regime, the bill amends the Corporations (Fees) Act 2001 to allow the registrar to collect fees related to the performance of registry functions or the exercise of a registry power.

Stage of Bill: Second reading moved in the House of Representatives (4 December 2019)

Events

[351] NSW: Blue Knot Foundation: managing vicarious trauma

Sydney: 25 March 2020, Wednesday, The Law Society of New South Wales, 170 Phillip Street, Sydney

Speaker: Julie Dombrowski, Blue Knot Foundation

CPD: 3.5 pts

Registration: Register online at lawinform.com.au

[352] VIC: Beyond Compliance: ESG and the Redefining of Risk Management

Melbourne: 26 March 2020, Thursday, Madgwicks Lawyers, Madgwicks Boardroom, Level 6, 140 William St, Melbourne

Speaker: Benjamin Weiss, Director — Veracity Worldwide

CPD: 1 pt

Registration: Register online at acla.acc.com/events

[353] NSW: Mandatory rule 6.1 — all law

Sydney: 27 March 2020, Friday, The Law Society of New South Wales, 170 Phillip Street, Sydney

Speakers: Sue-Ella Prodonovich, Principal — Prodonovich Advisory; Frances Moffitt, Regulatory Compliance Solicitor — The Law Society of NSW; and Paul Monaghan, Senior Ethics Solicitor — The Law Society of NSW

CPD: 3 pts

Registration: Register online at lawinform.com.au

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Your *Butterworths Corporation Law Bulletin* is published regularly, with 24 issues per volume keeping you completely up-to-date with events that shape today's corporate and commercial law. The Bulletin is available in hardcopy and online. Feedback regarding bulletin content is welcome and should be directed to the Legal Editor: olivia.zhang@lexisnexis.com.au

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