Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

2016 - 2017

Division/Agency: Australian Securities and Investment Commission
Question No: 319
Topic: Payday Lending
Reference: Written
Senator: Gallagher, Katy

Question:

Mr Medcraft: In terms of the principles of enforcement investigation, the three fundamental principles we look at are firstly, the amount of harm or loss that has occurred; secondly, the cost versus the regulatory benefit. Going to Peter's point about regulatory benefit, if we see a sector where we clearly want to send messages, it is a strategy that we have undertaken. Here you can see what we see as a regulatory benefit in a series of cases on payday lending. Thirdly—this is always a bit of an issue in many of the cases, as you know—is the availability of evidence, and whether or not we have received it. They are the three fundamental principles which really shape when we pursue investigations and enforcement. We now publish our approach to enforcement. That is available online.
Mr Kell: We would be very happy to provide a quick summary to the committee of the matters we have taken in the payday lending space, if that would help.
Senator GALLAGHER: That would be useful.

Answer:

Since 2010, ASIC has gained the following public outcomes against payday lenders where we had concerns regarding the following broad areas:

1. responsible lending,
2. avoidance,
3. advertising and
4. charging above the cap on costs.

1. Responsible lending

Cash Converters

- ASIC investigated Cash Converters online lending practices due to concerns they were entering consumers into unsuitable credit contracts by using internally generated benchmarks when assessing a consumers' capacity to repay a loan, instead of the consumers actual expenses.
- On 9 November 2016 ASIC announced it had completed its investigation and entered into an enforceable undertaking with Cash Converters. Under this agreement:
    - Cash Converters is required to refund eligible consumers $10.8 million in fees through a consumer remediation program overseen by Deloittes who will report to ASIC; and

  - Deloittes will review Cash Converters' current business operations and compliance with the consumer credit regime and report to ASIC at 6 months and 12 month periods - completion in May 2018.

- Cash Converters also paid penalties totalling $1.35 million.

Nimble

- ASIC investigated the conduct of Nimble in response to concerns we had with Nimble's responsible lending practices. In particular we were concerned that Nimble:
  - had not properly assessed the financial circumstances of consumers and relied on algorithms which did not properly take consumers' financial information into account.
  - failed to consistently recognise where consumers had obtained repeat loans from payday lenders within a short period of time. Even where repeat loans were properly identified, Nimble did not take sufficient or appropriate steps as required by law before providing a loan to the consumer.
  - failed to make proper inquiries of consumers' requirements and objectives, and inquiries that were made were of a general nature and resulted in not enough information for Nimble to fully understand the consumer's needs.
- ASIC accepted an enforceable undertaking in March 2016 from Nimble in settlement of our concerns that required Nimble to refund $1.5 million and make a community benefit payment of $50,000 to Financial Counselling Australia. At the completion of the remediation program Nimble had accessed 4,248 consumers and refunded them just over $1.4 million. The additional refunds for consumers Nimble could not contact together with the community benefit payment were paid to Financial Counselling Australia in October last year and totalled over $218,000.

The Cash Store

- ASIC investigated Cash Store and Assistive Finance Australia for wholesale responsible lending failures and engaging in unconscionable conduct in selling income protection insurance (CCI) to consumers on Centrelink benefits. ASIC commenced civil penalty proceedings and in early 2015 the Court awarded record civil penalties totaling nearly $19 million against these entities. The Cash Store has ceased operating in Australia.
- The CCI product covered consumers against the risk of becoming unemployed, sick or dying during the period of the payday loans, which could be as short as one day, and was usually around two weeks.
- The insurers of the CCI products sold by The Cash Store Pty Ltd (in liquidation) to payday loan customers agreed to refund the premiums paid by consumers:
  - In early 2015 Allianz Australia Insurance Ltd agreed to refund consumers $400,016.
  - In mid-2015 CGU Insurance Limited, together with Accident and Health International Underwriting Pty Ltd, agreed to refund consumers over $2,000,000.
  - In early 2017 the CCI premium refunds were donated to the Insurance Law Service (run by the Financial Rights Legal Centre) as the insurers could not access consumers' details from The Cash Store. Final amounts donated were $580,000 by Allianz and $2.26 million by IAG (CGU).

***Abaz Pty Ltd* (Moneyplus)**

- In 2014 ASIC issued Moneyplus with a $42,500 fine for failing to obtain bank statements for the past 90 days for consumers who had taken out a previous loan with Moneyplus. This contravened the small amount lending laws.

2. Avoidance

Peter Elfyd Llewellyn

- In August 2016 ASIC banned Peter Elfyd Llewellyn of Queensland, from engaging in credit activities for a period of ten years. Mr Llewellyn was banned following an investigation by ASIC into his conduct as a director of PR Finance Group Ltd (in liquidation) (PRFG) and Australian Money Exchange (in liquidation) (AMX).
- ASIC found that AMX engaged in unlicensed credit activity during the period 1 July 2011 to 23 September 2013 in which Mr Llewellyn was knowingly involved. AMX attempted to avoid the requirement to be licensed by structuring short term loans to avoid the application of the National Credit Code. AMX charged fees on short term loans which were in excess of the limits imposed by the National Credit Code.

Fair Go Finance Pty Ltd

- In early 2016 Fair Go Finance paid $34,000 in penalties for overcharging consumers on payday loans. Fair Go Finance was also required to refund approximately 550 consumers around $34,500 for the interest and fees it collected from consumers in excess of the maximum amount allowed.
- ASIC's investigation identified that the loans were set up in a manner that attempted to avoid consumer protections. Although the credit contracts stated the loans could be repaid over a three year period, in practice the consumer was required to repay the loan over a substantially shorter period (which could be as short as 19 days). Consumers were also charged a default fee if they failed to meet the shorter repayment terms.
- ASIC identified that Fair Go Finance charged establishment fees of more than twice the 20% maximum allowed. In a number of instances the total amount repaid by consumers over the term of the loan exceeded the maximum amount allowed under the National Credit Act.

Teleloans

- In mid-2015 ASIC was unsuccessful in its action against Teleloans. Teleloans' business model provided that consumers entered into near simultaneous agreements with Teleloans and Finance & Loans Direct Pty Ltd (FLD). Contracts between consumers and FLD included a charge of 5% of the loan amount, and therefore fell within the short term credit exemption in s6(1) of the National Credit Code. Contracts with Teleloans include further fees of a financial supply fee (calculated as a percentage of the loan amount and number of repayments) and a weekly account keeping fee.
- ASIC argued that these contracts together meant that fees and charges exceeded the maximum amount permitted by s6(1). The Court did not accept that the contracts should be read together, but viewed the arrangement as separate contracts and therefore falling outside the scope of the National Credit Code.

Fast Access Finance (FAF)

- ASIC investigated the conduct of FAF who were operating a business model whereby consumers looking for a payday loan entered into agreements to buy and sell diamonds. In October 2015 the Federal Court found that this avoidance model did involve the provision of credit and FAF had engaged in credit activities without a license. The Court also found that FAF 'intended to conceal the true nature of the transaction from those responsible for enforcing the interest cap.'

- In November 2015 the Court ordered FAF to pay the 5 consumers who gave evidence in the matter approximately $17,000.
- In March 2017 the Federal Court issued FAF a fine of $730,000.

Cash Loan Money Centres and Sunshine Loans

- In late 2014, following ASIC intervention, Cash Loan Money Centres and Sunshine Loans agreed to stop offering 'leaseback' arrangements at high cost to consumers who wanted a payday loan and to offer a small amount loan that complied with the legislative cap on costs.
- Under this model consumers looking for a payday loan were signed up to an arrangement where the consumer 'sold' a household item such as a washing machine or mobile phone to the business, in return for a sum of money, and simultaneously 'leased' the goods back from the business. In practice, the goods never changed hands, and the business never actually saw the household goods, or confirmed the current market value before 'purchasing' them from the consumer.
- Similarly, under the model used by Sunshine Loans, a consumer would approach the business for a payday loan, and enter into an agreement to assign the rights to use their mobile phone or car to the lender for a fee, and then simultaneously lease the rights back.

Fast Easy Loans Pty Ltd (Fast Easy Loans)

- In late 2014 Fast Easy Loans agreed to refund more than 2,000 consumers a total of $477,900 following ASIC's concerns that it charged consumers a brokerage fee where it was prohibited from doing so.
- From September 2010 to June 2013, Fast Easy Loans acted as the broker for a related lender, Easy Finance Loans Pty Ltd (Easy Finance), and unlawfully charged consumers a brokerage fee in excess of certain state and territory interest rate caps. In charging a brokerage fee, Fast Easy Loans engaged in credit activities without a credit license.
- Fast Easy Loans and Easy Finance operated under a previously commonly promoted business model where consumers dealt with both a broker and a payday lender at the same time, with the entities having the same directors and owners and operating out of the same premises. One reason for using this model was to provide a means (via the broker entity) to charge consumers an amount in excess of state and territory interest rate caps.
- Commonwealth Regulations in June 2014 make it clear that broker costs do not sit outside the small amount loan cap.

3. Advertising

Money3

- In mid-2015 after an ASIC investigation Money3, agreed to stop offering its two payments 'fixed fee' loan arrangement and agreed to refund more than $100,000 to approximately 400 consumers following concerns raised by ASIC that it breached consumer credit laws and engaged in misleading conduct.
- Money3's 'fixed fee' loan required only two repayments despite having a term of 16 months. Under the terms of the contract, the first repayment (generally due a week after the loan was taken out) was for a nominal amount, and the much larger second repayment was due 15 months later. This second payment usually accounted for more than 90% of the total amount repaid.

- ASIC was concerned that the product was likely to be unsuitable for most of the financially vulnerable customers who obtained it, and in breach of the national responsible lending obligations. Consumers may also have been misled into believing the terms of the loan enabled flexible repayments when the contract in fact disclosed that a large fee could be charged if the consumer asked for a variation of the repayment schedule.

Paid International Ltd (First Stop Money Ltd)

- In early 2014 Paid International Ltd paid $30,600 in penalties after ASIC issued three infringement notices for making misleading representations in its online advertisements. These advertisements stated that it offered “instant decisions” and loan approvals “within minutes” for payday loans offered on websites operated by Paid International Ltd.
- ASIC was concerned the ads were false or misleading because the lender’s assessment of a loan application was not ‘instant’ or completed ‘within minutes’. In some instances, loan applications took up to 72 hours to be assessed.

Ferrratum Australia Pty Ltd (Ferratum)

- In late 2013 Ferratum an online lender paid a penalty of $10,200 to ASIC for false or misleading advertising together with refunding affected consumers all transaction fees paid.
- ASIC’s investigation found that Ferratum advertised a 'free $100 loan' on its website, in television advertisements, on automatic teller machine screens and in Google text and display advertisements, between 24 May 2013 and 31 July 2013. However, ASIC found that this was misleading as transaction fees applied to the first $100 of the loan.

Foresters Community Finance Ltd (trading as Fair Finance Australia)

- In early 2013 Fair Finance Australia paid a $6,600 penalty for false or misleading advertising and removed the offending advertisement.
- This resulted from Fair Finance advertising on its website in October 2012 the effective annual interest rate on certain loans as 19.95%, when the interest rate under the relevant credit contracts was in fact 35%.

Nimble Australia Pty Ltd (Nimble) (previously known as Cash Doctors)

- In 2013 Nimble changed its advertising following ASIC concerns it was potentially misleading. In 2012 and early 2013 Nimble made statements both on its website and in the press that its credit contracts were ‘short term’. These statements did not clearly explain that the Nimble product was a continuing credit contract with an indefinite term.
- ASIC was also concerned that statements Nimble made comparing its product with a credit card were inaccurate. Specifically, its website stated that a loan could not be redrawn unless it had been paid in full and that Nimble’s loans were different from a credit card in that respect.
- In fact, Nimble’s loans could be redrawn before they were paid in full, much like a credit card and therefore consumers could just as easily be ‘locked down for months or years’ as Nimble represented was the case with credit cards.

4. Breaches of cap on costs

Cash Stop Financial Services Pty Ltd (Cash Stop)

- In 2014 ASIC agreed to an enforceable undertaking from Cash Stop which required the refund of $14,000 to more than 650 consumers following an ASIC investigation.
- ASIC found that Cash Stop retained part of the loan funds under 697 payday loans, which it should have paid directly to consumers, by charging a subscription fee for a Membership Rewards Program in contravention of the credit laws.

PAID International Ltd (PAID)

- In late 2014 ASIC accepted an enforceable undertaking (EU) from PAID under which it was required to refund $1,128,142 to 6,650 customers (20,273 loans) who were charged an excessive fee after taking out loans of up to $5,000, including small amount loans.
- ASIC's investigation found that between 1 July 2011 and 30 June 2013, PAID:
    - unlawfully charged its customers in New South Wales and the Australian Capital Territory a fee of up to $59.50 to pay the loan money into their bank accounts by electronic funds transfer (EFT) (instead of by cheque), and
    - had failed to comply with its general conduct, responsible lending, advertising and disclosure obligations.
- PAID went into administration in early 2015. The administrator of the deed of company arrangement (entered into in March 2015) admitted claims totaling $913,946 for 6650 consumers owed under the EU and anticipated a total dividend of 45 cents in the dollar to be distributed to unsecured creditors including the eligible consumers under the EU. As at the end of June 2015 $239,308 had been refunded.
- In late 2015 ASIC suspended the Australian credit licence of PAID because it ceased to engage in credit activities and was insolvent. The credit licence has since been cancelled.

Fair Loans Foundation Pty Ltd

- In mid-2013 Fair Loans Foundation Pty Ltd entered into an enforceable undertaking under which it agreed to refund approximately 864 consumers around $157,000 in overcharged interest and appoint an independent consultant to ensure it complies with the credit laws in the future. Fair Loans also paid $22,000 in infringement notices for related breaches.
- ASIC's investigation of Fair Loans identified concerns that the interest rate being disclosed to consumers in the advertising and loan contracts was less than the actual rate charged.