

Article Information

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Westpac responsible lending case

Industry was stunned when, on 4 September 2018, ASIC and Westpac reached a settlement that would involve Westpac paying a fine of \$35 million regarding civil penalty proceedings that ASIC brought against Westpac for responsible lending breaches. In mid-November, industry was further shocked. The Federal Court of Australia (Perram J) declined to 'approve' the ASIC/Westpac agreement.

The decision gives significant guidance around court expectations of 'settlements'.

On 13 November 2018, the Federal Court of Australia (Perram J) declined to make the declaration of contravention and pecuniary penalty orders agreed between the Australian Securities and Investments Commission (ASIC) and Westpac Banking Corporation (Westpac) in civil penalty proceedings brought by ASIC against Westpac under the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act).^[3] The court's decision was expected to provide clarity around the use of the Household Expenditure Measure (HEM) benchmark in performing 'responsible lending' assessments under section 128 and 129 of the NCCP Act. Instead, the decision clarified what the court expects of 'settlements' in civil penalty proceedings.

ASIC commenced civil penalty proceedings against Westpac in 2017, alleging breaches of section 128 of the NCCP Act. Section 128 prohibits a credit licensee such as Westpac from, among other things, entering into a credit contract unless it has within the preceding 90 days made an assessment of whether the credit contract is unsuitable for the consumer.

On 4 September 2018, it was announced that Westpac and ASIC had agreed to a civil penalty of \$35 million.^[4] The conduct alleged to have amounted to a contravention of section 128 of the NCCP Act was the conditional approval by Westpac's automated decision system, without referral to manual review, of home loan applications in the following circumstances:

1. use of the HEM benchmark value rather than the applicant's declared living expenses in calculating the consumer's monthly surplus/shortfall for loan serviceability, where the consumer's declared living expenses were higher than the HEM benchmark value. For 5,041 loans, had the consumer's declared living expenses been used instead of the HEM benchmark value, the application would not have been approved without first being referred for manual assessment
2. for interest-only loans, calculating repayments to be input into the serviceability calculation on the basis of amortisation over the full term of the loan, rather than the residual term of the loan after the expiry of the interest-only period. For 5,395 loans, where had the repayments been calculated by reference to the residual term of the loan after the expiry of the interest-only period, the application would not have been approved without first being referred for manual assessment, and
3. for interest-only loans, both (a) and (b) above (441 loans). Loan applications that were conditionally approved where declared living expenses were higher than the HEM benchmark, but would have been approved anyway if declared living expenses were approved, were not alleged to be contraventions of section 128.

The court refused to make the declaration in the terms sought by the parties as it did not disclose any contravention of section 128 of the NCCP Act. Section 166(3) requires a declaration of contravention to specify, among other things:

'the conduct that constituted the contravention'.

Section 128 prohibits a credit licensee such as Westpac from entering onto a credit contract without having first made an

assessment about whether or not the credit contract is unsuitable for the consumer. Conditional approval of an application falls short of this conduct. If those conditional approvals resulted in credit contracts being entered into by Westpac, the declaration of the contravention would at least need to have stated which contracts were in fact entered into without the required assessment having been made.^[5]

As a declaration of contravention is a necessary prerequisite to a pecuniary penalty order,^[6] the court could not order the agreed \$35 million penalty against Westpac. The court also stated that, on the evidence before it and the uncertainty as to whether Westpac's conduct amounted to a contravention of section 128, it was not possible to assess the reasonableness of the agreed penalty.

Whilst the court refused to make the orders sought by the parties, the matter is not disposed of. ASIC's options (as the applicant) are to:

- continue the proceedings on a contested basis and prove on the balance of probabilities^[7] that Westpac contravened section 128 of the NCCP Act
- negotiate with Westpac and reach an agreement on further facts and proposed consent orders to be put to the court for ratification, or
- discontinue the proceedings against Westpac.

^[1] ASIC, '[Westpac admits to breaching responsible lending obligations when providing home loans and a \\$35 million civil penalty](#)' (Media release 18-255MR) 4 September 2018.

^[2] *Australian Securities and Investments Commission v Westpac Banking Corporation* [2018] FCA 1733 ('ASIC v Westpac').

^[3] *ASIC v Westpac*, [2].

^[4] ASIC, '[Westpac admits to breaching responsible lending obligations when providing home loans and a \\$35 million civil penalty](#)' (Media release 18-255MR) 4 September 2018.

^[5] *ASIC v Westpac*, above n 1 [26].

^[6] *NCCP Act* s 167(2) ('NCCP Act').

^[7] *Ibid* s 202.