

Answer to question in writing:

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS

REVIEW OF THE ASIC ANNUAL REPORT (SECOND REPORT) 2019

ASIC13QW

Question

The following questions relate to ASIC's decision not to appeal the Westpac 'Wagyu and Shiraz' lending case:

- (a) What pros and cons did ASIC consider in its decision not to appeal?
- (b) What percentage of past cases has ASIC appealed?
- (c) Does ASIC see appeal as the default option when litigation is unsuccessful? What does ASIC consider in making this decision?
- (d) Does ASIC think there are any potential negative impacts that may arise from the decision not to litigate in this instance?
- (e) What steps is ASIC taking to mitigate any of these negative impacts? In particular, what steps is ASIC taking to respond to concerns that it will lead to poorer quality lending decisions?

Answer

- (a) ASIC's decision was based upon a consideration of: the Full Court appeal judgment; external legal advice; the prospects of success in seeking leave to appeal and in appealing; and the regulatory context of the provisions the subject of the litigation.
- (b) ASIC has appealed approximately 3% of civil cases in the 10 years to September 2020. It has appealed approximately 46% of civil cases where the initial judgement was not in ASIC's favour or at least part of ASIC's case was unsuccessful.
- (c) ASIC does not consider an appeal the default option for unsuccessful litigation. ASIC reviews all unsuccessful judgments it receives and considers whether to appeal having regard to a number of factors including: whether the judgment contains any appealable errors; whether the regulatory purpose for bringing the proceeding remains; any implications from the judgment for the laws ASIC (or other agencies) administer;; and ASIC's prospects of success in any appeal.
- (d) The decision of the Full Court clarifies that the National Credit Act cannot be construed as prescribing requirements for matters that a lender must consider when making an assessment of whether a contract is unsuitable for the consumer (other than those

specified in s129 of the Act). The Court has found that the Act leaves this to the lender to determine.

However, the Court has noted that the Act is concerned with ensuring the assessment made by the lender is correct, and that the lender is otherwise motivated by the Act (and penalties that apply to the prohibition on entering unsuitable loans) to avoid entering into unsuitable loans.

Accordingly, lenders should continue to take steps to understand the circumstances of the consumer they are dealing with, in a way that enables the lender to determine whether the loan is unsuitable for that person.

- (e) ASIC has a number of regulatory tools (including product intervention powers; actions for breach by licensees of the obligations to act efficiently, honestly, and fairly and to not mislead or deceive; as well as the soon to be implemented design and distribution obligations) to address consumer harm from poor lending conduct.

We also note that we are engaging with Treasury on the recently announced credit reforms.