

**Senate Economics Legislation Committee**  
**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Budget Estimates

2017 - 2018

**Division/Agency:** Australian Securities and Investment Commission  
**Question No:** 116  
**Topic:** Storm  
**Reference:** Hansard page 23-24 (31 May 2017)  
**Senator:** Macdonald, Ian

**Question:**

Senator IAN MACDONALD: What can you tell me about the wash-up on the ongoing prosecutions with Storm?

Mr Kell: If you are referring to the Cassimatis's—

Senator IAN MACDONALD: And the banks that are implicated.

Mr Kell: It might be useful if we provide you with a structured report on each of those issues. In terms of matters that are still on foot, in August last year the Federal Court found that the Cassimatis's breached their duties as directors of Storm Financial. Earlier this year the court heard submissions on penalties and costs. We are still awaiting the decision on that. That has taken some time. There have been outcomes in relation to compensation against various of the banks, including CBA and Macquarie. Because I do not have all the figures off the top of my head, I would probably prefer to provide you with a brief structured run-through of all of those outcomes. There are quite a few of them, as I am sure you can appreciate. It has possibly been one of the biggest things we have ever done.

Senator IAN MACDONALD: That would be helpful and useful. Thank you for that...

[...]

Senator IAN MACDONALD: Without asking for the treaties on the law that you administer, you mentioned, Mr Kell, that you are awaiting the decision of the court on penalties. Is the law such that the penalty can include an order to compensate, pay back, repay or refund those who have proved some misfeasance?

Mr Kell: I do not think that is a feature of this case, but I will double-check that and come back to you. We are seeking pecuniary penalties, disqualifications, and restraint from providing financial services. Compensation has primarily been around the role of the banks where we have obtained a series of settlements.

**Answer:**

Background

Storm Financial (**Storm**) operated a system created by Emmanuel and Julie Cassimatis (**the Cassimatises**), which ASIC considered provided "one-size-fits-all" investment advice to clients. The advice recommended that clients invest substantial amounts in index funds using "double gearing" (**Storm Model**). This approach involved taking out both a home loan as well as a margin loan in order to purchase units in index funds, create a "cash dam" and pay Storm's fees. Once initial investments took place, "Stormified" clients would be encouraged to take "step" investments over time.

By the time of Storm's collapse in early 2009, approximately 3,000 of its 14,000 client base had been "Stormified". In late 2008 and early 2009, many of Storm's clients were in negative equity positions, sustaining significant losses. In ASIC's estimation, approximately 2,780

investors or investor groups suffered loss in the region of \$830 million (based on ASIC's Compensation Model).

The CBA, Storm's secured creditor, appointed receivers to Storm in early January 2009. Shortly thereafter, the Cassimatises (the executive directors and founders of Storm) placed Storm into voluntary administration.

#### ASIC's investigation and legal proceedings

In December 2008, ASIC commenced an investigation into the advice provided to the "Stormified" clients. That investigation was widened after Storm's collapse (in early 2009).

#### ***Injunction proceedings***

In February 2009, ASIC obtained freezing orders against the Cassimatises in the Queensland Supreme Court, in respect of a \$2M "dividend" which the Cassimatises had received in late 2008 (**Injunction Proceeding**). ASIC brought the Injunction Proceeding as it was concerned that the dividend had not been properly approved by the board of Storm and was paid at a time when Storm was likely insolvent or nearing insolvency. As the frozen funds were assets covered by CBA's security interest, in mid-2009 ASIC consented to the CBA receivers substituting ASIC as the applicant in the Injunction Proceeding. The frozen funds were subsequently released to the CBA, by the Cassimatises, towards Storm's overall indebtedness to the CBA.

#### ***Liquidation orders***

In late March 2009, ASIC obtained orders in the Federal Court of Australia for Storm to be placed into liquidation. The liquidators of Storm subsequently confirmed that Storm was insolvent, as of late 2009. No dividends were paid to unsecured creditors (including clients) in that liquidation.

#### ***Other civil proceedings***

In December 2010, ASIC initiated a number of proceedings in the Federal Court of Australia arising out of the Storm investigation:

1. civil penalty proceedings against the Cassimatises;
2. compensation proceedings against Bank of Queensland (**BoQ**), Senrac and Macquarie Bank in relation to investors Barry and Deanna Doyle (**Doyle Proceeding**); and
3. proceedings against the Commonwealth Bank of Australia (**CBA**), BoQ and Macquarie in relation to their involvement in an unregistered managed investment scheme run by Storm.

#### ***Proceeds of Crime Act 2002 (POCA) and other considerations***

Due to the circumstances around the Injunction Proceeding (and subsequent release of the frozen funds to the CBA), there was no need for a referral to the AFP for a proceeds of crime application and nothing further arising out of ASIC's investigation warranted such a referral.

Further, given Storm's insolvency, no proceeding for compensation has been brought by ASIC as against Storm.

#### ***Compensation recovered***

ASIC's investigations and actions in relation to the CBA, BoQ, Senrac and Macquarie (including intervention in and assistance given to class actions against the same banks),

resulted in approximately \$368.6 million being paid to former Storm investors (including in relation to the benefits recovered or received by investors from settlement or hardship schemes implemented by these banks).

The \$368.6 million is made up of the following:

1. \$236.6 million in compensation paid in relation to ASIC's actions against CBA, BoQ, Senrac and Macquarie broken up approximately as follows:
  - a. \$136 million from CBA (pursuant to a settlement entered into in September 2012;
  - b. \$82.5 million from Macquarie under a revised settlement agreement entered into in December 2013, following ASIC's intervention;
  - c. \$17 million from BoQ and Senrac (pursuant to a settlement entered into in September 2014); and
  - d. \$1.1 million paid by BoQ and Macquarie to Barry and Deanna Doyle in relation to the Doyle Proceeding; and
2. \$132 million paid by the CBA by virtue of its Resolution Scheme.

In addition to the above, in July 2015, the Court approved a settlement between CBA and relevant investors, whereby the CBA agreed to pay approximately \$33.8 million by way of compensation and costs to Storm investors who had not previously accepted compensation from CBA under the ASIC/CBA Settlement, calculated using ASIC's Compensation Model.

A class action commenced against Westpac in 2013 is currently listed for trial in the Federal Court of Australia and is scheduled to be heard from 13 November to 15 December 2017. ASIC is continuing to monitor the progress of the class action.

### ***Civil penalty proceeding against Storm's directors, the Cassimatises***

In these proceedings ASIC alleged that the Cassimatises breached their directors' duties under the *Corporations Act 2001* by causing Storm to give inappropriate advice to an identified group of clients. ASIC sought orders banning the Cassimatises from the financial services industry and disqualification from being involved in the management of corporations as well as pecuniary penalties. ASIC did not seek any compensation orders in the civil penalty proceedings against the Cassimatises for various reasons, including the following:

- a substantial amount of compensation was already obtained through the prior compensation proceedings described above;
- the fact the identified group of investors in these proceedings were likely to benefit from the recoveries in the compensation proceedings; and
- the lack of direct legal liability between the Cassimatises to the identified group of investors (as opposed to Storm).

Edelman J handed down his decision on 26 August 2016, finding that the Cassimatises had each breached their duties as directors as they: caused Storm to provide advice to certain investors that was inappropriate to their personal circumstances, failed to give such consideration to the subject matter of the advice, and did not properly investigate the subject matter of the advice given.

Edelman J said (at paragraph 833):

*"A reasonable director with the responsibilities of Mr and Mrs Cassimatis would have known that the Storm model was being applied to clients such as those who fell within this class and that its application was likely to lead to inappropriate advice. The consequences of that inappropriate advice would be catastrophic for Storm (the entity*

*to whom the directors owed their duties). It would have been simple to take precautionary measures to attempt to avoid the application of the Storm model to this class of persons".*

A penalty hearing took place on 1 February 2017 before new docket Judge, Dowsett J, to determine what civil penalties and disqualification orders and declarations should be made as a result of the Cassimatises' breach of their director duties. Dowsett J reserved his decision on penalty and costs. ASIC now awaits the outcome of the penalty hearing.

#### Other outcomes

In addition to the above outcomes, ASIC banned one adviser for four years (Stuart Drummond) and entered into enforceable undertakings with five Storm advisers, which required advisers to either remain out of the industry or to undertake further training and be subject to audit review processes.