PANORAMIC

FINANCIAL SERVICES LITIGATION

Australia

Financial Services Litigation

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NATURE OF CLAIMS

Common causes of action

What are the most common causes of action brought against banks and other financial services providers by their customers?

The most common causes of action brought against banks and other financial services providers by their customers include:

- breach of contract, including express and implied terms;
- breach of statute, including consumer protection provisions, such as engaging in unconscionable conduct, misleading or deceptive conduct, or imposing unfair contract terms;
- breach of trust or fiduciary duties; and
- breach of duty of care.

Law stated - 12 June 2024

Non-contractual duties

In claims for the mis-selling of financial products, what types of non-contractual duties have been recognised by the court? In particular, is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

The types of non-contractual duties recognised by Australian courts in connection with the mis-selling of financial products include:

- consumer protection law obligations, such as prohibitions on unconscionable conduct, misleading or deceptive conduct, false or misleading representations, and unfair contract terms;
- disclosure obligations relating to financial products;
- prohibitions on sales tactics, such as bait advertising, pyramid selling, and hawking (unsolicited offers of) financial products;
- design and distribution obligations relating to financial and credit products;
- suitability and responsible lending obligations in relation to consumer credit; and
- general obligations applicable to financial services licensees, such as the obligation to carry on financial services 'efficiently, honestly, and fairly'.

While some of these duties are only actionable by regulators (eg, the Australian Securities and Investments Commission, or ASIC), consumer protection laws are generally actionable directly by customers where they suffer losses. Certain breaches may attract civil penalties and some may even result in criminal liabilities.

It is worth noting that many duties in relation to consumer protections apply generally to consumers and some commercial settings, even where financial services laws are not obviously engaged, such as in relation to certain cryptocurrency related offerings.

Law stated - 12 June 2024

Statutory liability regime

In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

Aggrieved investors may initiate proceedings for misleading or deceptive statements or omissions in disclosure documents (such as in prospectuses for securities), and breach of continuous disclosure requirements under the Corporations Act 2001 (Cth) (Corporations Act). Class action proceedings are frequently initiated by plaintiff law firms and litigation funders on behalf of shareholders, claiming losses arising from inadequate or delayed market disclosure by listed entities.

The breadth of consumer protections on misleading or deceptive conduct means it is a common feature of claims for breach of disclosure obligations. The regime may also apply to claims between commercial counterparties in certain circumstances.

It is possible for statutory and common law claims in relation to false or misleading statements to be pursued in parallel, such as claims for negligent misstatement in tort or common law misrepresentation. Claims may also be pursued in relation to cross-border offerings where there is a relevant jurisdictional connection to Australia.

Claims for false or misleading statements are frequently pursued against listed companies, whereas private companies frequently seek to rely on statutory exemptions where they are seeking to raise funds absent a disclosure document.

It is generally necessary to establish reliance on a false or misleading statement in order to recover losses.

Law stated - 12 June 2024

Duty of good faith

Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

The role of good faith in Australian contract law remains unsettled. There is no prima facie implied duty of good faith in commercial contracts, including those between financial institutions and their customers. However, the court could imply this duty in a commercial contract if the common law test is satisfied.

The High Court of Australia has yet to rule on the nature and content of the duty of good faith. Recently, the Federal Court held that the duty of good faith requires a party not to act capriciously, dishonestly, unconscionably, arbitrarily or defeat the object of the contract.

However, a financial institution is generally under no obligation to prioritise a customer's interest over its own.

While the status of the duty of good faith is uncertain, customers of banks and financial institutions frequently seek to formulate claims based on mandatory consumer protection laws.

Law stated - 12 June 2024

Fiduciary duties

In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

A financial institution will owe fiduciary duties to its customers where their relationship falls within one of the established categories of fiduciary relationships. For example, where the financial institution acts as an agent on behalf of its customers, or where the financial institution acts as a trustee for the benefit of its customers. This can be compared with the typical legal relationship between banker and customer, which is one between debtor and creditor, and not an accepted category of fiduciary relationship. A fiduciary duty will not usually arise outside of the established categories.

However, in cases where there is an explicit undertaking made by one party to the other, or where a legitimate expectation is found, the court may recognise a fiduciary duty between a financial institution and its customers. Such expectation could arise from the parties' relationship or from particular representations or dealings.

While most financial advisors seek to limit their obligations to providing general advice, broader fiduciary obligations may be imposed where the advisor creates an expectation that it is providing personal advice having regard to the customer's circumstances and best interests.

Legislative amendments also impose a statutory duty on financial product advisors to act in their clients' best interests where they provide personal advice to retail clients, subject to safe harbour defences. From 1 January 2021, this duty has been extended to mortgage brokers, requiring them to act in the best interests of borrowers with respect to home lending.

To some extent, a fiduciary duty can be limited or excluded if the client provides informed consent, but that would require clear and reasonable contractual arrangements and may need to satisfy other requirements such as prohibitions on unfair contract terms.

To give a typical example, the question of whether cryptocurrency exchanges assume trustee or other fiduciary obligations to their customers remains a live issue, which falls to be determined under each exchange's applicable terms and conditions and any course of dealing. In the recent case of ***Re FTX Australia Pty Ltd (admin apptd) and FTX Express Pty Ltd (admin apptd)*** [2023] VSC 788, Justice Matthews found that the Australian arm of the FTX cryptocurrency exchange did not owe trust obligations to its customers.

Law stated - 12 June 2024

Master agreements
How are standard form master agreements for particular financial transactions treated?

Standard form loan or master agreements are used by banks and financial institutions for a variety of financial transactions, such as loan precedents produced by the Asia Pacific Loan Market Association and International Swaps and Derivatives Association (ISDA) Master Agreements. These agreements are commonly enforced at law, but there is limited case law dealing with the construction of common terms of most standard form agreements.

Law stated - 12 June 2024

Limiting liability
Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

Financial institutions may impose contractual terms limiting or excluding certain contractual, tortious or even fiduciary liabilities, particularly in relation to institutional or wholesale clients.

However, generally speaking, financial institutions cannot exclude statutory liabilities or claims. The Corporations Act, the National Consumer Credit Protection Act 2009 (NCCP Act) and the Australian Securities and Investments Commission Act 2001 (ASIC Act) all limit the ability of banks and financial institutions to contract out of certain statutory provisions. It is typically not permitted to exclude liability for fraud.

Australian courts generally construe exclusion and limitation clauses against the party that relies on them, which is known as the contra preferentem principle. It is common to include contractual provisions seeking to limit the application of this rule in commercial contracts.

The unfair contract term regime may also operate to limit reliance on some limitation clauses if they cannot be justified as reasonably necessary to protect a party's commercial interests, and if they create a significant imbalance between the rights and obligations of the parties.

Law stated - 12 June 2024

Freedom to contract
What other restrictions apply to the freedom of financial institutions to contract?

Financial institutions, like other contractual parties, generally enjoy the freedom to contract. However, there are statutory limitations on such freedom, including under:

- statutory consumer law protections under the Corporations Act, the ASIC Act and Australian Consumer Law; and
- the National Consumer Credit Code (as part of the NCCP Act), which regulates consumer credit activities.

Since November 2023, the unfair contract terms regime has been extended to a broader range of consumer and small business contracts. These changes include broader restrictions on one-sided clauses including those which seek to limit or exclude one party's liability where a clause cannot be justified as reasonably necessary to protect that party's commercial interests.

The unfair contract terms regime applies to banks, financial institutions, fintechs and cryptocurrency exchanges, and other businesses and applies to both financial and non-financial products or services (under either the ASIC Act or Australian Consumer Law). Breach of the regime could lead to severe civil penalties which may apply cumulatively where used across multiple standard form contracts.

A number of examples of unfair contract terms are given in the legislation, which include provisions which enable one party to unilaterally vary contractual terms, limit or vary performance, or apply automatic renewal.

In contrast with certain common law jurisdictions, Australia applies a broad approach to identifying potential penalty clauses, but allows contracting parties, including banks and other financial institutions, broader scope to justify the use of such clauses where they protect a 'legitimate interest' as long as they are not 'extravagant' or 'out of all proportion'. There are a number of cases that discuss the difference between penalties and liquidated damages.

Law stated - 12 June 2024

Litigation remedies
What remedies are available in financial services litigation?

The following remedies are available in relation to financial services litigation between private parties (and more generally, to private disputes in Australia):

- damages;
- injunctive relief;
- specific performance;
- rescission; and
- declarations.

The majority of financial services providers are required by ASIC to have dispute resolution mechanisms in place, including internal dispute resolution procedures and mandatory membership with the Australian Financial Complaints Authority (AFCA).

AFCA is an independent statutory body that provides dispute resolution services for consumers and certain small businesses with complaints against AFCA-member financial services organisations. Australian Financial Services licence holders, Australian credit licence holders, authorised credit representatives and superannuation trustees are required to be AFCA members. AFCA will review any complaints received against those parties and can make determinations in favour of the complainant in the following terms:

- payment of a sum of money for financial loss (subject to monetary limits);

- acceptance of a claim pursuant to an insurance policy;
- release of a security over a debt;
- repayment, variation or waiving of a fee or interest charged; and
- affirm, vary or otherwise set aside and substitute a decision or conduct the subject of the complaint to AFCA.

As opposed to private disputes, in financial services regulatory actions, the regulator may seek civil and criminal penalties and adverse publicity orders. Often regulatory actions will arise as a consequence of complaints made to AFCA, since AFCA is required to report any systematic issues it observes arising from a financial firm's actions.

Law stated - 12 June 2024

Limitation defences
Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

Australia employs a statutory limitation regime, in which each state and territory has implemented its own legislation. Accordingly, the limitation periods for a particular cause of action will vary between jurisdictions. The limitation period applicable to a particular cause of action may also be set out in federal or state-based legislation.

It is possible to contract out of applicable statutory limitation periods or enter into tolling agreements, or both.

Proceedings which allege offences under the NCCP Act (or the related regulations) must be brought within three years of the commission of the offence. If proceedings are brought under the Act or regulations after the three-year period, the complainant must seek the consent of the Attorney-General to bring about the proceedings.

Law stated - 12 June 2024

PROCEDURE

Specialist courts
Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

Australia does not have any specialist courts that specifically deal with hearing financial services disputes. For the purposes of case management, there are commercial and corporation lists in certain state supreme courts and a corporations list in the Federal Court in which financial services disputes between private parties are likely to be listed.

There are no judges in any of the Australian jurisdictions that exclusively preside over financial services litigation.

The Australian Financial Complaints Authority (AFCA) is an external dispute resolution body that has the power to adjudicate on complaints brought against financial services institutions which are AFCA members. Decisions relating to a complaint will be made by an ombudsman, an adjudicator or an AFCA panel. Not all decision-makers appointed by AFCA have a legal background, but may have other relevant industry experience. AFCA's board of directors is responsible for appointing adjudicators. There are no other specialist tribunals dealing with financial services disputes.

AFCA is able to consider complaints about:

- credit, finance and loans;
- insurance;
- banking deposits and payments;
- investments and financial advice; and
- superannuation.

Law stated - 12 June 2024

Procedural rules

Do any specific procedural rules apply to financial services litigation?

No specific procedural rules apply to financial services litigation in Australian courts.

Law stated - 12 June 2024

Arbitration

May parties agree to submit financial services disputes to arbitration?

Each Australian state or territory has legislation for the governance of commercial arbitration. The Commonwealth has also passed legislation in relation to international commercial arbitration.

There are no restrictions upon parties agreeing to arbitrate financial services disputes; however, that does not supersede any rights which a party may have to bring a dispute to AFCA.

Law stated - 12 June 2024

Out-of-court settlements

Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

Parties may agree, by way of written contract or otherwise, to resolve a dispute out of court via an alternative dispute resolution procedure, such as mediation or arbitration.

Various financial services providers are required by the Australian Securities and Investments Commission (ASIC) to have dispute resolution mechanisms in place, including internal dispute resolution procedures and membership of AFCA (by which membership they are required to submit themselves to AFCA's dispute resolution processes). AFCA operates as an independent external dispute resolution mechanism that deals with disputes between consumers and small businesses concerning financial firms.

The appeal avenues for AFCA determinations depend on the subject matter of the complaint. For superannuation complaints, a party can appeal a determination to the Federal Court on a question of law. The subject matter of the appeal is confined to the question of law itself and not the actual merits of the dispute. For complaints other than superannuation complaints, there are no statutory appeal mechanisms and hence the determination made by AFCA is final, unless it is rejected by the complainant. If the complainant rejects a determination, they will not be bound by it and may bring an action against the financial firm in the courts. Generally, financial firms will be unable to appeal an AFCA decision as they have joined the AFCA scheme and therefore must submit to AFCA's authority to preside over the disputes to which they are a party. The only grounds on which a financial firm may appeal an AFCA determination is if the decision has been affected by '*Wednesbury* unreasonableness' or if the AFCA rules have not been complied with.

Law stated - 12 June 2024

Pre-action considerations

Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

Prior to commencing litigation in the Federal Court of Australia or Federal Circuit Court, there is a legislative requirement for the parties to take genuine steps to resolve a dispute, including through alternative dispute resolution mechanisms such as mediation. Parties must file a 'genuine steps statement' at the same time that they are making an application to commence proceedings. The statement should list the steps that the parties have taken thus far to resolve the issue. If no steps were taken prior to commencing litigation, the parties must explain why this is the case. Although non-compliance with this procedure does not preclude parties from commencing litigation, non-compliance may adversely influence a costs order.

There are also requirements in various state and territory courts prior to commencing litigation. These include 'reasonable steps' or 'genuine steps' requirements similar to the Federal Court. For example, in South Australia prior to commencing litigation, a party is required to serve a pre-action claim setting out the basis of their claim, any expert reports and an offer of settlement to a party to whom they intend to bring an action against. The receiving party must provide a response to the offer of settlement, the basis for their response and/or defence of the claim and supporting information and expert reports, and the parties are then required to attend a pre-action meeting with a view to resolving the dispute.

In addition, where parties have commenced court actions, most superior courts of Australia will enter into court ordered mediation before a final hearing will be set down.

Consumers and small businesses considering bringing proceedings against AFCA members may consider bringing a claim to AFCA prior to court proceedings. This is a cheaper

and quicker way to resolve the dispute, is a no costs jurisdiction, and complainants can commence proceedings on limited grounds if they are dissatisfied with the result.

Apart from AFCA determinations, the pre-action considerations for financial services disputes are the same for other forms of litigation.

Law stated - 12 June 2024

Unilateral jurisdiction clauses

Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral jurisdiction clauses are common in financial agreements; however, a party cannot usually contract out of an Australian statute. In addition, where a financial services company operates in the Australian jurisdiction an action is likely to arise under Australian law, and the consumer will have a right to seek a resolution through AFCA or in the superior courts of Australia.

However, unilateral jurisdiction clauses can be upheld where the contractual arrangements are between private commercial entities and do not attract the same consumer protections.

Law stated - 12 June 2024

DISCLOSURE

Disclosure obligations

What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

Australia has broad disclosure obligations. Where disclosure is ordered in court proceedings, it must be full and frank and is subject to a statutory declaration by the producing party that it has complied with its disclosure obligations. The rules for discovery vary between Australian jurisdictions. In some jurisdictions, disclosure is a right and litigants are subject to continuous disclosure obligations of all relevant documents which relate to the genuine matters in dispute, while in others a party must apply for disclosure of relevant documents and/or specific categories of discovery and evidence must first be filed before disclosure will be ordered.

Certain documents are exempt from being disclosed, including material subject to legal professional privilege, without prejudice communications, and other recognised categories attaching privilege.

Documents which are the subject of disclosure by a party are prevented from being used for any purpose other than for the specific court matter in accordance with the English *Harman* principle, which has been adopted in Australia.

Australia does not currently have banking secrecy or blocking statutes but there is a self reporting of contraventions by financial services and credit licensee's regime, including documents which support those contraventions. There are also broad powers held by the

regulatory bodies which can compel production and disclosure of documents by financial institutions for the purposes of surveillance and for enforcement of court actions.

Law stated - 12 June 2024

Protecting confidentiality

Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

Parties can employ various procedural methods to protect confidential documents. Non-publication orders prohibit or restrict the publication of information, which can be used to protect client information. Suppression orders can also be utilised, which more broadly prohibit disclosure of information. A pseudonym order may also be available to obscure the identity of a person in court documents and in hearings by initialising their name or restricting the way they are referred to in open court. The statutory power to grant these orders is available in all jurisdictions and at all judicial levels.

The *Tournier* principle provides that bankers, and by extension financial institutions, have a duty of confidentiality to their customers. This restricts the ability of financial institutions from disclosing confidential client documents during court proceedings. There are a few exceptions that apply to this principle, including where:

- disclosure is required under a compulsion of law;
- there is a public duty to disclose;
- it is reasonably necessary to protect the bank's interests, such as where litigation against the bank is commenced by the customer; and
- the disclosure is made with the client's express or implied consent.

Law stated - 12 June 2024

Disclosure of personal data

May private parties request disclosure of personal data held by financial services institutions?

Financial services firms must comply with the obligations conferred by the Privacy Act 1988 (Cth). This prevents the disclosure of documents that disclose personal information, including data. Individuals can disclose or waive privacy at their own discretion. Where this does not occur, third parties will not be entitled to access personal data.

However, personal information can be disclosed if it is required or authorised under Australian law or compelled by an order of the court. Subsequently, subpoenas and notices to produce can be utilised, in the court's discretion, to compel the disclosure of documents containing personal data held by third parties.

Law stated - 12 June 2024

Data protection
What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

Technology-assisted review is a common mechanism used to expedite the discovery process. This includes the use of electronic discovery and predictive coding. Predictive coding reduces the size of disclosure by pre-emptively determining which documents are relevant to the proceeding. The use of electronic discovery further ensures the metadata is tied to the document.

The Federal Court has stipulated in the Technology and the Court Practice Note that parties can agree on what data security will be utilised. This allows parties to implement greater data protection at their discretion.

Both law firms and the courts engage in various procedures to ensure that client data is protected. The courts will facilitate various secured file transfer mechanisms for electronic transfer of files or secured file transfer services for physical transfer. The courts also take various steps to protect personal information they hold against unauthorised access, modification or other misuse and otherwise use processes for secure data storage by employing specialist legal data companies.

Law stated - 12 June 2024

INTERACTION WITH REGULATORY REGIME

Authority powers
What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

The Australian Securities and Investments Commission (ASIC) is the main regulator that brings actions for contraventions of financial services law. ASIC is empowered to take a range of criminal, civil and administrative actions to address alleged misconduct within its jurisdiction.

ASIC may take enforcement action for a variety of purposes including to punish wrongdoers, protect investors, preserve assets, prevent or disrupt misconduct, correct disclosures, ensure affected investors and consumers are remediated, and improve compliance with the laws it administers.

There are three broad types of enforcement action that ASIC may pursue to achieve the above outcomes:

- criminal proceedings – examples of criminal remedies include prison terms, criminal fines and court orders. ASIC commonly takes criminal action in relation to unlicensed dealings;
- civil proceedings – including civil penalty proceedings. The Corporations Act and the Australian Securities and Investments Commission (ASIC Act) specify various ‘civil penalty provisions’. It is common for ASIC to pursue breaches of these provisions

against banks and financial institutions. ASIC may also obtain injunctions and other civil orders such as relinquishment, disqualification and compensation orders, and orders requiring a wrongdoer to establish a compliance, education or training programme; and
- administrative and other enforcement action that do not require court proceedings – such as seeking restrictions on licensed activity, disciplinary action, stop orders, public warning notices, and court enforceable undertakings.

ASIC can work with the Commonwealth Director of Public Prosecutors or the Australian Federal Police to prevent dealings in, or to confiscate, proceeds of crime and may exercise powers to begin a representative action to recover damages or property for others who have suffered loss in accordance with the ASIC Act and the National Consumer Credit Protection Act 2009 (NCCP Act). ASIC will ordinarily only do so if it would be in the broader public interest, beyond the interests of the affected consumers or investors on whose behalf it commences the proceedings.

In some rare circumstances, ASIC may intervene in private litigation or seek leave to appear and assist the court.

Since the Banking Royal Commission in 2018, ASIC has adopted a more aggressive enforcement posture seeking to litigate certain cases and test the regulatory perimeter. In its most recent Corporate Plan for 2022–2026, ASIC says it will continue to be an active litigator, taking strong and targeted action to protect consumers and investors from harm and to maintain trust and integrity in the financial system.

Law stated - 12 June 2024

Disclosure restrictions on communications

Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

Australian regulators have broad investigative and information-gathering powers. Communications between regulators and financial institutions are not subject to specific secrecy or confidentiality restrictions protecting them from disclosure in litigation. However, Australian regulators generally cannot compel the production or disclosure of documents subject to legal professional privilege.

In recent times, ASIC has been increasingly challenging privilege claims by financial institutions that it considers invalid (eg, because ASIC believes privilege has been waived or the information was unlikely to have ever been privileged). Generally, ASIC will expect to see a coherent explanation to substantiate why certain material are privileged. ASIC has issued an information sheet stating its views and position on claims of legal professional privilege. It is also important to bear in mind that a defendant to proceedings commenced by ASIC may challenge a claim for legal professional privilege asserted by ASIC if it has not been properly made.

ASIC encourages cooperation from banks and financial institutions waiving legal professional privilege claims. Parties may voluntarily elect to provide privileged information

to ASIC on a limited and confidential basis under ASIC's standard 'Voluntary Confidential LPP Disclosure Agreement'. However, so-called 'limited waiver' of legally privileged material disclosed to ASIC does not prevent third parties from asserting that privilege has been waived including in overseas proceedings. This can pose risks in jurisdiction like the United States which adopts a narrower view of limited waiver. Collateral disclosure in court proceedings may also lead to a loss of privilege.

Specific statutory secrecy provisions may also protect certain information shared between financial institutions and regulators and prohibit the disclosure of such information (such as 'protected document' and 'protected information' retained by the Australian Prudential Regulation Authority). However, Australian law provides broad rights on freedom of information, which may allow anyone to seek discovery materials that have been produced to regulators. Class action claimants often use this as a tool to gain knowledge on investigations by regulators which may aid their private claims. It is prudent to identify the existence of, and in some cases redact, commercially confidential or personal information disclosed to regulators in order to prevent collateral disclosure of such material.

Law stated - 12 June 2024

Private claims
May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Private parties can bring proceedings against financial institutions directly for certain breaches of regulations, where the regulations include specific remedial provisions providing such persons with standing to seek relief. While certain provisions are only enforceable by regulators, private litigant and class action claims are frequently commenced on the basis of information gathered from regulatory investigations. There is a developed ecosystem of plaintiff law firms and litigation funders who pursue class action claims against banks and financial institutions on behalf of private litigants.

In a claim by a private party against a financial institution, the financial institution will generally only be required to disclose complaints made against it by other private parties where relevant on the pleaded case. Claimants may seek to subpoena a regulator to produce documents obtained in its investigations. The court may permit the subpoena where the request is relevant on the facts.

That said, disclosure of complaints made by other parties of a similar nature would usually not be relevant. Neither are the collateral facts disclosed in such claims usually relevant.

Law stated - 12 June 2024

Private claims
In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

In a claim by a private party against a financial institution, the financial institution will generally only be required to disclose complaints made against it by other private parties

where relevant on the pleaded case. Claimants may seek to subpoena a regulator to produce documents obtained in its investigations. The court may permit the subpoena where the request is relevant on the facts.

That said, disclosure of complaints made by other parties of a similar nature would usually not be relevant. Neither are the collateral facts disclosed in such claims usually relevant.

Law stated - 12 June 2024

Enforcement

Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

Especially prior to the Banking Royal Commission in 2018, ASIC would often agree to settle claims in exchange for enforceable undertakings from banks or financial institutions. These undertakings are enforceable by ASIC in court in the event they are breached. Private parties cannot directly enforce enforceable undertakings. However, they may alert the regulators of any breach of such undertakings which may prompt the regulators to enforce them.

Law stated - 12 June 2024

Changes to the landscape

Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

There have been significant regulatory changes since the global financial crisis, including but not limited to the introduction of the NCCP Act in 2009, the Future of Financial Advice reforms in 2012 and 2014, and further reforms recommended by the Banking Royal Commission in 2018. The vast majority of the 76 recommendations made by the Banking Royal Commission have been passed into laws.

Among these changes, the penalties for financial sector and corporate misconducts were extended and significantly increased by the introduction of new civil penalty provisions and higher maximum penalties.

The Financial Accountability Regime, or FAR, was also introduced in 2023 extending reforms introduced in 2019 under the Banking Executive Accountability Regime. FAR imposes enhanced accountability and self-reporting obligations on financial institutions in the banking, insurance and superannuation industries and their directors and senior executives.

In October 2021, the Government introduced design and distribution obligations (DDO) to businesses offering financial and credit products to retail consumers. DDO require issuers and distributors of these products to assess the needs of customers, and to distribute those products in a targeted manner. These include publishing an appropriate target market determination (TMD) before any financial product is provided to retail customers and ensuring compliance with those restrictions.

ASIC has been actively using DDO and product intervention powers to regulate the financial and credit markets, including a ban on binary options and extending product intervention orders in relation to contracts for difference. ASIC has also utilised its powers to prevent the distribution of single-asset crypto-asset funds to retail consumers. It is currently pursuing enforcement action against a global cryptocurrency exchange over an alleged failure to issue a TMD in relation to a margin extension product, which ASIC alleges is a credit facility.

Law stated - 12 June 2024

Complaints procedure

Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

AFCA is an independent external complaints body that enables consumers and certain small businesses to resolve disputes without commencing formal litigation, by way of a complaint to AFCA. AFCA operates as an independent external dispute resolution mechanism that deals with disputes between consumers and small businesses concerning financial firms. Many financial firms are required to be members of AFCA. This complaint process is not a prerequisite to litigation, rather it provides consumers with an alternative option for dispute resolution.

As of 1 January 2024, AFCA adjusted its monetary limits and compensatory caps for complaints. AFCA can now consider disputes where the claim commenced by a consumer does not exceed A$1,263,000, or where the credit facility does not exceed A$6,317,000 for small businesses and primary producers.

In determining the appropriate remedy, AFCA seek to achieve, as nearly as possible, to place the complainant in the position they would have been if the conduct of the financial firm had not caused the loss; or to compensate the complainant of the loss to the extent AFCA holds the financial firm responsible for the loss. AFCA may, in addition or instead, award compensation for indirect financial losses, although this is capped at A$6,300 per claim.

AFCA has authority to hand down determinations, which operate to the same effect as a decision. These determinations are binding on the financial firm, but the complaining customer does not have to accept it and financial firms are more readily challenging the jurisdiction of AFCA to make some awards and looking to the courts for intervention into AFCA determinations. If the complainant rejects the determination, the parties to the dispute retain their legal rights to commence litigation.

Law stated - 12 June 2024

Recovery of assets

Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

In Australia, the Financial Claims Scheme (FCS) operates as an extrajudicial process that protects deposit-holders of authorised deposit-taking institutions (ADI) in the event that the

institution becomes insolvent. The FCS is a safety net backed by the federal government for deposits up to A$250,000 per account holder. It also covers general insurance policy claims up to A$5,000.

Once the FCS is activated by the federal government following the failure of an ADI, APRA will seek to pay account holders within seven calendar days. Payment will typically be either a cheque or electronic transfer to a nominated account. The process to collect payment is directly communicated to the claimant by APRA once activated.

The Compensation Scheme of Last Resort (CSLR) commenced operation on 2 April 2024, to provide compensation of up to A$150,000 to consumers who have unpaid AFCA determinations. From 1 July 2024, the CSLR will be funded by levies imposed on parts of the financial services industry. The purpose of the CSLR is to provide compensation for the misconduct of financial services firms that became insolvent. Compensation is restricted to firms that were licensed to provide the relevant product.

Law stated - 12 June 2024

UPDATE AND TRENDS

Challenges and trends

What are the principal challenges currently facing the financial services litigation landscape in the past year? What trends are apparent in the nature and extent of financial services litigation? Are there any other noteworthy features that are specific to financial services litigation in your jurisdiction?

At the end of 2023, the Australian Law Reform Commission published its report on reforming corporations and financial services legislation. The report highlights that the current primary and delegated legislative instruments governing financial services, such as the Corporations Act and the National Consumer Credit Protection Act 2009, are poorly defined and fail to prioritise key issues. This creates a challenging expectation for firms to follow legislative requirements without a clear understanding of their application.

The report also highlights the impact of notional amendments which create a major source of incoherence affecting financial services legislation. Notional amendments are provisions that alter the legal effect of another provision while retaining the original text of the provision. These amendments can be made by either the Minister of Finance or the Australian Securities and Investments Commission (ASIC). A stark example is section 708(8)(c) of the Corporations Act which states that an offer of a body's securities does not need to be disclosed to investors if it appears from a certificate from an accountant no more than six months before the offer is made. However, the Corporations Regulations 2001, regulation 6D.5.02 has notionally amended that provision to two years. This amendment renders the six-month requirement obsolete; however, it continues to appear within the primary legislation. Consequently, a stark challenge exists within the financial services to navigate the legal landscape. This exposes financial service firms to litigation as without assistance from legal counsel, they are at risk of contravening the legislation.

ASIC's 2024 enforcement priorities include addressing poor distribution of financial products (under its design and distribution obligations and product intervention powers), misleading

conduct in relation to sustainable finance (eg, greenwashing), the high-cost credit and predatory lending practices of small credit contracts to consumers and small businesses, and governance and directors' duties failings.

In addition, ASIC has been testing the regulatory perimeter and actively bringing enforcement actions against the crypto-asset and contracts for difference industries, especially over unlicensed crypto-asset offerings which ASIC alleges mimic traditional financial products. These have included a particular focus on digital wallet, payments and yield-based offerings.

With expansion of consumer protections in relation to unfair contract terms, we expect ASIC to bring new enforcement actions in relation to standard form contracts which it alleges include unfair contract terms. Under the existing regime, ASIC sued PayPal in 2023 over alleged unfair contract terms in PayPal's user agreement. Other significant litigated regulatory matters in recent times include providing financial services without proper licences (eg, promoters of unlicensed offerings or 'finfluencers'), market manipulation, and breaches of consumer protection provisions.

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