

Deborah Mitchell

From: Section 11C(1)
Sent: Thursday, 25 January 2018 1:59 PM
To: Section 11C(1)
Subject: Fw: Amex fee case [DLM=Sensitive]

Categories: Folder: ~SENT

Hi Section 11C(1)

Sorry this has taken me a while, it slipped to the bottom of the to-do list as Section 11C(1) was away and I was focusing on getting the RM report finished.

Is this the level of detail Section 11C(1) will need for the email?

Kind regards,

Section 11C

Hi Section 11C(1)

A Fairfax [article](#) late last year mentioned a court action against American Express in the Supreme Court of Victoria by Mr Brighton-Stangstins.

Court action - Amex merchant surcharge disclosure

As set out in the article, the issue in the case is whether merchant surcharge fees have to be disclosed under the UCCC in relation to a 2007 credit card contract taken by Mr Brighton-Stangstins. The proceedings were commenced in 2013. There was a pre-trial directions hearing on 8 December 2017, which may have precipitated the article. I could not find any information on when the matter is listed for hearing.

Following the introduction in 2017 of new restrictions on surcharging solely enforced by the ACCC, ASIC's role in relation to credit card surcharging is virtually non-existent.

FOI determination - Amex higher default interest

Mr Brighton-Stangstins was successful in 2014 obtaining documents from ASIC in a FOI determination relating to an [outcome](#) against Amex in relation to the charging of a higher default interest rate.

The information released under the FOI determination does not directly relate to the current court action.

FOS determination - ANZ remediation of \$37M

The article also mentions that Mr Brighton-Stangstins was the instigator in 2011 of a FOS determination in 2017 that led to the remediation of \$37M to credit card customers for overcharging interest on purchases. FOS have confirmed that ANZ was the credit provider. The main issue in contention was ANZ's ability to charge interest on the interest incurred on purchases and cash advances when the full account balance is not paid by the due date due to deficiencies in their contractual terms.

It appears that the FOS determination is not relevant to the current action against Amex.

Briefing paper

I will prepare a briefing paper on this issue for your Estimates appearance.

Kind regards,

Section 11C(1)

----- Forwarded by Section 11C(1) /Sydney/NSW/ASIC on 18/01/2018 02:24 PM -----

From: Section 11C(1) /Sydney/NSW/ASIC
To: Section 11C(1) /Sydney/NSW/ASIC@ASIC,
Date: 18/01/2018 11:27 AM
Subject: Re: Fw: Amex fee case [DLM=Sensitive]

Hi [redacted],

Thanks very much for chasing this up.

I think the two options for the briefing are:

- incorporate an update on this matter into the current credit card brief ([Credit cards - reforms and ASIC project - December 2017.docx](#))
- make a new brief for this issue, with some material from earlier briefs (such as around surcharging: [November 2016 - Credit and debit cards surcharges.docx](#))

I have an open mind about which path we take, although I think a new briefing is probably a little easier.

Separately I think it might also be a good idea for you to send a short email to [redacted] summarising what you've found.

Cheers,

[redacted]



From: Section 11C(1) /Sydney/NSW/ASIC
To: Section 11C(1) /Sydney/NSW/ASIC@ASIC,
Date: 17/01/2018 05:06 PM
Subject: Re: Fw: Amex fee case [DLM=Sensitive]

Hi [redacted],

FOS have confirmed (under notice) that the entity that remediated \$37 million was ANZ. It appears from the information FOS provide me that ANZ informed FOS that they were keeping ASIC updated on this issue.

Is there a document that I should include the briefing in?

Kind regards,

[redacted]

From: Section 11C(1) /Sydney/NSW/ASIC
To: Section 11C(1) /Sydney/NSW/ASIC@ASIC,
Date: 16/01/2018 08:28 AM
Subject: Re: Fw: Amex fee case [DLM=Sensitive]

Thanks [redacted] - that's very helpful.

I think the easiest way to find out the name of the FSP is to contact FOS. Sometimes they are willing to tell you who the FSP is, but on other occasions they require a notice. The best contacts are probably [Section 11C\(1\)](#) (or maybe [Section 11C\(1\)](#)).

[Section 11C\(1\)](#) @FOS.org.au>

[Section 11C\(1\)](#) Case Manager
Systemic Issues
Financial Ombudsman Service Australia
T: [Section 22](#) | Free Call: 1800 367 287
www.fos.org.au

Cheers,

[Section 11C\(1\)](#)

[Section 11C\(1\)](#) | Acting Senior Manager | Deposit Takers, Credit & Insurers | ASIC | Sydney | T +61 [Section 22](#) |



From: [Section 11C\(1\)](#)/Sydney/NSW/ASIC
To: [Section 11C\(1\)](#)/Sydney/NSW/ASIC@ASIC,
Date: 12/01/2018 06:00 PM
Subject: Re: Fw: Amex fee case [DLM=Sensitive]

Hi [Section 11C\(1\)](#),

Supreme Court case

As set out in the article, the key issue in the case appears to be whether merchant fees have to be disclosed under the Code. The matter is in relation to 2007 credit contract, so in respect of UCCC. The proceedings were commenced back in 2013. There was a pre-trial directions hearing on 8 December 2017, which may have precipitated the article. I could not find any information on when the matter is listed for hearing.

FOS determination

The FOS determination referenced in the article is mentioned in FOS's 2016-17 annual report and dealt with in more detail in the FOS Systemic Issues Report for the quarter ending June 2017. I have included the description of the matter from the Systemic Issues Report below. I have not been able to identify whether the dispute does in fact relate to ANZ as suggested in the article. It is also not clear when the conduct ceased. **Would it be worthwhile for me to contact FOS to request the name of the FSP or is there another way I could look into this?**

6.2.2 Credit card – application of interest rates (307612)

A systemic issue that was previously reported as unresolved in the December 2013 quarter report has been re-instated as an ongoing definite systemic issue investigation.

An applicant had lodged a complaint with FOS in August 2011 regarding the manner in which the FSP charged interest on its credit cards. Among other things, the dispute involved allegations that the FSP had breached the *Uniform Consumer Credit Code* and *National Credit Code* by failing to disclose the interest charges it applies to different components of the applicant's credit card debt. In particular, the applicant said that the FSP failed to disclose, in either the conditions of use which apply to his credit card account or in the pre-contractual statement that it would charge interest on previously billed interest, fees and charges, and also failed to define "purchases" upon which it charges interest.

The main issue in contention was the FSP's ability to charge interest on the interest incurred on purchases, cash advances and promotions when the full account balance is not paid by the due date.

Following a review of the FSP's submissions, the Lead Ombudsman, Banking and Finance, remained concerned that the FSP had potentially overcharged interest on cash advance interest

after the end of the first statement period. The overcharge is the difference between the purchases annual percentage rate (APR) and the cash advance APR.

On this basis the Lead Ombudsman considered, at the time, that the matter represented a definite systemic issue and indicated to the FSP that he required it to compensate customers for any overcharging of interest on cash advance interest. Discussions took place with the FSP regarding proposals for remediation and accompanying categories of proposed exemptions. The FSP estimated that refunds would be approximately \$32 million in total (including agreed exclusions). The estimate was based on 36 months of daily customer data and monthly data beyond the 36 months to remediate customers for a six year period in total.

In the December 2013 quarter, FOS discontinued the dispute that raised this systemic issue under paragraph 5.2 of the FOS Terms of Reference. This was due to the commencement of proceedings in the County Court of Victoria by the applicant, which related to the credit contracts with the FSP that were subject to the dispute.

We considered the effect of the discontinuation of the dispute on the systemic issue investigation at the time. The discontinuation of a dispute would not ordinarily result in the discontinuation of a systemic issue investigation. However, as the proceedings related to the interpretation and application of the terms and conditions of the applicant's credit card contract with the FSP, we considered it appropriate to discontinue our investigation of the appropriate resolution and remediation of this systemic issue at the time.

As requested, the FSP informed us that the court proceedings were settled on a commercial basis to avoid the costs of litigation.

In the absence of a court decision to the contrary, FOS took the view in the March 2015 quarter that it was appropriate to reinstate the systemic issue investigation and proceed to implement the remediation program.

During the September 2015 quarter, the FSP provided information about its planned remediation. It advised that it would apply adjustments to between 500,000 to 650,000 impacted consumer credit card customers across approximately 800,000 – 1.3 million accounts over the relevant period (being November 2006 to March 2014).

The FSP also provided an indicative timeline setting out the breakdown of the tasks required to apply adjustments to impacted customers but advised that it would not complete the remediation until the last quarter of 2016.

During the March 2016 quarter, two meetings were held with the FSP to discuss the progress of its remediation program and to discuss the payment of interest to affected customers. The FSP has confirmed that the first tranche of adjustments to existing account holders will take place in July 2016 and that the project was intended to be completed within a twelve month period.

In addition, and as a result of these meetings, the FSP advised that for affected former cardholders it will only send cheques to those customers in the adjustment bands \$20 < \$25 and above. Current cardholders will have refunds made directly to their accounts. No adjustment will be paid to former cardholders who no longer hold a credit card in the adjustment bands below \$20 < \$25.

It was also agreed that with respect to compensatory interest, the FSP will pay the median compensatory interest to those customers who are entitled to receive a payment of interest of \$20 or more. Work preparing for the first stages of the remediation continued during the June 2016 quarter.

In the September 2016 quarter, the FSP confirmed to FOS that the remediation project had commenced and that 35,000 customers had received their adjustments at this time. The FSP has also confirmed that customers will continue to receive adjustments through to February 2017.

During the June 2017 quarter, the FSP concluded its remediation program. It confirmed to FOS that it paid adjustments totalling \$37,006,977.71 to 358,717 customer accounts through a combination of payments directly to customer accounts as well as by cheque.

The FSP also confirmed the relevant terms and conditions had been amended. The Lead Ombudsman was satisfied with the FSP's actions and confirmed the matter was resolved.

Link with FOI application

The media release upon which the FOI application was based does not appear to be relevant to the case. The media release was in relation to an matter about default fees. (I happen to have worked on this matter when I was in FSE).

Kind regards,

Section 11C(1)

Section 11C(1) | Senior Lawyer | Deposit Takers, Credit and Insurers | Australian Securities and Investments Commission | Tel: Section 11C(1) | [Section 11C\(1\)@asic.gov.au](mailto:Section 11C(1)@asic.gov.au)

From: Section 11C(1)/Sydney/NSW/ASIC
To: Section 11C(1)/Sydney/NSW/ASIC@ASIC,
Date: 08/01/2018 02:37 PM
Subject: Fw: Amex fee case [SEC=UNCLASSIFIED]

Hi Section 11C(1),

Would you have capacity to look into the issue mentioned in [this Fairfax Article](#) late last year?

I'm not sure there will be an awful lot involved, other than a general look into the detail to make sure there isn't anything else we need to do, as well as the briefing Section 11C(1) has requested.

Additionally, the FOI application Section 11C(1) mentioned in her email related to the work in [this media release](#). Mr Brighton-Stangstins and Amex both appealed our decision on that application - the Information Commissioner's decisions are [here \(Applicant\)](#) and [here \(Amex\)](#). I worked on the initial decision with Section 11C(1) did the internal review.

Cheers,

Section 11C(1)

Section 11C(1) | Acting Senior Manager | Deposit Takers, Credit & Insurers | ASIC | Sydney | T +61 Section 22 |



----- Forwarded by Section 11C(1)/Sydney/NSW/ASIC on 08/01/2018 02:20 PM -----

From: Section 11C(1)/Hobart/TAS/ASIC
To: Section 11C(1)/Sydney/NSW/ASIC@ASIC,
Date: 08/01/2018 02:11 PM
Subject: Fw: Amex fee case [SEC=UNCLASSIFIED]

Hi Section 11C(1),

Section 11C(1) has asked if we can follow this up. We have an Estimates appearance in February and Section 11C(1) would like a short briefing on this issue, perhaps rolled into the existing credit cards briefing or a previous surcharging briefing.

Happy to discuss.

Kind regards,

Section 11C(1)

Section 11C(1) | Group Senior Manager – Deposits & Payments | Deposit Takers, Credit & Insurers | Hobart | +61 Section 22 | [Section 11C\(1\)@asic.gov.au](mailto:Section 11C(1)@asic.gov.au)



----- Forwarded by Section 11C(1)/Hobart/TAS/ASIC on 08/01/2018 02:09 PM -----

From: Section 11C(1)/Sydney/NSW/ASIC
To: Section 11C(1)@asic.gov.au,
Date: 23/12/2017 11:30 AM
Subject: Amex fee case [SEC=UNCLASSIFIED]

Hi, not sure if you have seen this. We had at least one FOI from this applicant.

Also I'm not sure which entity FOS made the decision about?

Section 11C(1)



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