



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: TAXATION & COMMERCIAL DIVISION

File Number: **2015/6269**

Re: **Tony Nguyen**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

Tribunal: **The Hon. Justice Stevenson**

Date: **21 June 2017**

Place: **Sydney**

The Tribunal decides to set aside the decision made by the Australian Securities and Investments Commission on 15 October 2015 and orders that pursuant to sections 80 and 81 of the National Consumer Credit Protection Act 2009 (Cth), Tony Nguyen is banned from engaging in any credit activity for four (4) years, from which is deducted the period between 15 October 2015 and the date of this order.



.....
The Hon. Justice Stevenson

CATCHWORDS

CORPORATIONS - financial services - credit activities - banning order - where the applicant sought a review of the decision made by the respondent to permanently ban the applicant from engaging in credit activities - where the respondent sought that the applicant be prohibited from engaging in any credit activity for a period at the high end of the three to ten year range - decision set aside and substituted - orders made banning the applicant from engaging in any credit activity for four years

LEGISLATION

Australian Securities and Investments Commission Act 2001(Cth), ss 12BAA, 12BAB, 12DA(1)

Corporations Act 2001 (Cth)

National Consumer Credit Protection Act 2009 (Cth), sch 1, ss 6, 7, 8, 9, 29(1), 30(1), 80, 80(1)(d)(i), 80(1)(e)(i), 80(1)(f), 81

CASES

ASIC v Adler [2002] NSWSC 483

Gardam v George Wills & Co Ltd 1988 82 ALR 415

Global Sportsman Pty Ltd and Anor v Mirror Newspapers Ltd and Anor (1984) 55 ALR 25

John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited [1993] FCA 295

Re Vault Market Pty Ltd [2014] NSWSC 1641

Yorke v Lucas [1985] HCA 65

SECONDARY MATERIALS

ASIC Regulatory Guide 218 Licensing: Administrative action against persons engaging in credit activities

ASIC Regulatory Guide 203 Do I need a credit licence?

ASIC Regulatory Guide 204 Applying for and varying a credit licence

Australian Securities and Investments Commission Regulations 2010 (Cth), regs 2B(1), 2B(2)

National Consumer Credit Protection Regulations 2010 (Cth), reg 25

REASONS FOR DECISION

The Hon. Justice Stevenson

21 June 2017

Introduction

1. On 15 October 2015 a delegate of the Australian Securities and Investment Commission ("ASIC") made an order pursuant to sections 80 and 81 of the *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Act"), which permanently banned Mr Tony Nguyen from engaging in credit activities. On 1 December 2015 Mr Nguyen applied to the Administrative Appeals Tribunal for a review of that decision.
2. The application for review came before me for hearing on 7 to 11 November 2016. This application proceeded as a hearing de novo and was concluded within four days, due to the non-appearance of a number of anticipated witnesses.

Background

3. Mr Nguyen was 29 years of age at the time of the hearing and had been involved in the financial services industry for several years. He holds the following academic qualifications:
 - Bachelor of Business, majoring in Financial Planning and Management (2009)
 - Graduate Diploma in Financial Planning (2011)
 - Masters Degree in Applied Finance (2011)
 - Certificate in Mortgage Broking (2012).

At the time of the hearing Mr Nguyen had completed approximately half of the requirements for the degree of Master of Business Administration.

4. From 24 September 2012 until 18 June 2013 Mr Nguyen was employed as a credit representative by RAMS Financial Group ("RAMS"). He was based at the Marrickville branch and held credit representative number 428566.

5. From 4 June 2013 until 30 May 2014 Mr Nguyen was employed by BT Financial Group, with responsibility for maintenance and review of financial planning policy. BT Financial Group is the component of Westpac Bank.
6. Between May 2013 and March 2014 Mr Nguyen assisted a number of people with applications for housing loans with the ANZ Bank. Nine out of a total of 36 loan applications were found to have been supported by false documents.
7. On 27 May 2013 Mr Nguyen entered into an Introducer Agreement with the ANZ Bank. This agreement was terminated by the ANZ Bank on 19 December 2013. On the same date, Mr Nguyen applied to become a referral partner for Tomorrow Finance Group ("TFG"). His application was approved on 23 December 2013 and this agreement was terminated by TFG on 25 March 2014.
8. Mr Nguyen's superior at BT Financial Group was Ms Patricia O'Brien. She gave a statement in the proceedings (Tab 4 of the Respondent's Further Evidence, Volume 1) in which she set out certain details of the offer of employment to Mr Nguyen. In particular, she set out clauses relating to "conflict of interest" in Mr Nguyen's employment contract.
9. Ms O'Brien stated as follows:

1 *At page 6 of the Terms and Conditions is a section titled "Conflict of Interest." This section provides examples of situations that could give rise to a conflict of interest which Tony was required to avoid as an employee of Westpac, including:*

...

- (b) *participating in any business activity or employment outside Westpac that may involve you in any financial dealings with Westpac, especially if those dealings may place Westpac in a moral and/or legal position of responsibility to someone else;*
- (c) *undertaking any other employment or business activities (unless you have your manager's written consent);*

...

12. *The Conflict of Interest section of the Terms and Conditions also states:*

You must let us know straight away if you think that any activity you are considering might conflict with our core values or business. If you are unsure about whether a situation creates or has the potential to create a conflict of interest, please discuss it with your manager before taking any further action.

10. As noted, on 27 May 2013 Mr Nguyen entered into an Introducer Agreement with the ANZ Bank. He dealt principally with Loans Officer Ms Christine Haramis at the ANZ Bank but he also had some involvement with Mr Rick Truong.
11. The Introducer Agreement provided as follows, inter alia:

INTRODUCTIONS

2.1 Introductions

- (a) The Introducer may introduce or refer to ANZ from time to time, prospective customers seeking Qualifying Loans.
- (b) Each Introduction by the Introducer to ANZ must be by way of an Introducer Form (in the prescribed form) and contain the following:
 - (i) the contact details of ANZ;
 - (ii) details of the Introducer including the Introducers identification number or similar identification;
 - (iii) disclosure of the commission which may be received as a result of the referral;
 - (iv) a signed acknowledgment by the prospective customer in the prescribed form; and
 - (v) any other details required by ANZ to be provided to the customer by the Introducer from time to time.
- (c) The Introducer must act strictly within the policies and procedures prescribed from time to time by ANZ in relation to referrals, and at all times within Regulation 25 of the National Consumer Credit Protection Regulations 2010 (Cth) and any other law or regulation relevant to the referrer's conduct under this Agreement.

2.2 Introducer not to quote fees and other amounts

The Introducer must not quote to the prospective customer, any fees or other amounts in respect of a Qualifying Loan.

2.3 No obligation to approve

ANZ, in its absolute discretion, may decline or approve any application for a Qualifying Loan made as a consequence of an Introduction.

2.4 **Obligations as a holder of an Australian Credit Licence**

For the avoidance of doubt, the Introducer is at all times required:

- (a) to be a Registered Person or maintain an Australian Credit Licence and fulfil the requirements of Registered Persons or a holder of an Australian Credit Licence as in force from time to time; or
- (b) to maintain the status of an authorised Credit Representative of a holder of an Australian Credit Licence or a Registered Person and in that case, notify ANZ of any change in the licensee/Registered Person or the authorisation.

ANZ is entitled to take reasonable steps to verify that this obligation is satisfied.

2.5 **Nature of relationship**

- (a) The Introducer's role under this agreement is limited to the Introduction of prospective customers to ANZ as provided in this agreement.
- (b) Nothing in this agreement constitutes a partnership, joint venture, agency or other form of fiduciary relationship between the Introducer and ANZ.
- (c) The Introducer:
 - (i) does not have any authority to bind ANZ in any way and must not represent that it has, or hold itself out as having, authority to bind ANZ in any way;
 - (ii) must not pledge or purport to pledge the credit of ANZ in any way;
 - (iii) must not take part in the preparation or execution of Loan Agreements or security documents for loans or any related documents;
 - (iv) must not make any representations to any prospective customers concerning Qualifying Loans;
 - (v) must not engage in conduct which is false, misleading or deceptive concerning any matter outlined in this agreement; and

- (vi) must comply with all applicable laws in relation to its obligations under, and activities in connection with, this agreement.

3. **COMMISSION**

3.1 **Entitlement and payment**

- (a) Provided the Introducer has met its obligations under this agreement:
 - (i) where a Qualifying Loan is Drawn Down within the first 6 months from the Commencement Date, as a result of an Introduction, ANZ must pay to the Introducer the Commission set out in item 4 of the reference schedule; and
 - (ii) where a Qualifying Loan is Drawn Down after the first 6 months from the Commencement Date, as a result of an Introduction, ANZ will pay to the Introducer the Commission at a rate determined by ANZ in its absolute discretion having regard to the Introductions previously submitted by the Introducer.
- (b) ANZ may structure the Qualifying Loan with a referred customer by opening one or more loans with the customer. In that case, the total amount of all of the loans opened as a result of the Introduction applies when calculating the Commission.
- (c) ANZ will pay Commission to the Introducer in arrears on or about the 15th day of each month in relation to Qualifying Loans Drawn Down during the previous month.

3.2 **Disclosure**

- (a) The Introducer must ensure that where it refers a customer seeking a Qualifying Loan to ANZ, the Introducer discloses (in a manner approved by ANZ):
 - (i) the nature of the Introducer's relationship with ANZ; and
 - (ii) the Commission (if any) to which the Introducer is or may become entitled to receive should that customer Draw Down a Qualifying Loan from ANZ.
- (b) ANZ may disclose to a customer the amount of any Commission payable to the Introducer in ANZ's Loan Agreement or other communication to the customer.
- (c) Each Introducer Form must be signed by the prospective customer acknowledging that the Introducer has disclosed the nature of the

Introducer's relationship with ANZ and the Commission (if any) to which the Introducer may become entitled to receive should that customer Draw Down a Qualifying Loan from ANZ."

12. ANZ Bank personnel prepared an Introduction Document for Mr Nguyen, which read as follows:

Tony Nguyen introduces you to ANZ.

Present this Introduction at DOUBLE BAY ANZ Branch or CHRISTINE HARAMIS ANZ Home and Investment Lending Manager when you apply for your eligible ANZ home loan. For more information please contact CHRISTINE HARAMIS on...

All applications for credit are subject to ANZ's normal lending criteria. ANZ terms and conditions, fees and charges apply. Tony Nguyen may benefit from ANZ in the form of a cash payment (being up to 0.5% of the eligible ANZ loan amount actually approved and drawn down). You can ask ANZ if your loan is an Eligible Loan for which the Introducer will receive a commission. Please present this flyer at the ANZ loan application for Tony Nguyen to be eligible for a commission payment.

Tony Nguyen

TPMI Number: 6725

Australian Credit Licence Number: 428566

Referrer Name: Tony Nguyen

Referrer Number 6725

Customer acknowledgement of the above notice:

_____ *(signed)* _____

Date: __ 10/12/2013 _____

...

13. In part the contents of this document were incorrect, in that Mr Nguyen has never held an Australian Credit Licence ("Credit Licence"). The number 428566 was that which he held as a credit representative with RAMS.
14. Between May 2013 and March 2014 Mr Nguyen was involved in thirty-six loan applications to the ANZ Bank. Twenty-seven of these loan applications were submitted pursuant to the Introducer Agreement with the ANZ Bank and the remaining nine via the TFG partner referral arrangement.

15. It was common ground that Mr Nguyen was involved in loan applications to the ANZ Bank by the following persons:
- Thao Phuong Vo;
 - Somkhit Phansavanh;
 - Chek Bac Tang and Kelly Thu Phung Hua;
 - Thi Oanh Vo;
 - Thi Anh Tiet Dang;
 - Thi Trinh Do;
 - Minh Ngoc Ho;
 - James Hoang Vo;
 - Vannack Ngan and his wife Thao Thi Hien Nguyen (also known as Kate).

There was no issue that these nine applications were supported in part by false documents.

16. Initially, ASIC contended that Mr Nguyen knowingly provided false documents to the ANZ Bank. Ultimately ASIC abandoned that submission and contended that Mr Nguyen acted "recklessly", within the meaning of section 160D of the Credit Act, in relation to provision of false documents.
17. On 25 August 2014 ASIC officers conducted a voluntary interview with Mr Nguyen. The transcript of this interview was contained in the T documents (Tab 5). An element of Mr Nguyen's case was that he has co-operated with ASIC at all times.
18. At the commencement of the hearing I enquired of counsel for ASIC whether his client pursued an order that Mr Nguyen be banned permanently from conducting credit activities. I was informed by counsel that ASIC sought an order for a permanent ban. At the conclusion of the hearing and in written closing submissions, however, counsel for ASIC sought an order that Mr Nguyen "be prohibited from engaging in any credit activity for a period at the high end of the 3 to 10 year range." This change of position followed ASIC's concession that the evidence did not establish that Mr Nguyen knowingly provided false documents to the ANZ Bank.

19. At the commencement of the hearing counsel for Nguyen said:

We accept that we should be banned for a period of time, and we have made concessions in relation to that, and we say that the period banning should range from a year to three years ...

20. During his oral closing submissions, counsel for Mr Nguyen made the following concessions:

- *...I do concede that he overstepped the line and it's a question for you to consider how far he overstepped that line and instituted or was involved in credit activity where he needed an Australian credit licence.*
- *If he was banned for three years he would've accepted that but, no, they banned him permanently. They rubbed him out for life.*
- *... I've set out what the regulation 25 of the National Consumer Protection Regulations provides an exemption. It is conceded on the evidence that my client may have stepped outside that exemption...*

21. During his closing oral submissions, counsel for ASIC conceded that the period for which Mr Nguyen has been banned from engaging in credit activities should be taken into account. Consequently the time between the original order on 15 October 2015 and the date of this decision should be deducted from the banning period which results from these proceedings.

22. As noted, during his closing oral submissions counsel for ASIC abandoned the initial contention that Mr Nguyen knowingly submitted false documents to the ANZ Bank in support of loan applications. Counsel for ASIC said:

...at the commencement of the proceedings ASIC's case was that the evidence would demonstrate that Mr Nguyen knew that the documents were false, the relevant false documents were false. ASIC accepts that, as the evidence has emerged during the hearing, there is inadequate evidence to satisfy the tribunal that Mr Nguyen knew that the documents were false.

The Evidence and Witnesses

23. Mr Nguyen relied on statements from the following witnesses:

- Tony Nguyen, 7 September 2016;
- Thi Trinh Do, 20 July 2016;

- Thi Anh Tiet Dang, 18 July 2016;
 - Minh Ngoc Ho ,19 July 2016;
 - Thao Phuong Vo, 24 July 2016; and
 - Thi Oanh Vo 23 July 2016.
24. Only Mr Nguyen and Ms Thi Anh Tiet Dang could be made available for cross-examination. Obviously, the weight to be given to the contents of the witness statements of the other five persons was affected adversely by their failure to attend the hearing. I attach little or no weight to the contents of these statements.
25. Mr Nguyen also called evidence from Mr Rick Truong, an ANZ Bank loans officer. Mr Truong gave his evidence pursuant to a subpoena and at no stage provided a written statement. Mr Truong first had contact with Mr Nguyen when he was employed as a credit representative with RAMS. Mr Nguyen re-contacted Mr Truong when he entered into the Introduction Agreement with the ANZ Bank.
26. Mr Nguyen misrepresented his employment situation to Mr Truong in an email exchange in August 2013. These emails read, inter alia, as follows:
- Nguyen: *Hey Rick, how are you mate? I'm accredited with ANZ mortgages as an introducer so I could start passing details over to you if you were up to it. Cheers, Tony.*
- Truong: *Hey Tony, good to hear from you. So what is your situation at present? Still with RAMS? Hoping you're doing well. When you're next free, drop by and we can catch up for a coffee. I've been pretty busy in the past weeks so hopefully it will continue. May I ask who you signed the introducer with? It would most likely go to that person. In saying that, if you would like to deal with me directly I'm sure we can look at that. Talk to you soon.*
- Nguyen: *Hey Rick. I'm still with RAMS but based in the CBD now so it will be hard for me to get to Cabramatta on a weekday. How are you placed for a catch this weekend or Saturday morning for a coffee?*
27. Mr Truong gave the following evidence, inter alia:
- Mr Nguyen approached ANZ Bank staff in relation to becoming an Introducer;
 - to his knowledge, an Introducer does not require a credit licence;

- his understanding of the role of an Introducer was that "the Introducer refers business to us and we write the business";
 - ANZ Bank staff check and verify client information;
 - an Introducer has no role in verification of client information;
 - he asked Mr Nguyen to provide customer information to assist with loan applications; and
 - he "definitely" did not require Mr Nguyen to conduct due diligence checks.
28. Mr Nguyen adduced character evidence from Mr John Baylouni. He is a real estate agent in Ashfield, who said that he has a friendship with Mr Nguyen which developed from business dealings.
29. Mr Nguyen served a subpoena to give evidence upon Ms Christine Haramis. She attended the hearing on 9 November 2016 but produced a medical certificate from Dr Peter Calligeros (Exhibit 10) which read as follows:
- 8/11/2016*
- TO WHOM IT MAY CONCERN*
- Dear Sir*
- This is to certify that Mrs CHRISTINE CONTOMINAS presented today for treatment.*
- She is suffering anxiety symptoms tremor, teary, insomnia palpitation.*
- She is due to attend court on the 9/11/2016 and this is impacting on her emotionally.*
- Yours Faithfully*
- (signed)*
- Dr P Calligeros*
- ...
30. Neither party wished to put questions to Dr Calligeros, nor raised as an issue the fact that Ms Haramis was apparently referred to as "Christine Contominas" in the medical certificate. Both parties accepted that the person who attended upon Dr Calligeros and came to the hearing was Ms Haramis.
31. Counsel for Mr Nguyen elected not to call Ms Haramis to give evidence. He said:

I don't wish to call her in those circumstances. I think it would be unfair. I don't think as a consequence of this case anyone should be subjected to health issues.

Counsel for ASIC "acceded to that course", as he wrote in his closing written submissions. The statement of Ms Haramis was in evidence but, obviously, the weight which can be given to its contents was affected adversely by the lack of cross-examination. I attach little or no weight to the contents of her witness statement.

32. ASIC relied upon statements from Mr John Allen of TFG and Ms Patricia O'Brien, who was Mr Nguyen's superior at BT Financial Group. Mr Allen gave oral evidence by way of cross-examination and Ms O'Brien was not required for that purpose. I have referred above to the statement of Ms O'Brien.

33. The statement of Mr John Allen read as follows:

- 1 *This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true.*
- 2 *I am 31 years of age.*
- 3 *I am a director of Tomorrow Finance Group Pty Ltd (**TFG**).*
- 4 *TFG holds an Australian credit licence (**the TFG ACL**). It acts as an intermediary for the referral of home loan enquiries. TFG is not a credit provider and does not provide credit assistance.*
- 5 *TFG operates a website, www.tomorrowfinance.com.au (**the TFG Website**), where members of the public can make inquiries about home loans which are transmitted by TFG to the credit provider nominated by the user.*
- 6 *TFG also has a partner referral program where businesses can become a "referral partner" of TFG. This enables the businesses to use the TFG Website to refer their customers to a credit provider. TFG pays commission to referral partners of TFG for successful referrals based on commission received by TFG from the credit provider for the referral.*
- 7 *On about 19 December 2013, Tony Nguyen (**Mr Nguyen**) applied to become a referral partner of TFG via the TFG Website as a sole trader with ABN 77 051 308 594 (**the Application**).*
- 8 *When applying to become a referral partner, Mr Nguyen agreed to the terms and conditions of the TFG referral partner program.*

I AM SHOWN a 3 page document bearing **ASIC BARCODE TON.1000.0001.0006**. **I IDENTIFY** this document as a copy of the terms and conditions of the TFG partner referral program that Mr Nguyen agreed to when he applied to become a TFG referral partner on about 19 December 2013. **I PRODUCE** a true copy of this document.

9 TFG approved the Application on about 23 December 2013.

10 In early 2014, I had a meeting with Mr Nguyen, in a meeting room at the head office of Westpac, at 275 Kent Street in Sydney. I waited in a waiting room in the Westpac building, until a young Asian man approached me and we had a conversation to the following effect:

He said: "Hi I am Tony Nguyen."

I said: "Hi I am John Allen from Tomorrow Finance."

The two of us went into a meeting room and the conversation continued to the following effect:

I said: "Do you work at Westpac?"

He said: "I do not work for Westpac. I am a financial planner that does a lot of work with Westpac. As a result they allow me to use their premises to work out of, from time to time. I also have offices in other locations in western Sydney. I have a strong client base from my financial planning business. My financial planning business has a number of clients which I can refer to you and that I see a fit with our businesses. I am looking forward to working with you."

11 TFG made one payment of commission to Mr Nguyen of \$3,920.40 in March 2014 in relation to 2 loan referrals made by Mr Nguyen on loans which had settled.

I AM SHOWN a 1 page document bearing **ASIC BARCODE TON.1006.0001.0002**. **I IDENTIFY** this document as a copy of an invoice created by TFG indicating that on about 1 March 2014, TFG made a payment of \$3,920.40 to Mr Nguyen for referrals he had made on loans which had settled. **I PRODUCE** a true copy of this document.

12 On about 25 March 2014, I had a conversation with my business partner Mitch Fraser (**Mitch**) to the following effect:

He said: "I have just had a call from Christian Rodgers from ANZ who stated that Tony Nguyen has engaged in fraud and as a result must be terminated from TFG as a referral partner."

I said: "We must terminate him immediately."

34. In cross-examination Mr Allen said that he "had no cause to complain about" the work which Mr Nguyen carried out as a referral partner for TFG. He said that his "only concern" arose from the circumstances of his first meeting with Mr Nguyen. He elaborated as follows:

Did you have any cause to complain about his work?---No. No. My only concern was initially when I first met with Tony. I was surprised that I was meeting at the Westpac head office when he provided the address. That was alarming to me, but when I since spoke to him he explained the reason why. He explained that he was a financial planner and does a lot of work with Westpac and that he has a financial planning business, and hence while we were there. That was the only really alarming thing to me, but his comments made a lot of sense, based on which he

would've engaged in referral opportunities going after that, yes. But outside of that nothing in that meeting alarmed me that he would be doing anything other than his responsibilities of referring – simply referring a customer to a lender.

35. Mr Allen confirmed that there is no necessity for a referral partner to hold a credit licence. He said that "absolutely" referral partners "are not supposed to engage in credit activity." He explained the role of a referral partner in these terms:

So, they're not to engage in dealing with a customer around financials or any kind of credit advice at all. So what they are simply to do is to identify a customer, relay that information on to a lender; the lender would then engage in credit activity or within the credit service to provide to the customer to facilitate a loan ...

36. Two volumes of T documents were tendered in evidence by consent. Two binders of material described as "Respondent's Further Evidence" were also tendered by consent.

Issues

37. In his closing written submissions, counsel for ASIC identified the issues in the proceedings as follows:

ISSUES

22. ASIC identifies the issues before the Tribunal here as follows:

- (a) **Issue 1:** *Did the Applicant engage in credit activity in respect of the loan applications by the nine (9) consumers to the ANZ Bank?*
- (b) **Issue 2:** *If it is found that the Applicant engaged in credit activity, did he do so without an ACL, in contravention of s29(1) of the Credit Act?*
- (c) **Issue 3:** *Did the Applicant contravene the prohibition in s30(1) of the Credit Act against holding out?*
- (d) **Issue 4:** *Did the Applicant contravene the prohibition in s160D of the Credit Act against giving false or misleading information?*
- (e) **Issue 5:** *Did the Applicant engage in conduct, in trade or commerce, in relation to financial services that is misleading or deceptive or is likely to mislead and deceive in contravention of 12DA(a) of the Australian Securities and Investments Commission Act 2001 (Cth)?"*
- (f) **Issue 6:** *Did the Applicant contravene any credit legislation for the purposes of s80(1)(d)(i) of the Credit Act?*
- (g) **Issue 7:** *Is the Applicant likely to contravene any credit legislation for the purposes of s80(1)(e)(i) of the Credit Act?*
- (h) **Issue 8:** *Is the Applicant not a fit and proper person for the purposes of s80(1)(f) of the Credit Act?*

(i) **Issue 9:** *If ASIC's power to make a banning order was enlivened, should the discretion to ban the Applicant be exercised, pursuant to s80 of the Credit Act?*

38. I do not necessarily accept that issues 7 and 8, as set out above, require determination. Nonetheless, I will examine the evidence and submissions within this helpful framework.

Issue 1: Did the Applicant engage in credit activity in respect of the loan application by the nine (9) consumers to the ANZ Bank?

39. The meaning of "credit activity" is set out in section 6 of the Credit Act, which provides as follows:

(1) The following table sets out when a person engages in a **credit activity**.

Meaning of credit activity		
Item	Topic	A person engages in a credit activity if:
1	credit contracts	(a) the person is a credit provider under a credit contract; or (b) the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or (c) the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider); or
2	credit service	the person provides a credit service; or
3	consumer leases	(a) the person is a lessor under a consumer lease; or

		(b)	the person carries on a business of providing consumer leases; or
		(c)	the person performs the obligations, or exercises the rights, of a lessor in relation to a consumer lease or proposed consumer lease (whether the person does so as the lessor or on behalf of the lessor); or

4	mortgages	(a)	the person is a mortgagee under a mortgage; or
		(b)	the person performs the obligations, or exercises the rights, of a mortgagee in relation to a mortgage or proposed mortgage (whether the person does so as the mortgagee or on behalf of the mortgagee); or

5	guarantees	(a)	the person is the beneficiary of a guarantee; or
		(b)	the person performs the obligations, or exercises the rights, of another person who is a beneficiary of a guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person's own behalf or on behalf of the other person); or

6	prescribed activities		the person engages in an activity prescribed by the regulation in relation to credit, being credit the provision of which the National Credit Code applies to, or would apply to if the credit were provided.
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- (2) A subclass of any of the conduct referred to in the table in subsection (1) is also a **credit activity**

Note: For example, ASIC could impose a condition on a licence under subsection 45(6) that provides that a person is authorised to be a credit provider only under particular types of credit contracts (such as credit card contracts).

40. The only category which could apply to Mr Nguyen is "2. credit service: the person provides a credit service". Section 7 of the Credit Act provides as follows:

7 Meaning of credit service

A person provides a **credit service** if the person:

- (a) provides credit assistance to a consumer; or
- (b) acts as an intermediary.

41. Section 8 of the Credit Act provides as follows:

8 Meaning of credit assistance

A person provides credit **assistance** to a consumer if, by dealing directly with the consumer or the consumer's agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

- (a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or
- (b) suggests that the consumer apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- (c) suggests that the consumer remain in a particular credit contract with a particular credit provider; or
- (d) assists the consumer to apply for a particular credit contract with a particular credit provider; or
- (e) assists the consumer to apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- (f) suggests that the consumer apply for a particular consumer lease with a particular lessor; or
- (g) suggests that the consumer remain in a particular consumer lease with a particular lessor; or
- (h) assists the consumer to apply for a particular consumer lease with a particular lessor.

It does not matter whether the person does so on the person's own behalf or on behalf of another person.

42. Section 9 of the Credit Act provides the following definition of the term "acts as an intermediary":

9 Meaning of acts as an intermediary

A person **acts as an intermediary** if, in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

- (a) acts as an intermediary (whether directly or indirectly) between a credit provider and a consumer wholly or partly for the purposes of securing a provision of credit for the consumer under a credit contract for the consumer with the credit provider; or
- (b) acts as an intermediary (whether directly or indirectly) between a lessor and a consumer wholly or partly for the purposes of securing a consumer lease for the consumer with the lessor.

It does not matter whether the person does so on the person's own behalf or on behalf of another person.

43. The National Credit Code (schedule 1 to the Credit Act) contains a definition of "credit contract". Section 4 provides:

8 Meaning of credit contract

*For the purposes of this code, a **credit contract** is a contract under which credit is or may be provided, being the provision of credit to which this code applies.*

44. Section 5 of the National Credit Code sets out the circumstances which are covered by the Code. For present purposes, it is relevant that the nine consumers are all "natural persons" who sought to be provided with credit "for personal, domestic or household purposes" or "to purchase residential property for investment purposes" or "to refinance credit ..."
45. Regulatory Guide 203 issued by ASIC addresses the meaning of the phrase "giving credit assistance". The Guide reads as follows:

RG 203.70 The term 'assist' is not defined in the National Credit Act. We consider that it involves helping the consumer to apply for a particular credit contract or credit limit increase. For example, you may be assisting a consumer to apply for a particular credit contract if you help the consumer to:

- (a) *negotiate the terms of a credit contract with a particular credit provider; or*
- (b) *complete the application form by providing guidance on what information to include in the application.*

RG 203.71 The level of help that you give to the consumer may affect whether you are regarded as 'assisting' the consumer to make the application. For example, if you merely give the consumer the credit provider's application form, you may not be assisting.

However, if you also explain questions asked in the form, identify and compile particular information to include in the application, ... you may be providing credit assistance.

46. The Regulatory Guide also addresses the meaning of the term "intermediary", providing as follows:

RG 203.73 The term 'intermediary' is not defined in the National Credit Act. We consider that you may not act as an intermediary between a consumer and a credit provider or lessor if you are an intermediate agent or 'go-between' who prepares or passes on information. To be engaging in the credit activity of 'acting as an intermediary' your role must also be, wholly or partially, engaged in for the purpose of securing a provision of credit or a consumer lease for the consumer.

...

RG 203.76 Intermediaries can include:

(a) persons who refer the consumer to another person who engages in credit activities, if this is done for the purpose of securing a provision of credit or a consumer lease for the consumer;

(c)...

An example of when a person is acting as an intermediary, as follows:

A real estate agent refers a consumer to a finance broker to arrange finance for the purchase of a house. The agent is paid a 'finder's fee' by the broker. The agent is likely to be acting as an intermediary between the consumer and a credit provider because they gave the referral for the purpose of securing a provision of credit for the consumer. It does not matter that the consumer has not yet made a decision about which credit provider to apply to.

47. Section 29 of the Credit Act prohibits a person from engaging in credit activities without an Australian Credit Licence. Regulation 25 of the *National Consumer Credit Protection Regulations 2010* ("the Credit Regulations") exempts certain activities from the requirement for a credit licence.

48. Regulation 25 relevantly provides as follows:

25 Activities exempt from requiring a licence

(1) For paragraph 110(b) of the Act, this regulation exempts certain credit activities from:

- (a) section 29 of the Act; and*
- (b) definitions in the Act, as they apply to references in the provisions mentioned in paragraph (a); and*

- (c) *instruments made for the purposes of any of the provisions mentioned in paragraphs (a) and (b).*

Note: Section 29 of the Act provides that a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

(2) *A credit activity is exempted if:*

(a) *the activity consists only of:*

- (i) *a person (**person 1**) informing another person (**person 2**) that a licensee or registered person, or a representative of the licensee or registered person, is able to provide a particular credit activity or a class of credit activities; and*
- (ii) *person 1 giving person 2 information about how person 2 may contact the licensee, registered person or representative; and*

(b) *at the time the activity is engaged in, person 1 discloses to person 2*

- (i) *any benefits, including commission, that person 1, or an associate of person 1, may receive in respect of the activity; and*
- (ii) *any benefits, including commission, that person 1, or an associate of person 1, may receive that are attributable to the activity; and*

(c) *the disclosure mentioned in paragraph (b) is provided in the same form as the information mentioned in paragraph (a).*

(2A) *A credit activity is exempted if:*

(a) *the activity consists only of:*

- (i) *a person (person 1) informing another person (person 2) that a licensee or registered person, or a representative of the licensee or registered person, is able to provide a particular credit activity or a class of credit activities; and*
- (ii) *person 1 giving person 2 information about how person 2 may contact the licensee, registered person or representative; and*
- (iii) *person 1 making arrangements enabling person 2 to contact the licensee, registered person or representative by means of a link that can be accessed from a website provided by or for person 1 or an associate of person 1; and*

(b) *at the time the activity is engaged in, person 1 discloses to person 2*

- (i) *any benefits, including commission, that person 1, or an associate of person 1, may receive in respect of the activity; and*
- (ii) *any benefits, including commission, that person 1, or an associate of person 1, may receive that are attributable to the activity; and*

(c) *the disclosure mentioned in paragraph (b) is provided in the same form as the information mentioned in subparagraph (a)(ii).*

...

49. Regulatory Guideline 203 addresses the circumstances in which a person can rely upon this exemption, on the basis that he or she provides "a mere referral" (RG203.116 to RG203.118). On this issue, the Guidelines provide as follows:

RG 203.116 If you refer a consumer to another person who is licensed or authorised to engage in credit activities and help the consumer to get in contact with that other person, you may be engaging in credit activities by:

(a) acting as an intermediary to secure a provision of credit ... for the consumer; or

(b) providing credit assistance (e.g. where the other person is only able to provide, or provide credit services in relation to, a single credit contract ..., your referral could be considered a suggestion that the consumer apply for that credit contract..);

RG 203.117 ...you may be exempt from the requirement to be licensed if you only inform the consumer that the person can provide particular credit activities and:

(a) give the consumer information about how to contact the other person or arrange for the consumer to do so by using a link from a website (known as a 'downstream referral'); or

(b) give the other person the consumer's name and contact details and a description of the purpose for which the consumer wants a provision of credit ... (known as an 'upstream referral').

RG 203.118 You cannot rely on these exemptions if you engage in broader activities that are credit activities.

50. I will now consider the details of Mr Nguyen's involvement with the loan applications to the ANZ Bank of each of the nine consumers. I note the submission on behalf of Mr Nguyen to the effect that he believed at all times that he did not go beyond his role as an "introducer" or a "referral partner" and at no stage engaged in "credit activity". I accept the submission on behalf of ASIC that an objective test applies and that the beliefs of Mr Nguyen are irrelevant to this issue.

51. I now set out the evidence in relation to Mr Nguyen's involvement with the loan application submitted by each of the nine consumers. This evidence is drawn from the witness statements of Mr Nguyen and Ms Thi Anh Tiet Dang and evidence which they gave in cross-examination. The statements of the remaining four witnesses in the case for Mr Nguyen were in evidence but, as noted, were not tested by cross-examination. I attach little or no weight to this untested evidence.

52. I have set out above certain clauses in Mr Nguyen's Introducer Agreement with the ANZ Bank. In cross-examination Mr Nguyen indicated he read the contents "quickly" prior to signing the document. He said that he was unfamiliar with the provisions of Regulation 25 of the Credit Regulations. He indicated that he became familiar with the provisions of Regulation 25 only "through my legal representative".
53. Counsel for ASIC questioned Mr Nguyen in relation to his involvement with each of the nine consumers. He commenced with Mr Vannack Ngan and Ms Thao Thi Hien Nguyen. Mr Ngan gave a witness statement dated 1 December 2014 in the case of ASIC but failed to attend the hearing for cross-examination. Counsel for ASIC properly accepted that this lack of cross-examination would impact significantly upon the weight which could be given to the contents of the statement of Mr Ngan. I attach little or no weight to this untested evidence.
54. In my view, it is safe to take into account only the evidence given on his oath by Mr Nguyen in relation to his dealings with Mr Ngan and Ms Nguyen. He said that he had several conversations with Mr Ngan, during which he said "I need a loan" and "this guy at the ANZ said you would help me out." All of their conversations took place in the English language. Mr Nguyen said that neither Mr Ngan nor Ms Nguyen met with Ms Haramis at the ANZ Bank.
55. Mr Nguyen agreed in cross-examination that he took the following steps in relation to the loan application by Mr Ngan and his wife:
- requested copies of his Driver's Licence, passport, rate notices and St George home loan statements;
 - forwarded discharge of mortgage forms in relation to existing loans with the St George and Commonwealth Banks;
 - accepted a blank loan application form signed by Mr Ngan;
 - met with Mr Ngan and his wife in a café and obtained his signature on a loan application form; and
 - submitted the loan application and supporting documents to Ms Haramis.
56. Mr Nguyen forwarded to Ms Haramis payslips allegedly issued by MJZ Accountants and BBB Capital Pty Ltd in support of the loan application of Mr Ngan and his wife. Mr

Nguyen denied strongly that he had any knowledge that these payslips were false documents.

57. Mr Nguyen agreed in cross-examination that he took the following steps in relation to the loan application of Mr Minh Ngoc Ho:

- liaised with Mr Rick Truong at the ANZ Bank;
- discussed the loan application requirements with Mr Ho in Vietnamese as he was unable to speak English;
- asked Mr Ho to sign a blank application form, which he filled in on his laptop computer in his presence;
- explained to Mr Ho that the ANZ Bank would undertake a credit check and had him sign a privacy form;
- obtained from Mr Ho information about his assets and liabilities, which he inserted in the application form;
- submitted a loan application and supporting documents to the ANZ Bank;
- liaised with Mr Ho's conveyancing solicitor, at the request of Mr Truong, in order to amend the address on the contract; and
- obtained Mr Ho's signature on the letter of offer of loan.

58. Mr Nguyen denied strongly that he had any knowledge that payslips allegedly issued by Santo Tiling Pty Ltd were false documents. These payslips were submitted in support of Mr Ho's loan application.

59. Mr Nguyen agreed in cross-examination that he had the following involvement in the loan application of Ms Thao Phuong Vo:

- met with her initially while he was employed with RAMS, when her loan application was unsuccessful;
- discussed with Ms Vo her asset and liabilities and entered this information on the loan application form;
- liaised with Ms Haramis and discussed with her Ms Vo's credit history;

- advised Ms Haramis "to be careful" in light of Ms Vo's credit history and made a suggestion that her prospects of success might be improved if she purchased the property as owner/occupier;
- discussed the potential assistance of an up-front valuation with Ms Haramis;
- suggested to Ms Haramis that Ms Vo could service the loan as owner/occupier, relying on information which he had obtained when in the employment of RAMS;
- forwarded the loan application and supporting documents, the contract for sale and the privacy form to Ms Haramis;
- discussed an 80% loan to value ratio ("LVR") with Ms Haramis and asked her to treat the application on an urgent basis;
- obtained the signature of Ms Vo on a letter of offer of loan and witnessed mortgage documents; and
- obtained Ms Vo's signature on a discharge of mortgage document.

60. Mr Nguyen agreed that his dealings with Ms Vo were conducted in English. He denied strongly that he had any knowledge that payslips and PAYG statements allegedly issued by Laser Beauty Pty Ltd were false documents. These documents were submitted in support of Ms Vo's loan application.

61. Mr Nguyen agreed in cross-examination that he took the following steps in relation to a loan refinance application by Mr Chek Bac Tang and Ms Kelly Phung Hua:

- completed the loan application form in handwriting in the presence of Mr Tang and Ms Hua;
- sent the application form and supporting documents to Ms Haramis;
- discussed matters pertaining to the loan application with them in Vietnamese, as they were not fluent in English;
- advised Ms Haramis that:

the husband ... is self-employed, however he has not done his financials, therefore I have put his income at zero, but the deal should service a loan on Kelly's income.
- advised Ms Haramis that the customers wished to split their loan into two components of \$100,000 and \$260,000;

- requested an 80% LVR;
- requested that Ms Haramis:

please do variable and interest on five years for both splits. Anything else, please let me know. This is not urgent but just be conscious that the home loan statements only go up to 24 October, so please submit before the documentation goes out of date.

62. Mr Nguyen denied that he knew the pay slips and PAYG summary allegedly issued by Passas and Co. Pty Ltd, which were submitted in support of the loan application, were false documents. He conceded that he engaged in a conflict of interest by negotiating the discharge of Westpac Bank mortgages by refinances from rival financial institutions. Mr Nguyen was employed by BT Financial Group at this time and bound by the contractual conditions which were described in the evidence of Ms Patricia O'Brien.
63. Mr Nguyen gave the following evidence, inter alia, in relation to the loan application of Ms Thi Oanh Vo:
- he never met Ms Vo and received an initial referral from a real estate agent;
 - he dealt at all times with an intermediary, who he believed to be a mortgage broker named "Hien";
 - he did not ask for and never became aware of the surname of the intermediary;
 - Hien gave to him a signed loan application form and he "transcribed what was on the old application form into the ANZ form" in handwriting;
 - Hien provided copies of two payslips and a PAYG statement, which he submitted to Ms Haramis with the loan application form;
 - he did not tell Ms Haramis that an intermediary named Hien was involved in the transaction;
 - he advised Ms Haramis that the customer wished "to do a refinance and 80% LVR" and asked her "what are our chances?"; and
 - he provided information to Ms Haramis concerning a default which appeared on a VADA report concerning Ms Vo.

64. The payslips and PAYG statement allegedly issued by Narbet Pty Ltd in relation to Ms Vo were false documents. Mr Nguyen denied that he knew that these documents were false when he provided the loan application to Ms Haramis.
65. In relation to the loan application of Ms Thi Anh Tiet Dang, Mr Nguyen said as follows in cross-examination:
- he met with her on several occasions and had conversations in Vietnamese with her;
 - he filled in the loan application form in handwriting and she signed the document in his presence;
 - she provided to him copies of her Driver's Licence, Medicare card, payslips and PAYG statement;
 - he submitted the loan application and supporting documents to Ms Haramis, with requests for an 85% LVR and a five-year interest only arrangement as first preference; and
 - when Ms Haramis queried the high level of income of the customer, Mr Nguyen telephoned Ms Dang and then informed her that the customer was the manager as well as a nail artist.
66. Mr Nguyen denied that he knew that two payslips allegedly issued by Professional & Spa Holdings Pty Ltd in respect of Ms Dang were false documents. Similarly, he denied that he was aware that a PAYG statement was a false document.
67. Mr Nguyen was asked in cross-examination about his involvement with the loan application of Ms Thi Trinh Do. He said inter alia:
- he never met Ms Do;
 - Ms Do was referred to him by a person he knew only as "Tina", who he believed to be a broker;
 - Tina told him that Ms Do wished to purchase an investment property and that she had an existing business loan with the ANZ Bank;
 - he spoke to Ms Haramis about the feasibility of the proposed loan;

- he asked Tina to obtain documents from Ms Do, including identity material and payslips;
- Tina procured the signature of Ms Do on the last page of the application form and he filled in the details;
- he submitted a loan application form and supporting documents to Ms Haramis;
- he stated in an email to Ms Haramis, inter alia, "I recently did an ANZ business loan for her ...", which transaction was actually arranged by Tina;
- he informed Ms Haramis that the customer wished to borrow 80% of the purchase price;
- he requested that Ms Haramis process the application urgently and provide an outcome by the following afternoon; and
- he received an email from the conveyancing solicitor which stated, inter alia: "... to enable you to process our client's finance application".

68. Mr Nguyen provided to Ms Haramis copies of a tax return and estimate which allegedly related to Ms Do. He denied that he knew that false documents were submitted in support of this loan application.

69. Mr Nguyen was asked in cross-examination about his dealings with Mr James Huang Vo. He said:

- he never met or spoke to Mr Vo, who lived in Western Australia;
- Mr Vo was referred to him by a woman he knew only as "Mai", who he believed to be a broker;
- Mai provided to him a signed loan application, which had been completed in handwriting;
- he did not know whether Mr Vo actually signed the loan application form;
- the person Mai provided him with supporting documentation for the loan application;
- he submitted the loan application and supporting documents to Mr Truong at the ANZ Bank; and

- he did not advise Mr Truong that a broker was involved in the transaction.
70. Mr Nguyen stated in cross-examination that he had the following dealings with Ms Somkhit Phansavanh with respect to her loan application:
- Ms Phansavanh lived in South Australia;
 - he never met Ms Phansavanh but spoke with her by telephone in English;
 - he posted to her the loan application and privacy forms, which were returned bearing signatures;
 - he obtained information concerning her financial position during telephone conversations;
 - he completed the loan application form in handwriting;
 - he submitted the loan application form to Ms Haramis, with a request for an 80% LVR and suggestions in relation to "cash out" and "up-front valuation";
 - before he submitted the loan application and supporting documents to Ms Haramis, they spoke by telephone and "workshopped the deal"; and
 - he posted a mortgage discharge form to her for signature, filled in the details and provided this document to Ms Haramis.
71. Mr Nguyen submitted to Ms Haramis two payslips, allegedly from Solar Winds Australia Pty Ltd, and a PAYG statement in relation to this consumer. He denied that he knew that these documents were false at the time the loan application was submitted to Ms Haramis.
72. Ms Thi Anh Tiet Dang provided a witness statement dated 18 July 2016, which read as follows:
- I, Thi Anh Tiet Dang, 51... make the following statement.*
- 1 *I was introduced to Tony from one of my lawyers Helen and Nina from Selective Lawyers in Cabramatta who said Tony can refer me to someone at ANZ to assist with my home loan. I was looking to purchase my first property at that time and I was very nervous and did not know how to go about going about applying for finance.*
 - 2 *I do not speak English very well and I do not write English at all and I needed someone who could translate English to Vietnamese and who would be able to provide me with the documents from the ANZ bank.*

- 3 *Tony assisted me with my loan application to ANZ by acting as a translator between the ANZ lender Christine Haramis and I myself. As an immigrant, to get a bank loan, there are a lot of forms to fill in and it's an overwhelming process if you are from Vietnam.*
- 4 *I understood that Tony was just introducing me to the ANZ and that Christine Haramis was my credit adviser. She would speak to Tony who would in turn translate what she said to me. The trouble is, there are not many Vietnamese people who are educated who can explain financial information in a simple way from English to Vietnamese.*
- 5 *At Christine's request, I provided documents requested such as payslips, PAYG summaries and bank statements. I gave these documents to Tony who would collect them from me and provide them to Christine on my behalf. Tony translated into Vietnamese what I needed to do with the forms provided by the ANZ bank. Tony was very helpful and a very nice person to deal with in giving me the documents and collecting the information from me.*
- 6 *I did not go to meet Christine at the bank as I was informed that Tony could provide the documents to me and collect the signed documents from me. Tony did not give me credit advice and acted really as my translator. I believe that the ANZ bank employed Tony because they knew he could speak Vietnamese. Without Tony translating the information for me, I would have [been] unable to get all the details together to provide them to Christine with the completed signed forms.*
- 7 *I heard that Tony got into trouble with ASIC but I don't know much about the law. I was never contacted by ASIC and I would have happily explained to ASIC that he only acted as an interpreter for me. Without this practical translation, it would have been very difficult for me to get a loan.*

73. Ms Dang attended the hearing and was cross-examined by counsel for ASIC, with the assistance of a Vietnamese interpreter. It may be that her recollection was faulty or that she resisted providing relevant information, particularly in relation to false documents. In any event, Ms Dang was an unimpressive witness. She denied that she was aware that false documents were submitted in support of her loan application.

74. Nevertheless, the following matters emerged from her oral evidence:

- she never met or had any contact with Ms Haramis;
- a person named "Tina" introduced Mr Nguyen to her and subsequently she met with him on a number of occasions;
- she obtained payslips and a PAYG statement from a person whom she met in a coffee shop, before her first contact with Mr Nguyen;
- she did not tell Mr Nguyen that she obtained these documents from a man in a coffee shop;

- at the time of the loan application she was employed as a nail artist and earned \$700 per week;
 - she signed the loan application form and Mr Nguyen inserted information in English; and
 - Mr Nguyen did not tell her that he would earn commission on her loan agreement.
75. Ms Dang stated in cross-examination that she told Mr Nguyen that she earned \$700 per week. I have commented as to the unsatisfactory nature of her evidence. Mr Nguyen denied that Ms Dang told him that she earned this income. He agreed that Ms Haramis queried the contents of the payslips allegedly provided by Professional & Spa Holdings Pty Ltd. In my view, the state of the evidence does not permit a finding safely to be made on this factual issue.
76. Ms Dang said in re-examination that her loan application was successful and that she makes regular monthly mortgage repayments to the ANZ Bank. She stated that no person from the ANZ Bank ever contacted her in relation to the false documents.
77. Mr Rick Truong gave evidence in the case for Mr Nguyen, pursuant to a subpoena. Inter alia, he said as follows:
- he is a lending manager for the ANZ bank;
 - he met Mr Nguyen in approximately 2013;
 - he understood that the role of an introducer was to refer business to the ANZ Bank;
 - the role of introducer entailed no responsibility for client verification;
 - he asked Mr Nguyen to obtain information and documents from clients; and
 - he "definitely" did not expect Mr Nguyen to carry out due diligence checks.
78. Mr John Allen, the managing director of TFG, provided a witness statement in the case for ASIC and was cross-examined by counsel for Mr Nguyen (Respondent's Further Evidence, Tab 1 Volume 1). The contents of this statement are set out above in these reasons.

79. In his oral evidence Mr Allen said inter alia:

- there is no requirement for a referral partner to hold a credit licence;
- a referral partner's role is to pass on contact details to a lender;
- a referral partner does not obtain documents from a customer;
- he met Mr Nguyen at the Westpac Bank head office;
- Mr Nguyen told him that he was a financial planner who "[did] a lot of work with Westpac";
- TFG provided no loan application forms to Mr Nguyen; and
- a referral partner does not engage in any credit activity, nor gives "any kind of credit advice at all".

80. Mr Allen also gave oral evidence, as set out above, in relation to his concerns that his initial meeting with Mr Nguyen took place at the head office of Westpac Bank. As noted above, Mr Nguyen falsely told Mr Allen that he was a financial planner who "[did] a lot of work with Westpac."

81. An objective test is to be applied in order to determine whether Mr Nguyen engaged in credit activity. Nonetheless, his stated intentions in relation to the loan applications which he submitted to Ms Haramis give an indication of the steps which he was prepared to take in his dealings with customers.

82. On 19 September 2013 Mr Nguyen emailed Ms Haramis as follows:

Hi Christine,

Please see attached application for Nghia Thang Huynh. His drivers licence says Tempe but he actually lives at Campsie as per application form address. He is getting it changed from the RTA. The cooling off for his property ends Tuesday 5pm so again this is urgent. Apologies for putting this pressure on you, but all these deals are genuinely urgent deals and are coming from my referral partners not from me directly. This is just how these clients do business so need to accept this is how they do it or either turn all their business away. They do provide a lot of good business though so I think it is worth the pain.

Also my referral partners are complaining at how long it takes to get a loan approved with ANZ. James Hoang Tien was submitted to you on Friday at 11am and still no response yet. Can you please see if you can expedite this deal. 4 days to get a wrapped and packed deal approved subject to valuation is too long unless I am not filling in the application correctly for you or there is missing

information. I want to give you deals that are 100% completed and you only need to spend 30 mins doing the data entry into your system. Credit shouldn't take more than 48 hours to assess the deal I assume. What is credit's SLA at ANZ? These referral partners have been used to 2 days or even max 3 from RAMS to get a deal approved subject to valuation. SLA from RAMS credit is 48 hours.

Thanks and again appreciate all the hard work you have done for me.

Tony

83. In my view, it is significant that Mr Nguyen stated that his aim was to "give [Ms Haramis] deals that are 100% completed" and that her role in the loan applications would be limited to "[spending] 30 mins doing the data entry into [ANZ Bank's] system." I consider that it is also significant that Mr Nguyen referred to "filling in the application" and obtaining information himself. If Mr Nguyen in fact acted in accordance with this stated intention, he would have gone well beyond the role of an introducer or referral partner. In my view, the evidence established that he did so in relation to each of the nine consumers.
84. Mr Nguyen never met Mr James Huang Vo, Ms Thi Oanh Vo or Ms Thi Trinh Do. He had no actual knowledge of their identities, nor their personal or financial circumstances. He relied upon information provided by third parties to a very significant extent.
85. Mr Nguyen obtained information and documents directly from Ms Thi Anh Tiet Dang, Mr Minh Ngoc Ho, Ms Thao Phuong Vo, Mr Chek Bac Tang and Ms Kelly Phung Hua, Ms Thi Oanh Vo, Ms Thi Huh Tiet Dang. He submitted their loan applications to Ms Haramis, despite these consumers having no contact with her at all.
86. Mr Nguyen discussed the nature and structure of proposed loans and LVRs with Ms Haramis in relation to Ms Thao Phuong Vo, Mr Chek Bac Tang, Ms Kelly Nguyen and Ms Thi Hugh Tiet Dang. He made suggestions to Ms Haramis for "upfront valuations" in at least two instances.
87. Mr Nguyen discussed the credit history of Ms Thao Phuong Vo with Ms Haramis and suggested that she "be careful" with this information. He suggested that she arrange for an "upfront" valuation and that she process the loan application with Ms Vo as an owner-occupier. Mr Nguyen utilised financial information concerning Ms Vo, which he had obtained as an employee of RAMS, to fill out the ANZ Bank loan application. Further, Mr

Nguyen forwarded a contract for sale to Ms Haramis and obtained Ms Vo's signature on the letter of offer of loan and mortgage documents.

88. Mr Nguyen liaised with the conveyancing solicitor of Mr Minh Ngoc Ho, at the request of Mr Truong. Apparently, an incorrect address appeared on the contract for sale of the relevant property. Mr Nguyen obtained the signature of Mr Ho on the letter of offer of loan.
89. Mr Nguyen conceded in cross-examination that he regarded the consumers as his "clients". Clearly, he advocated for the granting of loans in his communications with Ms Haramis and Mr Truong.
90. I am satisfied that Mr Nguyen provided "credit assistance" to the six consumers with whom he had direct dealings. He suggested to each of these customers that they apply for particular loans with the ANZ Bank (section 8(a) of the Credit Act). He assisted these consumers to apply for a particular credit contract with the ANZ Bank (section 8(d) of the Credit Act). I am satisfied that he provided the same "credit assistance" to Mr James Huang Vo, Ms Thi Oanh Vo and Ms Thi Trinh Do, although his dealings with them were conducted through people he described as "brokers".
91. I am satisfied that this credit assistance was provided as part of, or incidentally to, a business carried on by Mr Nguyen. As noted, he referred to the consumers as his "clients" and in some instances described himself as a "broker". Obviously, he undertook these activities for the purposes of securing commission for himself on the loan contracts.
92. In his witness statement of 7 September 2016, Mr Nguyen described his role as an ANZ Bank Introducer as follows:

...

16 *I spoke to the clients and introduced them to the ANZ so the clients could make loan applications. At all times, I received information from the clients and was a conduit to provide the information to the ANZ, only as an Introducer and used my translation of English to Vietnamese skills.*

17 *At no time, did I and was not required to review the documents or give any feedback in relation to the position of their loan application. ANZ staff conducted a due diligence of the documents provided by the clients. I was not required to have a Credit Licence and there is no evidence that I ever held out to the clients that I had a credit licence. Clearly, I didn't need one as I was an Introducer and ANZ had the Credit Licence.*

18 *I received supporting documents from the clients in connection with the loan application and provided these documents with loan application forms to ANZ. I have consistently given evidence to ASIC that I did not inspect these documents nor was I required to do so under the introducer agreement.*

...

93. It is abundantly clear that Mr Nguyen's activities with the nine consumers extended well beyond these parameters. In at least two instances, he acted in breach of the terms of the Introducer Agreement. He contended with the ANZ Bank that he "must not take part in the preparation or execution of Loan Agreements or security documents for loans or any related documents."
94. Mr Nguyen obtained the signature of Ms Thao Phuong Vo on a letter of offer of loan and a discharge of mortgage document. He witnessed her signature on mortgage documents. He filled in a discharge of mortgage form which had been signed by Ms Somkhit Phansavanh. In my view this conduct constitutes "[taking] part in the preparation and execution of Loan Agreements or security documents for loans or any related documents", which is prohibited by clause 2.5(iii) of the Introducer Agreement.
95. In my view, it is immaterial whether Mr Nguyen took some of these actions at the request of Mr Truong or Ms Haramis. Section 8 of the Credit Act states clearly that:
- It does not matter whether the person does so on the person's own behalf or on behalf of another person.*
96. I am satisfied that Mr Nguyen acted as an "intermediary" between the consumers and the ANZ Bank wholly or partly "for the purposes of securing a provision of credit for the consumer under a credit contract for the consumer with the credit contract" for the purposes of section 9 of the Credit Act. Mr Nguyen's actions clearly were directed at the procuring of loans from the ANZ Bank for the consumers. Similarly, it is immaterial that Ms Haramis and/or Mr Truong may have requested this assistance from Mr Nguyen.
97. Accordingly, I find that Mr Nguyen provided a "credit service" for the purposes of section 7 of the Credit Act. He provided "credit assistance" to the nine consumers and/or acted as an intermediary between these customers and the ANZ Bank. It follows, and I find, that Mr Nguyen engaged in "credit activity" for the purposes of section 6 of the Credit Act.

Issue 2: If it is found that the Applicant engaged in credit activity, did he do so without an ACL, in contravention of s 29(1) of the Credit Act?

98. It was common ground that Mr Nguyen has never held a credit licence. The issue, therefore, is whether any of the provisions of Regulation 25 of the Credit Regulations operate to protect him from a breach of section 29(1) of the Credit Act. I have set out above the provisions of Regulation 25.

99. Regulatory Guide 203 provides as follows:

RG 203.116 If you refer a consumer to another person who is licensed or authorised to engage in credit activities and help the consumer to get in contact with that other person, you may be engaging in credit activities by:

- (a) acting as an intermediary to secure a provision of credit ... for the consumer; or*
- (b) providing credit assistance (e.g. where the other person is only able to provide, or provide credit services in relation to, a single credit contract ..., your referral could be considered a suggestion that the consumer apply for that credit contract..);*

RG 203.117 ...you may be exempt from the requirement to be licensed if you only inform the consumer that the person can provide particular credit activities and:

- (c) give the consumer information about how to contact the other person or arrange for the consumer to do so by using a link from a website (known as a 'downstream referral'); or*
- (d) give the other person the consumer's name and contact details and a description of the purpose for which the consumer wants a provision of credit ... (known as an 'upstream referral').*

RG 203.118 You cannot rely on these exemptions if you engage in broader activities that are credit activities.

100. As set out above, I am satisfied that Mr Nguyen's involvement with the loan applications of all nine consumers extended well beyond the proper role of an introducer or referral partner. For the same reasons, I am satisfied that his activities exceeded the scope of the protections afforded by Regulation 25 the Credit Regulations.

101. Mr Nguyen's involvement with the nine loan applications was not limited to provision of information that a licensee or registered person, or a representative thereof, could provide particular activity and contact details for those persons. He provided no information concerning contact with staff of the ANZ Bank to any of the consumers.

102. Additionally, there were occasions when Mr Nguyen failed to inform consumers that he would receive commission in relation to their loan agreements. By his own admission he did not inform all of the consumers that he would receive commission on their loan contracts. In cross-examination he said:

... the majority of times it was disclosed, because with ANZ it was always disclosed because the client had to sign a form. There was no standard procedure with Tomorrow Finance because there was no form that needed to be signed.

103. It is true that both Ms Haramis and Mr Truong requested that Mr Nguyen obtain further information and documents from some of the consumers. In my view, however, these requests do not protect Mr Nguyen from the operation of section 29(1) of the Credit Act. He was responsible for his own actions and obtained a benefit from these loan contracts by way of commission.

104. Accordingly, I am satisfied and I find that Regulation 25 the Credit Regulations does not operate to exempt Mr Nguyen from the obligation to hold a credit licence in relation to his activities with the nine consumers.

Issue 3: Did the Applicant contravene the prohibition in s30(1) of the Credit Act against "holding out"?

105. Section 30(1) of the Credit Act provides as follows:

A person must not hold out:

(c) (a) that the person holds a licence; or

(d) (b) that the person holds a licence authorising the person to engage in a particular credit activity;

...if that is not the case.

106. ASIC contended that Mr Nguyen contravened this provision by providing to six consumers the Introduction Letter which stated that he held a credit licence. As noted above, it was common ground that he has never held a credit licence.

107. I accept Mr Nguyen's evidence that personnel at the ANZ Bank created the Introduction Letter. In cross-examination Mr Nguyen denied that he gave his RAMS credit representative number to any person at the ANZ Bank. He agreed that he completed an application form to become an introducer prior to his initial meeting with Ms Haramis. This application form was not in evidence, thus nothing is known of its contents.

108. Mr Nguyen denied that he deliberately failed to inform Ms Haramis at their first meeting that RAMS had cancelled his credit representative status. He denied that he elected not to inform ANZ staff that he no longer held the status of a credit representative because he believed that this information would jeopardise his position as an introducer.

109. Mr Nguyen gave evidence as to the time and circumstances when he became aware of this error in the Introduction Letter. He said in re-examination:

Q. *At what point in time did you realise that the ANZ had placed the Australian credit licence number there? At what point of time did you realise that that was a mistake?*

A. *I guess when ASIC undertook the investigation of myself. That's when I realised there was an error there I took it on face value that ANZ, being a large institution, they would comply with the law. So I just went with whatever they gave me.*

Q. *So when ANZ gave you, or prepared this introducer form, did you assume that the information on that form was correct?*

A. *Yes, I would assume that, you know, being a large institution they would have, you know, thoroughly done – done their checks, you know, because I'm introducing business to them, so, you know, they would have had an obligation to sort of verify my information and then have it all correct there, as part of the law."*

110. In *Re Vault Market Pty Ltd* [2014] NSWSC 1641 Brereton J dealt with an allegation that an entity "held out" that it was the holder of an Australian Financial Services Licence. His Honour said:

[28] *The first element of this alleged contravention is that Vault held out that it had an AFSL. To "hold out" involves making a representation.*

[29] *The website and website documents contained no statement in the precise terms that Vault held an AFSL. However, on the website appeared a reproduction of ASIC's logo, with the details "ASIC Registered Reg. No: 164 458 511" (which was in fact Vault's ACN), and the statement "Vault ... is registered by ASIC ...". The Financial Services Guide included statements that "... to comply with our obligations as the holder of an Australian Security and Exchange Commission (License No ACN 164 458 511 & ABN 88164458511)", that "Vault Market is a registered company (License No 164458511) which authorises KiwiFX Bank to provide advice on and deal in the following classes of financial products ;.."; and "ASIC Licensee: ... Vault".*

[30] *These statements appeared in the context that the contracts for difference being offered by Vault were financial products; that Vault's website and the website documents included repeated references to the Corporations Act and to ASIC; and that Vault's offers were directed towards "small time" or "mum and dad" investors: the website included statements that its offers were directed towards "individual retail investors" and that its*

trading platform was "user-friendly" and "easy to use". In that context, to that audience, the website and website documents conveyed that Vault held the requisite AFSL to carry on its business [cf ASIC v Stone Assets Management, [30]].

111. I accept that ANZ Bank staff created the Introduction Letter, which Mr Nguyen then provided to the six consumers. In my view, he considered that he was required to distribute this document to consumers pursuant to his agreement with the ANZ Bank. I accept that Mr Nguyen became aware of this incorrect information only when ASIC commenced its investigation.
112. It may be that Mr Nguyen could and should have exercised greater diligence, in terms of the correctness of the contents of the Introduction Letter. On the other hand, I have found that he did not create the document. I am satisfied further that he distributed the document to consumers as a requirement of the Introduction Agreement. I am not satisfied that Mr Nguyen contravened the provisions of section 30(1) of the Credit Act.

Issue 4: Did the Applicant contravene the prohibition in s160D(1) of the Credit Act against giving false or misleading information?

113. Subsection 160D(1) of the Credit Act provides as follows:

A person (the giver) must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether, the information or document is:

- (e) a) false in a material particular; or*
- (f) b) materially misleading.*

114. As noted above, there was no dispute that false documents were submitted to the ANZ Bank by Mr Nguyen in support of the loan applications. As noted further, ASIC abandoned its submission that Mr Nguyen knowingly submitted false documents. Ultimately, the submission on behalf of ASIC was that Mr Nguyen submitted documents "recklessly, as to whether this information was false in a material particular or materially misleading, for the purposes of section 160D of the Credit Act.
115. ASIC submitted further that Mr Nguyen acted in breach of section 160D(1) by providing the Introduction Letter to six consumers when he knew, or was reckless as to whether, the information in relation to a credit licence was false in a material particular and/or materially

misleading. I reject this submission, as I accept that Mr Nguyen became aware of this incorrect information only when ASIC began its investigation.

116. I accept the submission on behalf of Mr Nguyen to the effect that he had a firm belief that verification of information was the sole responsibility of officers of the ANZ Bank. The falsity of these documents in fact was revealed by information verification processes carried out by ANZ Bank staff.

117. The issue, therefore, is whether Mr Nguyen acted "recklessly" for the purposes of section 160D(1) of the Credit Act in relation to the false documents and the Introduction Letter. In his closing written submissions counsel for the ASIC wrote:

127. *"Recklessness" for the purpose of s160D(1) of the Credit Act incorporates a subjective, rather than an objective test.*

128. *What must be shown is, per Beach J in Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589 (in relation to a similar statutory provision):*

"At the least, ... some awareness of the risk and indifference or "not caring" as to the risk or its consequences. Recklessness is an actual advertence to risk but a conscious disregard of or indifference to the risk. Contrastingly, negligence or carelessness is where there may be no advertence to or conscious awareness of the risk at all.

129. *In Coakley and Australian Securities and Investments Commission [2008] AATA 247 at [191] the Tribunal noted that "The legal concept of recklessness usually entails the conscious disregard of a known risk. ... the applicant's conduct in signing statements of reasons in respect of persons who were not his clients on the basis of information obtained from others, and seeking to use statutory exclusions in order to avoid the disclosure requirements, certainly comes close.*

118. In *Australian Securities and Investments Commission v Mariner Corporation Ltd [2015] FCA 589*, Beach J held that a subjective test applies to the concept of "recklessness". His Honour said:

278. *In summary, a subjective test for "reckless" applies. That test is either the Criminal Code test for "recklessness" or the common law subjective meaning which requires an awareness of the risk and a conscious disregard or indifference to that risk ...*

119. ASIC relied upon Mr Nguyen's experience as a "loan writer" while employed at RAMS in support of its contention that he acted "recklessly" in submitting false documents. In this regard, ASIC also relied upon the fact that Mr Nguyen held a Certificate IV in Mortgage Broking. The contention was that this experience would or should have alerted him to the

risk of submission of false documents in support of loan applications, in the course of his role as Introducer and referral partner.

120. Given that a subjective test is to be applied to determine the question of "recklessness", Mr Nguyen's state of mind assumes relevance. He held a firm belief that it was ANZ Bank staff, and not himself, who bore responsibility for verification of information in relation to consumers and documents submitted in support of loan applications. He believed that his role as an introducer or referral partner carried no such responsibility.
121. Mr Nguyen's role as a loan writer at RAMS differed significantly from that which he undertook as an Introducer or referral partner. His role at RAMS cast an obligation upon him to verify customer information. His role as an Introducer or referral partner included no such responsibility. Mr Allen and Mr Truong both gave clear evidence to the effect that an Introducer or referral partner should not undertake any verification checks.
122. In these circumstances, I do not consider that Mr Nguyen had "an actual advertence to risk but a conscious disregard of or indifference to the risk." I am satisfied that Mr Nguyen did not turn his mind to the genuineness or otherwise of documents submitted in support of the nine loan applications.
123. In these circumstances I am not satisfied that Mr Nguyen acted "recklessly" in relation to the submission of false documents to the ANZ Bank. I find his conduct did not constitute a breach of section 160D(1) of the Credit Act.

Issue 5: Did the Applicant engage in conduct, in trade or commerce, in relation to financial services that is misleading or deceptive or is likely to mislead and deceive?

124. Section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* ("the ASIC Act) provides:

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

125. "Financial service" is defined in s 12BAB of the ASIC Act, which relevantly provides, as follows:

(1) *For the purposes of this Division, subject to paragraph (2)(b), a person provides a financial service if they:*

- (g) (a) provide financial product advice (see subsection (5)); or
- (h) (b) deal in a financial product (see subsection (7)); or
- (i) ...
 - (g) provide a service (not being the operation of a derivative trade repository) that is otherwise supplied in relation to a financial product (other than an Australian carbon credit unit or an eligible international emissions unit); ...
- (7) For the purposes of this section, the following conduct constitutes dealing in a financial product:
 - (a) applying for or acquiring a financial product;
- (8) Arranging for a person to engage in conduct referred to in subsection (7) is also dealing in a financial product, unless the actions concerned amount to providing financial product advice.

126. "Financial product" is defined in section 12BAA of the ASIC Act. This section provides that a credit facility is a "financial product". The term "credit facility" is defined in Regulations 2B(1) and 2B(3) of the *Australian Securities and Investments Commission Regulations 2001* ("ASIC Regulations"), which provide as follows:

- (1) For paragraph 12BAA(7)(k) of the Act, each of the following is a **credit facility**:
 - (j) (a) the provision of credit:
 - (i) for any period; and
 - (ii) with or without prior agreement between the credit provider and the debtor; and
 - (iii) whether or not both credit and debit facilities are available;
 - ...
 - (k) (f) the provision of a mortgage that secures obligations under a credit contract (other than a lien or charge arising by operation of any law or by custom);
 - (l) ...
- (3) In this regulation:

"credit" means a contract, arrangement or understanding:

 - (a) under which:
 - (i) payment of a debt owed by one person (a **debtor**) to another person (a **credit provider**) is deferred; or
 - (ii) one person (a **debtor**) incurs a deferred debt to another person (a **credit provider**); and
 - (b) including any of the following:
 - (i) any form of financial accommodation;
 - ...

127. It is clear that the loans for which the nine consumers applied in these proceedings were "financial products" for the purposes of section 12BAA of the ASIC Act. Accordingly, I accept the submission on behalf of ASIC that section 12DA(1) of the ASIC Act applies to the present circumstances, regardless of my finding as to whether Mr Nguyen engaged in "credit activity" for the purposes of the Credit Act. The issue here is whether Mr Nguyen engaged in conduct which was "misleading or deceptive or is likely to mislead or deceive" within the meaning of section 12DA(1) of the ASIC Act.
128. An objective test is to be applied to the determination of this issue, as was indicated by the Full Court of the Federal Court in *Global Sportsman Pty Ltd and Anor v Mirror Newspapers Ltd and Anor* (1984) 55 ALR 25. Those proceedings concerned a case stated in respect of section 52(1) of the *Trade Practices Act 1974*, which is a provision comparable to subsection 12DA(1) of the ASIC Act.
129. In that case, Bowen CJ, Lockhart and Fitzgerald JJ said (at p 6):

...

If a corporation is alleged to have contravened s 52(1) by making a statement of past or present fact, the corporation's state of mind is immaterial unless the statement involved the state of the corporation's mind. Whether or not s 52(1) is contravened does not depend upon the corporation's intention or its belief concerning the accuracy of such statement, but upon whether the statement in fact contains or conveys a meaning which is false; that is to say whether the statement contains or conveys a misrepresentation. Most commonly, such a statement will contain or convey a false meaning if what is stated concerning the past or present fact is not accurate; but a statement which is literally true may contain or convey a meaning which is false.

...

130. Counsel for ASIC pointed to a decision of the High Court of Australia in *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 and wrote:

157 *In Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 Mason ACJ, Wilson, Deane and Dawson JJ considered that intention to mislead or deceive is not a requirement for a breach of the prohibition against misleading or deceptive conduct. They then observed, at 666:

"That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive."

131. Counsel for ASIC further referred to a decision of French J (as his Honour then was) in *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 at 427. His Honour said:

The innocent carriage of a false misrepresentation for one person to another in circumstances where the carrier is seen to be a mere conduit, does not involve him in making that representation.

His Honour continued:

"When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation."

132. Counsel for ASIC further referred to the authority *John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited* [1993] FCA 295, where the Full Federal Court held at [17]:

In our opinion an estate agent which holds itself out as, amongst other things, consultants to institutional investors and to developers as major properties" would not be regarded by potential purchasers of properties as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity.

133. On this issue, the submission on behalf of ASIC was that "the Tribunal may find that Mr Nguyen's conduct in providing false information and false documents to ANZ is misleading or deceptive if he provided that material to ANZ in circumstances where he did not make it clear that he was not the source of the information and did not disclaim belief in its truth or falsity."

134. In my view, it must have been obvious to ANZ Bank staff that Mr Nguyen was merely passing on information for their consideration in the context of loan applications. He was not "the source of the information" and merely "passed it on for what is worth", in the words of the High Court in *Yorke v Lucas*. He had no determinative role whatsoever in the success or failure of the loan applications.

135. For these reasons, I am not satisfied that Mr Nguyen engaged in "conduct in relation to financial services which was misleading or deceptive or was likely to mislead or deceive". I find that no conduct on the part of Mr Nguyen constituted a breach of subsection 12DA(1) of the ASIC Act.

Issue 6: Did the Applicant contravene any credit legislation for the purposes of s80(1)(d)(i) of the Credit Act?

136. I have found that Mr Nguyen contravened section 29(1) of the Credit Act by engaging in credit activity without a credit licence. I have rejected the submissions on behalf of ASIC that he contravened section 31 or section 160D(1) of the Credit Act or section 12DA of the ASIC Act.

Issue 7: Is the Applicant likely to contravene any credit legislation for the purposes of s80(1)(e)(i) of the Credit Act?

137. Counsel for ASIC submitted that Mr Nguyen is likely to contravene credit legislation for the purposes of section 80(1)(e)(i) of the Credit Act. He based this submission on the following matters:

- Mr Nguyen has contravened credit legislation;
- he "has not maintained the high standards expected of a person engaging in credit activities";
- he has not demonstrated an ability to recognise conflict of interest;
- he demonstrated an ignorance of "important elements of the operation of the Credit Act";
- he "does not possess attributes of good character, diligence, honesty, integrity and judgment"; and
- he has behaved dishonestly and/or recklessly in the course of credit activities.

138. Counsel for ASIC submitted that a conflict of interest arose when Mr Nguyen was employed by BT Financial Group. It seems to me that there is substance to the submission on behalf of ASIC, to the effect that Mr Nguyen only reluctantly conceded this conflict of interest.

139. Mr Nguyen was asked in re-examination to comment on the position of conflict of interest which arose when he was employed by BT Financial Group. He said:

At that time, you know, I didn't really think too much about it and you know, looking back it was, you know, a massive mistake, it was a conflict of interest, you know, with work and I should have told my manager what I was doing. I am deeply sorry about doing that.

140. In his opening submissions, counsel for Mr Nguyen conceded that he breached his employment contract with BT Financial Group by "[entering] into an Introducer Agreement with TFG." Mr Nguyen was employed by BT Financial Group between 4 June 2013 and 30 May 2014. He had an Introducer Agreement with the ANZ Bank from 27 May 2013 until 19 December 2013. He was a referral partner with TFG between 19 December 2013 and 25 March 2014. Accordingly, he breached his employment contract by entering into each of these arrangements. I am inclined to the view that counsel's concession on behalf of Mr Nguyen extended to both of these arrangements.
141. I accept also the submission on behalf of ASIC that Mr Nguyen failed to appreciate that he placed himself in a position of conflict of interest, while an employee of BT Financial Group. He assisted consumers to refinance existing loans with financial institutions who were commercial rivals of Westpac Bank.
142. Despite my acceptance of several of the submissions which were advanced on behalf of ASIC, I am not satisfied that Mr Nguyen is likely to contravene credit legislation in the future. For reasons which appear below, I accept that he "has learned from his mistakes" and will exercise proper diligence in the future.
143. I have power to make a banning order pursuant to section 80(1)(d)(i) of the Credit Act, as I have found that Mr Nguyen contravened credit legislation. I consider that this provision should be the basis of a banning order in respect of Mr Nguyen, rather than section 80(1)(e)(i) of the Credit Act.

Issue 8: Is the Applicant not a fit and proper person for the purposes of s80(1)(f) of the Credit Act?

144. ASIC has published Regulatory Guidelines 204 – Applying for and varying a credit licence ("RG 204"). RG 204.177 provides that, to be a fit and proper person to engage in credit activities, the person must:
- (a) be competent to operate a credit business (as demonstrated by the person's knowledge, skills and experience);
 - (b) has the attributes of good character, diligence, honesty, integrity and judgment.

145. The closing written submissions of counsel for ASIC pointed to a number of defects in the conduct of Mr Nguyen, including:

- his non-adherence to the terms of the Introducer and referral partner agreements;
- his deceit of Mr Allen and Mr Truong;
- his failure to disclose the involvement of intermediaries in loan applications;
- his failure to translate relevant parts of loan application forms to Vietnamese speaking consumers;
- engagement in conflict of interest situations; and
- breach of his employment contract with BT Financial Group.

146. I accept that Mr Nguyen's conduct fell short of acceptable standards for these reasons. I am conscious, however, that he engaged in this undesirable behaviour as a young man of approximately 25 or 26 years of age. I am not prepared to conclude that he is "not a fit and proper person for the purposes of s 80(1)(f)", as was urged on behalf of ASIC. Again, I would prefer to rely upon section 80(1)(d) as a basis for a banning order in relation to Mr Nguyen.

147. Mr Nguyen was asked in re-examination to describe the effect upon him of the banning order. He said tearfully:

... ---Yes, it's – it's really sort of turned my life upside down, you know, I'm only 29 and I've – you know, I've been in the finance industry for sort of eight years now and as a result of this ban I've, you know, lost all future employment prospects in the financial services industry and yes, I've really, I guess one of the important things is that I've let my family down, you know. You know, my parents divorced at a very young age when I was three months so my mother has you know, took care of me and you know, she's been in Australia for 30 years – more than half her life and she was also an immigrant, like many of my clients there, she you know, fled Vietnam and she went to Hong Kong by boat and she was in a refugee camp for five years and it was very tough for her and, you know, when she was able to come to Australia it was an opportunity for her to, you know, build a new life together, Mum and I, you know. She worked very hard to raise me, you know, a single mother, from three months, you know, she suffered domestic violence and every dollar she made, you know, it would go towards my education, you know, from when I was in year 4, you know, she – I went to two tutoring schools so that I could, you know, get into a selective school, you know, which would, you know, further enhance my education and throughout sort of high school I received extra tutoring, and that tutoring wasn't cheap, you know. She had to work, you know, 20 hours a day; she was doing sewing back then, so she'd work very hard, and what money she made was for me and my education. And, you know, because of this

ban, you know, all that really means nothing now because, you know, I can't work in the financial services industry. As mentioned previously, I've done my Bachelor of Business, my Graduate Diploma, my Masters, you know, all that, you know, was money my mother, you know, contributed to. You know, it's not cheap, education in Australia, and we have a broad class education, but it's not cheap, and the permanent ban really it's affected me in so many ways, and my mum as well. You know, it's been a big disappointment to my mum, my family, and my reputation, you know. I'm not able to work ever again. It's – it's very sad because I've got at least another 30 years, and, you know, I believe with my experience and education I've attained, you know, I could really have a successful career and help clients and people along the way. But unfortunately because of this ban I'm not able to – to do that. So it's just really – it's really cut short, you know, my future opportunities and life.

148. Mr Nguyen was asked in re-examination "Why do you say you are a fit and proper person to work in the finance industry?" He replied:

... ---I'll tell you, I've got a lot of work experience, I've got, you know, a strong educational background. I'm, you know, I've always, you know, acted in my clients' best interests. I mean even though we're here today, you know, no clients have suffered any losses; the banks haven't suffered any losses, you know. I haven't really caused any harm, you know. I was just, you know, trying to assist my clients, you know. So, yes, that's really what I was trying to do. I had no bad intentions to – to – you know, mislead the bank, provide the bank with false information. Yes, it was just, I think, you know, I was getting a bit too ambitious, you know, sort of, I guess, given my age, you know. I believe, you know, I've learned from my mistakes, and you know, I'm more mature professionally. So I think that's why the public can be confident that I'm a fit and proper person.

149. I observed carefully the demeanour of Mr Nguyen as he gave this evidence. I accept that he spoke honestly and sincerely and that he genuinely regrets his actions. I accept that he has learned from his experiences during the ASIC investigation and proceedings.

Issue 9: If ASIC's power to make a banning order was enlivened, should the discretion to ban the Applicant be exercised, pursuant to s80 of the Credit Act?

150. In *ASIC v Adler* [2002] NSWSC 483, Santow J considered factors relevant to determination of a period of disqualification from management of a corporation pursuant to the Corporations Act 2001. These factors are relevant to the issue of the length of a banning period in respect of Mr Nguyen from engagement in credit activities. Santow J said (at p 11):

[56] The cases on disqualification gave orders ranging from life disqualification to 3 years. The propositions that may be derived from these cases include:
(i) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards. ASIC v Hutchings (2001) 38 ACSR 387 at 395;

ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor [2002] NSWSC 310; *ASC v Forem – Freeway Enterprises* (1999) 30 ACSR 339 at 349-350; *ASC v Donovan* (1998) 28 ACSR 583 at 602; *ASC v Roussi* (1999) 32 ACSR 568 at 570 – 571; *Re Strikers Management Pty Ltd*; *ASC v Dimitri* (Burchett J, Federal Court of Australia, 7 May 1997, unreported); *Re Tasmanian Spastics Association*; *ASC v Nolan* (1996) 23 ACSR 743 at 751;

(ii) *The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office: ASC v Roussi (supra) at 570; Re Gold Coast Holdings Pty Ltd ASIC v Papatto* (2000) 35 ACSR 107 at 112;

(iii) *Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors: ASC v Roussi at 570; Re Gold Coast Holdings Pty Ltd (supra) at 112; Re Tasmanian Spastics Association (supra) at 751;*

(iv) *The banning order is protective against present and future misuse of the corporate structure: ASC v Donovan (supra) at 603:*

(v) *The order has a motive of personal deterrence, though it is not punitive: Re Magna Alloys & Research Pty Ltd* (1975) ACLR 203 at 205; *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor (supra)*; *ASC v Donovan at 607; Re Tasmanian Spastics Association at 751;*

(vi) *The objects of general deterrence are also sought to be achieved: ASC v Donovan at 602;*

(vii) *In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company: ASC v Donovan at 607;*

(viii) *Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty: ASC v Donovan at 605-607;*

(ix) *In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public: ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor; ASIC v Parkes* (2001) 38 ACSR 355 at 386; *ASC v Forem-Freeway Enterprises; ASC v Roussi at 570-571;*

(x) *It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct: ASC v Donovan at 607; ASIC v Parkes (supra) at 386;*

(xi) *A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming: ASC v Forem-Freeway Enterprises at 351;*

(xii) *The eight criteria to govern the exercise of the court's powers of disqualification set out in Commissioner for Corporate Affairs v Ekamper* (1987) 12 ACLR 519 have been influential. *It was held that in making such an order it is necessary to assess:*

- *Character of the offenders*
- *Nature of the breaches*
- *Structure of the companies and the nature of their business*
- *Interests of shareholders, creditors and employees*
- *Risks to others from the continuation of offenders as company directors*
- *Honesty and competence of offenders*
- *Hardship to offenders and their personal and commercial interests; and*
- *Offenders' appreciation that future breaches could result in future proceedings.*

ASC v Roussi at 570-571; Re Gold Coast Holdings Pty Ltd at 111;

(xiii) Factors which lead to the imposition of the longest periods of disqualification (that is disqualifications of 25 years or more) were:

- *Large financial losses*
- *High propensity that defendants may engage in similar activities or conduct*
- *Activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy*
- *Lack of contrition or remorse*
- *Disregard for law and compliance with corporate regulations*
- *Dishonesty and intent to defraud*
- *Previous convictions and contraventions for similar activities*

ASIC v Hutchings; ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor; ASC v Parkes;

(xiv) In cases in which the period of disqualification ranged from 7 years to 12 years, the factors evident and which lead to the conclusion that these cases were serious though not "worst cases", included:

- *Serious incompetence and irresponsibility*
- *Substantial loss*
- *Defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty*
- *Continued, knowing and wilful contraventions of the law and disregard for legal obligations*
- *Lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform*

ASC v Forem-Freeway Enterprises; ASC v Donovan; ASC v Roussi; Re Strikers Management Pty Ltd; Re Gold Coast Holdings Pty Ltd.

The difficulty with Roussi's case is that disqualification for 10 years was ordered, as this was the period of disqualification that the ASC had sought. Had a longer period been applied for, Einfeld J may have considered giving a longer period: ASC v Roussi at 571;

(xv) The factors leading to the shortest disqualifications, that is disqualifications for up to 3 years were:

- Although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated*
- The defendants had no immediate or discernible future intention to hold a position as manager of a company*
- In Donovan's case, the respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings*

ASC v Donovan; Re Tasmanian Spastics Association.

151. ASIC has issued Regulatory Guideline 218 ("RG 218"), which includes a table headed "Factors and examples of conduct relating to specific periods of banning". This table reads as follows:

Outcome	Factors	Examples of conduct (indicative only)
Banning for 10+ years and permanent banning	Dishonesty and intent to defraud	Misappropriation of client funds or otherwise engaging in fraud or theft
	Continued, knowing and wilful contraventions of the law and disregard of legal obligations	Falsification, concealment or deliberate destruction of records required to be kept
	Causing a large financial loss or making a large financial gain	Engaging in a pattern of persistent contraventions that indicates systemic failure or a general lack of understanding of and regard for compliance
	Previous contraventions of the law	
	Serious incompetence and irresponsibility	
	A likelihood that the person will engage in similar contravening conduct in the future	
	Significant adverse impact on	

consumer confidence

Banning for 3-10 years Adverse impact on consumer confidence Non-compliance with provisions of the National Credit Code

False, misleading or deceptive, or unconscionable conduct, or conduct with a lesser degree of dishonesty Not making reasonable inquiries in the course of making an unsuitability assessment as required under Ch 3 of the National Credit Act, or providing credit that is unsuitable for the consumer

Causing a significant financial loss or making a significant financial gain

A deliberate course of conduct to enrich themselves at others' expense but with a lesser degree of dishonesty Engaging in credit activities without either holding a credit licence, acting as the representative of a licensee or being exempted from the licensing requirement

Incompetence and irresponsibility, but with the possibility that the person may develop requisite skills and abilities Engaging in credit activities not covered by the credit licence, if one is required

Disregard for the law and compliance with regulations Failing to keep financial records that must be kept

Failing to comply with disclosure requirements, including not disclosing commissions and other benefits

Banning for less than 3 years Some loss to client, but as a result of carelessness or inadvertence rather than dishonesty Giving a complying disclosure document, but not with the required time

Attempt to remedy the contravention and person has fully ASIC as required

cooperated with ASIC

No previous history of
contraventions

Indications of clear intention to
comply with legal obligations in
demonstrated behaviour

Note: These factors and examples are indicative only. Each case must depend on its particular circumstances and will be determined on a case-by-case basis. The factors in this table have been compiled having regard to the propositions formulated in *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re: ASIC v Adler*, (2002) 42 ACSR 80. A combination of more than one example of misconduct can increase the seriousness of the misconduct, so that a longer banning than indicated by this table is merited. Consumer loss is not a prerequisite for a period of banning.

152. As noted above, ASIC abandoned its contention that Mr Nguyen should be subject to a permanent ban on engaging in credit activities. ASIC's ultimate submission was that there should be a ban "at the high end" of the range of three to ten years. The submission on behalf of Mr Nguyen was that there should be a banning order in the range of one to three years.
153. I take into account the fact that no conduct of Mr Nguyen caused financial loss to any of the consumers or the ANZ Bank. Ms Dang gave evidence to the effect that no ANZ Bank officer ever took any action in relation to her loan application and that she maintains her mortgage.
154. I take into account also that Mr Nguyen was a young and apparently, overly ambitious person when he committed breaches of the Credit Act. He has continued with his studies in the financial services sector and is highly likely to obtain the degree of Master of Business Administration.
155. I have regard to Mr Nguyen's statements of regret and contrition for his actions, which he gave on his oath. I accept that he expressed these sentiments genuinely and that he "has learned from his mistakes", in the words of his counsel.

156. Mr John Baylouni spoke highly of Mr Nguyen's character and honesty but he appeared to have limited knowledge of the circumstances which led to these proceedings. Nonetheless, I accept that he found Mr Nguyen to be a diligent person who followed through with commitments and tried to help people in the Vietnamese community.
157. I do not accept that Mr Nguyen acted with dishonest intent. In my view he acted with "incompetence and irresponsibility but with the possibility that [he] may develop requisite skills and abilities", in the language of Table 2 of RG 218.

Decision

158. In summary, I am of the view that Mr Nguyen regrets and has learned from his transgressions of credit legislation. He has experienced the stress of the hearing before the ASIC Delegate and these review proceedings. I consider that he is capable of acquiring the requisite knowledge and experience to enable him properly to engage in credit activities in the future.
159. I am also of the view, however, that a period of protection of the public is desirable while Mr Nguyen completes his studies and reflects upon his past conduct. I accept the submission on behalf of ASIC that there should be a banning period in the range of three to ten years. I do not accept that the period should be at "the high end" of that range, as I consider that there are mitigating factors to which I have referred above in these reasons.
160. Taking into account all of the circumstances, I will make an order which bans Mr Nguyen from engaging in credit activity for a period of four years. This period will be reduced by the time between the original banning order of 15 October 2015 and the date of my order.

*I certify that the preceding
160 (one hundred and sixty)
paragraphs are a true copy of
the reasons for the decision
herein of The Hon. Justice
Stevenson*

.....
Associate

Dated: 21 June 2017



Dates of hearing: **7, 8, 9 and 10 November 2016**

Date final submissions received: **15 November 2016**

Counsel for the Applicant: **Mr N Coburn**

Counsel for the Respondent: **Mr S Cleary**

Solicitors for the Respondent: **Ms C Jefferies**