Compliance Committee Webinar

Hot topics for fund managers: what you need to know now

Elliott Stumm – Partner HW Funds | Hall & Wilcox

October 2024

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Reforms

Privacy

Privacy and Other Legislation Amendment Bill 2024

AML/CTF

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

Privacy reform

What may be coming?

- Broader enforcement powers
- Automated decision-making
- Statutory tort for serious invasions of privacy

What may be coming next?

AML/CTF reform

Key objectives

Extend the regime - ‘tranche two entities’	Modernise the regulation of virtual assets and payments technology	Simplify and clarify the regime

‘Closing the gaps’

AML/CTF reform

Programs will need to be restructured

- No more - ‘Part A’ and ‘Part B’
- Instead - ‘ML/TR risk assessment’ and ‘AML/CTF policies’
- Proliferation financing

AML/CTF reform

Oversight and governance – clarifying roles

- Governing body
- AML/CTF Compliance Officer

Customer due diligence changes

- Initial and ongoing CDD
- Focus on outcomes to be achieved

AML/CTF reform

Some other points

- Information sharing and ‘tipping off’
- Reporting groups – ‘lead entity’
- Virtual assets – new designated services
- Information gathering powers

The latest lessons for compliance professionals from the corporate regulator

Compliance Committee Webinar

Selina Nutley – Partner, HW Funds and Dispute Resolution

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Contents

Design & distribution obligations

Purpose: to assist consumers to obtain appropriate products and require issuers to distribute those products in a targeted manner

Prepare a TMD which describes the **target market** and specifies appropriate distribution conditions

Take **reasonable steps** to make it likely for the financial product to reach consumers in the target market

Monitor and review outcomes and consider whether **changes** to the TMD are required

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ASIC v Firstmac Limited

Firstmac distributed the High Livez PDS to existing Firstmac term deposit holders

The TMDs for High Livez and the Firstmac term deposits identified different key attributes of consumers who were likely in the target market for the product

ASIC alleged (and the Court agreed) that Firstmac failed to take **reasonable steps** that would have resulted in, or would have been reasonably likely to result in, the distribution being consistent with the High Livez TMD

ASIC v American Express Australia Limited

DJs and AMEX distributed the DJs AMEX credit cards in DJs department stores to retail consumers

The DJs AMEX credit cards experienced an increase in cancelled application rates

AMEX failed to review the TMD for the DJs AMEX credit cards in circumstances where it knew, or ought reasonably to have known, that cancelled application rates for those cards were a circumstance that would reasonably suggest that the TMD was no longer appropriate

ASIC REP 795 - the ‘reasonable steps’ obligation

- Distributors. Do you have systems to conduct due diligence on distributors?
- Training. Do you undertake practical DDO training programs for operational staff?
- Advertising. Do you use advertising procedures and checklists that consider the TMD and DDO requirements?
- Questionnaires. Do you use filtering questions which comply with ASIC’s view of questionnaire design principles?
- Do you ensure your complaints reporting and other investor feedback processes capture information relevant to DDO?

Filtering questions?

Pre stop order

1. What is your primary investment objective? (Select only one option)
❑ **Income Distribution** – The Fund's target market is consumers seeking Income Distribution. The Fund aims to pay income distributions monthly.
❑ **Capital Preservations –** If you have selected Capital Preservation, you should consider that while a Syndicate-Fund is generally a capital stable investment, there is a risk that you may lose some or all of your money invested in a Syndicate-Fund. We recommend that you read the risks details in the Fund's Product Disclosure Statement and relevant Syndicate Fund Supplementary Product Disclosure Statement, and that you seek professional financial advice before investing in the Fund.
❑ **Capital Growth –** If you have selected Capital Growth, you are not in the target market of the Fund and we will not accept your application. The Fund's target market is consumers seeking Income Distribution. It does not generally provide capital growth returns and there is a risk that you may lose some or all of your money invested in a Syndicate-Fund. We recommend that you seek professional financial advice before investing in the Fund.

Filtering questions?

Post stop order

2. What is your investment objective in applying to invest in the Fund? (tick one option only)

- ❑ **Income distributions**

OR

- ❑ **Capital growth**

MORE INFORMATION

What is an income distribution?

An income distribution is the periodic payment of income from the Fund's assets to its investors.

What is capital growth?

Capital growth in an investment is the increase in value of an investment over time.

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Filtering questions?

Pre stop order

2. What is the intended use of this fund in your investment portfolio? (Select only one option)
❑ **Satellite Allocation (up to 10%) –** The Fund's target market is consumers intending to use the Fund as a Satellite Allocation.
❑ **Minor Allocation (up to 25%) –** If you have indicated that you intend to use the Fund as a Minor Allocation of your investment portfolion, you should consider your investment in the context of a broader portfolio and your desired risk return profile. The Fund may be suitable as a Minor Allocation for consumers in a pension phase and looking for regular income without capital growth and who intend to diversify investment across a number of the Fund's Syndicate Funds. We recommend that you seek professional financial advice before investing in the Fund.
❑ **Core Component (up to 50%) –** If you have indicated that you intend to use the Fund as a Core Component, you are not in the target market of the Fund and we will not accept your application. We recommend that you seek professional financial advice before investing in the Fund.
❑ **Major Allocation (up to 75%) –** If you have indicated that you intend to use the Fund as a Major Allocation, you are not in the target market of the Fund and we will not accept your application. We recommend that you seek professional financial advice before investing in the Fund.
❑ **Solution/Standalone (up to 100%) –** If you have indicated that you intend to use the Fund as a solution/standalone investment, you are not in the target market for the Fund and we will not accept your application. We recommend that you seek professional financial advice before investing in the Fund.

Filtering questions?

Post stop order

3.	What percentage of your total investable assets, excluding your residential home, do you intend to allocate to the Select Income Fund in total as part of your diversified portfolio of investable assets?
	Please enter a percentage up to 100%: ☐☐☐ %

MORE INFORMATION

What are investable assets?

Investable assets are the financial resources you have available for investment purposes, excluding your primary residence and the money you need for daily living expenses; for example, bills and mortgage payments.

What is diversification

Diversification is typically achieved by spreading your investable assets across different asset classes and sectors. The aim of diversification is typically to lower your overall portfolio's risk, in some cases by limiting exposure to the performance of any individual investment type, and achieving more stable returns. It is important to consider diversification when building an investment portfolio.

Key lessons learned

- The obligation to take reasonable steps also applies to both the issue of a product and the distribution of the PDS
- Issuers and distributors must continually monitor and review TMDs and act promptly where a review trigger occurs
- DDO training at both the board level and operational staff (e.g. marketing, distribution, registry and compliance) is key
- Review your filtering questions
- DDO is central to ASIC's enforcement focus – compliance failures may lead to an ASIC stop order and in a worst case – significant fines

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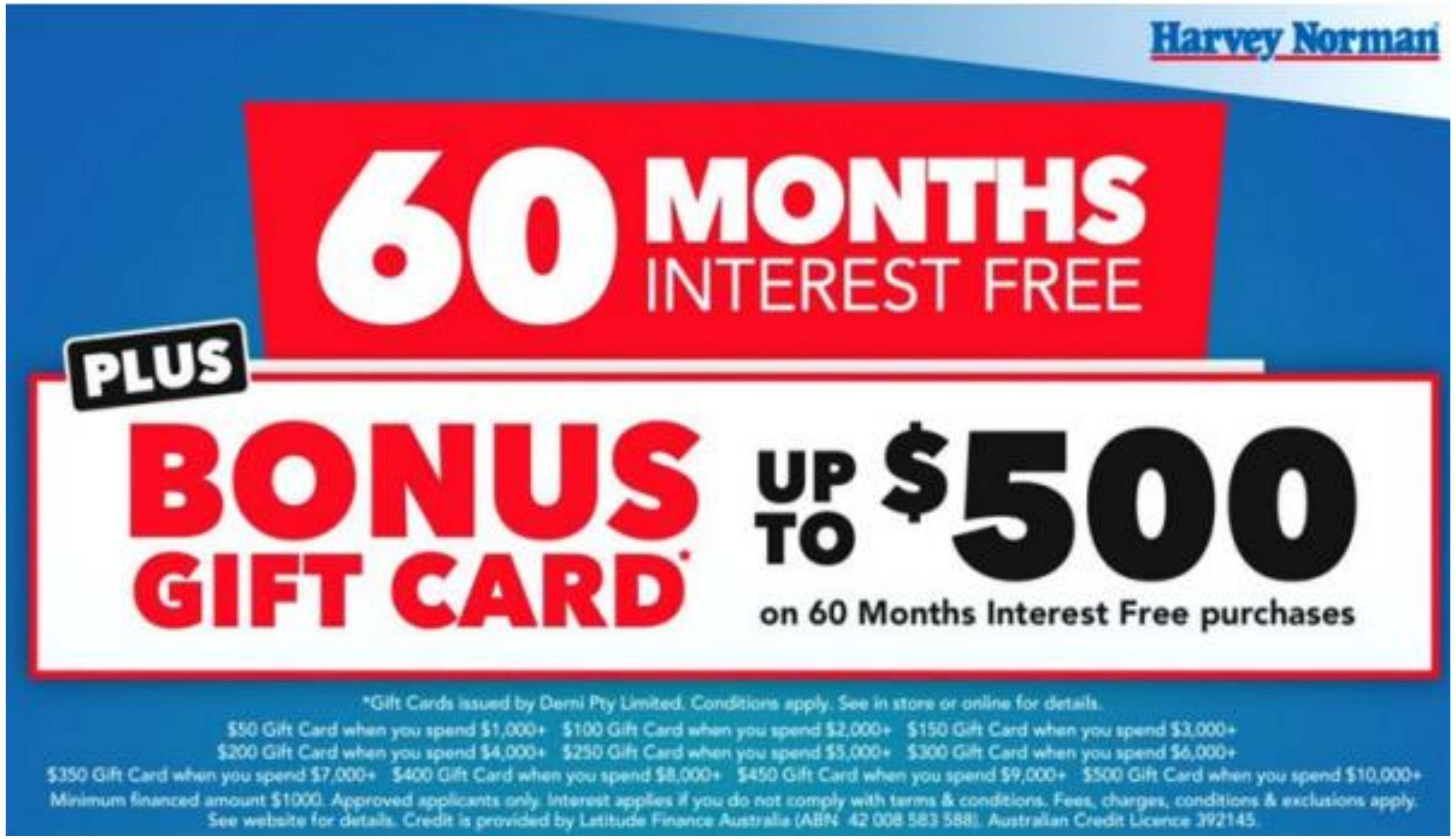
ASIC v Harvey Norman & Latitude

- ASIC filed proceedings over promotion of interest free payment methods
- Alleged failure to disclose availability conditions (that payment was via Latitude issued credit card) and misrepresented costs (establishment fee and monthly fee on Latitude card) with focus on attractive aspects at expense of less attractive aspects
- Argued $1,000 purchase if paid on-time would still result in a minimum total of $1,537



Disclaimer

- Most ads contained the following disclaimer:

  Offer ends [date]. Apply in store/online. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

- In the case of radio ads, the disclaimer was spoken more softly and delivered at a rapid pace.

Latitude's arguments

- Latitude argued:
  - In the context of the ads, consumers would know "*there is no such thing as a free lunch, let alone charity*".
  - Reasonable consumer would know the companies were not offering a "*charitable free lunch which no reasonable consumer, sceptical of advertisements in general and knowing of advertisers' tendency to exaggerate, would understand the offer to involve*".
  - The credit facility gave consumers an additional right, but not an obligation, which did not carry such a risk, inherent danger or disadvantage that it needed to be brought to the consumer's attention. "*The fact that some individuals may misuse credit is no more relevant than that some people may misuse a bonus set of steak knives*".
  - Potentially vulnerable users were reduced by the use of responsible lending practices.
  - Focus on less attractive aspects was "*par for the course when it comes to advertising*".
  - .

Harvey Norman's arguments

- Harvey Norman argued:
  - Not misleading or deceptive if the ads conveyed any fees or charges would be relatively insubstantial
  - None of the ads contained a dominant message (as alleged by ASIC)
  - If they did contain a dominant message, it was no more than that Harvey Norman was a good place to buy home and electrical goods because they have attractive prices.
  - A reasonable consumer would not expect all conditions would be displayed with the same prominence as the advertising of other elements.
  - A reasonable consumer would expect there may be conditions which could be sought and obtained before acting in response to the ads.

Court’s findings

- Both Harvey Norman and Latitude engaged in misleading and deceptive conduct.
- Consumers had to enter into a fundamentally different financial arrangement than the one promoted.
- Consumers would have understood that, provided they paid the 60 equal monthly payments, they would not be required to make any other payment in respect of their purchases.
- Court reached this finding because of the:
  - prominence of the statements
  - clear meaning of the statements, and
  - absence of any appropriate qualification to them.
- Reasonable consumers have a real and legitimate interest in knowing the fundamental terms of the arrangement they are being invited to enter, so they know the financial responsibilities they must undertake.

Effectiveness of disclaimers

- As to the disclaimers:
  - Absent a direct statement that qualified the banner statements, the ad implied, by omission, the material terms of the payment method were only those contained in the ad.
  - Some consumers *may not* have seen the disclaimer because of the small lettering, and that it was eclipsed by the prominence of the banner statements.
  - Some consumers *may* have seen the disclaimer but dismissed it "*in the reasonable expectation that, because it was in such small lettering, it must have been addressing subsidiary or unrelated matters that did not meaningfully qualify the banner statements*."
- The references to "fees & charges apply" was uninformative and cryptic, because it did not identity what the fees and charges were, or how or when they apply.
- The disclaimers are likely to have been construed as relevant only to occasions of non-compliance.

Effective disclaimers

- Disclaimers can still be helpful, but context and content are all important.
- The more qualification is required to balance the information in the headline claim, the more prominent the qualification should be: RG234.47.
- Some banner claims are so prominent they cannot be disclaimed.
- Should not be inconsistent with other content.
- Have sufficient prominence to effectively convey key information on a first viewing.
- Careful with font size, colour, placement, referring to other websites.
- Simply referring to another website or PDS unlikely to be sufficient. Eg:

Example 19: Qualifications and warnings to be included in an advertisement

If the headline claim for a superannuation fund that members 'pay a low administration fee of $104 per annum' is prominently qualified by a statement that 'other fees and charges apply—refer to our PDS', consumers will immediately be aware that the administration fee does not represent the only cost. On the other hand, if the headline claim is qualified only by a statement suggesting that consumers 'refer to our PDS', consumers will have no reason to suspect that other costs will be incurred.

Source: RG234.49

Contact us

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Thank you!