Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
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Department/ Agency: ASIC
Question: BET 11
Topic: Licence Conditions
Reference: Hansard pg 20-21, 4 June 2014
Senator: Bishop

Question:

Senator MARK BISHOP: Mr Medcraft, I want you to take this question on notice and give me a considered response. I know you appreciate the time. I have done hundreds of inquiries in my almost 20 years in this place. I did numerous inquiries for outside organisations before coming here on issues for which they wanted independent review and advice. I have never been in an inquiry, at the end, where I did not have the most clear view of the outcome. This is the only time it has ever happened in my time in public life.

I continue to be much troubled by this inquiry, because I am unclear as to what has occurred. I have noted Mr Kirk's comments today, going back to 2007 through to 2009 and 2010, where you had to constantly readdress the same issues. I have noted your comments about the lack of trust and how the lesson you have learnt is that you need to be much tougher and more proactive, for the benefit of clients in this industry. I continue to be troubled by the responses we have received from the Commonwealth Bank and others.

I would ask you to give me a considered, thoughtful response on why the new licence conditions you are about to impose cannot impose the following conditions: firstly, why the entire file history on all the clients of advisers who worked with, under or above those two characters—Mr Nguyen and the other man—cannot be reviewed and recommendations made by an independent expert, appointed by yourself; secondly, why all clients of advisers at any time classified as high risk or critical risk, by the Commonwealth Bank or other organisations, cannot have their entire file system similarly reviewed so that at least the people who have lobbied to have this inquiry can see that public justice has been delivered.

Mr Medcraft: I will come back to you.

Senator MARK BISHOP: Thank you, Mr Medcraft. Thank you, Chair, for that indulgence.

CHAIR: A three-minute question on notice! Thank you.

Answer:

In response to the first question (that is, why the entire file history of all the clients of advisers who worked with, under or above Mr Nguyen and Mr Awkar, cannot be reviewed and recommendations made by an independent expert appointed by ASIC), we make the following observations:

1. In 2010 CFPL conducted and reported to ASIC on a review of Mr Nguyen's servicing planners and a number of other advisors who worked with or were associated with Nguyen, to ascertain whether the concerns raised in respect of Mr Nguyen extended to their conduct[1]. Arising from that review, CBA breach reported Joe Chan (a servicing

[1] A servicing planner assists the financial planner with tasks such as preparing paperwork and organising meetings.

planner for Mr Nguyen) on 30 September 2010 and 8 August 2011. Pursuant to an enforceable undertaking with ASIC Joe Chan removed himself from the financial planning industry for 2 years. The general remediation program was applied to the advisors involved.

2. Our understanding is that Mr Awkar did not have servicing planners.

3. We cannot impose such licence conditions for the reasons set out below.

In response to the second question that is, why all clients of advisers at any time classified as high risk or critical risk, by the Commonwealth Bank or other organisations, cannot have their entire file systems similarly reviewed;-

ASIC has a number of tools available to require organisations to do certain things. These tools include:

1. Formal court action: If ASIC were successful in criminal, administrative or civil action against CBA, such a remedy (i.e. undertaking a review of client files of advisers rated as "critical" or "high" risk) would not be available .

2. Imposing licence agreements: For ASIC to impose such license conditions, it must be for proper regulatory purposes; that there is a reason why the conditions are necessary to ensure that a licensee complies with the law or addresses past non-compliance. If ASIC imposed licence conditions on CBA which required CBA to review client files of all advisers rated as "critical" or "high" risk, CBA would (in all likelihood) appeal that decision to the AAT. The reasons that would prompt CBA to appeal to the AAT are likely to be the same reasons that:

   - CBA would not agree to the licence conditions;
   - CBA would point to in support its appeal; and
   - the AAT would refer to in upholding CBA's appeal.

   These reasons include the fact that:

   - ASIC does not have sufficient evidence – such as widespread customer complaints in respect of some or all of CBA's advisers or breach reports in respect of a significant number of CBA advisers - to suggest that such licence conditions are necessary or warranted.
   - the adviser rating system is a tool designed to appropriately manage risk within a business. If an adviser is rated "critical" or "high" risk, it does not automatically follow that they have given inappropriate advice and caused the customer financial loss.
   - CBA has already implemented a compensation program (under the enforceable undertaking entered into with ASIC and under the earlier Project Hartnett) to remediate customers of CFPL[2] who were provided with inappropriate advice and suffered financial advice. To the extent that there were inconsistencies in that compliance process CBA has already agreed to license conditions to remedy those inconsistencies. Beyond that, ASIC does not have evidence, for example from

[2] CBA recently informed ASIC that customers of certain Financial Wisdom advisers have also been compensated.

widespread consumer or investor complaint that that compensation process has not been adequate.

- Such a widespread program of review would not be available as a remedy if ASIC were successful in civil, criminal or administrative proceedings against the bank.
- Finally ASIC cannot require CBA to undertake such a review under the terms of the enforceable undertaking between ASIC and CFPL. The enforceable undertaking between ASIC and CFPL was formally brought to a close on 26 November 2013; that is, the date on which ASIC accepted PwC's final report. Accordingly, ASIC cannot, under the terms of the enforceable undertaking (including clause 2.17), require CFPL to initiate such a review based only on the conduct and problems that were sought to be addressed through the EU and in the absence of new issues.

ASIC also refers to its responses to the supplementary questions on notice arising from the Senate Inquiry hearing in April 2014.

3. By agreement: An agreement to undertake such a review may take the form of:
   - Licence conditions imposed by agreement;
   - An enforceable undertaking;
   - A voluntary undertaking: note that under a voluntary undertaking, ASIC would not have the power (unlike with an enforceable undertaking) to apply to the court for orders (i.e. compelling CBA to undertake the review) if CBA did not comply with the voluntary undertaking);
   - A settlement agreement.

   It is unlikely, however, that CBA would agree to undertake a review of all "critical" or "high" risk advisers for the reasons set out at point 2, above. It is important to remember that a party usually agrees to do certain things as an alternative to ASIC taking enforcement action against the party. While negotiated outcomes can and often do secure outcomes beyond what can be achieved through enforcement proceedings, they are subject to what can be negotiated between the parties. It is therefore unlikely that a party will offer to take action or incur costs under a negotiated agreement if those actions or costs go far beyond what a court would order (as would be the case with such a review).