

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 30 May – 1 June 2006

Question: bet 25 (ASIC)

Topic: Banks withholding statement and providing customers with off balance sheet ledgers

Hansard Page: Written

Senator SHERRY asked:

- (1) Does ASIC consider that banks who deliberately withholding customers bank statements recording all transactions on the customers account/s to be misleading or likely to mislead when such action prevents the customer from preparing tax returns and the opportunity to re-finance with an alternative bank?
- (2) Does ASIC consider it likely to be misleading for banks to provide consumers with "off balance sheet ledgers" (such as shadow ledgers), with the notation to "retain for their financial records" when according to the ATO, such records cannot be used in the preparation of financial records and conflict with the actual balance of the customers account?
- (3) In April 2004, ASIC received copy of the ACCC's General Counsel Units legal advice that addressed banking practice of:
 - a) Issuing conflicting and confusing statements of account to consumers
 - b) Conduct of providers of financial services attempting to recover debts

The ACCC legal advice identified this type of behavior as a breach the ASIC Act, the Corporations Act and the Trade Practices Act. What action has ASIC taken against any banks in relation to the ACCC General Counsel Units advice to protect bank consumers who are not being provided with full disclosure and transparency about all transactions that have occurred on their bank accounts which are often secured by mortgage over customer's life savings and may involve superannuation funds? Why is ASIC not taking any action when there are repeated cases illustrating banks deliberately withholding of customers banks statements and issuing conflicting and confusing statements of account?

Answers:

- (1) ASIC has examined material provided by both the ACCC and copies of correspondence from a CBA customer. If a bank issues conflicting statements there is potential for such to involve misleading conduct in breach of section 12 DA of the ASIC Act (2001). Whether or not the statements are misleading would depend on all of the circumstances including any discussions that took place between the bank and its customer. Questions would also arise about whether the customer suffered loss or damage as a consequence of the statement

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being made. ASIC would expect that if a customer had received conflicting statements, they would, in the first instance, pursue the matter with their bank.

ASIC would be very concerned if it appeared that a bank or a number of banks had a problem involving the regular or systemic issuing of conflicting statements. The accounting treatment adopted by the banks, and the CBA in particular, for accounts where part of a debt has been written off involves the recording of different parts of a debt in different systems. Wherever this occurs, there is potential for conflicting or inaccurate statements to be issued in the absence of appropriate procedures.

In light of this, ASIC met with the CBA to review the concerns raised by the material provided by the ACCC about non-performing loans. ASIC was satisfied that there are appropriate procedures in place to: -

- (i) ensure that the CBA's commitment to the Parliamentary Joint Committee to issue regular statements on loan accounts in default showing the full amount alleged to be owing is met; and
- (ii) avoid the risk of conflicting statements being issued.

The ongoing statements are issued from a separate system where the full amount of the alleged debt is recorded. ASIC found there were appropriate notations on the mainframe system.

ASIC is satisfied that scope for human error has been minimised. ASIC is also satisfied that if an incorrect statement were issued through error, customers will have an appropriate contact point within the bank if confusion arises. This is advised to customers on their regular statements.

Based on a review of all material available, ASIC is of the view that there is no evidence that conflicting statements were issued on a regular or systemic basis. ASIC is satisfied that there are appropriate procedures in place to prevent this happening.

- (2) Advising a consumer to retain a document 'for their financial records' is a general statement. The ATO issues its own guidance as to what documents qualify for use as taxation records. ASIC is unable to comment on what the ATO has determined in this respect.
- (3) On 22 April 2004, the Australian Competition and Consumer Commission (ACCC) referred to ASIC concerns about banks on occasion issuing conflicting or confusing statements to customers where the loan or some part of it had been written off as unlikely to be recoverable in the banks' accounts. The ACCC's concerns were expressed principally in relation to the Commonwealth Bank of Australia (CBA).

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Subsequently, the ACCC provided ASIC with copies of correspondence with the CBA in relation to one customer that included material establishing that conflicting statements had been issued to that customer.

The bank customer also raised concerns with ASIC, together with more fundamental concerns about the approach adopted by the banks in accounting for and recording interest and other charges on loans that had been written off as unlikely to be recoverable in the banks accounts.

These fundamental issues are:

- (i) the manner of accounting created a legal barrier between the bank and its customer to the recovery of the amounts of interest and charges recorded on the separate ledger. ASIC is of the view that, in the absence of other factors or representations, there is no such legal barrier. This view is supported by the decision of Barrett J in *Timms v Commonwealth Bank of Australia* (February 2006).
- (ii) the accounting treatment adopted by the banks was in some way illegal. ASIC is of the view that the practice is consistent with the requirements of Chapter 2M of the *Corporations Act*, including relevant accounting standards.

ASIC invited the bank customer to provide any current examples of incorrect or conflicting statements being issued. Nothing further was received.

ASIC will continue to monitor complaints of this type of activity in the normal course. If relevant material is received, ASIC will reopen its inquiries, but at present, ASIC does not intend to take further action on the issue.