

**Senate Economics Legislation Committee**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Budget Estimates 30 May – 1 June 2006

**Question:** bet 26 (ASIC)

**Topic:** Eedra Zey

**Hansard Page:** Written

**Senator SHERRY asked:**

I have been made aware of a particular case in relation to a Ms. Eedra Zey. Her ASIC files have been attached.

In July 2005, a trustee, in a senior role with the Commonwealth Bank, was able to transfer a beneficiary's superannuation funds (life savings) without her knowledge or consent, diminishing the balance significantly and losing the non-preserved amount in the process. This Bank staff member had resigned as trustee (as advised by APRA) in November 2004. This fund was a SMSF, yet despite the fact that the member was not a trustee, no action appears to have been taken by any regulator against the fund or its trustee. I am advised that ASIC was made aware of issues with this fund and it's (former) trustee on 10 December 2004 and denied being the proper authority. ASIC were again advised about issues on 29 July 2005 and thirdly on 28 September 2005 when APRA advised it was ASIC's jurisdiction. Yet, the complainant is not aware that ASIC has taken any action whatsoever and as recently as last week was told that ASIC would not pursue the matter.

- (1) Can you explain how these funds could be transferred without consent and against instructions by a corporation who is not the trustee?
- (2) Can you explain why the Commonwealth Bank still holds these funds against the beneficiary's instructions and without application or consent and why the bank 'apologised' for accepting these funds 'in error' but 10 months later still has not remedied the 'error' and there appears to have been no consequences for this behaviour?
- (3) How was it that this SMSF, controlled by a person working for the Commonwealth Bank, was able to issue this person with an interest in it without a PDS and without consent or application? If you failed to take action because the relative entity was a bank, what is your arrangement with APRA being that they failed to prosecute this case
- (4) These funds were acted on by a Commonwealth Bank agent/employee contrary to the respective law. ASIC was repeatedly made aware for nearly two years, yet the lady still doesn't have her funds. ASIC advised **they would not take action. Please explain what you are going to do about this situation?**

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- (5) I am advised that ASIC acknowledged to the complainant in December 2005 that this case was falling through the regulatory cracks. What arrangements are in place between ASIC and APRA and the ATO to ensure breaches of the Corporations Act do not fall through the cracks? Why did ASIC not prosecute this case?
- (6) This case suggests that ASIC lacks effective safeguards. Can you explain how a person, who in this situation who went to ASIC on three occasions, to APRA on more than three occasions, to the ATO on more than three occasions and to the Commonwealth Bank continually over the last two years can gain resolution in this matter?
- (7) Once you were aware APRA was doing nothing, what communication did you have with APRA to ensure your Act was not compromised?

#### Answers:

##### **Background:**

The three regulatory agencies have different responsibilities in respect of superannuation:

- ASIC regulates what funds tell you and how they abide by the law, but has limited application to self-managed superannuation funds ('SMSFs').
- APRA regulates how most funds operate, but specifically excludes SMSFs.
- The ATO regulates SMSFs, employer contributions (superannuation guarantee), co-contributions and superannuation tax rules.

The issues raised cover the jurisdictions of all three agencies. As standard practice, ASIC will not reach a decision without first checking the facts and explanations of all the relevant parties involved. In this instance, the relevant parties are Ms Zey, Mr Atkinson and Almondo Pty Ltd, the trustee of the Almondo Superannuation Fund. The specific issues involve the status of Ms Zey's superannuation entitlement and her access or control of that entitlement.

##### **Response to questions:**

- (1) At all times, Almondo Pty Ltd has been the trustee of the Almondo Superannuation Fund. Almondo Pty Ltd, as trustee, is generally authorised to move funds.

Mr Lindsay Atkinson is the sole director and member of Almondo Pty Ltd. As a director, Mr Atkinson has responsibilities to the company Almondo Pty Ltd, whose duties extend further as trustee of the Almondo Superannuation Fund.

The role of the Commonwealth Bank (CBA), which employed Mr Atkinson, is that of a deposit-taking institution.

- (2) The transfer of funds from the CBA deposit account in the name of Almondo Pty Ltd as trustee for the Almondo Super Fund to the Colonial First State First

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Choice Personal Superannuation Account in the name of Ms Eedra Zey, was transacted by Almondo Pty Ltd in its capacity as trustee of the Almondo Superannuation Fund. As trustee, Almondo Pty Ltd has the legal capacity to perform such a transfer.

The SMSF in question is not a financial product of the CBA. The CBA's involvement in relation to the deposit account used by the SMSF is incidental; the CBA only acts in its capacity as the institution providing a deposit account.

ASIC has no information regarding any purported apology by the CBA.

- (3) It is not relevant that Mr Lindsay was an employee of the CBA. The fiduciary relationship in question is Almondo Pty Ltd's duty as trustee to the member(s) of the Almondo Superannuation Fund.

As the fund was a SMSF, Almondo Pty Ltd as the financial product issuer, was obliged to provide Ms Zey a product disclosure statement, unless Ms Zey had access to all the information required of such a statement (s1017D(2A), Corporations Act). In correspondence sighted by ASIC, Mr Atkinson and his solicitors maintain the trust deed was provided to Ms Zey, who was made a signatory to the bank account on 12 May 2004, soon after transferring her money into the Almondo Superannuation Fund.

The Almondo Superannuation Fund, as an SMSF, was regulated by the ATO. The issue of an interest in the Almondo Superannuation Fund to a person who is not a trustee put the Almondo Superannuation Fund in breach of the SMSF requirements. When it became apparent that the fund no longer satisfied the legal requirements of an SMSF, the fund fell within APRA's jurisdiction. Therefore, the ATO no longer had jurisdiction to act and correctly referred the matter to APRA on 27 April 2005.

In a letter of 13 May 2005, APRA sets out the reasons why the fund established by Mr Atkinson defaulted to APRA's jurisdiction because it did not meet the requirements of a SMSF for the purposes of the Tax Act.

ASIC, after making inquiries in accordance with procedures under the Memorandum of Understanding between ASIC and APRA, declined to act because the appropriate regulator – APRA – was dealing with the matter.

- (4) There has been no unlawful transfer by either Almondo Pty Ltd as trustee or by the CBA as deposit-taker. ASIC did not need to take action as APRA had properly taken carriage of the matter and interceded on Ms Zey's behalf in a meeting on 10 May 2005 with Mr Lindsay Atkinson and a letter to both Ms Zey and Mr Atkinson on 13 May 2005.

APRA confirm sighting a CBA Cash Management Call Account in the name of Almondo Pty Ltd as Trustee for the Almondo Superannuation Fund, which stated that the account held a credit balance of \$103,094.92 that represented the superannuation entitlement of Ms Eedra Zey.

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As a result of that letter, and according to documents ASIC has sighted, it appears Mr Atkinson has rolled \$90,638 to a complying superannuation fund that represents Ms Zey's preserved superannuation entitlement of \$103,094.92 less unpaid taxation on contributions and administration fees. This occurred as a result of Ms Zey's non-response to repeated requests from Mr Atkinson and his solicitors for instructions as to where Ms Zey wanted her entitlements to be transferred.

APRA's letter clearly advises Ms Zey of her position including that her entitlement now sits in an approved and compliant superannuation fund. Under the legislation, Ms Zey may either roll that money to a different approved and compliant superannuation fund of her choice or a SMSF of her own creation (providing that SMSF is certified by the ATO as compliant).

As far as ASIC can currently ascertain, the superannuation entitlement remains with Colonial First State First Choice Personal Super Account in Ms Eedra Zey's name. Therefore, Ms Zey does indeed have control and access to her superannuation within the superannuation framework.

In relation to the status of the funds as either 'preserved' or 'unpreserved', a rollover from one fund to another, does not alter the status of the components of the rollover amount. If Ms Zey maintains that some or the entire amount is unpreserved, then proof needs to be provided in the form of an Eligible Termination Payment statement or proof that the addition of her money was a personal contribution or both. This is a matter best addressed by Ms Zey directly with the trustee of the Colonial First State First Choice Personal Super or alternatively with the Superannuation Complaints Tribunal (SCT).

- (5) ASIC has limited responsibility for SMSFs. Memoranda of Understanding sit between ASIC, APRA and the ATO. The ATO referred the matter to APRA who appropriately dealt with the merit and substance of the complaint. Compliance has been achieved by APRA under the Superannuation Industry (Supervision) Act 1993 (SIS Act). ASIC found insufficient evidence to establish a breach of the Corporations Act.
- (6) APRA acted in accordance with its powers under the SIS Act by accepting a referral from the ATO and by arranging meetings and sending letters to the parties involved and in particular to Ms Zey including directing the trustee to perform certain actions and in doing so, achieved compliance.

ASIC first received a complaint from Ms Zey on 10 December 2004. ASIC acknowledged Ms Zey's complaint on 15 December 2004. On 24 December 2004, ASIC wrote to Ms Zey and explained that her matter was not best served by ASIC because of its limited jurisdiction in relation to SMSFs. ASIC referred Ms Zey to the ATO.

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ASIC received a second complaint from Ms Zey on 29 July 2005. After further inquiries, ASIC wrote to Ms Zey on 30 August 2005 advising it had reviewed the matter and ultimately determined there was no basis to take action given the compliance achieved by APRA. In the same letter, ASIC advised that an additional remedy remained available through the SCT if Ms Zey continued to have concerns about the amount of the rollover.

ASIC received a third complaint from Ms Zey on 28 September 2005. Although the matter was strictly speaking not in its jurisdiction, ASIC wrote to Mr Atkinson, her accountant and sat down with Ms Zey in November 2005 to assist in resolving her dispute. It is ASIC's view that APRA, in its efforts that culminated in a letter to Ms Zey dated 13 May 2005, has acted reasonably in assisting Ms Zey and in particular, provided Ms Zey with a clear assessment of her situation including advice on what she could do next.

At all times, ASIC kept a constant dialogue with Ms Zey and advised her that she reserved the right to lodge a complaint with the ASIC approved external dispute resolution scheme, the SCT. This remedy remains within Ms Zey's power.

Ms Zey is able to access her superannuation and it is not apparent further resolution is possible.

- (7) APRA in its letter to Ms Zey and Mr Atkinson on 13 May 2005 found that Mr Atkinson had taken reasonable steps to refer Ms Zey to a fund of her choice and did not believe the complaint was justified.

Ms Zey was notified by Mr Atkinson on 7 July 2005 that her funds had been rolled over into an industry approved rollover fund at Colonial First State First Choice Personal Super and that her account balance on entry into the new fund was \$90,638.00. APRA also wrote to the complainant by letter dated 28 September 2005 noting that the complainant herself did not respond to a letter from the solicitor acting for Mr Atkinson (19 November 2004), notifying her of his preparedness to resign as trustee and inviting her to take over the trusteeship of the fund. Mr Atkinson's solicitors also wrote to Ms Zey's solicitors on 6 June 2005 asking her to nominate an approved rollover fund. In the absence of a response from Ms Zey, her superannuation entitlement was rolled over into the complying Colonial First State fund in her name.

Ms Zey raised the issue that she did not authorise the rollover. APRA concluded that money was not improperly withdrawn or withheld from the complainant. APRA also advised that any concerns Ms Zey may have concerning the amount of benefit paid or Mr Atkinson's response to her specific requests **should be referred to the SCT.**