

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Cleared by Minister's Office:

Signature:

Date:

Question: BET 21

Topic: Brien Ernest Cornwell Case

Hansard Page: E116-117 (01/06/2010)

Senator JOYCE asked:

Senator JOYCE—I have a brief question. Mr D'Aloisio, I have been looking on your website. Are you aware of a gentleman by the name of Brien Ernest Cornwell?

Mr D'Aloisio—I am sorry?

Senator JOYCE—Brien Ernest Cornwell.

Mr D'Aloisio—It does not ring a bell immediately, Senator.

Senator JOYCE—He had an investment scam around Newcastle. I note that on the website on Tuesday, 13 May 2008, the Supreme Court of New South Wales ordered the operators of an unregistered managed investment scheme linked to Newcastle property development to stop promoting or issuing further interests in the scheme following an application by ASIC. You had an enforceable undertaking taken against him, but it now appears that Mr Cornwell is driving around in a black sports car, taking holidays in Croatia and has managed to peel off things to his wife. Why is it that ASIC, with these dodgy dealers, cannot nail them down?

Mr D'Aloisio—First, in relation to the specifics of the case that you are mentioning, I am happy to look at that further and provide you with a more specific answer. I am not aware of the case. But certainly I will look into that and give you a more detailed answer. In terms of the comment, 'Why aren't they nailable?', of course they are. We do in terms cancel people's licences. We ban directors. We do follow up that to the best to ensure that they do not come back into schemes and so on. But ultimately we enforce the law as we find it. Once we have done that, unless someone has been incarcerated or they are in prison, we cannot monitor them on a 24-hour basis.

Senator JOYCE—So there was a section 93AA enforceable undertaking taken against him. What does that actually mean?

Mr D'Aloisio—It depends on its terms. It is an alternative to, for example, going to court. You can get by agreement under the relevant legislative provisions these enforceable undertakings. They have the force of law. The undertaking will be not to do something or to pay something. It will be the sort of order you would get in a court, for example, except it is done by agreement with legislative backing. If it is breached, there are remedies that ASIC would have, including going to court and including enforcing that enforceable undertaking in a court of law.

Senator JOYCE—We know that issues such as Storm get a lot of publicity. The Commonwealth Bank come out and say, 'Oh, well, sorry about that. We'll fix up our section of it.' Everything looks very earnest. What do we say to the investors in Brien Ernest Cornwell's scams who see him now basically living pretty comfortably? I

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

notice he has his own personalised number plates on his own nice sports car. He is taking holidays and other people have lost their house. Does an enforceable undertaking mean that they are going to get their money back?

Mr D'Aloisio—Senator, I understand what you are saying. Where people have been subjected to a scam and they have lost money and they see perhaps the promoters of those scams re-establishing and doing other things, that is really disheartening. I understand that. At the end of the day, we can only work with the law, and if there is a breach of the law, we take action in relation to that. If in this circumstance there are breaches of the enforceable undertaking—and I will take it on notice and look at it—clearly we could take some action. But does that mean that once a person has been banned or lost a licence that that person cannot engage in any other form of business and build up wealth elsewhere? Of course it does not mean that. I will say this: in relation to the work that ASIC does with schemes, in any given year we close down a substantial number of these schemes. We do ban a substantial number of people. A lot of them do not actually come back in and run the schemes again. But you are right; if there are those that do, simply taking action against an illegal scheme and banning someone does not necessarily mean that they are out of play in a business sense for the rest of their lives. It just does not extend that far.

Senator JOYCE—Well, this gentleman has come to my notice because he is living in a hilltop house overlooking Newcastle. Either he has a BMW and his wife has a Mercedes or it is the other way around. He has been on holidays to Croatia. He seems to be living a pretty comfortable life yet there is a whole range of people around him who are basically broke because of him. He is back in business. What are we doing wrong that we cannot chase these people down? Are we missing the resources? Are we missing the laws? What is going wrong that these can be flaunted in front of the people who basically are living without, living on the bones of their backside because they have been done over?

Mr D'Aloisio—As I say, I will look at it further and give you a more specific response in relation to the case you have mentioned because I do not know the facts. In our system, when there is corporate wrongdoing, at the end of the day at the heart of our system is the corporation. The corporation is there because there actually is limited liability. The liability does not actually pass to the directors and the shareholders. You have a corporate veil, if you like, in terms of your business dealings which have significant advantages in the way that our economy works. So if it is the corporation, for example, that has been at the centre of the problem, it does not necessarily then follow that the individual is liable—that the director is liable—and that their personal assets are at risk. They will only be at risk if they themselves have breached a provision of the Corporations Act or if a shareholder has breached a provision of the Corporations Act. So, generally speaking in our system, where you work through corporate structures and trust structures with corporate trustees, the purpose of those vehicles is actually to protect the personal assets of individuals. But I am saying that there is a limit to that as well. The limit is where you then prove wrongdoing of the individuals who are involved in those corporations, and then of course, through sections such as 180 of the Corporations Act, you can get

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

compensation for investors. An example is us taking action in that sense in the Westpoint case where we have sued the directors and the auditors.

Senator JOYCE—Lifted the corporate veil because of the illegality of the actions of the director?

Mr D'Aloisio—Correct.

Senator JOYCE—Which in this case is Mr Cornwell. You apply for court orders for him to repay investors. Would that be correct? Is that one of your roles?

Mr D'Aloisio—We can. It depends on the action that we might take. We can seek compensation orders. If, for example, we close down an illegal managed investment scheme and we feel that those individuals involved in it breached provisions of the Corporations Act, we may, under the powers that we have, seek compensation orders from a court in relation to the individuals who are involved and their assets. But that would depend on the particular case. But we would have the power to be able to do that just as we have the power to sue directors and to seek compensation orders against directors.

Senator JOYCE—Mr D'Aloisio, taking on notice that there is this person called Mr Cornwell and that he has a house overlooking Newcastle, that he has a couple of sports cars and that he is going on holidays, will you give a guarantee that you will look into his file? If it warrants it, will you bring about orders to enforce him to repay the people he ripped off?

Mr D'Aloisio—Senator, as I have said, I would like to look into it and take it on notice. Indeed, if we receive complaints or information that indicates there is wrongdoing and there are issues, we would clearly pursue them. You have used the word 'guarantee'. I do not have enough facts at the moment to know what course of action we would take. But I am quite prepared to look at it and to come back and outline what we have decided to do in relation to it.

Answer:

Are you aware of a gentleman by the name of Brien Ernest Cornwell? Why is it that ASIC, with these dodgy dealers, cannot nail them down?

We are aware of one Brien Cornwell.

So there was a section 93AA enforceable undertaking against him. What does that actually mean?

1. Enforceable undertakings are one of a number of remedies available to ASIC for breaches of the legislation ASIC is responsible for enforcing. It is an outcome ASIC may accept as an alternative to court action or certain other administrative actions. Sections 93A and 93AA of the ASIC Act sets out ASIC's ability to accept a written undertaking given by a responsible entity of a registered scheme and any other person respectively. From 1 July 2010,

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

section 322 of the National Credit Act will also enable ASIC to accept a written undertaking given by a person.

2. An enforceable undertaking can be initiated by a company, an individual or a responsible entity, or as a result of a discussion between that party and ASIC. We do not have the power under sections 93A and 93AA of the ASIC Act to require a person to enter into an enforceable undertaking. Similarly, a person cannot compel ASIC to accept an enforceable undertaking.
3. We may accept an enforceable undertaking instead of:
 - a. seeking a civil order from a court (e.g. an award of damages or compensation, or an injunction);
 - b. taking administrative action (e.g. cancelling a licence); or
 - c. referring a matter to another administrative body.
4. ASIC will not consider an enforceable undertaking unless we have reason to believe there has been a contravention of relevant legislation and have commenced an investigation into the conduct we believe gives rise to the suspected breach. ASIC will not contemplate an undertaking to forestall an investigation.
5. When deciding whether an enforceable undertaking is appropriate in the circumstances of the case, we will consider the following factors (this list is not exhaustive):
 - a. Is the person prepared to publicly acknowledge ASIC's concerns about the conduct and the necessity for protective or corrective action?
 - b. Was the misconduct that ASIC considers to be a breach inadvertent?
 - c. Was the conduct that ASIC considers to be a breach a result of the conduct of one or more individual officers or employees of the company?
 - d. What was the seniority and level of experience of the individual(s) involved in the breach?
 - e. Has the person co-operated with ASIC, including providing us with complete information about the underlying breaches and any remedial efforts?
 - f. Will it achieve an effective outcome for those who have been adversely affected by the conduct or compliance failure?
 - g. Is the person likely to comply with the enforceable undertaking?
 - h. Has the person been the subject of complaints or previous ASIC enforcement action?
 - i. What are the prospects for a speedy resolution of the matter?
6. An enforceable undertaking can sometimes offer a more effective regulatory outcome than could otherwise be achieved through other available enforcement remedies, namely civil or administrative action. ASIC will not

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

enter into an enforceable undertaking unless it offers a more effective regulatory outcome.

7. When we assess whether an enforceable undertaking is a more effective regulatory outcome than other possible courses of action, we take into account four critical considerations:
 - a. the position of consumers and investors whose interests have been or may be harmed by the suspected conduct;
 - b. the effect on the regulated person's future conduct;
 - c. the effect on the regulated population as a whole; and
 - d. the community benefit in regulatory outcomes being achieved as quickly and cost-effectively as possible.

8. We would consider an enforceable undertaking to be an effective regulatory outcome if it:
 - a. promotes the integrity of, and public confidence in, our financial markets and corporate governance;
 - b. specifically deters the person from future instances of the conduct which gave rise to the undertaking;
 - c. promotes general deterrence in making the business community aware of the conduct and the consequences arising from engaging in that conduct; or
 - d. provides an ongoing benefit by way of improved compliance programs.

What do we now say to the investors in Brien Ernest Cornwell's scams who see him now living pretty comfortably?

The answer to this question emerges from answers to subsequent questions.

Does an enforceable undertaking mean that they are going to get their money back?

No, it is not a guarantee.

What is going wrong that these can be flaunted in front of the people who basically are living without, living on the bones of their backside because they have been done over?

If Cornwell has access to a luxury vehicle but is not the registered owner, or has not contributed to its purchase, then we cannot intervene.

It should be noted that the Newcastle Palais scheme was not a scam as such. Newcastle Palais was the proprietor of the Palais Royale land; investor funds appear to have been applied to some of the development costs (demolition in particular); feasibility studies and valuations were conducted and a DA was submitted to

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Newcastle City Council. Though the property was included as part of a guarantee in respect of another of Cornwell's developments, it would be impossible to consider this illegal activity.

Which in this case is Mr Cornwell. You apply for court orders to repay investors. Would that be correct? Is that one of your roles?

Answered by the Chairman at Senate Estimates 1/6/2010

ENDS