

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 236

Topic: Dishonour Fees

Hansard Page: Written

Senator BUSHBY and EGGLESTON asked:

1. With reference to the class action against the dishonour fees charged by Australian banks as started by IMF Australia, it was reported on May 14 that ASIC had blocked attempts by IMF to gain access to documents, including product disclosure statements held by the banks that would have assisted this class action. What were the reasons for blocking access to these documents? Were there legal impediments?

Answer: ASIC does not hold the documents that were sought by IMF Australia. The majority of products relevant to IMF Australia did not require a Product Disclosure Statement (PDS) to be prepared, due to the “basic deposit product” exemption in the *Corporations Act* (section 761A of the *Corporations Act*). These products would have been issued under “terms and conditions” documents rather than PDSs.

Although ASIC could use its statutory powers to obtain the relevant terms and conditions documents, ASIC does not generally use its powers to obtain such documents for the purpose of providing them to a private litigant. Private litigants are able to obtain the documents necessary for litigation through court-sanctioned discovery processes.

2. In ASIC’s view, would there be disruptions to financial markets in Australia if this case were to proceed? Are there any market regulatory reasons for denying access to documents?

Answer: Noting that the class action has not yet commenced, and that pleadings and arguments have not yet been made and the size of claims not known, within ASIC’s area of regulatory responsibilities. ASIC is not able to express a view on whether or not there would be a disruption of financial markets.

3. What are ASIC’s views on the potential success of a case that tests the law on dishonour fees? Would this be a case that ASIC would prosecute themselves on different terms?

Answer: ASIC has not formed a view on the potential success of the bank class action, noting again that the class action has yet to commence and that pleadings and arguments have not yet been made. The legal question on which the class action rests is a complex area of the common law.

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Also, ASIC does not have jurisdiction to bring an action under the common law doctrine of penalties, which we understand is the basis for the class action.

4. Given that ASIC are determined to test the law in front of courts with regards to deterrence and public policy aspects, why is it being seen to block a case that would test the law with regard to bank fees?

Answer: ASIC has not sought to block the class action.

* This question was also asked in writing by Senator Eggleston on 8/06/2010