

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio

Supplementary Budget Estimates, 2 - 3 November 2005

Question: SBET 6

Topic: ASIC – Investigations

Hansard Page: E109/E110

Senator Sherry asked:

1.

Senator SHERRY—The *7.30 Report* broadcast a program on 18 August involving two individuals. I have the transcript; there was nothing confidential about it. A Ms Anna Chernisnova had allegedly been convinced to shift \$200,000 by a sales person out of the ANZ fund. I must say I was a little taken aback, she worked for ANZ; I would have thought a person would have had a greater knowledge. Anyway, she was convinced to shift it out into a managed account, and then the money was withdrawn and apparently stolen. There was I think a car repair operator who—not the same level of moneys, Aaron Kendon I think was his name. Anyway, has ASIC had anything to do with the investigations around the salesperson who convinced them—

Mr Lucy—I will take those on notice, if I may. They do not that immediately gel with us, so we will take them on notice.

2.

Senator SHERRY—It was the *7.30 Report* of 18 August. Emma Alberici, who was the interviewer, said: After investigating a series of complaints earlier this month, the Australian Securities and Investments Commission shut down the PFS business development group—

Personalised Finance Solutions, does that ring any bells?

Mr Cooper—Yes, that does. I think to provide a comprehensive report, particularly if there is any potential for it to be an outstanding investigation, we should take it on notice.

3.

Senator SHERRY—Okay. Could also take this on notice. In a case like this, is there any potential for compensation to be payable? It was superannuation moneys, but I am not sure whether it will be covered in terms of the compensation provisions of the act. Could you give us a view about that?

Mr Lucy—Yes.

Answers:

Question One:

ASIC investigations indicate that Ms Chernishova was approached by an employee "salesperson" of PFS and that Mr Kendon was approached by a director of the Company. As ASIC's investigations are continuing it is not appropriate to comment on what action ASIC may or may not be considering in relation to the PFS employee or director.

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates, 2 - 3 November 2005

It should be noted that Ms Chernishova and Mr Kendon were persuaded to set up SMSFs, not managed investment accounts. Ms Chernishova's funds were allegedly misappropriated from her SMSF, while Mr Kendon was allegedly deceived into buying what it is believed were valueless shares for his SMSF. Ms Chernishova and Mr Kendon have assisted ASIC in its investigation.

Question Two:

On 26 July 2005, ASIC sought orders for the appointment of a provisional liquidator to PFS Business Development Group Pty Ltd and ten other related companies (which together form the "PFS Group" of companies), as well as restraining Mr Shaun Oliver White, Mrs Nicole White and Mr Damian Tolson (directors of a number of the companies) from carrying on business relating to superannuation.

ASIC alleges, amongst other things, that these parties had misled investors and acted unconscionably, leading investors to roll over approximately \$800,000 of existing superannuation funds into self-managed superannuation funds, while also persuading investors to invest a further \$700,000 into joint venture investments.

On 5 August 2005, ASIC was successful in obtaining orders restraining the three directors and the PFS Group companies from carrying on a financial services business or from carrying on a business related to superannuation interests without holding an Australian Financial Services Licence (AFSL). ASIC was also successful in August 2005 in having provisional liquidators appointed to the 11 companies in the PFS Group.

On 8 December 2005, ASIC was successful in obtaining orders from the Supreme Court of Victoria winding up the 11 companies in the PFS Group. However, in light of an appearance in person by the three directors on that day, the Court adjourned to 22 February 2006 ASIC's application for declarations that the PFS Group companies and three directors, being Mr Shaun Oliver White, Mrs Nicole White and Mr Damian Tolson, had engaged in conduct that was false and misleading in relation to the carrying on of a financial services business. The Court also adjourned to that date ASIC's application that the directors should be banned from managing corporations for a period that the Court deems appropriate.

On 23 February 2006, there was no appearance by Mr or Mrs White. Mr Tolson appeared representing himself. The Court considered evidence and the matter has been adjourned to 20 March 2006 for final submissions in relation to ASIC's application for declarations that the PFS Group companies and three directors had engaged in conduct that was false and misleading in relation to the carrying on of a financial services business. The Court has indicated that ASIC's application that the directors should be banned from managing corporations, would be the subject of a separate hearing at a later time.

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates, 2 - 3 November 2005

On 30 May 2006, the Court found that Mr White, Ms White and Mr Tolson and eight of the defendant companies in the PFS Group had carried on an unlicensed financial services business. It also found that the three personal defendants together with seven of the defendant companies had engaged in a variety of activities that were misleading and deceptive.

In relation to the allegations of breaches of directors' duties, the court found that Mr White, Ms White and Mr Tolson had breached their duties. While Tolson was found to have breached his duties by gross negligence, the Court found that Mr White and Mrs White had failed to discharge their duties in good faith, citing various acts of dishonesty as the basis for such findings.

On 6 July 2006 the Court made orders that Mr White and Ms White be disqualified from managing corporations for life. This is the first time that the Court has taken such action. The Court also made orders banning Mr Tolson from managing corporations for seven years. The court found that Mr Tolson had acted in good faith but that his conduct was such as to amount to gross negligence.

The Court also permanently restrained those directors from carrying on business or dealing in superannuation interests, financial services or financial products.

ASIC's investigation is otherwise continuing.

Question Three:

The definition of "fund" for the purposes of section 229 of the Superannuation Industry (Supervision) Act specifically excludes SMSF's from eligibility for compensation pursuant to that section in relation to the loss of monies from the fund.

The defendants have no assets that could be used to satisfy an order for compensation under the Corporations Act or ASIC Act.