

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

Question: sbt 3 (ASIC)
Topic: Eedra Zey (further questions relating to Bet 26)
Hansard Page: Written

Senator SHERRY asked:

At the last Estimates I placed on notice questions relating to a constituent Ms Eedra Zey (BET 26)

Background

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.

Excerpt from ASIC answer (bet 26) from last estimates

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.

Response and questioning in response to answer above

In relation to ASIC responsibilities is it true to state that ASIC has jurisdiction in regards to a corporation's duty to disclose? Further, if that corporation is a trustee then that duty carries on and that no "limited application" of the Corporations Act exists in Ms Zey's situation?

What sections of the Corporations Act is applicable in Ms Zey's situation, that would remove responsibility of ASIC to oversee corporation's duty to disclose?

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In Ms Zey's case she was informed by ATO that this was under APRA's authority as the SMSF was a non-complying fund, APRA informed her it was ASIC's responsibility and ASIC seem reluctant to accept responsibility. As Ms Zey is caught up in a jurisdictional gap between three authorities I wish to ask ASIC questions relating to three agencies and request you liaise with other agencies as required.

Is it true APRA regulate all funds, except SMSF's, unless the SMSF is non-compliant by not meeting the definition of a self-managed super fund?

Is it true a SMSF is not classified as "Not compliant" until the Commissioner of Taxation declares it so?

Will the ATO take no responsibility for the time period from the apparent non-compliance to the period it is 'declared' non-complaint?

In the case of Ms Zey, APRA should have become the regulator of her fund around June 2003 due to obvious non-compliance but due to the delay in declaring this by the Tax Commissioner there was a regulatory gap for a long period of time, do the regulators agree this is an area that can be open to regulatory gaps?

Questions in relation to ASIC's responses (BET 26)

ASIC wrote: (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.

The trustee is generally authorised to move funds, however if this trustee is not licensed through ASIC are they still permitted to move funds?

Was Almondo licensed through ASIC?

Also must a trustee supply a PDS? In this case Almondo did not.

ASIC's response in BET 26 stated "The role of the Commonwealth Bank (CBA), which employed Mr Atkinson, is that of a deposit-taking institution".

Does not CBA have a fiduciary duty to Zey as she entered into a contract with them by way of being a customer, and in turn would they not be required to meet the Banking Code of Conduct?

Does not CBA have some responsibility? As Ms Zey alerted the bank to the risk of fraud in a business partnership; and the bank refused to take action which resulted in all funds were stripped by Mr Atkinson and moved to Almondo.

Questions in relation to ASIC's responses (BET 26)

ASIC wrote: (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 Choice Personal Superannuation Account in the name of Ms Eedra Zey, was transacted by Almondo Pty Ltd in its capacity as trustee of

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the Almondo Superannuation Fund. As trustee, Almondo Pty Ltd has the legal capacity to perform such a transfer.

Do you feel Almondo still had full legal capacity to perform transfers, even when:

- ***Almondo resigned as trustee in November/December 2004 after ignoring 6 months of correspondence from the beneficiary, Ms Zey,***
- ***Almondo was directed to not take this action by Ms Zey on numerous occasions but all correspondence (by email, fax, hand and registered post) was ignored, and***
- ***Colonial have stated in writing they should not have accepted these funds?***

Answer:

1. ***In relation to ASIC responsibilities is it true to state that ASIC has jurisdiction in regards to a corporation's duty to disclose? Further, if that corporation is a trustee then that duty carries on and that no "limited application" of the Corporations Act exists in Ms Zey's situation?***

What sections of the Corporations Act is applicable in Ms Zey's situation, that would remove responsibility of ASIC to oversee corporation's duty to disclose?

ASIC has jurisdiction in relation to the disclosure obligations of corporations and trustees of superannuation funds. A director of a company must make full and fair disclosure to shareholders of material information. A trustee of a superannuation fund must make full and fair disclosure of material information to members.

Almondo Pty Limited, as trustee for the Almondo Superannuation Fund of which Ms Zey was a member, therefore, had a duty of disclosure. On the information available to ASIC, it appears this duty of disclosure was satisfied.

2. ***Is it true APRA regulate all funds, except SMSF's, unless the SMSF is non-compliant by not meeting the definition of a self-managed super fund?***

Is it true a SMSF is not classified as "Not compliant" until the Commissioner of Taxation declares it so?

Will the ATO take no responsibility for the time period from the apparent non-compliance to the period it is 'declared' non-complaint?

In the case of Ms Zey, APRA should have become the regulator of her fund around June 2003 due to obvious non-compliance but due to the delay in declaring this by the Tax Commissioner there was a regulatory gap for a long period of time, do the regulators agree this is an area that can be open to regulatory gaps?

A superannuation fund is either a self-managed superannuation fund ('SMSF') and is, therefore, under the jurisdiction of the ATO, or it is not and is, therefore, under the jurisdiction of APRA.

Whether a fund is an SMSF depends on whether it meets the definition in section 17A of the *Superannuation Industry (Supervision) Act 1993*.

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A declaration as to whether a fund is 'non-compliant' relates to its concessional tax treatment.

ASIC does not agree that there is a regulatory gap. APRA is the appropriate regulator when the fund ceases to meet the definition of an SMSF. On the information available to ASIC, both APRA and the ATO were actively involved in attempting to resolve the issues in this matter.

3. ***The trustee is generally authorised to move funds, however if this trustee is not licensed through ASIC are they still permitted to move funds?***

Was Almondo licensed through ASIC?

Also must a trustee supply a PDS?

A trustee of a superannuation fund is authorised to move funds in accordance with its duties as a trustee and the trust deed. The status of the trust vis-à-vis superannuation regulation does not affect the validity of the superannuation fund nor the transactions within the fund.

As a non-public offer fund, Almondo Pty Limited, as trustee for the Almondo Superannuation Fund, neither holds nor is required to hold an Australian financial services licence (*Corporations Regulation* 7.6.01(1)(a)).

A person acquiring an interest in an SMSF is not required to be given a Product Disclosure Statement if that person has access to all the information which would otherwise be required to be included in a Product Disclosure Statement.

4. ***Does not CBA have a fiduciary duty to Zey as she entered into a contract with them by way of being a customer, and in turn would they not be required to meet the Banking Code of Conduct?***

Does not CBA have some responsibility?

The fiduciary duty owed by the bank was to its customer, Almondo Pty Limited (as trustee for the Almondo Superannuation Fund).

5. ***Do you feel Almondo still had full legal capacity to perform transfers, even when:***
- o ***Almondo resigned as trustee in November/December 2004 after ignoring 6 months of correspondence from the beneficiary, Ms Zey;***
 - o ***Almondo was directed to not take this action by Ms Zey on numerous occasions but all correspondence (by email, fax, hand and registered post) was ignored; and***
 - o ***Colonial have stated in writing they should not have accepted these funds?***

Material before ASIC indicates that the trustee offered to remove themselves as trustee and hand full control of the fund to Ms Zey. To ASIC's knowledge, Ms Zey did not respond to this offer.

A trustee of a superannuation fund is authorised to move funds in accordance with its duties as a trustee and the trust deed.