

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

4 – 6 June 2013

Question: BET 119-124

Topic: ASIC Investigations/ Inquiries

Written: 13 June 2013

Senator EGGLESTON asked:

119. ASIC has had the opportunity of assessing some, if not yet all, of the complaints lodged with it complaining of the conduct of Bankwest towards borrowers following the acquisition of Bankwest by the Commonwealth Bank.

Does ASIC intend to investigate the behaviour of Bankwest following the assessment it has made of complaints lodged with it by customers?

- a. If not, why not?
- b. If so, what laws does ASIC consider may have been contravened?

120. Has ASIC assigned a Breach and Misconduct Officer to look into the submissions received from Bankwest customers?

- a. If so, what steps have been taken to inform the public and ask aggrieved parties to come forward with their evidence?
- b. If no steps have been taken, why not?

121. What Federal laws are in place to prevent banks from behaving unreasonably or unconscionably towards customers?

Please provide, at a minimum, the key legislation and relevant sections of key Acts.

122. Which laws does ASIC administer, oversee or utilise in regulating the behaviour of banks towards customers?

123. Does ASIC consider there is any gap in the legislative and administrative scheme for the supervision of the Australian banks in protecting bank customers against unreasonable conduct by banks?

- a. If so, what are these gaps and what does ASIC suggest needs to be done?

124. Does ASIC consider there is a need to extend the prohibitions in Section 1041 subsections E to H of the Corporations Act to encompass the behaviour of banks?

- a. If so, why?

Answer:

119. ASIC has received a number of allegations of misconduct relating to the enforcement of commercial loans made by Bankwest prior to its takeover by the Commonwealth Bank of Australia (CBA) in 2008, including concerns about the actions of receivers and managers.

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

4 – 6 June 2013

ASIC assesses each allegation it receives to determine what, if any action is appropriate. Further details of how ASIC deals with allegations of misconduct are set out in [Information Sheet 153](#).

One potential course of action is commencement of an investigation with a view to possible enforcement action. ASIC is not obliged to commence an investigation into all matters brought to its attention, and ASIC is not in a position to take enforcement action in relation to all alleged breaches of the laws it administers. ASIC considers a range of factors when deciding whether to commence an investigation with a view to possible enforcement action, including strategic significance, benefits of pursuing misconduct, whether there are alternative courses of action and other issues specific to each case, including whether there is evidence which would be admissible in court. Additional information about ASIC's approach to enforcement is set out in [Information Sheet 151](#).

On the basis of the information assessed to date, ASIC has not commenced an investigation into the conduct of the CBA or Bankwest. ASIC will continue to assess any additional information which may come to hand.

ASIC generally does not act for individuals and we encourage affected commercial clients to consider alternative options such as lodging disputes with external dispute resolution schemes or taking their own legal action. We recommend that individuals seek their own professional advice in this regard. Additional information about ASIC's approach to involvement in private court proceedings is set out in Information Sheet 180.

It is understood that some of Bankwest's commercial clients have commenced their own legal proceedings and that one or more class actions are being contemplated.

120. ASIC assesses all reports of alleged misconduct lodged with us to determine whether the concerns raised suggested breaches of the law we administer, and whether ASIC should take further action in response to any identified breaches. Misconduct reporters can lodge their reports with via our online, available at www.asic.gov.au/complain. Further details of how ASIC deals with reports of misconduct are set out in ASIC Information Sheet 153 *How ASIC deals with reports of misconduct*.

ASIC has considered, is considering, or will consider any reports of misconduct we receive from submitters to the Inquiry into the post-GFC banking sector raising these concerns. We will also consider the specific submissions if the misconduct reporter so requests in their report.

Under the *Australian Securities and Investments Commission Act 2001* and our operating policies, ASIC generally keeps confidential whether we have received reports of misconduct about a particular issue, and must keep confidential the content of any misconduct report, and the identity of any misconduct reporter. Further information about the circumstances when ASIC may make public comments to confirm our assessment, inquiries, or operational activities is set out in ASIC Information Sheet 152 *Public comment*.

121. Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) contains provisions prohibiting, among other things:
- Unconscionable conduct (sections 12CA and 12CB);

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

4 – 6 June 2013

- Misleading or deceptive conduct (section 12DA);
- False or misleading representations (section 12DB);
- False or misleading representations in relation to financial products that involve interests in land (section 12DC).

Section 12BF of the ASIC Act voids unfair terms in standard form consumer contracts, but does not apply to commercial loan contracts.

Business lending is not regulated under the *National Consumer Credit Protection Act 2009* (National Credit Act) which imposes specific obligations on credit providers in relation to responsible consumer lending in Chapter 3.

In addition, Division 3 of the National Credit Code (Schedule 1 to the National Credit Act) provides for changes to consumer credit contracts on grounds of hardship and unjust transactions. A Court may:

- Make changes to consumer credit contracts on the grounds of borrower hardship (section 74 of the Code);
- Reopen unjust transactions (section 76); and
- Review unconscionable interest and other charges (section 78).

Further protections in the National Credit Code include those in Part 5, Division 2, placing restrictions around the manner in which credit providers can enforce consumer credit contracts in default.

122. ASIC is responsible for administering the

- *Australian Securities and Investments Commission Act 2001* (most relevantly those provisions governing unconscionable conduct and misleading or deceptive conduct)
- *Corporations Act 2001* (relevantly in relation to financial services licensing and the giving of appropriate advice in relation to financial services)
- *National Consumer Credit Protection Act 2009* (relevantly in relation to credit licensing, responsible lending and the National Credit Code).

123. The *Australian Securities and Investments Commission Act 2001* (ASIC Act) contains prohibitions on misleading and deceptive or unconscionable conduct. Whether particular conduct is misleading or unconscionable generally turns on the specific facts of each transaction. The unfair contract terms provisions of the ASIC Act apply more broadly to standard form consumer credit contracts, but do not apply to commercial loan contracts.

Business lending is not regulated under the *National Consumer Credit Protection Act 2009* (National Credit Act) which imposes specific obligations on providers of consumer credit in relation to responsible lending, pre-contractual disclosure and enforcement of consumer credit contracts in default. The National Credit Act provides that a Court may make changes

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

4 – 6 June 2013

to consumer credit contracts on the grounds of borrower hardship, reopen unjust transactions, and review unconscionable charges.

In December 2012 Treasury released an exposure draft of the *National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012* for public consultation proposing reforms to the regulation of small business lending. However, in February 2013 the Government advised that any reforms to small business lending would be deferred as consultation indicated a need to further examine a number of key issues, including whether the benefits of regulating small business lending could be delivered in a more targeted and effective way.

124. Sections 1041A to 1041H of the *Corporations Act 2001* (Corporations Act) already encompass the behaviour of banks in relation to financial services, containing prohibitions against:

- Making false or misleading statements (section 1041E);
- Inducing persons to deal in financial products by making false, misleading or deceptive statements (section 1041F);
- Engaging in dishonest conduct (section 1041G); and
- Engaging in misleading or deceptive conduct (section 1041H).

In addition, the *National Consumer Credit Protection Act 2009* (National Credit Act) prohibits the giving of false or misleading information in the course of engaging in a consumer credit activity (section 160D). The National Credit Code prohibits the making of false or misleading representations in relation to a matter that is material to entry into a consumer credit contract or a related transaction or in attempting to induce another person to enter into a consumer credit contract or related transaction (section 154).

The prohibitions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) against misleading or deceptive conduct in relation to financial products (including credit facilities) apply to all credit contracts, not just consumer credit contracts.

Whether and how either the Corporations Act or the National Credit Act, or any other Act, should be amended to further restrict the behaviour of banks in particular is a matter for Government.