

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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4 – 6 June 2013

Question: BET 127-136

Topic: Commonwealth Financial Planning Limited (CFP)

Hansard Page: Written, 13 June 2013

Senator CAMERON asked:

127. According to ASIC media release 11-42AD, Mr Don Nguyen's seven year ban was a result of a range of misdemeanours but not unlawful conduct including possible fraud. Was ASIC at any time made aware of allegations of unlawful conduct by Mr Nguyen including possible forgery of clients' signatures on documents?
- a. If ASIC was aware of allegations of this nature, what steps were undertaken to investigate allegations of unlawful conduct by Mr Nguyen during his employment with CFP?
128. Is ASIC comfortable with financial institutions appointing internal compliance consultants to replace external compliance consultants to conduct investigations such as the internal investigation CFP conducted into the conduct of Mr. Nguyen and other employees of CFP?
- a. What are the challenges for management overseeing such investigations and what systems need to be in place to ensure the integrity of internal investigations carried out by financial planning businesses?
- b. Does ASIC set standards for the conduct of internal investigations?
- I. If so, what are they?
129. Has ASIC investigated the procedures and processes undertaken by CFP in its internal investigation titled "Project Hartnett"?
- a. If not, why not, and if an investigation has been undertaken what was the outcome?
130. Should financial institutions conduct internal audits of financial planners who are writing business significantly in excess of expected targets?
- a. Are there thresholds of business being written by financial planners employed by companies like CFP in place that when crossed would suggest unusual or unorthodox practices and warrant internal scrutiny by the firm concerned?
- b. Would the conduct undertaken by Mr Nguyen have been exposed if internal scrutiny had been undertaken by the CFP and had ASIC been advised of any investigations and outcomes?
131. Has ASIC investigated whether CFP engaged in an attempted cover-up of the practices engaged in by Mr. Nguyen and others, including but not limited to alleged destruction or doctoring of documents, referred to by whistle-blowers as "cleaning up" documents; or the withholding of information about potential civil or criminal offences from ASIC or the police?

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132. Despite having been made aware of the conduct of employees of CFP on 30th October 2008, over which it appears ASIC took no action or made any enquires, what were the circumstances that eventually led to ASIC raiding the offices of CFP in March 2010?
133. Why did ASIC decide not to investigate allegations of forgery included in material provided to ASIC by Mrs Jan Braund and correspondence at a face-to-face meeting in June 2010?
- a. Is it correct that an ASIC employee on July 21, 2010 told Ms Braund that they had enough evidence and would not be using her case?
134. Why have both ASIC and CFP persisted with the fiction that Mr. Nguyen resigned from CFP on July 6, 2013 due to ill health when it appears that his employment would otherwise have been terminated on June 20, 2009 at the instigation of CFP for conduct warranting summary dismissal?
- a. Did ASIC enquire of CFP as to the reason Mr. Nguyen was permitted to resign on account of ill-health rather than terminating his employment as it would appear CFP was entitled to do at law?
- I. If so, what explanation was provided by CFP?
- II. If not, why not?
- b. Does ASIC consider the fiction of his resignation to have been merely a device to limit reputational damage and potential financial liability on the part of CFP?
- c. Is it ASIC's view that Mr. Nguyen's clients should in all the circumstances have been made aware of the reasons for Mr. Nguyen's departure from the company?
- I. If not, why not?
135. Apart from Mr. Nguyen, a further six financial planners employed by CFP received ASIC imposed bans; Mr. Anthony Awkar, Mr. Ricky David Gillespie, Mr. Simon Langton, Mr. Christopher Baker, Ms. Jane Duncan and Mr. Joe Chan. Were any of these financial planners found to have forged client signatures on documents?
- a. If so, whom?
- b. Does ASIC consider the act of forging a client's signature on a document to be a criminal offence?
- I. If so, and if any of the above were found to have forged signatures, did ASIC refer the cases of forgery to police for criminal investigation?
- II. If not, why not?
136. Apart from the clients of Mr. Nguyen, how many clients of CFP were clients of Messrs Awkar, Gillespie, Langton, Baker, Chan and Ms. Duncan?
- a. What was the value of the investor funds managed by those planners and what was the financial value of the losses incurred by those clients attributable to the improper and/or unlawful actions of those financial planners?

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Answer:

127. The conduct involving Mr Nguyen was not merely misdemeanours; it included allegations of misleading conduct and inappropriate advice. Other concerns included in the administrative brief relating to Mr Nguyen:

- asking a blind client to sign a document; and
- whitening-out Financial Needs Analysis documents in order to use the same generic information for each client.

At the time this media release was issued, the only criminal allegation which had been brought to ASIC's attention involved a 2008 switching document in relation to Mrs Jan Braund (Mrs Braund). This allegation presented evidentiary issues; as a consequence, ASIC chose not to rely on this allegation in the banning action (for further information, please see ASIC's response to question 133). After the conclusion of the ASIC's banning action against Mr Nguyen, ASIC received other allegations of unlawful conduct by Mr Nguyen; in this regard, please see ASIC's response to question 133.

a. In relation to the steps taken by ASIC, please refer to ASIC's response to question

133. Please also refer to paragraphs 13 to 36 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters.*

128. Under the Corporations Act, licensees have a number of general obligations that are relevant to this question. For example, they must:

- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
- have in place adequate arrangements for the management of conflicts of interest; and
- comply with the conditions on their licence and the financial services laws.

In keeping with the principles-based nature of the financial services legislation, ASIC does not generally prescribe how licensees should meet their compliance or risk management obligations. Instead, ASIC provides guidance that what licensees need to do to comply with their obligations which will vary according to the nature, scale and complexity of their business (Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104)). The responsibility for the compliance function, whether outsourced or conducted internally, remains with the licensee.

Whether a particular compliance task or review is better done by internal compliance staff or external consultants will depend on the nature and circumstances of the task involved. ASIC's regulatory guidance provides that "*where compliance issues have arisen (such as major breaches or repeated compliance failures), external compliance review is particularly appropriate*".

Where ASIC is involved, it may, depending on the circumstances, require the use of external consultants. In the CFPL matter, there was involvement by external consultants:

- from April 2008 in CFPL's program for addressing problems identified by ASIC's surveillance, this being prior to the whistleblower complaints in October 2008;

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- in the development and administration of the compensation program required by ASIC and announced by ASIC in November 2010; and
- in the currently ongoing implementation of the Enforceable Undertaking (EU) accepted by ASIC in October 2011.

See paragraphs 18, 55 and 67 respectively of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

- a. The challenges for management overseeing investigations and compliance duties generally include managing the sometimes competing priorities of the business, the affected consumers and the licensee's professional indemnity insurer. All licensees have an obligation to provide financial services efficiently, honestly and fairly and to have adequate arrangements to manage their conflicts of interest and this carries across to the compliance and risk management functions. ASIC's expectations in relation to the management of conflicts of interest are set out in Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181)
- b. In accordance with the principles-based legislation ASIC administers and having regard to the diversity of circumstances in which an internal investigation might take place, ASIC does not set specific standards for the conduct of internal investigations. ASIC's expectations in relation to the monitoring and supervision of representatives and the management of conflicts are set out in RG 104 and RG 181 respectively.

Under s912D of the Corporations Act, licensees must report certain breaches (or likely breaches) of the Act. Licensees must give ASIC a written report as soon as practicable, or in any case, within 10 business days of becoming aware of any significant breach (or likely breach) of their obligations under s912A, s912B (other than the obligation under s912A(1)(c) and their obligation under s912A(1)(c) to comply with certain financial services laws).

Where breaches are reported to ASIC, we will, where appropriate, take action to ensure that the breach is properly investigated and remedied by the licensee.

Where we take regulatory action (i.e an EU) we may require a particular review methodology to be adopted. Please see ASIC's response to question 128 for more information on this point.

129. No.

- a. ASIC has not investigated the procedures and processes of Project Hartnett as we have not been provided with any evidence which warrants such an investigation.

Project Hartnett was the subject of oversight by an independent expert. Please see paragraphs 55-56 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

130. Under the Corporations Act, Australian financial services licensees have a number of general obligations that are relevant to this question. For example, they must:

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- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
- have in place adequate arrangements for the management of conflicts of interest;
- comply with the conditions on their licence and the financial services laws;
- take reasonable steps to ensure that their representatives comply with the financial services laws; and
- unless they are regulated by the Australian Prudential Regulation Authority, have adequate risk management systems.

In accordance with these obligations, ASIC expects licensees to implement compliance arrangements that suit the nature, scale and complexity of their business. ASIC expects licensees to understand the specific risks that form part of their business and to implement arrangements to manage these risks.

ASIC's experience indicates that internal audits, conducted at least annually on each representative, are an essential part of how licensees meet these requirements. It is also ASIC's experience that potential risk factors, such as volume of business written, level of commissions received and advising on high risk strategies, frequently inform the selection of client files that are subject to the internal audit process. ASIC supports this approach.

- a. As referred to above, the financial services legislation administered by ASIC is principles-based, so specific risk triggers are not mandated by ASIC. Instead, licensees must ensure that they have in place processes and procedures for the management of conflicts of interest, monitoring and supervision of representatives and risk management. The nature of these processes and procedures should be tailored to the licensee's business model.
- b. There was internal scrutiny by CFPL: see paragraphs 11-20 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*. It would be speculative to predict whether or not that process, absent the whistleblowers, would have led to the exposure and reporting of Mr Nguyen to ASIC.

131. ASIC has received allegations of a "cover-up" concerning Mr Nguyen in two parts:

First, in their communications with ASIC, the whistleblowers raised concerns that CFPL staff were "cleaning-up" Mr Nguyen's client files. Other than the names of the alleged clean-up team, very little information was provided in support of the allegation.

Second, in November 2011 (and onwards), Financial Resolutions Australia (FRA) alleged that five client files (in respect of the Braund, Blanch, Mackrell, Foo and Gao files) had been "sanitised" by CFPL.

ASIC was also informed, by CFPL, that:

- they had identified that 423 of Mr Nguyen's files were missing; and
- they had, as a consequence, "reconstructed" 182 files, partially or fully, using source systems, such as their database COIN which contains such items as stored statements

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and advice, applications and account records as well as telephone interviews with clients.

ASIC considered all the information provided alleging a "cover-up" of Mr Nguyen's behaviour and made a judgment not to take further action. In doing so, ASIC took into account a number of matters including:

- the very real potential that some legitimate review activities CFPL undertook under the CACP (see paragraphs 16 and following of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*) culminating later in the period in file reconstructions in some cases – which CFPL informed ASIC of – may to a significant degree have been misinterpreted as a "clean-up" or "sanitisation" exercise;
- the difficulties associated with proving allegations of a "cover-up" to the criminal standard of proof including difficulties arising from Mr Nguyen's very poor file and record keeping practices and the complexities and uncertainty created by the file reconstruction process;
- CFPL's contemporaneous cooperation with ASIC, including providing material under notice and reporting breaches to ASIC and its demonstrated willingness to report serious and/or criminal misconduct, such as forgery, where it found sufficient evidence to establish it (e.g. the cases of Anthony Awkar and Ricky Gillespie);
- ASIC's desire to prioritise, as key outcomes:
 - the establishment of a compensation scheme for impacted clients;
 - ensuring that, through an EU, CFPL addressed their systemic and cultural compliance issues (to minimise the possibility of improper adviser conduct - of the type alleged in respect of Mr Nguyen - occurring again); and
 - taking enforcement action to remove certain CFPL advisers, who had not complied with their obligations, from the financial services industry.
- the cost and number of resources that would be required to more fully investigate the alleged "cover-up";
- the impact on other investigations as a result of diverting budget and resources to a full investigation of the conduct alleged; and
- the fact that poor or slow handling of internal breaches and investigations, and even mismanagement of those processes, does not amount to a criminal cover up.

The whistleblower made a further allegation to ASIC in July 2010 that a file "clean-up" exercise was taking place regarding another adviser named Mr Anthony Awkar (Mr Awkar). No detail was provided to support the allegation. Mr Awkar's conduct was reported to ASIC by CFPL in a breach report dated 12 July 2010, which alleged that client signatures were falsified, among other acts of dishonesty. CFPL also referred Mr Awkar to the NSW Police Service.

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132. Please see paragraphs 13-47 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

133.

2008 switching document forgery allegation

In April 2010, ASIC received a complaint from Mrs Braund to the effect that her signature on a 2008 switching document was forged by Mr Nguyen.

Mrs Braund alleges that, in October 2008, she requested that Colonial First State (CFS) switch her allocated pension funds from managed investments to wholesale cash (on the advice of Mr Nguyen). In March 2009, CFS informed Mrs Braund that her allocated pension funds had been switched back from wholesale cash to managed investments, thus incurring substantial losses. Given that Mrs Braund had not authorised the switch back (from wholesale cash to managed investments), she took the view that Mr Nguyen had forged her signature on the switch back document.

The evidence reviewed by ASIC indicates that:

- CFS made an administrative error, which resulted in Mrs Braund's instructions in October 2008 - to switch her allocated pension funds from managed investments to wholesale cash - not being actioned; and
- As a result, Mrs Braund's allocated pension funds were not switched (from wholesale cash to management investments) and those funds remained in managed investments for the entire period between October and March 2009.

Consequently, it is also ASIC's view based on the evidence available that:

- the original switch not having occurred and thus no switch back having occurred, no 'switch back' document (with instructions to switch Mrs Braund's allocated pension fund from wholesale cash to managed investments) ever existed; and
- Mr Nguyen did not forge Mrs Braund's signature on a 'switch back' document; and
- the absence of a switch back document in Mrs Braund's file is due to the matters set out above; it is not part of a "cover-up" by CFPL.

ASIC's view (as set out above) is:

- supported by the documentation that we have reviewed (including Mrs Braund's client file); and
- consistent with the analysis of CFPL. CFPL has informed Mrs Braund of its analysis on several occasions, including by telephone on 7 April 2009 and by letter on 15 May 2009.

For the reasons set out above, ASIC made a judgment to not take action in relation to the 2008 switching document forgery allegation.

Misuse of signature allegation

In February 2010, ASIC received a complaint from Mrs Braund to the effect that Mr Nguyen had photocopied her signature onto a number of documents contained on her client file.

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Mrs Braund alleges that her signature must have been forged by Mr Nguyen as she was out of the country on the dates of the relevant documents.

ASIC considered Mrs Braund's allegation. Based on evidence we had collected, ASIC was concerned that Mr Nguyen may have had a defence available to him in respect of a charge that he had fraudulently misused Mrs Braund's signature. ASIC made a judgment not to investigate further, taking this concern and the following factors into account:

- The difficulties associated with proving these allegations to the criminal standard of proof including, in particular, difficulties caused by Mr Nguyen's very poor file and record keeping practices;
- ASIC's desire to prioritise, as key outcomes:
 - the establishment of a compensation scheme for impacted clients;
 - ensuring that, through an EU, CFPL addressed their systemic and cultural compliance issues (to minimise the possibility of improper adviser conduct - of the type alleged in respect of Mr Nguyen - occurring again); and
 - taking enforcement action to remove certain CFPL advisers, who had not complied with their obligations, from the financial services industry.
- the cost and number of resources that would be required to more fully investigate the allegation; and
- the impact on other investigations as a result of diverting budget and resources to a full investigation of the conduct alleged.

2004 statement of advice forgery allegation

In January 2013, ASIC received a complaint from FRA and Mrs Braund to the effect that CFPL had forged Mrs Braund's signature on a statement of advice dated 8 March 2004.

By way of background, CFPL provided FRA with a copy of a statement of advice dated 8 March 2004, in respect of Mrs Braund. FRA and Mrs Braund allege that the signature on this version of the document is different to the signature on the same statement of advice on Mrs Braund's client file. FRA and Mrs Braund allege that CFPL forged the signature after Mr Nguyen resigned from CFPL.

ASIC has not investigated this allegation further principally due to the age of the alleged conduct. Other reasons supporting ASIC's decision not to investigate include:

- the difficulties associated with proving these allegations to the criminal standard of proof including, problems arising from Mr Nguyen's very poor file and record keeping practices;
- ASIC's desire to prioritise, as key outcomes:
 - the establishment of a compensation scheme for impacted clients;
 - ensuring that, through an EU, CFPL addressed their systemic and cultural compliance issues (to minimise the possibility of improper adviser conduct - of the type alleged in respect of Mr Nguyen - occurring again); and

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- taking enforcement action to remove certain CFPL advisers, who had not complied with their obligations, from the financial services industry.
 - the cost and number of resources that would be required to more fully investigate the alleged forgery; and
 - the impact on other investigations as a result of diverting budget and resources to a full investigation of the conduct alleged.
 - a. ASIC has no record of such a conversation on July 21, 2010. Further, ASIC did use Mrs Braund's complaint in the AAT proceedings.
134. It is our understanding that Mr Nguyen resigned from CFPL on 6 July 2009. ASIC first became aware of Mr Nguyen's resignation on 27 July 2009 when CFPL submitted a breach report to ASIC. CFPL advised ASIC that Mr Nguyen had resigned and that they were reviewing the quality of advice provided to his clients.
- a. No.
 - I. & II. The issue of employment is a matter between the employer and the employee. In our experience it is not uncommon for an adviser who is subject to increased monitoring and supervision from their employer to resign. It is also our understanding that generally employees do not need the permission of their employer in order to resign.

Further, it is ASIC's understanding that, at the time that Mr Nguyen resigned, CBA's internal investigation into Mr Nguyen's conduct was ongoing.
 - b. No. From a liability perspective, there are no implications associated with a financial planner resigning because the licensee remains liable for the advice provided during the financial planner's employment at the licensee. Furthermore, ASIC's ability to take action against either a licensee or a representative, where it is in the public interest to do so, does not cease because a financial planner has resigned. ASIC banned Mr Nguyen from providing financial services for seven years on 10 March 2011. Mr Nguyen's resignation did not impact the compensation provided to clients impacted by his inappropriate advice.
 - c. No. It was appropriate to notify Mr Nguyen's clients of the details of his conduct only *after* findings of fact were made against Mr Nguyen. This occurred on 10 March 2011, when ASIC's banning action against Mr Nguyen concluded and ASIC issued a media release in respect of the action..

The media release issued by ASIC on 10 March 2011 stated that Mr Nguyen had been banned from providing financial services for seven years because he had failed to comply with financial services laws by:

 - failing to have a reasonable basis for advice;
 - failing to provide statements of advice;
 - failing to provide product disclosure statements;

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- failing to provide additional information when recommending the replacement of one financial product with another;
- making statements that were false or misleading in a material particular; and
- inducing clients to deal in financial products by making statements or forecasts that were misleading, false or deceptive.

The media release also stated that: "*Mr Nguyen's conduct was not isolated and persisted for a period of at least two years between 2006 and 2008, with multiple clients. Further, Mr Nguyen failed to demonstrate a willingness to ensure the highest standards of compliance with the financial services industry and lacked the necessary ability and knowledge to discharge the duties and obligations imposed by the Corporations Act on a provider of financial services.*"

ASIC notes that, prior to 10 March 2011:

- CFPL sent all of Mr Nguyen's clients a letter advising them that CFPL had concerns with the advice provided by Mr Nguyen and that CFPL would be seeking to review the advice provided to each client. This letter was sent in August 2010; and
 - ASIC issued a media release which stated that it was investigating a "*former CFP representative*" who had "*potentially breached various sections of the Corporations Act 2001 by providing inappropriate financial advice*". This disclosure was made in ASIC's media release regarding the compensation program implemented by CFPL. ASIC issued the media release on 3 November 2010.
- I. As stated above, it was only appropriate to notify Mr Nguyen's clients of the details of his conduct *after* findings of fact were made against Mr Nguyen.
- ASIC's Information Sheet 152 titled "*Public Comment*", states that ASIC will generally:
- only confirm the existence of an investigation, or comment on an investigation, where it is in the public interest to do so. ASIC must balance the public interest benefits of making a statement against the rights of the individual subject to the investigation. In the case of Mr Nguyen, ASIC disclosed, on 3 November 2010, that it was investigating a "*former CFP representative*" who had "*potentially breached various sections of the Corporations Act 2001 by providing inappropriate financial advice*". This disclosure was made in ASIC's media release regarding the compensation program implemented by CFPL; and
 - only publicise private administrative proceedings (which includes the banning action ASIC took against Mr Nguyen) upon their conclusion.

Further, the law of defamation can, in some instances, be a barrier to an employer, such as CFPL, making statements about the conduct of an employee, particularly prior to findings of fact being made against that employee.

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135. In two cases ASIC found evidence of forgery sufficient for it to be considered in a banning decision.

- a. Anthony Awkar and Ricky Gillespie.
- b. Yes.

I. & II. ASIC's consideration of the Gillespie matter is continuing.

CFPL referred the matter of Anthony Awkar to the NSW Police who conducted an investigation and informed CFPL on or around 15 April 2013 that they would not be pursuing criminal charges due to evidentiary difficulties establishing the offences.

136. According to documents provided by CFPL:

- Awkar – 409
- Gillespie – 55
- Langton - 329
- Baker – 699
- Chan – 187
- Duncan - 86

a. The total value of investor funds managed by those planners is not known by ASIC.

Compensation paid to clients of those advisers as advised by CFPL is as follows:

- Awkar - \$1,422,000
- Gillespie - \$1,073,000
- Langton - \$48,000
- Baker - \$13,571,000
- Chan – 0
- Duncan - 0