

Answer to question in writing:

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS

REVIEW OF THE ASIC ANNUAL REPORT (SECOND REPORT) 2019

ASIC41QW:

Regarding the case ASIC v Mitchell (No 2) [2020] FCA 1098:

- (a) What is ASIC's view of Beach J's decision to call Mr McWilliam as a witness?
- (b) In ASIC's view, how did Beach J calling Mr McWilliam impact the outcome of the case?
- (c) Does ASIC believe that the case established any precedents that might significantly impact future civil penalty proceedings brought by ASIC?

Answer:

- (a) During the hearing, ASIC sought to tender into evidence certain emails between Mr Harold Mitchell of Tennis Australia and Mr Bruce McWilliam of Seven West as part of ASIC's case that Mr Mitchell had breached his duties as a director to providing certain information to Mr McWilliam during negotiations for the sale of Tennis Australia's television broadcasting rights.

Mr Mitchell, exercising his penalty privilege, chose not to give evidence in relation to the emails while ASIC chose not to call Mr McWilliam in relation to them.

Justice Beach was called upon by ASIC to admit the emails as 'business records' under s 69 of the Evidence Act 1995 while his Honour, under s 135, had the discretion to refuse to admit them into evidence.

His Honour, in admitting the emails into evidence, exercised his discretion under s 46 of the Federal Court of Australia Act 1976 to call Mr McWilliam as a witness and permitted both ASIC and Mr McWilliam to cross-examine him. ASIC accepts that it was within power to call Mr McWilliam as a witness, however ASIC maintains (as it submitted at trial) that his Honour ought not have exercised his discretion to do so.

- (b) Justice Beach's judgment shows that his assessment of Mr McWilliam's evidence impacted upon his Honour's findings in relation to that part of ASIC's case that turned upon claims that Mr Mitchell breached his duties by providing information to Mr McWilliam.

(c) No. ASIC considers that the decision made by Beach J reflects the exercise of a judicial discretion that was largely driven by the facts and, therefore, is unlikely to impact future civil penalty proceedings.