PJC QoNs 21 June 2013

Paul Fletcher asked:

CFPL 1

Mr FLETCHER: You have put to us that you were pursuing this matter even though you were not saying things publicly about it. Is there evidence that you can provide to us on notice that demonstrates an increasing intensity of engagement in this issue?

Mr Kell: We are looking forward, I should say, about presenting some of that material and providing some context around that, especially in relation to the inquiry that was just announced. We would be happy to present similar information to this committee if you would like.

Mr FLETCHER: And would that go to such things as the seniority of the ASIC executive or officer who had carriage of the issue or the number of officers who were involved in pursuing it—in other words, some quantitative metrics to support the proposition that you were substantially engaged on this issue even though you were not saying things publicly about it?

Mr Kell: I am not sure it would work in exactly the way you have described. These are issues that we are also reviewing ourselves at the moment in terms of preparing for the sorts of questions that we are going to get as part of this inquiry. It is not necessarily the case that for each investigation there is a neat step-up over a period of time.

Mr FLETCHER: Let me put the question another way. Do you, for example, at a particular point say, 'This issue is of sufficient gravity that we should establish an internal task force or working group on it'?

Mr Kell: If you are asking that generally, yes. If you are asking that in relation to this issue, yes, there obviously was a trigger point where we asked for more information from the company, undertook the formal inquiry and then started processes around establishing a compensation requirement to impose on the company and banning the various advisers and trying to establish who within the company had been providing inappropriate advice—all those sorts of processes that you work through when you are looking a large instance of potentially inappropriate advice across a range of advisers within a large organisation.

Mr FLETCHER: Can I ask then, on notice: are you able to provide a time line and include on that time line, to the extent possible, evidence demonstrating key milestones in terms of degree of engagement such as, for example, setting up an internal working group?

Mr Kell: We can certainly provide an account of how ASIC looked at this matter. But I think we will cover many of the things that you are after there, and that is what we will be seeking to do.

Answer:

A timeline of ASIC's involvement in the matter is as follows:

February 2007: ASIC's surveillance of Commonwealth Financial Planning Limited (**CFPL**) commenced. ASIC interviewed various CFPL staff and reviewed 496 pieces of advice provided by 51 advisers.

February 2008: ASIC wrote to CFPL about the findings of its surveillance; namely, significant concerns in relation to, among other things:

supervision of financial advisers;

breach reporting to ASIC[1];

record keeping and compliance; and

the quality of financial advice.

April 2008: CFPL implemented a Continuous Improvement Compliance Program (**CICP**) in response to, and to address, ASIC's concerns. The CICP focused on, among other things, CFPL's risk framework, breach reporting and adviser competence and supervision.

2008/2009: ASIC met with members of CFPL on a monthly basis to monitor the CICP and its effectiveness. During this time, ASIC received information from whistleblowers and CFPL itself (eg. through breach reports) about problems within CFPL. Within the CICP process, ASIC:

sought further information about these problems from CFPL; and

discussed these problems – and their rectification – with CICP.

October 2008: On 30 October 2008, ASIC received an email complaint from anonymous whistleblowers within CFPL. The core of the concerns raised in the complaint were:

Poor quality advice and the failure to carry out risk profiling by an adviser named Don Nguyen;

The paying of cash incentives by Mr Nguyen to branch staff to divert clients to him rather than to other CFPL planners;

A 'conspiracy to defraud clients of proper compensation' at management level for the damage caused by Mr Nguyen's poor advice and to 'clean up' files; and

A poor, sales-oriented, culture within CFPL more generally.

November 2008: ASIC decided to handle the complaint raised by the anonymous whistleblowers within the CICP program. It was thought better to deal with the complaint as a particular example of the broader problems that ASIC had identified within CFPL and which the CICP program was designed to address, rather than to treat it as a separate matter.

December 2008: On 4 December 2008, ASIC raised concerns about Mr Nguyen with CFPL and, on 5 December, ASIC requested that information on Mr Nguyen be provided at the upcoming

[1] Under the Corporations Act, holders of financial services licences are required to report material breaches of financial services laws to ASIC.

monthly CICP monthly monitoring meeting. Discussion took place at that meeting on 18 December and on 24 December, CFPL confirmed by email that four complaints had been received about Mr Nguyen, three of these had been resolved and CFPL was dealing with the remaining client, who had legal representation. CFPL also advised that Mr Nguyen was being closely supervised and his advice vetted prior to being provided to clients.

May 2009: During May 2009, ASIC received further information about the unresolved complaint against Mr Nguyen and the enhanced supervision arrangements in place at CFPL in respect of Mr Nguyen. On 27 May 2009, ASIC received a letter from an anonymous person who was previously employed at CFPL. This letter was also sent to various media outlets, CFPL and others. The letter raised more general allegations about poor sales-based culture at CFPL, poor compliance by a number of planners and the breaching of internal rules around referral of clients. As there were no new allegations about Mr Nguyen, the letter was added to the existing CFPL matter.

June 2009: On 11 June 2009, CFPL lodged a breach report with ASIC in relation to advice provided by an adviser named Mr Gillespie. It raised concerns about the possibility of forgery. ASIC accepts that the breach report was lodged, but we have no record of receiving it[2] until a more extensive report was lodged at the end of August 2010 which referred to the June 2009 report. ASIC then requested, and obtained, a copy of the June 2009 report from CFPL, and both reports were passed to ASIC's Enforcement team for action.

July 2009: On 27 July 2009, CFPL lodged a breach report with ASIC in relation to advice provided by Mr Nguyen. The report noted that, following a couple of major complaints from clients, CFPL had done a review of 16 client files and found:

> three client files that demonstrated no reasonable basis for advice;
>
> two files where the clients' specific needs had not been addressed; and
>
> two client files where recommendations were made to the client and implemented, but documentation was lacking because no Statement of Advice was provided to the client.
>
> CFPL further advised that Mr Nguyen had resigned and that it was reviewing all affected clients at no cost to the clients. The Nguyen breach report was assessed by ASIC's Misconduct and Breach Reporting team and then passed to specialists in the Financial Advisers team to be incorporated in the existing CFPL matter.

October/November 2009: In October and November 2009, ASIC sought and received further information and updates on CFPL's handling of the Nguyen matter. This included more detail on the review that led to the breach report and the establishment of a CFPL project to deal with complaints by and compensation for Mr Nguyen's customers, with 165 clients in focus for contact reviews, and in some cases new Statements of Advice and/or compensation.

December 2009/January 2010: In December 2009 and January 2010, ASIC received two emails from the original whistleblowers expressing concern that ASIC was not taking action and that this was allowing CFPL to 'reconstruct Nguyen's non-existent files'. On 12 January 2010, ASIC contacted the whistleblowers inviting them to meet with ASIC staff in person. On 15 January

2010 ASIC received a longer complaint from the whistleblowers again raising concerns about Mr Nguyen's advice, the cleaning up of files and that compensation being offered was inadequate.

February 2010: On 24 February 2010, ASIC met with the whistleblowers on 24 February 2010. Staff attending for ASIC included staff from both the Financial Advisers and Enforcement teams.

March 2010: On 5 March 2010, ASIC made a decision that the matter should be dealt with by its Enforcement team. On 24 March 2010, ASIC served notices on CFPL requiring immediate production of documents relating to Mr Nguyen. During March 2010, CFPL commenced Project Hartnett, a compensation scheme designed to remediate former clients of Mr Nguyen and, later, Anthony Awkar.

July 2010: On 19 July 2010, following ASIC's investigation, a brief on Mr Nguyen was referred to a delegate[2] for consideration of banning action. On 21 July 2010, ASIC met with CFPL and CFPL provided a commitment to remediate former clients of Mr Nguyen.

August – October 2010: From August to October 2010, there were discussions between ASIC and CFPL about the adequacy of compensation arrangements. ASIC negotiated the inclusion of several key elements in the compensation scheme including:

> the ability for clients to obtain independent advice, up to the value of $5,000 and paid for by CFPL, to assess the compensation offer (in some cases, more than $5,000 was paid); and
>
> the appointment of an independent expert to review the adequacy and appropriateness of the compensation processes, including whether all affected clients were covered and the calculation methodologies for compensation offers.

November 2010: ASIC formally announced the Project Hartnett compensation scheme.

December 2010: ASIC commenced monthly status meetings with CFPL to monitor compliance with the enforceable undertaking, among other things.

March 2011: Mr Nguyen was banned from providing financial services for seven years.

October 2011: ASIC accepted an enforceable undertaking from CFPL. The enforceable undertaking required CFPL to, among other things:

> conduct a comprehensive review of its risk management framework;
>
> improve the monitoring and supervision of its representatives; and
>
> remediate clients of certain[3] CFPL advisers if they had suffered a loss.

[2] ASIC has discretionary powers under the Corporations Act to suspend or cancel financial services licences and to ban individuals from the financial services industry. ASIC is required to provide natural justice, including holding a hearing, before exercising these powers. ASIC maintains a panel of Hearing Delegates to conduct these hearings and to exercise these powers on behalf of ASIC. The Delegates make decisions based on evidence put to them by ASIC and the the affected person or entity. The Delegates make their decisions in accordance with the law, including relevant decisions made by the AAT and the Federal Court. The Delegates decisions can be reviewed by the AAT and the Federal Court.

October 2011: Following ASIC's investigation, a brief on Mr Awkar was referred to a delegate for consideration of banning action.

December 2011: Following ASIC's investigation, a brief on Ricky Gillespie was referred to a delegate for consideration of banning action.

January 2012: ASIC accepted an enforceable undertaking from financial adviser Simon Langton which required Mr Langton to remove himself from the industry for two years. This undertaking followed ASIC's investigation of Mr Langton's conduct as a financial adviser of CFPL.

February 2012: Following ASIC's investigation, a brief on Jane Duncan was referred to a delegate for consideration of banning action.

March 2012: ASIC's decision to ban Mr Nguyen for seven years was upheld on appeal to the Administrative Appeals Tribunal.

April 2012: Mr Awkar was permanently banned from providing financial services.

April 2012: Ms Duncan was banned from providing financial services for three years.

April 2012: ASIC accepted an enforceable undertaking from financial adviser Chris Baker which required Mr Baker to remove himself from the industry for five years. This undertaking followed ASIC's investigation of Mr Baker's conduct as a financial adviser of CFPL.

June 2012: ASIC accepted an enforceable undertaking from financial adviser Joe Chan which required Mr Chan to remove himself from the industry for two years. This undertaking followed ASIC's investigation of Mr Chan's conduct as a financial adviser of CFPL.

October 2012: Mr Gillespie was permanently banned from providing financial services.

July 2013: Mr Gillespie withdrew his appeal to the AAT.

The resources devoted by ASIC to this matter were as follows:

Two senior officers from ASIC's Financial Advisers team were principally responsible for monitoring the CICP and its effectiveness. From time to time, these officers were assisted by two other members of the Financial Advisers team. These officers met with members of the CICP steering committee on a monthly basis to monitor the program and its effectiveness.

From March 2010, a team of between six and 14 ASIC officers, drawn from ASIC's Enforcement and Financial Advisers teams, were responsible for:

Reviewing in excess of twenty breach reports lodged with ASIC by CFPL and conducting investigations into, among others, Messrs Nguyen, Gillespie, Awkar, Langton, Baker and Chan and Ms Duncan.

Preparing, and referring, briefs on Mr Nguyen, Ms Duncan, Mr Gillespie and Mr Awkar to a delegate for consideration of banning action.

[3] Advisers in respect of whom CFPL had lodged a breach report with ASIC and/or a client had complained about.

Preparing for (and, in the case of Mr Nguyen, attending) the AAT hearing in respect of Messrs Nguyen and Gillespie.

Negotiating the terms of the enforceable undertakings entered into with Messrs Langton, Baker and Chan, who removed themselves from the industry for 2, 5 and 2 years respectively.

Negotiating with CFPL regarding the adequacy of compensation arrangements proposed by CFPL and the terms of an enforceable undertaking with CFPL.

Monitoring CFPL's compliance with the terms of the enforceable undertaking.

There are currently five ASIC officers involved in investigating, or pursuing enforcement action in respect of, two former CFPL financial advisers.

Paul Fletcher asked:

CFPL 2

Mr FLETCHER: Mr Kell, I wrote to Mr Medcraft on 27 August about the conduct of Mr Nguyen, asking a series of questions. Mr Medcraft wrote back to me on 11 September last year and the letter contains the statement, 'It is ASIC's understanding that 11 claims of former Nguyen clients are still being negotiated.' I just want to understand how that fits with the 37 cases that you have specified in your statement today. Is it possible that more have come to light or is it potentially a different definition?

Mr Kell: It is a different definition, effectively. Out of that $50 million and the 1,100 cases that I mentioned, a subset relate to Nguyen—about $23 million, I think, from memory. I will have to double-check that. About $23 million compensation relates to former clients of Nguyen. Two hundred and two former clients have been paid $23 million. From recollection, there are still nine former Nguyen clients where matters have yet to be resolved. So it is a subset of the larger set of compensation that is being provided, to not only former Nguyen clients but clients of the other planners involved. Does that answer your question?

Mr FLETCHER: Yes. On notice, could I just get a reconciliation? You may have just given it to me now, but could I get it in writing as well—the reconciliation between that 37 number and the 11 number?

Mr Kell: Sure.

Answer:

By way of background:

on 11 September 2012, Greg Medcraft wrote to Paul Fletcher MP and stated that "*It is ASIC's understanding that 11 claims of former Nguyen clients are still being negotiated*";

on 21 June 2013, Peter Kell advised a hearing of the Parliamentary Joint Committee that "[ASIC's] *Our actions saw seven advisers banned from the industry, and we set up a*

compensation system that will result in more than 1,100 clients receiving around $50 million in compensation. There are around 37 or so cases, out of that 1,100, that are yet to be resolved".

Mr Medcraft was referring to the number of claims outstanding (11) in respect of former clients of Mr Nguyen, as at 11 September 2012. Mr Kell was referring to the total number of claims outstanding (37) in respect of all advisers, including Mr Nguyen. By way of further explanation, the 37 outstanding claims arose from the following CFPL compensation schemes:

Project Hartnett, which remediated former clients of Mr Nguyen and, later, Mr Awkar; and

The "Past Business Review"[4], which remediated former clients of advisers:

who were the subject of a breach report by CFPL to ASIC; or

who had, in the client's view, provided inappropriate advice.

More than 7,000 customer reviews were performed under Project Hartnett and the Past Business Review. To date, more than 1,100 clients have been paid more than $50,000,000.

ASIC understands that seven former clients of Mr Nguyen have unresolved claims against CFPL. These clients have been encouraged by CFPL and ASIC to take their claim to FOS if they are dissatisfied with CFPL's handling of their claim; one client is currently pursuing their claim through the Financial Ombudsman Service (**FOS**). Of the remaining clients, ASIC understands that:

One client recently had an amount of $164,171 (representing CFPL's latest settlement offer) credited to their account by CFPL.

One client recently had an amount of $112,590 (representing CFPL's latest settlement offer) credited to their account by CFPL.

One client – who was assessed (during Project Hartnett) as not requiring compensation, as a gain was made – is claiming that they are owed compensation. CFPL's view is that compensation is not payable as no financial loss was suffered by the client.

Two clients, who previously signed settlement deeds with CFPL, are seeking to re-open settlement negotiations. CFPL recently advised these two clients that it will not object to FOS determining the issue of compensation afresh.

One client, who previously signed a settlement deed with CFPL, is in dispute with CFPL about a matter which, according to the client, was not considered in the original settlement.

ASIC also understands that 30 former clients of Mr Awkar and other advisers the subject of the Past Business Review have unresolved claims against CFPL. Four clients are currently pursuing their claim through the Financial Ombudsman Service (**FOS**). Of the remaining clients:

Three clients (who have not entered into a settlement deed with CFPL) are dissatisfied with the offer made or compensation received by CFPL;

[4] The compensation scheme arising from the enforceable undertaking between ASIC and CFPL.

CFPL have been unable to contact and finalise compensation in respect of 19 clients; and

CFPL are considering the compensation due to four clients.

ASIC's view is that where claims cannot be resolved by agreement, the best course for claimants - consistent with the design of the compensation arrangements - is for the claimants to take their matter to FOS for independent determination. ASIC is regularly seeking updates from both CFPL and from the representatives of the outstanding claimants.

Paul Fletcher asked:

CFPL 3

Mr FLETCHER: Does that therefore mean that the total amount of compensation paid is an indication of the total amount of loss that was suffered by reason of poor advice?

Mr Kell: That is, broadly speaking, the objective, yes.

Mr FLETCHER: Subject, presumably, to the caveat that not all cases have yet been resolved?

Mr Kell: There are a few that have not been resolved.

Mr FLETCHER: You have given us the total number that went into the system and the total number that remain unresolved, but what we do not know is the split by value.

Mr Kell: I see—the ones that are unresolved?

Mr FLETCHER: Are the ones that are unresolved, on average, larger or smaller or about the same as those that have been resolved?

Mr Kell: I do not know that for sure. I am not sure that they are necessarily the larger ones, if that is what you are indicating. I think there is a mix, but we are happy to take that on notice.

Answer:

The average amount of compensation paid by CFPL to affected clients is approximately $45,000. Excluding the claim currently before FOS, the average amount of the unresolved claims in respect of Nguyen (based on the amounts paid by CFPL, referred to above) is $138,000.

Paul Fletcher asked:

CFPL 4

Mr FLETCHER: I have just one other issue. There have been some reasonably serious claims reported in the media about what occurred at Commonwealth Financial Planning after it became evident that complaints had been made to the regulator—correction: there have been two classes of fairly serious claims. One is that, as part of the conduct of certain advisers, there was forgery of documents, forgery of signatures and so on. The second is that it has been alleged that, subsequent to it emerging that complaints had gone to ASIC, there was what was described as a 'sanitising of

files', which I understand to mean that clients' files had particular documents removed from them, and in some cases the entire file went missing. Has ASIC investigated those two separate classes of allegations, what are ASIC's views on those matters and is there further action to be taken?

Mr Kell: Doing a very careful assessment of the files and the information that is held by CFPL particularly in relation to the advisers who provided the inappropriate advice was certainly central to the work we did in this area. We did not find evidence that would support a criminal prosecution or criminal action being taken.

Mr FLETCHER: I infer from that that you carefully considered whether there were grounds for criminal action.

Mr Kell: We do as a matter of course in these sorts of matters.

Mr FLETCHER: Are you able to say what it was that was not present that meant you could not proceed to prosecution?

Mr Kell: I would prefer to take that on notice to provide a more fulsome response around that, but it is evidence of the sorts of criminal conduct, broadly speaking, that you referred to earlier.

Answer:

ASIC received forgery allegations in respect of Mr Nguyen and CFPL, as follows:

> First, that Mr Nguyen had photocopied a client's signature onto a number of documents.
>
> Second, that Mr Nguyen had forged a client's signature onto a 2008 switching document and that CFPL had subsequently "covered-up" the forgery by claiming that the 2008 switching document did not exist.

ASIC made enquiries into these forgery allegations and decided not to further investigate them for a number of reasons including the following:

> In relation to the first forgery allegation, ASIC was concerned that Mr Nguyen may have a defence available to him. That is, there was doubt as to whether the client may have inadvertently facilitated and acquiesced to the use, by Mr Nguyen, of a photocopy of her signature.
>
> The second forgery (and cover-up) allegation was based on the understanding of the client, and the client's adviser, that she was legitimately switched out of a product but subsequently illegitimately switched back into the product. As the client did not sign an instruction to switch back into the product, they assume that to achieve that switch back, someone must have created a switching instruction document and forged the signature of the client on it and that subsequently as part of a cover-up CFPL have refused to provide or have disposed of that forged switching instruction.
>
> > In fact, the evidence reviewed by ASIC indicates that CFPL made an administrative error such that the switch out of the product never took place. That not having occurred, there never was a switch back of the investment and there never was a switch back

instruction document. As such there was no switch back instruction on which a signature was needed or was forged and it has not been hidden or disposed of as part of a cover-up.

ASIC also received information that CFPL staff had "sanitised" five client files and had "cleaned-up" the client files of Messrs Nguyen and Awkar. ASIC reviewed this information and made a judgment not to take further action. In so doing, ASIC took into account a number of matters including:

CFPL's contemporaneous cooperation with ASIC and their willingness to volunteer information and report breaches to ASIC (and other law enforcement agencies), as follows:

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

CFPL reported breaches to ASIC in respect of more than 20 advisers and also referred, where appropriate, matters to the state police. By way of example, Mr Awkar's conduct was reported to ASIC by CFPL in a breach report dated 12 July 2010. The breach report alleged that client signatures had been falsified, among other acts of dishonesty. CFPL also referred Mr Awkar's conduct to the NSW Police Service[5].

The very real potential that some legitimate review activities CFPL undertook under the CICP culminating later in file reconstructions in some cases (which CFPL informed ASIC of (see the subparagraph above)) 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;

the complexities and uncertainty created by the file reconstruction process;

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.

ASIC's judgment not to take further action in respect of the matters referred to above was also influenced by:

ASIC's desire to prioritise, as key outcomes:

the establishment of a compensation scheme for impacted clients;

ensuring that, through an enforceable undertaking, 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 and others - occurring again); and

[5] Note: on or about 15 April 2013, the NSW Police informed CFPL that they would not be pursuing criminal charges due to evidentiary difficulties establishing the offences.

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 matters; and

the impact on other investigations as a result of diverting budget and resources to a full investigation of the matters.

QoN 5

Senator BOYCE: Do you have any interaction with Whistleblowers Australia? They are a sort of support group for whistleblowers, I suppose.

Mr Kell: Not that I am aware of, no.

Mr Price: Not that I am aware of.

Senator BOYCE: There are a lot of nos, can I say for the sake of Hansard.

Mr Kell: I should have checked, I do not know if any whether of my colleagues want to make any comments about whistleblowers at this stage.

Mr Savundra: No.

Mr Price: There is a regulatory framework in relation to protections for whistleblowers and those laws were introduced in around 2005-06, I think. They were controversial at the time because there were a couple of competing policy priorities. One is to get useful information to the regulator; the other is you do not want to encourage claims that may not have merit. They are important policy considerations.

Mr Tanzer: I would certainly like to check that rather than just assume the answer, but I am certainly not aware of that. Mr Day cannot be here today but that is one area that quite frequently has contacts with groups who are relevant to people who might make these sorts of reports. He may well have that sort of contact.

Senator BOYCE: I am happy for that to go on notice.

Answer:

ASIC's register notes that Whistleblowers Australia Incorporated is an incorporated association based in New South Wales and is regulated by New South Wales Fair Trading.

ASIC does not have a record of receiving any direct reports of misconduct from Whistleblowers Australia.

Deb O'Neill (Chair) asked:

CFPL 6

CHAIR: In Senate estimates, you took a question on notice from the Economics Legislation Committee regarding the estimate of the financial losses incurred by Mr Nguyen's particular book between October 2008 and when he actually resigned in 2009. Do you have that?

Mr Kell: I do not have an update.

CHAIR: Could you take that on notice and advise us as well? We are mindful that the Senate—

Answer:

ASIC does not have an estimate of the losses suffered by clients between October 2008 and 6 July 2009.

The fact that ASIC confronted CFPL about Mr Nguyen's conduct on 4 December 2008 and got an assurance that Mr Nguyen was then being closely supervised and all of his advice pre-vetted before being provided to clients is a likely limiting factor on inappropriate advice generating losses during this period.

Beyond this, the overarching aim of the ASIC-approved CFPL compensation scheme (including Project Hartnett and the Past Business Review) was to restore clients to the financial position they would have been in had the inappropriate elements of the advice not occurred and they had been provided with appropriate advice. ASIC required that the compensation measure be applied irrespective of when the inappropriate advice was provided. A total of $23,000,000 has been paid to former clients of Mr Nguyen.

Senator Boyce asked:

CFPL 7

Senator BOYCE: The 16-month delay in doing anything has been in the media over and over. In your view, did ASIC promptly react to the information they were given? Was there any delay at all in beginning to investigate the claims brought to you?
Mr Kell: I think we would like to come back to you on that question. Part of the issue here is that many of the people involved—in fact, pretty much all of the people involved—are no longer with the organisation.

Answer:

On 30 October 2008, ASIC received an email complaint from anonymous whistleblowers within CFPL. The complaint centred on the actions of Mr Nguyen.

ASIC took prompt action and, on 4 December 2008, confronted CFPL about Mr Nguyen's conduct. ASIC requested further information from CFPL about Mr Nguyen, including:

Mr Nguyen's previous compliance history and current compliance audit; and

CFPL's current investigations and any rectification work undertaken (or to be undertaken).

CFPL provided ASIC with information in relation to Mr Nguyen and gave ASIC an assurance that Mr Nguyen was being closely supervised and his advice vetted before being provided to clients.

In light of the above, ASIC made a decision to handle this complaint within the CICP. The whistleblowers' complaint was a specific and serious instance of the broader problems ASIC was aware of and dealing with on a compliance basis through the CICP.

With the benefit of hindsight, ASIC considers that it should not have placed as much reliance on CFPL's ability to identify and rectify all of the problems in its advice business. ASIC reached this conclusion in late 2009 and early 2010, based on its experience with CFPL and the CICP. This conclusion was also based on information about ongoing problems obtained both from CFPL and the whistleblowers that the CICP was not dealing promptly and effectively with the general issues raised or with the problems regarding Nguyen. ASIC then put the matter on a more formal investigative path which led to the range of activities and outcomes which are set out in response to CFPL 1, above.

ASIC PJC QoN 8 – June 2013

Unclaimed money: behaviour patterns

Mr FLETCHER: From first principles, does it seem plausible that behaviourally that would be a way people might treat their money? In other words, they would be less likely to leave it untouched for seven years than for three years?

Mr Kell: You would imagine there is more likelihood that people may look at their accounts between that three- and seven-year period. As to how many that might affect, at the end of the day that is very hard to say.

Mr Tanzer: I am not sure about that. I am not sure of the analysis done at the time, but I am not sure that your supposition is right. It might be that 99.9 per cent of people who do not look for three years also do not look for seven years.

Mr FLETCHER: Could you take on notice whether there is any analysis known to ASIC of that question; namely, the pattern of people's behaviour in dealing with their money? And, under the law as it previously stood, was there a steadily declining rate of engagement with accounts after one year, two years and three years et cetera?

Mr Kell: Yes.

Answer:

ASIC has not analysed the pattern of people's behaviour in dealing with their money in inactive bank accounts and unclaimed money. ASIC has not been advised of any analysis of this nature.

ASIC has not analysed the engagement rate of owners with their accounts after one year, two years, three years, or more. ASIC has not been advised of any analysis of this nature.

In the unclaimed money field, ASIC has not received or maintained data about engagement levels with accounts. The analysis of engagement rates by ASIC is difficult, given that ASIC does not hold this data as it is held by the banks (if this data is held at all).

ASIC PJC QoN 9 – June 2013

Moneysmart: Sociological Data and connectivity unclaimed money/financial literacy – Robert A

CHAIR: If you could take this on notice, because I do not know if it will even be possible for you to find it. One of the things I have been very mindful of is women fleeing domestic violence—particularly at the end of a week when we had a quilt with that theme presented to the parliament that is going in the spouses' lounge—and those sorts of situations where women, often with small amounts of money, have to pick up their life and move on. I do not know what the gender breakdown would be on some of these accounts, but I would be interested in that and in any other further sociological data on the people to whom these accounts belong. It has certainly exercised the minds of the parliament a little bit this week. It would be interesting to find a little of the detail that lies in the background of this.

The other point is that, when people who might not in any other circumstances engage with ASIC's website come through looking for this, there is an opportunity for a more substantive conversation in terms of financial literacy. What have you got in place to make an easy connection for people doing a money search to then go to the financial literacy dimensions of the website?

Mr Kell: That is a very good question. We do seek to leverage off the very large numbers we get coming to the unclaimed money section, to encourage them to go to the website MoneySmart more generally to take advantage of the section that allows you to put together a budget or look at some advice about investments. So, certainly, even at the most basic level, part of the program is to introduce them to the website because it is a part of our MoneySmart website, the unclaimed money section, and to leverage off that as far as we can. It is not a large percentage that go to visit other parts of the website; but, because so many people come to unclaimed moneys, there are a large number in absolute terms who then do take the opportunity to look at other information we have on financial literacy, and that is a good thing from our perspective.

Answer

When the institutions provide the unclaimed money data to ASIC, the institutions identify the name of the owner, and do not identify the gender of the owner. It is not possible to make a determination or estimate of gender based on the names as this would largely be a manual, resource intensive process, and would not provide accurate results.

Similarly, the limited information that the institutions provide to ASIC does not contain other sociological data on the money owners, such as the people to whom inactive bank accounts belong.

ASIC's MoneySmart website makes it very easy for people who search for unclaimed money to engage with ASIC's other financial literacy tools and resources.

The unclaimed money search function is on the MoneySmart homepage, immediately next to all of ASIC's calculators, and among quick links to publications, financial counselling information, ASIC's unlicensed companies list, material in other languages and our e-newsletter.

The unclaimed money search page itself has all of ASIC's other financial literacy resources and tools highlighted across the top menu, including resources about borrowing and credit, superannuation and retirement, investing and scams; and the 'find unclaimed money' facility in the left hand navigation bar is immediately adjacent to links to our calculators, publications, quizzes, news, seminars and information on how people can check ASIC lists about companies, schemes or personal property before they get financial advice, loans or credit, or buy financial products.

ASIC PJC QoN 10 – June 2013

Senator BOYCE: Mr Kell, you would no doubt be aware of a speech made by Senator David Johnston in the Senate on Wednesday about ASIC. He spoke about ASIC's very sorry saga of a vindictive waste of Commonwealth money. Do you have a comment on the speech and the information in it?

Mr Kell: No, I do not at this point in time. I am happy to take that on notice.

Answer:

Background

The principal focus of the Senator's speech was the insider trading prosecutions of Messrs. Roberto Gerald Catena, Colin Edward George Hebbard, Flemming Hood Nielsen and Mr Mark Richard McKenzie.

ASIC alleged that in July and August 2006 Messrs Catena, Hebbard and Nielsen possessed inside information regarding a possible takeover of Vision Systems Limited (VSL), a publicly listed company on the Australian Securities Exchange (ASX). It is further alleged that Mr Hebbard also communicated the inside information to a fellow broker, Mr McKenzie. ASIC alleges that between 26 July and 8 August 2006, while employed as a broker with Citigroup in Melbourne, Mr McKenzie possessed inside information and purchased VSL shares on his own account and advised four of his clients to do the same.

The criminal proceedings against Mr Mckenzie were determined first, with a Magistrate in Victoria ruling on 25 May 2011 that there was insufficient evidence to commit Mr Mckenzie for trial.

On 27 February 2013, Mr Hebbard pleaded guilty to one count of insider trading in that he communicated inside information to Mr Mckenzie. In sentencing Mr Hebbard on 18 April 2013 in the WA Supreme Court, Corboy J fined him $20,000 and recorded a conviction.

On 19 March 2013, the jury returned not guilty verdicts against **Mr Catena** and **Mr Nielsen** on 28 counts out of 33 counts in the indictment. On 8 April 2013 at the WA Supreme Court, the remaining counts against Mr Catena and Mr Nielsen were discontinued by the Commonwealth Director of Public Prosecutions.

ASIC's investigation arose from a referral from the ASX and the Commonwealth Director of Public Prosecutions is prosecuted the matter.

Senator David Johnston's speech on 19 June 2013:

ASIC submits that there are a series of legal and factual errors, misconceptions or omissions (that formed the basis of the Senator's speech. The matters will be dealt with in the order that they arose in the speech.

Paragraph 4: Model Litigant Rules

ASIC believes it is at least implicit in this paragraph that Senator Johnson believes that the Rules applied to the prosecutions of Messrs Catena, Hebbard, Nielsen and McKenzie. This is incorrect. The *Legal Services Directions 2005* – which contain the Rules - explicitly state that the Directions are not intended to cover the handling of criminal prosecutions and related proceedings unless expressly referred to.

Paragraph 5: Prosecution Policy of the Commonwealth

This is the correct policy document to consider in relation to the standards to be applied to the initiation and continuation of Commonwealth criminal proceedings. However, the Senator makes no reference to the fact that in indictable criminal proceedings such as these, the application of the tests contained in the Prosecution Policy are the responsibility of the statutorily independent prosecution agency – the CDPP.

Paragraph 6: "offences carry a 10-year imprisonment penalty"

At time of the alleged commission of the offences (July to August 2006) the maximum term of imprisonment attached to insider trading offences (s1043A *Corporations Act*) was 5 years.

Paragraph 8: "The Magistrate found that it was a circumstantial case

In his ruling in the McKenzie committal, Magistrate O'Day agreed with the prosecutor's submission that the case was circumstantial. ASIC would like to point out that it is a common misconception that circumstantial cases are somehow inherently weaker than cases that are constituted by direct evidence. Juries in circumstantial cases are regularly specifically disabused of this notion in the instructions they are given before retiring to consider their verdict.

Paragraph 9: ASIC could have appealed the Magistrate's decision.

This is not possible at law.

Paragraph 9 & 16: "on precisely the same facts that this Magistrate threw out, they proceeded to conduct a three-week Supreme Court trial."

This is incorrect, while each of the four prosecutions in this matter were factually related, the evidence in respect of each defendant varied.

Paragraph 11: "...it is almost an absolute offence".

This has no foundation at law. One of the specified fault elements for the insider trading offence is that the person ought reasonably to have known that the information had the required characteristics of inside information. This must be proven based on the facts and circumstances

known to the accused. This is not remotely comparable to an "absolute offence" which requires no proof of any fault element.

Paragraph 11: Offending in the least serious category of insider trading cases

While this description was applied to what Hebbard pleaded guilty to (based principally on the acceptance that it could not be established that he actually knew that the information was inside information), the Senator then claims that the trial of the other accused (Mr Catena and Mr Nielsen) also warranted that description. This is erroneous. In relation to Mr Catena for example, the extent of the allegations – extending to 20 charges – are indicative of the fact that the conduct that was alleged at trial was significantly more serious than that which was pleaded to by Mr Hebbard.

Paragraph 12: The facts fit the mould of relative triviality

As in an earlier point, there is a failure here to recognise the difference in the allegations in the trial as opposed to the plea of Mr Hebbard. Furthermore, it is noted that the sentencing of Mr Hebbard to a reasonably significant fine of $20,000 for the single offence tells against the claim that his offending – even if in the least serious category for insider trading – could in any way be properly regarded as trivial. Indeed, the Commonwealth sentencing option that specifically caters for a conclusion that an offence is of a "trivial nature" is the non-conviction "bond" under s19B of the *Crimes Act 1914*. The sentencing Judge in Hebbard rejected a defence submission that Mr Hebbard should be dealt with under this provision.

In conclusion, ASIC looks forward to engaging with Senator David Johnson and discussing any of the abovementioned points.

PJC: Question on Notice 18 - Product reform

In its submission to the Trio inquiry, the Financial Planning Association (FPA) welcomed the 'best interest duty' and the banning of commissions under the FOFA reforms. However, the FPA noted that product reform is not being addressed, including in the area of potentially misleading claims being made about products.

a) Is ASIC considering ways to enhance the responsibility of product providers and fund managers in developing products for retail investors?; and if so,

b) What consultation has ASIC undertaken in this area, what has been the industry response, and is ASIC considering anything more than appealing to the best interests of product providers and fund managers?

Answer

(a)

Enhancing the responsibility of product providers and fund managers would generally require legislative reform. For example, whether to introduce a duty on product providers to consider the suitability of a product for retail investors to whom they are sold would be a matter for the Government.

For completeness, it should be noted that the Government left open the possibility for a review of 'the present light handed regulation of certain product issuers, in particular managed investment schemes, including the possible need...to move to a somewhat more interventionist approach' in response to recommendation 3.1 in the St John Report on compensation arrangements for financial services licensees.

However, ASIC can influence industry behaviour by providing guidance on our expectations concerning compliance with existing regulatory obligations, and monitoring compliance with that guidance. For example, ASIC has:

- Developed disclosure benchmarks for a range of products, including over-the-counter contracts for difference and types of managed investment schemes (e.g. infrastructure, unlisted property, agribusiness), which product issuers should address in relevant disclosures on an 'if not, why not' basis. These benchmarks are directed to helping retail investors understand the risks associated with these products, assess their potential benefits and decide whether investment in the products is suitable for them.
- Given guidance that advertisements should not state or imply that a product is suitable for a particular class of consumers unless the promoter has actually assessed the suitability of the product for the particular consumers targeted by the advertisement.
- Released revised guidance for platform operators, which requires them to disclose how they select investments for inclusion on platform menus and is aimed to strengthen the gatekeeper role of platform operators as product issuers themselves.

ASIC is also exploring the best ways to regulate complex products and structures, including through the whole of the product lifecycle, not simply distribution and disclosure.

(b)

Other than as noted in 1(a) above, ASIC has not commenced any formal direct consultation with industry on enhancing the responsibility of product issuers and fund managers in developing products for retail investors (including complex products and structures). Should it choose to do so in the future, ASIC would consult with relevant stakeholders (including industry) before finalising any such guidance in accordance with its current consultation practices and Office of Best Practice Regulation requirements.