

SENATE ECONOMICS REFERENCES COMMITTEE
Inquiry into the Performance of the Australian Securities and Investments Commission

QoN 7: From Senator Whish-Wilson P83 & 84

P83

Senator WHISH-WILSON: Could I then ask if this is something that you are seeing rolled out right across the industry? Or were Commonwealth Financial Planning an anomaly in the sense that they did not keep electronic records?

Mr Kell: The short answer would be it is uneven. We are seeing these new technologies for file maintenance and whatnot rolled out, but I could not tell you that every firm has them as yet.

Ms Bird: They are not required to keep electronic records, but more and more advising firms are keeping electronic records. They use electronic compliance systems which record everything.

Senator WHISH-WILSON: Is this something ASIC would be interested in trying to get voluntary if not compulsory compliance on in the future? If it is going to make this sort of thing a lot easier for compliance and risk management, shouldn't it be something that is given consideration?

Ms Bird: As a general principle, record keeping is extremely important to us, and good, reliable record keeping which we can trust will make our job a lot easier. How that is put in place is really a policy matter for government. At the moment we just deal with the law that we have and the records that we find. Where we think that they are not appropriate or something has happened to them, then we will take whatever action we can to try and deal with that particular problem.

CHAIR: That is a policy question, so I will ask the policy question. Do you seek that the committee make a recommendation in due course that firms maintain modern, up-to-date electronic records maintenance systems and that it be done by regulation? Do you want to take that on notice?

Mr Kell: A recommendation that looked at how we could improve record keeping would be very good. My only hesitation is the cost for quite small firms and whether that would need to be taken into account, but otherwise—

Mr Medcraft: The phrase 'red tape' comes to mind. Do the industry associations like the FPA have a best practice standard on this?

Ms Bird: I actually do not know.

P84

Mr Medcraft: **Can we perhaps come back, because it would be interesting to hear whether the industry has a best practice standard on record keeping.**

CHAIR: **We might be interested in more of a considered response.**

Mr Medcraft: **We will come back with a considered response, including perhaps the current industry best practice, whether it is the FPA or others. Let's face it: from a business perspective it is a much better idea to keep records electronically in terms of overseeing your business anyway. So it makes a lot of commercial sense.**

CHAIR: **Take it on notice.**

Mr Medcraft: **We will take it on notice.**

Answer:

QoN 7 relates to record-keeping in the context of personal advice. In responding to this question we have not considered the record-keeping requirements of Australian financial services (AFS) licensees for the provision of services other than personal advice. As of 1 July 2013, there have been no statutory record-keeping requirements on AFS licensees who provide personal advice to retail clients under the Corporations Act. Historically, ASIC imposed a standard licence condition on record-keeping for personal advice in *Pro Forma 209 Australian financial services licence conditions* (PF209). However, the terms of this licence condition refer to the previous obligation in s945A of the Corporations Act, which was repealed by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

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Notwithstanding the current state of the law, at no time did the law specify that records must be kept electronically.

To the best of our knowledge, there is no "industry best practice" on electronic record-keeping. In practice, many advisers or licensees do not keep comprehensive electronic records unless they have a very large advice business. Our experience is that medium to large AFS licensees keep a mixture of hard-copy and electronic records. For example, emails are clearly kept in electronic form, whereas Statements of Advice (SOAs) and fact finds may be in hard-copy or scanned.

Furthermore, ASIC's surveillance work has demonstrated that record-keeping in the financial advice industry is generally poor. We would welcome Government recommendations to improve record-keeping as good record keeping is critical for ASIC to monitor and enforce compliance with the law. However, this must also be balanced with the increased cost of compliance that such requirements may impose.

If electronic record keeping is recommended, there would need to be clear guidance on what would constitute an electronic "original" for documents which are signed and require retention - for example Authority to Proceed documents signed by clients, Fact Finds signed by clients as being accurate, SOAs signed by the adviser etc.

ASIC has consulted previously about what, if any, record-keeping obligations should apply to AFS licensees who provide personal advice to retail clients (see Consultation Paper 214 *Updated record-keeping obligations for AFS licensees* (CP 214). ASIC proposed imposing record-keeping requirements by class order, both to replace the previous obligation under the standard licence condition and to capture additional information. Industry responses to the proposals in this Consultation Paper have been mixed. However, a majority of respondents expressed support for ASIC issuing a class order to update the record-keeping obligations for licensees so that it refers to the new best interests duty and related obligation under FOFA, rather than the previous obligation in s945A. ASIC is hoping to finalise the consultation process on CP 214 in the coming months. Further, CP 214 and any outcome from that consultation process will not address the manner in which records must be kept such as whether they are in electronic or hard copy form.