

# Chapter 11

## **Commonwealth Financial Planning Limited: The file reconstruction and compensation process**

11.1 A central concern of the committee's inquiry was the adequacy and integrity of the ASIC-approved compensation arrangements that the CBA put in place for affected CFPL clients. While ASIC and the CBA maintain that the process resulted in fair outcomes for affected clients, the committee has also received evidence from other witnesses that suggested the CBA's compensation assessments were based on files that were incomplete or otherwise compromised by the original non-compliance of CFPL staff. Mr Morris and Ms Swan go so far as to suggest that the CBA deliberately 'doctored' files or otherwise manipulated the compensation process in order to dupe clients out of the money they were entitled to receive.

11.2 This chapter examines the integrity of the file reconstruction and compensation process.

### **Summary of the file reconstruction and compensation process**

11.3 In March 2010, CFPL initiated Project Hartnett, which, according to ASIC, was the process for determining whether compensation was payable to a CFPL client and, if so, how much. In summary, the Project Hartnett process involved:

- contacting clients to advise that CFPL had concerns about the advice they had received;
- assessing whether a client's circumstances were accurately reflected in his or her file and, where appropriate, directly contacting a client in order to make such an assessment (on the basis of this assessment, CFPL would then assess if compensation was payable); and
- meeting, where appropriate, with CFPL clients to obtain detailed information regarding their circumstances and assess whether the advice they received was appropriate to those circumstances.<sup>1</sup>

11.4 On 21 July 2010, CFPL gave ASIC a commitment to remediate former clients of Mr Nguyen. Between August and October 2010, negotiations took place between ASIC and CFPL regarding the adequacy of the CFPL's proposed compensation arrangements. ASIC had particular concerns that CFPL's initial proposal did not include a mechanism for the independent review of compensation offers. As a result of the negotiations, the compensation arrangements announced in November 2010 included the following key elements:

- a review of all relevant client files by CFPL;

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1 A more detailed explanation is available in ASIC, *Submission 45.3*, pp. 13–14.

- 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);
- a process whereby clients were informed of dispute resolution options, notably the free external dispute resolution scheme, the Financial Ombudsman Service (FOS), if the compensation was still in dispute; and
- the appointment of an independent expert to review the adequacy and appropriateness of the compensation processes, including:
  - whether all relevant clients were covered;
  - calculation methodologies for compensation offers; and
  - client communication, including those few cases where clients were unable to be contacted.<sup>2</sup>

11.5 ASIC also negotiated with CFPL to ensure that all of Mr Nguyen's clients who had received a settlement offer prior to the commencement of Project Hartnett in March 2010, were reviewed and assessed using the Project Hartnett methodology.<sup>3</sup> ASIC explained that the 'overarching aim' of the compensation process 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.

This was done by assessing the advice strategy and comparing the client's actual portfolio financial position against a reference portfolio, based on their assessed risk profile. The difference was paid as compensation to the client. CFPL also repaid any fees that did not reflect value for the service provided. The compensation amount also considered the time value of money and taxation impacts as appropriate.<sup>4</sup>

11.6 Project Hartnett later also included clients of Mr Awkar. A second phase of compensation was developed as part of the enforceable undertaking to remediate clients of other CFPL advisers (that is, not Mr Nguyen or Mr Awkar) who had been the subject of a breach report by CFPL to ASIC. This compensation phase is referred to as the 'Past Business Review'.<sup>5</sup>

11.7 As many of the client files of Mr Nguyen and other CFPL advisers were incomplete or compromised by the non-compliant behaviour of CFPL advisers, the compensation assessment process involved the reconstruction of client files so as to provide an accurate picture of a client's actual financial circumstances. However, as

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2 ASIC, *Submission 45*, pp. 10–13.

3 ASIC, *Submission 45.3*, p. 12.

4 ASIC, *Submission 45.3*, p. 13.

5 ASIC, *Submission 45.3*, p. 12.

discussed further below, the nature and intent of this reconstruction process is contested.

11.8 ASIC informed the committee that the CFPL compensation process ultimately involved the review of more than 7,000 client files, with compensation totalling approximately \$51 million paid to over 1,100 of these clients.<sup>6</sup> This evidence will be revisited in Chapter 12.

### **Criticisms of the file reconstruction and compensation process**

11.9 Maurice Blackburn told the committee that its own clients were ultimately satisfied with the compensation processes and outcome put in place by CFPL following ASIC's intervention in 2010 and the settlements of all the Maurice Blackburn civil court actions in 2011. The law firm, however, expressed 'some concerns about the compensation arrangements that were put in place and in particular, whether unrepresented persons' losses would have been adequately assessed'.<sup>7</sup> In particular, Maurice Blackburn was concerned that CFPL's own calculation of compensation due to each client relied in part on information from CFPL's client files, 'some of which were tainted with the questionable practices of Mr Nguyen'. Moreover, CFPL's assessments were, in Maurice Blackburn's experience:

...sometimes more risk tolerant (thereby resulting in lower financial losses) than was ultimately negotiated at mediation. Therefore, unless clients disputed CFPL's retrospective reassessments, they may well have received compensation which did not reflect their losses.<sup>8</sup>

11.10 The CFPL's program for compensating Mr Nguyen's victims did have a review mechanism, whereby an independent expert oversaw the compensation arrangements. However, Maurice Blackburn suggested that:

...to be fully effective, this [review mechanism] required the independent expert to have the resources to conduct full retrospective reviews of all CFPL's and Nguyen's clients' investment positions and to conduct forensic analyses to compare the investment positions with the outcome achieved under Mr Nguyen's advice.

To have such a review in place would have been a big undertaking requiring very significant resources to support the independent expert to examine the portfolios of the hundreds of clients of CFPL and Nguyen. To the best of our knowledge this did not occur.<sup>9</sup>

11.11 Maurice Blackburn also suggested that the external oversight of the process 'really has very little impact on the rigor of the process unless the external oversight

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6 ASIC, *Submission 45.3*, p. 12.

7 Maurice Blackburn, *Submission 200*, p. 2.

8 Maurice Blackburn, *Submission 200*, p. 2.

9 Maurice Blackburn, *Submission 200*, pp. 2–3.

includes a whole raft of people conducting the same reviews on an individual basis'.<sup>10</sup> Asked to summarise its concerns, Maurice Blackburn told the committee that, at the heart of the problem, was that the compensation process involved self-assessment by CFPL with a lack of external oversight.<sup>11</sup> In order to compensate clients, CFPL needed to assess whether the products that Mr Nguyen had been selling them were appropriate to their risk profile, and doing so on the basis of their Financial Needs Analysis. However, CFPL did this reassessment 'based on documents they had, some of which were tainted and flawed'.<sup>12</sup> It was not clear, Maurice Blackburn further explained, to what extent CFPL tested the integrity of these documents through consultations with aggrieved clients.<sup>13</sup>

11.12 Asked whether those CFPL clients who were not represented by Maurice Blackburn would have had materially different compensation outcomes if they had been represented, Maurice Blackburn told the committee:

I think they probably would have been, yes. It seemed to us that the few clients who came to us after they had signed up to the direct compensation arrangements had been put in a higher risk tolerance category and therefore their losses were assessed as being less than they might otherwise have been. For example, one of the main people we acted for, before he came to us, was offered one-tenth of what we ultimately negotiated for...them.<sup>14</sup>

11.13 Mrs Braund's own experience would appear to support claims that the files used by the CBA to assess compensation payable to clients had been compromised. Mrs Braund explained in her submission that Mr Morris provided her with a copy of her CFPL client file as a safeguard against the risk of the file otherwise 'disappearing' from the CBA's records. She further reported that she later received a copy of her file from the CBA, but certain documents included in the client file provided by Mr Morris were missing from the CBA-supplied client file. According to Mrs Braund, this included the original document from 2002 where she established her investment with CFPL on the basis that it was to be invested conservatively 'and that I would only use proceeds from capital'.<sup>15</sup> This document, which was a handwritten note that appears to have been prepared by Mr Nguyen, was tabled by Mrs Braund during her appearance before the committee on 10 April 2014.

11.14 Like Maurice Blackburn, Ms Swan suggested that the offer of compensation made to her parents was based on a file that had been compromised. Unlike Maurice

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10 Mr John Berrill, Lawyer and Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 15.

11 Mr John Berrill, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 13.

12 Mr John Berrill, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 14.

13 Mr John Berrill, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 14.

14 Mr John Berrill, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 16.

15 Mrs Janice Braund, *Proof Committee Hansard*, 10 April 2014, p. 6.

Blackburn, Ms Swan directly alleged that CFPL/CBA staff had in fact fraudulently altered client files in order to deny clients fair compensation:

My detailed submission to this inquiry exposed the role of CBA and ASIC in reducing my parents' investment of \$260,000 to only \$92,000 within 22 months. I am here today because CBA's financial planner, Don Nguyen, and CBA's senior management engaged in systematic fraud, forgery, and deceptive and misleading conduct, to retrospectively cover up Nguyen's activities, to specifically refute my parents' claims and to minimise CBA's financial liability.<sup>16</sup>

11.15 Specifically, Ms Swan alleged that after first advising that they had lost her parents' files, the CBA sent her parents:

...copies of fraudulently altered and falsified documents that CBA management had manufactured to convince my parents that they were responsible for choosing high-risk investments.<sup>17</sup>

11.16 These documents, according to Ms Swan, included a fraudulent Statement of Advice and Financial Needs Analysis, complete with forged signatures.<sup>18</sup> Asked how she knew the documents were fraudulent, Ms Swan explained:

Because, unlike most of the clients of Mr Nguyen, my parents walked off with an original copy of their statement of advice...So, when they send me documentation and claim it is a copy of the statement of advice or extracted from the statement of advice or part of the contract in the statement of advice, I fortunately have an original, so I can prove categorically that the documentation they sent me was fraudulent.<sup>19</sup>

11.17 Ms Swan contended that the 'cover up' extended well beyond CFPL itself, and was in fact endorsed by senior management at CBA:

Instead of saying, 'Yes, we've been caught, we own up, we'll compensate you, we'll rewind this problem and we'll apologise,' there was a deliberate decision made by senior management at CBA, right at the top, to cover this up.<sup>20</sup>

11.18 Ms Swan also claimed that despite the commitment given by CFPL to review and assess settlements made prior to the commencement of Project Hartnett in March 2010 (as referred to above), her parents were never contacted by the CBA:

When ASIC became involved, they directed CBA to contact all of the affected clients and advise them that they could have their compensation

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16 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 1.

17 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 1.

18 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 1.

19 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 4. Copies of these documents were tabled by Mrs Swan during her appearance before the committee.

20 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 3.

reviewed. That has not happened. My parents have never received a letter reopening that. When I eventually engaged Financial Resolutions Australia on my behalf to contact them to renegotiate or reopen and review our compensation, we merely received this letter from [the director of CBA Customer Relations] in 2013 to say, 'It had been reviewed, it was appropriate, and we will not be discussing this anymore.'<sup>21</sup>

11.19 Ms Swan discounted the value of the oversight of the compensation assessment process by an independent expert. Ms Swan argued that the independent expert's review would itself have been based on 'fraudulent documentation which does not reflect the true situation'. Given her scepticism regarding the compensation assessment process and the independent expert's review of that process, Ms Swan expressed concern that the compensation process had not been:

...open to any scrutiny by the clients. We have not been invited in to have it explained. I do not know how the [compensation assessment] calculation is done.<sup>22</sup>

11.20 Ms Swan concluded that, given the compensation process appeared to have been based on the 'CBA's own fraudulent documentation', the CBA's claim that the 'compensation process and discussions with their customers have been honest and transparent are farcical'.<sup>23</sup>

11.21 Mr Morris who, as noted in Chapter 8, claims to have personally witnessed Mr Nguyen and his colleagues doctoring client files, told the committee that he was also able to observe the compensation process 'very closely'. It appeared to Mr Morris that 'a lot of bad faith' underlined that process:

The vast majority of people got a letter in the mail with an offer of money that said: 'You may have received inappropriate advice. Here is \$100,000'—or \$50,000 or whatever number [it] was—and here is a panel of six law firms or you can see somebody else if you want to. Here is five grand to get that ticked off.' For most people who get an offer like that in the mail it is just going to be manna from heaven. I observed close-up what they were doing to massage that process to minimise the compensation cost.<sup>24</sup>

11.22 According to Mr Morris, rather than seeking to compensate the clients of 'rogue planners' (as CFPL/the CBA characterised them), CFPL instead:

...sought at every turn, by every means, to cover up what occurred, to destroy or suppress the evidence in the files and to defraud the victims of the compensation they were entitled to.<sup>25</sup>

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21 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 5.

22 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, pp. 5–6.

23 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 1.

24 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 49.

25 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 40.

11.23 Mr Morris voiced particular suspicions regarding Project Hartnett, suggesting that given there were about 50 people working on the project over a period of several years, it was difficult to accept that these people were simply working on reconstructing 182 files. He told the committee that if the intention were simply to reconstruct files, it:

...would be [a] simple matter to print out a statement of advice. If it was on the system, all you have to do is press the print button and add that to the file. It simply does not compute that those people were engaged on an innocent file reconstruction and compensation program.<sup>26</sup>

11.24 Asked whether there was a need for a 'full, properly independent review' of CFPL client files, Mr Morris responded:

Absolutely and also of more clients than just the Don Nguyen ones. It is a business where even ASIC said there were fundamental widespread problems with the advice. Of the 7,000 pieces of advice that were reviewed, 16 per cent of them resulted in compensation being paid. That is a massive proportion. It is a business that was clearly non-compliant. To say there were only seven rogue planners and only 7,000 pieces of advice that needed to be considered in that environment I think is ludicrous. I suspect a broader review is going to uncover there are a lot more, like tens of thousands of clients, who are probably entitled to compensation. It has never been looked at.<sup>27</sup>

### **CBA's response to criticism regarding file reconstruction and compensation**

11.25 The CBA defended the integrity of the file reconstruction process, and told the committee that the process included extensive checks and balances to ensure fair compensation outcomes for CFPL clients.

11.26 Given the deficient state of many client files, the CBA was asked if it had considered contacting individual clients and asking them to review their respective files for completeness and accuracy. The CBA confirmed that its remediation process:

...did not include asking clients to review the Bank's file in toto. Depending on the issue(s) we found with each adviser, we determined what information was required in order to re-evaluate the advice given.

In many cases we had all of the information required to re-assess the advice received, whether through documents in the client file, or by referencing data in our electronic records management and product systems. Where hardcopy documentation was lacking, CFP printed file documents from electronic storage or contacted relevant customers, requested their records and used these to assist its review.

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26 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 43.

27 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 49.

Almost half of the client cases reviewed (3289 of 7038) involved CFP contacting the client to seek additional information. In approximately one third of those cases (1166 of 3289), the clients provided additional information that was used by CFP in evaluating their case.<sup>28</sup>

11.27 Not surprisingly, the CBA told the committee that it was confident the compensation process had:

...correctly compensated adversely affected customers with a fair and reasonable outcome, by correcting their position as if they had received appropriate advice.<sup>29</sup>

11.28 The CBA also suggested that 'almost all of those customers who were affected by these events have been restituted to their satisfaction'.<sup>30</sup> Only a 'handful' of affected CFPL clients, the bank told the committee, remained dissatisfied with the restitution provided or offered to them.<sup>31</sup>

11.29 Asked about Ms Swan's suggestion that there was 'no facility in the compensation process for clients or their advisers to review the documents being used for the compensation calculation', the CBA told the committee:

We do acknowledge the lack of documentation that the business did have in reviewing customer information. We relied on a lot of information from current systems and processes that we did have. In some cases where we were not clear on the information that was recorded in the file, we contacted the customer and asked them if they had documentation, and we relied on that documentation. So through the Blanches, through Marilyn Swan, we did work with the group that was representing her for two years and did actually ask for a copy of the original documentation that would have assisted us in deciding or discussing the remediation process that we had.<sup>32</sup>

11.30 The CBA further stated that it did not believe the remediation process was deficient.<sup>33</sup> It outlined the steps taken in Project Hartnett when files were incomplete:

Each of the cases that we reviewed had a case manager—so there was contact with customers. We spoke to them directly or they had a representative acting on their behalf. Through that engagement and through the process we established an amount that we thought was the compensation amount had they had appropriate advice. We did actually explain the process around the information that led to that, the allocation of

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28 CBA, answer to question on notice, no. 9 (received 24 April 2014), p. 8.

29 CBA, answer to question on notice, no. 9 (received 24 April 2014), p. 8.

30 Mr David Cohen, General Counsel and Group Executive, Group Corporate Affairs, Commonwealth Bank of Australia, *Proof Committee Hansard*, 10 April 2014, p. 20.

31 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, pp. 36.

32 Ms Marianne Perkovic, Executive General Manager, Wealth Management Advice, CBA, *Proof Committee Hansard*, 10 April 2014, p. 27.

33 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 28.

the client's risk profile and the observations that we made about the investments that that client had with us and other investments that they had. It was in those initial conversations that it came to light that it was not correct or that there was other information that the customer may have had and those were the records that we then relied on going through that process.

With the 7,000 client cases that we looked at through this whole remediation process of [Project Hartnett] plus through the enforceable undertaking, a lot of those cases were remediated and we had very good communication between the customer or their legal representative. There was a selection of customers where it did take a longer time, because on multiple requests of information we did not receive it and we had to act on the information that we received—albeit continuing to ask for other information that would help us clarify and help us determine any differences in what the framework was giving us.<sup>34</sup>

11.31 CBA explained to the committee that some client files, particularly for Mr Nguyen, were 'not in the right order'. It stated further that:

...in terms of the files themselves, and the customers that those files belonged to, we started to work through what other information the bank had that could be contributed, which we could put into those files. I am talking about things like application forms on their investment that we had access to. Those were the pieces of information that we put on the client. It was known as a client file through the Hartnett process, not the original file.<sup>35</sup>

11.32 The CBA also told the committee that it had advised ASIC of the state of the CFPL client files, including the number of missing files. It had, in turn, agreed with ASIC on a process for securing enough information so that it could determine the appropriate level of compensation for each client.<sup>36</sup>

### **ASIC's evidence on file reconstruction and compensation**

11.33 While acknowledging that the poor record keeping practices at CFPL had proven a major problem, ASIC told the committee that CFPL/the CBA had been upfront about the need to reconstruct client files:

Record keeping was very poor. Again, because they were not adequate, there was a process of trying to reconstruct files, and CFP were telling us they were doing that. They were very open. That needed to be done to try to find out what had happened and regenerate from their system some of the documents.<sup>37</sup>

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34 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 28.

35 Ms Marianne Perkovic, CBA, *Proof Committee Hansard*, 10 April 2014, p. 30.

36 Ms Marianne Perkovic, CBA, *Proof Committee Hansard*, 10 April 2014, p. 30.

37 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 77.

11.34 Alluding to Mr Morris's suggestion that the CFPL had engaged in a systemic effort to fraudulently reconstruct files in order to deny CFPL clients proper compensation, ASIC suggested that:

...there is some chance that, internally within CFP, people observing [the file reconstruction] may have interpreted that as an illegitimate process whereas it was a process that we understood [was undertaken] for proper purposes and was openly advised to us.<sup>38</sup>

11.35 ASIC also told the committee that it had not generally pursued claims that CFPL client files had been 'sanitised' or 'doctored' in order to defraud CFPL clients. Such allegations, it told the committee, had generally taken the form of vague 'Chinese whispers within the CFP' that files were being cleaned up.<sup>39</sup> Similarly, responding to Ms Swan's suggestion that her parents' file had been 'doctored' by the CFPL, ASIC said:

We know the file was to some degree reconstructed. Essentially, it was not clear to us from looking at the material that there was evidence that it had been doctored in some way to try and benefit CFP subsequent to its original generation, beyond the general reconstruction.<sup>40</sup>

11.36 ASIC also clarified that while it believed it had misplaced its trust in CFPL in terms of expecting it to make the cultural and system changes that needed to be made at the time of the CFCP, this did not mean ASIC believed the CFPL had 'sanitised' or 'doctored' client files in order to defraud CFPL clients of proper compensation. Mr Kirk told the committee:

My comment earlier that our trust was misplaced was not intending to suggest it was misplaced in the sense that we now think that CFP had a program for changing or doctoring files. We do not think that is the case. We have not seen evidence that that is the case. I just wanted to clear that up. We trusted them that they would be able to uncover all of their own problems and fix them and change their culture, and that trust was misplaced—not a trust about honesty about files.<sup>41</sup>

11.37 Asked if ASIC was comfortable with the CBA not writing to all of its clients and asking them to provide any material that might be relevant to assist in the reconstruction of the files, ASIC responded:

We were certainly conscious of that as a problem and we tried to put some measures in place in the compensation scheme to address it. Generally, with clients subject to the review, they were all notified that they were part of the review. They were not sent their file.

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38 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 77.

39 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 77.

40 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 82.

41 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 79.

In a second phase, CFP had to go through the file and analyse whether it contained full records of the client's position...There was a process whereby they had to check whether the file was adequate or whether there were gaps in it. Where there were problems, they then made contact with the client and tried to reconcile what the client understood the history and instructions to have been with what was in the file. That contact was initially by phone, to check whether there was any disparity between the client's understanding and what was in the file. If that showed up any problems at all, the next step was a full interview with the client. It is a difficult issue to address when the files are inadequate. There was a process to try and do that. I guess the final step in that process was to have access, for the people getting compensation offers, to an adviser and that paid for, so there could be a test at that point and some push-back against what had been offered to them, some questioning of whether the records were accurate and consistent with what the client was telling that adviser.<sup>42</sup>

11.38 In an answer to a question on notice, ASIC further suggested that it would likely have been 'largely futile' for the CBA to send every client a copy of his or her file. Most clients, ASIC contended, could not be expected to be aware of all the documents that should be contained in their file. Moreover, such a process would probably have significantly delayed the compensation process, as clients took time to respond, 'or, more likely, did not respond at all given the difficulty of the questions being posed'.<sup>43</sup>

11.39 ASIC further explained that the professional services firm appointed under Project Hartnett was required to assess the compensation methodology, review a number of client files and randomly select client cases to test the adequacy of compensation offers, including cases where there was a dispute with the client about the compensation on offer.<sup>44</sup> Moreover, ASIC itself reviewed aspects of the compensation process, 'especially if there were matters that seemed to involve a high level of disputation towards the end of the process'.<sup>45</sup> Clients who disputed the compensation offer also had the option of taking their claims to FOS.<sup>46</sup>

11.40 ASIC told the committee that while the process of reviewing and reconstructing CFPL client files might not have been perfect, ultimately it was satisfied with the integrity of the process and the compensation outcomes it delivered for affected CFPL clients:

I think in the circumstances, where there was this problem with record keeping and inadequate files, the process put in place, in terms of a large, mass-scale thing, where 7,000 clients were looked at, had appropriate steps

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42 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 78.

43 ASIC, answer to question on notice, no. 11 (received 21 May 2014), p. 6.

44 ASIC, *Submission 45.3*, p. 14.

45 Mr Peter Kell, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 79.

46 ASIC, answer to question on notice, no. 11 (received 21 May 2014), pp. 8, 9.

to try and address that problem. I am not saying that that is going to be perfect in every file. When documents do not exist, the situation is very difficult, no matter what process you adopt.<sup>47</sup>

11.41 Asked about unresolved CFPL client claims, and its contact with the various parties regarding these claims, ASIC told the committee:

In terms of the contact with CFP, it is not only getting reports from them on progress but getting copies from them of correspondence sent to the clients and knowing the content of that material and stipulating what needs to be in some of that. One of the things we did towards the end of last year was to make sure that they made it unambiguously clear to the remaining people with contested claims that not only could they go to FOS to have it resolved but CFP would waive any jurisdictional limits in that process. Some of those problems are under limited jurisdiction or they are disputes about whether there had been a previous agreement and there was already a binding deed of release and such. We got them to clarify for all of those customers that they were willing to waive those things.<sup>48</sup>

11.42 ASIC explained that across the compensation program (which included former clients of both Mr Nguyen and other CFPL advisers) it understood there were 57 former clients with issues potentially remaining, although for 45 of these the problem was they were uncontactable.<sup>49</sup> Excluding clients who could not be contacted, there remained 12 clients with unresolved claims against CFPL, out of a client base of 7,000, and after over 1,100 compensation offers had been made across this client base.<sup>50</sup>

***CBA's offer of \$5000 to offset the cost of an independent review***

11.43 The CBA offered affected CFPL clients \$5,000 to help pay for an independent review of his or her compensation assessment by a 'qualified accountant, solicitor, or licensed financial adviser of the customer's choice'.<sup>51</sup>

11.44 Ms Swan claimed that she was unable to access CBA's \$5,000 offer to pay for an accountant or lawyer:

They refused to pay [Financial Resolutions Australia], whom I have chosen to represent me, that money to do this investigation. Furthermore, the Commonwealth Bank are picking and choosing which companies they will

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47 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 78.

48 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 84.

49 Mr Greg Kirk, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 84. Mr Kell also noted that one of the tasks of the independent expert was to track down clients who were difficult to contact. Mr Peter Kell, ASIC, *Proof Committee Hansard*, p. 84.

50 Mr Greg Kirk, Mr Peter Kell and Mr Greg Medcraft, ASIC, *Proof Committee Hansard*, 10 April 2014, pp. 84–85.

51 CBA, *Submission 261*, p. 9.

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deal with. This is not an open process. They are picking and choosing which accountants and which lawyers you can employ.<sup>52</sup>

11.45 Asked about the utility and adequacy of \$5,000 on offer from the CBA, Maurice Blackburn told the committee:

To the extent to which people did access independent information and advice, that is fine. To the extent to which \$5,000 would have been enough, it depends who you go to, I suppose, and what their expertise is. But, again, from a principled point of view, you would say: yes, there is the potential for that to provide independent rigour, independent oversight and independent review, but was it taken up and was that the way it was played out? Not from the experience we had or the information we had seen from other clients.<sup>53</sup>

11.46 Upon further questioning, Maurice Blackburn revealed that the cost of the service it provided to the 30 CFPL clients it represented would have been around \$30,000 to \$35,000 per client (these costs were covered by the CFPL as part of the settlement).<sup>54</sup>

11.47 ASIC at one point implied that it would be reluctant to require the CBA to undertake the type of comprehensive file review undertaken by Maurice Blackburn, because such an approach would be prohibitively expensive for the CBA. Specifically, when the committee pointed out that Maurice Blackburn's client file reviews had cost somewhere in the order of \$35,000 per client, and indicated that this might be the cost per client of a proper file review, ASIC responded that when multiplied across the 7,000 affected clients at CFPL the cost to the CBA would run into the hundreds of millions of dollars (see Box 11.1). Drawing on ASIC's approach to the enforceable undertaking negotiations with CFPL, it would also seem to indicate that, in its approach to negotiating enforceable undertakings more generally, ASIC may give excessive regard to the burden an undertaking might impose on a company. This broader point concerning ASIC's approach to enforceable undertakings is explored further in Chapter 17.

### ***ASIC on the possibility of a new review of CFPL client files***

11.48 Asked if there would be any legal obstacle to ASIC requiring the CFPL to undertake a full, independent review of CFPL client files, ASIC responded that it could only do so in the context of an enforceable undertaking or settlement agreement. Given the CFPL did not offer to undertake such a review in the context of their enforceable undertaking negotiations with ASIC in 2010, ASIC advised that it would be unlikely to do so now or in the future given the 'prohibitive cost and time involved in such a process'. ASIC also informed the committee that it was unable to require

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52 Mrs Marilyn Swan, *Proof Committee Hansard*, 10 April 2014, p. 5.

53 Mr John Berrill, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 15.

54 Mr John Berrill, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 15.

CFPL to undertake such review under the terms of the 2011 enforceable undertaking, and that there were only limited (and highly unlikely) circumstances in which it could now require CFPL to do so.<sup>55</sup> In any case, ASIC reiterated its view that the CFPL compensation process adequately compensated CFPL clients who had suffered a financial loss as a result of inappropriate advice, including clients without legal representation.<sup>56</sup>

***Box 11.1: Is ASIC reluctant to make CBA pay for a client file review?***

The following exchange during the public hearing on 10 April 2014 raises questions about ASIC's willingness to require the CBA to undertake a comprehensive review of CFPL client files because of the cost associated with that review:

CHAIR: We all understand the process, because we had it in exhaustive detail this morning, but our questioning queries the utility of that process, when CBA did not seek every person to provide any relevant supplementary material to help in the reconstruction of the file. That is the first point. The second complaint this morning was the inadequacy of the \$5,000 ceiling. We had evidence from the lawyers from Maurice Blackburn, who handled 30 or 40 clients, to the satisfaction of all of their clients, that their costs per file were something like an average of \$35,000. What I am putting to you, Mr Kirk, is that the process of review, remediation, reconstruction of files, was in and of itself inadequate and necessarily led to poor outcomes. That is what I am asking you to address. Why were you satisfied with that process?

Mr Kirk: I think in the circumstances, where there was this problem with record keeping and inadequate files, the process put in place, in terms of a large, mass-scale thing, where 7,000 clients were looked at, had appropriate steps to try and address that problem. I am not saying that that is going to be perfect in every file. When documents do not exist, the situation is very difficult, no matter what process you adopt.

CHAIR: Yes, but, if the problem derives from the fact that the officers of Commonwealth Financial Planning at first instance, with any or all of the 7,000 clients, did not do their job properly, did not maintain records, falsified records, falsified signatures, so that nothing could be reconstructed properly, in terms of outcomes, bad luck for the Commonwealth Bank. It should have been instructed to do the job properly, as was done by this law firm in Melbourne, Maurice Blackburn. If that cost \$35,000 or \$40,000 per client, well, that is the penalty for not operating properly in the marketplace at first instance.

Mr Kirk: But doing that for 7,000 clients, at \$35,000 or \$40,000, would be a few hundred million dollars.

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55 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 51.

56 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 52.

CHAIR: It would. That is not your concern. It is the concern of the shareholders of Commonwealth Bank, the concern of the directors of Commonwealth Bank. Let the directors go to the meeting and explain that the dividend has been reduced by 10c this year because of the incompetence that was allowed by the senior managers. It is not your concern. That is the point I am trying to make. Who cares?

Source: *Proof Committee Hansard*, 10 April 2014, p.78.

## Questions about the compensation scheme for non-Project Hartnett clients

11.49 To this stage of the case study, most of the evidence has been drawn from clients of Mr Don Nguyen. Their evidence clearly indicates that, since becoming aware of misconduct in CFPL, they have been bitterly disappointed with the process of rectification and the bank's attitude. A number of similar accounts can also be drawn from confidential submissions. They include:

- A elderly man, whose wife was housebound, had his only assets of around \$100,000 in term deposits—the CBA convinced him to switch all his money into the Colonial Mortgage Fund. The financial adviser did not produce a Statement of Advice but used a Transaction Without Advice document. This document is meant to be used where a client comes into the bank asking for a particular product themselves and receives no advice from the planner, which was clearly not so in this case. It was alleged that the planner claimed the commission on this false basis. Although the Fund was frozen, with the help of an advocate, the man was able to receive several thousand dollars in compensation for the losses he sustained but did not receive compensation for the extreme distress due to the defective advice.
- A woman in her 90s was put into the Colonial First State Enhanced Income Fund on the understanding that it was a conservative product and better than a term deposit. She received no explanation from her adviser that there was risk attached to this product. The money was in the fund for 20 months during the global financial crisis with a loss of \$1,500 on the entry price and exit price. Over that period of time, the client missed out on some \$30,000 in interest payments that would have been received had the funds been in a term deposit. With the assistance of an advocate, she was able to obtain over \$30,000 compensation in contrast to the original offer of \$1,500.
- A Centrelink recipient, with very poor literacy skills, signed documents that he could not understand including a Statement of Advice and was placed in an aggressive portfolio.<sup>57</sup>

11.50 Although these particular clients of CFPL eventually received compensation, it was only through the intercession of an advocate who 'kicked and screamed' on their behalf and even then there was no allowance for the clients' pain and suffering.

11.51 It must be kept in mind that there were other people who also have suffered loss because of the actions of other CFPL advisers. Clients of Mr Nguyen, and later clients of Mr Anthony Awkar, were subject to the compensation scheme known as Project Hartnett. Subsequently, another compensation scheme, referred to as the Past Business Review, was initiated to recompense clients of other advisers that were named in breach reports or about whom CFPL received complaints.<sup>58</sup>

11.52 The accounts given by Mr Nguyen clients and those of other now banned financial advisers stand in stark contrast to those of CBA and ASIC. Indeed, the committee has received submissions from a number of CFPL clients whose experiences of the process after 2009 reveal quite a different story from the bank's. One such client who, in 2007, rolled over the last of her AMP superannuation fund into CFPL became alarmed at the large amounts of money disappearing from her superannuation. Her financial planner was Mr Chris Baker who left CFPL in February 2009. She cannot recall hearing from CFPL until 2013 when a staff member:

...who apparently had been my new financial advisor since 2009, contacted me to tell me about the Christopher Baker Enforceable Undertaking to ASIC and informing me that I might be entitled to compensation.<sup>59</sup>

11.53 She explained that:

- she had to ask for copies of her file on three separate occasions from three separate people;
- her signature appears on some pages of the documents but she does not remember having ever discussed the content with Mr Baker let alone seen or received a Statement of Advice; her middle name is spelt incorrectly, twice and crossed out; the information on the medical practitioner is spelt incorrectly; and the answers to the questionnaire on her medical history and family medical history are not true;
- for many years she had been paying for 'very expensive insurance' that she did not want and did not know she had; and
- since 2009, her adviser, who replaced Mr Baker, had never once called her or returned her calls or responded to messages left for him.<sup>60</sup>

11.54 She noted further that there was another document from 2008, which she supposedly signed with her married name even though she had reverted to using her maiden name. In her view, the document was 'dodgy':

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58 ASIC, *Submission 45*, pp. 13–14.

59 Name withheld, *Submission 374*, p. 6.

60 Name withheld, *Submission 374*, pp. 6–7.

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I have no idea what this document is or what it is saying. I have asked... the complaints officer at CBA, three times for more information on the original of the document, where it is, who is the author and what does it mean.<sup>61</sup>

11.55 When she finally spoke to someone at CBA and asked if she could see her file she was told:

...Baker did not keep good records and what he did have was with a special team of case managers who were looking into Baker's client files to determine how much financial loss his clients had suffered. He also told me Baker had about 1500 clients and CFP were flat out trying to clean up the problem.

I said I wanted to speak to the case manager looking into my case and I wanted access to my records. He told me that was not possible. The records were located somewhere else and not on CFP's premises. He said he did not know exactly where they were. He told me that I could not see the case manager because he was about to go on holidays.<sup>62</sup>

11.56 This CFPL client received a letter of offer with a 60-day time limit in which to accept or reject the offer, five days before the time limit expired. She explained:

I was so upset by this. It was so unfair. I tried calling again but the numbers they had provided were disconnected and I couldn't get through to anyone. I had to leave another voicemail message for [name withheld] and eventually called CBA general complaints before I got someone to respond to me.<sup>63</sup>

11.57 Another case also demonstrates that the damage caused was not confined to financial loss. Indeed, some clients have been completely bewildered by the remediation process itself, which they have found confusing and stressful. One such person only learnt of the extent of Mr Rick Gillespie's misconduct from ASIC in a letter received as late as April 2014. The submitter had been a client of Mr Gillespie and her instructions to him were that she was risk averse and wanted to protect her principal 'at all costs'. In summary, the submitter identified the following facts:

- money was lost from her super fund while Mr Gillespie was her financial planner;
- CBA knew at the time of assigning her account to Mr Gillespie that he was under investigation;
- although the bank was aware of Mr Gillespie's fraudulent activities the bank did not contact her—thereby not providing her with the opportunity to scrutinize and reassess her finances;

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61 Name withheld, *Submission 374*, p. 7.

62 Name withheld, *Submission 374*, p. 8.

63 Name withheld, *Submission 374*, p. 10.

- there was total confusion and mixed messages from the bank about who was managing her affairs after Mr Gillespie left CFPL;
- ASIC's focus appeared to be on gathering evidence against Mr Gillespie and not on supporting the victim—indeed the submitter was of the view that she would not be protected by ASIC and that it was not acting on her behalf; and
- CFPL did not advise her of the full extent of wrongdoing alleged against Mr Gillespie until April 2014—for example, she met with representatives from CBA in April but even then did not know the extent or involvement of any wrongdoing by the bank regarding her financial situation.<sup>64</sup>

11.58 At this late stage, rather than being reassured by the remediation process, this victim has been left even more troubled:

This is a problem not of my making. All this cloak and dagger stuff with ASIC and 4 Corners is all well and good, but it is making me sick and at the end of the day I still have no way of knowing if I have been a victim of a CBA staff financial planner who failed to comply with financial services laws.<sup>65</sup>

11.59 The husband of another CFPL client informed the committee that:

I have witnessed on a number of occasions Gloria becoming upset to the point of tears while on the phone to Commonwealth Financial Planning trying to obtain information, ask questions, and correct the record.<sup>66</sup>

11.60 The committee has also received correspondence from a couple who entrusted the CBA/Colonial with '\$1 million hard earned dollars from two middle class Australians who worked hard at jobs and renovated homes and sold them to get ahead'. In late 2009, they complained to the CBA's state manager over their losses and no service. They eventually had \$12,000 in fees returned for no service. However, at no stage were they informed about Mr Gillespie and his conduct. The bank blamed the poor performance of their portfolio on the global financial crisis.<sup>67</sup>

11.61 Following the May 2014 *Four Corners* program, a CBA case manager contacted the couple, sent them a package of documents with a request to verify their signatures. After viewing the documents, they identified 17 forged signatures—many of the forgeries related to moving superannuation into the fund, switching, statements of advice and withdrawals. The CBA case manager did not provide them with any information or explanation for pursuing this matter now, after all these years.

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64 *Submission 469* (Confidential).

65 Name withheld, *Submission 127*, p. 1.

66 Mr Frazer McLennan, *Submission 127*, p. 1.

67 Correspondence to committee (name withheld).

11.62 The cases dealing with CFPL cited throughout this report clearly demonstrate that the wellbeing of a number of the bank's customers was not a priority—whether it was during the initial stage of receiving financial advice through to seeking and in some cases obtaining compensation.

11.63 As the committee gathered more and more evidence, lingering doubts about the robustness and fairness of the compensation process began to grow. It could see major flaws in the process, in particular:

- the delays in CFPL recognising that advisers were providing bad advice or acting improperly and in CFPL acting on that knowledge and informing clients;
- the use of letters or the telephone to contact clients and the manner in which information was conveyed, which rather than reassure clients tended in some cases to intimidate and confuse them;
- CFPL's obfuscation when clients sought information on their accounts/adviser;
- a strong reluctance on the part of CFPL to provide files to clients who requested them;
- no allowance made for the power asymmetry between unsophisticated, and in many cases older and vulnerable clients, and the CFPL;
- throughout the compensation process the client was being used to test decisions or conclusions already reached by CFPL;
- no client representative or advocate was present during the early stages of the investigation to safeguard the clients' interests when files were being checked and in many cases reconstructed;
- the numerous allegations of missing files and key records, of fabricated documents and forged signatures, which do not seem to have been investigated;
- instances where the CFPL's initial offer of compensation was manifestly inadequate; and
- the offer of \$5,000 to clients to pay the costs of an expert to assess the compensation offer was made available only after the CFPL had determined that compensation was payable and an offer had been made.

11.64 Recent developments have only deepened the committee's misgivings about the integrity and fairness of the process.

