

Chapter 8

Commonwealth Financial Planning Limited: What went wrong at CFPL and why?

8.1 One of the committee's major concerns during this inquiry was the misconduct by financial advisers and other staff at Commonwealth Financial Planning Limited (CFPL), part of the Commonwealth Bank of Australia Group (CBA), and what some regard as ASIC's failure to respond to reports of this misconduct in a timely and effective manner.

8.2 This chapter provides an overview of the CFPL case, an analysis of what went wrong at CFPL and why, and a critical appraisal of the CBA's characterisation of the misconduct at CFPL as 'inappropriate advice' to clients.

8.3 Other issues raised by the CFPL matter are explored in the next three chapters. Chapter 9 provides:

- an overview of the surveillance project that ASIC undertook in relation to CFPL in 2007–08, and an assessment of the Continuous Improvement Compliance Program (CICP) that was implemented as a result in April 2008; and
- a review of ASIC's response to reports of misconduct at CFPL, including the disclosures made by CFPL whistleblowers.

8.4 Chapter 10 assesses the adequacy and effectiveness of the enforcement actions taken by ASIC in relation to the CFPL matter including, among other things, the enforceable undertaking from CFPL that ASIC accepted in October 2011. Chapter 11 examines the integrity of the client file reconstruction and compensation process put in place by CFPL/the CBA. The committee's conclusions on the CFPL matter are contained in Chapter 12.

8.5 The committee has received evidence from various parties involved in the CFPL matter including CFPL clients, a CFPL whistleblower, the CBA and ASIC. In addition to submissions and oral evidence from ASIC and the CBA, the committee has published submissions from former CFPL clients, family members of former CFPL clients, or representatives of CFPL clients, who, in addition to being highly critical of the CBA, in varying degrees argued that ASIC failed to prevent the misconduct at CFPL or respond appropriately when the misconduct became known. Three of these submitters—Mrs Jan Braund, Ms Merilyn Swan and the law firm Maurice Blackburn—also provided oral evidence to the committee on 10 April 2014. In addition, the committee received a number of submissions and oral evidence from

one of the CFPL whistleblowers, Mr Jeffrey Morris, that was highly critical of the CBA and ASIC's handling of the matter.¹

Chronological overview

8.6 In mid-2010, public reports emerged of problems affecting the quality of financial advice being provided to CFPL clients. While the exact nature and extent of these problems is contested (and explored further below), it is accepted by all parties that multiple CFPL advisers failed to meet required compliance standards and provided advice that was irresponsible, self-serving and incidental to client interests. The precise timeframe of this adviser misconduct remains unclear, but in terms of the individual CFPL advisers subject to ASIC enforcement action, most of the misconduct appears to have taken place between 2006 and 2010. For one adviser, Mr Christopher Baker, ASIC found compliance failures from 1 March 2005; for another, Mr Jade Zaicew, ASIC suggested that misleading and deceptive conduct took place between August 2011 to May 2012.²

8.7 A chronological summary of the CFPL matter is provided below in Table 8.1.

Table 8.1: Chronological summary of the CFPL matter

<i>Date</i>	<i>Event</i>
February 2007	ASIC commenced a surveillance project in relation to CFPL.
February 2008	ASIC notified CFPL of its concerns resulting from the findings of its surveillance project.
April 2008	CFPL implemented the Continuous Improvement Compliance Program in response to ASIC's concerns.
September 2008	Mr Don Nguyen, a CFPL financial adviser, was suspended from CFPL for compliance failures.
15 October 2008	Mr Nguyen returned to CFPL as a senior planner, in effect a promotion from his position prior to suspension.
30 October 2008	The CFPL whistleblowers faxed an anonymous report to ASIC (signed 'the three ferrets'), reporting Mr Nguyen's conduct and a 'high level' cover-up of that conduct at CFPL.
10 November 2008	The CFPL whistleblowers sent their first follow-up email to ASIC. In subsequent exchanges in November 2008 and February 2009, ASIC indicated that the issue was still 'under consideration'.

1 Mr Jeffrey Morris, *Submission 421* (and supplementary submissions). Mr Morris appeared before the committee in Canberra on 10 April 2014.

2 On Mr Baker see ASIC, 'ASIC accepts enforceable undertaking from former Commonwealth Financial Planning adviser', *Media Release*, no. 12-63AD, 4 April 2012; on Mr Zaicew see ASIC, 'ASIC bans former Commonwealth Financial Planning adviser from financial services and credit activities', *Media Release*, no. 14-068MR, 4 April 2014.

May 2009	Frustrated by ASIC's apparent inaction, the CFPL whistleblowers provided their information to a journalist from <i>Investor Daily</i> . Articles about the CFPL matter were published in <i>Investor Daily</i> on 18 May 2009, 25 May 2009 and 22 June 2009. The article on 25 May named Mr Nguyen.
2 June 2009	Mr Jeffrey Morris, one of the CFPL whistleblowers, met with CBA Group Security and reported his knowledge about Mr Nguyen and the management 'cover up'.
4 June 2009	The CFPL whistleblowers sent an anonymous email to CBA senior management (the 'Mallord' email), providing information on Mr Nguyen and the management 'cover up'.
29 June 2009	Mr Nguyen met with CFPL managers and was told to resign.
6 July 2009	Mr Nguyen formally resigned, citing ill health and denying any wrongdoing.
27 July 2009	The CBA filed a breach report with ASIC regarding Mr Nguyen.
24 February 2010	The CFPL whistleblowers made their first visit to ASIC. Mr Morris later wrote they 'marched in ASIC's door...to demand action'. ³
24 March 2010	ASIC issued notices to CFPL to hand over documents relating to Mr Nguyen. Mr Nguyen's client list and audit trail data was required immediately, and his client files were required by 9 April 2010.
24 March 2010	Project Hartnett, the CFPL's process for determining compensation payable to clients of Mr Nguyen and, later, clients of adviser Mr Anthony Awker, began.
19 July 2010	ASIC referred a brief on Mr Nguyen to a delegate for consideration of a banning action.
21 July 2010	CFPL gave ASIC a commitment to remediate former clients of Mr Nguyen.
3 November 2010	CFPL commenced a remediation project for former clients of Mr Nguyen.
3 March 2011	ASIC banned Mr Nguyen from providing financial services for seven years.
25 October 2011	CFPL entered into an enforceable undertaking with ASIC.
19 March 2012	Mr Nguyen's banning order was upheld by the Administrative Appeals Tribunal (AAT) on appeal.
25 October 2013	The independent expert engaged in relation to the enforceable undertaking, PricewaterhouseCoopers, provided ASIC with its final report.
26 November 2013	ASIC accepted the final report of the independent expert, formally bringing the enforceable undertaking between CFPL and ASIC to a close.

3 Mr Jeffrey Morris, *Submission 421*, p. 3.

The misconduct of individual CFPL financial advisers

8.8 In its first written submission on the CFPL matter, ASIC outlined the various aspects of the conduct of individual CFPL advisers that most concerned the regulator and were the subject of regulatory action. These were:

- failing to have a reasonable basis for advice;
- failing to provide Statements of Advice;
- making statements that were false or misleading in a material particular;
- making forecasts that were misleading, false or deceptive;
- failing to make reasonable inquiries before implementing advice;
- providing asset allocation advice far above that recommended for the client's risk profile; and
- failing to complete 'financial needs analysis' documentation.⁴

8.9 ASIC has taken enforcement action against eight individual CFPL advisers.⁵ Five of these advisers were banned by ASIC from providing financial services, and three removed themselves from the industry under an enforceable undertaking. The advisers banned from providing financial services were:

- Mr Don Nguyen—banned for seven years on 3 March 2011, with the decision upheld by the AAT on 19 March 2012;
- Mr Anthony Awkar—permanently banned on 19 April 2012;
- Ms Jane Duncan—banned for three years on 19 April 2012;
- Mr Rick Gillespie—permanently banned on 30 October 2012; and
- Mr Jade Zaicew—banned for seven years on 4 April 2014.

8.10 The advisers who removed themselves from the industry for a defined period under an enforceable undertaking were:

- Mr Simon Langton—two years, from 9 January 2012;
- Mr Christopher Baker—five years, from 3 April 2012; and
- Mr Joe Chan—two years, from 1 June 2012.

8.11 A large proportion of the evidence received by the committee in relation to the CFPL matter concerned one CFPL adviser in particular, Mr Don Nguyen. Mr Nguyen was an authorised representative of CFPL between 1 October 2003 until his resignation on 6 July 2009. His conduct was the subject of a series of CFPL

4 ASIC, *Submission 45*, p. 12.

5 ASIC's submission, which was provided to the committee in August 2013, indicated that ASIC had taken enforcement action against seven CFPL advisers. An eighth former CFPL adviser, Mr Jade Zaicew, was banned by ASIC for seven years on 4 April 2014.

whistleblower reports to ASIC, the first of which was made anonymously on 30 October 2008 after Mr Nguyen returned to CFPL on 15 October 2008 following a period of suspension for suspected compliance failures. As noted above, Mr Nguyen was banned by ASIC from providing financial services for seven years on 3 March 2011.⁶

CFPL's sales-based culture

8.12 While Mr Nguyen's conduct was particularly egregious, it should be noted that it is broadly agreed—by ASIC, the CBA and Mr Morris—that the problems at CFPL did not start or end with Mr Nguyen. Rather, the problems that ASIC identified at CFPL went beyond any single adviser or group of advisers; at the heart of these problems were systemic and organisation-wide failures within CFPL. In one of its submissions, ASIC reports that it had concerns about the:

...adequacy of CFPL's processes and controls, its dealing with misconduct by its representatives in a consistent manner, its capacity for early identification of irregularities in its advice process, the adequacy of controls over its clients' records and the consistent application of its complaints handling and internal dispute resolution processes.⁷

8.13 Mr Morris told the committee that Mr Nguyen and other non-compliant advisers would not have been able to operate as they had were it not for the 'incredibly loose, non-compliant culture' at CFPL. He described an aggressive sales-based culture wherein advisers pushed clients into inappropriately high-risk products both to earn bonuses and 'avoid getting the sack'.⁸

8.14 Maurice Blackburn provided a similar assessment based on the experiences of former CFPL clients that it represented in various civil actions. Its work on behalf of these clients revealed a toxic, 'boiler room'-like environment at CFPL, where advisers chasing commissions would systematically target clients in conservative positions, selling them into high-risk products that were inconsistent with their conservative risk profiles. Maurice Blackburn explained that in order to do this, the advisers needed to circumvent processes that would usually 'work by putting some downward pressure on those sorts of extreme sale practices'. These processes included the preparation and maintenance of Financial Needs Analysis and Statements of Advice documents.⁹

8.15 Maurice Blackburn explained to the committee that almost all of its 30 clients were retirees, who had originally been in conservative investments. These clients had been:

6 ASIC, 'Clients of Commonwealth Financial Planning compensated and ASIC bans former financial adviser for seven years', *Media Release*, no. 11-42AD, 10 March 2011.

7 ASIC, *Submission 45*, pp. 12–13.

8 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 45.

9 Mr John Berrill, Lawyer and Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 10 April 2014, p. 17.

...convinced by Mr Nguyen to transfer their moneys into much riskier and high-risk investments and they lost substantial moneys. The most stunning example we had was a couple in their mid-80s who had a \$5 million portfolio and lost \$2½ million of that. They were conservative investors and they were convinced by Mr Nguyen through a process that was completely flawed. It involved lots of cutting and pasting of documents, almost all of which were not completed by them or sighted by them.¹⁰

8.16 Interestingly, in a 2007–08 surveillance project carried out by ASIC in relation to CFPL (which is discussed in the next chapter), ASIC appeared to have identified the relationship between the amount of revenue a particular adviser was bringing in and the CFPL's tolerance of non-compliance on the part of that adviser. On 29 February 2008, ASIC wrote to the CFPL that it had found:

...that of the 38 representatives who were rated Critical [by the CBA's Risk Matrix system], CBA revoked the authorisation of only 12 representatives. We do not know why the remaining representatives continue to retain their authorisations. There appears to be some correlation between the amount of revenue generated by the representative and CBA not revoking an authorisation.¹¹

8.17 On 5 May 2014, the ABC's *Four Corners* program revealed documentation showing that in 2006 Mr Nguyen was, in fact, assessed by the CBA as being a 'Critical Risk' by its compliance team.¹² This information would appear consistent with the suggestion in ASIC's 2008 letter that CFPL/the CBA appeared willing to turn a blind eye to non-compliant advisers, so long as they were earning significant revenue for the company (as Mr Nguyen was).

8.18 In his submission, Mr Morris wrote that Mr Nguyen 'was widely known as "Dodgy Don" for years *before* the events of 2008–09'. That Mr Nguyen's 'dodgy' conduct was at once widely known and generally tolerated was, Mr Morris argued, indicative of a culture at CFPL/the CBA that was driven by 'sales and a metricated short term remuneration/bonus structure *at all levels* and where ethics and propriety at best take a back seat'.¹³ The abovementioned findings of ASIC's 2007–08 surveillance project, together with *Four Corners*' revelations about Mr Nguyen's 2006 risk assessment, appear to firmly support Mr Morris's assessment in this regard.

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

11 ASIC, letter to Commonwealth Financial Planning Limited and Financial Wisdom Limited, 29 February 2008, *Additional Information 7*, p. 4.

12 ABC, *Four Corners*, 'Banking Bad', 5 May 2014, and supporting document at www.abc.net.au/4corners/documents/2014/BANKING/Nguyen_CBA_Internal_Review_2006.pdf.

13 Mr Jeffrey Morris, *Submission 421*, p. 4 (italics in source).

Allegations of forgery

8.19 One of the most serious allegations made against the CBA during the inquiry was Mrs Jan Braund's claim that the bank had either ignored or sought to cover up Mr Nguyen's misuse of her signature to facilitate product-switches and other transactions that she had not authorised.

8.20 Mrs Braund provided the committee with evidence demonstrating that a number of these transactions took place when she and her husband were overseas, when it would have been physically impossible for her to sign the transaction authorisations. A number of these transactions were apparently made using a copy of Mrs Braund's signature. Mrs Braund emphasised that she had never given Mr Nguyen permission to use her signature, and tabled a statutory declaration to that effect during her appearance before the committee.¹⁴

8.21 According to Mrs Braund, the CBA had refused to take any action in relation to her allegations that Mr Nguyen used a photocopy of her signature to invest against her profile.¹⁵ The CBA responded that it had in fact investigated Mrs Braund's claims of forgery, and accepted that she could not have put several of the signatures on authorising documents. The bank nonetheless maintained that the findings of its investigation of Mrs Braund's claims were inconclusive, and did not warrant a report to the police:

We had our security team investigate those issues. Our security team is a team comprised, in many cases, of ex-police officers, so they do have experience in these types of issues. We were not able to conclusively find evidence that we felt would be sufficient to lead to a brief to go to the police. I would draw a distinction there, because in other cases of advisers we did actually find clear evidence of forgery and we did report the matter to police and the police looked into the issues. In this particular case with Mr Nguyen, we were not able to form a conclusive view that there had been forgery.¹⁶

8.22 The CBA told the committee that Mrs Braund's allegations regarding the misuse of her signature to facilitate an unauthorised 'switch back' of funds to managed investments in October 2008 was 'based on her misunderstanding of circumstances'. According to the CBA, Colonial First State 'failed to execute' Mrs Braund's October 2008 request that her investment be switched from managed investments into cash. Therefore, rather than a 'switch back' taking place using her forged signature, the CBA claims that the original switch to cash never actually took place:

[A]s Mrs Braund's original October 2008 instruction had not been executed, there was no 'switch back' transaction at all. Therefore no 'switch back'

14 Mrs Janice Braund, *Proof Committee Hansard*, 10 April 2014, p. 8.

15 Mrs Janice Braund, *Proof Committee Hansard*, 10 April 2014, p. 2.

16 Mr David Cohen, General Counsel and Group Executive, Group Corporate Affairs, Commonwealth Bank of Australia, *Proof Committee Hansard*, 10 April 2014, p. 23.

document came into existence and as a result Mrs Braund's signature was not used.¹⁷

8.23 The CBA also addressed Mrs Braund's allegations regarding the use of her photocopied signature on a number of switch and withdrawal requests from 2006 to 2008 at times when she was overseas. As to why the misuse of Mrs Braund's signature on these occasions did not result in a report to the police, the CBA again argued that it 'found insufficient evidence to support a report to the police'. Specifically, the CBA told the committee that Mrs Braund had indicated that Mr Nguyen had informed her that he had photocopied her signature (although the bank did not directly state that Mrs Braund had authorised Mr Nguyen to use that signature). CFPL's investigation subsequently found that four signatures on withdrawal and withdrawal/switch requests appeared to be identical, but that all withdrawals had been deposited directly into the Braunds' non-CBA bank account:

CFP believes it is likely that the Braunds requested these four withdrawals and the instructions were submitted by Mr Nguyen or someone else at CFP to execute these instructions on behalf of the Braunds while they were overseas and not able to sign the forms themselves. CFP believes this was done in order to facilitate access to their funds while the Braunds were overseas. CFP has been unable to verify its belief with Mrs Braund because she has refused to meet with CFP.

CFP also investigated whether there was any advantage obtained by any staff member in the execution of these instructions. No benefit (payment, credit, bonus) was earned or received by any CFP staff member in relation to a withdrawal or switch on the Braunds' accounts involved in these four transactions.¹⁸

8.24 In addition, the CBA noted that there were certain difficulties in Mrs Braund's case which weighed against making a report to police. They included: the uncertainty around whether Mr Nguyen had himself affixed Mrs Braund's signature to the transaction requests; no benefit was to be gained by Mr Nguyen or any other CFPL employee from affixing Mrs Braund's signature to these requests; and as Mr Nguyen was no longer employed at CFPL it was not possible to question him about the matter.¹⁹

8.25 While the CBA did not make a report to the police regarding Mrs Braund's case, the CBA told the committee that it had, in the past, referred advisers to the police where it had found evidence of forgery. However, in the Nguyen case and in the case of Mr Gillespie, CBA investigations had not revealed the hard evidence needed to make a report to the police. Still, the CBA assured the committee that it would not hesitate to report these advisers to the authorities if it acquired the necessary evidence:

17 CBA, answer to question on notice, 24 April 2014, pp. 2–3.

18 CBA, answer to question on notice, 24 April 2014, p. 3.

19 CBA, answer to question on notice, 24 April 2014, pp. 4–5.

We have nothing to hide about this. If there was forgery perpetrated then we have nothing to hide. There is no gain. It is a criminal offence. It should be reported to the police, as we have done in the past and we would be prepared to do so in the future.²⁰

8.26 ASIC's evidence to the committee would tend to support the CBA's claim that it was willing to report forgery to the police when it had evidence available to make such a report. Mr Greg Kirk told the committee that his understanding was that the CBA had:

...referred at least one matter to the police—not Mr Nguyen but a Mr [Anthony Awkar]—that involved forgery. Mr [Awkar] was banned by us, in part using the evidence about the forgery. I think the police determined not to take the case further because they did not think they could prove that to a criminal standard in a court.²¹

8.27 In addition to being critical of the CBA's apparent inaction in relation to her allegations of forgery, Mrs Braund also told the committee that ASIC had failed to take any action in relation to her claims.²² Discussing the forgery allegations, ASIC also told the committee that it would be unlikely to prepare a brief for the DPP in relation to signature fraud simply on the word of a complainant. Even if it were clear that a signature was not the signature of the complainant:

...proving who actually did put the signature on [a form] is another question and we need to prove that beyond reasonable doubt. So it is not as simple as taking it straight to the DPP or indeed taking it to the court.²³

Don Nguyen's promotion and allegations of a management 'cover up'

8.28 As noted above, Mr Nguyen was suspended from CFPL in September 2008 for suspected compliance failures. According to Mr Morris, Mr Nguyen's suspension had been prompted by a number of developments, namely that: Mr Nguyen had failed a file audit; client complaints were 'pouring in' as Mr Nguyen's poor advice was exposed by the onset of the global financial crisis; Mr Nguyen had been caught paying \$50 'backhanders' to Chatswood Branch staff to give him client details directly; and he had been caught 'red handed' by a compliance manager defrauding CommInsure 'by tendering \$5,000 invoices for financial advice that was never provided'.²⁴ An internal CFPL memo provided by Mr Morris suggests Mr Nguyen was suspended in August 2008 'as a result of an issue raised with respect to an advice fee for a client in receipt

20 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 38.

21 Mr Greg Kirk, Senior Executive Leader, Deposit Takers, Credit and Insurance Providers, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 75.

22 Mrs Janice Braund, *Proof Committee Hansard*, 10 April 2014, p. 2.

23 Mr Tim Mullaly, Senior Executive Leader, Financial Services Enforcement, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 83.

24 Mr Jeffrey Morris, *Submission 421*, p. 8.

of a trauma claim'.²⁵ This advice fee is evidently the CommInsure fraud referred to by Mr Morris.

8.29 Despite what would appear to have been overwhelming evidence of misconduct on Mr Nguyen's part, on 15 October 2008 Mr Nguyen not only returned to work at CFPL, but was promoted to the position of senior planner. Mr Morris and the other CFPL whistleblowers alleged in their anonymous fax to ASIC on 30 October 2008 that Mr Nguyen's promotion was part of a management conspiracy to avoid paying client compensation. The amounts involved, the whistleblowers suggested, ran into the tens of millions—'enough to cost all the managers involved their jobs'. The whistleblowers explained that by promoting Mr Nguyen, CFPL management was able to ensure he had access to his clients, which was necessary to allow him 'to dupe and discourage clients from pursuing their complaints'. The whistleblowers further alleged that CFPL management realised that if they sacked Mr Nguyen, this would place the CFPL in a 'very poor position' to defend compensation claims by his clients. Conversely, promoting Mr Nguyen would 'tend to strengthen their position'.²⁶

8.30 Mr Morris explained that, following Mr Nguyen's suspension from CFPL in September 2008, he personally witnessed the workings of a CFPL management conspiracy to cover up Mr Nguyen's wrongdoing. His version of events, if accurate, would indicate a coordinated and systematic effort by CFPL/the CBA to mislead Mr Nguyen's clients and discourage them from pursuing compensation claims, and is worth quoting at length:

Contrary to what was said earlier [by CBA representatives appearing before the committee on 10 April 2014], [CFPL management] knew Nguyen had done all the things he was accused of; he was caught red-handed. They announced he had been suspended for fraud and he would not be coming back. The trouble is that, with the GFC going on, they needed a planner to hose down Nguyen's clients who were complaining. They offered his client book to another planner. They gave him his phone. After a week of this, of all the client complaints ringing up, and being told by the complaints people that they were not going to do anything for them, he threw the phone back and he said he would not have anything to do with it.

So they brought Nguyen back and reinstated him and promoted him so that he could fob off the clients and discourage them from making complaints about what had happened. At the same time, they had done a file review and they had found photocopied risk profiles in his fact files. The risk profile is probably the most critical thing a planner does. Nguyen just gave everybody more or less the same risk profile. He got to the point where he just photocopied them. They found this in 2008, and he should have been dismissed at that point. But they brought him back for two reasons. One

25 A copy of this memo, dated 25 November 2009, is attached to *Submission 421.5*. Elsewhere, the CBA has stated that Mr Nguyen was suspended in September (rather than August) 2008.

26 Mr Jeffrey Morris, *Submission 421*, pp. 11–12.

was to hose down the client complaints. The other was to sanitise his files. They gave him a second assistant to help sanitise the files. I saw him there, day after day, with liquid paper going through changing things in the fact files.²⁷

8.31 The CFPL whistleblowers alleged that while the compliance team at CFPL had recommended that Mr Nguyen be sacked for his misconduct, the team had evidently been warned to 'back off' by CFPL/CBA management 'on a sufficiently senior level'. The whistleblowers further alleged that CFPL's internal complaints handling area:

...also appears to have been got at (again at a senior level, probably above Commonwealth FP) and agreed to deal with complaints about Don Nguyen on a purely individual basis, just looking at what is in front of them for each case and ignoring the wider systemic issues of which they are well aware.²⁸

8.32 On 5 May 2014, *Four Corners* broadcast a handwritten document by a CFPL compliance officer on 24 November 2008 that read in part: 'If pulled Don out, huge compensation issue for CFP—Better to work for client's best interests to resolve all issues'.²⁹ This document, which Mr Morris has since provided to the committee, would appear to support the whistleblowers' claims that Mr Nguyen was promoted with a view to minimising any compensation costs for the CBA.³⁰

8.33 While the CBA conceded that the decision to promote Mr Nguyen was wrong, it also suggested that the reasoning at the time was that he would be subject to closer supervision in his new role:

In hindsight, it is very clear to us that he should not have been promoted. The reasoning at the time seems to have been that in this more senior position he would actually see fewer clients. He would supervise but he would actually physically see fewer clients. He was also relocated to Chatswood, where he would be under the closer supervision of his manager. Clearly, that was the wrong decision in view of the investigative reports and as events unfolded, but it was the decision taken at the time. Furthermore, I think at the time the full extent of his misconduct was clearly not known; but, with the benefit of hindsight, it was the wrong decision.³¹

8.34 The CBA made no attempt to defend the decision to promote Mr Nguyen. It should nonetheless be noted that if CFPL management genuinely believed that Mr Nguyen would see fewer clients as a senior planner, this evidently did not work.

27 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, p. 47.

28 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, pp. 9–11.

29 ABC, *Four Corners*, 'Banking Bad', 5 May 2014, www.abc.net.au/4corners/stories/2014/05/05/3995954.htm.

30 A copy of the compliance note, dated 24 November 2008, is attached to *Submission 421.6*.

31 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 24.

Ms Swan, for instance, reports that her parents met with Mr Nguyen twice in November 2008.³²

8.35 A report by Adele Ferguson and Chris Vedalgo in the Fairfax press suggested that upon Mr Nguyen's return from suspension in late 2008 he was placed under supervision and his Statements of Advice were vetted before being provided to clients. Ms Ferguson and Mr Vedalgo report that on 22 December 2009, Mr Nguyen was notified that his advice to clients would no longer need to be vetted before being sent to clients.³³ This report, if accurate, would suggest that not only did Mr Nguyen remain in direct contact with clients as a senior planner, but also that any heightened supervision to which he was subject following his return from suspension was temporary.

8.36 Asked why the CBA did not make a breach report to ASIC when Mr Nguyen was first suspended in September 2008, the CBA told the committee that the findings from the investigation at the time were 'inconclusive'. While acknowledging 'the decisions made around' the investigation of Mr Nguyen in September 2008 and his subsequent return to work were 'the wrong decisions', the CBA did not directly concede that it should have made a breach report to ASIC at the time.³⁴

CBA's actions between Mr Nguyen's promotion and his forced resignation

8.37 According to Mr Morris, between Mr Nguyen's return from suspension in October 2008 and his forced resignation in mid-2009, Mr Nguyen set about sanitising client files 'literally liquid paper bottle in hand, with a little help from his two servicing planners'.³⁵ At the same time, Mr Nguyen continued to mislead and deceive clients. This included an episode in late 2008 where Mr Nguyen missed the team's Christmas party because:

...he and his two servicing planners were busy trying to stitch up a 93 year old with \$1.6 million to invest for a \$32,000 [2% flat] advice fee. It goes without saying that no financial planner with a shred of decency to them would have contemplated acting this way.³⁶

8.38 Frustrated by what they regarded as a CFPL management cover-up of Mr Nguyen's activities (and, as discussed in the next chapter, by ASIC's failure to act on their information) in May 2009 the CFPL whistleblowers provided their information to an *Investor Daily* journalist. The whistleblowers reasoned that:

32 Ms Marilyn Swan, *Submission 395*, pp. 7–8,

33 Adele Ferguson and Chris Vedalgo, 'Bank tried to hide documents from victims of banned planner', *Sydney Morning Herald*, 14 June 2013, p. 1.

34 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, pp. 23–24.

35 Mr Jeffrey Morris, *Submission 421*, p. 15.

36 Mr Jeffrey Morris, *Submission 421*, p. 14.

...going public would force CBA to act and go through the farce of a 'voluntary disclosure' to ASIC of what they had long known. That hot potato dumped in their lap should in turn force ASIC [to] act.³⁷

8.39 Articles based on the whistleblowers' information were published by *Investor Daily* on 18 May 2009, 25 May 2009 and 22 June 2009. The article on 25 May named Mr Nguyen. Shortly after the publication of the 25 May article, Mr Nguyen was suspended from work. Mr Morris, meanwhile, reported his allegations regarding a CFPL management cover-up of Mr Nguyen's conduct to CBA Group Security on 2 June 2009. On 4 June 2009, the CFPL whistleblowers also sent an anonymous email to CBA senior management (subsequently referred to as the 'Mallord' email, for the name that appeared in the sender's address) in an attempt to ensure the bank had no reason not to act.³⁸ Mr Morris suggests that the whistleblowers' actions were 'the direct cause of Nguyen's forced "resignation" on 2 July 2009 and CBA's filing of a Breach Report with ASIC regarding Nguyen on 27 July 2009'.³⁹

8.40 Mr Nguyen resigned from CFPL on 6 July 2009, while still on suspension. In his letter of resignation, he denied any wrongdoing and cited ill health as the reason for resigning.⁴⁰ Mr Morris alleged that Mr Nguyen was allowed to resign and receive payments from a generous CommInsure income protection policy (worth 75 per cent of his former salary) as a pay-off for not revealing what CFPL management had encouraged him to do since his first suspension.⁴¹

8.41 Asked to what extent the CFPL breach report to ASIC regarding Mr Nguyen was prompted by the *Investor Daily* articles, the CBA told the committee:

In reviewing the situation at that time, that was one contributing factor but not the sole one. There was already an investigation taking place and the information that actually came out allowed us to have some more information to follow up. So it was not the sole issue but it led to a combination of pieces of information.⁴²

8.42 According to ASIC's submission, when CFPL lodged its breach report regarding Mr Nguyen it indicated that it had conducted a review of 16 of Mr Nguyen's client files after receiving 'a couple of major complaints from clients'. The breach report, it implied, was prompted by this file review.⁴³ The CBA did not refer to the

37 Mr Jeffrey Morris, *Submission 421*, p. 15.

38 Mr Jeffrey Morris, *Submission 421*, pp. 17–18.

39 Mr Jeffrey Morris, *Submission 421*, p. 21 (italics in source).

40 A copy of Mr Nguyen's letter of resignation is attached to *Submission 421.6*.

41 Mr Jeffrey Morris, *Submission 421*, p. 25.

42 Ms Marianne Perkovic, Executive General Manager, Wealth Management Advice, CBA, *Proof Committee Hansard*, 10 April 2014, p. 22.

43 ASIC, *Submission 45*, p. 9.

internal disclosures of the whistleblowers, or the publication of the *Investor Daily* articles, as factors contributing to the decision to prepare the breach report.⁴⁴

CBA's characterisation of misconduct at CFPL as 'inappropriate advice'

8.43 In its written submission, the CBA acknowledged that 'in the past a small number of its advisers, none of whom remain with CFPL, provided inappropriate advice to some customers'.⁴⁵

8.44 The CBA was challenged to defend its characterisation of the misconduct at CFPL as 'inappropriate advice' during its appearance before the committee. The CBA's group general counsel, Mr David Cohen, responded as follows:

'Inappropriate' is the word we used because it covers the fact that in some cases advice was just not suitable for the client in question. 'Inappropriate' covers the fact that some of the behaviours, which I think you are alluding to, from some of our people just were not the appropriate behaviours, were not the behaviours that we expect and enforce today. As I said, the people, the structures and the culture just were not the right people, structures and cultures at the time, and we should have done better.⁴⁶

8.45 The CBA was further pressed on this issue, and asked why it had used the term 'inappropriate advice' in its submission when the chairman of the CBA, Mr David Turner, told shareholders at the CBA's 2013 annual general meeting that what had happened was 'shocking'. Mr Turner was further quoted as saying:

There's no excuse for giving bad advice, absolutely no excuse. We had the wrong people giving the advice and the business was structured wrongly, and remunerated wrongly, and the culture was wrong.⁴⁷

8.46 At the committee's public hearing, the CBA conceded that 'some of the workings of [CFPL] were shocking'.⁴⁸ It added that its use of the term 'inappropriate advice' did not mean that the CBA believed:

...the circumstances that occurred should be treated lightly, and we certainly do not treat it lightly. We had taken the view—a very serious view—that we needed to substantially improve the business because it was not run the way it should have been run. There is no doubt about that. I do not wish to downplay for a second the fact that the impact on customers was severe... We do not treat lightly the fact that we did have poor systems,

44 A copy of the breach report is attached to *Submission 421.5*.

45 CBA, *Submission 261*, p. 3.

46 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 20.

47 *Proof Committee Hansard*, 10 April 2014, p. 21. Mr Turner is quoted speaking at the CBA annual general meeting in Clancy Yeates, 'Rogue planner behaviour "shocking": CBA', *Sydney Morning Herald*, 8 November 2013.

48 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 21.

we did not have the right people and we did not have the right culture, as the chairman has said.⁴⁹

Pain and suffering resulting from the CFPL case

8.47 As noted above, despite characterising the misconduct at CFPL as 'inappropriate advice', the CBA acknowledged that the 'impact on [CFPL clients] was severe'. The evidence provided by a number of former CFPL clients drove home the extent of the harm caused, which went far beyond financial detriment. These clients spoke of being bullied by CFPL/the CBA, and described the stress and uncertainty that they and their families were subject to as a result of misconduct at CFPL.

8.48 The personal toll that this misconduct had on clients was made clear in a submission from Mr and Mrs Mervyn and Robyn Blanch. Mrs Blanch was a client of Mr Nguyen, and between May 2007 and March 2009, Mrs Blanch's \$260,000 investment in an Allocation Pension portfolio prepared by Mr Nguyen was reduced to \$92,000.⁵⁰ In addition to outlining the financial losses they suffered, Mr and Mrs Blanch emphasised the distress they experienced in dealing with Mr Nguyen and other CFPL and CBA staff:

Throughout our association with CBA/CFPL's staff and Nguyen we have been subjected to deliberate acts of fraud and deceptive and misleading conduct. We have been ignored, lied to, stonewalled, fobbed off, bullied, and sent fraudulent documentation by CFPL staff and CBA's senior management within Customer Relations. They actively tried to cover up Nguyen's activities, denying any knowledge of or liability for his conduct.⁵¹

8.49 In her appearance before the committee, Mrs Braund relayed how the investment she and her husband made with CFPL coincided with the onset of Mr Braund's dementia. Mrs Braund told the committee that her husband had always taken care of their finances; as Mr Braund's dementia worsened, she relied on Mr Nguyen to act with honesty and integrity. However, Mr Nguyen failed to carry out her request that their investments be moved to cash in early 2007 and used a copy of Mrs Braund's signature to move the Braunds' money into high risk investments without her approval. Ultimately, this betrayal of trust meant that at the same time as Mrs Braund was caring for her dying husband, she was also forced to deal with a massive decline in the value of her investment and a bank that refused to acknowledge any wrongdoing or provide meaningful compensation:

People's lives have been shattered. I have been scorned...

49 Mr David Cohen, CBA, *Proof Committee Hansard*, 10 April 2014, p. 21.

50 In addition to the submission from Mr and Mrs Blanch, their experience is outlined in a submission from their daughter, Ms Marilyn Swan, *Submission 395*. Ms Swan also gave evidence at a public hearing on 10 April 2014.

51 Mr and Mrs Merv and Robyn Blanch, *Submission 300*, p. 1.

CBA has bullied me and they gave me this incredible feeling that, while I was dealing with Alan's dying, I still had to try to deal with them.⁵²

8.50 Mr Frazer McLennan, writing on behalf of his wife Gloria, who was a client of CFPL adviser Mr Chris Baker, described the effect on his wife of watching as her investment (which was placed in an aggressive portfolio without her knowledge) rapidly declined in value:

[M]uch of Gloria's anguish is caused by her deep down to the bone sense of fairness. She endeavours to make everything fair for all in any situation, and sometimes to her detriment. In this case her sense of fairness is being challenged, and it's not fair what Commonwealth Financial Planning is doing, and it does her head in, which does 'us' harm as well. They are being corporate bullies trying to wear down individuals who they have done wrong.⁵³

Committee view

8.51 The committee notes that in a limited way the CBA has acknowledged that there were problems in its financial advice business, and expressed regret that some of its customers were affected by 'inappropriate advice' received from a 'small number' of CFPL advisers. The CBA has also acknowledged that it mishandled the Nguyen matter, at least with respect to the CFPL investigation of his compliance failures in 2008 and his subsequent return to CFPL in October 2008 after a short period of suspension.

8.52 These modest acknowledgements aside, the committee believes that the CBA's characterisation of the misconduct at CFPL as 'inappropriate advice' provided by 'a small number' of CFPL advisers, deliberately and grossly understates the extent of the wrongdoing within CFPL. The committee believes the phrase 'inappropriate advice' comprehensively fails to capture the deceptive and misleading conduct of CFPL financial advisers. Indeed, the committee heard compelling evidence that client signatures were forged and/or misused by CFPL financial advisers, and while the committee reserves judgement on whether this activity would provide a basis for criminal action, it suggests that to characterise such activity as 'inappropriate' is, in itself, entirely inappropriate. Further, the phrase 'inappropriate advice' does not capture the systemic failures in the CFPL's business operations, including the ineffective compliance regime and toxic sales-based culture fostered by flawed remuneration arrangements.

8.53 The committee also notes that the phrase 'inappropriate advice' stands in stark contrast to the admission by the chairman of the CBA, Mr David Turner, that what happened at CFPL was 'shocking', and that there was 'absolutely no excuse' for the way the business was operated (see Box 8.1).

52 Mrs Janice Braund, *Proof Committee Hansard*, 10 April 2014, pp. 2–3.

53 Mr Frazer McLennan, *Submission 127*, p. 2.

Box 8.1: 'Inappropriate advice' or 'shocking' conduct?

'CFP acknowledges that in the past a small number of its Advisers, none of whom remain with CFP, provided inappropriate advice to some customers'.

Source: Commonwealth Bank of Australia Group, *Submission 261*, p. 4.
The submission was provided to the committee on 11 November 2013.

'What we did was shocking. There's no excuse for giving bad advice, absolutely no excuse. We had the wrong people giving the wrong advice and the business was structured wrongly, and remunerated wrongly, and the culture was wrong'.

Source: Mr David Turner, chairman of the CBA, speaking at the CBA's 2013 AGM on 8 November 2013, as quoted in Clancy Yeates, 'Rogue planner behaviour "shocking": CBA', *Sydney Morning Herald*, 8 November 2013, www.smh.com.au.

8.54 Moreover, the committee remains unconvinced by the CBA's explanation of the circumstances surrounding Mr Nguyen's promotion in October 2008 to the position of senior planner. While the CBA acknowledged the decision to promote Mr Nguyen was wrong, it explained that the reasoning at the time was that in his new role Mr Nguyen would be subject to higher levels of supervision. The CBA's explanation for Mr Nguyen's promotion is nonsense. Beyond the fact that Mr Nguyen's poor practices were already well established by 2008 (indeed, he had been rated a 'critical risk' by the CBA in 2006), there is little evidence that upon his return to CFPL in October 2008 Mr Nguyen was placed under heightened supervision for a prolonged period. The committee believes Mr Morris's explanation for Mr Nguyen's promotion is far more convincing: that is, CFPL management decided it would be easier to 'hose down' client complaints, and generally minimise the CBA's exposure to compensation claims, if Mr Nguyen remained a CFPL adviser.

