

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

2016 - 2017

Division/Agency: Australian Securities and Investment Commission

Question No: 163

Topic: ASIC case against Westpac / BT for superannuation sales campaigns

Reference: Written

Senator: Ketter, Chris

Question:

1. Can you provide the Committee with an update of the action that ASIC is taking against Westpac and BT Funds Management for contraventions including failures of the best interest duty?

2. Is ASIC concerned that there are other funds engaging in similar practices?

3. What actions is ASIC taking in relation to these?

4. As you may be aware, the Retail Remuneration Review issues paper released by Stephen Sedgwick on 17 January 2017

“tentatively identified some practices of some banks that have high risk of incentivising poor selling practices leading to poor customer outcomes, which those banks should consider changing. These include practices that deliver significantly increased incentive payments as certain sales thresholds are achieved (described below as accelerator-type payments).

Similarly, arrangements deserve careful scrutiny that provide incentives based on cross sales such as add-on insurance products, or that deny access to incentives otherwise available unless sales or cross-sales targets are also met.” (page 2)

Is ASIC concerned that the banks could be effectively circumventing FOFA protections and the ban on conflicted remuneration by using so called balanced scorecard bonuses and general advice?

Answer:

Adopting the numbering in the QON, ASIC responds as follows:

1. ASIC commenced proceedings in the Federal Court of Australia against Westpac subsidiaries Westpac Securities Administration Limited (**WSAL**) and BT Funds Management Limited (**BTFM**) on 22 December 2016.

In the proceeding, ASIC alleges that WSAL and BTFM have been providing personal financial product advice to customers over the phone, specifically recommending that customers roll out of their other superannuation funds into their Westpac-related superannuation account. WSAL and BTFM are not permitted to provide personal financial product advice under their Australian financial services licenses.

ASIC alleges a number of contraventions of the *Corporations Act 2001* (Cth) in the proceeding including failure to act in the best interest of the customer (ss961B and 961K) and failure to ensure that WSAL and BTFM did all things necessary to ensure that the

financial services covered by the licenses were provided efficiently, honestly and fairly (s912A(1)(a)).

WSAL and BTFM have filed a defence in which they dispute ASIC's allegations and essentially contend that the licensees have been providing general financial product advice.

WSAL and BTFM have been ordered to submit their evidence in the case by 26 May 2017. The matter is before the Court again for directions on 26 July 2017. ASIC is hopeful the matter will be listed for trial in the second half of this calendar year.

2. ASIC has a number of investigations underway considering whether personal advice was given under a general advice model.
3. The investigations referred to in the response to question 2 are continuing and no decision has been made as to what, if any, action ASIC might take.
4. The conflicted remuneration provisions apply to both general and personal advice.

The conflicted remuneration provisions do not prohibit employees who provide advice to retail clients from receiving performance benefits. However as noted in paragraph 2.20 of the 2012 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, there is a need to strike a balance between rewarding performance and avoiding inappropriate influence over advice. Some employers determine the amount of any performance benefit given to an employee based on a number of differently weighted criteria. This approach is commonly referred to as a 'balanced scorecard'. Often one or more of the criteria in the balanced scorecard relate to the volume of financial products acquired by clients.

ASIC has provided guidance in Regulatory Guide 246 Conflicted remuneration at Table 3 on what licensees should consider when evaluating performance benefits. Factors include:

- the criteria that must be met for an employee to be able to receive a performance benefit and whether satisfying such criteria could reasonable be expected to influence the advice
- the behaviour being encouraged through the performance benefit
- the weighting of the benefit compared to an employee's overall remuneration
- how direct is the link between the performance benefit and the value or number of financial products recommended or acquired by clients based on the advice provided by an employee
- how directly involved in the advice giving process is the recipient of the benefit
- whether the benefit is given in an environment that encourages the provision of good quality advice that is in the client's interests

<http://download.asic.gov.au/media/1247141/rg246.pdf>

Where we have evidence of licensees rewarding employees using volume based criteria in breach of the conflicted remuneration provisions, we will take appropriate regulatory action.