

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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Question: BET 179-294

Topic: Commonwealth Financial Planning Limited (CFP) and Commonwealth Bank of Australia (CBA)

Hansard Page: Written, 14 June 2013

Senator WILLIAMS asked:

179. Peter Kell of ASIC is quoted in the SMH article of 1 June 2013 referring to "...an enforceable undertaking that completely changed the way CFP does business..." My question is: why was this necessary.
- a. How could one of the major players in this industry, which ASIC is responsible for supervising, have been in such dire need of a "complete change" in the way it does business?
- b. In lauding its apparent accomplishment with the enforceable undertaking is not ASIC in fact indicting itself for having been asleep at the wheel?
180. Does ASIC believe that on the basis of information published by Fairfax investigations that CBA may not have fully cooperated with the regulator and selective in the information provided.
181. Would ASIC not have remained blissfully unaware of the true situation but for the action of the whistleblowers?
182. Is ASIC concerned that the information that has been provided to Fairfax and others (rather than ASIC) demonstrates that many persons have lost faith in ASIC doing anything or protecting them or their identity?
183. The whistleblowers and others seem to be alleging that ASIC has gone easy on CFP. Would ASIC have a conflict of interest in exposing the full extent of any wrongdoings at a major industry player as that in effect indicts ASIC as a regulator that failed to do its job?
184. I am particularly concerned about what happens with persons that draw matters to ASIC's attention commonly known as "whistle-blowers". What action does ASIC take to protect same people and utilise the information if it is considered credible?
185. I find it rather remarkable that no action was taken to follow up on the claim of documents being destroyed contemporaneously. Is it a common occurrence for ASIC to get a fax from a whistle-blower within a financial institution, on a fax letterhead and address of that institution, claiming records have been destroyed and failed to act?

Action of ASIC to March 2010

186. Why did ASIC take no action to seize the CFP files for 16 months after the whistleblowers fax of 30 October 2008 warned of the need for urgency as the files were being "cleaned up"?
187. Does ASIC accept that it is possible, in view of this warning from a subsequently vindicated source and this delay, that evidence may have been destroyed?

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188. If so, does ASIC accept that it is possible that this evidence may have included evidence of the forged signatures alleged by Mrs Braund?
189. Why did ASIC take no action to seize the files until after the whistleblowers requested a personal meeting with ASIC in February 2010?
190. What is ASIC's history of involvement in this matter from 30 October 2008 until March 2010 including who had carriage of the matter, what they did?
191. Did a representative of ASIC admit on 19 April 2012 that if the whistleblowers hadn't physically come in to ASIC in February 2010, nothing would ever have happened with their report?
192. What was ASIC's reaction to articles in various industry magazines such as Investor Daily in mid-2009 querying why ASIC had not followed up the complaint?
193. When ASIC did commence the investigation, did ASIC interview any of the persons that had been identified to them in the whistleblowers fax as key people to speak to?
 - a. If not, why not?
194. At the meeting with whistleblowers at ASIC in February 2010, did the whistleblowers hand over the documents "Diary Note 15 October 2008" and the "Mallord" email of 4 June 2009 sent to CBA senior management?
 - a. In light of those documents, why did ASIC publicly praise CBA's "Cooperative and Consultative" approach in relation to this matter?

Action from 2010 Onwards

195. Why did ASIC not investigate allegations of forged signatures before imposing the banning order on Nguyen or before the AAT Hearing?
196. On 21 June 2010 did someone from ASIC ring Mrs Braund to say they had enough evidence against Mr Nguyen?
197. Does ASIC accept that the evidence provided by Financial Resolutions Australia (FRA) of forged signatures on behalf of Mrs Braund is credible? If not why not?
198. If ASIC accepted this evidence (which I presume they did not), would this evidence of forgery have led to the imposition of a longer banning order on Nguyen?
199. Did ASIC seek to obtain a copy of the Group Security Report on this matter prepared in mid-2009 and earlier Group Security Reports?
200. Please provide, in relation to the 7 banned advisers at CFP:
 - a. Dates they left employment of CFP/CBA
 - b. Dates of any breach reports filed by CFP/CBA
 - c. Whether ASIC action in each case was triggered by a report from CFP/CBA, a report from whistleblowers or by investigative action by ASIC
 - d. Please advise, in relation to the client files of Nguyen:
 - e. Precise date of meeting with whistleblowers at ASIC in February 2010
 - f. Date notice served on CFP to hand over files
 - g. Notice period given to CFP to hand over these files.

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- h. Date files secured by ASIC
 - i. Date files handed back to CFP
 - j. Were any files copied or retained? If so, how many?
 - k. Number of files handed over.
 - l. Number of clients
 - m. Number of missing files
 - n. Number of files examined by ASIC
 - o. Number of files in which deficiencies were identified by CFP
 - p. Number of files in which deficiencies were separately identified by ASIC
201. Did ASIC examine client signatures in files?
202. Were signatures original in all cases? If not, how many files contained photocopied documents rather than originals?
203. Were client signatures missing from documents in client files? If so in how many documents and in how many files?
204. Did ASIC obtain copies of investment forms and switching forms lodged by Nguyen with Colonial First State to verify original signatures?
205. Did ASIC carry out any forensic examination of client signatures?
206. Does ASIC investigate thoroughly evidence it does not uncover itself?
207. Why did ASIC officers describe as “conspiracy theories” the evidence, statements and materials provided to them over the last two years by representatives of victims?
208. On 13 April 2012 the Member for Shortland wrote to ASIC asking for copies of authorities used to switch the investments of Mrs Braund (as Mrs Braund believed that her signature has been fraudulently attached to these documents). Why were these documents not provided?
209. What communications there were between ASIC and CFP and CBA management from Tuesday 28 May 2013 and 4 June 2013. What ASIC officers had contact with CFP and what was the nature of that contact and approximately how many hours were spent on this matter by respective ASIC officers in terms of contact with CFP?
210. ASIC advises that they are trying to resolve outstanding cases. What actions have they taken in this regard? What have they done about settlement since the article in the Herald of 1 June 2013?
211. Has ASIC been made aware of or investigated claims that employees of Commonwealth Financial Planning Limited were involved in “sanitising” of affected clients’ files?
212. Please provide full details of ASIC’s enquiries in this respect.
213. Was ASIC aware of allegations of “internal fraud” perpetrated by Mr Nguyen on CommInsure by falsely invoicing advice fees?
214. Is internal fraud by a financial adviser a concern to ASIC as to whether the adviser is “fit and proper” and whether the Licensee should report it?

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215. Why have independent consultants such as FRA identified problems with documents that have not been identified by ASIC and the Independent Expert?
216. It has been reported by Fairfax Media that CBA “provided all documentation requested by authorities in their investigation.” Is this correct?
- a. If “yes”, what did ASIC request?
 - b. If it is correct, why did ASIC not request documents requested by victims (clients) of Mr Nguyen including switching instructions, copies of files and original documents?
 - c. If not, why not?

Clean-up of Industry

217. What action does ASIC propose to take in respect of CBA managers involved, who in some cases may have left CBA but remain in the industry, some in very senior positions?
218. I note CFP agreed to an Enforceable Undertaking on 25 October 2011. This was to result in a change of compliance culture. What were these changes in compliance, how are they measured, and how do they correct the problems of the Don Nguyen matter?
219. With regard the major changes to the industry as a result of the Enforceable Undertaking can you please confirm:
- a. Is the group executive responsible from the financial planning division in or around 2008 and 2009 (who was copied into one of the emails from the whistleblower) still employed by CBA? The group executive was a role that reports directly to the managing director.
 - b. Are the general managers of the CFP business (I can provide names if required) at the time of Mr Nguyen and the subsequent successor still employed in senior management roles in the financial services industry?
220. How is a clear message sent to the industry when persons at a lower level are banned but the general managers are still running significant financial services businesses?

Independent Expert

221. Was there a brief for the Independent Expert as to his role and functions?
- a. If “yes”, should this be made available to any of the parties seeking compensation or their advisers?
 - b. If not, why not?
 - c. Who wrote the brief for the Independent Expert?
 - d. What was ASIC’s role in preparing the brief?
222. According to the language of the ASIC press release used to announce the CBA compensation scheme, it is understood that CBA will deal with an Independent Adviser if they satisfy certain criteria (in which ASIC appears disinterested), and pay their costs up to \$5,000. It is claimed that CBA refuses to deal with some advisers. Is ASIC aware of this?

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223. Contrary to the written material, an ASIC officer has advised – and CBA has demonstrated – that CBA can choose not to deal with a particular adviser. Can you please confirm this is the case?
224. I note that you have advised that the Independent Expert undertook a sampling of offers to identify that the compensation was fair. I also note that FRA has written to ASIC identifying some of the concerns with the compensation program and individual files that they have reviewed. Did your Independent Expert's sampling of some of the compensation offers identify the same issues that FRA has, or was their review much more restricted so they could not identify these matters?
225. How did the Independent Expert review offers in order to ascertain the fairness of the CFP offers without speaking to the clients? If they did speak to clients, can you advise how many persons the Independent Expert talked to?
226. Could you please advise what particular expertise did the Independent Expert have?
- a. Were they Qualified Financial Planners?
 - b. Had they had experience as advisers to what were mainly retirees with limited financial experience in many cases?
227. How many compensation offers have been scrutinised by the Independent Expert? Did they review any of the situations where compensation was increased substantially?
228. Has the Independent Expert provided reports to ASIC of his or her activities and if so can you please provide a summary of those reports?
229. Is ASIC or the Independent Expert concerned that a large percentage of the advice provided by CFP is "Restricted Scope Advice"?
230. Has the Independent Expert reviewed the process for dealing with persons where English is a second language (ESL) or the health and age of the client?

Queries re Operation of the Compensation Program

231. In relation to the ASIC sponsored compensation scheme for the victims operated by Commonwealth Financial Planning, why did ASIC not inform, or insist that Commonwealth Financial Planning inform, the victims fully of the circumstances that led to the compensation scheme?
232. Why did ASIC not require the scheme to provide for all shortcomings in the financial advice provided to victims other than just basic risk profiling and asset selection errors?
233. Why did ASIC allow the quantum of compensation to be determined solely by Commonwealth Financial Planning with no right of review for victims or opportunity for arbitration by a third party built into the process?
234. Why has ASIC allowed the wearing down tactics employed by Commonwealth Financial Planning towards elderly and vulnerable victims, some of whom still remain to be compensated nearly three years after the scheme was set up and over five years since their losses?

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235. My view is that there should be allowance for pain and suffering in the compensation calculation. The case of Mrs Braund and her husband, suffering with vascular dementia and the indifference of CFP and the apparent inertia of ASIC, is simply shocking. Did ASIC consider the need for some sort of compensation for the pain and suffering?
- If not, why not?
236. Do you agree the brief for the compensation scheme is important?
- a. If the brief was limited, then could the value of the compensation scheme would be somewhat restricted?
237. ASIC has identified that the client compensation scheme was never meant to be definitive. Could you please show me where this qualification to the compensation scheme was identified to the clients of Mr Nguyen?
238. I also understand that some persons who had compensation in their own name and that of a super fund related to them, were not able to accept one offer without both being accepted. If this charge is sustained, it is a clear instance of CFP exerting undue pressure on the victims of this affair. What was ASIC's view in relation to this allegation?
239. My concern in this is that information has been provided to ASIC now for the best part of five years, and the investigation seems to be continuing with no end timeframe. As time goes on it is harder to prove these matters. I note in particular that over this time victims of Mr Nguyen and the cover-up have died (such as Mr Braund) or are in the process of dying with serious illnesses. They are also suffering other symptoms of old age including memory loss. I would appreciate if you could advise how you are taking these factors into account in terms of the timelines of compensation?
240. Were the Deceased Estates of Nguyen clients approached re compensation?
241. What confidence does ASIC have that all clients of Mr Nguyen have been compensated?
- a. The AAT Decision refers to 1,300 clients, CBA says 900, other figures say 200-odd are compensated. What is the number that should be compensated and how is this determined?
242. Mrs Braund's representatives requested switching instructions of Mrs Jan Braund, and asked why the documents cannot be acquired by ASIC. I note Information Sheet 145, as well as the ASIC Act 2001 itself, would appear to provide the basis for obtaining those documents. Why did ASIC not request these documents?
243. How it is possible under the compensation scheme that CBA may refuse to hand over documents at its discretion. Does ASIC believe this may result in the possibility that they will only provide documents that assist their position? This would, in my opinion, impact the fairness of the process particularly in light of the unequal bargaining position of the parties.
244. Could you please advise when CFP claims they became aware of Mr Nguyen's actions?
- a. If they had been occurring for a long time, why did the compensation program take so long to be enacted?
- b. It seems they were taken "kicking and screaming" to fix up what they had knowingly avoided for years. It would seem to me that in these circumstances you would want

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very stringent supervision of the “voluntary” compensation scheme. Is this a fair comment?

245. Although the compensation scheme was announced in August 2010, when did compensation commence?
246. Under the compensation scheme documents, CBA listed preferred legal advisers. Has ASIC or the Independent Expert looked at these CBA nominated and:
- a. Reviewed what documents these firms requested;
 - b. How the law firms made the calculation compensation (and their expertise);
 - c. In how many circumstances was documentation queried in comparison to objections raised by say, non-preferred parties?

I am very concerned with the concept of independent advice for clients in these circumstances and whether there may be a conflict.

247. An ASIC press release states that there was a voluntary compensation scheme. Is ASIC’s view that settlements made before the date of the commencement of this scheme should be re-opened where applicable?
248. What will ASIC do if a settlement prior to the compensation scheme is not re-opened?
249. What protocols are in place that CBA doesn’t refuse to deal with any adviser that is not preferred by them?
250. If it was found that CBA/CFP had not been completely open with ASIC, would that cause concerns with ASIC as to the fairness of the settlement procedures to date?
251. Do you agree some of the terminology used by CBA seems that these offers have the stamp of ASIC approval?
252. Is ASIC concerned with representations made by CBA such as, “please be assured that this matter has been dealt with thoroughly, and in consultation with ASIC and an Independent Expert who has reviewed the implementation of the advice review program for clients of Mr Nguyen” influenced persons to accept the settlement offer or go to a CBA recommended adviser rather than seek to query the offer?
- a. Could this be misleading as it provides no information concerning the wrongdoing that CBA knew about? I understand the clients were kept ignorant of this.

Investigation of Specific Evidence by ASIC

253. What action has ASIC taken to date in relation to the allegations of file tampering by the whistleblowers and evidence of forgery provided by the victims?
254. Did the whistleblower Mr Jeffrey Morris advise the ASIC representative of an allegation of a false Statutory Declaration prepared by Mr Nguyen?
- a. If yes, what action did ASIC take to follow up this information from the whistleblower?
255. Mr Medcraft has reported to a Member of the House of Representatives on that it is not satisfied that credible evidence has been provided to ASIC on this matter. I note the

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following areas of concern have been advised in writing to ASIC. As the Regulator, with the powers under the ASIC Act, is ASIC in a better position to obtain the evidence than the victims in many cases?

- a. Has the following been sent to ASIC or requested that ASIC obtain:
 - I. A set of documents that were produced to a client by CFP (prior to the ASIC Compensation Scheme) which were clearly different from the client records that they had retained. CFP was unaware that the client had the records.
 - II. A claim by Mrs Jan Braund's case that she expected that her file had been sanitised and requesting a comparison of her file and the CBA file to show whether anything had been removed or added to the file.
 - III. A copy of switching instructions on which CFP originally paid compensation and a request for a copy of the CBA internal investigation into the switching funds. She believed there was no original signature by her on these. CBA paid out compensation at the time for that error which would strongly suggest they were satisfied that Mrs Braund did not execute the documents. This may suggest fraud.
 - IV. Original signatures on documents or required CBA to allow original documents to be sighted. What would Mr Medcraft consider not be credible in the above requests and whether they would produce tangible evidence?
256. Mrs Jan Braund raised questions of signature with CBA Group Security in 2009. ASIC was copied into this correspondence. Has ASIC asked to review the Group Security reports and when?
257. Concerns have been raised based on the limited documentation clients were provided with, and concerns raised that there may be Liquid Paper corrections etc. Has ASIC or the Independent Expert sought to sight original documents to verify or discount these claims?
258. On 17 November 2011 evidence of certain anomalies was provided to ASIC by FRA. These included:
 - Documents with a concern re the version number at the bottom of the document. Version numbers are regularly updated whereas a document purportedly produced in June 2006, is a May 2003 version. The next page of the 2003 document includes performance data to 31 December 2004. It was noted there was a possibility that this document has been created by scanning, splicing and copying (as alleged by whistleblowers).
 - A Statement of Advice is produced and dated 29 June 2006 and apparently signed by the client of 29 June 2006 (refer page 36). However, on page 35 on the first line reads: "I have read and understood the Statement of Advice date 13 July 2006". This date also appears under the signature on page 33. It was advised to ASIC that the Coin software used by CFP must be manually overridden to change the date in the above places; otherwise it will reflect the date the report is produced.

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- The FNA for Client XX of 19.1.04 is very interesting. It has a version of “03.09” on it with performance data to 2002.

Did ASIC investigate the documents that were provided in relation to these apparent anomalies and what was the result?

If not, why not?

259. Has ASIC or CBA involved a recognised fraud consultant such as Mr Paul Westwood of Forensic Document Services to review any of the documentation?
260. Documentation relating to Mrs Robyn Blanch was provided to ASIC. I have been advised that ASIC has not spoken to Mrs Blanch. Has ASIC investigated this allegation of forgery?
- a. If “yes”, why have they not spoken to Mrs Blanch and what was the outcome of their investigation?
 - b. If no investigation, why has no investigation been made?
261. Do you think it would be worth reviewing Group Security and determining what matters of fraud they have investigated and where investigated, need to be entered onto the Breach Register and/or other reportings made to the relevant authorities including ASIC, Federal Police and APRA?

ASIC Powers and Criminal Behaviour

262. Why has ASIC not taken any action against the managers at CBA who attempted to cover up this matter from at least September 2008?
263. Have ASIC considered referring allegations of forgery by Mr Nguyen to the Police for investigation?
264. Further to the above, I have concerns with regards documents either not requested by ASIC during the course of its investigation into this matter, or not provided by the CBA during same. Does ASIC under the *ASIC Act 2001*, Sections 28, 29 and 30, have the power to request production of books, inspection of books, or to give notice as to their intention to do so? “Books” according to the definitions for Division 3 of the ASIC Act may include (c) a document or (e) any other record of information. To the best of my understanding, such documents as planning file notes, switch authorities and Statements of Advice (some of the documents it has been suggested ASIC might like to request from CBA) would also not be covered by legal privilege, which is the only excuse a business may give for failing to produce these documents if requested by ASIC?
- a. Why were these documents not requested when clients asked ASIC to obtain them as CBA refused to provide them?
265. Does ASIC Information Sheets ASIC Act 2001 refer to the set out documents that can be requested, include client files. Why were client files not demanded by ASIC where requested by clients? ASIC had represented to the clients they are powerless to compel CBA to produce the documents that were significant in establishing the real sequence of events at CBA.
266. At what stage do investigations by Group Security into fraud need to be reported to ASIC and entered into the Breach Register?

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267. If there were proven to be fraudulent documents, and people have refused to investigate and have covered up knowledge of the fraud, do you propose to forward this to either the State Director of Public Prosecutions for prosecution under the New South Wales Crimes Act or to the Commonwealth Director of Public Prosecutions? I note in this regard the investigation by Group Security.
268. Will ASIC review this conduct in light of Section 316 of the Crimes Act and prepare a brief for the Police or Director of Public Prosecutions?
- a. Section 316 of the Crimes Act deals with “concealing a serious of indictable offence”. Are relevant ASIC officers in New South Wales familiar with this provision?
269. Do the actions of CBA staff including review by Group Security, discussion internally as to documents to be provided by CBA, suggest a cover-up of fraud?
- a. If not, what would constitute a cover-up of fraud?
270. Is there any legislation or regulatory guidelines that govern what records a holder of an Australian Financial Services Licence (AFSL) must provide to clients in the case of a dispute?
- a. What action can be taken if the holder of an AFSL does not provide them?

Compliance Issues

271. Did ASIC examine the Breach Register of CFP?
- a. If not why not?
- b. If yes, did ASIC examine, or cause the Independent Expert to examine, the files of advisers with complaints logged against them?
- l. If yes, in how many cases?
272. On 19 April 2012 did a representative of ASIC tell the whistleblower Mr Jeffrey Morris that he wasn't interested in looking at another forged signature (from another planner) from June 2007 on the basis that it was too long ago?
273. If CBA refused to investigate fraud, as per the letter from Dr Brendan French to Mrs Jan Braund, how does this impact the Enforceable Undertaking (EU) entered into by CBA? This appears to be contrary to the EU's stated aims.
274. If there is proven to be fraud (or a reasonable suspicion) and CBA has refused to investigate it, is there:
- a. Any impact on the EU?
- b. Any issue with the Responsible Managers of the relevant business?
- c. Does it impact on their capacity to operate an Australian Financial Services Licence?
- d. Should it be included in the Breach Register?
275. Should there be evidence of fraud; would this have an impact on the ASIC sponsored compensation scheme as this fraud was disclosed to clients?
276. What is the role of the Responsible Managers and the Responsible Officers in compliance?

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I understand these are defined terms in the Corporations Law?

277. Has any action been taken against any of the Responsible Managers of the CFP business over this time?
- a. What was the action or is this anything that ASIC considers they should have done?
 - b. If no action, is ASIC satisfied they have performed to a reasonable standard?
278. With regard the banned CFP advisers, when were details of their misconduct included in the Breach Register which is required to be maintained in the Corporations Law?
- a. Was this recorded as soon as the behaviour was identified?
279. At what point is it expected that an AFSL holder should report fraud? Should any fraud be recorded in the Breach Register?
280. Was the threshold at which fraud should be reported (it at all) met in the case of the CFP advisers banned?
281. Has ASIC investigated or investigating any current CFP employees?
- a. Were any of the banned advisers investigated when they were employed by CFP?
282. Has CFP informed ASIC of any problems with advisers (or reported in their Breach Register) that have led to their banning while currently employed?
283. If there is no contemporaneous reporting of breaches, as soon as CFP is aware, of the banned advisers, is ASIC concerned that they may be only handed people who have already left CFP?
284. I note a number of compliance reports were prepared by CFP in relation to certain planners. These are produced in draft which is sometimes modified, I understand, before the final report was produced. Has ASIC looked at all the relevant final reports and have they sought to look at draft reports particularly in the case of Mr Nguyen?
285. What documents has CFP chosen to apply for legal professional privilege (if any) in this matter?
- a. What reliance can be placed on legal professional privilege where there is fraud?
286. Would ordinarily matters that are subject to legal professional privilege be matters that should be in the Breach Register?
287. Has there been serious misconduct of a similar nature to the banned advisers been reported in the Breach Register subsequently?
- a. If “yes”, what action has been taken?
 - b. If “no”, is it because all bad advisers were identified, and none now remain? I am concerned that once without whistleblowers the culture will revert back regardless of Independent Experts, EUs etc.

The Administrative Appeals Tribunal Decision

288. On 26 September 2011 did a representative of ASIC tell Mrs Jan Braund and others that he “didn’t want to hear about” allegations that Mr Nguyen was being paid an income

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protection benefit from the CBA group? At the same meeting, did the ASIC representative say that forged signatures by Mr Nguyen were “old news” and assert that “it was in the banning order”

289. Paragraph 132 of the AAT Decision ‘AAT Decision’ on Mr Nguyen refers to an internal CFP review of Nguyen extending over 2006-2009 involving 80 of his clients. Did the duration, timing and extent of this review suggest to ASIC that CFP had not acted promptly and appropriately with regard to Mr Nguyen?
290. At Paragraph 18 of the AAT Decision Mr Nguyen told the AAT he was suspended in November 2008 and at Paragraph 81 Mr Nguyen apparently told a client that he saw in October that he was on holidays when he saw them. In view of the Diary Note of 15 October 2008 in ASIC’s possession, did it concern ASIC that Mr Nguyen was making statements to the AAT that were not true?
291. At Paragraph 13 of the AAT Decision, it was noted that another CFP employee was unable to be of much assistance to the AAT that she only worked for Mr Nguyen for about two weeks. Did ASIC make any attempt to establish the truth or otherwise of this assertion?
292. At Paragraph 151 [d] of the AAT Decision the financial penalty suffered by Mr Nguyen since July 2009 was taken into account in determining the penalty. Was ASIC aware of allegations that Mr Nguyen has been paid under an income protection policy from CBA’s insurance subsidiary CommInsure since that time?
- a. If so, did ASIC consider establishing the truth or otherwise of these allegations so that the AAT might have been properly informed on the matter?
293. Did ASIC investigate and place before the AAT all matters available to it in relation to Mr Nguyen?
294. There are a number of serious inaccuracies with the AAT. Why were issues of forgery not presented to the AAT?
- a. If ASIC was not aware of these allegations at the time can they now take further action notwithstanding the AAT upholding of the seven year ban?

Answer:

179.

Due to extensive misconduct and inappropriate advice provided by some advisors at CFPL and the culture that that conduct took place in.

- a. There were, and are, significant issues in the financial advice industry. ASIC identified and spoke publically about poor advice found in its shadow shopping exercises in 2003 and 2006 and has previously pointed out these issues to Parliamentary Inquiries most notably the Parliamentary Joint Committee inquiry into financial products and services in Australia. The issues include remuneration and ownership conflicts of interests and the competence of advisers.

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Prior to the FOFA reforms the law did not prohibit the distorting conflicts of interest that were a cause of many of the problems in the industry. Nor did the law place sufficient emphasis on the advice needing to address the best interests of the client.

The FOFA reforms, which arose in response to the Parliamentary Joint Committee inquiry into financial products and services in Australia, will help address the conflicts of interest in the financial advice industry and ASIC has been working over the last few years to improve the competence of financial advisers. This is a process that will take time.

Please see paragraphs 7 – 11 and 86-88 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

b. No.

180. ASIC formed its own view that the CFPL matter needed to move from a cooperation based resolution of concerns to a formal enforcement action with set timeframes and documents produced under notice.

For more information on this point, please see paragraphs 13-47 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

181. ASIC was aware of, and working on resolving, the general problems at CFPL in advance of the whistleblowers' contact with ASIC. However, the whistleblowers did alert us to the particular and serious problems with Mr Nguyen.

182. Whilst we do not think there is evidence that people have generally lost faith in ASIC, It is the case that some people come to doubt the organisation, particularly where they have lost savings and are disappointed in the outcome of ASIC actions and decisions in their matter.

ASIC acknowledges that aspects of its handling of the CFPL matter (see paragraphs 71 to 76 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*) - and the media coverage that followed - have contributed to the doubts and concerns of some of those affected. This is quite apart from the inconvenience and distress experienced by CFPL clients as a direct consequence of the conduct of CFPL financial advisers such as Don Nguyen.

In other cases there can be a significant expectation gap between what consumers and investors, who have suffered financial loss, would like ASIC to do and what is possible under the law and appropriate within ASIC's statutory role. This too can contribute to a loss of confidence in ASIC.

We look forward to discussing these matters in more detail at the Senate inquiry.

183. ASIC refutes any suggestion that it went 'easy on CFPL'. It was a very significant public outcome that resulted in wholesale changes to CFPL's culture, business, management and advice structures as well as the payment of over \$50,000,000 in compensation and the banning of 7 individuals.

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ASIC has no conflict of interest in exposing the full extent of wrongdoing at a major financial institution.

- 184.** Please see ASIC's response to question 113.
- 185.** No. It is not a common occurrence for ASIC to receive such a fax. It is also not the case that ASIC took no action. In this regard, please see paragraphs 130-47 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*. Please also see ASIC's response to question 133.
- 186.** Please see paragraphs 13-47 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.
- 187.** If it is true that files were being 'cleaned up', as opposed to being reconstructed from available electronic records then, yes, it is possible that evidence may have been destroyed. While this possibility exists, ASIC's response to question 131 explains why we have not further investigated this matter.
- 188.** If it is true that files were being 'cleaned up', as opposed to being reconstructed from available electronic records, and if it is true that evidence was destroyed then, yes, it is possible that such evidence included evidence that might have established whether or not Mrs Braund's allegations of forgery were well founded.
- 189.** Please see paragraphs 13-47 and 75 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.
- 190.** Please see paragraphs 21-36 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.
- 191.** The whistleblowers came in to ASIC in response to a request from ASIC that they come and meet with ASIC officers. The statement attributed to the ASIC officer is not accurate. The ASIC representative stated that the matter had ultimately come to the right person to for it to be progressed appropriately.
- 192.** ASIC noted the criticisms being made. In the circumstances ASIC chose not to discuss its ongoing handling of the CFPL matter in the media.
- 193.** No.
- a.** ASIC relied on other evidence to progress the matter and prioritised its investigation to focus on ensuring an appropriate compensation model was put in place to remediate impacted clients as well as engaging with CFPL to ensure their systems and controls were such that a similar situation could not occur again.

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194. Yes.

- a.** CBA did demonstrate a cooperative and consultative approach throughout the Project Hartnett and Enforceable Undertaking process.

195. Please refer to ASIC's response to question 133.

196. No. Please refer to ASIC's response to question 133(a).

197. Please refer to ASIC's response to question 133.

198. A longer banning order may have been imposed if sufficient evidence could be adduced to establish the allegation.

199. Yes. Please refer to ASIC's response to question 285.

200.

a.

- Ricky Gillespie – Resigned on 12 May 2009
- Don Nguyen - Resigned on 6 July 2009
- Jane Duncan - Resigned on 27 January 2010
- Anthony Awkar – Terminated on 21 June 2010
- Joe Chan – Terminated on 1 October 2010
- Christopher Baker – Resigned on 27 February 2009
- Simon Langton – Terminated on 23 June 2010

b.

- Ricky Gillespie – Breach Report 11 June 2009
- Don Nguyen – Breach Report 27 July 2009
- Jane Duncan - Breach Report 8 February 2010
- Anthony Awkar – Breach report 12 July 2010
- Joe Chan – Breach Report 30 September 2010 & 8 February 2011
- Christopher Baker – Breach Report 21 March 2011
- Simon Langton – Breach Report 6 April 2011

- c.** All investigations, except the Mr Nguyen investigation, commenced after a breach report was received by ASIC from CFPL.

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d. and e.

24 February 2010 (please see paragraph 36 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*).

f.

- 24 March 2010: s33 Notice requiring client files (please see paragraph 38 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*).
- 24 March 2010: s19 Notice requiring client list and audit trail data.

g.

- s 33 Notice: 9 April 2010
- s19 Notice: Immediate production required

h. 9 April 2010. Eight archive boxes were received (79 client files).

i. No files have been returned to CFPL.

j. All files provided by CFPL have been retained by ASIC.

k. 79 client files provided.

l. 68 clients.

m. Unknown to ASIC

n. Initially, ASIC examined:

- Mr Nguyen's employment file;
- CFPL's policies and procedures;
- reviews of Mr Nguyen's work undertaken by CFPL (including a later review of 33 client files undertaken by CFPL); and
- complaint files (that is, files created in respect of clients who had complained about Mr Nguyen's advice).

Based on the information drawn from its initial review, ASIC selected 15 client files for a comprehensive review. Each of the 15 client files contained similar problems; namely, "cookie-cutter" advice, regardless of a client's risk profile, and a strong bias towards listed property trusts. These problems were similar to the problems identified in CFPL's later review and the complaint files.

In light of the above, ASIC made a judgment to:

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- immediately initiate a banning action in respect of Mr Nguyen and obtain detailed witness statements from two clients; and
- ensure that, through Project Hartnett, detailed client file reviews were undertaken in respect of all of Mr Nguyen's (and Mr Awkar's) clients.

Subsequently under the processes provided for in the EU, CFPL reviewed a further 2130 adviser files (generated by 6 advisers) and paid compensation in respect of 287 files. This process was reviewed and reported on by the independent expert appointed under the EU.

- o. CFPL's breach report to ASIC, dated 27 July 2009, advised that deficiencies existed in seven of Mr Nguyen's client files.

During Project Hartnett, CFPL reviewed all of Mr Nguyen's client files and determined to pay compensation to 201 clients on the basis that they had suffered financial loss as a consequence of inappropriate financial advice.

- p. Please refer to ASIC's response to question 200(n).

201. In some instances, client signatures were examined.

202. Unknown to ASIC.

203. ASIC is aware that, in some instances, client signatures were missing from certain documents on client files. ASIC has not reviewed all client files, so it is unable to say:

- how many documents were missing signatures; and
- how many files contained documents with missing signatures.

While it is certainly good practice to have clients sign documents including, in particular, statements of advice, it is not a breach of the law to fail to do so.

204. In some instances.

205. No.

206. This depends on the nature of the allegations, the reliability and availability of the evidence and the likelihood of a successful prosecution, as well as the availability of ASIC resources at the given time.

207. This phrase has been taken out of context. The relevant ASIC officer was of the view that FRA were not focusing on resolving the issue of compensation for their clients. For this reason, the ASIC officer repeatedly encouraged FRA representatives to prioritise obtaining a speedy resolution of their clients' compensation claims, rather than focusing on allegations of forgeries and cover-ups.

208. ASIC responded to Jill Hall MP's letter on 21 May 2012 and advised it was ASIC's understanding that the requested documents had been provided to Mrs Braund's financial adviser. It specifically states that:

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"In your aforementioned letter dated 13 April 2012 you have stated that Mrs Braund is seeking to be provided with copies of the authorities used to switch her investments. It is my understanding these documents, namely copies of withdrawals and switches in relation to each of the four relevant policies, were provided to her adviser on 10 February 2012. If this is not the case then I ask ASIC be so informed of that fact".

In her letter to ASIC in response, dated 19 July 2012, Jill Hall MP did not address this matter.

209. During this period, an ASIC officer:

- received two emails from CFPL employees; one regarding the Past Business Review Final Report and the other regarding the scheduling of the monthly EU meeting; and
- had two telephone conversations with a CFPL employee; one regarding FRA clients who were yet to finalise their compensation payment and the other regarding recent media reports and whether CFPL intended to respond to those reports.

Contact between ASIC and CFPL during this period would amount to 10 minutes or thereabouts.

210. ASIC has engaged, and is continuing to engage, with CFPL regarding outstanding claims. Since 1 June 2013, one outstanding claim has been settled.

211. Please refer to ASIC's response to question 131.

212. Please refer to ASIC's response to question 131.

213. Yes.

214. Yes.

215. To provide an answer to this question the particular documents and the alleged problems with them would need to be identified.

216. It is impossible for ASIC to answer whether "all" documentation was provided. ASIC is not aware of documentation that was not provided bar those subject to a legal professional privilege claim.

- a.** ASIC requested a range of information in relation to Mr Nguyen including client files, Group Security reports, reports evidencing files reviews, six monthly audit details, complaint files and his personnel file.

b. & c. ASIC did request these materials.

217. Unless a breach of the law is identified, ASIC is unable to take action. See also ASIC's answer to Question 220.

218. Please see paragraphs 63-67 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

219.

- a.** We assume that this question refers to an email that was sent by the whistleblowers on 24 February 2010 to Ralph Norris, Ross McEwan and Grahame Peterson at CBA.

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Ross McEwan and Ralph Norris have left CBA and we understand Grahame Petersen is still employed by CBA.

b. Please provide names in relation to this question.

220. While ASIC has the power to cancel an Australian Financial Services Licence (**AFSL**) or ban a person from providing financial services, ASIC does not have the power to prevent a person from having a role in managing a financial services business. ASIC considers that this is a gap in the law.

In the specific case of CFPL, we think that the EU which resulted in significant management, business and cultural change as well delivering compensation for clients sent a strong message to industry about the very real costs associated with providing inappropriate advice to consumers.

221. Yes.

a. No.

b. The role of the Project Hartnett independent expert was to provide verification to ASIC about the adequacy and appropriateness of the process. It was not to report to individual claimants.

c. The independent expert's role and terms of reference were agreed to in consultation between ASIC, CFPL and the independent expert.

d. As above.

222. CFPL offered to pay up to \$5,000 to enable CFPL clients to receive independent advice in relation to compensation offers. The independent advice was required to be provided by a lawyer, accountant or licensed financial adviser. This was communicated in writing to CFPL clients in or around September 2010.

ASIC is aware that the relationship between CFPL and one firm of advisers – who ASIC understands are not lawyers, accountants or licensed financial advisers - has broken down and ASIC is in the process of examining what has occurred.

223. Please refer to ASIC's response to question 222.

ASIC is aware that the relationship between CFPL and one firm of advisers has broken down and ASIC is in the process of examining what has occurred.

224. No, the independent expert review did not identify the same issues in the compensation offers as are sought to be raised by FRA, although the process supervised by the independent expert did lead to significant increases in compensation paid in some instances.

Details of the scope of the independent expert's review are set out in the responses to questions 225 and 227.

225. By way of background, the purpose of Project Hartnett was to restore clients to the position they would have been had the inappropriate elements of the advice not occurred. This was

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done by 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. CFP repaid any fees that did not reflect value for service provided. The compensation amount also considered the time value of money and taxation impacts as appropriate.

The independent expert tested a sample of cases to assess the accuracy of the compensation calculations. The independent expert re-performed the calculations of the client's actual and reference portfolios using business analytics software and CFPL raw data files, transaction histories, and the business rules from the Project Hartnett methodology.

The independent expert did not speak to clients; rather, CFPL staff were responsible for interviewing and compensating clients. The Project Hartnett methodology ensured that this occurred within a control environment that was self-sustaining within CFPL. The independent expert's work was deliberately focused on testing that CFPL's control and governance framework was operating as intended (which included testing a sample of cases to assess the accuracy of the compensation calculations).

- 226.** The role of independent expert was undertaken by a professional services firm. The independent expert team comprised a number of members, all of whom held relevant graduate and industry qualifications. Team members reviewing financial advice held RG 146 or DFS (Financial Planning) qualifications and had industry experience in advice quality monitoring roles for other major banks' financial planning businesses.

The partner who was ultimately accountable for the work of the independent expert team is a registered auditor and has served as the independent compliance expert on a range of regulatory remediation and compensation matters involving ASIC, APRA, AUSTRAC, ACCC and ACMA.

- a.** Please see above.
- b.** All members of the independent expert team were experienced in providing financial advice to people at all life stages, including transition to retirement and retirement (please also refer to ASIC's response to question 226).

We also note that the Project Hartnett methodology incorporated CFPL's standard operating policies and procedures. These policies and procedures included dealing with clients with disabilities or from non-English speaking backgrounds, and the identification and application of CFPL's hardship processes.

- 227.** The independent expert reviewed 15 case files from end-to-end. The independent expert also tested a sample of cases to ensure that the Project Hartnett methodology was operating as intended; in this regard, please see ASIC's response to question 225.

The independent expert observed at least two cases where the clients had been compensated in 2009 (prior to Project Hartnett) and then had their cases re-opened as part of Project Hartnett. In both cases, further compensation was paid in 2011 as a result of applying the Project Hartnett methodology:

- Case A: Original compensation \$150,000 in December 2009. Project Hartnett further compensation \$365,950 in February 2011 and

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- Case B: Original compensation \$27,825 in October 2009. Project Hartnett further compensation \$173,931 in May 2011.

The independent expert also observed another two cases where clients had provided CFPL with additional information once they had received an offer. After considering this information, the client's risk profile was adjusted to reflect this information and a revised offer made:

- Case C: First Project Hartnett offer \$30,462 based on growth reference portfolio. Revised Project Hartnett offer \$112,044 based on conservative reference portfolio; and
- Case D: First Project Hartnett offer \$126,009 based on aggressive reference portfolio and gearing. Revised Project Hartnett offer \$315,149 based on moderate reference portfolio and with gearing unwound.

228. The independent expert has provided the following reports:

- on 15 December 2011 the independent expert provided a report covering the independent expert's assessment of the design and implementation phases of Project Hartnett. The report also assessed the methodology of the project and
- on 20 April 2012 the independent expert provided two reports regarding the closure of Project Hartnett. One of the reports related to Mr Nguyen, the other related to Anthony Awkar. These reports detailed the closure of Project Hartnett and the various tests that the independent expert completed in order to determine if the project had been completed adequately.

229. No, the law specifically allows financial advisers to provide scaled advice.

230. The Project Hartnett methodology incorporated CFPL's standard operating policies and procedures. These policies and procedures included dealing with clients with disabilities or from non-English speaking backgrounds, and the identification and application of CFP's hardship processes. The independent expert did not review those policies and procedures.

231. Please refer to ASIC's response to question 134(c).

232. Project Hartnett did (as set out below) take into account matters other than basic risk profiling and asset selection errors.

Project Hartnett involved three phases.

In phase one, a letter was sent to former clients of Mr Nguyen and Mr Awkar informing them that CFPL:

- had concerns with the advice provided by Mr Nguyen;
- was working with ASIC to assess the situation; and
- would be seeking to review the advice each client had received.

In phase two, CFPL telephoned the client to verify whether CFPL held accurate records relating to the client's needs, objectives and circumstances and the advice that was provided to the client. This initial interview allowed CFPL to test the reliability of the information CFPL

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had on its file, make an assessment as to whether inappropriate advice had been given to the client and, further, whether compensation could be paid promptly to clients.

If the client's situation varied from CFPL records or other special circumstances existed (eg. the client had submitted a formal complaint about the adviser; the client had been impacted by multiple complex issues that would require more investigation; the client raised new issues regarding the advice they were given which CFPL were not aware of; the client had suffered from a particular hardship or special disadvantage), phase three occurred.

In phase three, CFPL employees met with clients to obtain detailed information regarding their personal financial circumstances, needs and objectives and the advice provided by Mr Nguyen and Mr Awkar.

In addition to the steps set out above, a large amount of analytical work was completed on each of the client files. The key areas assessed by CFPL were:

- Did the Financial Needs Analysis capture the client's needs and objectives?
- Were there sufficient enquiries and investigation into the client's circumstances?
- Was the client's risk profile clearly established?
- Did the advice address the client's needs and objectives?
- Was the advice delivered in a compliant manner?
- Was the client overly exposed to Listed Property Securities?
- Was the client overly exposed to internally geared funds?
- Where margin lending was recommended, could the client access the benefits of tax deductible interest and afford to service the debt recommended from disposable income less living expenses?
- Where margin lending was recommended, if interest rates rose by an appreciable amount from the time the loan was recommended, was the loan still affordable without selling down the business?

- 233.** Claimants had and do have recourse to FOS for an independent review of any offer of compensation that they consider to be inadequate.

Please see paragraph 55 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

- 234.** ASIC has not allowed wearing down tactics. In fact, ASIC (together with CFPL) put in place a process (Project Hartnett) whereby these matters can be resolved in an appropriate fashion. In this regard, please see ASIC's response to question 232.

Over 95% of matters were completed within 18 months. ASIC has attempted to assist in resolving the small number of outstanding matters and has on numerous occasions encouraged representatives of clients to seek recourse to FOS. FOS can make an independent and final determination of compensation. Access to FOS as a forum for final resolution of claims that the parties have not been able to resolve is a common feature of compensation schemes put in place where ASIC has taken regulatory action because of

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FOS's widely recognised role as an independent source of dispute resolution for consumer claims across financial services.

Any final determination made by FOS would be binding on CFP but not the client. It should be noted that FOS is free to access, has a wider discretion than the courts and can determine matters according to the law, good industry practice and what is fair and reasonable.

- 235.** ASIC acknowledges that in addition to financial loss, poor and inappropriate advice can cause enormous distress to those impacted by and that very significant suffering can result.

The Corporations Act requires that licensees have internal and external dispute resolution processes to address breaches of the Corporations Act. The Corporations Act does not specifically address compensation for pain and suffering. Damages or compensation may be awarded for breaches of specific provisions of the Act. The damages or compensation can be characterised as a payment for economic loss and do not incorporate a component for pain and suffering.

Damages may be awarded under the general law with respect to tortious claims for corporate negligence and/or misrepresentation. Damages for torts have two components, economic loss and non-economic loss and aim to restore the injured person to the position they were in before the tort was committed. The non-economic loss may include a contribution for 'pain and suffering.' Damages for pain and suffering are not easily quantifiable and will usually be calculated having regards to the individual's circumstances and expert opinion. In the financial services context, damages for pain and suffering would not be common. ASIC does not have the standing to pursue tortious claims for individuals.

Regulatory Guide 139 sets out ASIC's policy on external dispute resolution (EDR). A scheme must, as a minimum, compensate a complainant for any direct loss or damage caused by a breach of any obligation owed in relation to the provision of a financial or credit product or service and for non-financial loss where appropriate.

Both FOS and the Credit Ombudsman Service (COSL) have some ability to compensate an individual for a non-financial loss in limited circumstances. In the case of FOS, the maximum amount of non-financial loss is \$3,000 per claim (see 9.3 of FOS Terms of Reference). COSL may award compensation for non-financial loss such as personal inconvenience, stress and/or anxiety. This form of compensation is only awarded in limited circumstances and generally would not be for a substantial amount (see Rule 55.15 and COSL position statement 3).

ASIC considers that whether the legislative regime should be amended to provide for compensation of affected clients for their pain and suffering is a policy matter for Government and may need to be considered in the context of compensation available for breach of statutory provisions in other fields.

- 236.** Yes.

a. Yes, if the brief were limited, then depending on the limitation the value of compensation available might be restricted.

- 237.** Recourse to FOS is available in circumstances where the parties have not been able to reach agreement. In CFPL's communications to claimants, they have been advised of the

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availability of access to FOS for resolution should clients be dissatisfied with the compensation offered.

238. These cases were raised by ASIC with CFPL and it is ASIC's understanding that all bar one were subsequently settled. The outstanding matter is subject to a dispute between CFPL and the client's advisor regarding the payment of the advisor's fees.

239. Regardless of the circumstances of the client, ASIC's goal was, and is, to have all compensation resolved as quickly as possible. However, to ensure that clients experiencing hardship were dealt with quickly, ASIC required that such clients were dealt with first and their compensation fast-tracked, where appropriate.

It is ASIC's understanding that:

- five cases (out of 201) involving Mr Nguyen's clients remain open; and
- in each of those five cases, CFPL has made a final offer, which offer has not been accepted.

Under the structure of the compensation scheme, the appropriate next step where a final offer of compensation has been made and the client does not wish to accept it is for the client to refer the matter to the Financial Ombudsman Service for independent assessment and resolution. ASIC has been seeking to encourage the clients involved to take that step .

240. Yes. In those cases, an assessment was made and an offer communicated to the relevant executor/trustee.

241. Not all Mr Nguyen clients were to be compensated. Compensation was offered to those who were found to be the subject of inappropriate advice and who suffered financial loss. One of the roles of the Project Hartnett Independent Expert was to ensure that the Mr Nguyen's client population was properly captured.

- a.** 1,684 of Mr Nguyen's clients were reviewed as part of Project Hartnett and it was found that 201 required remediation.

242. ASIC did request these documents.

243. It is ASIC's understanding that CFPL gave clients all documents that, in the ordinary course of obtaining financial advice, they should have received.

However, in the absence of an obligation to discover all documents (which arises, for example, in legal proceedings), CFPL is not obliged to give clients their complete client file (which may contain, for example, irrelevant documents or documents which are commercially sensitive). CFPL is also not obliged to provide clients with documents that are subject to legal professional privilege.

In 2010, CFPL informed ASIC that there were instances where Mr Nguyen's files were not able to be located or where documents on those files were missing. In some instances this very poor file and record keeping may make it impossible to provide original documents to clients.

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In circumstances where clients or their representatives complained to ASIC that they had not been provided documents relevant to assessing their compensation offer, ASIC engaged with CFPL to facilitate the provision of those documents. ASIC notes, further, that where a client takes their claim to FOS, FOS is able to seek documents that are relevant to resolving the dispute.

- 244.** We understand that CFPL became aware of Mr Nguyen's actions from at least as early as August 2008.
- a.** Please see paragraphs 37-42 and 54-62 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.
 - b.** Please see paragraph 55-62 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.
- 245.** Project Hartnett commenced on 24 March 2010.
- 246.**
- a. & b. & c.**
- Clients were not required to rely on the list of CFPL listed legal advisers.
- In relation to independent advice for clients, please see paragraph 55 of ASIC's initial submission to the Senate inquiry: *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.
- ASIC has not investigated the conduct of advisors to clients in the compensation process.
- 247.** At ASIC's request, Project Hartnett included a review of all settlements entered prior to Project Hartnett's commencement.
- 248.** ASIC is not aware of any pre compensation scheme settlements that have not been re-examined. If it did become aware of any, it would take the matter up with CFPL.
- 249.** CFPL offered to pay up to \$5,000 to enable CFPL clients to receive independent advice in relation to compensation offers. The independent advice was required to be provided by a lawyer, accountant or licensed financial adviser. This was communicated in writing to CFPL clients in or around September 2010.
- ASIC is aware that the relationship between CFPL and one firm of advisers – who, ASIC understands, are not lawyers, accountants or licensed financial advisers - has broken down and ASIC is in the process of examining what has occurred. It is ASIC's understanding that there are no formal protocols in place to address such a breakdown.
- 250.** Yes, it would warrant consideration as to whether the particular lack of openness involved had impacted on the fairness of the settlement.
- 251.** No.
- 252.** No.
- a.** Please see ASIC's response to questions 231 and 134(c)

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- 253.** Please refer to ASIC's response to questions 131 and 133.
- 254.** Yes.
- a.** ASIC conducted a review of the client file in question and determined to take no further action principally on the basis of the age of the conduct (2004 – 2005) and the lack of documentation on the file.
- 255.**
- a.**
- I.** To be able to respond to this question, ASIC would need to know the identity of the client involved.
- II.** Yes.
- III.** Please refer to ASIC's response to questions 131 and 133.
- IV.** Please refer to ASIC's response to questions 131 and 133.
- 256.** ASIC asked for Group Security Reports from CBA on 24 March 2010; legal professional privilege was claimed in respect of these documents. However, CBA did provide ASIC with a number of documents titled "*Progress reports to management*". These documents summarised the contents of the Group Security reports.
- 257.** No. An internal CFPL memorandum provided to ASIC details how Mr Nguyen whited-out names and other details on client fact-finds for the purpose of using the same generic information. This conduct formed part of ASIC's banning action.
- 258.** Please refer to ASIC's response to question 131.
- 259.** No.
- 260.** ASIC is unaware of any forgery allegation concerning Robyn Blanch. The advisors involved have only made an allegation that Mrs Blanch's file was manipulated by CFPL. Please see, also, ASIC's response to question 131.
- a. & b.** Please refer to ASIC's response to question 131.
- 261.** No. ASIC asked for Group Security Reports from CBA on 24 March 2010; legal professional privilege was claimed in respect of these documents. However, CBA did provide ASIC with a number of documents titled "*Progress reports to management*". These documents summarised the contents of the Group Security reports.
- 262.** Please refer to ASIC's response to question 131.
- ASIC can only take action where a breach of the law can be established against an individual. Please see, further, ASIC's response to question 220.

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- 263.** If ASIC considered that further action was warranted it would be more likely to proceed by itself referring a brief to the DPP. Please also refer to ASIC's response to question 133.
- 264.** ASIC has the power, under s28 of the *ASIC Act 2001 (ASIC Act)*, to issue notices for the production or inspection of books for the purposes of, among other things, an investigation. The definition of books includes documents and any other record of information (s5 ASIC Act).

The books sought under notice by ASIC should be no more than what is reasonably necessary for the investigation.

A recipient of a notice must produce relevant books in their physical possession, custody and control, except to the extent that the recipient has a reasonable excuse for not complying with the notice. Reasonable excuses for non-compliance with the requirements of a notice includes, by way of example only, a valid claim for legal professional privilege (**LPP**). The recipient of a notice must explain *why* LPP applies to the information.

Once ASIC receives the books, it has an obligation to protect the confidentiality of those books. ASIC is only permitted to disclose those books in certain circumstances (eg. if compelled by a court, or under s 25 or 127 of the ASIC Act).

- a.** ASIC engaged with CFPL and it is our understanding that clients were provided with the documents they were seeking.

- 265.** It is ASIC's understanding that CFPL clients were provided with the documents they were seeking. ASIC did not represent to CFPL clients that it was powerless to compel CFPL to produce client files. In this regard, however, ASIC refers to its response to question 264 and notes that:

- ASIC may only seek books under notice that are reasonably necessary for its investigation; and
- ASIC has an obligation to protect the confidentiality of books received under notice.

As a consequence, in the circumstances of the CFPL matter, ASIC was unable to:

- seek client files under notice for the purposes of providing CFPL clients with those documents; and
- provide client files received under notice to CFPL clients, absent a court order.

- 266.** This question raises two separate processes: formal breach reporting to ASIC which is required by law and the maintenance of an internal breach register by a licensee, which is not a formal legal requirement but forms part of good compliance practice. Taking these in turn:

ASIC's policy on breach reporting is set out in Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

Under s912D of the Corporations Act, licensees must report certain breaches (or likely breaches) of the Act. Licensees must give ASIC a written report as soon as practicable, or in any case, within 10 business days of becoming aware of any breach (or likely breach) of their obligations under s912A, s912B (other than the obligation under s912A(1)(c) and their

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obligation under s912A(1)(c) to comply with certain financial services laws). The obligation to give ASIC a written report applies where:

- the licensee has breached any of the specified obligations; or
- the licensee is likely to breach any of the specified obligations; and
- that breach (or likely breach) is 'significant'.

The term 'significant' is not defined in the Corporations Act. Whether a breach (or likely breach) is significant or not depends on the applicable circumstances. We consider that the nature, scale and complexity of the licensee's financial services business might also affect whether a particular breach is significant or not.

RG 78 makes it clear that ASIC considers that fraud by a representative, and the licensee's failure to prevent fraud by a representative, is likely to involve a significant breach of each of the licensee's obligations in s912A because such breaches will:

- have some impact on the licensee's ability to supply the financial services covered by its licence;
- indicate that the licensee's arrangements to ensure compliance with its obligations are inadequate; and
- involve actual or potential financial loss to clients.

Instances of fraud need to be reported to ASIC as soon as practicable, or in any case, within 10 days of the licensee becoming aware of the breach.

While the Corporations Act does not require licensees to maintain a breach register ASIC considers that a breach register is necessary in practice to ensure that adequate arrangements are in place to enable compliance with the obligation to identify and report all significant breaches (or likely breaches).

267. If there were sufficient evidence to support such a charge, ASIC would consider further action.

268. In the absence of sufficient evidence, it is unlikely ASIC will take further action in relation to this matter.

a. Yes.

269. No. Please refer to ASIC's response to question 131.

a. It is not possible to summarise the myriad facts and circumstances that could constitute a cover-up of fraud; however, section 316 of the Crimes Act sets out the elements of the offence:

"1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the

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Police Force or other appropriate authority, that other [person](#) is liable to imprisonment for 2 years.

(2) A [person](#) who solicits, accepts or agrees to accept any [benefit](#) for himself or herself or any other [person](#) in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury [caused](#) by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a [person](#) without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was [obtained](#) by the [person](#) in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4)."

- 270.** Under the Corporations Act, an AFSL holder is required to have a dispute resolution system which comprises an internal dispute resolution (IDR) scheme and membership of an approved EDR scheme: s912A(1)(g) and s912A(2) of the Corporations Act. There is not specific provision addressing what records and documents licensees are required to provide to clients in the event of a dispute.

At general law, parties to litigation are obliged to discover all documents (both originals and copies) relating to the facts in issue in the proceedings. In order to comply with these obligations, parties ought to preserve all documents which are or may be relevant to existing or potential claims.

- a.** ASIC cannot compel a licensee to provide documents to clients. ASIC can however, obtain copies of books and records from a licensee for ASIC's own legitimate regulatory purposes.

Under ASIC Regulatory Guide 139, an EDR scheme must be able, under its Terms of Reference, to make appropriate non-monetary orders obliging a scheme member to take (or not take) a particular course of action in order to resolve a complaint or dispute. An example of a non-monetary order includes releasing documents and/or information relating to the customer that are under the control of the financial or credit product or service provider (see RG 139.226).

Licensees must comply with the EDR scheme terms of reference which include requirements to provide the schemes with information upon request.

- 271.** No.

- a.** ASIC relied on other sources of information. ASIC was confident that it had sufficient information available to establish that CFPL had a systemic problem.

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b. & l. No

272. Mr Morris was advised by an ASIC officer on 19 April 2012 that ASIC can and will consider any and all matters yet noted the difficulties of proving a five year old alleged forgery.

273. The letter from Brendan French to Mrs Braund, dated 23 January 2013:

- states that, given that Mrs Braund's complaint to CBA had been settled on financial terms (and a deed of release entered into), it was inappropriate to further discuss elements of Mrs Braund's resolved complaint; and

- welcomes contact from Mrs Braund on matters unrelated to her compensation.

This letter does not impact on the EU entered into by CBA. We note that CFPL has a general obligation under 912A of the Corporations Act to act efficiently, honestly and fairly.

274. Please see ASIC's response to question 273.

275. In order to properly respond to this question it would be necessary to know the nature of the fraud involved.

276. The term "responsible officer" is defined under s9 of the Corporations Act as "in relation to a body corporate that applies for an Australian financial services licence means an officer of the body who would perform duties in connection with the holding of the licence".

The term 'responsible manager' is used by ASIC in Regulatory Guide 105 *Licensing: Organisational Competence* (RG 105). Responsible managers are the people who manage a financial services business and to whom we look to assess the organisational competence of the business.

Where a licensee is a body corporate, its responsible managers do not need to be officers but in some cases they may be.

Responsible managers

Responsible managers are the means by which corporate licensees meet their organisational competence obligations under s 912A(1)(e) of the Corporations Act.

The responsible manager is responsible for the significant day-to-day decisions about the ongoing provision of financial services. RG 105 outlines that ASIC considers that:

- responsible managers will be the people who decide how financial services are to be provided and who supervise the provision of those services (RG 105.25);
- the responsible manager should have the appropriate knowledge and skills for this role in the business (see RG 105.30); and
- responsible managers need to have knowledge and skills that demonstrate an AFS licensee can provide all of the financial services and products covered by its licence and understand the legal and compliance obligations relating to those services and products (RG 105.34).

In this respect, responsible managers have a role in ensuring compliance. However, depending on the nature, scale and complexity of the business, there might be other people in the business with a more specific responsibility for compliance.

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In Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104) we state our expectation that a director or senior manager will be allocated responsibility for overseeing compliance measures and reporting to the governing body.

Responsible managers may be directors in small businesses but in larger financial services entities, direct responsibility for compliance may sit with staff ranging from the chief executive officer down to middle management (RG 105.26).

Responsible officers

Responsible officers, as legal 'officers' of an entity, have responsibility for overseeing compliance measures. RG 104.52 suggests that senior management involvement might extend to:

- communicating the measures to those responsible for implementing them and other stakeholders;
- ensuring that the area responsible for the measures has adequate staff and resources;
- ensuring staff education and awareness of the measures;
- implementing clear reporting lines for the manager(s) responsible for the measures; and
- receiving regular reports on the measures.

277. No action has been taken against individual Responsible Managers. There is no specific action that can be taken against a Responsible Manager as s912A relates to the general obligations of a financial services licensee. It was CFPL's failure in this regard that led to the EU.

Please see, further, ASIC's response to question 220.

- a. The EU was the appropriate action.
- b. ASIC believes the EU was the appropriate regulatory outcome.

278. Not known.

In relation to the maintenance of a breach register, please refer to ASIC's response to Question 266.

- a. Not known.

279. Please refer to ASIC's response to question 266.

280. Yes, in respect of the advisers (Anthony Awkar and Ricky Gillespie) who were banned by ASIC for dishonest conduct (forging client signatures).

281. ASIC is presently conducting enquiries in relation to the conduct of one current CFPL employee.

- a. No.

282. No.

283. CFPL has advised ASIC of advisers who have potentially breached their obligations; some of those advisers are still employed by CFPL, while others have resigned or been terminated.

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284. ASIC did not seek to view the draft reports for any of the advisers.

ASIC did however request all documents provided to management on the progress of the investigation. This would have indicated to ASIC whether information had been omitted from final reports.

285. Group Security internal investigation reports. However, CBA did provide ASIC with a number of documents titled "*Progress reports to management*". These documents summarised the contents of the Group Security reports.

a. Legal professional privilege does not attach to communications between a lawyer and client which facilitate the commission of a crime or fraud. By way of example:

- if a lawyer provides legal advice to a financial advisor against whom fraud allegations have been made, legal professional privilege attaches to that advice; and
- if a lawyer provides legal advice to a financial advisor which guides the advisor in the *commission* of a fraud, then legal professional privilege does not attach to that advice.

In the circumstances of the CFPL matter, the allegations of fraud made against the advisers do not impact upon CFPL's ability to claim legal professional privilege over privileged communications.

286. It is not possible to state a general rule in relation to this.

287. ASIC has not had access to the breach register.

a. & b. CFPL has reported recent serious adviser misconduct without the involvement of whistleblowers.

288. The relevant ASIC officer did not make the precise statements attributed to him in this question. He confirmed that ASIC would not take action in relation to allegations that Mr Nguyen forged signatures and received an income protection benefit. Please refer to ASIC's response to question 133 in relation to ASIC's rationale for not taking action in relation to allegations that Mr Nguyen forged signatures.

The existence of an income protection benefit is a matter for CBA and not ASIC.

289. Yes. See paragraphs 74 and 75 respectively of *Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters*.

290. Mr Nguyen informed the AAT that he was suspended in November 2008. What Mr Nguyen told the AAT was substantially accurate in this regard, albeit that Mr Nguyen's suspension in fact ended in October 2008.

291. The witness referred to was called to give evidence by Mr Nguyen, not by ASIC. The witness was cross-examined by ASIC's counsel following her evidence in chief. However, as the witness's evidence did not appear to be of any assistance to Mr Nguyen, ASIC's legal team did not consider that there was any reason to question the truthfulness or otherwise of the witness's evidence.

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- 292.** ASIC was not aware that Mr Nguyen was being paid an income benefit from Comminsure during the AAT proceedings. ASIC was only made aware of this in August 2012.
- a.** Please refer to ASIC's response to question 292.
- 293.** ASIC put before the AAT the matters relating to Mr Nguyen which it could establish at that point in time.
- 294.** Please refer to ASIC's response to question 133.
- a.** Yes. Please refer to ASIC's response to questions 1 and 133.