

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

Department/Agency: ASIC

Question: SBT 22-24 -

Topic: misleading advertising in the financial services sector

Reference: Hansard page no. 66 - 21 October 2015

Senator: Bushby, David

Question:

I just have some questions on misleading advertising in the financial services sector. Just to establish a few things, what is your head of power? What gives ASIC the right to look at false and misleading advertising in the financial services sector? We have discussed this over the years, but—

Mr Kell: There is a provision under the ASIC Act, provisions which mirror the provisions in the Australian Consumer Law that the ACCC also administers that prohibit misleading and deceptive conduct, and prohibit false and misleading conduct. That is one key element. There are also provisions in the Corporations Act that prohibit similar sorts of conduct.

Senator BUSHBY: You say they mirror the Corporations Act. Is the wording exactly the same?

Mr Kell: The provisions in the ASIC Act essentially mirror those in the Australian Consumer Law, that is right; so we can seek the same types of penalties.

Senator BUSHBY: A decision that was made under the Competition and Consumer Act in their provisions, which laid down principles in the Duracell bunny case: would that be guiding decisions that are made by ASIC?

Mr Kell: That is right, to the extent that they are relevant for financial services—issues such as whether the disclaimer was enough to correct the headline impression that may have been misleading. Those sorts of principles apply across industry.

Senator BUSHBY: Correct me if I am wrong, but I would suspect that the ACCC probably looks at these issues more than ASIC does, because they are across a wide range of industries rather than just the financial services sector, which you look at, on this issue.

Mr Kell: We have had quite a focus on this sector in recent years, but there is no doubt they would look at it across a wider range of industries.

Senator BUSHBY: There is potentially more case law to rely on that comes out of the competition and consumer side, which would equally apply here.

Mr Kell: That is an important point to make as well, that it does not have to be the regulator bringing a case under these laws. They were available for private actions, and in fact many of them are significant actions—

Senator BUSHBY: Under the laws that you mentioned.

Mr Kell: Yes. We are happy, if it would help you, to provide you—maybe not now—with some information about some of the actions we have taken. For example, we have had a real focus on misleading claims around establishing self-managed super funds, especially in the online environment—claims that you can do it for free, when that has not been the case. We have had a couple of thematic areas where we have been looking at misleading marketing and advertising.

Senator BUSHBY: I would be interested in that. Take that on notice and give me a list of that. I am going to ask about a specific area which I have asked about in previous years as

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

well, and that is in terms of superannuation claims—not so much self-managed, but by superannuation providers. If there was an ASIC market participant which was offering consumers a superannuation calculator based on assumptions which were patently not comparing like products with like products, but producing outcomes which were held out as showing differing outcomes—even though the assumptions they were based on were not necessarily like for like—over a person's working life, would that be of concern to ASIC?

Mr Tanzer: It is something that we have looked at on various occasions in the past.

Senator BUSHBY: Have you had any recent complaints along those lines?

Mr Tanzer: We may have to take that on notice. You may well be referring to Industry Super Australia's ad campaign around 'Compare the pair'. We have certainly looked at that campaign in the past.

Senator BUSHBY: You might have words with them, and every so often something comes up, slightly different—

Mr Tanzer: There has been a range of issues around that, one about whether or not the way the information is presented suggests that a person could get a particular outcome in the future, and the extent to which disclaimers or voiceovers can correct that type of impression; that is right.

Senator BUSHBY: What resources does ASIC have to look into these sorts of things?

Mr Tanzer: We apply the same sorts of tests in this area as we do across our enforcement regime. We look at the fact—this will be published in our enforcement policy—about the public interest, the availability of other remedies or other parties who might be able to take action, the availability of the evidence, the likely detriment in considering whether we should take action.

Wednesday, 21 October 2015 Senate Page 67

ECONOMICS LEGISLATION COMMITTEE

Senator BUSHBY: That is the second time you have mentioned that other parties can actually take actions themselves.

Mr Tanzer: That is right.

Senator BUSHBY: What differentiates between a decision from ASIC to take action itself, or another party taking action itself?

Mr Tanzer: Generally speaking, in this area of the competition and consumer law, misleading or deceptive conduct, we have seen in the consumer world a number of actions taken by sometimes competitors who may feel that they are suffering a particular loss. Sometimes it is just injunctive action taken by competitors to restrain activity that they think is unreasonable. In order to do that, normally you need some sort of standing. The most obvious way of having standing is to be able to assert or establish that there is damage caused to you by virtue of that, because the provisions do provide an ability for a person to take action to recover damages as a result of misleading or deceptive conduct. There are sometimes opportunities for private parties also to consider taking injunctive action.

Senator BUSHBY: If an industry participant came to you and said, 'We're concerned about these ads, but we're not going to take action ourselves; we'd like you to,' would that be sufficient, or would you ask them, 'Why aren't you taking action yourself?' How do you work out—

Mr Tanzer: It depends very much on the circumstances of the particular case, but yes. The fact that there was an industry participant who, it appeared, perhaps had standing to take a

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

matter and had an interest that seemed to be relevant and who was well-enough resourced to take their own action, that is something we would take into account underneath that heading of whether there are alternative remedies available for the person who is raising the issue. It would not be a determining factor, but it would be one of the factors we would take into account.

Mr Kirk: That said, there has not been a strong tradition within financial services of private sector litigation. Entities do not tend to—they are more likely to come to us and complain. As well as the fact that Mr Tanzer was referring to, the real concern for us is if consumers are being misled and making bad decisions as a result of a misleading ad. Regarding the fact that an entity might take an action themselves but refuses to, we are still left with the concern about the impact on consumers.

Senator BUSHBY: Exactly, so that is what it will come down to. The nub of it for you will be consumers potentially being misled. Now, I asked whether there had been any recent complaints along those lines. Perhaps you could take that on notice, and in doing so tell us how many complaints, and about which types of superannuation advertisements—and by industry segment, if you can.

Mr Tanzer: Sure, I would be happy to—outside the last year. Is that all right?

Senator BUSHBY: In the last couple of years would be fine. And has ASIC banned, caused or modified or issued an enforceable undertaking in relation to any comparison-type superannuation advertisements in the last two years? And similarly—

Mr Tanzer: Yes, we can certainly give you some information about the action we have taken.

Answer:

Self-managed superannuation funds (SMSFs) are a key focus of ASIC's work on misleading and deceptive advertising. We want to ensure that only those investors for whom an SMSF is suitable are advised to establish an SMSF and that consumers receive clear and accurate information.

The themes we have focused on recently in misleading and deceptive advertising on SMSFs include:

- providers claiming that SMSFs can be established 'free' of charge;
- the risks, benefits and costs of SMSFs compared with funds regulated by the Australian Prudential Regulation Authority (APRA);
- the performance of SMSFs compared with APRA-regulated funds; and
- the performance of certain investments within SMSFs (e.g. property).

Examples of action we have recently taken include:

- In March 2015, Australian Financial Planning Solutions Pty Ltd (AFPS) paid a \$10,200 infringement notice after ASIC issued an infringement notice for making false or misleading representations in an article titled "Benefits of a self-managed super fund" that appeared on AFPS's website: Media Release ([15-052MR](#)) *Australian Financial Planning Solutions pays \$10,200 penalty for misleading advertising* (12 March 2015).

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

- In July 2015, Omniwealth Services Pty Ltd paid a \$10,200 infringement notice, after including potentially misleading claims on its website about the performance of a geared property investment within an SMSF: Media Release ([15-190MR](#)) *Omniwealth pays penalty for potentially misleading advertising* (21 July 2015).
- In August 2015, Dixon Advisory Group Limited paid two \$10,200 infringement notices after including potentially misleading claims on its website comparing the costs and performance of SMSFs to industry and retail superannuation funds as well as a promotional video which made claims in relation to an independent review of the superannuation system: Media Release ([15-207MR](#)) *Dixon Advisory Group pays an infringement notice for potentially misleading advertising* (4 August 2015).
- In November 2015, the Federal Court of Australia made declarations and ordered Superannuation Warehouse Australia Pty Ltd (SWA) to pay a penalty of \$25,000 for false and misleading "Free SMSF Setup" advertising. The statements were made on two websites operated by SWA. SWA, which provides online accounting and administration services for SMSFs, admitted that the statements were false and misleading: Media Release ([15-322MR](#)) *Court orders penalty for false and misleading 'Free SMSF Setup' advertising* (4 November 2015).

ASIC does receive intelligence about superannuation more generally and a summary of the complaints received in 2013/2014 and 2014/2015 financial years are attached in the excel spreadsheet. There have been 87 matters received in the last two financial years, and 25 of these are listed as superannuation fund matters¹.

Some matters are not raised via the misconduct and breach reporting process. For example, some issues are identified via existing surveillance processes, or as part of industry liaison. As a consequence of this, the figures in the spreadsheet above do not necessarily directly correlate with the actions taken.

Examples of the actions taken in relation to APRA-regulated superannuation funds include:

- Infringement notices on Media Super for their comparisons with SMSFs: see Media Release [14-001MR](#)
- Infringement notices on Equity Trustees Ltd for their involvement with the promotional material of the Good Super Fund, relating to their rollover campaign: see Media Release [15-039MR](#)
- Infringement notices on BT Funds Management Ltd for their use of google ad words: see Media Release [15-149MR](#).
- ASIC has also requested that a trustee modify their website disclosure in relation to their "self-managed option" as we were concerned that it gave the impression that it offered the same level of choice in assets as a self-managed super fund, when this was not the case: see Media Release [15-251MR](#).

¹ Noting that some of the 25 appear to include SMSF matters as well as matters to do with APRA regulated super funds.

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

- ASIC has received a number of complaints about ISA's Compare the Pair campaign and last year ISA agreed to make changes to future advertising campaigns following ASIC feedback: see Media Release [14-138MR](#)).

In addition to these matters, where results have already been publicised, ASIC has undertaken the following actions:

- Issued warning letters and negotiated changes to advertising campaigns in relation to a variety of matters, including:
 - The use of projections
 - The use of comparisons
 - Use of past performance; and
 - Information about rolling over super.

There have been other instances where corrective disclosure has been negotiated with an entity other than a superannuation trustee – these other entities include a payroll provider holding out they offered "clearing house" services to the superannuation industry (when they had no authorisation as a clearing house) and a website provider that gave ratings to different superannuation funds.

We have also sought corrections to at least one calculator offered by a superannuation trustee, on the basis that it may have overstepped our relief available for calculators in Class Order 05/1122. This class order helps facilitate the use of generic calculators. It provides relief from the licensing and disclosure requirements in Chapter 7 of the *Corporations Act 2001* provided certain basic criteria are met, and warnings given. In particular, the calculator is not to be used to promote a particular financial product.

In addition, we take regular action in relation to disclosure in superannuation beyond advertising and promotional material. Many of the breaches received by ASIC from trustees include unit pricing or charging errors that require rectification and disclosure to members and we assist in overseeing these processes in some cases.

We have also recently run proactive disclosure projects looking at the new requirements for trustees under Stronger Super reforms. In 2014 we ran a project looking at compliance with the new product dashboard requirements (see Media Release [14-110MR](#)) and in 2015 we ran a project looking at compliance with the new executive officer remuneration and systemic transparency requirements (see Media Release [15-245MR](#)).

As noted, we do receive complaints and on occasions we take no further action partly because the entity could take action for itself. Many of the provisions of the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* provide an ability for another party, such as an aggrieved member, to take action. This year, we have received at least two complaints from a trustee who is concerned by the promotional material of their competitors, particularly with regards to comparative advertising sent to employers looking to make changes to their default fund arrangements. While we may well take action in the future about promotional material to employers (and have warned the industry of this), we did not consider that the cases presented to us warranted further action and the trustee who raised the issues could take action for themselves.