Appendix 2

Answers to Questions on Notice

Questions asked on 13 September 2005

Question 1
When was the formal notification of the decision not to prosecute?

Answer:
There was formal notification on 2 May 2005.

This view was expressly confirmed by the DPP at a liaison meeting with senior ASIC enforcement staff on 15 June 2005 and in writing on 29 June 2005 prior to ASIC commencing its civil penalty proceeding against Mr Vizard.

Question 2
(in relation to privileged advice from the DPP-should the public have a right to see it)

Mr Lucy—My point was that I would like to take the question on notice so that we can consider our situation.

Answer:
ASIC respectfully asks that the Committee not press its request for release of this privileged correspondence.

Advice and correspondence between ASIC and the DPP attracts both legal and professional privilege and public interest immunity. Accordingly, there is no public right in favour of disclosure of DPP advice.

The Committee will appreciate that it is essential that the DPP should be able to correspond frankly and confidentially with Commonwealth law enforcement agencies such as ASIC. The production of such correspondence, even "in camera", would be inconsistent with the on-going need for such frankness and confidentiality.

ASIC respectfully requests that the Committee observe its usual circumspection in calling for material the production of which might prejudice current or future law enforcement.

Question 3
Would you take on notice and provide to the committee—if you are able to—the dates on which any discussions between ASIC and the DPP about the use and non-utility of section 19 were had in relation to this matter?

Answer:
The issue of Greg Lay's evidence was discussed in detail between ASIC investigators and the DPP on several occasions after ASIC referred a brief of evidence to the DPP in November 2004.

The tenor of these discussions was that the DPP required Greg Lay to sign a voluntary witness statement rather than attend a s19 examination and this was the only way to progress

the DPP's decision-making. The critical issue was that the s19 transcript of a witness is not admissible in evidence and while there have always been provisions to subpoena reluctant witnesses after the laying of charges, the DPP was and has not been willing to rely on s19 transcripts in lieu of a signed statement in respect of the evidence of key witnesses when making decisions to prosecute.

ASIC and the DPP specifically discussed the issue of a section 19 notice in respect to Greg Lay at a liaison meeting of senior ASIC and DPP staff held on 15 June 2005. The substance of that discussion concerned whether a s19 examination would assist the DPP in resolving concerns about the credibility of Greg Lay given his refusal to provide a statement and his request for indemnification.

The view was that a s19 would not overcome the credibility issue created by his refusal to sign a statement.

Having provided ASIC investigators with his evidence voluntarily and on tape, his refusal to verify the truth of those statements made his credibility – as opposed to the means by which that evidence could be secured – the critical issue.

Question 4
Prior to the Vizard matter being made public, I want to know whether you had raised any concerns about the operation of the MOU or the content of the MOU, either with the DPP or with the relevant minister.

Answer:
ASIC and the DPP had been in discussions about updating the MOU for some months prior to the announcement of the Vizard matter.

The Vizard case itself did not raise any new issues relating to the MOU that had not already been identified.

Question 5
(in relation to the MOU with the DPP)

Chairman, I would like to take that on notice for my own knowledge. I do not know what Ms Redfern has responded. On the basis that what she said is correct, which I am sure that it is, I would have no difficulty, but since the question is directed to me I would need to satisfy myself.

Answer:
Yes, the document is now public.

Question 6
Could I ask you on notice, unless you have a ready answer, to take a look at the CAMAC report, take a look at the DPP's remarks, integrate it with other things you know and give the committee a view as to whether there are any areas in the law covering directors' duties, insider trading, penalties and even corporate governance matters which, in your opinion, could be brushed up or improved arising out of the circumstances of this case?

Answer:
ASIC does not believe the Vizard case has exposed a systemic weakness in the enforcement of either the insider trading prohibition or breaches of directors duties. The case highlights that credible enforcement action always depends on at least one reliable witness being prepared to give evidence. The DPP statement reinforces this position.

The case also highlights the difficulties and complexities involved in investigating and prosecuting insider trading to a criminal standard. In each case it is necessary to establish beyond a reasonable doubt a defendant possessed inside information and the inside information was material to the price or value of the shares and was not generally known. An additional difficulty in this case was establishing that Vizard was the person who instigated the trading. This required evidence from Greg Lay and this was the reason he was a critical witness.

As the Explanatory Memorandum to the Financial Services Reform Bill 2001 stated, the difficulties in proving insider trading beyond reasonable doubt (i.e. the criminal standard of proof)

"…may result in cases not being pursued even where there has been a breach of the provisions. This difficulty may result in cases not being pursued even where there has been a breach of the provisions. This is undesirable as it casts the law into disrepute, and also threatens the integrity of financial markets…It is therefore proposed to make the market misconduct and insider trading provisions civil penalty provisions. The application of the civil burden of proof (balance of probabilities) will facilitate the bringing of actions for breaches of the provisions. The application of civil penalties is likely to act as a deterrent to market misconduct. " (Ex. Mem. Para 2.78-2.79)

The addition of insider trading as a civil penalty obviated the need to amend further the insider trading prohibition however the Vizard share trades predated this amendment and hence this route was not available in the Vizard case.

ASIC v Petsas & Miot (2005) 23 ACLC 269, was also a case that in the DPP's view could not have been the subject of a successful criminal prosecution and hence the insider trading civil penalty provisions were used in that case.

There is one possible reform issue that would alleviate the DPP's difficulties in dealing with reluctant witnesses. An amendment to s49 of the ASIC Act to enable ASIC to require certain witnesses to provide a statement in an admissible form would achieve this, and is supported by the DPP. Under the ASIC Act, a s19 examination transcript of a witness is not admissible unless the witness is dead or absent. However, currently a witness may choose whether to provide a statement in a criminal prosecution. Without a statement, the DPP is unable to properly assess the evidence to make a prosecution decision, and in some states, a committal cannot proceed.

An alternative, which is not as useful, is to allow a transcript of a witness' examination to be admitted into evidence where the court or the rules of procedure, such as in criminal committal proceedings, require a written statement to be relied on as a record of the witness' evidence in chief. This may allow the DPP to place greater reliance on s19 transcripts as a basis for decisions to prosecute than is presently the case.

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Question 7

I would not have thought that being able to tell me whether or not the two former directors had been interviewed or not, as a matter of fact, is a particular problem.

Answer:

Three former directors were interviewed prior to the commencement of ASIC's civil proceedings.

Question 8

Subsequent to the decision to investigate the Telstra matter that Ms Burke brought up, what discussions have there been with either ministers or ministerial officers and yourself, Mr Cooper, Professor Collier or, to your knowledge, other officers of ASIC? …

Answer:

The decision to investigate Telstra was made on Tuesday 6 September 2005 and the first part of the PJC hearing was 13 September 2005. In that time there was no contact with Ministers or Ministerial officers by the Deputy Chairman, Commissioner Collier any Executive Director or any person associated with the Telstra investigation.

The ASIC Chairman had contact with Minister Brough and the Treasurer at an FSAC dinner on the evening of 12 September at which the issue of Telstra was not referred to be neither Minister nor Mr Lucy.

Question 9

That leads in part to my next question. You referred earlier to an example about insurance et cetera. As a consequence of this exercise, are you able to provide the committee with a case-by-case list - but not going to names - of the mis-selling and the disregard for the interests of clients that you identified? Please take it on notice.

Answer: See Appendix 4 of this report

Question 10

I would also like you to take on notice how many identified cases of mis-selling or disregard of clients' interests you have 'settled'—cases that have reached a successful conclusion, cases where you believed you had to take action and a response has occurred. I would like the details, not necessarily names but the quantum of money and the type of case. Could you take that on notice?

Answer: See Appendix 4 of this report

Question 11

I would be interested in some detail of how you regulate the license dealers in the companies under the new regime as far as your investigations are concerned and in percentages of investigations that occur and the abnormalities that you detect.

Answer: See Appendix 4 of this report

Question 12
There is some detail in this press release that I will go into next time, but can I ask you to check something. The press release went out on 1 April. The *Financial Review* article on 2 April was obviously off the back of the press release. However, one of the issues that concerns me is that the *Financial Review* article of 2 April, which was based on your press release, contains detailed information of a monetary size—specifically, $140,000—that was not in the press release. The question is: are ASIC aware or have they investigated whether or not a leak occurred from the organisation that provided to the *AFR* that monetary detail, which was not in the press release that was released the day before?

Answer:
ASIC did not leak any information to the AFR or any other media outlet about the prosecution of Mr Moore. After the media release was issued, the AFR asked ASIC what ASIC alleged to be the total of superannuation money involved in the transactions that are the subject of the charges.

ASIC supplied that information to the AFR.

Questions asked on 9 November 2005

Question One
Are you aware of any ASX trading irregularities in relation to Sausage software?

Answer:
In 1996 ASIC received a referral from the ASX in relation to trading irregularities in Sausage Software shares but has not received any referral from the ASX in relation to Sausage Software since this time. ASIC has spoken to the ASX about trading irregularities in Sausage Software in March 2000. During this time there were 2 price alerts generated by the ASX's market surveillance system.

One was for an unusual price increase. This was reviewed and assessed by the ASX as trading within normal range. The other price alert was for a closing price fall over a 15 day period. This was reviewed and assessed as price returning to previous levels. No alerts for unusual volumes in relation to trading in Sausage Software shares were generated by the ASX systems during this period. These matters were not referred to ASIC.

Question Two
How many trading irregularities have been referred from the ASX to ASIC over:
The financial year to date;
Financial year 2004/05;
Financial year 2003/04;
Financial year 2002/03;
Of these referrals, how many became investigations?

Answer:
ASIC received the following numbers of referrals from the ASX For the following financial years. The numbers of these referrals that have resulted in an investigation are also listed:

	ASX Referrals	Number of these investigated
Financial year to date:	16	5
Financial Year 2004/05:	73	27
Financial Year 2003/04:	48	36
Financial Year 2002/03:	53	45

There is a significant change in the proportion of referrals that resulted in an investigation between the 2003/04 financial years and the 2004/05 financial years. This is because ASIC changed the way it treated ASX referrals in May 2004. Prior to May 2004, ASX referrals routinely went to ASIC's enforcement directorate to be assessed in that directorate.

It was common practise for investigations to be commenced as part of this assessment process. In May 2004, ASIC's procedures were changed so that the referrals were assessed in what was then ASIC's policy and markets regulation directorate without a formal investigation being commenced. The referrals are now assessed in ASIC's compliance directorate without a formal investigation being commenced.

One of the reasons this change was because ASIC found that a relatively small proportion of investigations following ASX referrals resulted in enforcement action.

Therefore, it was considered more efficient for referrals to be assessed before they went to the enforcement directorate with only those that were more likely to result in an enforcement action or matters of strategic significance being referred to the enforcement directorate for investigation.

The enforcement directorate has not changed the number of resources it devotes to investigating markets matters but this change has allowed it to focus more investigative resources on matters that are more likely to result in enforcement outcomes or have strategic significance.

ASIC believes that this change has facilitated better outcomes in the investigation of market matters over the last 2 years.

Question Three
The MOU and protocol documentation between ASIC and the ASX, can this be made available to the committee.

Answer:
The MOU is a public document and is available on ASIC's website. There are no other current protocol documents between ASX and ASIC.

Question Four
In relation to insider trading, is there documentation outlining how and what you investigate and do you determine your procedures in relation to these investigations?

Answer:
ASIC does not have specific documentation that sets out procedures for investigating insider trading but does have documentation providing procedures in relation to the conduct of investigations generally.

However, ASIC has staff who specialise in insider trading investigations are in the process of preparing documentation outlining various methodologies for conducting insider trading investigations. These staff also provide assistance to ASIC's investigation staff on the methodologies that can be used to investigate particular insider trading investigations.

Of course, any methodology must recognise that each investigation will be different depending on the facts and circumstances of the suspected offence and the investigations need to be tailored accordingly.

Question Five
What is the final cost of the switching survey?

Answer:
Fully loaded staff costs including salaries, an allowance for salary on-costs, property and overheads is $0.320.7M. Direct salary costs were $0.238.7M. Travel costs amount to $600.00.

Question Six
What is the final cost of the shadow shopping exercise?

Answer:
ASIC's shadow shopping exercise is in progress and is yet not complete. We therefore cannot respond to this question at this point in time. When the exercise is complete a list of costings can be made available to the committee.

Question Seven
Were any accountants included in the switching surveillance?

Answer:
Yes.

1. Some of the authorised representatives of AFSLees are accountants and in some cases the surveillance looked beyond their conduct as authorised representatives into their conduct as accountants outside the scope of their AFSL authorisation.

   One particular issue that arose is whether proper disclosure was being made to clients about which 'hat' the adviser was wearing, particularly when advising on SMSFs. Another issue was the risk management procedures of AFSLees in relation to their liability when an authorised representative acted outside the scope of their authority.

2. Three discrete surveillances were conducted on accounting firms providing advice and administration services for SMSFs. One is ongoing.

Question Eight
Super calculators – do you take actuarial advice here about what is ok?

Answer:
Yes, ASIC takes actuarial advice in relation to superannuation calculators.

Question Nine
Audit independence, what have been the issues raised across the sector?

Answer:

The suggested areas for improvement in our report were:

- Firms had remained more focused on Sarbanes-Oxley than CLERP9;
- Firm's own testing of independence systems revealed unsatisfactory results;
- All firms' partners are required to be financially independent of clients, but firms had varying policies on professional staff prohibitions;
- Some firms took narrow and legalistic view of independence when considering non-audit services and did not appear to consider a reasonable person's perception test;
- All firms had inadequate documentation and varying processes for audit engagement team independence confirmation;
- Firms had a wide variety of documentation supporting decisions for approving non-audit services;
- Some firms levels of attendance and completion of independence training was inadequate; and
- Firms did not clearly communicate consequences of non compliance to staff.

Most firms did not have a central register of independence queries and breaches

Question Ten

Does ASIC share the view of the Financial Reporting Council, that Audit Independence guidelines in Australia may be overly prescriptive?

Answer:

The findings in our report were that all firms had generally adequate systems and processes in place and we did not identify any breaches of the Corporations Act.

We did suggest areas for improvement and our approach was to articulate to the firms where they could improve but we were not prescriptive about how they achieve these improvements - this is a matter for each firm to consider in the context of its own local and global systems, structure, and resources.