Chapter 2

Matters considered at oversight hearing

2.1 The committee inquired into several areas of ASIC's activities. These included:

- the Commission's ongoing regulatory response to the collapse of Trio Capital;
- the growth of Australia's superannuation sector;
- complaints handling;
- advertising standards; and
- ASIC's resources.

ASIC's ongoing regulatory response to the collapse of Trio Capital

2.2 Although the committee has presented its report for its inquiry into the collapse of Trio Capital, the committee continues to closely monitor relevant regulatory activity. While the government has yet to present its response to the committee's recommendations, the committee obtained from ASIC an overview of the regulator's ongoing response to the financial collapse.

Communication between regulatory bodies

2.3 As part of its inquiry into the collapse of Trio Capital, the committee identified opportunities for increased cooperation and coordination between the regulatory and enforcement agencies overseeing Australia's financial markets.[1] The committee found that communications between ASIC and the Australian Prudential Regulation Authority (APRA) regarding key material relevant to Trio Capital was lacking. In the committee's view, effective inter-agency communication is an area where significant improvements can be made.[2] In previous oversight inquiries, the committee has also highlighted the importance of cooperation between regulatory agencies and encouraged ASIC to improve information sharing with APRA.[3]

2.4 It appears that ASIC does not share the committee's view regarding the apparent extent of the communication gap. The committee was informed that '[t]here always were good lines of communication, but the report has really made us focus on areas we can improve'.[4] While not providing a detailed overview of proposed

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1 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, May 2012, pp 143 & 153; recommendation 11.

2 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, p. xx.

3 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, November 2011, p. 6.

4 Mr John Price, Senior Executive Leader, ASIC, *Committee Hansard*, 22 June 2012, p. 3.

procedural change, ASIC and APRA are considering a 'more structured' approach to information sharing.[5]

Enforcement actions

2.5 The committee was informed that discussions are continuing with the Australian Crime Commission (ACC) and the Australian Federal Police (AFP) regarding individuals involved in the Trio Capital collapse. In particular, the committee was advised that ASIC and the ACC are considering whether Mr Jack Flader warrants a multi-agency government response.[6] The committee was also informed that the matter has not yet been referred to the AFP.[7] The committee notes ASIC's media release of 5 June 2012, which states 'ASIC believes there is currently insufficient evidence to prove a breach by him of Australian law'.[8]

2.6 The committee was also informed that appeals have been lodged in the Administrative Appeals Tribunal regarding enforcement action against certain financial advisers.[9]

2.7 ASIC advised that the Commission has approved funding for PPB Advisory from the Assetless Administration Fund.[10] While acknowledging ASIC's advice that the funding has been granted in accordance with the rules of the Assetless Administration Fund, the committee notes that this funding is in line with Recommendation 10 of the committee's Trio Capital inquiry report.

The value of enforceable undertakings

2.8 The committee has previously indicated its intention to seek ASIC's advice regarding the value of enforceable undertakings. In particular, the committee is interested in ASIC's view of the suitability of enforceable undertakings as a deterrence mechanism when weighed against the deterrent effect of criminal sanctions.[11] This is of particular relevance to the Trio Capital collapse, given the extent to which enforceable undertakings have been used in response to industry misconduct.[12]

2.9 The committee was advised that ASIC maintains a register of enforceable undertakings and monitors ongoing compliance.[13] The committee was also informed

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5 Mr Price, ASIC, *Committee Hansard*, 22 June 2012, p. 15.

6 Mr Price, ASIC, *Committee Hansard*, 22 June 2012, p. 3.

7 Mr Chris Savundra, Senior Executive Leader, ASIC, *Committee Hansard*, 22 June 2012, p.3.

8 ASIC, 'ASIC provides update on Trio', Media release 12-11MR, 5 June 2012.

9 Mr Price, ASIC, *Committee Hansard*, 22 June 2012, p. 4.

10 ASIC, answer to question on notice, 22 June 2012 (received 26 July 2012).

11 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, May 2012, p. 11.

12 An overview of the enforceable undertakings relating to the collapse of Trio Capital is available in the committee's May 2012 report: Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, May 2012, p. 36.

13 Mr Savundra, ASIC, *Committee Hansard*, 22 June 2012, p. 11.

that in some cases ASIC adopts a dual approach to monitoring compliance, with ASIC's compliance review being informed by an independent external compliance assessment.[14] The committee drew ASIC's attention to the enforceable undertaking obtained from Mr Tony Maher, formerly known as Paul Gresham. ASIC advised that the terms of the undertaking do not prevent ASIC from taking further regulatory action:

> **Mr Savundra:** The purpose of the enforceable undertaking is protective in nature. It is in lieu of an administrative banning action, and its prime purpose is protection of the Australian public. So the EU is a timely and effective means of protecting the public from Mr Gresham; it is not concerned with regulatory action looking at alleged misconduct.
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> […]
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> **Mr Price:** The EU does not constrain ASIC from taking further action.

AFSL suspensions and director qualifications

2.10 Throughout the Trio Capital inquiry, and, prior to that during the 2009 financial products and services inquiry and the resulting Future of Financial Advice reforms, the committee has explored with ASIC the qualifications required to obtain an Australian Financial Services Licence (AFSL). Events since the committee tabled its report into Trio Capital further highlight the significance of the AFSL system for the integrity of Australia's financial system. The committee sought ASIC's views on media reports alleging that persons suspended from providing financial services are continuing to advertise as directors of the associated financial planning firm. The media reports further allege that the suspended financial advisers are informing clients that 'it is business as usual'.[15] ASIC advised that the Commission is investigating the allegations.[16]

2.11 The discussion highlighted the current disconnect between the criteria to obtain an AFSL and the qualifications required to act as company directors. Mr Greg Medcraft, Chair, ASIC, advised 'You can be banned from financial services, but you can still be a director of a financial services company, which is quite an interesting issue'.[17] ASIC hypothesised that the distinction in Australia's corporations law between the roles of financial advisers and company directors may not be well understood:

> **Mr Medcraft:** Think about an ordinary person. An ordinary person would probably think that if somebody is banned from financial services they ought to be banned from being a director of financial services company.
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> **Ms Gibson:** As a director of a financial services company you would manage the whole company and you could manage accounts, but you could

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14 Mr Price, ASIC, *Committee Hansard*, 22 June 2012, p. 11.

15 Mr Ken McGregor, 'Couple defies trading ban ruling', *The Advertiser*, 20 May 2012.

16 Mr Peter Kell, Commissioner, ASIC, ,*Committee Hansard*, 22 June 2012, p. 7.

17 Mr Greg Medcraft, Chair, ASIC, *Committee Hansard*, 22 June 2012, p. 8.

> not, as an individual, be doing anything to do with financial advice. So, you could not be selecting the products that your employees might be portraying.[18]

2.12 While noting that the issue is a matter for government, ASIC stated that the issue is one that should be considered further.[19] The committee urges the government to further consider the matter.

Committee view

2.13 The committee thanks ASIC for its broad overview of activities in response to the committee's Trio Capital report. The committee anticipates the release of the government's response to the committee's report, by the dates required under resolutions of the House of Representatives and of the Senate.[20]

2.14 The committee notes that the obligations and duties of AFSLs, prescribed by Division 3 of Chapter 7 of the Corporations Act, include an obligation to 'do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly'. The committee believes that this is the community's expectation, and that these standards must be rigorously upheld.

2.15 In its report into the collapse of Trio Capital, the committee noted ASIC's views in relation to limitations and restrictions of its role in granting AFSLs. The committee stated that these were legitimate concerns. However, the report also observed that in terms of ASIC's power to register an entity rather than an individual director, 'there does appear to be a strong case to establish a register of employee representatives in the financial services industry'.[21] The committee reiterates the recommendation it made as part of its inquiry into Trio Capital that the government consider whether current processes are adequate when there is a change of ownership or control of a company which holds an AFSL, or whether there is a need for more detailed scrutiny of the new owner.[22]

2.16 The committee notes ASIC's advice regarding the deterrent value of enforceable undertakings. While noting the advice that further actions can be taken if appropriate, it would be of concern to the committee if enforceable undertakings were inadequate or inappropriate to act as effective deterrents. The committee invites ASIC to provide further advice regarding the matters that ASIC takes into consideration when determining whether an appropriate regulatory response includes enforceable undertakings.

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18 Mr Medcraft, ASIC; Ms Belinda Gibson, Deputy Chair, ASIC, *Committee Hansard*, 22 June 2012, p. 8.

19 Mr Medcraft, ASIC, *Committee Hansard*, 22 June 2012, pp 8 & 9.

20 House of Representatives Resolution of 29 September 2010; Senate Resolution of 24 August 1983.

21 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, May 2012, pp 83–84.

22 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, May 2012, p. xxviii.

Growth of Australia's superannuation industry

2.17 ASIC advised that the continuing growth of superannuation is a key pressure for Australia's financial markets over the coming 12 months and, indeed, the coming decade. The growth in self-managed superannuation funds (SMSFs), and increasing SMSF investment in managed investment schemes, are areas of 'high focus' for ASIC.[23]

2.18 Two strategies were offered in response to the pressures and potential risks associated with the continuing growth of Australia's superannuation pool. First, ASIC focused on investor responsibilities. Mr Medcraft commented on the importance of education to aid investors in understanding the meaning of holding an AFSL and the different regulations relating to different superannuation funds.[24] Second, the commission also noted regulators' responsibilities to monitor markets particularly for innovations and to work collaboratively with international counterparts.

> …the International Organisation of Securities Commissions [….] allows us to have a consistent international approach to standards of dealing with regulation of markets and products. That forum is quite important to us.
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> The lessons of the past are quite interesting. If you look at crises over the last couple of hundred years, you have two key lessons. One is that innovation outpaces regulation. We have seen this again and again. The second is that regulators failed to recognise the globalisation of markets and products. It is a fact, and I think you just have to be aware of that.[25]

Committee view

2.19 The collapse of Trio Capital highlights areas of potential weakness within Australia's superannuation industry. The committee notes ASIC's advice regarding the potential pressures arising out of the growth of Australia's superannuation industry. Accordingly, the committee will continue to monitor ASIC's activities to address identified areas of concern and to maintain, facilitate and improve the performance of Australia's superannuation system.

Complaints handling

2.20 The committee has previously explored with ASIC the Commission's complaints handling procedures.[26] ASIC had advised that communications with complainants regarding the outcome of any investigations can be limited, to ensure procedural fairness to persons investigated.[27] ASIC officers reported being conscious

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23 Mr Medcraft, ASIC, *Committee Hansard*, 22 June 2012, p. 13.

24 Mr Medcraft, ASIC, *Committee Hansard*, 22 June 2012, p. 4.

25 Mr Medcraft, ASIC, *Committee Hansard*, 22 June 2012, p. 16.

26 See, for example, Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, February 2011; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, May 2011.

27 Mr Tony D'Aloisio, Chairman, ASIC, *Committee Hansard*, 11 March 2011, p. 37.

of the tension between protecting the rights of individuals and facilitating investor confidence in the efficacy of Australia's financial system and the regulator's role in promoting a sound market.[28] ASIC further advised that Market Integrity matters are 'treated with sensitivity', and, therefore, complainants are informed that ASIC will not enter into further correspondence unless ASIC requires additional information.[29]

2.21 At the oversight hearing in June 2012, the committee drew to ASIC's attention what appeared to be a standard clause in the Commission's correspondence:

> We are unable to provide further details regarding what, if any, action, we may or may not take in relation to the concerns you have raised. Please note that ASIC will only contact you again in relation to your complaint if we require further information or evidence to assist our inquiries.[30]

2.22 ASIC confirmed its previous advice regarding its approach to informing complainants of the outcome of their engagement with ASIC.[31] The committee was also informed that the *Corporations Act 2001* restricts disclosure of certain information gathered.[32]

Committee view

2.23 As the committee has previously noted, appropriately engaging with investor concerns promotes market confidence.[33] Accountability and transparency are two hallmarks of a sound and secure market. The committee recognises that this is a topic that has been previously canvassed with ASIC. The committee appreciates the constraints that limit disclosure. However, the continued queries which the committee receives regarding ASIC's complaints and investigative processes highlights market participants' uncertainty regarding ASIC's role in responding to concerns. In keeping with the statutory obligation to promote informed market participation, the committee considers that correspondence with complainants should make clear any barriers to ongoing communication or disclosure. Therefore, it would be appropriate for ASIC to consider whether improvements could be made to standard clauses in correspondence material.

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28 Mr D'Aloisio, ASIC, *Committee Hansard*, 11 March 2011, p. 37.

29 ASIC, answer to question on notice 2, 11 March 2011 (received 28 April 2011).

30 Mr Paul Fletcher MP, Parliamentary Joint Committee on Corporations and Financial Services, *Committee Hansard*, 22 June 2012, p. 16.

31 Mr Kell, ASIC, *Committee Hansard*, 22 June 2012, p. 17.

32 Ms Gibson, ASIC, *Committee Hansard*, 22 June 2012, p. 17.

33 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, May 2011.

Advertising standards – misleading and deceptive conduct

2.24 The committee has previously explored with ASIC the Commission's role in monitoring advertising content.[34] ASIC confirmed that the Commission is actively promoting compliance with the advertising standards required by the ASIC Act and the Corporations Act.[35] Released in February 2012, ASIC's Regulatory Guide 234, 'Advertising financial products and advice services: Good practice guidance', outlines ASIC's approach to enforcing the safeguards in Australia's corporations law against misleading and deceptive advertising.

2.25 It was evident that the regulatory approach recognises that advertising that is likely to create unrealistic expectations can impede investor confidence, and informed decision-making, and erode market competition.[36] As Mr Peter Kell, Commissioner, stated: the regulatory approach is proactive, seeking to 'stop people being drawn into investments or other products before difficulties are created'.[37] While the regulatory guide applies to all industry participants, the committee was informed that ASIC is particularly focused on advertising in rural and regional Australia, and the advertising of insurance products, consumer credit products and financial services.[38]

2.26 ASIC advised that since mid-2010, the Commission's regulatory actions have resulted in corrections to approximately 130 advertisements.[39] Under Australia's corporations law, ASIC has broad discretion to determine the appropriate regulatory response to misleading or deceptive advertising. Responses can include infringement notices, public warning notices, 'stop orders' and compensation claims.[40] It was apparent that the regulatory options under the corporations law enable ASIC to adopt an appropriate focus on both investor redress and industry deterrence and sanction.[41] The committee was informed that the Commission expects 'high levels' of industry compliance:

> We have been sending a message this year going forward that we will be looking to take tougher [regulatory] outcomes…it is a signal to the industry

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34 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, March 2012, pp 20–21.

35 Mr Kell, ASIC *Committee Hansard*, 22 June 2012, p.11.

36 Mr Kell, ASIC, *Committee Hansard*, 22 June 2012, p.11; ASIC, *Regulatory Guide 234*, 'Advertising financial products and advice services: Good practice guidance', February 2012, p. 4.

37 Mr Kell, ASIC, *Committee Hansard*, 22 June 2012, p. 11.

38 Mr Kell, ASIC, *Committee Hansard*, 22 June 2012, pp 11–12.

39 Mr Kell, ASIC, *Committee Hansard*, 22 June 2012, p. 11; 'ASIC releases guidance on advertising ', 12-23MR, 14 February 2012.

40 ASIC, *Regulatory Guide 234*, 'Advertising financial products and advice services: Good practice guidance', February 2012, p. 36.

41 Mr Kell, ASIC *Committee Hansard*, 22 June 2012, p. 12; ASIC, *Regulatory Guide 234*, 'Advertising financial products and advice services: Good practice guidance', February 2012, p. 36.

> that we expect high levels of compliance…So we are sending a strong message that we will be using those powers more going forward.[42]

Committee view

2.27 The committee commends ASIC for the release of Regulatory Guide 234. The committee shares ASIC's view of the significance of advertisements for the performance of Australia's financial system. The committee considers that industry's communications with investors and consumers, including but not limited to advertisements, should facilitate, and not impede, informed participation in Australia's financial markets. The committee notes with interest the indication that the Commission will consider strong regulatory responses to instances of misleading and deceptive conduct. The committee seeks ASIC's continued advice regarding developments in this area, and will revisit this matter at subsequent oversight hearings.

ASIC's resources

2.28 The committee continues to consider the level of resources available to ASIC, and the allocation of resources within ASIC. Accordingly, the committee has particularly monitored the recent expansion of ASIC's responsibilities – an expansion which has included the allocation of responsibility for the supervision of real-time trading on Australia's domestic licence markets, and expanded powers and functions resulting from the Future of Financial Advice reforms and the National Business Names Register.[43]

2.29 ASIC advised that a commitment to proactive engagement with the market is a key driver of ASIC's allocation of its resources. ASIC representatives did not provide an assessment of the adequacy of current budget appropriations and own-source revenue, but advised that the regulator seeks to optimally use all available resources. [44]

2.30 From the information provided, it was evident that ASIC liaises with Treasury regarding required resources. In response to a question taken on notice regarding ASIC's review of client money handling practices in the contracts-for-difference sector, ASIC advised that the Commission 'is discussing with Treasury the potential levels of resources that may be required'.[45]

Committee view

2.31 The committee approves ASIC's commitment to proactive engagement with Australia's financial markets. However, the committee has been concerned to ensure that the expansion of ASIC's responsibilities is not accompanied by a diminution in

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42 Mr Kell, ASIC, *Committee Hansard*, 22 June 2012, p. 12.

43 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, February 2011, p. 7; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, March 2012, p. 21.

44 Mr Medcraft, ASIC, *Committee Hansard*, 22 June 2012, p. 13.

45 ASIC, answer to question on notice, 22 June 2012 (received 30 July 2012).

the quality of the regulatory services ASIC provides. The committee also considers that it is appropriate for ASIC, when prioritising its resource allocations, to consider not only the current but the emerging needs of Australia's financial markets. The committee will therefore continue to raise this matter with ASIC.

Ms Deborah O'Neill MP

Chair