Parliamentary Joint Committee on Corporations and Financial Services

Statutory Oversight of the Australian Securities and Investments Commission

August 2008

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Duties of the Committee

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the Parliamentary Committee's duties as follows:

(a) to inquire into, and report to both Houses on:

(i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

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Chapter 1

Statutory oversight

1.1 The Parliamentary Joint Committee on Corporations and Financial Services was established by the *Australian Securities and Investments Commission Act 2001*. Section 243 specifies the Committee's duties, which include:

> (a) to inquire into, and report to both Houses on:
>
> > (i) the activities of the Australian Securities and Investments Commission (ASIC) … or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed.

1.2 This report is presented in execution of the committee's duty under s.243(a)(i).

1.3 In undertaking this oversight function, the committee has inevitably focused on matters of a controversial nature, or areas where there may be scope for ASIC to improve the way in which it carries out its responsibilities. Despite this, the committee remains satisfied that ASIC continues to carry out its functions in accordance with the provisions of the corporations legislation.

Public hearing

1.4 The committee held a public hearing on 18 June 2008 to examine matters falling within ASIC's regulatory jurisdiction. Evidence was provided by Mr Tony D'Aloisio, Chairman of ASIC, Mr Jeremy Cooper, Deputy Chairman and Ms Belinda Gibson, ASIC Commissioner.

1.5 A copy of the Hansard transcript from the hearing has been tabled for the information of the Parliament. It is also available online at http://www.aph.gov.au/hansard/joint/commttee/J10924.pdf.

Additional information

1.6 A number of questions were placed on notice at the hearing. Those questions and ASIC's responses are at Appendix 2.

Chapter 2

Issues raised with ASIC

2.1 The committee's hearing with Australian Securities and Investments commission (ASIC) officials on 18 June 2008 included discussion on a number issues relating to ASIC's regulatory responsibilities. The main issues that were discussed are considered in this report. They include:

- the regulation of financial markets, particularly issues relating to short selling and margin loans;
- ASIC's strategic review;
- ASIC's response to recent property investment scheme collapses;
- the regulation of financial planners and the introduction of professional indemnity insurance for negligent advice;
- banking and credit regulation and the implementation of the government's green paper proposals.

Market regulation

2.2 Volatility in the Australian share market has brought attention to the regulation of short selling and margin lending. There have been concerns that undisclosed covered short selling - where shares are borrowed, sold, re-purchased at a lower price, and returned for a profit - is affecting market transparency and encouraging illegal market manipulation. Margin loans have also been implicated in instances of targeted short selling, where short sellers aware of an impending margin call have used this inside knowledge to further drive down share prices. In addition, margin lending has been under scrutiny following the collapse of margin lenders Opes Prime and Lift Capital, in circumstances where investors had apparently been unaware of the unsecured nature these products.

2.3 ASIC told the committee that it had worked with the ASX to hasten action against alleged misconduct referred by the ASX. The breakdown of enforcement and surveillance activity between January and May was described as follows:

> Between January and May this year the ASX has referred some 40 matters to us on possible insider trading and market manipulation. We are investigating 11 of those for possible civil criminal administrative proceedings. Fourteen are under surveillance and 11 have been referred to our licensing unit. Only four have been closed for insufficient evidence. In addition, we have one insider trading matter before the courts at present, six matters with the Commonwealth Director of Public Prosecutions, two on

> insider trading, and two market manipulation matters are also with the CDPP.[1]

2.4 ASIC indicated that it had issued a warning concerning the use of false and misleading rumours on share trading and indicated that it had recommended to government that disclosure rules applying to short selling be improved, which has been accepted.[2]

2.5 On margin lending, ASIC has published a reminder about the continuous disclosure obligations concerning the margin loans of directors. They described its effect and the circumstances in which disclosure is triggered by the materiality of the directors' exposure:

> When it became clear that a number of margin loans over those types of shareholdings were being sold down we made an announcement to the exchange that said that companies that know that this is the position should be disclosing to the market that that is happening. We took the view, and take the view, that disclosure is probably a better course than outright prohibition, simply because people then find ways to get around prohibition. When we said that some of that should be disclosed there were a number of disclosures about the existence of margin loans, or in some cases the fact that they were not disclosed. The disclosure would be under the continuous disclosure rules of the stock exchange.
>
> …
>
> Where there is a significant shareholding—I think the usual view we took was a five per cent shareholding as the level—the entry into those loans where there are directors involved should be disclosed.[3]

2.6 ASIC told the committee that it is investigating the failure of Opes Prime.[4] The broader issue of how well informed consumers are about the nature of such products was also addressed. While emphasising the legitimate function served by the practice, ASIC acknowledged that the disclosure requirements in this area could be improved:

> …what we have seen also are issues of whether or not a margin loan is explained in such a way that the investor, the borrowers, actually understand how it works, how the mortgage arrangement works, how calls can be made, how you have to meet the calls or the shares will be sold, how shares can be taken out of a portfolio and you would be given a margin call. We think that the disclosure around that to the investors can be improved and I think the government has picked that up as part of its green paper as to whether, for example, margin loans should be subjected to the same

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1 ASIC, *Committee Hansard*, 18 June 2008, p. 2

2 ASIC, *Committee Hansard*, 18 June 2008, p. 2

3 ASIC, *Committee Hansard*, 18 June 2008, pp 34-35

4 ASIC, *Committee Hansard*, 18 June 2008, p. 2

product disclosure statements that other forms of investments are subject to. That is a matter now for government.[5]

Committee comment

2.7 The committee is of the view that ASIC should continue to press for improvements to the disclosure rules applying to short selling and margin lending where deemed necessary. Further, the committee does not consider that issuing warnings about misconduct is going to have any discernable effect. ASIC needs to maintain a greater level of cooperation with ASX to act on instances of insider trading and market manipulation. It should remain closely engaged with the ASX on these matters to ensure that referrals and investigations continue to be a high priority. Such communication and cooperation is essential to enforcing the rules that give investors in the market.

ASIC strategic review

2.8 Following its recent strategic review ASIC has announced that its focus over the next three to five years will be:

- better understanding the stock market to improve market regulation;
- looking further ahead to assess systemic risks;
- better explaining its actions and what ASIC is trying to achieve; and
- having clearer priorities, particularly retail investors and insider trading, market manipulation and disclosure.

2.9 ASIC stated that it would make the following changes to achieve this:

- additional investment in market research and analysis;
- appointment of an external advisory panel to provide advice on market-related issues;
- restructuring the organisation from four 'silo' directorates to 17 'outwardly focused stakeholder teams';
- providing additional resources to the supervision of brokers/intermediaries and surveillance of exchange traded markets;
- improved staff development.[6]

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5 ASIC, *Committee Hansard*, 18 June 2008, p. 35

6 ASIC, *Correspondence to committee*, 8 May 2008; see also ASIC, *Press release*, 'ASIC announces results of its strategic review', 8 May 2008

2.10 ASIC told the committee that it wanted to be better positioned to address emerging regulatory issues:

> …what we are seeking to have is an organisation that is positioned closer to the stakeholders and the people it regulates, so that it better understands its markets. It about taking on initiatives that are more forward looking than perhaps we may have in the past. We are very good at coming in and cleaning some up. The question is whether we can also work harder at trying to see where markets are headed and what issues are likely to arise.

2.11 A notable aspect of the intended changes is the appointment of an external advisory committee to provide expert market advice on specific regulatory issues. ASIC indicated that:

> …we feel that when a subprime crisis occurs, for example, our ability to get … information and to see how it could likely fall out is extremely important because that will determine the regulatory response. For us, we have to make a judgment about how heavy-handed our response might be or what we need to do, always mindful of the market impact. … We felt that as a commission we would benefit by having an advisory board drawn from our major stakeholders and chaired by someone independent. We would take the work on a subprime issue and debate it with them about what they see as the implications for the market and what are the implications for ASIC as a regulator. It is an advisory panel. It would not have access to any confidential or other information in terms of ASIC, and we would, as a commission, form our own view on whether or not we accepted that advice.[7]

2.12 However, ASIC emphasised that the idea would not be pursued if it was not working:

> …if the end it does not work or we cannot make use of it, clearly we are not going to waste their time. These are important men and women who are going to give their time, so we have to make their time commitment meaningful. If we cannot do that, I do not think anybody would have a problem with just letting it go. But we think it will work and will help us tremendously in our work.[8]

2.13 The committee was particularly interested in how the additional responsibilities stemming from this shift could be undertaken within existing budgetary constraints. ASIC told the committee that it would be able to achieve its objectives within the 2008-09 budget by re-organising priorities, improving efficiency and removing duplication. However, it admitted that this may not be sustainable beyond 2009-10.[9] ASIC said:

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7 ASIC, *Committee Hansard*, 18 June 2008, p. 15

8 ASIC, *Committee Hansard*, 18 June 2008, p. 16

9 ASIC, *Committee Hansard*, 18 June 2008, p. 9 & pp 12-13

> One of the things that was behind the restructure has been that we felt we needed to improve efficiency and productivity as part of where ASIC was at, so we did set ourselves the task of achieving that and really driving that efficiency and productivity as best we could. At the end of the next 12 months we will be in a much better position to be able to say to government that we have given it our best shot in getting this, but we have found that we might need additional resources in these areas. We would be coming to government with a track record of really trying to run the organisation as efficiently as possible.[10]

2.14 There is the additional prospect that some of the ASX's market supervision responsibilities may be shifted to ASIC in the near future. This has followed criticism that the ASX is conflicted in its dual role of market operator, where there is an incentive to maximise trading volumes, and market regulator. The possibility of the government ending the ASX's monopoly on market services would also have implications for its regulatory role, given the obvious conflicts that might arise from the ASX regulating its competitors. ASIC may also be granted additional responsibilities from the government's green paper on financial services and credit regulation. The committee heard that:

> …there is clearly a recognition within government and certainly a recognition within ASIC that, if the matters that are in the green paper come to ASIC, then there will be a need for increase in the size of our budget and our allocation.[11]

Committee comment

2.15 The committee supports ASICs restructuring plans, particularly with respect to a greater emphasis on understanding and conducting surveillance of financial market activities and trends. The committee will monitor its effectiveness with interest.

Property scheme collapses

2.16 The regulation of high risk property investment schemes continues to be the subject of ASIC's attention following the Westpoint, Fincorp and ACR collapses. Since its last oversight hearing, ASIC has responded by implementing more stringent measures to protect consumers, focussing on better disclosure and improved advertising standards for issuers of unlisted and unrated debentures. These include:

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10 ASIC, *Committee Hansard*, 18 June 2008, pp 12-13

11 ASIC, *Committee Hansard*, 18 June 2008, p. 9

- In October 2007 ASIC released a regulatory guide for debenture issuers, requiring them to disclose against eight benchmarks on an 'if not, why not' basis.[12]

- In December 2007 ASIC released a regulatory guide on debenture advertising, including restrictions on the use of terms such as 'secure', 'guaranteed' and 'safe' to better reflect the risks associated with such investments.[13]

- In April 2008 ASIC reported its findings of a review into the disclosures made by each of the unlisted, unrated debenture issuers and posted their disclosure documents on the ASIC website.[14]

- In April 2008 ASIC also released the findings of its review into the profile of investors in unlisted, unrated debentures.[15]

2.17 At the committee's oversight hearing ASIC stated that it had attended a number of meetings with Treasury as part of its efforts to convince the government to raise the $50,000 threshold applying to promissory notes.[16] The government's green paper on Financial Services and Credit Reform proposes abolishing the threshold altogether, thereby removing the distinction between promissory notes treated as debentures or financial products. All would be treated as debentures.[17]

2.18 The committee also heard that the Westpoint investigation is almost complete. Officers indicated that $300 million dollars was being claimed on behalf of investors in civil proceedings, in addition to the preparation of criminal briefs relating to former directors and unlicensed advisors.[18]

Committee comment

2.19 The committee again notes ASIC's previous tardiness on addressing the problems with this sector and hopes their more forward-looking strategy will better protect investors in this area.

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12 ASIC, *Regulatory Guide 69*, 'Debentures - improving disclosure for retail investors', October 2007

13 ASIC, *Regulatory Guide 156*, 'Debenture advertising', December 2007

14 ASIC, *Press release*, 'ASIC acts to provide retail investors with better disclosure in unlisted unrated debentures', 23 April 2008; ASIC, *Report 127*, 'Debentures - improving disclosure for retail investors', April 2008

15 ASIC, *Report 126*, 'Understanding investors in the unlisted, unrated debenture (UUD) market', April 2008

16 ASIC, *Committee Hansard*, 18 June 2008, pp 5-6

17 Treasury, *Green Paper*, 'Financial Services and Credit Reform', June 2008, p. 40

18 ASIC, *Committee Hansard*, 18 June 2008, pp 2-3

Financial planners

Professional indemnity insurance

2.20 Compulsory professional indemnity (PI) insurance for financial planners has been introduced, though concerns remain over the adequacy of cover that will be available in the insurance market. The regime is designed to protect consumers seeking compensation for losses attributable to negligent financial advice. ASIC has released its guidance on compensation and PI insurance, which outlines a two stage approach that takes into account the limited PI insurance commercially available at present. From 1 July 2008 until 1 July 2010 licensees must hold a minimum standard of cover, with a higher standard coming into force at the end of that two year implementation period.[19]

2.21 ASIC informed the committee that availability of cover had so far been adequate:

> New applicants for licenses who have been required to take out PI insurance do not appear to be having difficulty obtaining PI insurance.[20]

2.22 The committee was also told that the regime would be subject to further review:

> …sure government has an open mind as to whether it will be in the end totally effective and whether it needs to be reviewed, but our feeling is to give it two years to see how we go and then review it at the end of that time.[21]

Committee comment

2.23 The committee is pleased to hear that cover is so far commercially available, and that ASIC is prepared to review the scheme should it prove to be deficient.

Financial Industry Complaints Service

2.24 The adequacy of compensation for investors through the Financial Industry Complaints Service (FICS) also continued to receive attention. In 2007 FICS announced it would lift the compensation limit it can order advisers to pay investors from $100,000 to $150,000 from July 2008.[22]

2.25 ASIC stated that the limit should be $280,000, in line with other regulators such as the Banking and Financial Services Ombudsman. It also conceded that there

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19 ASIC, *Regulatory Guide 126*, 'Compensation and insurance arrangements for AFS licensees', March 2008

20 ASIC, *Committee Hansard*, 18 June 2008, p. 6

21 ASIC, *Committee Hansard*, 18 June 2008, p. 22

22 Financial Industry Complaints Service, *FICS Bulletin*, Issue 52, 5 December 2007

were arguments in favour of the limit being even higher, particularly given the higher average value of self-managed superannuation funds.[23]

Shadow shopping survey

2.26 In previous ASIC oversight reports the committee has called for ASIC to repeat its successful superannuation switching advice shadow shopping survey, and to publicly name planners who have repeatedly failed to provide superannuation switching advice with a reasonable basis.[24] This has not occurred since the committee's last oversight hearing.

2.27 ASIC indicated to the committee that it plans another shadow shopping exercise in the 2009-2010 financial year. Describing it as an 'expensive and time consuming process', ASIC provided the following explanation for the lengthy gap between each exercise:

> When [the exercise] is concluded a number of issues come out of the shadow shopping report which we then interact with industry about, sometimes taking enforcement action, sometimes enforceable undertakings and other times we just have discussions with industry. We are a little bit out of cycle on that in the sense that we did the last shadow shop in 2005 and reported on it in 2006 and then continued to do work after that.[25]

Committee comment

2.28 The committee is of the view that ASIC has still not adequately explained why it has taken so long to establish plans for another shadow shopping exercise. However, it is encouraged that the decision has been made to conduct another one, even if it is later than desirable.

Banking and credit regulation

2.29 The government's green paper on financial services and credit regulation has outlined options for a federal takeover of consumer credit regulations. The options include a federal takeover of the regulation of all credit products; regulating mortgages only and leaving other consumer credit products to the states; or maintaining the status quo.[26] The transfer of regulatory control in these areas will require the states' agreement.

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23 ASIC, *Committee Hansard*, 18 June 2008, p. 27

24 See for example Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission*, August 2007, p. 13

25 ASIC, *Committee Hansard*, 18 June 2008, p. 23

26 Senator the Hon Nick Sherry, *Press release*, 'Fundamental reform of Australia's financial services and credit regulation', 3 June 2008

2.30 ASIC informed the committee that the green paper presented a series of options that are yet to be finalised, making it difficult to assess its likely effect on ASIC. The committee heard that:

> It does not present a particular finality to which we could then respond and say that we have these comments about that particular state of affairs and we think it would cost X million dollars to do. The understanding that the commission has is that additional responsibilities that flow out of this green paper will be appropriately funded, but it all depends on what the ultimate proposals are. … There are myriad different models that could be presented and each one would have resourcing and skills and all sorts of implications for us.[27]

2.31 The regulation of reverse mortgages, which are being considered as part of the green paper, was again of particular interest to the committee. ASIC reiterated the risks with this product, especially for the elderly:

> …with reverse mortgages there are assumptions about growth in interest rates and about growth or non-growth in asset prices. When you have those variables over a long period of time you can get them out of kilter. Those that would tend to be more elderly that take the reverse mortgages may see some difficulties down the track.[28]

2.32 In their response to a question on notice, ASIC informed the committee that it had received a relatively low number of complaints about reverse mortgages. However, they explained that this is probably due to the increase in equity release products is a recent phenomenon, and that problems with them may not have yet emerged.[29] In evidence ASIC told the committee that they had focussed on trying to pre-empt problems that may occur in an environment of rising interest rates and falling asset prices.[30]

Committee comment

2.33 The committee is encouraged that the government has chosen to consider this issue as part of its green paper. ASIC should continue to use all avenues available to it to educate consumers about the risks associated with these products. The committee is of the view that while ASIC's consumer website FIDO is an important part of this, coverage in the mainstream press is far more effective and needs to be pursued vigorously.

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27 ASIC, *Committee Hansard*, 18 June 2008, p. 32

28 ASIC, *Committee Hansard*, 18 June 2008, p. 33

29 ASIC, *Response to question on notice no. 8*, Appendix 2

30 ASIC, *Committee Hansard*, 18 June 2008, p. 33

Mr Bernie Ripoll MP

Chairman

Appendix 1

Public hearings and tabled documents

Wednesday 18 June 2008 – Canberra

Australian Securities and Investments Commission

Mr Tony D'Aloisio, Chairman

Mr Jeremy Cooper, Deputy Chairman

Ms Belinda Gibson, Commissioner

Tabled documents

ASIC achievements against its 6 priorities (last 12 months)

Appendix 2

Answers to questions on notice

Question on Notice 1

Staffing (Sen Boyce, p. 12 Hansard)

Senator BOYCE—Going back to the restructure, you have 13 fewer senior managers in the new system. What are your staff levels pre- and post restructure?

Mr D'Aloisio—Pre- and post restructure we have around 1,500 to 1,550.

Senator BOYCE—Is that full time?

Mr D'Aloisio—I can get you more precise numbers and that will not change.

Response:

The new structure will become operational on 1 September. Full time equivalent staff (FTE) prior to the announcement of the new structure was 1,569.6.

Staffing levels will not be reduced in the new structure.

Parliamentary Committee on Corporations and Financial Services –A SIC Oversight Hearing – 18 June 2008

Question on Notice 2

Staffing (Sen Boyce, pp 14-15 Hansard)

Senator BOYCE—How many of those 18 would have worked for ASIC for more than two years?

Mr D'Aloisio—It depends on the reappointments. So far we have appointed about half of those.

Senator BOYCE—Do you have nine appointed?

Mr D'Aloisio—We are talking about 51 positions being reduced to 42. We have appointed about 19 of the positions that were vacant from internally. I do not have the numbers of the average seniority and position of those people, but they would be well in excess of five, eight or 10 years. I can get that information for you.

Senator BOYCE—I would like to get the figures for the number of internal versus external appointments for those 42 positions, and also perhaps something that says how many have had more than two or three years service with ASIC.

Mr D'Aloisio—I am very happy to do that. We can give you that in relation to the existing appointments that have been made, and we can build on that as the appointments proceed over the next month or so.

Response:

Of the 42 new senior executive positions available under the new structure, we made 29 internal appointments to these positions. 24 of the 29 have greater than 2 years service with ASIC, with an average length of service of 11 years and 3 months. We are currently recruiting internally and externally for the remaining positions.

Question on Notice 3

Enforcement (Sen Boyce, pp 20-21 Hansard)

Senator BOYCE—I have one more question on prosecutions and stats. On page 4 you talk about the illegal managed investment schemes that you took action on. Can you tell us why the figure has dropped substantially from 2006-07 to 2007-08?

Mr D'Aloisio—I could say that people were more honest.

Senator BOYCE—I am waiting for you to say you have been fantastically successful in scaring them out of it or they have just gotten more clever.

Mr D'Aloisio—Again, this is an example of the stats that I talked about earlier; that you could draw too much from it. What you need to do is go behind some of those. There might be fewer of those, but they may have been much more complex in the sorts of behaviour changes that we were seeking to push, and it has taken us time. My guess is those figures are also not totally up to date in the sense that we have got the 2007-08 year, which is incomplete. I will take that on notice as well and have a look behind those stats for you.

Response:

The figures contained in the report tabled at the PJC contained information collated as at 31 May 2008. Since that report was tabled, ASIC has obtained more accurate information regarding the numbers of investors and funds involved in schemes and has finalised more illegal managed investment schemes actions (most notable the Supersave and Integrity Plus schemes – see ASIC MR 08-129).

Set out below is a table of action taken in relation to illegal investment schemes over the last four years. The table covers civil actions taken by ASIC and does not include other actions, such as criminal proceedings.

With the exception of 2005/2006, which includes details of the Westpoint schemes, ASIC's work in relation to illegal schemes has been relatively constant over the last four years.

Financial Year	No. of Schemes	Investors	Funds involved
04/05	76	2150	$220M
05/06	102	5000*	$788M*
06/07	105	2550	$202M
07/08	80	2069	$174M

*Westpoint has impacted on these figures, involving 4300 investors and about $360M in funds.

The number of matters referred for consideration requiring an enforcement response has declined over the last 3 years, in respect of illegal scheme activity. Accordingly, ASIC has resourced less matters for enforcement activity in 2007/2008. It is difficult to say with any certainty if the number of complaints received by ASIC has decreased over the same period as complaints received by ASIC in isolation may not necessarily identify themselves as relating to illegal scheme activity. ASIC continues to refine its method of collecting and recording complaints so as to enable it to see if complaints in relation to illegal schemes activity is decreasing.

Question on notice 4

Deterrence (Senator Murray, p. 22 Hansard)

Senator MURRAY—I want to put this proposition to you. I sense that probably ASIC has not thought that much about this area before. As you know, there is a whole advocacy in the parliament and outside of the parliament with respect to deterrence, which is often about heavier incarceration regimes or fines, and that is appropriate. But there are ways to use the existing law, in other words applying the deterrents already in there which are not fully enough exercised. Could I ask you, on behalf of the committee, whether perhaps next time you are in front of the committee you can give us a more considered view of that and whether the proposition I am putting to you is a real observation or just my view. Secondly, in a more formal sense, can you indicate how the Commonwealth, through you or on its own basis through the chief law officer in the land, could get a clearer view in the judiciary about how these matters should be approached?

Mr D'Aloisio—Thank you. We will do that.

Response:

Q.1 - can give us a more considered view of that and whether the proposition I am putting to you is a real observation or just my view?

ASIC has been provided by Parliament with a broad range of remedies to achieve deterrence. AISC is active in using these remedies and over the last 4 years has used a broad range of regulatory tools to achieve deterrence outcomes by conviction of 167

white collar criminals (88 jailed), banning 253 people from managing corporations and 136 from offering financial services. It has also taken court action in relation to illegal schemes and has obtained court orders or undertakings for fines, costs and compensation of over $400 million and frozen $214 million assets for investors and creditors.

ASIC's new strategic approach will consider this question in its work in the future. Our aim is to provide the best outcomes in terms of deterrence and change in market behaviour that can be achieved using the powers available. To achieve this we will consider using all the deterrence powers that are available and appropriate, including, where possible, using approaches that do not rely on legislative powers, such as warning letters.

For example, we have identified that we can be more active in banning market participants, such as brokers, from providing financial services. In other instances we may be a bit more proactive in the use of the powers to ban directors.

In dealing with illegal early release superannuation schemes, ASIC has looked broadly at available remedies in its own legislation and in other legislation (more specific details cannot be provided as these investigations are on-going).

Q. 2 - can you indicate how the Commonwealth, through you or on its own basis through the chief law officer in the land, could get a clearer view in the judiciary about how these matters should be approached?

Specific information about the economic impact of misconduct that ASIC regulates is often put before courts in evidence form victims.

Information about the broader economic impact of misconduct that ASIC regulates could be put before the courts for consideration in assessing the seriousness of misconduct and imposing penalties or sentences. To an extent this material is already provided by ASIC, or the Commonwealth Director of Public Prosecutions in criminal prosecutions. In our experience it is difficult to get this material before the courts, particularly in markets matters, and ASIC is working to increase this. ASIC is currently discussing the issue with the CDPP.

Obviously, there are constitutional limits on the guidance that can be provided to courts about how to quantify the seriousness of these matters. However, the level of maximum penalty that the legislature specifies for a particular offence does provide guidance to courts on how seriously Parliament views that misconduct relative to other misconduct.

Question on Notice 5

Budget (Mr Keenan MP, p. 24 Hansard)

Mr KEENAN—Could you remind me: how long did it take for the government to say that they were not going to implement that cut?

Mr D'Aloisio—I could take that on notice. I cannot recall. I thought it was fairly soon after, probably January or February I think. We can check that for you. I think that might be the best.

Response:

The Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry, announced at the Senate Economics Committee Additional Estimates hearing of 20 February 2008 that the Commonwealth Government was not proceeding with the savings measures initially announced on 2 March 2007.

Question on Notice 6

Chartwell (Sen Boyce, pp 30-31 Hansard)

Senator BOYCE—In relation to complaints or warnings to ASIC, not necessarily in the banking or financial sector, I notice that during the estimates hearing you mentioned that you had had one anonymous complaint regarding Chartwell. Would you know when that was?

Mr D'Aloisio—There was an anonymous complaint. I will have to take that on notice. We received an anonymous complaint in April 2006 about a scheme that they were conducting and how it was operating. Because it was anonymous our compliance and surveillance team were not really able to follow it up and decided not to take any action at that point in relation to it. Then there was a further complaint earlier this year around February to April, in that period, that then was actioned and then the company went into voluntary administration and we are now running a full investigation.

Senator BOYCE—I have an email here from a Mr Jonathon Sear, who is a Melbourne accountant, saying that he telephoned ASIC on 14 September 2007 and alerted them to his concerns regarding Chartwell. He was told there was no adverse information regarding Chartwell and that his comments would be passed on to the ASIC intelligence unit, so that suggests that there has been another complaint. What I want to know now is what is the ASIC intelligence unit? What happens to these complaints? How do you get to the situation where, as you said before, you know about issues that are likely to arise?

Senator BOYCE—Mr Sear also advises me that he has had no contact from ASIC whatsoever since he made this phone call.

Mr D'Aloisio—I would like to take that on notice and come back to you and the committee specifically.

Response:

I notice that during the estimates hearing you mentioned that you had one anonymous complaint regarding Chartwell. Would you know when that was?

ASIC received an anonymous complaint about Chartwell Enterprises Pty Ltd on 27 March 2006 about an unsolicited offer to invest in Chartwell by way of a personal loan agreement.

Complaint from Mr Jonathon Sear

ASIC's incoming call records show a call from a "Jonathon" (the caller) who contacted ASIC's general enquiry line on 14 September 2007. The caller did not provide ASIC with his surname, telephone number or address. The caller did inform ASIC that he was an accountant, and that a client of his had informed him of a potential investment with Chartwell Enterprises. The caller informed ASIC that his client intended to mortgage her house to invest $300,000 in Chartwell where she would receive a 20% return (10% each month and the balance of 8% at the end of each year).

The caller did not have any physical information, other than the terms repeated to him by his client. The caller had not viewed the prospectus given to his client and did not have any other information or evidence to make a formal complaint with ASIC but stated that he wanted ASIC to be aware of this company.

At the time of this call there was no 'adverse information' in the public domain about Chartwell.

ASIC has not contacted the caller again as the call was logged as 'information only'. The call was not logged as a complaint because the caller stated that he did not have any further information to provide to ASIC and was ringing to report his concerns about an investment his client intended to make. Further, as stated above, the caller did not provide ASIC with his telephone number or address.

From 1 July 2008, ASIC has enhanced the information recording systems for calls to our Infoline service, so that we may conduct more intensive data sweeps and improve our early intelligence systems for the detection of illegal schemes or misconduct based on the volume or type of calls to ASIC's Client Contact Centre.

What is the ASIC intelligence Unit?

ASIC does not have a single 'intelligence unit'. ASIC records information or 'intelligence' against corporate and individual subjects of each activity it undertakes, and records general information or industry specific intelligence where no individual subjects are identified e.g. general consumer protection campaigns. One of the activities ASIC undertakes is to receive and assess reports of misconduct from the public and answer general enquiries. We do this by way of our Client Contact Centre (that houses our General Enquiry line and Infoline services) and our dedicated Complaints Unit, National Assessment & Action. ASIC receives over 650,000 calls to our call centre each financial year, and a small proportion of these are escalated as complaints usually at the caller's request or if the operator determines further action is required on the subject of the call. Depending on the campaigns being targeted by

ASIC, particular call types will also be automatically escalated (e.g. debtor harassment complaints).

What happens to these complaints?

ASIC's Client Contact Centre answers general queries regarding our public databases, information from our website, queries about the correct lodgement of forms, and complaints that may be resolved in a single call. Any unresolved complaints or complex issues are generally escalated to National Assessment & Action, where there is a designated analyst to deal with all referrals from the Client Contact Centre. The complaints analyst will contact the caller and assist with the query by providing public assistance, or in circumstances where the issue requires further analysis the query will be lodged as a complaint.

How do you get to the situation where, as you said before, you know about issues that are likely to arise?

ASIC is taking continuous steps to improve our detection and assessment of information and reports of misconduct received, and the formation of the Stakeholder Services group within the Real Economy, combining for the first time the Client Contact Centre and complaints functions is a significant step in our strategic review process to deliver this objective.

Question on Notice 7

Complaints (Sen Boyce, p. 32 Hansard)

Senator BOYCE—Would you be, for instance, able to give us, without taking too much time and effort, a list of the number of early complaints you had regarding the companies or the matters that you list in the report that you have given us—One.Tel et cetera?

Mr D'Aloisio—We could do that, for example, with Westpoint, ACR and Fincorp. We could pick some clear examples and indicate what the range of complaints was, when we acted, what we did and so on. We will try to give you a snapshot of that and we will also put into that a clearer picture of how we analyse and where they go in the steps, because there are flowcharts that indicate what happens to complaints and, if they pass certain gates, where they go to next in the organisation. We can give the committee that—

Response:

1. WESTPOINT

<u>Complaints made to ASIC about Westpoint</u>

ASIC received 12 reports of information from the public about various entities in the Westpoint Group prior to the May 2004 media release announcing the Emu

Brewery/Bayshore action. To put this in context, ASIC received and reviewed over 40,000 formal complaints from the public over the same period (1999-2004).

ASIC responded to every complaint it received about Westpoint. The 12 complaints raised various concerns about mezzanine financing as a 'type' of fundraising and the issue of whether it is (or should be) a regulated product. None of the complaints raised concerns about investment redemption or solvency. In terms of spread, ASIC received:

- 1 complaint a year in 1999, 2000 and 2001 which we resolved,
- 2 complaints in 2002 and
- 7 complaints in 2003.

ASIC received a further 17 complaints between May 2004 and November 2005.

In late 2004 and early 2005, a handful of investors raised concerns about delayed redemption of investments and income distributions, however in the course of ASIC making enquiries into these complaints in 2004, these investors were paid. In the second half of 2005 ASIC received further complaints about late payment, which ASIC then considered as evidence in our investigation leading to the winding-up applications announced in late 2005.

2. FINCORP

Complaints made to ASIC about Fincorp

In the period 30 September 2002 (the date of lodgment of the first Fincorp Investments Limited prospectus) to 23 March 2007 (the date the Administrators Korda Mentha were appointed to Fincorp), ASIC received 6 complaints and 4 general enquiries about various entities in the Fincorp Group. None of these complaints raised concerns about investment redemption or solvency.

To summarise, noting in bold the dates and brief details of ASIC action on disclosure and advertising, ASIC received the following complaints in chronological order:

- **30 September 2002 – 1st prospectus lodged by Fincorp Investments Limited (FIL).**
- **14 October 2002 – ASIC places interim stop order for inadequate disclosure.**
- **1 November 2002 – Defects rectified.**
- 27 February 2003 – anonymous complaint alleging that Fincorp had been falsely representing to the public that its debentures were backed by a guarantee from the National Australia Bank). ASIC wrote to the company in relation to possible misleading and deceptive advice being provided to the

public and we were satisfied with their response regarding change to internal checking procedures.

- **19 May 2003 – ASIC issues investor alert: Fixed interest products – higher returns mean higher risks (03-158)**
- 20 May 2003 – complaint from a member of the general public concerning an advertisement by Fincorp Finance Ltd offering interest up to 11.25% pa for debentures and unsecured notes. Following assessment this matter was internally referred to our Consumer Protection Directorate and considered as early intelligence in our later high-yield debenture campaign.
- **14 October 2003 – 2nd prospectus lodged by FIL.**
- 3 November 2003 – enquiry from member of the public about high interest offered by several companies including Fincorp. Person advised to obtain independent financial advice.
- **25 November 2003 – ASIC places interim stop order for inadequate disclosure.**
- **3 December 2003 - ASIC stops illegal advertising of a banned prospectus.**
- **6 January 2004 – Defects rectified – ASIC focuses on defective debenture prospectuses (04-002).**
- **29 April 2004 – ASIC scrutinises recent debenture prospectuses (04-124).**
- 12 May 2004 – concern by member of the public that consumers may not understand that the advertised rate of up to 11.75% is only applicable on maturity of 5 year investment in Unsecured Deposit Notes and that lower rates otherwise apply. No specific misconduct alleged.
- 5 July 2004 – enquiry from member of the public about a number of companies including Fincorp. Person advised to seek independent financial advice.
- **mid 2004 – ASIC runs high-yield debenture campaign. $1.8 billion at stake: warning to investors in high-yield debentures (04-242) issued 27 July 2004**.
- **21 October 2004 – ASIC terminates 2nd prospectus after interim and final stop order for inadequate disclosure.**
- **7 December 2004 – 3rd prospectus lodged rectifying previous concerns.**
- **17 February 2005 – ASIC action protects vulnerable investors in high-yield debentures (and attached debenture campaign report) (05-30).**

- **7 March 2005 – ASIC takes Court action against Fincorp in the NSW Supreme Court for disclosure inadequacies relating to 2nd prospectus (orders obtained 21 September 2005) (05-49).**

- 25 February and 26 April 2005 – 2 complaints from members of the public raising concerns in relation to the conduct of Fincorp and others for aggressive and possibly misleading advertising of financial products. The advertisements identified in the complaints were internally referred to our Consumer Protection Directorate.

- **30 August 2005 – ASIC takes action for misleading advertising. ASIC obtains legally binding undertakings from Fincorp to correct advertising.**

- **12 September 2005 – ASIC requires Fincorp to correct its advertising (05-272).**

- **22 September 2005 – Fincorp to offer millions in refunds to debenture investors (05-290).**

- 11 November 2005 – enquiry from member of the public asking for advice relating to shares and banking issues. Information provided.

- 16 November 2005 – 1 complaint from investor requesting advice on a transaction involving debentures issued by Fincorp. It appeared that the company had provided an option to the complainant to exit early from his investment, which he had taken up. However, as a result, Fincorp stated that due to his request for early release they would take $200 from his capital, as a lower interest rate would be applied to the loan. Following our assessment the complainant was advised that this was a contractual issue between himself and the Company, and that ASIC could not comment on the merits, or otherwise, of a particular investment, or the return derived from it. Complainant was advised that ASIC requires licensees who provide investment advisory services to have an internal complaint handling procedure; therefore he should contact the company. Complainant was also advised that if the complaint was not resolved by internal procedures to his satisfaction, he could make a complaint to FICS.

- 15 March 2006 – enquiry by member of public on behalf of her mother asking whether ASIC is taking action against Fincorp. Complaint withdrawn when Fincorp paid her mother in full.

- **22 August 2006 – ASIC issues investor warning – Don't invest a cent in a fixed interest investment without using ASIC's 3-way test (06-290).**

3. AUSTRALIAN CAPITAL RESERVE

Background

By way of background, on 30 May 2007, ASIC Chairman, Mr Tony D'Aloisio provided a statement on Australian Capital Reserve Limited (ACR) to the Senate Standing Committee on Economics, a copy of which is attached to this response at **Appendix B**.

ASIC commenced investigations into the collapse of Estate Property Group and its subsidiaries, including ACR, in October 2007. ASIC's investigations in relation to this matter are scheduled for completion by 30 September 2008.

Complaints made to ASIC about ACR

In the period 11 April 2000 (the date of lodgement of the first ACR prospectus) to 28 May 2007 (the date the Administrators McGrath Nicol were appointed to ACR) ASIC received 32 complaints about ACR.

To summarise, noting in **bold** the dates and brief details of ASIC action on disclosure and advertising, ASIC received the following complaints in chronological order:

- **11 April 2000 – 1st prospectus lodged. ASIC wrote to ACR identifying inadequate disclosure.**

- **3 May 2000 – Replacement prospectus lodged – defects rectified.**

- 7 July 2000 - 1 complaint received from a member of the public raising concerns about ACR's offer for investments in "unsecured notes" as "term deposits". The complainant believed this was a misrepresentation of the prospectus and people may have been misled into investing in a product that was not what they wanted. After contacting the company it appeared that ACR staff allegedly described the unsecured notes as similar to term deposits. Matter referred for surveillance to ASIC's Fundraising Program who conducted a further review and concluded the document and the descriptions were correctly disclosed.

- 11 January 2001 and 22 March 2001 – 2 complaints received (1 of them being a referral from the NSW Dept of Fair Trading and the other from a member of the public) alleging ACR was using unlicensed sales persons and pressure selling to induce members of the public to sign up for its prospectus. No further action was taken on the basis of insufficient evidence of any misleading or deceptive conduct, or breach of restrictions on advertising and distribution of a prospectus. The matter was internally referred to ASIC's Markets team for information only.

- 2 April 2001 – 1 complaint received from a member of the public about the then current prospectus raising concerns about the reported total profitability of

the group and what, in the complainants view, must be achieved to ensure that all interest and capital repayments are met. No further action was taken given that the prospectus was expiring on 10 April 2001.

- **6 April 2001 – 2nd prospectus lodged.**
- 4 July 2001 – 1 complaint received from a pensioner in respect of the interest rates offered by ACR (that ranged from 9% pa to 11% pa). The complainant believed that ACR promised returns that were beyond commercial sense. Assessment concluded that the rates of interest were found to be in-line with other market rates in respect to similar offers and, therefore, no offences identified.
- **7 September 2001 – 3rd prospectus lodged. Exposure period extended for inadequate disclosure.**
- **24 September 2001 – Replacement prospectus lodged – Defects rectified.**
- **5 March 2002 – 4th prospectus lodged.**
- 16 January 2003 – 1 complaint received from a member of the public raising concerns in relation to aadvertising by ACR by which they were offering retirees generous investment returns which the complainant believed were unsustainable and that it may be a pyramid scheme. No further action was taken as the returns offered were in line with market rates.
- 4 February 2003 – 1 complaint received from a member of the public about ACR seeking investor term deposits at an interest rate of 7.25% for 12 months, free of fees and charges with interest paid quarterly, increasing to 8.75% over 5 years. Matter was finalised as no further action as no contravention was identified.
- **4 March 2003 – 5th prospectus lodged.**
- **19 May 2003 – ASIC issues media release "03-158 Investor alert: Fixed interest products - higher returns mean higher risks".**
- 18 August 2003 - 1 complaint received from an employee at ACR concerned that that the information imparted by sales staff to investors about the prospectus may be misleading or unconscionable and that ACR's compliance systems were either not effective or not in operation at all. Matter internally referred to ASIC's Financial Services Reform directorate for surveillance.
- 11 September 2003 – 1 complaint received from a member of the public alleging that he was misled by ACR's television advertisement into believing that investments in ACR were guaranteed by the government. An assessment was conducted, but no evidence was found to support an allegation that the

advertising was misleading or deceptive, or that a reasonable prospective investor would form the view that the investment was government guaranteed.

- 31 October 2003 – 1 complaint received from a member of the public in relation to ACR's promised returns, claiming that they were beyond commercial sense. The complainant was concerned that ACR was targeting the elderly and wanted ASIC to investigate whether it was a scam. Advertisement reviewed and no offences identified.

- 5 November 2003 – 1 complaint received from a former employee alleging that ACR directed employees to remove all soft and hard copies of material showing non-compliance with FSR provisions (within the Corporations Act) in anticipation of an ASIC surveillance. ASIC obtained books and records under ASIC Notice but concluded there was insufficient evidence to initiate proceedings for a possible section 1307 breach (falsification of books) or a breach of the FSR provisions. Matter referred to ASIC's FSR Regulatory Compliance directorate for surveillance.

- **6 January 2004 – ASIC focuses on defective debenture prospectuses (04-002)**

- **3 March 2004 – 6th prospectus lodged.**

- **25 March 2004 – ASIC places interim stop order for inadequate financial disclosure.**

- **7 April 2004 – Replacement prospectus lodged – Defects rectified. Interim stop order revoked.**

- **29 April 2004 – ASIC scrutinises recent debenture prospectuses (04-124).**

- 9 June 2004 – 1 complaint received from a member of the public raising concerns that ACR's name may mislead the financially uninformed that it has links with the Reserve Bank of Australia. Matter finalised as no further action as the use of the name is not prohibited by the Corporations Regulations and, therefore, no offence could be identified.

- **15 July 2004 - $1.8 billion at stake: warning to investors of high-yield debentures (04-242).**

- **8 September 2004 – ASIC's high yield debenture campaign surveillance identifies deficiencies regarding omissions and misleading and deceptive statements.**

- **28 September 2004 – ASIC places interim stop order on the prospectus for omission of investment risks and accounting treatments of financial information.**

- **18 October 2004 – Supplementary prospectus lodged – Defects rectified.**

- **19 October 2004 – Interim stop order revoked.**
- **18 November 2004 – 7th prospectus lodged.**
- 30 November 2004 – 1 complaint received from an ex-employee alleging that telemarketers are providing financial advice and that the 'no [financial] advice' policy training was inadequate. Further claim that ACR demanded employees sign documents evidencing compliance training in the company's 'no [financial] advice' policy when training was either inadequate or did not occur. Matter was referred to ASIC's Financial Services Reform Directorate for further surveillance.
- **2 December 2004 – Exposure period extended. Replacement prospectus lodged – Defects rectified.**
- 10 February 2005 – 1 complaint received as a referral from another law enforcement agency raising concerns in relation to rates of return offered. The agency advised that they received a call from a retired Executive of Westpac that ACR's advertised rates of 8% to 9% was well above the market rates. Matter was already under surveillance by ASIC's Corporate Finance as a result of the Interim Stop Order dated 28 September 2004.
- **17 February 2005 – ASIC action protects vulnerable investors in high-yield debentures (05-30).**
- **4 November 2005 – Interim stop order for not disclosing changes in the financial position.**
- **9 November 2005 – Supplementary prospectus lodged – Defects rectified. Interim stop order revoked.**
- **17 November 2005 – 8th prospectus lodged.**
- 3 February 2006 – 1 complaint received from an investor who had requested an early redemption of funds and when completed noticed he had been charged administration fees and interest adjustments had been made. Complainant believed that ACR advertised that there were no charges payable. ASIC advised that as per the terms of the prospectus for ACR in the event of an early redemption of the funds, ACR may apply an interest rate adjustment and penalty costs to early repayments. Complainant also advised that ASIC requires licensees who provide investment advisory services to have an internal and external complaint handling procedure and to contact the company in the first instance. Failing a satisfactory resolution, complainant told to lodge a complaint with the Financial Industry Complaints Service.
- 13 March 2006 – 1 complaint received from a member of the public raising concerns that ACR salespersons were using pressure selling techniques to induce people to sign up for the prospectus. No offences identified.

- **11 July 2006 – Supplementary prospectus lodged.**
- **18 July 2006 – ASIC surveillance undertaken on the supplementary prospectus' concerning property developments. Disclosure satisfactory. No further action taken.**
- 31 July 2006 – 1 complaint received from a member of the public seeking ASIC's advice following receipt of an invitation to invest in a fixed interest investment unsecured deposit note. Complainant advised that ASIC does not give financial advice. Complainant advised to seek independent financial advice and provided with ASIC's 'Getting advice' guide.
- **11 August 2006 - Supplementary prospectus lodged.**
- **22 August 2006 – ASIC issues investor warning – Don't invest a cent in a fixed interest investment without using ASIC's 3-way test (06-290).**
- 11 September 2006 – 1 complaint received from a member of the public asking ASIC to assess the behaviour of the ACR to ascertain if company is complying with all of its obligations. Complaint does not identify specific issues and was finalised as no further action.
- **8 November 2006 – Supplementary prospectus lodged.**
- **7 December 2006 – 9th prospectus lodged.**
- **9 March 2007 – Interim stop order. Stop order issues include overstatement of profit and net assets from inflated property valuations, insufficient disclosure of risks and use of additional loan funds.**
- **15 March 2007 – ASIC requests that ACR cease the practice of rolling over investor funds.**
- 5 April 07 – 1 complaint received from a member of the public alleging that ACR was in financial difficulty and that there were similarities with Fincorp as it was offering high rates of return. Matter was referred for surveillance.
- **23 April 2007 – Final stop order.**
- 16 April 2007 – 1 complaint received from an investor that he had not received an adequate response from ACR to his request for redemption of his unsecured notes. Complainant was provided public assistance to assist him to follow the redemption process. We also informed the complainant that ASIC is aware and monitoring ACR and we had issued a final stop order preventing ACR from issuing further prospectuses.
- 3 May 2007 – 1 complaint received from an investor in relation to delay in redemption of investment, asking whether ACR would be another Fincorp.

Complainant advised that ASIC issued interim orders on 9 March 2007 and 30 March 2007 respectively, before issuing a final stop order on 23 April 2007.

- 8 May 2007 - 1 complaint received from an investor in relation to delay in redemption of investment. Complainant advised that a Voluntary Administrator (VA) had been appointed to ACR and explained about the role of the VA and provided with contact information.

- 10 May 2007 – 1 complaint received from an investor alleging that ASIC's stop order on ACR's prospectus was the reason for his failed attempt to redeem his investment. Complainant advised that a VA had been appointed to ACR and explained about the role of the VA and provided with contact information.

- 11 May 2007 – 1 complaint received, similar to above.

- **28 May 2007 – McGrath Nicol appointed.**

- **29 May 2007 – ASIC statement on Australian Capital Reserve (07-145).**

- Further 5 complaints received in late May from unsecured deposit note holders who did not receive repayment of their investment on maturity. All complainants were referred to and received information regarding the role of the VA.

2. ONE.TEL LIMITED

Background

On 30 May 2001, ASIC commenced an investigation into One.Tel Limited (One.Tel) following a referral of information by the Australian Stock Exchange and the appointment of voluntary administrators to One.Tel. This investigation was completed in December 2001 and ASIC commenced civil penalty proceedings on 12 December 2001.

Complaints made to ASIC about One. Tel

In the period 30 March 1999 to 30 May 2001 (the date of commencement of ASIC's investigation) ASIC received 4 complaints about One.Tel:

ASIC received 4 complaints between 30 March 1999 and 30 May 2001:

- 1 complaint on 30 March 1999. The complainant's client was a user of one.tel telecommunications and had concerns in relation to ACR's billing system and concerns about the company's use of the legal system to attack the client. An assessment was conducted but no offences identified within ASIC's jurisdiction.

- 1 complaint on 13 April 1999 from the "Ethics Action Group". The complaint related to various aspects of alleged conduct by One.Tel that the complainant

considered unacceptable. Complaint was finalised as no actual offences were identified, however, complaint was referred to the attention of Enforcement Directorate for intelligence purposes.

- 1 complaint on 22 May 2001 from a member of the public. Complainant asserted that principal shareholders were manipulating the share price in advance of an upcoming rights issue. Complainant advised that ASIC had commenced an investigation into One.Tel. Matter was referred to the Markets Branch who were investigating this matter and was merged with that matter.

- 1 complaint on 1 December 1999 from a member of the public alleging that Rodney Adler was privy to information not generally available to the market when he increased his holding in One.Tel. The matter was referred to Markets Enforcement for further analysis and surveillance.

- **30 May 2001 – ASIC announces One.Tel investigation.**

5. ASIC'S COMPLAINTS ASSESSMENT PROCESS

ASIC registers and conducts an assessment on every complaint and report of misconduct that we receive. In general terms, we follow a 7-step process:

1. Receipt and registration of the complaint on ASIC's Complaints Management System, against each individual subject of the complaint (recorded and searchable for future intelligence purposes).

2. Complaint allocated to analyst and acknowledged in writing (including contact details for analyst assigned to complaint).

3. Initial review of complaint.

4. Information gathering (for example, internal searches of ASIC public and private databases to identify any relevant intelligence; external searches; contact with the complainant, third parties and sometimes the subject to seek an explanation; notices to obtain documentary evidence; liaison with other law enforcement agencies).

5. Assessment, including identifying any jurisdictional issues, potential offences and breaches and the strength of available evidence. ASIC's risk assessment criteria is applied at this stage to determine whether referral for investigation triggered.

6. Recommendation of Action and Approval (including internal referral for investigation, surveillance, compliance action, or intelligence purposes; provision of public assistance to aid the complainant to resolve the complaint; and no further action where no offences, no jurisdiction, or action otherwise precluded).

7. Finalisation, including formal communication of result to complainant and any other interested party.

Question on Notice 8

Reverse mortgages (Mr Ripoll MP, pp 33-34 hansard)

CHAIR—Are reverse mortgages the subject of many complaints to ASIC?

Mr D'Aloisio—We could take that on notice. I am not sure.

CHAIR—If you could take it on notice, I would be interested just to see a little bit of a brief in terms of complaints, the types of issues and perhaps how that product works for people in terms of the complaints you receive.

CHAIR—We would like any information that ASIC has got in terms of information that has come to it, be they complaints or any other information, just to give the committee a better scope. And if you would take on notice too whether the ombudsman might have been the office that took more complaints, but we might pursue that in another forum.

Response:

ASIC has received relatively few complaints about reverse mortgages to date. However, this may be because the products are relatively new in the Australian market and the risks that have been identified may only eventuate in the longer term.

Background

In a reverse mortgage, the elderly consumer takes out a loan, which is secured by a mortgage over the house. The loan is designed so that the borrower can remain in their home until the sell it, move out or die and they do not need to make any repayments in the meantime. But at the same time the size of the loan increases, sometimes dramatically because the interest compounds. It is extremely difficult to determine how much money will be left at the end of the loan term because it depends on a number of variable factors including:

- how long the individual consumer will live
- future fluctuations in housing values, and
- whether the interest rate on the loan is fixed or variable.

The market for reverse mortgages in Australia has expanded dramatically since 2004: the number of providers has grown from three to 26 (as at November 2007) and there have been annual increases of 60% in the size of the market between 2004 and 2006 . This growth has included the emergence of new non-bank lenders, which have increased their market share by offering more aggressively structured products (e.g.

larger loans available to younger borrowers) with more features (including draw-downs, portability and capped interest rates).

Growth has, however, slowed in 2007 with a growth rate last year of 21%. Four lenders have recently either stopped accepting new loans or significantly cut back their operations .

The total size of the market as at December 2007 is $AUS 2.02 billion, there are just over 33,700 loans in all and the average loan size is $60,000.

Complaints

From 2005 to date, ASIC has received eight public and 10 internal complaints about equity release products. Most of these have related to reverse mortgages, with the minority relating to another type of equity release product – home reversion schemes .

Of the eight public complaints received, seven related to misleading and deceptive conduct and the last related to unconscionable conduct. The internal complaints were all generated as a result of ASIC's campaign to monitor the advertising of equity release products that may be misleading and deceptive.

The Banking and Financial Services Ombudsman (BFSO) has also received eight complaints that have been identified as relating to reverse mortgages in the last 12 months. The BFSO does not currently have a product category for 'reverse mortgages' so it is possible that there have been additional complaints that have not been identified. The fact that no specific category has yet been created is a reflection of the relatively low number of complaints to date.

ASIC's work in this area

ASIC has taken the following action in relation to equity release products:

2005	ASIC took action in court against the failed home equity release scheme Money For Living for misleading representations. Recently the Director of this scheme was sentenced.	MR05-332 MR06-097 MR08-88
2006	ASIC accepted an Enforceable Undertaking from Transcomm Credit Union in relation to misleading and deceptive conduct around their reverse mortgage advertising.	MR06-093
2007	ASIC took action to stop misleading reverse mortgage advertising by brokers that claimed reverse mortgages were	MR07-152

	not required to be repaid.	

ASIC has also undertaken the following research projects to identify and report on the risks to consumers who take up equity release products:

- 2005 Report 59 'Equity release products'. The report identified particular consumer risks, and
- 2007 Report 109 'All we have is this house'. The report recorded the experience of 29 borrowers who had taken out a reverse mortgage.

Some of the key risks we have identified include:

- long term financial risks (that borrowers will be left with insufficient or no funds to pay for likely medical, care and accommodation costs)
- risks to the consumer if their lender collapses (including the imposition of onerous fees and charges, the cessation of ongoing payments and possible eviction for technical breaches of contract), and
- significant limitations to the affordability, independence and quality of available advice.

We have recently conducted some internal work to ascertain the scope and impact of these risks. We have identified a trend towards increasingly aggressive product designs that, in the current economic climate, pose heightened risks for both consumers and lenders. In this context, we found that the factors most likely to negatively impact on consumers' outcomes are:

- the age of the borrower and the amount of money they borrow at origination relative to their equity (there are a number of products in the market that allow consumers to borrow large amounts of money from a relatively young age – exposing them to the greatest risks)
- movements in the economy (if property prices do not increase according to the optimistic assumptions relied on by some product providers, then consumers' equity may deplete very quickly), and
- the prudential stability of the lender.

We will continue to feed this work – and how it may relate to targeted regulation of these products – back to government.

Commentary

In this context the fact that ASIC has only received relatively low numbers of complaints may be considered surprising. However, this is probably explained by the fact that the increase in equity release products in the Australian market is a relatively new phenomenon (taking place in the last four years). In this context, the fact that

products are designed to be long term (in the sense that no regular repayments are required) may mean that it is simply too early for problems to emerge.

Question on Notice 9

Credit rating of ME Bank (Sen Chapman, p. 34 Hansard)

Senator CHAPMAN—I was a bit concerned to note recently the downgrading of the credit rating of Members Equity Bank. Is any aspect of that an area that comes under your jurisdiction or is that all APRA's?

Mr D'Aloisio—I think that is an APRA matter. Our work in relation to credit rating agencies is very much the licensing framework and compliance with the IOSCA code of conduct. The government has asked us to review those arrangements and we are engaged in a process with Treasury doing that, but the specific issue you are referring to is better directed to APRA.

Senator CHAPMAN—There are no sort of flow-on issues that would impact on super funds or anything?

Mr D'Aloisio—Not from what I know of the issue, but I am happy to take it on board further and have a look at it.

Response:

We understand that on 19 March 2008, Standard & Poor's placed Members Equity Bank on a 'creditwatch with negative implications', pending a review of funding sources. Following the announcement of this potential credit downgrading, we understand that Members Equity Bank has raised further funding from superannuation fund shareholders.

Whether Members Equity Bank continues to have adequate funding is an issue within APRA's jurisdiction as prudential regulator of authorised deposit-taking institutions.

The provision of further funding to Members Equity Bank by its superannuation fund shareholders also comes within APRA's jurisdiction as prudential regulator for these superannuation funds.

There may be also be an issue about whether the superannuation fund trustees have complied with their duties to avoid conflicts of interest because the funds have invested in, and also own shares in, Members Equity Bank. Again this issue comes under APRA's jurisdiction as prudential regulator for these funds. Trustees that are financial services licensees are also regulated by ASIC under the Corporations Act 2001, which imposes the obligation to have adequate arrangements in place to manage conflicts of interest.

We are liaising with APRA in relation to this issue.

Question on Notice 10

Vink matter (Mr Ripoll MP, p. 36 Hansard)

CHAIR—To finalise proceedings, I just want to raise two cases, one with which ASIC is very familiar, the Vink case. This case has been the subject of quite a bit of correspondence and work, but the new bit of information actually relates to perhaps a failing of the Corporations Act and a matter of principle in terms of the case. Perhaps if ASIC could just deal with that in the correspondence they would have received from Mr Vink that would be helpful. The other one which I have not—

Mr D'Aloisio—I will take it on notice. How recent is that, do you know?

CHAIR—The date is 7 May 2008.

Mr D'Aloisio—I will take that on notice. I was not aware of that.

Response:

The following issues are raised in Mr Vink's letter dated 7 May 2008:

(a) the purpose of the voluntary administration (VA) regime in Pt 5.3A of the Corporations Act 2001 (the Act) and, in particular, s435A;

(b) the purported ineffectiveness of s447E of the Act;

(c) the allegedly daunting mechanism for a person to make a complaint under s536 of the Act; and

(d) the case of Vink v Tuckwell in the Supreme Court of Victoria.

(a) PART 5.3A

Issue 1: Purpose of Pt 5.3A of the Act – s435A

The relevant provisions of Pt 5.3A

Pt 5.3A of the Act is indeed entitled: 'Administration of a company's affairs with a view to executing a deed of company arrangement'. However, the effect of the headings must be interpreted in light of the operative wording of the individual sections of the Act.

In general terms, Pt 5.3A may (as is indicated by s435A) be used to provide for the business, property and affairs of an insolvent company to be administered in a way that either maximises the chances of the company (or as much as possible of its business) continuing in existence, or if it is not possible for the company or its business to continue in existence, in a manner that results in a better return for the company's creditors and members than would result from an immediate winding up of

the company. It is thus expressly envisaged in the legislation that the purposes of Pt 5.3A would be more than simply the execution of a DOCA.

This result is confirmed by s439A(4)(b), which requires the administrator to provide to the creditors a statement setting out the administrator's opinion about whether it would be in the creditors' interests: (i) for the company to execute a DOCA; (ii) for the administration to end; and (iii) for the company to be wound up. The legislation thus expressly envisages three possible outcomes to the administration, and the execution of a DOCA is just one of the three.

Abuse of Pt 5.3A

If the other purposes for which Pt 5.3A is being used fit within s435A, they would be consistent with the intent of the legislature and would not constitute an abuse of Pt 5.3A. As Ron Harmer commented to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry that resulted in their June 2004 Report Corporate Insolvency Laws: a Stocktake (the PJC Report):

> 'any regime that is designed to encourage rescue or rehabilitation will, of necessity, have a number, indeed, probably a fairly high percentage, of failures. … It is inevitable that you are going to get not so much abuse of the system, but you are going to get directors and companies invoking something like voluntary administration, perhaps with some faint hope or expectancy that there might be something to be rescued or retrieved.' (emphasis added)

The PJC itself stated in their report:

> 'A fifth [of companies entering VA] are using the procedure to initiate a liquidation. The use of the procedure for these purposes does not indicate that the procedure is misused. Nor does the presence of other motives for initiating the procedure point to misuse. The policy favouring reorganisation does not imply that every company is a suitable candidate for it. Companies that are beyond the point of rescue, or that should be brought to an end, should be liquidated promptly and efficiently. Part 5.3A explicitly contemplates and provides a viable route to an orderly liquidation of a company.' (emphasis added)

If the provisions of Pt 5.3A are being abused, s447A(1) empowers the court to make such order as it thinks appropriate about how Pt 5.3A is to operate in relation to a particular company, e.g. by ordering that the administration is to end: see s447A(2)(b), Blacktown City Council v Macarthur Telecommunications Pty Ltd and Dallinger v Halcha Holdings.

The Dallinger case

Sundberg J did not rule in Dallinger v Halcha Holdings that it was not an abuse of the Act for a director to appoint a friendly administrator even when it is clear that the company cannot be saved from liquidation. While Sundberg J did state that it was not

of itself an abuse of the Act for a director to appoint an administrator when the company cannot be saved from liquidation (a conclusion that resulted from a natural reading of the meaning of the legislative wording), his Honour did not state that it was not an abuse of the Act for a director to appoint a friendly administrator. To the contrary, many of his Honour's comments stressed the need for the administrator to be impartial.

Sundberg J's comments in this regard have led subsequent judges to use the Dallinger case as authority for the proposition that to succeed in an application for the removal of an administrator the plaintiffs must establish a reasonable apprehension by a creditor of a lack of impartiality in the administrator as a result of association with the company or a creditor: see for example Spiteri v Georges and Re Central Spring Works Australia Pty Ltd.

It is implicit in Sundberg J's judgment that VAs must be for the purposes set out in s435A and that this section limits the reasons for which a registered liquidator may accept an appointment as voluntary administrator. It was decided in Aloridge Pty Ltd v Christianos that when the appointing directors have a purpose other than the genuine object of improving the position of the company or its creditors, an order may be made under s447A terminating the administration.

Sundberg J's judgment also does not affect the fact that Pt 5.3A disqualifies registered liquidators from accepting appointments as voluntary administrator from a company with which they have certain relationships prescribed in s448C(1), except with the leave of the court. In addition, at common law, a voluntary administrator must be independent and be seen to be independent, must act impartially, and must avoid conflicts between interest and duty, and between duty and duty.

The current state of the common law is not contrary to the intent of the legislation. The legislation's intent is indicated by the natural meaning of the Act, which was applied properly by Sundberg J. In the case before his Honour, the administrator recommended an administration because he felt that it was in the best interests of the general body of creditors for someone to take control of the company's affairs as soon as possible. His Honour did not accept that the directors' purpose in appointing the administrator was not the genuine purpose of seeking to improve the position of the company's creditors. His Honour was therefore not satisfied in terms of s447A(2)(b) that the provisions of Pt 5.3A were being abused.

Sundberg J's judgment in this regard has been approved by case law since, for example, Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd, Blacktown City Council v Macarthur Telecommunications Pty Ltd, Re Ansett Australia Ltd and Korda, Crimmins v Glenview Home Units Pty Ltd (in liq) and Vink v Tuckwell (No.2).

In addition, Sundberg J's judgment was consistent with the relevant extracts from the Explanatory Memorandum of November 1992 on the Corporate Law Reform Bill 1992 (Cth), which upon enactment introduced the new Pt 5.3A. In respect of

proposed s435A, it was stated that the primary object of the Part is to maximise the chance of the company emerging from administration with as much as possible of its business continuing in existence. Implicit in this is that there is also a secondary object – namely the second limb in s435A(b). This conclusion is confirmed by the PJC Report.

Issue 2: Possible amendment of s435A

Disregarding the state of the existing legislative position in s435A (or any hypothetical amalgamation of its two limbs), the policy question Vink raises is whether there should only be one purpose to Pt 5.3A, namely the administration of a company's affairs with a view to executing a DOCA. Whether the purpose to Pt 5.3A should be changed has implicitly been considered in two official inquiries that looked into the threshold test for entry into VA:

(i) *PJC June 2004 Report*: Corporate Insolvency Laws: a Stocktake

The PJC summarised their findings from the inquiry as follows:

> 'While many submissions were critical of particular features of the VA procedure and suggested alternative approaches in a number of areas, overall submissions commented positively on the procedure. The general view expressed in submissions was that the VA process is a useful and valuable procedure for companies that may be facing collapse.'

The PJC's only concrete recommendation (14) was for the threshold test permitting directors to make the initial appointment of an administrator under the VA procedure to be revised. The Committee noted the suggestion that the test be reworded to read 'the company is insolvent or may become insolvent.'

However, this recommendation was concerned to ensure that the VA procedure provides sufficient incentives to companies to initiate the procedure and to alleviate perceptions that the VA procedure is only available to insolvent companies. It was not to address any concern regarding the overall purpose of Pt 5.3A.

Several submissions suggested that the VA procedure was open to misuse because it was being used as a means of putting a company into liquidation (instead of through the normal creditors' voluntary liquidation (CVL) procedure), rather than of enabling a company to continue in existence. The PJC concluded in this regard as follows:

> 'It [VA] generally strikes a reasonable balance between liquidation and reorganisation. In the event that reorganisation or rescue is impossible, the VA procedure permits a prompt transition to a predictable, fair and orderly liquidation procedure in which losses are distributed appropriately and minimised to the extent possible . The flexibility that is inherent in the procedure in most cases achieves a balance between the interests of debtors and creditors.'

(ii) CAMAC Report: Rehabilitating large and complex enterprises in financial difficulties

The Corporations and Markets Advisory Committee (CAMAC) disagreed with the PJC recommendation 14 in CAMAC's October 2004 Report on Rehabilitating large and complex enterprises in financial difficulties. But this was not because it did not go far enough in recommending amendment to s435A. On the contrary, CAMAC stated that the current prerequisites for entering into VA should be retained, including where the directors consider that 'the company is insolvent, or is likely to become insolvent at some future time'.

CAMAC also stated that it was not in favour of any prohibition on an insolvent company appointing an administrator. As regards prohibiting directors of an insolvent company

from appointing an administrator, submissions generally opposed this prohibition, including for the reason that: 'in keeping with the objectives of VA (s435A), that procedure should be available even if there is only a limited possibility of a successful restructuring.'

Recent insolvency law reform

Notwithstanding there being no recommendations made regarding amendment of the purpose of the VA procedure, in last year's Corporations Amendment (Insolvency) Act 2007 (Cth) (the amending Act), one of the insolvency law reforms was to facilitate faster entry into CVL by amending the process for commencing CVL. The process was streamlined and modelled on the process for putting a company into VA. This reform is likely to reduce the instances of entry into CVL via the VA procedure where it is not envisaged that it will be possible to put together a DOCA.

Issue 3: Interaction with s462(2)

Subsection 462(2) gives creditors of a company standing to apply to the court for an order to wind up the company on a general ground specified in s461. However, once a company enters VA, a creditor is no longer able to apply to commence winding up proceedings, even if there is no prospect of the company entering into a DOCA.

If the concern here is that the director-appointed administrator is not independent and impartial, it is open to creditors to remove a director-friendly administrator from office and appoint someone else at the first meeting in the administration under s436E(4), or subsequently to apply to the court under s447A, s447E or s449B (as appropriate) for the same purpose.

If there is no prospect of the company entering into a DOCA, the company will either be returned to the management of the directors at the end of the s439A decision meeting or it will enter CVL under s439C(c) and s446A. In the first case, it is then again possible for a creditor to apply for an order to wind up the company on a general ground specified in s461, and in the second case, the creditors may under s499(2A)

appoint at the s439A meeting another person (instead of the administrator) to be the liquidator, or if a creditor has a reasonably based apprehension that the liquidator is not independent, the creditor may apply for the liquidator to be removed under s536.

(b) SECTION 447E

Issue 4: Effectiveness of s447E

VAs are intended to be short-lived, but the reality is that many administrations, especially those of large and complex groups of companies, can go on for many months and even years. Notwithstanding this, it is still possible for a court to be informed of improper conduct before the administration is terminated even in those administrations that stick to the minimum time limits. With competent legal advice, specialist representation by a qualified practitioner, and appropriate evidence marshalled in support of an application, there is no need for there to be any significant delay in applying to the court for an order under s447E.

ASIC has in the past received complaints that raise concerns about the external administration of a company lasting for an extensive period of time, and continues to be open to receiving similar complaints. In such circumstances, ASIC can make inquiries of the external administrator to ensure that the external administration is not being prolonged unnecessarily.

(c) SECTION 536

Issue 5: Use of s536 instead of s447E and the 'daunting' nature of making a complaint

The court is empowered to inquire into the liquidator's relevant conduct as an administrator as an incident of its inquiry under s536 of the Act: see ASIC v Edge. It is true that s536 is not meant to present a very high hurdle to any person who wishes to call for an inquiry: see Burns Philp Investment Pty Ltd v Dickens (No.2), ASIC v Edge and Vink v Tuckwell. However, the court needs to be satisfied of a prima facie case that a matter needs to be investigated in the public interest before dedicating public resources to a full-blown inquiry: see Burns Philp Investment Pty Ltd v Dickens.

Section 536 is therefore not more likely to be used by any person to inquire into the conduct of an external administrator while acting as voluntary administrator. For example, it may well be that the external administrator has only acted as voluntary administrator, or has acted as voluntary administrator and then deed administrator, but has not become a liquidator of the company previously in VA. The focus on s536 is also specifically on aspects of the conduct of liquidators which are liable to attract sanctions or control for disciplinary reasons: see Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd and ASIC v Edge. There may be other circumstances in which the voluntary administrator's conduct is more appropriately examined under s447E.

As for s447E itself, that section (similarly to s536) does not present a very high hurdle to an application either. In ASIC v Edge Dodds-Streeton J stated that although prejudicial or potentially prejudicial conduct as an administrator or deed administrator is a precondition of making an order under s447E(1), it is not a precondition of the court making inquiry into the defendant's conduct and determining the existence of such conduct, on an application under s447E(3). (See also Marks J's observations in Commissioner for Corporate Affairs v Harvey that an inquiry under s536 largely retains the adversarial character of common law litigation, combined with Dodds-Streeton J's view that in ASIC v Edge the procedure adopted for the s536 inquiry was equally appropriate for a determination under s447E.) The differences in ease of use of s447E and s536 may therefore be more illusory than actual.

Although in practical terms it may be quite daunting for any person to make a complaint, this is a function of the adversarial court-based dispute resolution system in Australia and is why litigation solicitors often instruct specialist advocates (barristers) to conduct court proceedings. The need for supporting material to be presented to the court in a contestable form subject to the adversarial process of evidence testing is a means of preventing unsubstantiated requests for inquiry being made and of ensuring that the truth as regards matters in dispute is established. The daunting nature of the proceedings may well have been a result of Vink having acted as a litigant in person, rather than any failing of the particular provision of the Act. (See also Vink v Tuckwell (No.2) as regards the injustice against a liquidator that may result from the lack of legal representation on the part of an applicant.)

(d) VINK v TUCKWELL (NO 2)

Issue 6: Vink's case in the Supreme Court of Victoria

The Supreme Court of Victoria has now handed down its decision: Vink v Tuckwell (No.2). After four days of hearing and examining voluminous amounts of documents, Robson J dismissed the application. His Honour was satisfied that none of the actions that the liquidator (Mr Colin Tuckwell) took in the liquidation warranted an inquiry. None of the creditors of the company in liquidation (CIC) supported the proceedings brought by Vink against the liquidator.

Vink conducted the proceedings as a litigant in person. Robson J concluded that this led to injustice against the liquidator. His Honour decided that the liquidator was exposed to serious allegations of misconduct and was wrongly accused of dishonesty. He held that a person with no interest in the liquidation was allowed to make serious and unfounded allegations against the liquidator.

Vink has now filed a Proposed Notice of Appeal in the Supreme Court on 3 July 2008 (he is appealing as of right).

Issue 7: Vink's encouragement of the PJC to consider assisting creditors

Vink himself was not a creditor of the insolvent company in question. He was in fact neither a director, a shareholder, a creditor nor a debtor of CIC. He had nothing to do

with the company, save that at the time CIC went into liquidation, a former director called Ms Ani Linton was his de facto partner. Vink assisted her in resisting the liquidator's action for recovery of a loan purportedly made to her by CIC and in proceedings seeking removal of the liquidator and seeking an order for an inquiry into his conduct.

In this case, Robson J concluded that a professional was unjustly accused of misconduct under the protection of legal privilege because the complainant was not subject to the ethical rules of lawyers. (A lawyer is not permitted to make allegations of fraud or dishonesty unless they are satisfied reasonable grounds exist to make such an allegation. Vink was not bound by such rules of professional conduct.)

A way for creditors to be assisted in similar instances in the future is for the liquidator of the debtor company not to have to deal with such proceedings and to incur costs in defending them. In this regard, we note Robson J's suggestion that the legislature should consider amending s536 to limit the class of persons who may complain to the court to those who have an interest in the liquidation.

It is worth noting as a comparison that s447E limits the class of persons who may apply to the court for an order under that section to ASIC or a creditor or member of the company. Similarly, as regards the general power of the court to make orders about how Pt 5.3A is to operate in relation to a particular company, s447A limits the class of persons who may apply to the court for an order under that section to the company, a creditor, the administrator or deed administrator, ASIC or any other interested person.

However, any amendment of s536 is a matter for the Government (not ASIC). We intend to draw the case of Vink v Tuckwell (No.2) to Treasury's attention in the near future.

Issue 8: Most liquidations not resulting from voluntary administrations

In the 2007 calendar year, 3,090 companies went into liquidation by order of the court and 5,009 as a CVL. Of the latter, 2,173 companies proceeded directly into CVL without going into VA first. Only 2,836 CVLs could thus have resulted from VA or deed administration.

This means that of the total of 8,099 liquidations, only 2,836 were a result of VA or deed administration, i.e. 35%. This figure is likely to be further reduced in future as a result of the legislative changes to the CVL commencement process that came into force on 31 December 2007.

Question on Notice 11

Dodrill matter (Mr Ripoll MP, p. 36 Hansard)

CHAIR—The other one which was not listed but which I will raise—and again please take this on notice—is the case of Mr Dodrill in relation to JMD Queensland, the Irish

Restaurant and Bar Company Pty Ltd and American Pie Restaurant Pty Ltd. This has been the subject of a number of pieces of correspondence between the complainant, ASIC and me as a member of parliament and also a number of court cases, all of which have been won by the complainant. I am seeking your review of that. If you could take that on notice and get back to us, that would be appreciated.

Mr D'Aloisio—Yes.

Response:

Mr Dodrill is a minority shareholder in JMD Queensland (ACN 097 200 381) (JMD), the Irish Restaurant and Bar Company Pty Ltd (ACN 073 727 205) (IRB) and the American Pie Restaurant Pty Ltd (ACN 098 180 011) (AP). Mr Dodrill is not a current director of these companies.

All three companies are small proprietary companies which are not required to prepare and lodge financial reports with ASIC. Generally, ASIC is of the view that individuals who choose to invest within this type of structure need to ensure that they conduct their own due diligence prior to investment and that they have appropriate legal mechanisms in place, for example a shareholders agreement, in order to best protect their interests. In addition to such mechanisms, shareholders have limited rights under the Corporations Act 2001 (the Corporations Act) to initiate Court action to protect their interests, which we understand have been exercised in this case.

While the directors of small proprietary companies are subject to ASIC's jurisdiction, it is not the role of ASIC to intervene in internal disputes between shareholders of small proprietary companies unless there is a clear public interest in doing so. Although Mr Dodrill has raised a number of complaints with ASIC (which we have assessed and reviewed on several occasions), and provided information in relation to his own legal proceedings and Court orders obtained, ASIC remains of the view that regulatory intervention is not warranted in the public interest in this case.

Question on Notice 12

Franchising (Sen Boyce, additional question on notice)

What interest is ASIC taking in current proceedings in the High Court re the franchising industry? If interested, how is this being expressed, eg how many staff involved? What are they actually doing?

What other activities regarding franchising is ASIC involved in?

Some current Bank of Queensland franchisees have been described as "dead men walking". What extra and/or specific efforts is ASIC making in terms of targeting financial literacy education at potential franchisees?

Response:

The ACCC regulate the franchising sector through the administration of the Franchising Code of Conduct. The ACCC is responsible for the enforcement of the code and has the power to investigate and prosecute breaches. The ACCC also has a responsibility to educate the sector and ensure that both potential and existing franchise participants are aware of their rights and obligations under the code.

ASIC's financial literacy education activities are primarily targeted at consumers and retail investors about such topics as avoiding financial scams, finance and investment tips and consumer rights. We have not targeted financial literacy education specifically at potential franchisees.

The ACCC publish 'The Franchisee Manual' for potential franchisees. The brochure looks at what franchising is, steps to take before choosing a franchise, answers to frequently asked questions and much more. The seventh edition was published in February 2008.

Question on Notice 13

Premium Income Fund (Mr Robert, additional question on notice)

The Premium Income Fund (nee MFS Premium Income Fund) has accused MFS/Octaviar of plundering the PIF of at least

$147.5m. There are also a range of other claims against MFS/Octaviar. What is ASIC doing to address this situation and assist PIF investors considering that some commentators are claiming that these actions may be a breach of the Corporations Act, of the Product Disclosure Statement, the PIF Constitution and the compliance plan?

Furthermore will ASIC be launching an investigation into the operation of MFS/Octaviar and particularly the PIF?

Response:

ASIC has been actively monitoring and making enquiries of MFS/Octaviar and the MFS/Octaviar Group since January 2008.

On 13 June 2008, the responsible entity of PIF (now known as Wellington Investment Management Limited (WIM)) became a wholly owned subsidiary of Wellington Capital Limited. Notwithstanding this change in ownership, ASIC has also continued to actively monitor events concerning WIM and PIF.

ASIC has concentrated its enquiries to date on monitoring the solvency of MFS/Octaviar and the liquidity of PIF to ensure that, to the extent possible, the interests of investors are protected. ASIC has also made enquiries concerning the continuous disclosure obligations contained in ASX Listing Rule 3.1 and section 674

of the Corporations Act and has emphasised the need for timely and appropriate disclosures to the market and investors in its dealings with MFS/Octaviar and WIM.

ASIC's enquiries also extend to considering the claim by WIM against Octaviar Limited and an Octaviar subsidiary for $147.5 million regarding investments made by PIF, which Octaviar Limited made a market announcement about on 24 June 2008.