Chapter 2

Matters considered at oversight hearing

2.1 The committee raised a number of matters with ASIC, the ASX and OLSC at the oversight hearing on 11 March 2011. These included:

- Market supervision:
  - ASX-ASIC coordination;
  - Market competition;
  - Broader market developments;
- Complaints-handling;
- Litigation:
  - Legal Services Directions;
  - Proceedings relating to the collapse of Storm Financial Ltd;
- Financial literacy;
- Freezing of investors' funds;
- Regulation of consumer credit; and
- Regulation of the not-for-profit sector.

Market supervision

ASX-ASIC coordination

2.2 The committee has previously noted the transfer of responsibility for supervision of real-time trading on Australia's domestic licensed markets from the ASX to ASIC.[1] ASIC explained that as a result of the transfer, the ASX has responsibility for market operation while ASIC has responsibility for market integrity rules.[2] The ASX described the demarcation in responsibilities as a 'regulatory versus non-regulatory distinction.'[3]

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1 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, pp 3–5.

2 Mr Mark Adams, Senior Executive Leader, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 25.

3 Mr Malcolm Starr, Executive General Manager, Regulatory and Public Policy, ASX, *Proof Committee Hansard*, 11 March 2011, p. 3.

2.3 There is potential for the responsibilities to overlap, as both the ASX and ASIC are concerned to ensure a transparent, effective market.4 The ASX argued that there is 'limited scope' for conflict between the ASX operating and ASIC market integrity rules. The committee was informed that ASIC and the ASX have established a compliance liaison committee that meets on a fortnightly basis to address issues of 'rule overlap.' Furthermore, the ASX noted that its rules are subject to ministerial disallowance, which both the ASX and ASIC commented could be used to address any conflict between ASIC and ASX rules.5

2.4 The ASX advised, and ASIC confirmed, that the compliance liaison committee oversees coordination of ASIC and the ASX's activities where these may overlap. The committee is updating the ASX-ASIC memorandum of understanding, and developing a protocol to coordinate enforcement and monitoring activities to avoid, for example, both agencies simultaneously conducting on-site broker reviews.[6] ASIC advised that the compliance liaison committee is also developing a protocol to govern continuous disclosure of information between the ASX and ASIC.[7]

2.5 At the oversight hearing in November 2010, held approximately four months after the transfer of market integrity responsibilities, ASIC advised that 'the time from identification of a problem through to a formal investigation has decreased.'[8] ASIC confirmed that the efficiencies gained through merging responsibilities for problem identification and investigation continued, advising that:

> ...out of our 24 matters that we have now sent through that have been approved for investigation 10 were taken on by deterrence teams within 30 days of the trading activity. Previously, ASIC would not really have seen a matter for maybe four to six weeks.[9]

2.6 The ASX suggested that the transfer would 'not necessarily' lead to improvements in market supervision, as the decision to transfer responsibility was in response to competition imperatives rather than any concern with the ASX's oversight activities. The ASX commented that the 'real test comes when you have additional market operators.'[10] However, the ASX concurred with the view that the transfer has removed 'double handling' and therefore resulted in a more efficient investigatory

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4 Mr John Yanco, Regional Commissioner for New South Wales, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 22.

5 Mr Kevin Lewis, Executive and Chief Compliance Officer, ASX, *Proof Committee Hansard*, 11 March 2011, p. 3; Mr Adam, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 25.

6 Mr Lewis, ASX, *Proof Committee Hansard*, 11 March 2011, pp 3–4; Mr John Yanco, Regional Commissioner for New South Wales, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 22.

7 Mr John Yanco, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 22.

8 Ms Belinda Gibson, Deputy Chairman, ASIC, *Committee Hansard*, 24 November 2010, p. 23.

9 Mr Yanco, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 27.

10 Mr Starr, ASX, *Proof Committee Hansard*, 11 March 2011, p. 6

process. Mr Kevin Lewis, Group Executive and Chief Compliance Officer, ASX, commented:

> One of the points that ASIC has made is that, because it is now doing the market monitoring itself and able to investigate straightaway, that certainly speeds up the process of taking enforcement action. I think that is unquestionably correct.[11]

Market competition

2.7 The Australian Government has granted a licence to Chi-X, subject to Chi-X meeting licensing conditions overseen by ASIC.[12] Amendments to market integrity rules and market regulation will be required to ensure consistency across a multimarket environment.

2.8 On 3 March 2011, ASIC announced a timeframe for the introduction of new market integrity rules to facilitate market competition.[13] In releasing the timeframe, ASIC advised that the timeframe takes account of the need for a seamless implementation of the new market integrity arrangements:

> We intend to implement a regulatory framework that reflects the minimum needed for the commencement of competition and that will minimise system changes for industry and maintain market integrity.
>
> We also intend to provide transitional arrangements for the rules that are likely to require more resources and capacity...
>
> We intend to consult on the additional rules needed in response to the wider market developments (e.g. relating to automated electronic trading and volatility controls). We intend to further consult with the aim of settling these additional rules in early 2012 (with sufficient lead time for transition and implementation). More details will be provided in coming months.
>
> We will work with Treasury, the ACCC and industry in considering the development of access arrangements to market operator services.[14]

2.9 In accordance with the timeframe, on 29 April 2011 ASIC released the final market integrity rules of general application that will 'provide the framework for the

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11 Mr Lewis, ASX, *Proof Committee Hansard*, 11 March 2011, p. 7.

12 The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, the Hon Bill Shorten MP, Assistant Treasurer, 'Government approves new financial markets competitor', Media release, 4 May 2011.

13 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, 3 March 2011.

14 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, Attachment 2, p. 2, 3 March 2011.

introduction of competition in equity exchange markets.' The majority of the new rules will apply from 31 October 2011.[15]

2.10 ASIC has also introduced market integrity rules specifically for the Chi-X market.[16] Mr Mark Adams, Senior Executive Leader, ASIC, explained that the Chi-X market integrity rules reflect the rules applying to the ASX:

> What we are intending to put in place, at first instance, [are] consistent rules across all market platforms which are based on the current ASX rules.[17]

2.11 The timeframe contemplates that subject to Chi-X receiving an Australian market licence and meeting ASIC's preconditions for commencement, Chi-X will commence operation in October/November 2011.[18] ASIC has advised that consequential amendments will be required for the market integrity rules specifically applying to the ASX market, and intends to issue these in October/November 2011.[19]

Broader market developments

2.12 The committee has previously noted ASIC's consultations on options to reform market structure and surveillance.[20] ASIC advised the committee that stakeholder feedback recommended that market integrity rules be considered in two phases; phase one to consider market competition issues and phase two to consider broader market developments.[21] On Friday 29 April 2011, ASIC announced that it will continue to consult on the need for additional market integrity rules to address broader market developments, with a view to finalising additional rules in early 2012. Matters that phase two will consider include volatility controls for extreme price movements and the regulation of dark pools.[22]

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15 ASIC, 'ASIC publishes final competition market integrity rules', Media release 11-87MR, 29 April 2011.

16 ASIC, 'ASIC publishes final competition market integrity rules', Media release 11-87MR, 29 April 2011.

17 Mr Adams, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 29.

18 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, Attachment 1, p. 2, 3 March 2011.

19 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, Attachment 1, p. 2, 3 March 2011.

20 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, pp 3–5.

21 Mr Adams, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 30.

22 ASIC, 'ASIC publishes final competition market integrity rules, Media release 11-87MR, Friday 29 April 2011; Mr Adams, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 30.

Committee view

2.13 The committee is concerned to ensure that the transfer of responsibilities from the ASX to ASIC leads to measurable improvements in market integrity. The committee notes the improvements in the time from identification to investigation. The committee will continue to raise this matter with ASIC, to determine whether improvements continue.

2.14 The committee will monitor the impact of increased competition on market integrity, and continue to seek ASIC's advice on this matter. The committee is also interested in the phase two considerations of whether additional market integrity rules are required, particularly in relation to dark pools, and will seek updates from ASIC about the progress of the phase two consultations.

Complaints-handling

2.15 ASIC receives approximately 14,000 complaints per year.[23] Of these, approximately 21 per cent relate to matters outside ASIC's responsibilities.[24] For the 2007–08 to 2009–10 financial years, on average a further 20 per cent relate to the same matters.[25] ASIC advised that each report of misconduct is formally assessed.[26] ASIC has established procedures for reviewing complaints, which can include information gathering from internal and external sources and consultations with the ASIC Deterrence team and Stakeholder teams to determine surveillance and compliance options.[27]

2.16 The committee was informed that ASIC's complaints handling policies require the agency to provide a response to complainants. ASIC's complaints handling policies recommend that ASIC respond to 70 per cent of complainants within 28 days.[28] ASIC advised that for the year-to-date, 80 per cent of complainants receive a response within this timeframe.[29] The committee raised with ASIC concerns that the committee has received that ASIC is not taking appropriate action in response to complaints. Mr D'Aloisio commented that ASIC is aware that some complainants may have this perception of ASIC's response to reports of potential misconduct:

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23 Mr Warren Day, Regional Commissioner, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 33.

24 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 33.

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

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

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

28 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 34.

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

> It is a problem that worries me, that worries the Commission, in the sense that we want to make sure that we are not seen to be dropping the ball in any cases and that we do discharge our responsibilities as a regulator.[30]

2.17 The committee was informed that the extent of information provided to the complainant can depend on the nature and assessment of the complaint. Where a matter is outside ASIC's responsibilities, ASIC seeks to refer the complainant to the appropriate government agency.[31] For complaints within ASIC's regulatory ambit, policies regarding market integrity, confidentiality and privacy can influence the level of information a complainant receives. ASIC advised that a measured, limited response can be required to avoid compromising market integrity:

> For Market Integrity matters, the acknowledgement letter advises complainants that they will not hear further from ASIC unless we need further information due to the sensitivity of these matters. These reports of misconduct need to be treated with sensitivity, because if the complainant was aware if ASIC was taking further steps, or misrepresents this, it has the potential to move the share price of a stock, possibly for no good reason.[32]

2.18 Mr Tony D'Aloisio, Chairman, ASIC, stated that ASIC's investigations into complaints are confidential, and explained that the confidentiality is to ensure fairness to the person investigated:

> But at the moment the default, if you like, is that the balance is in favour of individual rights and preserving those until such time as we feel there is a case to answer and it is going to court.[33]

2.19 In contrast to investigations, ASIC's litigation is on the public record. Mr D'Aloisio stated that the differing approaches to confidentiality have a bearing on ASIC's response to complainants:

> [The] line traditionally has been drawn that, once the investigation is complete, if ASIC decides to take action, it is announced and that then gives the public a right to know. The difficulty with that line has been that where ASIC decides not to take any action, that has not generally been announced or made known.[34]

2.20 Where litigation is commenced, for cases with a significant volume of complaints ASIC may adopt additional measures to inform the public of the progress of the case. For example, ASIC has developed a website to keep the public informed

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30 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 36.

31 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 35.

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

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

34 Mr D'Aloisio, AISC, *Proof Committee Hansard*, 11 March 2011, p. 37.

of the proceedings against Storm Financial Ltd (Storm Financial).[35] The website also contains confidential pages that provide information for investors.[36] A similar website was developed for ASIC's proceedings against Westpoint.[37]

2.21 The committee was informed that ASIC is reviewing options to improve communications with complainants:

> We are looking at what we can do to better improve that aspect of communication, of reassuring people that the matter is not dead or has not been lost sight of but at the same time balancing the rights of individuals. The other area that we have concerns about and are trying to grapple with is where you come to the view that ultimately a matter does not have the merit to proceed and how you then communicate that back to the individual. I am conscious of the problem, and we are trying to work it out.[38]

2.22 The review will consider what measures can be taken to decrease the time taken to respond to complaints, to ensure complaints are made to appropriate agencies at the outset, and to provide clear information about 'ASIC's attitude to certain complaints' (for example ASIC considers inter-director disputes to be private matters for the company to manage).[39]

2.23 The committee has previously commented that it would welcome an explanation of the trend for the number of complaints to increase per year.[40] ASIC considers that the trend is indicative of improved consumer literacy rather than a decrease in the quality of financial services. Mr Warren Day, Regional Commissioner, ASIC stated:

> As people become more informed, more financially literate, they are more likely to complain because they know who the players are, they know we exist, they know what our remit is; therefore they complain...[M]ore complaints shows an increase in financial literacy more than anything else.[41]

Committee view

2.24 Responding to complaints promotes market confidence, and is a key regulatory function. The manner in which complaints are handled affects public

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35 ASIC, 'Overview of ASIC's Storm website', https://storm.asic.gov.au/storm/storm.nsf (viewed 16 May 2011).

36 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 36.

37 ASIC 'Westpoint investors website', https://westpoint.asic.gov.au/ (viewed 16 May 2011).

38 Mr D'Aloisio, AISC, *Proof Committee Hansard*, 11 March 2011, p. 37.

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

40 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, p. 12.

41 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 45.

opinion about whether ASIC is effectively fulfilling its regulatory responsibilities. The committee notes with approval the percentage of complaints responded to within 28 days. It is apparent from the information provided to the committee that complaints are thoroughly assessed. The committee expects ASIC to provide complainants with sufficient information to assure them that the complaints have been assessed, without compromising the rights of persons investigated or market integrity. The committee looks forward to the outcomes of ASIC's review of what measures can be taken to improve communications with complainants.

Litigation

2.25 The committee routinely inquires into ASIC's involvement with civil and criminal litigation, and seeks information about the policies and practices that underpin the agency's litigation decisions. The committee notes that for the 2009–10 financial year ASIC concluded 156 matters.[42] For the same financial year, ASIC's spending on legal services exceeded that of other federal agencies. The agency's expenditure on legal services increased by approximately 14 per cent from $70.8 million in 2008–09 to $80.7 million.[43]

2.26 The committee was informed that 45 of ASIC's cases were resolved since the oversight hearing in November 2010. Of these, 41 were resolved in ASIC's favour. These matters include the Westpoint litigation, which ASIC anticipates will result in investors receiving $160 to $170 million of a total loss of $388 million, and the criminal proceedings against Mr Scott Kenneth Murray, Chief Executive Officer of Sonray Capital Markets Pty Ltd.[44]

Proceedings relating to the collapse of Storm Financial Ltd

2.27 ASIC has commenced several proceedings in response to the collapse of Storm Financial Ltd. These include civil penalty proceedings against Emmanuel Cassimatis and Julie Cassimatis as directors of Storm Financial, and compensation proceedings against parties including the Commonwealth Bank of Australia, Bank of Queensland Limited and Macquarie Bank Limited arising out of the entities' involvement in an alleged unregistered managed investment scheme operated by Storm Financial and alleged breach of contract, unconscionable conduct and liability as linked credit providers of Storm Financial under section 73 of the *Trade Practices Act 1974*.[45]

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42 ASIC, *ASIC Annual Report 09–10*, p. 16.

43 OLSC, *Legal Services Expenditure Report 2009-10*, 2010, p. 14.

44 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 19; ASIC, '11-29AD Sonray CEO pleads guilty', Media release, 22 February 2011.

45 ASIC, *Overview of ASIC's Storm Website*, https://storm.asic.gov.au/storm/storm.nsf (viewed 15 April 2011).

2.28 The committee was informed that dispute resolution has occurred and the matters are now before the courts. ASIC assured the committee that the agency is committed to progress the cases 'in the quickest possible time that it can given the court program and given the rights of the defendants to contest various issues.'[46]

2.29 ASIC's enforcement response to the collapse of Storm Financial also includes revoking the licence of a former authorised representative of Storm Financial, banning the financial adviser from providing financial services for four years. The ban follows ASIC's findings that the adviser contravened requirements under the *Corporations Act 2001* by providing inappropriate advice to a number of clients and making false and misleading statements.[47]

Legal Services Directions

2.30 As an agency under the *Financial Management and Accountability Act 1997*,[48] ASIC must comply with the Legal Services Directions in conducting, and in determining whether to conduct, litigation.[49] Mrs Janette Dines, Assistant Secretary, OLSC, advised that the directions were developed to promote the delivery of Commonwealth legal services 'in a consistent and coordinated manner so as to protect the Commonwealth's legal and financial position.'[50] The directions impose on Commonwealth agencies an 'obligation to act as a model litigant.' The model litigant obligations require agencies, including ASIC, to 'act honestly and fairly and with complete propriety in handling claims and litigation brought by or against them.'[51]

2.31 The Chief Executives of Commonwealth agencies are responsible for ensuring there are appropriate management strategies and practices in place to achieve compliance with the directions.[52] Mr D'Aloisio reported that, consistent with this requirement, the model litigant rules are 'part and parcel' of ASIC's litigation procedures.[53] The committee was informed that through the Chief Legal Office and General Council, ASIC has established procedures to 'track through complaints or

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46 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, pp 39 – 40.

47 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 19; ASIC, '11-32AD ASIC banks former Storm Financial adviser', Media release, 24 February 2011.

48 Department of Finance and Deregulation, 'Table of Agencies subject to the Financial Management and Accountability Act 1997', http://www.finance.gov.au/financial-framework/fma-legislation/fma-agencies.html (viewed 12 April 2011).

49 Clause 1.1, *Legal Services Directions 2005*.

50 Mrs Janette Dines, Assistant Secretary, OLSC, Commonwealth Attorney-General's Department, *Proof Committee Hansard*, 11 March 2011, p. 11.

51 Mrs Janette Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 11.

52 Clause 11.1, *Legal Services Directions 2005*.

53 Mr Tony D'Aloisio, Chairman, ASIC, *Proof Committee Hansard*, 11 March 2011 pp 32–33.

issues that may have been raised in relation to [ASIC's] compliance with those directions.'[54]

2.32 Mr D'Aloisio reported that the agency closely adheres to the directions,[55] and further stated:

> Our interests and the Attorney-General's interests are entirely consistent. At the end of the day we are a law enforcement agency and we work within law enforcement agency rules.[56]

2.33 In general, OLSC approves of ASIC's conduct in relation to the directions. Mrs Dines advised that ASIC actively complies with its obligations to inform the office of all potential breaches of the directions and complaints received about ASIC's conduct as a litigant; and confirmed that ASIC has a strong record of compliance with the directions:

> From everything we see, ASIC does take quite seriously the requirements and attempts to ensure that it complies with the kinds of standards of fairness that the model litigant obligations requires...[T]he majority of the model litigant complaints that the Office of Legal Services Coordination have looked at have been ones where ASIC has drawn the complaint to our attention, and we have generally not found a breach in those cases.[57]

2.34 ASIC has previously stated that the agency applies a 'considered and rigorous process' to determine whether to conduct litigation. The process includes consideration of whether litigation would be in the public interest and whether the case has 'more than reasonable prospects of success.'[58] ASIC confirmed this, commenting that:

> At the heart of it, at the end of the day, is the issue that, in undertaking any form of litigation you have to ask: is it a case where you have reasonable prospects of success as a matter of law? Secondly, is it in the public interest that you take that case on in that way? Those decisions are case by case decisions that the agency makes.[59]

2.35 It appeared that agencies may balance the two considerations. OLSC advised that:

> It is very explicitly recognised that there will be circumstances where, while technical legal advice would actually say that the Commonwealth's

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54 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 20110, p. 32.

55 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 32.

56 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 39.

57 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 14.

58 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 29 April 2010, pp 24 – 25.

59 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 33.

> prospects of success were limited, it would actually be appropriate because of those broader factors for an agency to initiate or pursue litigation.[60]

2.36 Regarding ASIC's role as a regulator, Mrs Dines noted that public interest considerations are of particular relevance:

> [J]ust being specific around ASIC...because of the nature of its regulatory functions it is not necessarily always clear-cut because you may have other regulatory objectives or specific things in your enforcement strategy...So we accept there is an additional level of sophistication that leaves it a little bit up to the judgement of the agency as to how you would make a decision in a particular circumstance.[61]

2.37 ASIC concluded that:

> ASIC is not required to report to OLSC on the matters which have not resulted in litigation. The Legal Services Directions...have limited application to such matters. The decision whether or not to progress a complaint or litigation is ultimately a regulatory decision informed by ASIC's statutory mandate rather than a legal decision to which the Directions apply.[62]

2.38 For the 2009-10 financial year, ASIC spent $50.2 million on internal legal services. In contrast, the cost of engaging external legal services totalled $30.5 million.[63] ASIC's expenditure on internal legal services exceeded that of other Commonwealth agencies, and increased by approximately 16 per cent from $43.3 million in 2008–09. ASIC's spending on external counsel was the second highest of Commonwealth agencies, increasing by approximately 10 per cent from $27.5 million in 2008–09.

2.39 It appeared that the directions can influence an agency's decision to engage internal rather than external legal counsel. Of particular relevance are ASIC's exemptions from two requirements under the directions. Mrs Dines advised that ASIC has greater flexibility to engage in-house counsel than most Commonwealth agencies, as the agency is exempt from the rule that in-house lawyers cannot act as counsel without the Attorney-General's prior approval.[64] The committee was informed that ASIC is also exempt from the $5 000 cap per day on the fees that may be paid to external counsel. With the approval of the portfolio minister, ASIC may engage external counsel at rates above $5 000, but not exceeding, $10 000 per day.[65]

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60 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 16.

61 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 17.

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

63 OLSC, *Legal Services Expenditure Report 2009-10*, pp 21, 27.

64 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, pp 13–14.

65 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 13.

2.40 There were two reasons for granting ASIC the exemptions. Mrs Dines stated that the exemption regarding in-house counsel is designed to promote cost-effective spending on legal services.[66] Second, the committee was informed that both exemptions facilitate the engagement of experienced, expert counsel. Mrs Dines explained that the cap on fees was granted following 'a significant period, over a couple of years, where ASIC consistently had difficulty in being able to engage counsel of a suitable stature and experience within the ceilings within the Legal Services Directions.' Similarly, the barriers to engaging in-house counsel were removed in 'recognition that, for many of the aspects or types of litigation that ASIC may undertake, the level of technical knowledge that an in-house lawyer can bring gives you a better result.'[67]

Committee view

2.41 The committee commends ASIC for its adherence to the Legal Service Directions. The committee may subsequently raise this matter with OLSC, to be satisfied that ASIC continues to comply with the directions and, in particular, the obligation to act as a model litigant.

2.42 The committee considers that ASIC must have ready access to highly qualified and experienced legal counsel to conduct litigation, and has previously commented that it is essential for ASIC to have dispassionate and expert legal opinion about the prospects of any proposed litigation.[68] The committee notes OLSC's advice that the exemption regarding the use of in-house counsel expires in June this year. It would be of significant concern were the Legal Services Directions to impede ASIC's access to high-quality legal services and thereby undermine ASIC's effectiveness as a regulator. The committee recommends that extending the exemption beyond June 2011 be promptly and carefully considered.

Financial literacy

2.43 On 15 March 2011, ASIC launched a new personal finance website 'MoneySmart'.[69] The website provides a range of calculators and tools to assist persons making financial decisions.[70] Subjects covered include budgeting, credit cards, loans, superannuation contributions and margin loans. Mr D'Aloisio explained:

> We see this website replacing [the FIDO website] and upgrading and providing interactive assistance to investors and financial consumers in

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66 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 13.

67 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 13.

68 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, June 2010, p. 13.

69 http://www.moneysmart.gov.au/.

70 ASIC 'MoneySmart.gov.au – simple guidance you can trust', Media release 11-4MR, 15 March 2011.

> relation to superannuation and loans in a number of areas. It is very much part and parcel of our drive to improve our financial literacy in Australia.[71]

2.44 'MoneySmart' was launched as part of the National Financial Literacy Strategy, which ASIC developed in consultation with the Government, the Financial Literacy Board and industry and community groups.[72] The Strategy aims to 'enhance the financial wellbeing of all Australians by improving financial literacy levels'[73] through:

- Delivering quality financial literacy education to all Australians through schools, workplaces, higher education institutions and in the community;
- Providing all Australians with access to the information and tools they need to make good financial choices;
- Going beyond education to guidance and other strategies to enhance the financial well-being of Australians, including developing a new consumer website; and
- Developing partnerships between the various sectors involved in financial literacy work.[74]

2.45 As noted on the 'MoneySmart' website, ASIC has established a Twitter account. The account provides information to ASIC's 'registry customers', including companies, officeholders, registered agents and financial services and credit licences.[75] Mr Day stated that the account presents information through a medium relevant to the financial services industry.[76]

2.46 The committee notes ASIC's decision to target the quality of financial advice provided to people at retirement, through shadow shopping research. The research aims to target an area of growing need, with an increasing percentage of the population preparing for retirement.[77]

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71 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 20.

72 ASIC, 'MoneySmart.gov.au – simple guidance you can trust', Media release 11-4MR, 15 March 2011.

73 MoneySmart, *About the strategy*, http://www.financialliteracy.gov.au/about-the-strategy (accessed 2 May 2011).

74 ASIC, 'MoneySmart.gov.au – simple guidance you can trust', Media release 11-4MR, 15 March 2011.

75 ASIC, *ASIC's registry services Twitter pilot*, http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+Twitter+pilot?openDocument (accessed 2 May 2011).

76 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 45.

77 ASIC, 'ASIC begins shadow shopping research', Media release 11-53MR, 21 March 2011.

Committee view

2.47 The committee notes with interest the development of 'MoneySmart' and the interactive consumer information and tools it provides. The committee would welcome a comparison of the effectiveness of 'MoneySmart' with the FIDO website, and will raise this issue with ASIC at subsequent oversight hearings.

2.48 The committee has previously noted its interest in financial literacy among retirees.[78] The committee approves ASIC's research into financial advice provided to persons considering retirement, and will seek ASIC's advice about the outcome of this research.

Freezing of investors' funds

2.49 The global financial crisis (the GFC) resulted in a significant increase in the number of illiquid investor funds. In accordance with the Corporations Act, these funds were frozen, thereby suspending investors' rights to redeem their investments.

2.50 There are two methods by which investors may redeem the investments; first, fund managers may release monies back through a single offer released on a pro rata basis to interested investors, and, second, funds may be released in response to hardship applications.[79] Mr Greg Medcraft, Commissioner, ASIC, advised that as of 31 January 2011, 6,500 hardship applications had been received of which 4,300 have been approved. $114 million has been returned through hardship payments.[80] Mr Medcraft reported that the agency is generally satisfied with the process and timeframes for the release of funds.

2.51 Since January 2010, ASIC has received an average of 10 complaints regarding frozen funds per month. ASIC advised that the complaints can be categorised as:

> those raising initial concerns with ASIC about their inability to access their investment in the frozen funds; those complaining about a fund's failure to implement a hardship policy; and those who have been unsuccessful in attempting to access their funds.[81]

2.52 The committee was advised that, in relation to the management of investor funds, the lessons of the GFC are informing future market regulation:

> ...we have been consulting on benchmarks for the future of the mortgage trust sector. The hope is that in the future we will have benchmarks that will highlight the nature and liquidity of the underlying fund. Again it is what

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78 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, p. 13.

79 Mr Greg Medcraft, Commissioner, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 40.

80 Mr Medcraft, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 40.

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

> we always do: we look at what we have done in the past and what we can do today. We are trying to have a more robust sector for the future.[82]

Regulation of consumer credit

2.53 With the introduction of the National Consumer Credit Code in 2010, ASIC received responsibility for licensing and monitoring consumer credit providers. Mr D'Aloisio reported that the transfer of responsibility to ASIC 'is going extremely well.'[83] Of the 14,700 persons registered, 6,882 have applied for licences. Mr D'Aloisio advised that 4,387 licences have been granted and ASIC has approved an additional 1,044 applications.[84]

2.54 The committee has previously been informed that the introduction of the national consumer credit system was in part a response to the 'varying degrees of rigour' with which state and territory consumer credit schemes were enforced.[85] Mr Day stated that ASIC is closely monitoring consumer credit complaints, to promote from the outset 'as close to 100 per cent compliance as we can.'[86] ASIC considers that strong initial compliance with the requirements will 'set [the consumer credit] industry up for better compliance into the future.'[87] ASIC advised that to strengthen ASIC's response to consumer credit concerns, ASIC is also prioritising the development of the skills and expertise of its staff in consumer credit issues relating to the provision of credit services by unlicensed and unregistered persons.[88]

Regulation of the not-for-profit sector

2.55 Regulation of the not-for-profit sector is fragmented, with multiple agencies including ASIC having regulatory responsibilities for the sector.[89] The committee was informed that ASIC regulates approximately five per cent of the not-for-profit sector, having authority to regulate not-for-profit organisations that are constituted as companies limited by guarantee.[90]

2.56 For the 2007–08, 2008–09 and 2009–10 financial years, complaints regarding the not-for-profit sector comprise approximately 3 per cent of the total complaints

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82 Mr Medcraft, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 41.

83 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 20.

84 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 20.

85 Dr Peter Boxall AO, Commissioner, ASIC, *Committee Hansard*, 23 June 2010, p. 23.

86 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 44.

87 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 44.

88 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 44.

89 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, p. 116.

90 Mr John Price, Senior Executive Leader, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 46.

ASIC received.[91] ASIC stated that complaints relating to these not-for-profit organisations predominantly relate to internal matters such as 'control and decision-making within a company and access to financial reports.' ASIC advised that it considered such internal matters are for the organisations, rather than ASIC, to address.[92]

2.57 In its 2010 report *Contribution of the Not-for-Profit Sector*, the Productivity Commission recommended that, as an interim measure, ASIC assume responsibility for all regulatory functions relating to not-for-profit organisations.[93] The Australian Government is currently considering this proposal, with Treasury releasing a consultation paper that outlines options of the combined regulatory functions being undertaken by ASIC or the Australian Taxation Office.[94]

2.58 In relation to the possibility of taking responsibility for the not-for-profit sector, Mr D'Aloisio noted that ASIC 'has a lot on', and further argued that ASIC would require appropriate resources to undertake the additional responsibilities:

> ...we would need to be adequately resourced to do that, to add to our registries. It is something that would take some time and some resources to put in place.[95]

Committee view

2.59 The committee reiterates its view that the expansion of ASIC's responsibilities carries with it the risk of diluting expertise and resources. This risk can be mitigated through appropriately resourcing ASIC to undertake any new responsibilities.

Mr Bernie Ripoll MP

Chairman

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

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

93 Recommendation 6.5, Productivity Commission, *Contribution of the Not-for-Profit Sector*, p. 152.

94 Treasury, *Scoping paper for a national not-for-profit regulator: Consultation paper*, January 2011, pp 22–23.

95 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 49.