Parliamentary Joint Committee on Corporations and Financial Services

Statutory Oversight of the Australian Securities and Investments Commission

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Members of the Committee

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The Hon Alan Griffin MP	VIC	ALP
The Hon Tony Smith MP	VIC	LP
Ms Laura Smyth MP	VIC	ALP

SECRETARIAT

Dr Richard Grant, Acting Secretary

Ms Erin East, Principal Research Officer

Ms Ruth Edwards, Administrative Officer

Suite SG.64
Parliament House
Canberra ACT 2600

T: 61 2 6277 3583
F: 61 2 6277 5719
E: corporations.joint@aph.gov.au
W: www.aph.gov.au/senate/committee/corporations_ctte

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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Abbreviations and glossary

AFSL	Australian Financial Services Licence
AFP	Australian Federal Police
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
FOFA	Future of Financial Advice
Frozen fund	A registered managed investment scheme for which investors' rights to redeem their investments have been suspended, as the scheme has ceased to be liquid. A scheme ceases to be liquid if its readily accessible, that is liquid, assets account for less than 80 per cent of the value of the scheme's property (*Corporations Act 2001*, ss601KA(4)).
GFC	Global Financial Crisis
RE	Responsible Entity
SMSF	Self-managed superannuation fund

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* (the ASIC Act). Section 243 of the ASIC Act specifies the committee's duties, which include:

> (a) to inquire into, and to 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 paragraph 243(a)(i).

1.3 As the corporate, markets and financial services regulator, ASIC is responsible for monitoring the integrity of Australia's financial system. Areas within the Commission's remit include promoting financial literacy and consumer education; corporate, financial services and consumer credit regulation; and the supervision of trading on Australia's licensed equity derivatives and futures market.

1.4 In inquiring into ASIC's activities, the committee seeks to determine whether ASIC is fulfilling its statutory responsibilities. In considering ASIC's performance, the committee has regard to section 1 of the ASIC Act, which directs ASIC to:

- maintain, facilitate and improve the performance of the financial system and entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
- promote the confident and informed participation of investors and consumers in the financial system;
- administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements;
- receive, process and store, efficiently and quickly, information given to ASIC under the laws that confer functions and powers on it;
- ensure that information is available as soon as practicable for access by the public; and
- take all necessary action to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

Gathering evidence

1.5 The committee held a public hearing on 12 September 2012 at Parliament House in Canberra. The committee acknowledges ASIC's ongoing cooperation.

1.6 This report reflects evidence taken at the hearing. Witnesses who gave evidence are listed in Appendix 1. Copies of the Hansard transcript of the hearing have been tabled for the information of the Parliament, and are available on the committee's website.[1]

Additional information

1.7 Several questions were placed on notice. The questions, and answers received, are published in Appendix 2.

1 Parliamentary Joint Committee on Corporations and Financial Services, *Oversight of ASIC*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/asic/index.htm (accessed 24 September 2012).

Chapter 2

Matters considered at oversight hearing

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

- ongoing regulatory response to the collapse of Trio Capital;
- implementation of the Future of Financial Advice (FOFA) reforms;
- regulatory activities affecting Australia's superannuation industry;
- supervision of Australia's domestic licensed markets;
- oversight of funds frozen as a result of the global financial crisis; and
- resources and regulatory approach.

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

2.2 The committee tabled its report into the collapse of Trio Capital in May this year. However, the committee continues to closely monitor ASIC's ongoing response to the corporate collapse. While the government has yet to present its response to the committee's recommendations, the committee obtained from ASIC a broad update on the Commission's relevant activities.

2.3 ASIC noted that it is continuing the forward work plan outlined in its submission to the Trio Capital inquiry.[1] The Commission has released a report on the custodian industry, a consultation paper on the regulation of research houses, and anticipates the release of regulatory guidance to improve disclosure by hedge funds.[2]

2.4 The measures that the Commission has undertaken also include amendments to capital requirements to increase the financial resources required of responsible

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1 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 15. ASIC's forward work plan is available in *Submission 51* for the committee's inquiry into the collapse of Trio Capital, pp 710, which can be obtained from the committee's website http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/trio/submissions.htm (accessed 25 September 2012).

2 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, pp 15-16. Regulatory guide 240 - *Hedge funds: Improving disclosure* was released in 18 September 2012, and can be obtained from ASIC's website: http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg240-published-18-September-2012.pdf/$file/rg240-published-18-September-2012.pdf (accessed 20 October 2012).

entities to operate managed investment schemes.[3] ASIC has also undertaken surveillance of 12 responsible entities, which found that risk management arrangements appear to be stronger for APRA-regulated entities compared with entities that operate outside the APRA framework.[4]

Communication between regulatory bodies

2.5 As part of its inquiry into the collapse of Trio Capital, the committee found that communications between ASIC and the Australian Prudential Regulation Authority (APRA) regarding key material relevant to Trio Capital were lacking. ASIC maintained its previously stated position that the Commission has 'a good working relationship with APRA'.[5] However, ASIC confirmed that it is considering measures to improve information sharing with the prudential regulator.[6] The committee was not provided details of the measures under consideration.

2.6 The committee was further informed that ASIC is updating its Memorandum of Understanding with the Australian Taxation Office. Matters under review include general liaison and information sharing protocols.[7]

Enforcement activity

2.7 ASIC's investigations into individuals connected with Trio Capital, including the ARP Growth Fund and the Astarra Strategic Fund, are continuing. ASIC advised that 'we continue to devote very considerable resources to the investigation of the Trio matters on an ongoing basis'. However, ASIC further stated that 'it is too early to say at this stage' whether investigations will result in successful enforcement actions.[8]

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3 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 16. The committee understands that from 1 November 2012 responsible entities must prepare 12-month cash-flow projections for at least quarterly approval by directors. Responsible entities (RE) must hold the greater of $150,000, 0.5% of the average value of scheme property (capped at $5 million), or 10% of the average RE revenue (uncapped). In addition, a liquidity requirement has also been introduced where an RE must hold at least 50% of the required capital in liquid assets.

4 Mr Greg Tanzer, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 19.

5 Mr John Price, Senior Executive Leader, Australian Securities and Investments Commission, *Committee Hansard*, 22 June 2012, p. 3; Mr Price, Australian Securities and Investments Commission, *Proof Committee Hansard*, 12 September 2012, p. 16.

6 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 21.

7 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 21.

8 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 18.

2.8 ASIC reiterated its previously stated view that the losses suffered by investors in the ARP Growth Fund ultimately resulted from investment decisions rather than fraudulent activities.[9]

Committee view

2.9 The committee acknowledges the devastating financial, emotional, and social consequences of the collapse of Trio Capital for investors. The committee queries ASIC's view on the legitimacy of the schemes in which the ARP Growth Fund invested. The committee requests that ASIC continue to appraise the committee of the liquidator's success in recovering funds for ARP Growth Fund members. The committee would also appreciate advice regarding whether the liquidator encountered any difficulties in fulfilling its responsibilities.

2.10 While awaiting the government's response to its recommendations, the committee acknowledges the work the Commission has undertaken to respond to the Trio collapse. In particular, the committee is interested in actions ASIC is taking to strengthen the regulatory framework for research houses and custodians and will seek ASIC's further advice regarding these developments at future oversight hearings.

ASIC's implementation of the Future of Financial Advice (FOFA) reforms

2.11 Legislation to introduce the Future of Financial Advice (FOFA) reforms received Royal Assent on 27 June 2012, and commenced on 1 July 2012.[10] However, prior to 1 July 2013 Australian Financial Services Licensees (AFSLs) may choose whether to adopt the FOFA requirements.[11]

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9 Mr Price, Australian Securities and Investments Commission, *Proof Committee Hansard*, 12 September 2012, p. 17.

10 Further details of the *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* are available at Parliamentary Joint Committee on Corporations and Financial Services, 'Information about the Bills', http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/future_fin_advice/index.htm (accessed 25 September 2012).

11 An explanation of the FOFA reforms ASIC's related regulatory responsibilities is available at Australian Securities and Investments Commission, *Future of Financial Advice*, http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Future%20of%20financial%20advice (accessed 25 September 2012).

Industry guidance

2.12 In reviewing the draft legislation, the committee recommended that ASIC issue guidance material on aspects of the reforms.[12] ASIC confirmed that it is issuing guidance in relation to the opt-in requirements, ASIC's additional licensing powers, the best interests duty, the scaled advice test, and conflicted remuneration.[13] ASIC had previously advised that finalised guidance material would be published in September this year.[14] The committee received an update on the status of the guidance material. ASIC advised that the Commission:

- will shortly release a consultation paper detailing the opt-in requirements;
- has issued finalised guidance on ASIC's additional licensing powers;
- has released a consultation paper regarding the best interests duty, with submissions due by 20 September 2012;
- has released a consultation paper on scaled advice, with submissions due by 20 September 2012; and
- anticipates that it will release a consultation paper on conflicted remuneration within the coming months.[15]

2.13 ASIC may exempt a person or a class of persons from the opt-in requirements where satisfied that they are bound by a code of conduct that 'obviates the need' for the opt-in provisions.[16] Separate to the FOFA reforms, ASIC has existing powers to approve codes of conduct.[17] ASIC has publicly stated that its current expectations for codes of conduct will form the basis of consultations on codes of conduct for the purposes of the opt-in FOFA requirements.[18] In evidence to the committee, ASIC

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12 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Corporations Amendment (Future of Financial Advice) Bill 2011 and the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011*, February 2012, Recommendation 6 and Recommendation 12, pp xiii–xiv.

13 Mr Price, Australian Securities and Investments Commission, *Proof Committee Hansard*, 12 September 2012, p. 8.

14 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 21 March 2012, p. 16.

15 Mr Price, Australian Securities and Investments Commission, *Proof Committee Hansard*, 12 September 2012, p. 8.

16 Australian Securities and Investments Commission, *Future of Financial Advice*, http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Future%20of%20financial%20advice (accessed 25 September 2012).

17 *Corporations Act 2001*, s.1101A.

18 Australian Securities and Investments Commission, *What ASIC is doing*, http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Future%20of%20financial%20advice (accessed 11 September 2012).

confirmed this approach.[19] At present, ASIC expects that, at a minimum, approved codes of conduct will:

- address specific industry issues and consumer problems not covered by legislation;
- elaborate upon legislation to deliver additional benefits to consumers; and/or
- clarify what needs to be done from the perspective of a particular industry or practice or product to comply with legislation.[20]

Enforcement approach

2.14 ASIC has publicly announced that the Commission will initially adopt a 'facilitative' approach to monitoring and enforcing compliance with the FOFA requirements.[21]

2.15 The Commission explained that this approach is 'fairly common' for major reforms. It was also clear that ASIC is intending to act proactively to promote compliance with the legislative reforms:

> **Mr Kell**: It is our aim to assist them to comply, to get across the line, so that they can get in shape for the new laws, rather than taking a very strict and inflexible approach from day one.
>
> **Mr Price**: ASIC policy development…is in addition to quite interactive discussions we are having with industry, sometimes on a daily basis, about various issues that they are seeing. The connections between ASIC and industry around how to implement FOFA are well and truly already made.[22]

Committee view

2.16 The committee thanks ASIC for its continued advice about the implementation of the FOFA reforms. Noting that AFSLs may choose to adopt the reforms prior to 1 July 2013, it is necessary for guidance material to be issued within the coming months and with some urgency. The committee will seek ASIC's advice regarding the extent to which AFSLs have adopted the reforms and any difficulties licence holders have encountered in implementing the new financial advice requirements. The committee anticipates that early adoption will provide ASIC the

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19 Mr Peter Kell, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 7.

20 Australian Securities and Investments Commission, *Regulatory Guide 183*, March 2005, p. 3.

21 Australian Securities and Investments Commission, *What ASIC is doing*, http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Future%20of%20financial%20advice (accessed 11 September 2012).

22 Mr Kell, Australian Securities and Investments Commission, Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 8.

opportunity to consider whether additional guidance is required, and to ensure that this guidance is in place prior to 1 July 2013.

Australia's superannuation industry

2.17 ASIC has previously advised that the continuing growth of the superannuation industry will strongly influence Australia's financial markets in the coming 12 months, and, indeed, the coming decade. Accordingly, ASIC has further advised that the superannuation industry is an area of 'high focus' for the Commission.[23]

Self-managed superannuation funds

2.18 In response to the collapse of Trio Capital, ASIC amended the MoneySmart website to advise that compensation is not available to self-managed superannuation fund (SMSF) investors in the event of theft or fraud.[24] The committee had made this recommendation in its report.[25] Further to this, the committee was informed that ASIC has now established an SMSF task force to examine currently available advice and options to more effectively engage with investors and consumers. It was noted that the task force was established relatively recently. Therefore, the Commission undertook to provide the committee updates regarding the work of the task force.[26]

Implementation of the SMSF auditor reforms

2.19 The committee explored with ASIC activities the Commission is undertaking to establish a register of SMSF auditors. The government intends that from 1 July 2013 registration will be a mandatory precondition for operating as an SMSF auditor.[27] ASIC advised that it expects registration to be available from 31 January 2013. It is anticipated that at minimum 6000 practitioners will register.[28]

Committee view

2.20 The committee agrees with ASIC's assessment that the continued growth of Australia's superannuation industry will affect the financial services landscape in the

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23 Mr Greg Medcraft, Chair, Australian Securities and Investments Commission, *Committee Hansard*, 22 June 2012, p. 13.

24 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 2 March 2012, p. 26.

25 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the collapse of Trio Capital*, May 2012, Recommendation 3, paragraph 7.6.

26 Mr Kell, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 14.

27 The Hon Bill Shorten MP, 'New form of licence expands financial advice', Media release 036, 23 June 2012.

28 Mr Tanzer, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 20.

coming years. The collapse of Trio Capital highlights the need for strong regulation and practitioner standards to protect the superannuation industry from fraud and mismanagement.

2.21 The committee is particularly interested in the work of the SMSF task force. The committee looks forwards to ASIC's continued advice regarding the task force's work, and will closely monitor developments in this area. The committee considers that a task force to guide SMSF regulation is particularly necessary, and should be comprised of representatives from other regulators concerned with SMSF activity. The committee will seek ASIC's advice regarding the task force's collaboration with the Australian Taxation Office and the Australian Prudential Regulation Authority.

2.22 The committee draws ASIC's attention to its previous discussions regarding misuse of the ASIC logo and Australian Financial Services Licences.[29] The committee is similarly concerned with any confusion regarding the significance of SMSF auditor registration. It would be inappropriate for SMSF auditors to claim, on the basis of their registration, that their services, or their audit findings, were 'ASIC endorsed'. The committee considers that it would be appropriate for ASIC to proactively attempt to dispel any such confusion or misuse of the auditor registration system, through providing the industry and investors guidance on the significance of auditor registration. Such guidance could usefully be included on the MoneySmart website.

ASIC's supervision of Australia's domestic licensed markets

2.23 Following the transfer of responsibility for the supervision of real-time trading on Australia's domestic licensed markets to ASIC in August 2010, the committee has routinely inquired into market integrity matters. Matters under inquiry include ASIC's response to internalised/non-transparent trading known as 'dark pools'.[30]

2.24 On the basis of information previously provided, the committee understands that dark pools traditionally operated to reduce the risk that large transactions could cause price volatility on the lit market. Accordingly, dark pools were originally intended to promote market stability.[31] However, the nature and purpose of the dark pools market is shifting. Technological advances have broadened market access to dark pools and increased the use of dark pools for smaller amount transactions. As

29 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, August 2011, pp 11–13.

30 See, for example, Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, August 2011, p. 7.

31 Dr Carole Comerton-Forde, Professor of Finance, Australian National University, *Committee Hansard*, 15 June 2011, p. 11.

ASIC has previously advised, these developments suggest that dark pools are no longer primarily a vehicle to minimise the risk of unintended market volatility.[32]

2.25 ASIC confirmed its previous advice that the value of dark pool trading has grown significantly in recent years, with the market accounting for five per cent of trading value as of March 2012. This value has increased since June 2011, in which dark pool transactions accounted for three per cent of trading value.[33]

2.26 ASIC further explained that dark pools operate without the safeguards applying to licensed markets:

> These venues are not licensed. If they were licensed they would have obligations to maintain a fair, orderly and transparent market. They would have things monitoring volume of sales. They would have some monitoring for integrity, insider trading and so on.[34]

2.27 ASIC is considering whether additional safeguards are needed to ensure parity between the lit market and the unlicensed market:

> The big issue is that there should be a level playing field. If it looks like the market, feels like market, it probably is a market.[35]

2.28 ASIC told the committee that it has established a task force to investigate the extent to which the unlit and unlicensed market is undermining the integrity of the lit market.[36] It is anticipated that the task force will issue a consultation paper for comment in February 2013. ASIC advised that matters under consideration include whether to impose a minimum size for dark pool transactions.[37] The task force's work will build on measures ASIC has already undertaken, which include additional draft market integrity rules. ASIC advised that the Commission is exploring rules requiring 'kill-switches 'for automated trading systems, which would enable trading algorithms to be immediately disabled:

> [I]n August we proposed rules and guidance on automated trading that cover high-frequency trading. Our proposals really build on confidence that

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32 Australian Securities and Investments Commission, answer to question on notice, 20 June 2012 (received 26 July 2012).

33 Australian Securities and Investments Commission, answer to question on notice, 20 June 2012 (received 26 July 2012); Ms Belinda Gibson, Deputy Chair, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 5.

34 Ms Gibson, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 3.

35 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 5.

36 Ms Gibson, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 3.

37 Ms Gibson, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 3.

> we are trying to achieve in equity markets. We have proposed, for market participants, among other things, a kill-switch which will be required in relation to algorithms in high-frequency trading; algorithmic testing, a process of certifying and reviewing annually; and we have also provided guidance on stress testing of order flows. So, essentially, we have tried to put more controls around making sure that systemic risk is protected with respect to high-frequency trading.[38]

Committee view

2.29 The committee has previously stated that it is concerned to ensure that the transfer of responsibility for supervision of real-time trading on Australia's domestic licensed markets from the Australian Securities Exchange to ASIC results in measurable improvements in market integrity.[39] It is evident that trading in the unlit market may affect the stability of the lit market. Indeed, the global financial crisis demonstrated the interdependency between the lit market and unregulated markets. In the committee's view, market integrity requires transparency and accountability in both the lit and unlit markets. The committee notes advice provided by Dr Carole Comerton-Forde, Professor of Finance, Australian National University, that it is 'very important' for dark pools to be regulated in their own right.[40] The committee draws this viewpoint to ASIC's attention. The committee will monitor developments in this area with interest.

2.30 The growth of dark pools raises the matter of ASIC's capacity to respond to innovation. The committee would be interested in ASIC's perspective on the Commission's current regulatory capacity to predict, and pre-emptively respond to, market developments.

Frozen funds

2.31 The committee has continued to monitor the effect of the global financial crisis (GFC) on Australia's economy and financial markets. This includes

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38 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 5; Australian Securities and Investments Commission, answer to question on notice, 20 June 2012 (received 26 July 2012).

39 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, May 2011, p. 7.

40 Dr Comerton-Forde, Australian National University, *Committee Hansard*, 15 June 2011, p. 11.

developments regarding the significant number of illiquid managed investment schemes frozen in accordance with requirements under the *Corporations Act 2001*.[41]

2.32 The Commission advised that as of July 2012, $10.96 billion in funds remain frozen. Of this, $6.36 billion are frozen and inactive with the remaining funds, with an accumulated value of $4.6 billion, in the process of winding up or restructuring.[42] At the height of the GFC the value of frozen funds totalled $25.36 billion.[43] Accordingly, as of July 2012, 43.2 per cent remain frozen. ASIC advised that it is estimated that it will be two to five years before all funds frozen as a result of the GFC are realised.[44]

2.33 The committee was informed of the policy intent underlying the requirement in the Corporations Act for illiquid funds to be frozen. While acknowledging that suspending investors' rights to redeem their investments could cause financial difficulties, Mr Price explained that the requirement to freeze illiquid funds was intended to protect investors:

> [T]he provisions around frozen funds were put there after the collapse of Estate Mortgage and various other funds many, many years ago. Possibly equally as damaging to investors is a situation where assets are sold in a very volatile market at fire sale prices. So what the legislature wanted to do was put in place a mechanism whereby there could be some sort of freeze until normality came back to the markets and you could realise those assets at a more reasonable price.[45]

2.34 ASIC advised that its administration of the frozen funds provisions in the Corporations Act seeks to appropriately balance long-term market correction and investors' immediate financial needs. It is this balance that prompted ASIC to

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41 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, February 2011, pp 911; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, May 2011, pp 1617; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, February 2011, pp 911; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, August 2011, pp 1314; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, November 2011, pp 1011; Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, March 2012, p. 18.

42 Mr Tanzer, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 20.

43 Mr Tanzer, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 20.

44 Mr Tanzer, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 20.

45 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 21.

introduce conditional relief, in the form of hardship payments, from the frozen fund requirements.[46] As of July 2012, 6345 applications for hardship payments have been approved, with payments totalling in excess of $155 million.[47] This figure has increased since January 2011, in which 4300 applications had been approved and $144 million returned to investors through hardship payments.[48]

2.35 ASIC's statutory responsibilities include advising the Minister about options to amend the Corporations Act to improve the Act's operation.[49] In November 2011, ASIC disclosed that the Commission has advised Treasury of options to amend the criteria prescribed by the Corporations Act to determine whether a scheme is liquid.[50] The committee heard that the proposed options seek to support investors through providing an objective basis on which to determine liquidity:

> One of the key issues in terms of the definition of the assets of illiquid or not at the moment is that, to some extent, it depends on the judgement of the relevant responsible entity, the relevant people who operate the fund. The nature of our suggested amendments is more about putting a more objective framework around judging where assets are liquid or not.[51]

2.36 It is evident that the definition of liquidity, and responsible entities' understanding of the definition, is integral to the operation of the frozen fund scheme. The committee was informed that investors' and responsible entities' understanding of liquidity is an area of concern:

> The problem with many of these funds is that they were sold as liquid investments, or nearly liquid, whereas the underlying assets were not liquid. That is the fundamental problem.[52]

Committee view

2.37 As the committee has previously noted, Australia's economy has received international recognition for its resilience during the GFC.[53] However, the GFC's

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46 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 21.

47 Mr Tanzer, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 21.

48 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 11 March 2011, p. 40.

49 *Australian Securities and Investments Commission Act 2001*, paragraph 11(2)(b).

50 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 25 November 2011, p. 20.

51 Mr Price, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 21.

52 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 22.

ongoing significance for investors is evident in the substantial proportion of funds that remain frozen following the period of global economic and financial instability. The committee notes that as of July 2012 only 57 per cent, that is, a little over half, of the funds originally frozen have been realised.

2.38 Frozen funds impact both investors and the economy. For investors, the inability to access investments may affect financial security. For the economy, every year funds remain frozen represents a year of lost opportunities. Frozen funds cannot contribute to national, or individual, economic growth. The committee will continue to monitor developments in this area, and seek ASIC's advice regarding whether steps can appropriately be taken to support, and accelerate, the process of returning to pre-GFC frozen funds status.

2.39 The committee particularly notes ASIC's advice regarding investor and responsible entities' understanding of the operation of the frozen funds scheme. It is of concern to the committee that there is uncertainty regarding the liquidity requirements. The committee has previously noted the importance for investors to be informed of the potential for funds to be frozen as a result of illiquidity.[54] The committee seeks ASIC's advice regarding whether improvements can be made to product disclosure statements to clarify the liquidity requirements. Furthermore, the committee seeks ASIC's advice regarding activities the Commission can undertake to improve financial literacy among responsible entities. The committee will also continue to seek ASIC's advice on whether amendments are required to the Corporations Act to improve the operation of the frozen funds scheme.

ASIC's resources and regulatory approach

2.40 The committee routinely questions ASIC regarding its enforcement strategies and allocation of resources. The committee was advised that the Commission expects gatekeepers in Australia's financial services system 'to act honestly, to be competent, to be diligent, and to manage conflicts of interest properly'. ASIC's enforcement action is focused on these four areas.[55]

2.41 The committee was provided a detailed analysis of the Commission's allocation of its resources to undertake surveillance activities. In summary, the Commission considers that Australia's financial services system 'is based on self-

53 Organisation for Economic Cooperation and Development, *OECD strategic response to the financial and economic crisis: contributions to the global effort*, 2009, p. 3, as cited in Parliamentary Joint Committee on Corporations and Financial Services, *Access for small and medium business to finance*, April 2011, p. 18.

54 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investments Commission*, August 2011, p. 14.

55 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 2.

execution and relies on people doing the right thing'.[56] Accordingly, the Commission 'takes a risk based approach' to 'try and get the best bang for our [ASIC's] buck'.[57] ASIC candidly stated the Commission's view regarding the extent of ASIC's enforcement capacity:

> ASIC is not a prudential regulator, not a conduct and surveillance regulator. The system we have is based on gatekeepers doing the right thing and it is self-executing. It is quite important in understanding what we are currently resourced to do. We are not resourced to be looking in everybody, and that is a very important message.[58]

2.42 An overview of outcomes of this approach to enforcement is provided in ASIC's Report 299 *ASIC enforcement outcomes: January to June 2012*. For the period of 1 January 2012 to 30 June 2012, ASIC undertook a total of 303 enforcement actions, which comprised 209 criminal proceedings, one civil action, 59 administrative remedies, 24 enforceable undertakings or negotiated outcomes, and one warning notice.[59] The majority of actions related to small business compliance and deterrence matters, with 196 actions taken against directors for summary offences such as the failure to keep proper books and records. In addition, ASIC commenced proceedings against nine directors for what it reported as 'more serious breaches of the law'.[60] The committee was informed that the report demonstrates ASIC's proactive, deterrence-based enforcement strategy:

> So it is about enforcement but is also about proactive regulation, saying "here are the key areas you should focus on and here are some examples of where we have taken action". So it is meant to be preventative, going forward.[61]

2.43 It was also evident that ASIC considers investor and gatekeeper education to be a necessary part of a proactive, deterrence-based enforcement methodology.[62]

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56 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 14.

57 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 15.

58 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 15.

59 ASIC, Report 299, September 2012, Appendix 1, p. 2.

60 ASIC, Report 299, September 2012, p. 20.

61 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 22.

62 Mr Medcraft, Australian Securities and Investments Commission, *Committee Hansard*, 12 September 2012, p. 15.

Committee view

2.44 The committee appreciates ASIC's candour regarding its interpretation of its statutory duty to enforce the standards required under the Corporations Act and related legislation. The committee is also appreciative of ASIC's frank disclosure of the resources available to undertake surveillance activities.

2.45 ASIC is required under the ASIC Act to undertake whatever action it can take, and is necessary to take, to enforce the laws of the Commonwealth that confer functions and powers on it. While the 2012–13 federal budget allocated specific purpose funding to ASIC for the Stronger Super reforms and the FOFA reforms, the committee reiterates its previously stated view that the Commission must be properly resourced to take all necessary and appropriate action to promote fair, efficient and safe financial markets.

2.46 However, enforcement and surveillance is only one part of an appropriate regulatory model. Proactive education is a necessary aspect of a well-balanced, effective regulatory framework. The committee is therefore pleased with the measures ASIC has taken, and will continue to take, to issue guidance material to gatekeepers. The committee also concurs with ASIC's view on the importance of investor and consumer education. The committee would appreciate receiving from ASIC an overview of the Commission's financial literacy and investor education strategies.

Ms Deborah O'Neill MP
Chair

Appendix 1

Public Hearing, Canberra

Wednesday 12 September 2012

ASIC Representatives

Mr Greg Medcraft, Chair

Ms Belinda Gibson, Deputy Chair

Mr Warren Day, Senior Executive Leader

Mr Peter Kell, Commissioner

Mr John Price, Commissioner

Mr Greg Tanzer, Commissioner

Appendix 2

Answers to questions on notice taken at hearing

ASIC oversight hearing, 12 September 2012

Question 1 (Hansard, p. 7)

Topic: Impact of FOFA Bill

Mr FLETCHER: On that point, I recollect that there was some discussion about the particular drafting of the bill and whether it actually achieved the result you have described, namely, that its practical impact does not take effect for two years from the implementation of the bill. Could I ask you to take on notice to explain how that mechanism works, particularly with respect to clients who are existing clients of advisers, as at 1 July 2013?

Mr Kell: I can do that.

Response

The opt-in provisions do not apply to an ongoing arrangement with an existing retail client. An opt-in notice will have to be provided to new clients. That is, clients who receive personal advice and who also enter in to an arrangement to pay ongoing fees after the commencement of FOFA. An opt-in notice for those new clients must be provided within 30 days of the two-year anniversary. The two-year timeframe from implementation of the bill is therefore relevant in that it is the earliest date on which the opt-in obligation will crystallise in relation to new clients. This also means that it will not be necessary for an industry code that obviates the need for opt-in to be in effect and approved by ASIC by 1 July 2013.

Question 2 (Hansard, p. 10)

Topic: Registration of SMSF auditors

(a) Senator BOYCE: How many of the 6,000 to 8,000 would you expect to go onto the register without competency requirements as a result of the transitional arrangements?

Mr Medcraft: Without a competency exam?

Senator BOYCE: Without a competency exam, sorry.

Mr Tanzer: I'm not sure that I can give you the answer.

Mr Medcraft: We will take it on notice. We do have those numbers, but we will take it on notice and give them to you. It's not because of the number years of experience, the numbers sitting exams—we will come back to with the numbers.

Response

It has been estimated that of the 6,000 to 8,000 expected to register under the transitional arrangements approximately 1,350 applicants would be required to sit a competency exam.

(b) Senator BOYCE: Is it likely that Mr Timothy Frazer, for example, would have gotten onto the register if this had come into place in, say, 2010 before you became aware of Trio?

Mr Medcraft: Essentially what you are saying is, effectively, a back test?

Senator BOYCE: No.

Mr Medcraft: I understand what you are saying.

Senator BOYCE: If you were unaware of the Trio Capital situation, would Mr Timothy Frazer—

Mr Medcraft: Have been eligible to be on the register?

Senator BOYCE: Yes.

Mr Medcraft: We will come back on that.

Response

If the proposed registration requirements, under the transitional arrangements, had been in place in 2010 Mr Frazer would have had to meet prescribed qualification requirements and fit and proper criteria. He may have been exempted from the competency examination requirement and the prescribed experience requirement under the transitional requirements. (ASIC is not aware of whether this is the case). Mr Frazer is currently subject to an enforceable undertaking (EU) with ASIC that includes a three year period of suspension as an RCA. Should he apply for registration with ASIC as an SMSF auditor after 31 January 2013 his EU and the related Trio matters would be considered significant factors in regards to assessing whether he meets the fit and proper requirements.

Question 3 (Hansard, pp 10–11;

Topic: Further information on registration of SMSF auditors

Mr Tanzer: I am not sure of the number of funds that he was an auditor for or any other circumstances.

Senator BOYCE: He was an auditor.

Mr Tanzer: I understand that.

Senator BOYCE: One assumes that—

Mr Tanzer: I don't know how many funds he was an auditor of or for how long he had been an auditor of those funds. In any case, I am happy to take it on notice.

Mr Medcraft: We will take it on notice and see. It is actually quite an interesting question.

Senator BOYCE: It does go to the heart, particularly if people try to use the register as a type of marketing tool in the way that some people try to use an AFSL licence.

Response

ASIC does not have access to this information. As the regulator for SMSFs, the Australian Taxation Office may have information as to the number of independent audit reports that an auditor provides for SMSF trustees each year.

We note that the ATO will continue to monitor the compliance of SMSF auditors and will refer matters to ASIC for consideration where action to disqualify the auditor may be appropriate.

Question 4 (Hansard, p. 11)

Topic: ASIC consideration of Securency

Mr TONY SMITH: Okay. Could I take you, then, to the issue that I have asked about before—I asked back in March of this year—with respect to your consideration of matters pertaining to Securency International and Note Printing Australia. You issued a press statement on Monday, 12 March, essentially saying that ASIC had decided not to take any action and not to make any further comment. It was a three- or four-line press release which I asked you about back in February. I am interested in how long that matter was under consideration by ASIC—or those matters, because there were two.

Ms Gibson: We were contacted by the AFP towards the end of 2011, and we looked at documents.

Mr TONY SMITH: I do not expect you to give me the precise date or anything.

Ms Gibson: Good.

Mr TONY SMITH: We can get that on notice later. ….

Response

ASIC held discussions with the AFP at various times in 2011. Following a discussion between ASIC and the AFP on 30 November 2011, in relation to a possible referral to ASIC, a meeting took place on 21 January 2012 at AFP offices. At that meeting ASIC staff were given a briefing as to the conduct of the AFP investigation and prosecutions. On 24 January 2012 ASIC was provided with a CD which contained the documents identified by the AFP as potentially relevant to the referral. These documents related to both NPA and Securency.

ASIC held discussions with the AFP and analysed these documents for the purposes of deciding whether or not to commence an investigation. Based on that review ASIC noted that there were significant obstacles to commencing any action. ASIC then issued a statement on 12 March 2012 to advise it had decided not to proceed to a formal investigation.

Question 5 (Hansard, p. 12)

Topic: ASIC's monetary contribution to MoneySmart

Senator BOYCE: … Can you tell us how much ASIC's contribution to be MoneySmart Week was? …

Mr Kell: As to the exact amount, I am happy to take that question on notice.

Response

ASIC has not provided a financial contribution to MoneySmart Week.

Along with many other key supporters of MoneySmart Week, ASIC provided in-kind resources to assist in planning, implementing and promoting MoneySmart Week. In ASIC's case this comprised:

- Staff providing secretarial and operational support.
- ASIC gave Financial Literacy Australia Limited (the not-for-profit company running MoneySmart Week) permission to use the MoneySmart name.
- Hosting the MoneySmart Week website (moneysmartweek.org.au).

Background

- MoneySmart Week was held for the first time from Sunday 2 – Saturday 8 September 2012. The Week will become an annual event, in the first week of each September.

- MoneySmart Week is an initiative of members of the Australian Government Financial Literacy Board. They formed a new not-for profit company (Financial Literacy Australia Limited) to organise the Week. Attachment 1 has a_list of directors.

- MoneySmart Week supports a key pillar of the National Financial Literacy Strategy: 'working in partnership and promoting good practice'. It was planned and delivered by volunteers from over 50 organisations across the business, community and government sectors. Supporting organizations are listed at Attachment 2.

Attachment 1 :Members and Directors of Financial Literacy Australia Limited*

Chairman - Mr Paul Clitheroe AM, Executive Director, ipac securities

Group Captain Robert Brown, Chairman, Australian Defence Force Financial Services Consumer Council

Mr Hamish Douglass, Chief Executive Officer, Magellan Financial Group

Mr Craig Dunn, Chief Executive Officer, AMP

Ms Linda Elkins, General Manager, Marketing, Colonial First State

Ms Fiona Guthrie, Executive Director, Financial Counselling Australia

Ms Elaine Henry OAM, Company Director

Mr Anthony Mackay, Executive Director of the Centre for Strategic Education

Mr Ian Silk, Chief Executive Officer of AustralianSuper

Mr Michael Smith OBE, Chief Executive Officer, ANZ Banking Group

Mr Robert Thomas, Chairman, Gardner Smith (Holdings) Pty Ltd

*This list represents all members of the Australian Government Financial Literacy Board except ASIC Commissioners. ASIC Commissioners have avoided formally joining Financial Literacy Australia Ltd to avoid any conflict of interest between ASIC's regulatory activity and Financial Literacy Australia's fund raising activity.

Attachment 2 - Organisations represented on MoneySmart Week Workstreams

ADF Financial Services and Consumer Council

AMP

ANZ Banking Group

AON Hewitt

Association of Super Funds of Australia

Australasian Retail Credit Association

Australian Bankers' Association

Australian Government Department of Human Services

Australian Government Department of Families, Housing, Community Services and Australian Library and Information Association (through the NSW State Library)

Indigenous Affairs

Australia Post

Australian Securities and Investments Commission

AustralianSuper

Buchan Consulting

Citi Australia

Clearview

Commonwealth Bank Foundation

EFTPOS Australia

Financial Basics Foundation

Financial Counselling Australia

First State Super

First State Super

FutureMap

Good Shepherd (Microfinance division)

HESTA Super Fund

Internal Consulting Group

Liberty Financial

M&CSAATCHI

ME Bank

Mercer

Mission Australia

NAB

Oliver Wyman

PricewaterhouseCoopers

Sandstone Technology

Suncorp

10,000girl campaign

The Benevolent Society

The Smith Family

University of Melbourne

Wesley Mission

Westpac Davidson Institute

Women's Information and Referral Exchange Inc (WIRE)

Woolworths

Many other organizations (e.g. The Australian Tax Office, Salvation Army, The Institute of Chartered Accountants) were represented in a broader group of supporters willing to promote MoneySmart Week through their networks.

Question 6 (Hansard, p. 15)

Topic: Frequency of hedge fund scrutiny

Senator BOYCE: I had been going to ask a question about the 6.6 years for hedge fund investment managers and REs. Are you able to provide on notice some more information about which funds come under scrutiny every 6.6 years? Do the top 10 get done more often? As you have with some of the others, are you able to break that down any further?

Mr Medcraft: We can.

Mr Tanzer: There is quite a lot of information about how we target our activities with respect to hedge funds and things that we publish, so we would be happy to provide some of that…..

Response

ASIC conducts both reactive and proactive surveillances of hedge funds. A reactive surveillance might be initiated on the basis of market intelligence or a complaint received. Pro-active surveillances are reviews initiated by ASIC and are focused on a particular theme (eg asset misappropriation) and involve us examining a sub-set of the wider hedge fund or hedge fund manager population. That sub-set might be selected on the basis of the amount of investors' money under management, whether the funds are retail or wholesale funds, or other relevant criteria, depending on the object of the surveillance. The overwhelming majority of our surveillance work on hedge funds is pro-active and the figure of 6.6 years to survey each manager in an identified population of 220 hedge fund managers is based on our proactive surveillance work.

In 2010 we undertook our first hedge fund systemic risk survey. This involved our largest nine managers (basically all local managers managing more than US$500m in hedge fund assets) having to answer a comprehensive set of questions about potential sources of systemic risk, such as the asset classes their funds are invested in, where those assets were located, the level of leverage used, and the identity of their largest counter parties. These nine managers held 52% of known hedge fund assets under management (excluding assets held by funds of hedge funds to exclude any double counting). The surveillance was coordinated with similar exercises undertaken by our counterparts internationally, though the results were assessed locally and only aggregated summary results shared with other regulators here and abroad. We are about to undertake our second systemic risk surveillance using the same US$500m threshold, and we estimate that approximately double the number of mangers will be completing the survey. The increased number is a result of our having identified some more hedge fund managers, the appreciation of the AU$ against the US$, and an increase in the size of several managers' assets under management.

We are just now wrapping up our 2nd Red Flags hedge fund manager fraud surveillance. The first was done over the 2009/10 financial year. The Red Flag surveillances involve assessing managers of both retail and wholesale hedge funds against a set of indicators for the existence of, or vulnerability of their hedge fund to,

manager fraud. The theme of the 2nd Red Flag surveillance was asset misappropriation, manipulation of fund returns and overpayment of management and performance fees. We used various risk based filters to reduce the number of managers we looked at to 58. ASIC prefers not to disclose the detail of the risk filters we use, as fraudulent managers may use this information to escape detection.

ASIC expects to continue to conduct both types of surveillance every two years or so. As a result, the largest fund managers and the fund managers which exhibit more risk indicators will likely be reviewed more often than the average of 6.6 years, and potentially every two years or so. By contrast, managers of smaller funds and that exhibit fewer risk indicators will likely be reviewed less often than the overall average.

Question 7 (Hansard, p. 18)

Topic: Action by ASIC against auditors

Mr FLETCHER: Given the conduct in the case of Trio, and that the audits that were conducted extended earlier than 2008, has ASIC considered the possibility of action against any of the auditors?

Mr Price: We certainly have considered action in respect of various of the auditors, but I would like to take on notice any further detail around that area, if I may.

Mr FLETCHER: Yes, I would like to get an answer to that question on notice. Could I also get on notice the answer to whether you believe there are any other parties against whom recovery could potentially be made of the monies that have been lost?

Mr Price: Sure.

Response

ASIC is responsible for regulating the conduct of registered company auditors. ASIC has reviewed the conduct of the auditor of both the Astarra Strategic Fund and the ARP Growth Fund for the financial year ending 30 June 2008. ASIC has also reviewed the audit of the Astarra Strategic Fund for the financial year ending 30 June 2009.

As a result of the disciplinary issues identified by these reviews, ASIC entered into an Enforceable Undertaking with Mr Timothy Frazer in lieu of commencing proceedings in the Companies Auditors and Liquidators Board. This Enforceable Undertaking provided that Mr Frazer would not act as a registered company auditor for three years.

Trio Capital Ltd (in liquidation) as the responsible entity of both the Astarra Strategic Fund and the ARP Growth Fun would be the party who would bring proceedings for compensation in respect of shortcomings by the auditor of these funds. ASIC anticipates that the liquidators of Trio Capital Ltd (in liquidation) would examine the feasibility of such a claim.

ASIC has a discretion to commence civil recovery action on behalf of an aggrieved person or company (eg: s50 of the ASIC Act) if it is in the public interest to do so. ASIC is not however obliged to do so.

In considering whether it is in the public interest to take civil recovery action on behalf of an aggrieved investor ASIC will take into account a range of factors including:

- A viable cause of action being identified (that is, establishing misconduct by the defendant that gives rise to the basis for a compensation action);
- The regulatory effect of the action;
- The existence of other parties able to commence proceedings seeking compensation for aggrieved investors (such as an external administrator or the investors themselves);
- The availability of funds to satisfy a judgement against a defendant to the proceedings;
- The prospects of the action being successfully litigated by ASIC;
- ASIC's regulatory priorities at the time;
- Availability of alternative forms of dispute resolution.

In the case of the Trio auditor we consider that legislative provisions including those imposing proportionate liability would complicate the ability of a party to obtain significant compensation.

ASIC does not propose at this stage to pursue civil action against the Trio auditor.

In respect of possible recoveries from other parties, ASIC has looked at a range of persons and entities. Of these persons and entities considered we have not identified any significant funds, assets or insurance that would satisfy a judgement debt even if ASIC identified and successfully pursued a claim against these persons.

We are aware that a claim bought in the Supreme Court of New South Wales by an investor in the Astarra Strategic Fund has been settled in favour of the investor. Notwithstanding this successful proceeding we are of the view that the funds/ assets available are not sufficient to adequately compensation all the affected investors in the Astarra Strategic Fund given the size of the total losses.

<u>Question 8 (Hansard pp 20–21)</u>

Topic: Investors in frozen funds

Mr Tanzer: … But you can see at least a positive movement from November 2009 where we had a total of 87 schemes involved with $25.3 billion down to now in the order of 50 schemes with $6.36 billion that remains frozen.

Senator BOYCE: Do you know how many investors there are in those?

Mr Medcraft: We can take that on notice.

Mr Tanzer: I do not have that figure here, I am sorry.

Senator BOYCE: No, that is okay. If you can do this without vast amounts of work, can you indicate whether they are individuals or organisations.

Mr Medcraft: We will see if we can get the numbers.

Mr Tanzer: Yes, we will see what we have.

Response

ASIC does not presently collect or collate information regarding number and/or types of investors remaining in these frozen funds.

Question 9 (Hansard p. 21)

Topic: Defining liquidity of assets

Mr Price: One of the key issues in terms of the definition of whether assets are liquid or not at the moment is that, to some extent, it depends on the judgement of the relevant responsible entity, the relevant people who operate the fund. The nature of our suggested amendments is more around putting a more objective framework around judging whether assets are liquid or not.

CHAIR: How is that done?

Mr Price: We have made some suggestions to Treasury, but in terms of the priority of those suggestions or looking for an appropriate legislative vehicle, I would need to take that on notice. It is probably a question for Treasury in terms of where they see that.

Response

ASIC has been assisting Treasury develop possible amendments to the definition of Liquid Assets in the Corporations Act 2001. Whether amendments are made to the definition of Liquid Assets is a matter for the Government.

Further follow up information

The following were not taken as official questions on notice, but were matters on which ASIC undertook to provide further information.

A) Hansard p. 14

Topic: Auditor registration requirements for SMSFs

Ms SMYTH: Is there a registration fee? I believe there is.

Mr Tanzer: I think there is. I cannot tell you exactly what it is, but I will find out.

Response

The fee to register is $100. We are waiting confirmation from Treasury as to whether this fee will be subject to CPI increases.

B) Hansard, p 23

Topic: Communications with World Bank about business registration

CHAIR: So, in the interests of raising from silver to gold, have you provided the World Bank with this information about changes to our business registration?

Mr Tanzer: I think they have their sources. I will go back and find out.

Mr Medcraft: When was that report done?

CHAIR: This year. June.

Mr Tanzer: But I think it is always based on work that they have done, so it runs up until the end of the previous year, I think. It would not yet—

Mr Medcraft: Take into account the business names and some of the other names. I am sure we will come back to you on it, but we will probably want a target to go on.

Response

The World Bank's Doing Business project provides measures of business regulations across 183 economies including Australia. The annual rankings are based on input from lawyers, accountants, judges, business people and public officials. The Treasury provides input on behalf of the Australian Government by way of an annual survey. The most recent survey was submitted by Treasury to the World Bank in July 2012. The survey response made reference to Australia's new online Business Names Register. The World Bank has indicated that Doing Business 2013 will be released around October this year.

Answers to questions on notice from Mr Fletcher MP

Expert Reports

Question 1

It seems that an expert report involves the provision by an expert of financial product advice. This is a financial service, so that the expert must hold a financial services license, and it is a condition of the license that the expert must attach a financial services guide to each report. This guide must set out, among other things, what a retail investor should do if they have complaint about the report. In essence, the investor must first refer the complaint to the expert and then if the investor is not satisfied with the expert's response, they may refer the complaint to an approved complaints resolution service, usually the financial Ombudsman Service.

Is that a fair summary of the present position?

Response

Independent experts providing financial product advice are typically required to hold an Australian Financial Services Licence (AFSL). However, some experts, such as geologists providing technical reports, are not required to hold an AFSL. AFSL holders need to have both internal and external dispute resolution procedures. If using dispute resolution processes, an investor should first complain to the expert directly. If they are not satisfied with the response they can contact the Financial Ombudsman Service (FOS) or other approved External Dispute Resolution Services. In addition, ASIC also closely monitors many expert reports and has issued substantial policy guidance on the standards expected of experts. ASIC assesses all complaints it receives regarding experts reports.

Question 2

Suppose a retail investor follows the directions in the financial services guide, and makes a complaint about the report in the first instance to the expert. How long might it take the expert to deal with the complaint?

Response

Under internal dispute resolution requirements, an expert / AFSL holder has up to 45 days to respond to a complaint *(Regulatory Guide 165: Licensing: Internal and external dispute resolution - para 100).*

Question 3

Isn't it the case that many of these corporate actions have run their ordinary course within about a month, meaning that in most cases, by the time the expert has dealt with the complaint, the corporate action is over?

Response

If commercial considerations mean that a transaction will likely be complete before any complaint is finalized through internal or external dispute resolution, ASIC strongly encourages investors to lodge their concerns with it.

ASIC reviews many transactions involving listed entities and we therefore recommend shareholders contact ASIC at first instance if concerns arise before the transaction is concluded. ASIC can use its position as a regulator to try to have any substantiated concerns addressed (for instance, by supplementary disclosure).

Question 4

If the investor is not satisfied with the outcome of the complaint and has time to refer the matter to the Financial Ombudsman Service, what expertise does the Financial Ombudsman Service have in relation to expert reports?

Response

Assuming a matter is referred to FOS rather than ASIC and they do not have internal expertise in a particular area, they are able to use the services of external experts to help resolve disputes. It should also be noted that FOS has discretion to refuse to consider the dispute where there is a more appropriate forum for a dispute to be heard *(FOS Terms of Reference 1 January 2010 (as amended 1 January 2012) - para 5.2(a)).*

Question 5

Can an officer of the Financial Ombudsman Service make an order correcting error in the report?

Response

FOS does not have the power to make amendments to an independent expert's report but it can order that compensation is paid.

Question 6

If the Ombudsman does not have time to correct the report, can he at least make an order compensating the complainant for financial loss?

Response

The maximum FOS can compensate applicants for direct financial loss and damage is $280,000 *(FOS Terms of Reference 1 January 2010 (as amended 1 January 2012) - schedule 1)*. However, an investor would need to show direct financial loss as a result of the actions of the expert in the course of them providing financial services.