

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 234

Topic: Appeal Processes

Hansard Page: Written

Senator BUSHBY and EGGLESTON asked:

1. Please provide an update on the appeal processes against OneTel, AWB and Fortescue Group.
2. During last estimates Mr D'Aloiso stated that when ASIC "considers that the matter is of significant public interest and a deterrence aspect is needed, ASIC will take the case on and will take it right through". Please outline the process through which ASIC determines whether a deterrence aspect is needed. Is this process based on legal principles or on wider public policy aspects?
3. ASIC state that they are entitled to take cases to appeal and to test the law. What are the processes that ASIC go through to determine whether or not to take a case to appeal?
4. Over the past three years, how many cases has ASIC decided to take to appeal and how many cases has ASIC accepted judgement at first instance?
5. If it were ASIC's opinion that the law needed changing for deterrence of public policy aspects after it had lost a case on first instance, does ASIC take steps to discuss potential law changes with the Minister, rather than launching into an appeal process to test the law and create that deterrence aspect?
6. On May 31, ASIC dropped its investigation of Offset Alpine case. Please explain the reasons for dropping the investigation at this stage. Can ASIC confirm that no charges were ever laid as a result of investigations?
7. What was the total cost to ASIC in its investigation of Offset Alpine since 2003? Would ASIC have continued the investigation under any circumstance or does ASIC simply now have other priorities for its budget? If ASIC had had the resources to do so, would the case have been pursued?

* This question was also asked in writing by Senator Eggleston on 8/06/2010

Answer:

1. ASIC has decided not to appeal the decision of the NSW Supreme Court dismissing ASIC's civil penalty proceedings against One.Tel's former joint Managing Director, Mr Jodee Rich and the company's former Finance Director, Mr Mark Silbermann (10-34 AD, 26 February 2010).

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In relation to the AWB proceeding the Court of Appeal of the Supreme Court of Victoria has heard and allowed the appeal by ASIC against the decision made by Justice Robson on 9 December 2009 to permanently stay ASIC's second civil penalty case against former AWB managing director Mr Andrew Lindberg.

ASIC has filed a notice of appeal in respect of the Federal Court decision handed down on 23 December 2009 in which the Court dismissed its application for civil penalty orders against Fortescue Metals Group Ltd ('FMG') and its CEO, Mr Andrew Forrest. The appeal is scheduled for hearing by the Full Federal Court in November 2010.

2. In considering whether to commence civil penalty litigation ASIC will have regard to various factors, including the matter's relevance to ASIC's strategic priorities, the seriousness and public effect of the alleged misconduct and the general deterrence or compliance effect of a successful outcome in the litigation. ASIC will also have regard to its prospects of success in the litigation. Under the Legal Services Directions 2005, ASIC is not permitted to start court proceedings unless it has received legal advice indicating that there are reasonable grounds for starting the proceedings.

The decision to commence civil penalty proceedings will usually be made by the senior executive who leads the relevant deterrence team in consultation with the Commissioner who is responsible for the matter or, in respect of a major matter, by the Commission. In each case the decision will be made with the benefit of legal advice.

3. In considering whether to appeal a decision ASIC will have regard to a range of factors including:
 - (a) the importance of the case in light of:
 - (i) ASIC's strategic priorities;
 - (ii) where relevant, the seriousness and public effect of the alleged misconduct;
 - (iii) where relevant, the general deterrence or compliance effect of a successful outcome;
 - (b) the potential precedential value and effect of the first instance decision;
 - (c) the prospects of a successful appeal.

Under the Legal Services Directions 2005, ASIC is not permitted to undertake or pursue an appeal unless it believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest.

4. In the last 3 financial years; 2007/2008, 2008/2009 and 2009/2010, there were 611 completed proceedings. Of the 611 completed proceedings, 523 were

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accepted at first instance and 88 were appealed. Of the 88 appealed, 83 were by the other party and 5 were appealed by ASIC.

5. If ASIC considered that a first instance court decision contained a statement of the law which was unsatisfactory in an important respect, ASIC would be likely first to consider appealing the decision. In deciding whether to appeal, ASIC would have regard to a range of factors, including those mentioned in the answer to question 3. If an appeal were unsuccessful or if it decided not to appeal, ASIC may discuss with the Government the possibility of a change to the law.
6. On 30 May 2010 ASIC announced that it had completed its investigation into the veracity of certain information provided in connection with the beneficial ownership of shares in Offset Alpine Printing Pty Ltd (*OAP*) and that it would not be asking the Commonwealth Director of Public Prosecutions (*CDPP*) to consider bringing any proceedings.
7. The amount expended by ASIC in its investigation of OAP since 2003 is \$3,989,423.02. This figure relates to external costs, in particular professional fees related to legal and forensic services.

ASIC's completion of its investigation and the decision not to refer a brief to the CDPP was not related to questions of resources or budget priorities.

ENDS