

Parliamentary Joint Committee on Corporations and
Financial Services
Opening Statement from the
Australian Securities and Investment Commission

Friday 28 March 2014

3000 words

Chairman, we are pleased to appear today. I congratulate you on your appointment as chair of the Committee and I also congratulate new members to the Committee and acknowledge longstanding members.

With me today is Deputy Chairman Peter Kell and Commissioners Cathie Armour, John Price and Greg Tanzer.

Also testifying are Senior Executive Leaders Chris Savundra, Warren Day and Greg Kirk.

For those new members, I would like to reiterate ASIC's three priorities, and show through some of our recent major announcements, how we are tracking against these priorities.

But first I would like to recognize two other issues – how ASIC is helping to achieve the Government's deregulation agenda, and ASIC's involvement with the Senate Economics References Committee inquiry into the performance of ASIC.

Deregulation

ASIC is contributing to the Government's red-tape reduction target by identifying regulation where the regulatory benefit does not justify the compliance burden and where removing certain obligations is consistent with our regulatory priorities.

Our first deregulation report to Treasury to the end of February 2014 showed a net compliance cost reduction of more than \$14 million a year as a result of our deregulatory initiatives.

ASIC can grant waivers from the law in certain circumstances. We grant these through individual relief applications and class order relief which results in compliance cost savings and also facilitates unique transactions and innovation (e.g. more than 2500 applications for relief were received in 2013, of which 75% were granted).

ASIC provides guidance to business which helps reducing the cost of complying with regulation (e.g. small business booklet to help with meeting obligations and an online hub to help small businesses better understand their responsibilities and access relevant information).

Next steps to cut regulation

ASIC is conducting a comprehensive review of forms we receive with a view to reducing the paper work burden for business through elimination, consolidation or streamlining forms.

ASIC is conducting a wholesale review of 84 class orders that are sunsetting over the coming years with a view to simplifying and rationalising the content of instruments we remake to enhance usability and reduce conditions for relief.

ASIC is making law reform suggestions to reduce compliance costs while maintaining an appropriate level of regulation.

ASIC is conducting a project to examine electronic delivery of disclosure right across our regulated population, including disclosures in relation to financial services, consumer credit and securities. We expect an increase in electronic disclosure to reduce costs for businesses in distributing disclosure documents.

ASIC is updating its external website – www.asic.gov.au - to improve the look, feel and usability of the website. This will mean easier and more efficient stakeholder use of the website and information on it.

ASIC Senate Inquiry

ASIC testified before the Inquiry in February this year and will testify again in April.

We welcome the inquiry and are grateful to all the people who have taken the time and made the effort to provide submissions.

ASIC has considered all the submissions in an effort to learn as much as we can from them and also to enable our organisation to do a better job.

We have made four submissions to the inquiry. They cover the full width of the Inquiry's terms of reference, including focusing on the issue that led to the inquiry on the handling of misconduct at Commonwealth financial planning.

Our submissions also considered an issue, in common with many submissions—that is, the problems arising from low-doc and mortgage lending prior to the global financial crisis.

We have made suggestions for policy reform in four areas:

- one, better regulating the financial advice industry, including raising financial adviser competence through a national exam and extending the public register to cover employee financial advisers, which will help remove bad-apple advisers from the industry.
- two, enhancing whistleblower protections.
- three, ASIC's licensing powers providing ASIC with an ability to ban a person from managing financial services businesses.
- four, strengthening ASIC's investigation and enforcement powers including streamlining our search warrant powers and reviewing the level, consistency and availability of penalties.

Penalties

On penalties, last week ASIC released Report 387 *Penalties for corporate wrongdoing (REP 387)*.

REP 387 reviews penalties in Australia for corporate wrongdoing to assess whether they are proportionate and consistent. It compares ASIC's penalties with:

- those in other countries;
- those of other Australian regulators; and
- across ASIC's regime.

The findings in REP 387 will inform ASIC's submission to the Australian Government's Financial System Inquiry.

The key findings show that:

- **international comparison -**
 - while our maximum criminal penalties—jail and fines—are broadly consistent with those available in other countries, there are significantly higher prison terms in the US, and higher fines in some overseas countries for certain offences;
 - **Higher prison terms in the US:** The US has a maximum penalty of 20 years for a wide range of corporate offences, in excess of what Australia and other jurisdictions have for any corporate wrongdoing offence.
 - **Higher fines in some overseas countries for certain offences:** The maximum for a violation of continuous disclosure obligations in Australia is \$34,000, whereas in Ontario (Canada), it is \$AUD5.25 million and in the US, it is \$AUD5.6 million.
 - There is a broader range of civil and administrative penalties in other countries, they are higher, and they include the ability to remove financial benefit from wrongdoing (i.e. disgorgement)
 - For a civil penalty insider trading case, the maximum penalty available in Australia is \$200,000. This is contrasted with Canada where the maximum is \$AUD1.05 million, the United Kingdom where there are unlimited civil and administrative fining powers, and the US where the civil penalty is 3 times the benefit gained.
 - **Disgorgement:** Disgorgement is available in Canada, Hong Kong, the UK and the US. The power to require disgorgement is either provided in legislation or is incorporated as a step in the process of penalty setting by the regulator (as in the UK).
- **comparison with other Australian regulators -**
 - the maximum civil penalties available to ASIC are lower than those available to other regulators and are fixed amounts, not multiples of the financial benefits obtained from wrongdoing;
 - *ACCC comparison*
The maximum civil penalties available to the ACCC to punish corporate wrongdoing (e.g. cartels, secondary boycotts, misuse of market power and exclusive dealing) are significantly higher than those available to ASIC. The maximum civil penalty available to the ACCC in conducting civil proceedings against corporations under the Competition and Consumer Act are the greater of \$10 million, 3 times the benefit obtained and 10% of the annual turnover of the company. In contrast, the greatest civil penalty available to ASIC under the Corporations Act is \$1 million for corporations.

- **comparison across ASIC's regime -**

- there are differences between the types and size of penalties for similar wrongdoing. For example, providing credit without a licence can attract a civil penalty up to ten times greater than the criminal fine for those who provide financial services without a licence.

Indexation

- In 1992, the maximum civil penalty for an individual under the Corporations Act was set at a fixed amount of \$200,000. It has not been changed since that date for individuals and therefore not altered for inflation. The present value of a penalty of \$200,000 is very different as between 1992 and 2014. In fact, the present value is over \$345,000.
- This can limit the deterrent impact on corporate wrongdoing.

Whistleblowers

In February, we released Information Sheet 52 *Whistleblowers and whistleblower protection* ([INFO 52](#)), which details our approach to dealing with whistleblower reports.

As discussed previously, this followed our major submission in 2013 to the ASIC Senate Inquiry where we explained how we have enhanced our approach to dealing with whistleblower reports.

INFO 52 is part of ASIC's commitment to improve its communication and handling of information brought to its attention by whistleblowers.

The information sheet explains:

- reporting important information to ASIC
- how we will communicate with whistleblowers
- who is a whistleblower
- the protections available to whistleblowers under the law,
- how ASIC deals with information from whistleblowers.

ASIC considers all information from the public as potentially providing valuable insights into possible misconduct that we may need to act on.

Mr Chairman, ASIC's three priorities are:

1. Confident and informed investors and financial consumers;
2. Fair and efficient markets; and
3. Efficient registration and licensing.

Priority 1 - Confident and informed investors and financial consumers

Education – ASIC's MoneySmart website

In the 2012-13 financial year:

- 3.68 million unique visitors; 89% increase on the last financial year
- 17,300 Facebook likes; 1,660% increase on the last financial year
- 3,200 Twitter followers; 92% increase on the last financial year

- YouTube videos – 231 videos in 16 languages:
 - 63,300 views; 32% increase on the last financial year
- 3 MoneySmart apps – TrackMySpend (budgeting app), Money health check (a personal financial evaluation app) and Mobile calculator (a simple financial calculator):
 - 270,800 downloads; 210% increase on the last financial year

Gatekeepers

ASIC continues its work to lift audit quality and last week released information to help directors and audit committees develop robust standards.

Information Sheet 196 *Audit quality: The role of directors and audit committees* ([INFO 196](#)) explained:

- why audit quality is important
- the responsibilities of the auditor
- the roles of directors and audit committees
- the responsibilities of directors for auditor independence
- who should manage the appointment of auditors
- what matters should be considered in setting audit fees, and
- what directors and audit committees can do to promote audit quality.

The quality of the independent audit process supports confidence in the quality of financial reports. Audit is important to companies, so they can raise capital and conduct business, and so that investors are confident and informed.

The quality of audits is also important to a wider group of stakeholders, such as creditors.

Directors and audit committees play a crucial supporting role, along with regulators, standard setters, and the accounting bodies, to audit firms in ensuring audit quality.

ASIC will continue to work with professional bodies (like the ICAA and CPA), directors and audit committees – and audit firms themselves – on how they can improve audit quality. We will monitor execution of any larger audit firm plans to improve audit quality, and their effectiveness.

Priority 2 - Fair and Efficient Markets

David Jones

There has been much interest in ASIC's investigation into the share trading of David Jones' two directors and a merger proposal from Myer.

As I told the Senate in February, ASIC examined this matter thoroughly. As with other insider trading investigations we used our powers to get the relevant information and interview the key people. However, there was insufficient evidence to take enforcement action and so in accordance with our usual practice we sent David Jones a 'no further action' letter.

This decision is not an exoneration or a tick of approval and if more evidence comes to light, the matter can be re-opened.

Generally, there are four things ASIC must prove for any insider trading case.

First, you need to show traders actually had the information.

Second, the information needs to be "inside" information so it was not generally known to the rest of the market.

Third, ASIC needs to prove the trader knew or ought to have known the information was material and not publicly available.

And last, we need to satisfy ourselves that the information was "material" in that information alone would have a material effect on the price or value of the company's shares.

In the David Jones matter we did not have sufficient evidence to establish the third point mentioned above. In addition, we also did not have sufficient evidence to show the information was material. On this materiality point, we sought the advice of an external market expert on whether that information was material.

The expert in question, Mr Harold Shapiro, has decades of stockbroking experience, and he was briefed with the relevant information, including information about the David Jones matter that is not in the public domain.

Mr Shapiro's conclusion, which was also the conclusion of ASIC's own internal market expert, was the information was not material.

However, regardless of whether director share trading is legal or not in any given case every director needs to consider how that trading might be viewed by the market.

Directors need to think about the front-page test. Perception sometimes is reality so it is very important to be very sensitive to perception.

Corporate Governance Roundtable

In parallel to the David Jones matter, this month ASIC held a roundtable on corporate governance issues, which discussed the regulation of director share trading; and ASIC's recent work regarding the handling of confidential information by listed companies.

The roundtable was attended by ASX, Australian Council of Superannuation Investors (ACSI), Australian Financial Markets Association (AFMA), Australian Institute of Company Directors (AICD), Australian Investor Relations Association (AIRA), Australian Shareholders Association (ASA), Governance Institute of Australia (GIA), Law Council of Australia, and Stockbrokers Association of Australia (SAA).

ASIC is preparing a report on the Roundtable which will be sent to the Minister by the end of April 2014.

Foreign exchange

As has been reported, a number of overseas regulators are investigating potential manipulation of foreign exchange benchmarks.

These include the UK Financial Conduct Authority (FCA), the US Commodity Futures Trading Commission (CFTC), US Department of Justice (DoJ), and the Swiss Financial Market Supervisory Authority (FINMA).

It has also been reported numerous banks are co-operating with regulatory enquiries and are conducting internal investigations into potential misconduct on foreign currency trading.

This is the next benchmark to be the target of global regulatory enquiries following the high-profile London Inter-Bank Offered Rate (LIBOR) investigations.

ASIC has commenced preliminary enquiries into this issue and is in close contact with a number of international regulators. Foreign exchange is a 24-hour, global market and much of the misconduct seems to have occurred in one of the major foreign exchange trading hubs overseas (such as London).

Market Supervision

Last week ASIC published its seventh report on the supervision of Australian financial markets and market participants.

Report 386 *ASIC supervision of markets and participants: July to December 2013* ([REP 386](#)) highlights the volume of market and participant-related outcomes achieved by ASIC in the second half of 2013.

Key outcomes include:

- 19,255 trading alerts produced (**down** from 20,938 - the new system allows for less 'false positive' alerts)
- 102 market inquiries conducted (**up** from 94 and 86 in the previous two periods)
- 31 matters referred for further investigation (**up** from 25 and 27 in previous two)
- 16 risk-based assessment visits conducted (down from 45, but this was an operational decision)
- 73 surveillances completed (down from 88)
- 26 instances of pre-emptive supervision action (**up** from 19)
- seven enforcement outcomes for insider trading offences (**up** from 5)
- seven infringement notices issued by the Markets Disciplinary Panel (**up** from 2)

This report shows ASIC's tailored financial markets surveillance continues to achieve strong results. The results are crucial to the further strengthening of investor confidence in the integrity of our markets.

Market Analysis Intelligence (MAI) markets surveillance system

ASIC continues to implement its new Market Analysis Intelligence (MAI) markets surveillance system.

The MAI system is built around algorithmic trading technology, and provides ASIC with an enhanced capability to detect, investigate and prosecute trading breaches.

The new system provides sophisticated data analytics to identify suspicious trading in real time and across markets. These above capabilities provide a functionality that

should lead to greater levels of detection of insider trading and market manipulation, and the flexibility to detect and deal with new types of misconduct. This is consistent with ASIC's strategic priority of maintaining fair and efficient financial markets.

The new system enables ASIC to interrogate larger data sets and monitor market activity, consistent with the increased use of technology in day-to-day trading, creating efficiencies through a streamlined and automated process for market analysts.

The system also provides the capacity to handle the continued increase in trade and message data.

Introducing the MAI system has delivered cost savings to ASIC of approximately \$5m. This \$5m saving has also enabled us to reduce the amount we need to recover from industry via ASIC's cost recovery model for market supervision.

Priority 3 - Efficient registration and licensing

We continue to bed down the Business Names System, which was introduced in May 2012.

As at 28 February 2014, there were over 1.91 million business names on the register.

ASIC is receiving close to 30,000 registration applications each month with 12% of applications lodged through the joint ABN/Business Name service in February 2014.

Since October 2012 ASIC has issued over 1.027 million business name renewals.

Since launch, over 99% of transactions have been completed online. Close to 30% of transactions occur between the hours of 5pm and midnight when it is more convenient for small business.

90% of registrations pass ASIC's automated name availability test and (subject to payment) are registered in a single online customer session. Where a name is not available a customer can select an alternative name.

A one (\$33) or three (\$76) year registration period is offered, with 60-65% of new registrants choosing the three year option. 70% of customers are choosing to 'pay now' using a credit card, with the remaining 30% choosing pay later (within 10 days by invoice).

Over 2,000 business name enquiries were received in February 2014 with the top call types continuing to be - (a) business name registration process; (b) business name renewal process; and (c) transferring ownership of a business name.

The speed to answer calls in February 2014 was just over 2 minutes.

Over 2.0 million 'free' searches were conducted in February 2014 online via the ASIC Connect search service or via machine to machine services through our information brokers.

Chairman we are now happy to take your questions.

ENDS