

Senate Standing Committee on Economics References

The Performance of ASIC

Based on firsthand experience of the devastating damage done to individuals whom ASIC publicly target, I respectfully request that the Committee address: the fairness and balance with which ASIC publicises its actions and suspicions **prior to charges being laid**. This matter relates to item b) of the Committee's Terms of Reference, namely, *"the accountability framework to which ASIC is subject, and whether this needs to be strengthened;"*.

Punishing suspects before charges are laid

There is a material contrast between ASIC's approach and the manner in which other Australian law enforcement agencies publicise their actions and suspicions prior to laying charges against individuals. ASIC's prominence as Australia's corporate regulator empowers it to crush innocent individuals, destroying reputations built up over decades of hard work and the attendant capacity to earn a living. It is critical that this power not be abused, and absolutely appropriate that the Committee focus on this aspect of ASIC's practice, particularly as ASIC's current behaviour may in part reflect previous criticism of its lack of success in bringing corporate criminals to justice.

It is not uncommon for ASIC to announce that it has:

- identified the actions of a named individual as suspicious, including identifying the nature of their suspected impropriety;
- taken legal action aimed at freezing the assets of this individual;
- taken legal action aimed at restricting the freedom of this individual to travel;
- decided to work with other law enforcement agencies (most commonly the Director of Public Prosecutions) to pursue this individual

all before the person has been charged. In many cases, including my own, these announcements are refreshed during the judicial process, often over the space of several years, in an atmosphere where the named individual has very limited ability to exercise a right of reply.

It is a vital article of faith of Australia's justice system that individuals are deemed innocent until charged, tried and convicted. Considering the overwhelming asymmetry between ASIC's resources and those of an individual, and the enthusiasm with which the media picks up on the regulator's announcements, it is incontrovertible that **ASIC merely announcing its intention to investigate a named individual, of itself amounts to an immediate and irreversible punishment**. Indeed, in my own case and others I have followed, the sentencing judge noted the personal disruption, loss of professional standing and reduced earning capacity suffered throughout a lengthy (just short of five years in my case) investigation and pre-trial procedure.

A Google search of my name illustrates the torrential media response occasioned by ASIC making the following announcement, that still appears on its website today:

<http://www.asic.gov.au/asic/asic.nsf/byheadline/AD08-85+ASIC+obtains+asset+preservation+orders+against+Dr+Stuart+Fysh?openDocument>

AD08-85 ASIC obtains asset preservation orders against Dr Stuart Fysh

Monday 15 December 2008

ASIC has obtained by consent a continuation of asset preservation orders against Dr Stuart Fysh in the Supreme Court on New South Wales.

Dr Fysh is a senior executive of BG Group Plc (a company with its head office in the United Kingdom). The orders were initially obtained by ASIC on 2 December 2008 and have been extended until 18 May 2009.

The Court ordered that Dr Fysh, a resident of Berkshire in the United Kingdom, is restrained from withdrawing funds from a stock broking account in Australia which has been identified by ASIC as holding funds relevant to share trading transactions.

ASIC is investigating share trading by Dr Fysh prior to BG Group's announcement in February 2008 of an alliance with Queensland Gas Company Limited.

ASIC sought the orders to freeze funds in the account it alleges contains the proceeds of various trades undertaken by Dr Fysh.

ASIC's investigation is continuing.

Editor's note: *On 10 December 2009, the Commonwealth Director of Public Prosecutions (CDPP) obtained restraining orders under section 18 of the Proceeds of Crime Act 2002 (POCA) against Dr Fysh from the Supreme Court of Queensland on the basis that there were reasonable grounds for suspecting that he had committed serious offences, namely, insider trading contrary to sections 1043A(1) and 1311(1) of the Corporations Act.*

The restraining orders prohibit Dr Fysh from disposing of or otherwise dealing with funds which were subject to ASIC's asset preservation orders (approximately \$800,000) and his interest in specified real property in Australia.

The CDPP has also applied for a pecuniary penalty order under section 116 of POCA requiring Dr Fysh to pay an amount to the Commonwealth equal to the benefits derived from his alleged offences. Because of this ASIC did not seek a continuation of its asset preservation orders which expired on 11 December 2009.

Editor's note: *On 18 May 2009, the asset preservation orders against Dr Fysh were extended by consent until 18 September 2009.*

Whilst factually correct, what this announcement and its subsequent editorial updates don't say is:

- The freeze order was obtained only with my full co-operation and on the basis of me making no admission of guilt. This may be implicit in "... by consent ..." but I can

assure the Committee that this is a fine distinction not drawn by any journalist, news agency or prospective employer I have encountered.

- Key elements of the material ASIC presented to the court in support of this order were erroneous and formed no part of the case ASIC eventually brought against me (which ultimately failed to be proven). It is very hard to describe the anguish of seeing your reputation, career and livelihood trashed on the basis of evidence that you know to be false. You feel disempowered, helpless and are set on a sure road to debilitating depression.

Subsequent ASIC announcements deal with me being charged, tried and convicted and I currently make no complaint in respect of those, save to note that:

- During the seven and a half months I spent in custody in NSW I was assaulted on four occasions, and on numerous others subjected to considerable danger, humiliation and degradation.
- On 17 July 2013 when my appeal was finally heard, the convictions were quashed and my immediate release ordered.

Aspects of ASIC's dealings with BG and the effectiveness of its co-operation with the DPP during the investigatory and pre-trial periods fall squarely within the Committee's terms of reference and, in my view, merit examination. However, the NSW Court of Criminal Appeal has yet to publish its reasons for allowing my appeal and it would be inappropriate for me to comment on these matters in advance of them doing so.

Nevertheless, I do not want to lose this opportunity to alert the Committee to the impact of ASIC's "announce early and announce big" policy on me and, I have no doubt, on other innocent people ASIC has investigated. Accordingly, having experienced the truly crushing impact of seeing my career and reputation destroyed, I invite the Committee to undertake a simple thought experiment, asking themselves:

- What if some of the people ASIC chooses to investigate are innocent? *Almost a mathematical certainty, I would suggest.*
- What if subsequent ASIC and/or DPP processes are sufficiently robust to prevent them being taken to trial? *They weren't in my case, but no doubt ASIC and DPP constantly strive to improve and no doubt they get it right on many occasions.*
- Do the Australian people want the careers and lives of these innocent people to be blighted by ASIC foolishly **rushing to publicise their pre-investigatory let alone pre-indictment steps**, and thereby seeking to burnish its organisational credentials as a hardnosed defender of the public good?
- Can any possible (and, I respectfully submit, highly questionable) benefit, such as by way of heightened deterrence, that might flow from ASIC's precipitate publicity in respect of those who are ultimately proven guilty, warrant the crushing blow to one who is innocent?

If the Committee entertains any doubt about the answer to the last question then this is not the Australia I grew up in and I for one would no longer wish to live here.

Prior to November 2008 I enjoyed an excellent reputation in the international oil and gas sector. Having led the BG team that established the Egyptian LNG project from 2001 onwards, by 2008 I answered to BG's Chief Executive and Board for its operations in 16 countries, accounting for 42% of Group production, some 240,000 boepd (bbls oil equivalent per day). Prior to leaving BG, I was regularly approached by international and Australian energy companies to consider executive and board-level roles, reflecting my achievements in the industry.

By mutual agreement BG announced that my departure was predicated on a perceived conflict of interest. During the subsequent two years it took ASIC/DPP to decide to prosecute me, I earnestly believe that but for the damage done by ASIC's public pronouncements it would have been perfectly possible to avail myself of many of the opportunities previously open to me. **Instead, discussions I had with prospective employers all foundered on the uncertainty attaching to me by virtue of ASIC's announced intentions.** It is difficult to describe the angst this caused me and my young family.

Things changed at the end of 2010 when DPP and ASIC announced their intention to indict me and, as noted above, I make no comment at this time about subsequent events. However, I came to understand throughout those first two years of hellish uncertainty that mine was not an uncommon situation and moreover, no one would ring a bell if ASIC ever did decide not to proceed - I would just be left dangling, career and earning capacity irretrievably damaged. This possibility may seem rather too theoretical to the Committee, but I respectfully remind them that my conviction has ultimately been quashed, and that **it must be that other less well-resourced individuals have been totally destroyed in cases where ASIC has ultimately opted not to proceed.**

I invite the Committee to contrast ASIC's 2008 announcement with the tone and tenor of the infrequent public comments made by police during criminal investigations. Never, in my experience, do the police name individuals they are interviewing or contemplating laying charges against. Never have I seen a police media release that says anything like "We think Mr Blogs did this and we are working to obtain proof of his crime. In the meantime, we have locked up his assets and told him he is not free to leave the country. We are talking to the DPP and they will soon decide whether or not to lay charges against Mr Blogs for this serious crime. Our conduct in this matter reflects our view that such affairs are a blight on Australian society, and you can be sure that we will continue to chase down and prosecute people who exhibit such behaviour."

I will not waste the Committee's time speculating why police do not proceed in this manner, but I certainly invite them to consider why we collectively sanction ASIC continuing to do so.

Moral hazard created by ASIC's early public positioning

ASIC works in a more complex space than policing agencies dealing with criminal cases where, by virtue of apparent facts and physical evidence, there will usually be little doubt that criminal conduct has occurred. The judgements ASIC has to make in determining criminality are more subtle than identifying a victim or looking for fingerprint and DNA matches. Frequently it is uncertain that a crime has actually been committed, and ASIC acts with broad discretion in such cases - processes supporting their decision making must be both rigorous and fair.

In my case, for example, the physical facts of the matter were not in dispute - at issue was the information I possessed at the time of trading shares and the significance, if any, of that information. ASIC took two years to conduct interviews and convert the distilled data into a DPP decision to charge me. Without venturing into the case, subsequent developments strongly suggest ASIC's process was flawed and there was not a sound basis for proceeding against me.

This raises the issue of **the moral hazard ASIC faces when it needlessly engages in headline-grabbing pre-investigatory/pre-indictment press commentary**. ASIC's unseemly rush to defend itself following recent public criticism of it not proceeding against Leighton directors (and not long before that, against senior RBA staff) suggests brittleness and sensitivity. Can an organisation so much in the public eye as ASIC reasonably claim its processes are **not** influenced by the expectations it creates through premature public announcements? I have no evidence in this respect and doubt that any could exist - but it stands to reason that an organisation facing the complexity ASIC does would be well advised to keep its counsel until it decides how to proceed. ASIC's failure to do so speaks to a worrying immaturity in the organisation, again a matter appropriate for this Committee's consideration.

21 October 2013

 Stuart Fysh