

SENATE ENQUIRY

Re: The performance of the Australian Securities and Investments
Commission (ASIC)

SUBMISSION UPDATE

Originally Forwarded: Friday, October 18, 2013

Accepted : October 30, 2013

Updated: Monday November 4, 2013

To: economics.sen@aph.gov.au

Permission to make the submission available is granted

(Please withhold Name and Contact Details)

***DISCLAIMER:** All Information presented as shareholder research has been sourced from broker trading records and Cudeco registry records. While the author considers the data to be accurate and the summaries presented as also being an accurate reflection of trading, no guarantees are given as to the reliability of data or any conclusions put forward. Shareholders and investors are encouraged to do their own Due Diligence and to make up their own minds in regard to any trends present in the trading data.*

SUPPLEMENTARY INFORMATION (Monday, November 4, 2013)

The following update to the submission concerning the Senate Enquiry into ASIC's performance is because of changes to events since the original submission was forwarded.

The changed events are threefold.

1. ASIC has formally responded to 4 separate complaints lodged since August 16, 2013, with a 'No case to answer' finding, but without being prepared to provide any indication whatsoever as how their decision was arrived at.

The complaints were referenced as: ASIC Complaint 2013-1 [<Reference Link>](#)
 ASIC Complaint 2013-2 [<Reference Link>](#)
 ASIC Complaint 2013-3 [<Reference Link>](#)
 ASIC Complaint Short Selling on August 21 [<LINK>](#)

2. A further complaint has been forwarded to ASIC this day, and is referenced as:

ASIC Complaint 2013-4 [<Reference Link>](#)

The complaint brings into focus all previous research and new matters not previously presented, none of which can be adequately explained in terms other than market manipulation. It provides a rationale with supporting data that lays out a compelling need for an inquiry into ASIC's regulatory oversight.

The issues raised also meet with the criteria spelt out by the ASIC Chairman in a recent ABC Lateline interview [<LINK>](#) where it was stated that ASIC is focussed on protecting retail investors, particularly when significant amounts of money are involved and lots of investors are affected. The complaint is associated with 7,000 predominantly retail investors having to watch \$0.5 billion being unfairly stripped from the market capitalization of the company they were invested in.

The complaint will provide an ongoing case study, coinciding with the Senate Enquiry deliberations, whereby the way in which systemic issues concerning the financial markets are actually dealt with can be observed. Any lessons learnt (or not learnt) from the multitude of transgressions already brought to attention by submissions will be on show, so that the Committee will have a current understanding of how the system of regulation works.

3. An article in the Sydney Morning Herald on November 1, 2013 titled '**Tough questions on ASIC dodged**' [<LINK>](#) tends to circumvent the Senate investigations by summing up that *"the Senate inquiry into the performance of the Australian Securities and Investments Commission will conclude that ASIC needs to be a more proactive and effective corporate law enforcer, and the recommendations ASIC put to it on Thursday will nudge it in that direction if they are adopted"*. The article was based on a further submission by ASIC on Thursday October 31.

In pre-judging the outcome of the enquiry, the article further destroys confidence in the system and rubs further salt into the wounds of those who have been victimised by the system, and who have taken the time to forward heartfelt submissions. They no doubt, and many others too, will be particularly upset if the '**tough questions are able to be dodged**'. One wonders what the point of having a report date of March 31, 2014 is, representing 5 months of investigations, if the final outcome is already decided. It strongly suggests another case of the big-end of town taking care of business and overriding due process and proper investigative processes. The enquiry into the operations of the regulator will now be seen in context with the effectiveness of the democratic system itself, and the effectiveness of government oversight.

It is strongly recommended that the Senate Committee looking into ASIC's performance familiarize themselves with Complaint 2013-4, as there have been no published studies on the impact of trading behaviours on the registers of public companies, nor have there been long-term studies of the manipulative use of HFT algorithms. Senators are encouraged to use their own assessments and assessments by independent financial connections they may have access to, such as accountants, fund managers, financial advisors, brokers or even government advisers. A strong view of whether the information is deserving of stringent regulatory attention will assist in deciding ASIC's effectiveness. The central issue is the anomalous data trends in evidence which can only be resolved through the forensic auditing of broker and client accounts. Conjecture can play no part either by the complainant in presenting the information or by regulators in attempting to excuse the behaviours. Essentially, the data reveals all and proper explanations need to be found. With a full appreciation of the issues, the Committee will be in a position to gauge how ASIC deals with the complaint and whether indeed the systemic problems identified require wide-ranging reforms to the way business currently takes place on the ASX.

There are a number of issues concerning the recent developments that have great relevance to the current Senate enquiry.

FURTHER TO THE ASIC DECISION

Firstly, a request to clarify the 'No case to answer' decision was met with the standard response, "We do not comment on operational matters". The request sought clarification of:

- whether ASIC investigations had confirmed the issues raised in complaints but had used its discretionary power not to proceed, or
- whether ASIC was unable to replicate the findings of research so didn't have a need to take action.

The questions were important for the following reasons:

1. If explanations were available to explain why the data anomalies presented in complaints didn't represent regulatory concerns, then that information should have been made available. In fact, in the interests of transparency and ensuring informed and confident investors, (i.e., ASIC's often quoted mandate), then those interpretations should be on public record.
2. If the data anomalies did represent share price manipulation issues, but the regulator had decided to use its discretionary powers not to act, then the complainant and investors generally are also entitled to be informed so that they may pursue other avenues for redress.
3. If the regulator wasn't able to replicate the findings of research and so couldn't justify taking actions, then the complainant ought to have been told so that there was an opportunity to divulge how the research findings were arrived at so that a clear understanding could be established.
4. If the research findings were thought to be incorrect after ASIC investigations had been made, then that too should have been advised for an opportunity to resolve any differences so that the situation was able to be accurately assessed.

In the above context, and in the face of overwhelming empirical evidence, the standard "We do not comment on operational matters" is unacceptable. It is also contrary to assurances on ASIC's website that complaints may be entitled to written explanations concerning judgements that have been made.

It also means that any trading complaint lodged with ASIC, without privileged access to supporting evidence, has next to no chance of being adequately addressed.

FURTHER TO COMPLAINT 2013-4

ASIC Complaint 2013-4 contains a wealth of information that relates to systemic issues with implications for all investors that have exposure to the ASX. It presents an almost overwhelming amount of evidence that points to share price manipulation concerning a particular ASX company where the brokers involved are clearly identified. The brokers represent a target for corrective action as they appear to have facilitated unfair trading activity, although whether it has been for their own proprietary trading accounts, or on behalf of clients, is unknown.

However, with the wide ranging investigative powers vested in ASIC, if it had the will, it would be able to go directly to the heart of the problems and identify the perpetrators through audits. Yet for whatever reason it has chosen not to, and refuses to even acknowledge that there is a problem. A regulatory framework that supports control over the market by the big-end of town, even when presented with overwhelming evidence that the system is seriously flawed, does not portend well for the health and sustainability of Australia's financial markets. The situation is then made somewhat ludicrous by claims that often there isn't enough evidence to proceed against wrong doing. [<REFERENCE INK>](#)

A growing acceptance that the share market is heavily manipulated but that the situation is just a fact of life for those prepared to chance their luck, is a terrible indictment of a system integrally linked to Australia's future prosperity. The acceptance comes from not actually understanding how the markets have become compromised and an acknowledgement that regulatory authorities are generally ineffective and well practised at deflecting blame and avoiding their responsibilities.

There is no question that market manipulation is a given in today's financial markets with scandals such as the Libor fiasco showing that markets much larger than the ASX can be unfairly controlled. The research undertaken identifies areas of concern where share price manipulation is able to be accommodated on the ASX without fear of intervention. They include:

- securities lending;
- high frequency algorithmic trading programs that facilitate control over prices whether it be in active trading or during auctions;
- extensive dark pool trades and other 'dark' off -market activity that can facilitate the transfers of large volumes of shares while avoiding price discovery.

Manipulative practices associated with the above activities are facilitated through high levels of collusion, an absence of transparency, a lack of market integrity and ineffective regulation. Collectively, all aspects of trading make it possible for artificial prices to be imposed on the market at will. Clearly, markets cannot have integrity when there are rules for a privileged class of investors and another set for everyone else.

While the Senate Enquiry's brief is not to fix the ills of modern markets, which arguably should be the subject of a separate enquiry especially given the vulnerability of retail investments and workers compulsory superannuation contributions, what it can do is to take steps to ensure that the 'asleep at the wheel regulator' is transformed into an effective body that actually performs all aspects of its charter in a manner that is beyond reproach.

In terms of the financial markets, all of the spurious trading behaviours identified by research would be resolved overnight if entities weren't able to conceal their activities to the extent currently allowed. Markets would also operate much more effectively, and with greater participation, if measures were taken to address manipulative short selling and manipulative algorithmic trading programs that have been behind widespread trading anomalies.

COMMON THEMES IN RELATION TO SENATE ENQUIRY SUBMISSIONS

The timing of this update coincides with the tabling of many other submissions by a variety of people and organizations, where dissatisfaction with ASIC's performance runs at very high levels. It is therefore a valuable exercise to reflect on the comments of others, and to acknowledge the common short-falls across different aspects of the financial markets whether it be the share market, the banking industry or funds management and investments generally.

To begin with Anne Lampe, as a former employee of ASIC raises valuable insights which go a long way to explaining the high levels of dissatisfaction that are associated with ASIC. Her revealing input has been referenced as Submission 106.

While at ASIC I sat at meeting after meeting where the same investor-related concerns would come up for discussion without any sign of progress in the investigation, or action. The matter simply moved from one agenda to the next. The decision to do something seemed to be too difficult or perceived to be too risky. It seemed to me that those at the top who should have been making decisions to act thought it safer to avoid making a decision than to make one that might be later criticised in either a courtroom or in

Canberra. Whilst I worked at regard for the committed and lawyers in the enforcement be some blockage at the top. too late. Negotiating taking people or companies action when complaints undertakings were discussed armies of lawyers in secret ever emerged about how the many investors were

Anne Lampe's revelations raise serious doubts about how much proper investigation has been done, if any, about the matters raised in ASIC Complaints 2013-1, 2013-2 and 2013-3.

Her revelations may also be signalling the likely fate of ASIC Complaint 2013-4

[<Link to Complaints>](#)

ASIC I had nothing but the highest hard- working investigators and section of ASIC. But there seemed to Action seemed always to be taken enforceable undertakings rather than to court was a preferred course of reached a crescendo. These and fought over, over months, by behind closed doors and few details damage to investors was done, how affected, or even whether the

undertaking was adhered to. In some cases the companies involved undertook to write letters to affected clients asking them to come in and discuss their concerns. Whether these letters were sent, how they were worded, whether they were replied to or what compensation was offered stayed secret. Everything seemed to go silent after a brief but meticulously crafted press announcement was released by ASIC. Legions of well-cut suits seemed to be regular visitors to the senior executive level of ASIC. I was not privy to these meetings and don't know if they were company executives, advisors, lobbyists or lawyers, but they all looked frightfully serious and confident at the same time. By contrast I never saw one aggrieved investor or representative of an investors' group make it to a meeting on ASIC's executive floor. They just weren't given the access.

Anne Lampe also highlighted ASIC's over-the-top reaction to a penny-poor protestor, Jonathan Moylan, who was responsible for an email hoax concerning Whitehaven coal.

Unlike rogue advisors and fund managers that have faced no charges, Moylan didn't gain from the prank, earned no bonus, hasn't thieved investors' money, didn't misappropriate or gamble with large chunks of retiree savings, and didn't lend any investor money to himself or his own companies. Nonetheless he is being dealt with as if he had committed a capital offence, far more severely than any Storm advisor or director, or any rogue CBA advisors allowed to quietly resign

Moylan's alleged crime was the spreading of false and misleading information - an offence under the Corporations Act. The Whitehaven trading that took place as outlined in the submission [<Reference Link: Pg 10>](#) is deserving of an enquiry in its own right. The trading suggests certain brokers used a spurious

report to mask their own manipulative trading agendas, a report that shouldn't have even seen the light of day given the usual checks and balances to verify unofficial statements before they are given-air time.

Indeed, if a proper investigation into ASX trading confirmed what has been presented as shareholder research spanning over of 3.5 years of trading and supported by empirical data, ASIC itself stands a very good chance of being responsible for spreading false and misleading information with its often trumpeted calls advising investors that the market is fair and transparent. Research suggests that the ASX market is not fair, and nor is it transparent, and it has been that way for a very considerable period of time.

Anne Lamp concluded with:

With the nation's retirement pool growing rapidly a major overhaul of its priorities and actions is imperative or we'll see a lot more hard earned national savings flushed down the spivs' drain. ASIC should not be permitted, with its vast resources, to sit and watch retirees be stripped of their life savings, and do nothing, while at the same time picking on low hanging fruit to justify its existence.

Equally, if the rorting of share market investments through dubious trading practices continues to be sanctioned, the drain in national savings could escalate very considerably.

Another insightful submission was Number 185 which was titled 'Why People don't come forward'. It referred to the creation of a system for writing mortgages which made it difficult to track any liability for wrong doing, so that holding perpetrators of dubious lending practices to account was problematic, especially when they all stood silently side by side with regulators behind a wall that camouflaged all wrong doing.

The parallels to the share market are uncanny, as that is one of the major findings of research i.e., the difficulty in detecting who is responsible for spurious trading behaviours and then the difficulty in making them accountable for the impact they have on the market and on company registers, with ASIC seemingly remaining silent and disinterested.

A lack of transparency and spurious dealings appear to be prevalent within both the banking industry and the share market and appear to facilitate an environment where innocent victims can be taken advantage of with impunity.

Submission 185 also had some interesting comments about the inherent failures in a system where regulators fail, and are seen to fail by the investing community, and where the perpetrators of wrong doing are actually protected, which is similar to Anne Lampe's experiences. The impact of those behaviours is to destroy credibility in the regulatory system itself and results in a reluctance to even bring matters forward that are deserving of investigation. The parallels with the reporting of child abuse and where nothing was done for many years are also relevant, as the impact on victims that cannot seek redress when presenting complaints can be quite devastating. The devastation is evident in submission after submission to the current Senate Enquiry.

The comment "*the level of corruption is so great that these players are protected and they know they are protected*" is an extremely damning summary of what is able to take place within the current regulatory regime. The concluding comments spell out exactly what will happen if far reaching reforms are not implemented after due consideration by the Senate Committee of all matters presented.

<Quote> If ASIC continues to allow "those who DO stand up to speak" to be destroyed, if it continues to fails in its duty to investigate, protect and prosecute; there is little hope that others will come forward. Corruption will flourish.

Submission 212 echoed the experiences of many others in stating

<Quote> ASIC has failed to represent both the business and consumer community in its protection of financial and regulatory rights. ASIC is ineffective, nonresponsive and inept: it epitomizes an institution that is not willing to take on the “big end of town” and runs on literal interpretation of their mandate to avoid investigation into common complaints that should have led into action and or investigation into both systemic and “trend” problems within the financial system.

ASIC have acted in a unconscionable way in the complaint.

The process in dealing with Incommunicative, difficulty in delays, several emails and given the run around, wouldn't be taking any action ASIC then went onto say take enforcement action in misconduct we receive and

Following on from Submission 212,
To properly investigate systemic share market issues outlined in several ASIC Complaints as per Submission 213, that potentially impact all investors on the ASX to a large extent, would also be considered as a reasonable thing to do, if not an imperative.

Yet that hasn't happened either.

[<Link to ASIC Complaints>](#)

misleading and management of my

ASIC is described as: establishing dialogue, long phone calls to get anywhere, eventually told that ASIC in regard to issues raised. that..” it is not obliged to relation to all reports of we take into account a range

of factors including the broader public interest, the strategic significance and benefits of pursuing misconduct. ASIC finishes by stating “ that these matters are concluded.”

This letter as reported to me by others that had lodged a complaint to ASIC ,was a standard letter delivered to all; Their response and excuse for not acting is an affront to those that have believed that we have a regulatory system that affords them protection –

The writer's experiences with ASIC as outlined above, further demonstrate the sentiments expressed in submission 185 explaining “Why people don't come forward”. It is also echoed by the Rule of Law Institute in their Submission Number 211, as per the following quote.

<Quote:> The volume of submissions received by this Inquiry detailing the financial loss and trauma suffered is indicative of a serious problem in the way in which ASIC manages its own investigative, regulatory, prosecution and penalty powers. The result of ASIC's misuse of its powers is a loss of faith in the rule of law because of the inability of the law to protect vulnerable members of the community.

The Rule of Law Institute also asserted that ASIC has sufficient powers but is has failed to use them. It also contended that there is a perception that ASIC does not investigate big businesses

The immediate results of chronic failures by ASIC in delivering effective regulatory oversight are:

- it acts as a deterrent for people to come forward; and
- it ensures that those who can abuse the system see no impediment to taking full advantage of the situation.

A failure to regulate the share market is one of the reasons that dubious practices figure so prominently in day to day operations, i.e., there is no active deterrent particularly if indiscretions are kept under the radar of surveillance operations which, judging by the extent of data anomalies, is not difficult to do.

The submission by Bob Katter (Number 210) alludes to collusion between ASIC and the firms involved in company receiverships. It may well represent a cosy arrangement where exclusive rights are made available to insiders who are able to capitalize on securing assets cheaply when firms go into receivership.

The Katter submission mentions: *We understand that there are allegedly connections between ASIC, personnel and corporations involved in company receiverships.* It is hoped that Mr Katter is able to help ensure that the Senate Enquiries findings are not a fait accompli as suggest by the Sydney Morning Herald article.

Certainly collusion is widespread regarding share trading and ASIC's tacit acceptance of widespread dubious trading practices is an integral part of how the system currently operates.

The CPA Submission (Number 209) rebukes ASIC for not *"collaborating in a genuine and constructive dialogue with potential partners in change"* and questions ASIC reliance on *"leveraging" media headlines over substantive outcomes to paper over an otherwise unimpressive recent track record*". They are actually harsh comments from a respected industry association and they present as an urgent wake-up call.

ASIC's preparedness to consider deals on sentencing and penalties on people under investigation who co-operate, provided their offence was not too serious or deliberately reckless" <[REFERENCE LINK](#)> represents an ad hoc approach to regulation where slaps on the wrist are hardly a deterrent to others, and fail to recognize the losses faced by innocent bystanders who have been affected by improper practices.

The Institute of Chartered Accountants (Submission 203) draws attention to ASIC's *"vitally important role in promoting confidence and stability in our capital markets, which in turn impacts on the activities of corporations and businesses broadly, as well as almost every Australian household"*. The statement in effect draws attention to widespread deficiencies in the way the system operates as highlighted by submission after submission.

Their submission also draws attention to the need for sound regulatory regime to protect the compulsory superannuation of Australian workers, by stating *"almost every Australian now has a stake in the ongoing stability and transparency of our capital markets"*.

The chartered accountants don't seem to realize that the majority of market dealings are opaque to the market and that the market itself operates as an un-level playing field. However they did assert that *"there has been an apparent lack of willingness on ASIC's part to work in an open and shared manner in order to secure the right outcomes in the marketplace"* which is possibly a veiled swipe at ASIC's tendency to advantage sophisticated investors over all others. The failure to charge UBS for trading irregularities with a trading spike in October last year <[Refer: UBS client in spotlight on trading spike](#)> is yet another example of the big-end of town getting off lightly especially when compared to the over-the-top reaction associated with the Jonathon Moylan false email incident concerning Whitehaven Coal.

Submission 203 also pointed to the tendency by regulatory agencies *"to lay responsibility for poor regulatory outcomes at the feet of other agencies, rather than being seen to operate as one cohesive group of law enforcement agencies"*. Such behaviours point to self serving activity and the looking after of 'elitist mates' rather than a concerted effort to administer justice and to ensure the highest standards of ethical practice are maintained within the finance industry.

The submission by the Industry Super association (ISA), numbered 201, emphasized ASIC's *"mission to ensure that the markets are "fair and transparent, supported by confident and informed investors and consumers"*, which again represents the standard mantra from ASIC and the industry, but unfortunately, what occurs in practice is far different. A growing recognition of ASIC's shortfalls and failures to act means that such claims are increasingly regarded with cynicism. The inevitable outcome is a reduction in respect for the position of market regulator which serves to exacerbate trading abuses and non-compliance.

The ISA submission indirectly draws attention to issues presented in the complaints tabled in this writer's submission (i.e., ASIC Complaints 2013-1 to 2013-4 <[LINK](#)>), and in particular regarding Complaint 2013-4. The problem is that research that quantifies the impact of trading on the registers of public companies and identifying the impact of algorithmic trades on prices, hasn't been done by the industry, and if it were, it is likely that they (i.e., the ISA, and for that matter, all other stakeholders) would be exceedingly more vocal as the problems are acute.

However the ISA did mention the following:

*The ISA made a number of submissions to ASIC in relation to HFT activities, which we believe are damaging to long-term investors such as superannuation funds. ASIC undertook a thorough consultation process on High Frequency Trading and Dark Pools, which ultimately resulted in **some** improvements in the transparency requirements and monitoring of HFT, **albeit not going as far as the recommendations proposed by ISA**. ISA will continue to strongly advocate for further tightening of the regulation of HFT and consideration on market structure issues so that a holistic approach can be taken with the view to creating **fairer and more efficient** capital markets.*

The fairness issues were politely understated by the ISA, but also, not addressed was the impact that manipulative short selling has on superannuation portfolios. The issue of custodians lending members' shares for the primary benefit of hedge funds and others, resulting in substantial losses to the owners of managed shares in return for meagre lending fees, represents the elephant in the room concerning the managed funds industry. <[Refer: Short sellers ring up \\$72bn profit over 18 months](#)>. The extent of problems regarding HFT were not flagged either but the Industry Super Network (ISN) has done so in a press release <[High Speed Trades Cost \\$1.5Billion](#)> .

The approach to regulation of market innovations such as short selling, dark pools, and HFT algorithms has essentially been a reactive process, rather than a carefully implemented, proactive approach ensuring that retail investors are not disadvantaged or compromised. The process has generally been a talkfest, with lots of headlines and then a backing away from problems, or comments that suggest the problems aren't as bad as first thought.

But the watchdog says public concern about high-frequency trading is "overstated". It made the comments in two reviews published yesterday into high-frequency and dark-pool trading Both reviews uncovered potential breaches of market integrity rules and the Corporations Act that are now under investigation.
<[REFERENCE LINK](#)>

Karina Barrymore (Herald Sun, June 22, 2013, Pg. 38) was more incisive in an article that responded to ASIC softening its stance in favour of big-business.

Dark pools, muddy waters, the upstairs market, black liquidity, iceberg orders, call them what you want, the practice of doing share trades in secret behind closed door seems just as bad as insider trading. Our fearless investment watch dog, the Australian Securities and Investment Commission this week officially backed off doing anything more to halt, control or even try and limit the large number of share deals being done in so called dark pools or secret transactions

The ISA submission also refers to ASIC's citing of insufficient resources as a reason for an ineffective regulatory response, however what the submissions haven't revealed is that the key problems are attitudinal and strategic, and magnified by a reluctance to use the powers ASIC already has. No amount of money will fix a corporate focus that is alienated from where it is required to be. Indeed, extra resources could result in more flexibility and improved mechanisms for avoiding responsibility. To use an analogy, debt problems that were at the core of GFC turmoil have essentially been addressed by creating more debt, with the result that markets have never fully recovered and the problems substantially remain over 5 years later.

Submission 192 highlights exactly how compromised the system of regulation is under ASIC's watch and again highlights why people don't come forward. The extent of subterfuge and camouflage that facilitates ineffective complaint resolution is alarming. So too is ASIC's role in knowingly contributing to a system that ensures that problems have little chance of being effectively addressed. The following clarifications in Submission 192 that were made in relation to the Financial Ombudsman's Service (FOS) and ASIC, are of particular concern:

- ASIC has ensured that the Financial Ombudsman's Service (FOS) is the only available avenue for a consumer to lodge a complaint against a Bank or financial institution. ASIC refers consumers to FOS.
- ASIC does not inform consumers that FOS is a company owned and funded by its stakeholders who are likely to be the same financial services providers (FSPs) against whom a consumer complaint will be lodged.
- FOS is a company which acts in the interests of FSP's more than it does for consumers.
- To give an air of public legitimacy to its claims to be a provider of fair and independent dispute resolution for consumers the FOS makes numerous and extensive references to ASIC on the Terms of Reference page of its web site.
- The FSP or bank involved in any serious systemic issue is never named in any required quarterly reporting to ASIC, the FOS does not name the FSP or bank publicly, and consumer information fundamental to the protection of consumer rights in Australia is purposely withheld from every member of the public.
- The ASIC reporting functions of the FOS, which have been approved by ASIC, have served to ensure that members of the public have never been informed of any systemic issues relating to banking and that banks that engage in maladministration in Lending are never named publically.
- The CCMC monitors subscribing banks' compliance with the Code. Under the Code each bank agrees to lodge an Annual Report with the CCMC about their compliance with Code obligations during the reporting year. Since 2008 this has simply been in the form of a questionnaire issued by the CCMC which acts as a self-assessment by banks with regard to compliance with the Code. There is no external reporting requirement by the CCMC to ASIC and being a body funded by financial service providers there is no control over the CCMC by ASIC.
- ASIC therefore maintains itself conveniently "blind" to the identity of any bank involved in systemic issues of Maladministration in Lending and reports nothing to consumers or to the Australian Government. Banks involved in Maladministration in Lending whose identity is known by the FOS, the CCMC and by the consumers who have lodged complaints with the FOS, continue on with "business as usual", secure in the knowledge that the public will never know.
- Claims by ASIC that it is a "gatekeeper" or that it promotes "gatekeeping" in the financial services sector are not founded in fact or supported by actions.
- Consumers are not treated fairly or impartially when dealing with FOS. The FOS has established a "Secure Services" area on its website. The FOS has one secure services area for its members including banks and financial services providers, another separate one for consumer advocates, and no secure area at all for consumer complainants.
- According to the FOS by mid 2012 more than 5,300 staff from their FOS members including banks and insurance companies had access to the secure services area of the FOS. Employees of FOS's members (banks and insurance companies) have open access to FOS's reports and can view and download reports on open and closed consumer disputes for any period from 1 January 2010 to the present. They can search for a particular dispute or all of the disputes that meet certain criteria.

- FOS says that members who have had systemic issues can view and download reports on these issues. What this in effect means is that staff of banks and insurance companies can freely view the FOS reports on consumer disputes in progress with banks at any time. This places consumers who have lodged complaints with FOS at a severe and unfair disadvantage.

Submission 192 is focussed on the banking/lending industry however the share market is structured in a similar way with high levels of camouflage protecting large volumes of spurious transactions with little effective action taken to address systemic problems. Then there is the standard “We Don’t have a Problem With It” mantra in response to practically all complainants who question what is allowed to take place.

Submission 190 provides yet another example of the treatment handed out by ASIC in addressing complaints of a serious nature. It again conveys why people are reluctant to come forward

<Quote> I submit the following example which will show a ready-made opportunity made available to ASIC to assist in maintaining a high standard of financial advice which was allowed to "go begging". The real reason why this was so, I am still not sure of to this day. What is pertinent in this instance was the fact that despite the evidence being handed to ASIC by a high level public servant, there was no effort made to pursue the factual evidence and allegations of extremely serious breaches reported. Lastly, ASIC also failed in a most basic way by not even bothering to keep me or my clients informed, which speaks to a cultural lack of empathy and understanding as to what effect they can have to protect peoples' finances and why they ultimately do exist, which is to serve the public who contribute to their budget.

Six months later I had to call ASIC myself to find out what progress had been made, only to be told "I'm sorry but ASIC does not handle individual complaints but only systemic problems".

ASIC Complaints 2013-1, 2013-2 and 2013-3 comprehensively reveal that ASIC does not even handle systemic problems. Instead, they are inclined to simply just look the other way with no explanations or clarifications offered despite obvious conflicts with existing laws that address share market manipulation.

The complaint by the Ombudsman Office (No. 189) once again draws attention to ‘Why People don’t Come forward’, by referring to issues with the ASIC website and how user unfriendly it is.

Another common theme in complaints received by the Ombudsman is that clients are often unsure about how to complain to ASIC about ASIC. While ASIC’s website contains a clear heading, “how to complain”, the subsequent list of links does not offer a clear and explicit opportunity to make a complaint about ASIC. There is also room for ASIC to further improve its communication with complainants.

One of the most frequent complaints that the Ombudsman receives about ASIC is that it has not investigated and/or taken enforcement action in relation to a report of misconduct or breach of legislation. Complainants typically state they have reported to ASIC what they believe to be a significant act of misconduct or breach of legislation by a director, other company official or a company itself. Following receipt of a letter from ASIC responding to the complainant’s report of misconduct and advising that it will not investigate, the complainant contacts the Ombudsman because they consider ASIC is not meeting its responsibility as a regulator.

The Ombudsman Office also refers to the conflict of how complainants view ASIC and how ASIC’s views its own role, as per advice on the ASIC website.

All reports of misconduct that we receive provide us with valuable information, but not every matter brought to our attention requires us to take action. Under the laws we administer, we have the discretion to decide whether to take further action on reports of misconduct that we receive. Generally we do not act

for individuals and we will seek to take action only on those reports of misconduct where our action will result in a greater impact in the market and benefit the general public more broadly.

The system obviously provides ASIC with much flexibility however by not using its investigative powers in relation to issues that potentially affect all investors on the ASX, and which if properly investigated are likely to find breaches of existing laws relating to market manipulation as covered by the Corporations Act and breaches of provisions concerning cartel activity as addressed by the ACCC. Inaction by ASIC may amount to a dereliction of duty as per Anne Lampe's observations rather than legitimate discretionary oversight.

Finally, it is also noted that a small number of submissions have generally come out in favour of ASIC and have recommended that ASIC be given access to additional funding. However such submissions conveniently ignore ASIC's failings with a head-in-the-sand approach that possibly suggests an elitist connectedness, an establishment club, or even self-serving interests who have directly or indirectly been party to a lot of the angst generated within the system. The need for a Senate Enquiry is certainly testimony to the amount of frustration that permeates the financial markets.

The overwhelming response to the enquiry is clearly revealing that the large-players in the financial system, including the regulator through not effectively discharging its duties, are complicit in allowing Australian citizens to be systematically parted from their assets and savings with little recourse to justice.

Highly dubious dealings have flourished in:

- **the share market** where trading is neither fair or transparent and nor does it function with integrity at all times, where the portfolios of retail investors and investors involved in managed funds, as well as emerging companies, are all unfairly targeted by unscrupulous trading practices;
- **the banking industry** where borrowers have been on the receiving end of cleverly crafted bank lending rorts; and
- **the consumer finance/investing sector** where people have been on the receiving end of investment scams.

As pointed out in submission 186, the buck really does stop with ASIC and it is up to the Senate Enquiry to take the first steps to initiate an overhaul of all facets of ASIC's operations to ensure that it effectively delivers all of that which is expected of it. The expectations are at least spelt out in ASIC's guiding statements and in Treasury briefs which make the current situation so untenable, as the job clearly isn't getting done as well as it should be. Australia cannot continue to tolerate a situation where the financial markets are substantially compromised and regulation is widely recognized as being ineffective.

Assuming the Senate Enquiry has the necessary wherewithal and the authority to make a difference, it is hoped that the 'done deal' article proffered by the Sydney Morning Herald is way off the mark, and just represents another example of media headlines being used to try and manage expectations for the benefit of vested interests.