



Senate Economics References Committee – inquiry into the performance of ASIC
Proof Hansard transcript from 19 February 2014:
Questions on notice for ASIC

1. (p. 6) CA

CHAIR: Okay. Did you also interview the other directors—those directors who are not Mr Vamos, Mr Clapham and Mr Mason? Did you interview all of the other directors?

Mr Savundra: No.

CHAIR: You did not. Why is that?

Mr Savundra: It was not necessary.

CHAIR: Okay, then. You should then place on the public record your understanding of what happened. A script offer was made by one company to David Jones. We know from the public record that at least three directors were involved in matters arising from that script offer. We know from the public record that there are another five or six directors on the board of the receiving company, and we know that they have been concerned as to how events proceeded, because their sentiments and the fact that they had not been advised and were not engaged were reported in the *Fin Review* yesterday. Are you satisfied in that context, Mr Price, that all of the material that was received by those three named gentlemen was equally received, at the same time, by all of the other directors and discussed fully at directors meetings or board meetings that considered the matter?

Mr Price: I would like to take that on notice.

CHAIR: Have you not made inquiries on that in the past?

Mr Price: I would like to take that on notice if I may.

CHAIR: The second question or the first one?

Mr Price: Both.

CHAIR: Have you made inquiries on the role, participation and activities of other directors of the receiving company?

Mr Medcraft: We will take it on notice.

CHAIR: Why is that?

Mr Medcraft: We have a right under your rules to take it on notice, I believe.

CHAIR: Yes. I am not asking you for the detail of the discussion or the transcripts. I am simply asking you if the organisation spoke to all of the directors of the company at the relevant time.

Mr Medcraft: I think the thing is that they need to go back and check, I presume.

Ms Armour: We know that we did not speak to all the directors of the company at the relevant time, but we did receive a significant amount of material from the company, including relevant board minutes. So we are aware of the knowledge amongst the other directors of the intention of these individual directors to acquire shares, and we are aware of their discussions on these matters.

CHAIR: I was going to come to that. So you have received minutes of all of the relevant board meetings that discussed the consideration.

Mr Medcraft: Correct.

CHAIR: Tell me: in David Jones—

Mr Medcraft: Sorry. Do we need to provide further information?

Mr Price: Does that answer your question, Senator?

CHAIR: It may. I am now advised that you had the minutes.

Mr Price: We had the minutes.

CHAIR: You had the minutes, and you have also advised that you are going to take on notice as to whether you interviewed all of the other directors.

Mr Medcraft: No, we did not.

CHAIR: You did not.



Mr Price: I just wanted to make sure the intention was to see whether we had the minutes. Do you need to provide any further information?

Ms Armour: We know we did not.

CHAIR: Okay. At meetings of the board of directors of David Jones, who takes the minutes? Does the company secretary take the minutes or is it delegated to another officer of the company?

Mr Savundra: I would have to take that on notice.

Q - Are you satisfied in that context, Mr Price, that all of the material that was received by those three named gentlemen was equally received, at the same time, by all of the other directors and discussed fully at directors meetings or board meetings that considered the matter?.....Have you not made inquiries on that in the past?

Answer:

Between 8 and 27 November 2013, ASIC interviewed Mr Mason, Mr Clapham, Mr Vamos and Mr McLennan in relation to the meeting of David Jones non-executive directors on 28 October 2013, among other things.

ASIC received and reviewed documents from David Jones including:

- i. all minutes and board papers of David Jones board meetings between 24 September 2013 and 22 October 2013;
- ii. all handwritten notes of attendees at the meeting of non-executive directors of David Jones on 28 October 2013;
- iii. all minutes and handwritten notes of attendees at the David Jones board meeting of 11 November 2013; and
- iv. all research papers relating to the potential merger of David Jones and Myer, prepared by its advisers Port Jackson Partners and Gresham Partners.

The investigation established that:

- (i) at 8:00am on 28 October 2013, Paul McLintock, Chairman of Myer, met with Peter Mason, Chairman of David Jones, and presented a confidential, conditional, non-binding indicative proposal to begin talks in relation to the potential nil-premium merger of Myer and David Jones via a scheme of arrangement to be driven and funded by David Jones. The proposal consisted of a nine-page letter signed by McLintock and a 12-page presentation. It was a condition of the proposal that the directors of David Jones unanimously approve the transaction on the terms set out in the proposal letter;
- (ii) at 1:00pm on 28 October 2013, Mr Mason convened a meeting of all the non-executive directors of David Jones, also attended by Bruce McLennan of Gresham Partners Limited. Peter Mason, Melinda Conrad and Bruce McLennan attended in person. John Harvey, Jane Harvey, Philippa Stone, Leigh Clapham and Steven Vamos attended by telephone. Mr Mason read out the main points of the Myer Proposal and each non-executive director was asked to give, and in-turn provided, their comments on the Myer Proposal. The non-executive directors were unanimously negative, with some recommending that the proposal be rejected forthwith; and
- (iii) at 10:00am on 11 November 2013, a board meeting of David Jones was convened, attended by Peter Mason, Steve Vamos, Leigh Clapham, Melinda Conrad, Jane Harvey, Philippa Stone, Paul Zahra



(CEO), Brad Soller (CFO) and a number of legal representatives and advisors. The directors gave the unanimous view that David Jones should not proceed with the proposal and it was resolved to respond to Myer with a letter of rejection. The directors of David Jones relied on a number of documents including the Myer invitation letter dated 28 October 2013 in making this resolution.

Q - Have you made inquiries on the role, participation and activities of other directors of the receiving company?

Answer:

ASIC did not proceed to interviews of other witnesses (including the other David Jones directors) following receipt of Harold Shapiro's expert report dated 31 December 2013 because further witness evidence would not be able to establish whether or not the information contained in the Myer invitation was material in the sense required by the Corporations Act. In the absence of proof of materiality, no insider trading offence can be made out.

Q- At meetings of the board of directors of David Jones, who takes the minutes? Does the company secretary take the minutes or is it delegated to another officer of the company?

Answer:

ASIC understands that the Company Secretary of David Jones takes the minutes at David Jones board meetings which are then approved by the Chairman of David Jones.



2. (pp. 7-8) JP

CHAIR: All right. Mr Price, has anything emerged in the public domain, or in private information you have received since you put out your statement, to suggest that it might be necessary to have discussions with all of the other directors of David Jones?

Mr Price: I think that to date the answer, from my perspective, is no. Cathie or Chris, do you have anything to say?

Mr Savundra: No, unless there is some specific information that comes to light. There is nothing at this stage, but obviously we reserve the right, and have reserved the right, to do so should new evidence or new information emerge.

CHAIR: The reason I ask that question is simply that there was some disquiet in a paper as to the level of information received and the level of knowledge those other directors had, and they expressly, by public release, disassociated themselves from some activities on that basis. I thought it might have been useful to dig down into what their particular concerns might be.

Mr Savundra: Just to add, there has been no approach of ASIC, so it is only through them.

CHAIR: No approach by ASIC or to ASIC?

Mr Savundra: To ASIC.

CHAIR: And also no approach by ASIC.

Mr Savundra: By ASIC.

CHAIR: Okay. David Jones has recently announced that it is reviewing its share trading policy. Are there any aspects of the current policy that are of concern to ASIC?

Mr Price: We did speak to representatives of David Jones about their intentions to amend the policy, and we did make some suggestions more broadly in terms of how that policy was worded, and we will continue to engage with them.

CHAIR: On that issue.

Mr Price: Yes.

CHAIR: On the new share trading policy. Generally speaking, in terms of preventing insider trading from occurring within companies, how important in the scheme of things are the share trading policies of individual companies relative to the importance of the broader regulatory framework under which you work?

Mr Price: If I can go back a step: the issue of director share trading was looked at in some detail by the Companies and Markets Advisory Committee, the government's law reform advisory committee, CAMAC, and it provided a report to government in 2009, including on this issue around director share trading, particularly in black-out periods. It made the point that, when you look at the regulatory framework, some of the key protections that are essential are already in place: laws in relation to insider trading; laws in relation to improper use of confidential information; and laws in relation to transparency of director share trading in section 205G of the Corporations Act. But then CAMAC went on to note that, even if directors are in possession of information that is not material to the company share price, so the information itself would not move the company share price, director share trading may cause concern. That is because there can be a perception of unfairness if a director has information that others do not, and they trade on that basis. That is even if the information in question would not have an impact on the share price. That is the genesis of this idea of share trading policies that we have now.

Following the CAMAC report handed down to government in June 2009, the ASX put in place a listing rule, which is listing rule 12, and that rule actually requires that companies set out a director share trading policy. There is substantial guidance about what those policies should contain—and that is in ASX guidance note 27. In addition to that, there is also some industry guidance about what people should think about when they set up that policy—for example, the Governance Institute of Australia, formerly Chartered Secretaries of Australia, have a good practice note on this very point.

To go back to your question: how important are these policies in the broader world of stopping insider trading? They provide a function in reminding people what their legal obligations are, but the legal obligations around insider trading are actually in the Corporations Act

CHAIR: I have one further question before I hand over to my colleagues.



Mr Medcraft: Just adding to what Commissioner Price said, given that and given recent events, that is why we made the recommendation to the minister to actually set up that corporate governance roundtable to—

Mr Price: To see if there is any tightening.

Mr Medcraft: To bring the parties together from an investor and issuer side to actually look at this. This was our initiative, so we thought it was important to perhaps take the initiative here and the minister supported us on that. I think it is a good thing for us to have a roundtable to see whether everything is working fine.

CHAIR: From what I have seen in the press, I happen to agree with your assessment there, Mr Medcraft. It is useful to have that information out in the public domain. Mr Price, I have one final question on this issue before I hand over to my colleagues. As I understand it, the most senior officer of David Jones has tendered his resignation. The board is about now finding a replacement. Two other directors have indicated they are going to step down within a three-month period and assert the company is doing a search for further replacement directors. Are you satisfied, Mr Price, that at all relevant times those three persons conducted themselves in an ethical and principled manner that we would expect of company directors?

I say that in the context of a lot of examination going on at the moment of politicians and former politicians as to their behaviour. Whilst I do not equate the two, a high standard in public life and public companies is expected. The question is: do you say to us that at all relevant times these three individuals conducted themselves in this matter in a principled and ethical manner?

Mr Price: That actually raises a couple of issues. I would not mind reflecting on that a little bit more so I might take that on notice.

Answer:

Pursuant to the requirements of section 13 of the Australian Securities and Investments Commission Act 2001, ASIC initiated an investigation relating to share trading by certain directors of David Jones Limited as it had reason to suspect that there may have been committed a contravention of the corporations legislation. The investigation carried out by ASIC was concerned with whether there had been a contravention of the corporations legislation, not with whether certain persons had acted in a principled or ethical manner.

In its appearance before the Senate Economic References Committee on 19 February 2014, ASIC:

- (a) commented on the importance of a director having regard to how his or her actions may be perceived by the investing public and whether his or her actions could reduce confidence in the integrity of the market; and
- (b) drew attention to the report in June 2009 of the Corporations and Markets Advisory Committee entitled "Aspects of Market Integrity". In its report the Committee expressed the view that it was in the interests of a company, as a matter of good and responsible governance and to maintain the confidence of investors, to adopt a disciplined approach to trading by its corporate officers in the company's securities during price-sensitive periods. The Committee also said that directors occupy a privileged position in relation to a company's affairs and that they should neither abuse their privileged position nor be seen as abusing it.

On 14 March 2014, ASIC has convened a roundtable corporate governance which considered, amongst other things, current market practice regarding director share trading in Australia and related aspects of market integrity. ASIC will report to the Assistant Treasurer by the end of April 2014.



3.(p. 15) PK/GM

Mr Medcraft: The overall point is that one in five Australians sees an adviser today. It probably should be one out of two Australians. So I think the sector should be thinking about this. It is not how you can divide up today's 20 per cent pie, it is how you can divide a 50 per cent pie. I think the industry needs to be thinking long-term and going 'How can we actually make this 50 per cent so that one out of two Australians sees an adviser?' I think that is the challenge and it is a challenge we all have in this sector. To FoFA, I think what Peter pointed out is that we have preserved the principles that were in FoFA, which are removal of the conflicts on tier 1 financial advice, and the best-interest duty. Our job is to do the best with what we have and that is what we are trying to do.

Senator DASTYARI: But it makes your job harder, does it not?

Mr Medcraft: We try to do the best with what we have but I will say it really worries me, the financial advice sector. I would really appeal to them. They really have to try and grab that challenge and win that confidence. They really have to do it, because we really need it—with superannuation. We actually need it. We need advice we can trust.

Senator BUSHBY: I understand what you are saying, that Australians need to have a financial-advice industry where they feel they can go and see their financial adviser and trust the advice they are going to get.

Mr Medcraft: Like seeing their doctor or lawyer.

Senator BUSHBY: And how to achieve that, were the issues that were canvassed by the Ripoll inquiry. There were a lot of submissions about how that could be done and in the end they made a set of recommendations. I do not think it was unanimous, but there was a set of recommendations and some recommendations by other members of the committee. The government then looked at the Ripoll inquiry and made decisions which included things that were not canvassed by or recommended by the Ripoll inquiry—is that correct?

Mr Medcraft: Yes.

Mr Kell: Agreed.

Mr Medcraft: I cannot—I think they included bits that are not—

Senator BUSHBY: You might take it on notice. I believe the FOFA reforms included measures that were not recommended by Ripoll—but similarly some of the measures recommended by Ripoll were not taken up by the government. What that highlights to me is that there is a range of options for how you actually try to foster a financial advice industry where Australians can feel they are going to get good advice. Some of those were trialled in the FOFA and some recommended by Ripoll were not taken up. But you mentioned yourself in your own recommendations there is an option for helping to do that. There is a range of options that we can try to implement in government which are not necessarily mutually exclusive to what is in FOFA. There are other ways of looking at this and how you can deal with it. You are nodding and saying that is correct.

Mr Medcraft: Actually, I think industry very much welcomes the idea of, say, having a national register of all employer representatives. This is where they, as well, can benefit by tracing bad apples who are not doing a good job. I think that is a constructive proposal. As well there could be a national exam, so that if you see an adviser you know they have the same level or standard. It a bit like sitting at HSC. We know that it is at least a common, level playing field. So I think there are positive ways of improving people's confidence in the standard and quality of advice.



Q - You might take it on notice. I believe the FOFA reforms included measures that were not recommended by Ripoll—but similarly some of the measures recommended by Ripoll were not taken up by the government.

Answer:

The *Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Financial Products and Services in Australia* (the Ripoll Report) made 11 recommendations:

- Two of these recommendations were not implemented (please refer to Recommendations 5 and 9 in the table below);
- Two recommendations were not directed at ASIC but at the Government (please refer to Recommendations 2 and 10 in the table);
- Recommendations 1, 3 and 4 are relevant to FOFA law reform and the conflicted remuneration and the best interest obligations; and
- All other FOFA reforms, such as the Fee Disclosure Statements, were not Ripoll Report recommendations.

Table of Ripoll Report recommendations

No.	Recommendation	Implementation	Detail
1	The committee recommends that the Corporations Act be amended to explicitly include a fiduciary duty for the financial advisers operating under an AFSL, requiring them to place their client's interest ahead of their own	Yes	The best interest duty and related obligations in Div 2 of Pt 7.7A require advice providers, when providing personal advice to retail clients to: <ul style="list-style-type: none">• Act in the best interest of their clients;• Provide appropriate advice;• Warn the client if advice is based on incomplete or inaccurate information; and• Prioritise the client's interests.
2	The committee recommends that the government ensure ASIC is appropriately resourced to perform effective risk-based surveillance of the advice provided by licensees and their authorised representatives. ASIC should also conduct financial advice shadow shopping exercises annually.	This recommendation relates to government funding.	
3	The committee recommends that the Corporations Act be amended to require advisers to disclose more prominently in marketing material restrictions on the advice they are able to provide consumers and any potential conflicts of interest.	Yes	This concept informs the conflicted remuneration provisions (although these provisions go further than disclosure as they ban): <ul style="list-style-type: none">• AFS licensees and representatives from accepting conflicted remuneration;• Product issuers and sellers from giving conflicted remuneration; and• Employers from giving AFS licensees and employees conflicted remuneration.
4	The committee recommends that	Yes	Yes, again this concept reflected in the



	the government consult with and support industry in developing the most appropriate mechanism by which to cease payments from product manufacturers to financial advisers.		conflicted remuneration provisions.
5	The committee recommends that the government consider the implications of making the cost of financial advice tax deductible for consumers as part of its response to the Treasury review into the tax system.	No	We note that the Assistant Treasurer recently reaffirmed that this reform is not possible in the current fiscal climate.
6	The committee recommends that section 920A of the Corporations Act be amended to provide extended powers for ASIC to ban individuals from the financial services industry.	Yes	FOFA implemented: <ul style="list-style-type: none"> • A change to the licensing threshold so that ASIC can refuse or cancel/suspend a licence where a person is likely to contravene (rather than will breach) its obligations; • Extended the statutory tests so that ASIC can ban a person who is not of good fame and character or not adequately trained or competent to provide financial services; • A change to the banning threshold so that ASIC can ban a person if they are likely to (rather than will) contravene a financial services law; and • Clarification that ASIC can ban a person who is involved, or is likely to be involved, in a contravention of obligations by another person.
7	The committee recommends that, as part of their licence conditions, ASIC require agribusiness MIS licensees to demonstrate they have sufficient working capital to meet current obligations.	Yes	In January 2012, ASIC released <u>an investor guide</u> and regulatory guidance with new disclosure benchmarks and principles for agribusiness managed investment schemes to improve investor awareness of the risks associated with these products. The benchmarks include requirements around fee structure and responsible entity or related party interests in the agribusiness scheme; designed to ensure fees are adequate to cover operating expenses.
8	The committee recommends that sections 913B and 915C of the Corporations Act be amended to allow ASIC to deny an application, or suspend or cancel a licence, where there is a reasonable belief that the licensee 'may not comply' with their obligations under the	Yes	Refer to Recommendation 6 above.



	licence.		
9	The committee recommends that ASIC immediately begin consultation with the financial services industry on the establishment of an independent, industry-based professional standards board to oversee nomenclature, and competency and conduct standards for financial advisers.	No	ASIC did not conduct this consultation because the Government ran an Advisory Panel on financial advice and professional standards, formed in November 2010. The Panel was to consult on professional, ethical, competency and training standards for the financial advice industry. ASIC Commissioner Greg Medcraft chaired the Panel.
10	The committee recommends that the government investigate the costs and benefits of different models of a statutory last resort compensation fund for investors.	This was a recommendation for the Government	On 26 April 2010 the Government commissioned Richard St John to undertake a review to consider the need for a cost and benefits statutory compensation scheme. The report was published in April 2012 and concluded that it would be inappropriate, and possibly counter-productive, to introduce a more comprehensive last resort compensation scheme to underpin the current relatively light compensation regime for financial advisers and other providers of financial services.
11	The committee recommends that ASIC develop and deliver more effective education activities targeted to groups in the community who are likely to be seeking financial advice for the first time.	Yes	Since 2009, ASIC has sought to target those consumers seeking advice for the first time by adding information about choosing and working with financial advisers to our Money Smart website, as well as developing a suite of calculators and tools designed to help people have a better informed conversation with an adviser. We have also released a new booklet aimed at people thinking about getting financial advice.



4. (p. 17) GM

Senator WILLIAMS: Was your appointment advertised or were you just appointed to the position?

Mr Medcraft: I was actually headhunted. I was running the Australian Securitisation Forum. I was headhunted by Heidrick & Struggles, I think it was.

Senator WILLIAMS: Headhunted by whom?

Mr Medcraft: I think it was Heidrick & Struggles.

Mr Kell: They are a search firm.

Mr Medcraft: Yes.

Senator WILLIAMS: Who then recommended you to the Treasurer for the job.

Mr Medcraft: The last thing I expected was to be a regulator. I was running an industry group.

Senator WILLIAMS: Right. I was glad to hear in your opening statement to this inquiry 'enable ASIC to do a better job'. I could not agree more. I want to refer to some of the things that have been done. You put an enforceable undertaking on AMP?

Mr Medcraft: I did not, but previous—

Senator WILLIAMS: Well, ASIC did.

Mr Medcraft: Yes.

Senator WILLIAMS: During that AMP enforceable undertaking, ASIC made a point that 93 per cent of the products sold by their financial advisers were actually AMP products. Can anyone answer if that is correct?

Mr Medcraft: On the question of the headhunters, I will come back to you with exactly which one it was, if you like.

Senator WILLIAMS: Did you read about how you got the job in *The Financial Review*?

Mr Medcraft: Sorry?

Senator WILLIAMS: Were you informed you had the job or did you read about it in *The Financial Review*?

Mr Medcraft: I did read about it in *The Financial Review*.

Senator WILLIAMS: I heard that you had found you had got the job by reading it in the paper. You were not informed.

Mr Medcraft: It was not that I had got the job. They said I had not applied for it. We will come back to you. I do not know whether you want the exact one. Can I just say it was a research firm? I will not say the name.

Answer:

Greg Medcraft first joined ASIC in February 2009 as a Commissioner.

He was recruited by Korn Ferry for the role which was also publically advertised and then selected by a panel made up of the Secretary of the Treasury (Ken Henry), the Public Service Commissioner and ASIC Chairman (Tony D'Alosio).



5.(p. 17) PK

Senator WILLIAMS: Okay. Moving on from that, I want to get to AMP. Was it the case that ASIC said that 93 per cent of the products advised by the financial planners were actually AMP products? I want to get to this point of vertical integration. Mr Kell, is that the case?

Mr Kell: Senator, I cannot remember the exact number, but it is around that. I am happy to check it for you.

Senator WILLIAMS: Can you take it on notice?

Mr Kell: Yes.

Senator WILLIAMS: Did you do a review with Macquarie Equities Limited and Commonwealth Financial Planning on a similar aspect, of financial planners recommending the products of the company they work for?

You did it with AMP. The question is: would you do it with those other two companies you put enforceable undertakings on?

Mr Kell: I do not have the answer to that off the top of my head, but I am happy to take it on notice.

Q - Was it the case that ASIC said that 93 per cent of the products advised by the financial planners were actually AMP products?

Answer:

Yes.

In the Enforceable Undertaking with AMP Financial Planning Pty Ltd (AMPFP) ASIC stated at paragraph 2.4.3: "Between January 2005 and October 2005, 93% of all new investment or superannuation business resulting from the advice of AMPFP Planners was invested in AMP platforms."

Q - Did you do a review with Macquarie Equities Limited and Commonwealth Financial Planning on a similar aspect, of financial planners recommending the products of the company they work for? You did it with AMP. The question is....would you do it with those other two companies you put enforceable undertakings on?

Answer:

No, with the type of entity based surveillance involved in these matters, each surveillance tends to be different as our concerns are matter specific.

In the case of Macquarie Equities Limited (MEL) we examined compliance deficiencies that involved a significant number of its advisers. These deficiencies included instances of:

- client files not containing statements of advice;
- advisers failing to demonstrate reasonable basis for advice provided to the client;
- poor client records and lack of detail contained in advice documents;
- lack of supporting documentation on files to determine if there was a reasonable basis for the advice provided to the client; and
- failing to provide sufficient evidence that clients were sophisticated investors.

In the case of Commonwealth Financial Planning Limited (CFPL) we were concerned about issues including:

- the adequacy of CFPL's processes and controls to deal with ongoing risks of non-compliance;
- CFPL's ability to deal with misconduct by its representatives in a consistent manner; and
- CFPL's capacity for early identification of irregularities in its advice process.

ASIC's Supplementary Submission on CFPL to the Senate inquiry into the performance of the Australian Securities and Investments Commission deals with the CFPL matter in considerable detail.



6.(p. 21) JP

Senator FAWCETT: I want to come back to the point about the ability to lift a phone and suspend somebody and to look at the threshold of compliance and non-compliance. In their submission the Institute of Company Directors talked about the regulatory guides that ASIC produce at times because of vague or poorly drafted legislation. How many of those do you produce?

Mr Price: We might take it on notice. Not all the regulatory guides that we have issued are still current, but, sequentially, we are up to more than 200.

Senator FAWCETT: Have you ever had cases where you have written your interpretation of legislation in a guide and then sought to apply that retrospectively?

Mr Price: Retrospectively?

Senator FAWCETT: So, before the guide is issued.

Mr Price: I would be surprised if we had, but I had better take that on notice; I am not sure.

Q- How many of those (Reg Guides) do you produce?

Answer:

ASIC has produced a total of 251 Regulatory Guides since it was formed in 1989.

From time to time, many of these Regulatory Guides are superseded because of a change in the law or because they have become otherwise redundant. In these cases, the Regulatory Guide is withdrawn, but is still listed on our Regulatory Guide index with an explanatory note.

Q - Have you ever had cases where you have written your interpretation of legislation in a guide and then sought to apply that retrospectively?

Answer:

We enforce the law and not regulatory guidance. The role of our guidance is to:

- explain when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act);
- explain how ASIC interprets the law;
- describe the principles underlying ASIC's approach; and
- give practical guidance (for example, describing the steps of a process such as applying for a licence, or giving practical examples of how regulated entities may decide to meet their obligations).

We are unaware of a case where we have applied our regulatory guidance retrospectively. As previously stated, it is the law rather than regulatory guidance that is enforced. However, we do not seek to provide guidance on every law we administer so we do enforce laws on which we have not provided guidance.



7.(p. 22) CA/JP

CHAIR: Before I hand back to Senator Fawcett, I have a question. Going back to Mr Shapiro, whom you appointed in the DJs matter to be the outside adviser, in his work did he do an event study?

Mr Price: What do you mean by an 'event study'?

CHAIR: An event study is an analysis to determine the reason for a spike in the share price to try and reduce what occurred to one particular event.

Mr Savundra: No, he did not undertake an event study. Just to reinforce again, the legal test for insider trading on materiality is an influence test; it is not a price test. The question that the expert needs to address is: would the information influence a common investee in their investment decision?

CHAIR: Was he asked to do an event study?

Mr Savundra: No, he was not.

CHAIR: In these matters of insider trading, where there is a demonstrable outcome once information is received by relevant persons and that demonstrable outcome is a share spike or a share decline, would it be normal practice to conduct an event study?

Mr Savundra: I would not say it is normal practice. We have in the past. The test is an ex-ante test rather than an ex-post test, but obviously you can use ex-post to assist—

CHAIR: You could do both.

Mr Savundra: Yes. We have in the past. Generally, defendants that we take action against regularly do, but I would not say it is standard practice.

Senator WILLIAMS: I think an event study is essential. If you look at every class action that has ever been carried out, you will see there has been an event study, a study of how the market was affected because of information. Perhaps you should look at getting an event study from Mr Shapiro on that very issue.

Mr Savundra: I will take that on notice. The reason they do that in a class action is that they usually need to quantify the loss. It is a different issue.

Q- Perhaps you should look at getting an event study from Mr Shapiro on that very issue.

Answer:

Mr Shapiro was briefed to consider the share price impact of the 1 November 2013 sales data announcement and the 30 January 2014 Myer invitation announcement. Mr Shapiro applied the relevant test for materiality and, in doing so, closely examined the price movements of David Jones shares immediately after each relevant announcement and the reasons for these price movements. He provided convincing reasons in his reports for the behaviour of the market following the relevant announcements.

Analyst's reaction to both announcements supports the expert's view that the relevant information was not material.

Mr Shapiro was not required to, nor did he, undertake an event study to determine the question of materiality. While share price movement can be instructive, it is not determinative of materiality and an event study alone will not satisfy the relevant legal test. In the circumstances, ASIC does not currently propose to obtain an event study in relation to this matter.



8. (p. 23) PK/GM

Senator FAWCETT: My concern is the lack of consultation. CPA were one example, but it is a theme about communication and consultation. You are not the only regulator that industry looks at and says that you are developing things in isolation as opposed to working collaboratively with them. That is my line of questioning. Whether or not they have disagreements is not the point. How often does ASIC meet with financial services industry associations, whether it is around your regulatory guise or other forums?

Mr Medcraft: I will have to take on notice how often we meet with—

Senator FAWCETT: If you could take that on notice, that would be good.

Q- How often does ASIC meet with financial services industry associations, whether it is around your regulatory guise or other forums?

Answer:

In the last financial year, ASIC held a total of more than 620 meetings with industry associations.

Formal forums for consultation and engagement with industry stakeholders include the Consumer Advisory Panel, the External Advisory Panel, Markets, the Supervisory Advisory Panel and the Directors Advisory Panel and quarterly or bi-annual liaison meetings with industry associations such as the Australian Bankers Association, the Financial Planners Association, the Insurance Council of Australia, the Australian Financial Markets Association, the Australian Stockbrokers Association, the Certified Practising Accountants and the Institute of Chartered Accountant Australia.

In respect of the financial services industry associations, ASIC has active and ongoing engagement with stakeholders. By way of example, ASIC's Financial Advisers team has held 53 industry association meetings so far this financial year and in the 2012-2013 financial year it held 90 meetings with industry associations.

In addition to meeting with industry associations we also consult extensively with industry on regulatory proposals.

In the 2012-2013 financial year, ASIC issued 33 consultation papers for public comment on a range of policy and regulatory proposals. On average, stakeholders had over 7 weeks to respond to a consultation paper. This was followed up with stakeholder roundtables or targeted stakeholder meetings and discussions to address any issues raised.



9. (pp 23-24) JP

Senator FAWCETT: What is the purpose of the ASIC Financial Services Consultative Committee?

Mr Price: I will take this on notice as well to make sure that it is accurate, because I am relying on my memory. The Financial Services Consultative Committee was set up after the implementation of the Financial Services Reform Act, which was introduced into parliament around 2004. It was directed towards dealing with a situation where a uniform set of legislation and regulatory rules had been introduced right across a diverse range of sectors that either previously were not regulated or alternatively were regulated by different models. So it was meant to try to pull together some of those more thematic type issues around the introduction of that new financial services reform legislation back in 2004. That is my recollection of the reason why that committee was set up.

Senator FAWCETT: The implication there is that the committee had a term to its existence, that you do not anticipate it has an ongoing role.

Mr Price: I need to go back and check the ins and outs of the committee. My recollection is that it went back to around 2004. I think it was discontinued three or four years later when a lot of the implementation issues around the Financial Services Reform Act had been largely bedded down. But, please, let me check that because I am relying on my memory and it was a long time ago.

Senator FAWCETT: Clearly it is some years since the committee has met, then?

Mr Price: That is certainly my recollection. What you tend to see now are meetings more with the various separate industry groups. But there are also overarching industry groups now.

Mr Kell: On that point, because it does develop as new reforms are coming through, we had an extensive range of consultation right across the financial services industry around the introduction of FOFA and also some of the super legislation, including national roadshows and extensive consultation with industry groups, collectively and individually. It is no exaggeration to say that there were multiple meetings every week around those issues, around how we were going to implement the law and around the concerns of individual companies. Also, there were national public meetings around the country.

Senator FAWCETT: Could you provide on notice a list of the meetings, as I think you have undertaken to do? I am particularly interested in knowing what structured meetings you had either with sectors of the industry or with the industry as a whole.

Mr Medcraft: In relation to that, we have regional consultative committees as well the national peak ones.

Senator FAWCETT: Feel free to include that in your answer on notice.

Q - What is the purpose of the ASIC Financial Services Consultative Committee?

Answer:

In 2007, ASIC established the Financial Services Consultative Committee (FSCC).

The forum provided an opportunity to deal with general financial services issues that were not specific to a particular industry/association.

Industry participants from across the entire financial services sector were invited to participate in the forums with the FSCC meeting on a bi-annual basis.

In 2008, the FSCC was disbanded following a restructure of ASIC and feedback from industry participants that they did not feel comfortable raising regulatory issues in front of one another. The forum was replaced by individual meetings with industry associations. Please see ASIC's response to question 8 for more information on our meetings with financial services industry associations.

In addition, ASIC Commissioners have regular meetings with the boards of both industry associations and major financial service firms.



Q- Could you provide on notice a list of the meetings, as I think you have undertaken to do? I am particularly interested in knowing what structured meetings you had either with sectors of the industry or with the industry as a whole [note that this was said in the context of the financial services industry].

Answer:

Each year, ASIC holds a number of meetings with the financial services industry. These meetings occur on both a structured and an ad hoc basis.

Our structured program of meetings with the financial services industry includes meetings with the following organisations:

- FPA (Financial Planners Association);
- AFA (Association of Financial Advisers);
- SPAA (SMSF Professional's Association of Australia);
- NIBA (National Insurance Brokers Association);
- AIOFP (Australian Independently Owned Financial Planners);
- ASFA (Australian Superannuation Fund Association);
- FSC (Financial Services Committee);
- ABA (Australian Bankers Association);
- ICA (Insurance Council of Australia);
- CPA (Certified Practising Accountants);
- ICAA (Institute of Chartered Accountant Australia); and
- FSC (Financial Services Council).

In addition to our structured meeting program, two of our stakeholder teams, the Financial Advisers Team and the Deposit-takers, Credit and Insurers team have regular meetings with the financial services industry.

By way of example, ASIC's Financial Advisers team has held 53 industry association meetings so far this financial year and in the 2012-2013 financial year it held 90 meetings with industry associations. ASIC's

Deposit-takers, Credit and Insurers team has attended 58 meetings with industry associations so far this financial year and attended 72 meetings with industry associations in the 2012-13 financial year.



10. (p. 24) GM

Senator FAWCETT: You make the comment there that ASIC obviously has some concerns and you make evaluations along the way. I would like to come back to a comment you, Mr Medcraft, made in your opening statement, which was that many of your staff have experience in the industry. I am happy for you to take my questions on notice. How many staff have experience and, more importantly, what level of competence—by competence, I mean a combination of both qualification and experience—is there across ASIC?

Mr Medcraft: I will have to take that on notice.

Senator FAWCETT: Secondly, what is your staff turnover? Once again you can take it on notice. That concerns the corporate knowledge that is residual within the organisation.

Mr Medcraft: It is dropping at the moment.

Senator FAWCETT: My last question concerns promotions. I would be interested in understanding the basis upon which people are promoted within ASIC, whether you laterally recruit, whether you promote predominantly from within and, again, what aspects of competence for the role, in terms of qualifications and experience, are applied to that. Lastly, does industry have any voice in terms of the level of competence they think is appropriate for somebody acting in that part and making judgments upon what they do?

Mr Medcraft: We will take it on notice.

Q - How many staff have experience and, more importantly, what level of competence – by competence, I mean a combination of both qualifications and experience - is there across ASIC?

Answer:

The information provided refers to the Senior Executive Service, Executive Level (1&2) in ASIC's stakeholder, enforcement, and legal functions, along with graduates across ASIC. It does not include non-executive level staff (other than graduates), or operations and registry staff.

Qualifications

- 96.3% of this cohort have a tertiary qualification.

The type of qualifications are:

- 70% bachelor degree;
- 41% second bachelor degree or a combined degree;
- 35.7% post graduate diploma, with an additional 5% holding more than one qualification at this level;
- 13.9% post graduate certificate;
- 19.7% masters, and 1.9% have a second masters level degree;
- A small number of ASIC staff have a PhD; and
- 72 % of graduates have a grade point average (GPA) ranking of distinction or high distinction.

The majority of qualifications are combined arts/law, commerce and business.

Experience

The work experience of the cohort is:

- 71.3% have industry experience with 28.4% in financial services;
- 35.9% in law firms (9.6% in the top tier law firms);
- 7.1% in government enforcement agencies (including Australian Federal Police, Police, Crime Commission);
- 9.2% in regulatory bodies other than ASIC (including ACCC, ATO, APRA, Reserve Bank, ICAC, overseas regulatory bodies);
- 24.4% in other government departments;



- 8.4% in professional services firms; and
- 15.7% have international experience.

The average length ASIC service for the cohort is 7.5 years.

The current average length of service for all ASIC staff is 8.46 years.

Q: What is your staff turnover? Once again you can take it on notice. That concerns the corporate knowledge that is residual within

Answer:

These figures apply to all on-going staff.

As at December 2013 (12 month rolling average):

- 5.60%: Natural attrition (voluntary resignation and retirement of on-going staff); and
- 8.18%: Total turnover (includes all exits of on-going staff).

Length of service and performance of exiting staff:

- The current average length of service for all ASIC staff is 8.46 years;
- For people leaving as a result of resignation or age retirement, the average Length of Service is 6.29 years; and
- The performance management records of exiting staff shows fewer high performers are leaving compared to other staff.

Building and retaining corporate knowledge

ASIC has invested in retaining corporate knowledge by:

- recruiting a dedicated Knowledge Manager; and
- implementing knowledge retention programs which are based on the retention of *explicit* knowledge (captured in databases) and also *tacit* knowledge (held by people).

1. Capturing organisation knowledge in the knowledge management databases

These databases contain ASIC opinions/advice, submissions, judgements, banning decisions, samples, procedures, templates, tools, lessons learned reports, expert reports and stakeholder presentations.

Content is reviewed with subject matter experts on a scheduled basis, to replenish and update as needed. The databases ensure that knowledge that is critical for ASIC's work is retained and enhanced systematically.

2. Capturing lessons from our projects and investigations

The *lessons learned* process has generated a range of policies, tools and advice and is particularly important for major matters. Together with the *lessons learned* report, these are captured in a repository and incorporated into the Enforcement Project Management framework, training program and project management practices.

A review committee ensures key issues are addressed systematically and lessons communicated across ASIC.



Q: I would be interested in understanding the basis upon which people are promoted within ASIC, whether you laterally recruit, whether you promote predominantly from within and, again, what aspects of competence for the role, in terms of qualifications and experience, are applied to that.

Answer:

Over the 2012 and 2013 calendar years, half (51%) of the vacancies filled at the EL1 and EL2 levels were filled by existing staff on promotion or transfer at level. The remaining 49% of positions were filled by staff from the external market.

For every position to be filled in ASIC a detailed position description is prepared. The position description details the accountabilities of the role and the selection criteria. This includes the specific qualifications, knowledge, skills and experience required for the position, as well as more general capabilities. This position description provides the basis on which the qualifications, experience and job-related qualities of candidates are assessed.

All applicants (internal and external) are considered through a rigorous competitive selection process. This involves applications being shortlisted and a panel consisting of two to three people, (at least one of whom is in a more senior position, and usually including a representative from another business unit), being convened. Shortlisted candidates are interviewed by the panel in accordance with an interview guide including appropriate technical and behaviour-based interview questions. Reference checks are conducted and a selection report prepared and approved by the relevant delegate prior to any job offers being made. The process may also include other selection methodologies such as psychometric testing and second interviews as appropriate. No preference is given to internal applicants.

Where internal staff are successful in applying for a non-ongoing (temporary) role, they undertake the role on 'higher duties' or temporary transfer arrangements, returning to their original role at the end of the period.

Staff may also gain short term opportunities to act in other positions at their level or above, without those positions having been advertised, for example, to backfill staff on leave or working on projects. In some cases these positions are advertised internally.

On occasion, staff may also be transferred laterally on a permanent basis, if they are a suitably qualified redeployee or to provide a development opportunity, in accordance with Public Service Act requirements.

Q: Lastly, does industry have any voice in terms of the level of competence they think is appropriate for somebody acting in that part and making judgments upon what they do?

Answer:

To avoid any potential for perceived or actual conflicts of interest, we do not invite industry participants to participate in recruitment processes or to be directly involved in stipulating the qualifications and experience required of ASIC staff.

However, as a significant proportion of ASIC's senior executive staff members have experience in relevant roles in industry, they are able to apply that perspective to ASIC.



11. (p. 26) GM

Senator WHISH-WILSON: On pages 172 and 173 of your submission, relating to ASIC's regulatory tool kit, under point 396, you also talk about ASIC having the right, under potential breaches of law, to include compensation for investors. Could you explain why John Gay was not required to pay compensation to investors for that particular breach, why that was not pursued?

Mr Medcraft: We will take it on notice.

Answer:

ASIC does not normally seek compensation or reparation for individual investors from insider trading. This is primarily because it is often difficult to identify the particular victims to be compensated. Only a limited class of investors are likely to be entitled to compensation, those being the counterparties to the offending trades. In the case of Mr Gay, only those investors which traded with Mr Gay during the relevant period are likely to be entitled to compensation. Investors more generally would not be entitled to compensation. This can produce an arbitrary result as many other buyers would not receive compensation as they did not match Mr Gay's orders simply through the sequencing of market orders. Mr Gay traded over 4 days. The orders placed on his behalf resulted in approx 850 separate trades with at least 300 counterparty buyers.

Given compensation is often a difficult and arbitrary process in insider trading matters, ASIC generally prefers to seek to deprive an insider trader of the "proceeds" or "benefits" derived from the illegal trading through the use of the *Proceeds of Crime Act 2002* (Cth) (POCA) with the assistance of either the AFP or the CDPP who can take such actions. Please note, ASIC itself is not empowered to utilise POCA.



12. (p. 27) CA/GM

Senator WHISH-WILSON: I understand that. Is there any ability for those types of fines or penalties to be used for cost recovery? Excuse my ignorance if that is the case. I know you would not prosecute on that basis, but can you tell us how much that court case actually cost the Australian taxpayer?

Mr Savundra: No, I would have to take that on notice, and that would only be ASIC's portion as opposed to the Commonwealth Director of Public Prosecutions, who prosecuted the matter.

Answer:

The cost of ASIC's investigation and the resulting work in relation to the prosecution of Mr Gay was approximately \$250,000.

In any proceedings taken against Mr Gay under POCA, if the CDPP is successful it might be able to recover its costs *in relation to those proceedings* from Mr Gay. Likewise, if the CDPP is unsuccessful it might be required to pay Mr Gay's costs in relation to those proceedings.