



**ASIC**

Australian Securities & Investments Commission

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### **Opening Statement Senate Economics References Committee Inquiry into the performance of ASIC**

**10 April 2014**

Words: 3,369

Good afternoon, Chairman.

Thank you for this opportunity to once again address the Committee.

With me are all of ASIC's Commissioners. They are:

- Deputy Chairman Peter Kell; and
- Commissioners Cathie Armour, John Price and Greg Tanzer.

Also with me are Senior Executive Leaders:

- Joanna Bird;
- Adrian Brown;
- Warren Day;
- Greg Kirk;
- Tim Mullaly; and
- Chris Savundra.

This statement covers six issues which are:

1. How ASIC identifies emerging risks;
2. The timeliness of our enforcement work;
3. Misperceptions that we either only take on small entities or the big end of town;
4. The quality of our staff;
5. An update on CFPL bannings; and
6. The initiatives we have put in place to improve our processes and services in response to this Inquiry.

### **Identifying emerging risks**

ASIC is very active in seeking to identify and respond to emerging risks within our sphere of regulation.

To this end, we established an Emerging Risk Committee in July 2011. The Emerging Risk Committee is comprised of a number of Commissioners and Senior Executive Leaders and formally meets every six weeks.

The Emerging Risk Committee seeks to proactively identify emerging risks. Factors that are taken into account when identifying emerging risks include:

- Macroeconomic and financial developments;
- Issues emerging internationally and international regulatory responses;
- Reports of misconduct data (as a comparative instrument against which emerging trends can be compared);

- Potential conflicts of interest faced by gatekeepers; and
- Innovation across and beyond a particular sector.

Each emerging risk is identified and assessed using a common framework based on the potential for harm, the nature of the risk and the likelihood and consequence of the risk crystallising into an event.

The risk assessment process assists us in determining the severity of the risk and the nature of our response. Our response will vary and runs the full gamut of our regulatory powers.

As an example of the sorts of issues considered by the ERC, a forthcoming meeting will shortly discuss electronic payments systems like bitcoin and the risks and benefits they present.

### **Timeliness of enforcement work**

ASIC often faces criticism that our enforcement actions are not timely enough.

There are a number of factors that impact on the timeliness of our enforcement action, but our aim is always to take successful action as quickly as possible.

Some examples of quick and effective action include:

- Opes Prime:
  - Within a week of ASIC commencing its investigation into the collapse of Opes Prime, we had obtained orders (by consent) preventing three directors of Opes Prime from leaving Australia. Within a year, we had negotiated a significant compensation package of \$253 million for investors.
  - Our investigations led to criminal charges being laid against directors just over 20 months from commencing our investigations.
- Our work to improve practices in the tyre and rim insurance industry:
  - In mid-2012, BMW Australia Finance Ltd notified ASIC that it had breached the National Credit Code in the way it was offering financing of insurance premiums to consumers. BMW subsequently refunded a total of \$1.4 million to 2,466 customers.

Following this breach report, ASIC conducted an industry-wide review that found that there had been improper financing of tyre and rim insurance premiums by some of Australia's largest car financiers. By mid-2013, we obtained agreements from a number of major car financiers to pay back over \$15 million to more than 30,000 car owners.

It is often the case that ASIC's most prompt actions go unnoticed and comment is only made when delays cause action to be slow. It is the experience of all regulators that those affected by misconduct will always want action and outcomes to be quicker.

It is also important to understand that in some cases we may be unable to take quick enforcement action for a number of reasons including evidential difficulties.

In many cases, taking successful litigation involves a number of time-consuming but essential components. This means that achieving enforcement results can sometimes take considerable time.

These factors include:

- the complexity that typically characterises cases involving financial misconduct;
- changes in technology, which have led to huge growth in the volume of information that ASIC is required to collect and analyse;
- increasing globalisation of financial markets, which may mean that vital evidence may be located offshore, which can slow our progress in retrieving it; and
- the potential for delays to arise in any of the steps in litigation itself, including because of backlogs in the court lists from existing caseloads.

Overall, we have a very good success rate on enforcement. In November 2012, as part of a wide international assessment program, the International Monetary Fund (IMF) conducted an assessment of Australia's financial regulation, including in particular ASIC's performance in enforcement. The IMF's report found that:

- ASIC has no reluctance to use its powers to enforce compliance;
- ASIC has good processes for deciding which cases to pursue and how to employ resources in the most efficient and effective way; and
- ASIC is an enforcement focused regulator seeking outcomes that support its regulatory objectives and its success rate, particularly in serious cases, is high.

### **Misperceptions that we only take on either small entities or the big end of town**

I am often told that ASIC either only takes on small entities or only takes on the big end of town.

Of course neither of these assertions is true.

Our enforcement record clearly demonstrates that we take on a very wide range of matters regardless of the size of the entity involved.

For example, we regularly take on big matters. Significant big matter results include:

- obtaining disqualification and pecuniary penalty orders against directors and officers of James Hardie;
- obtaining sentences of 12 months and 24 months for two Opes Prime directors, Laurie Emini and Anthony Blumberg, and reaching a settlement to deliver \$253 million in compensation;
- obtaining declarations that seven directors of Centro Group breached their duties in approving financial reports that failed to disclose significant financial issues facing the company, as well as additional penalties against the former Chief Executive Officer (CEO) and Chief Financial Officer (CFO); and

- jailing Trio director Shawn Richard for a minimum two years and six months, with another director, Tony Maher, still to be sentenced, as well as banning a number of other directors and advisers who recommended Trio investments (the Trio matter combined both fraud and a flawed business model exposed by the GFC).

Of course, we have taken on some big matters that we have not won. Our case on continuous disclosure obligations against Fortescue Metals Group is a case in point. This is the nature of litigation – we will not always be successful. But we need to be prepared to take on big cases in the interests of clarifying the law and contributing to the integrity of our markets.

Matters involving small and medium enterprises are not ignored by ASIC. Small Business Compliance and Deterrence (SBC&D) is a dedicated team within ASIC that undertakes high-volume investigations and prosecutions of more minor breaches of the Corporations Act and National Credit Act relating to ASIC's registry and licensing functions.

In the last three years, our SBC&D team has:

- handled 4,267 requests from liquidators seeking ASIC's assistance in ensuring directors comply with their obligations;
- obtained compliance prior to prosecution at a rate increasing from 40% to 45% in the past three years;
- disqualified 116 directors in the past 3 years from managing corporations;
- successfully prosecuted 1,428 directors in the past 3 years; and
- obtained the first criminal outcome for unlicensed credit activity.

We act without fear or favour irrespective of the size of the organisation. Each matter that is brought to our attention is assessed in the same way and there are a range of factors we consider when deciding to take further action. We have set this out publicly in Information Sheet 151 – *ASIC's approach to enforcement*.

For example, in the area of insider trading, ASIC has taken action against the Chairman of a Listed Company (e.g. John Gay, Chairman of Gunns Limited) through to relatively junior staff who handle confidential information (e.g. Mr Khoo, a banking associate with the Royal Bank of Canada).

In 2010, we conducted a study of our enforcement matters to provide a breakdown of the types of entities that were the subject of our investigations during the previous financial year. This analysis shows that ASIC's resources are directed very evenly across the different sectors of the market.

**Table 1: Percentage of investigations commenced per market sector, 2009–10 financial year**

Market segment <sup>1</sup>	Investigations commenced
Micro	33 (16%)
Small	77 (37%)
Medium	41 (20%)
Large	56 (27%)
Total	207

The information I have provided shows very clearly that ASIC action occurs across the spectrum regardless of entity size.

### Qualifications of our staff

I now want to turn to the issue of the quality of our staff. I, and my fellow Commissioners, take very seriously any criticism of ASIC staff. As I have said before, ASIC staff are highly committed to their work, professional, well qualified and competent. Criticism of ASIC staff often comes from people who do not fully understand the nature of the work we do and the challenges involved.

Since our last hearing, I have asked Helen O'Loughlin, the Senior Executive Leader responsible for People and Development for some detailed information about the qualifications and experience of our staff.

The data shows that 96.3% of our staff have a tertiary qualification (excluding non-executive level staff and operations and registry staff). Of this:

- 70% have bachelor degree;
- 41% have a second bachelor degree or a combined degree;
- 35.7% have a post graduate diploma, with an additional 5% holding more than one qualification at this level;
- 13.9% have a post graduate certificate;
- 19.7% have a 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.

<sup>1</sup> A 'micro entity' has 0–5 employees and/or turnover of less than \$500,000. A 'small entity' is one which is not a micro entity and has 6–15 employees and/or turnover of \$500,000–\$25 million. A 'medium entity' is one which is not a micro or small entity and has 16–250 employees and/or turnover of \$25–\$250 million. A 'large entity' is one which is not a micro, small or medium entity and has over 250 employees and/or turnover of over \$250 million.

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

In terms of work experience for the group:

- 71.3% of staff have industry experience with 28.4% in financial services;
- 35.9% of staff have experience in law firms (9.6% in the top tier law firms);
- 7.1% of staff have experience in government enforcement agencies (including Australian Federal Police, Police, Crime Commission);
- 9.2% of staff have experience in regulatory bodies other than ASIC (including ACCC, ATO, APRA, Reserve Bank, ICAC, overseas regulatory bodies);
- 24.4% of staff have experience in other government departments;
- 8.4% of staff have experience in professional services firms; and
- 15.7% of staff have international experience.

As you can see, our staff are very well qualified and experienced and to suggest otherwise is seriously misinformed.

### **Testimony by Mr James Wheeldon**

Chairman, one issue I want to address is the testimony last week by Mr James Wheeldon.

Mr Wheeldon made serious allegations in front of this Committee about ASIC's granting of legal relief in relation to superannuation calculators in 2005.

He alleged the process "was tainted with corruption" and named a number of current and former ASIC staff, particularly our Senior Executive Leader Mr Mark Adams.

Chairman, let me be clear: ASIC rejects completely Mr Wheeldon's allegations.

Online super fund calculators have long been a common and popular tool ordinary Australian super fund members use to get an indication of the money they will have on retirement.

Without the legal relief granted by ASIC there was a significant risk super funds, including both retail funds and industry funds, would have been unable to provide this useful tool to ordinary Australians.

This was the unintended result of broader reforms to the financial services law implemented in 2002, which meant generic super calculators could be caught under the *personal advice requirements*.

So instead of being free and easily accessible, consumers wanting to use these online calculators would have to see a financial planner for personal advice, which can be expensive and time consuming.

This clearly was not a sensible or desirable situation, and ASIC initially provided public guidance to the industry in May 2004 to help with the provision of these calculators.

However, significant uncertainty remained, which the Government at that time publicly recognised in its 2005 consultation paper on *Refinements to Financial Services Regulation*.

The Government noted ASIC would provide guidance or legal relief for the provision for online calculators to 'promote their use'.

In May 2005, ASIC announced it would grant legal relief to the whole industry (what we call class order relief), and in June that year we issued this relief for super calculators following consultation with a range of super industry bodies. We extended this relief to other investment calculators later that year following further public consultation.

Chairman, there was no special treatment for any parties involved in this matter. I can't emphasise strongly enough that every single super fund, irrespective of which industry association they belong to, irrespective of whether they are big or small, can use this legal relief to provide these calculators to members.

Furthermore, the conditions we attached to this relief apply to all funds in exactly the same way. These conditions are designed to ensure online calculators are of benefit to consumers. They include a requirement that the assumptions underpinning the calculators are reasonable and that the limitations of the calculators are spelt out. The conditions also mean online calculators cannot be used as marketing devices for financial products.

I'd also note that there is no legal relief for super funds from the law against misleading conduct, and ASIC has taken action and will take action if we see misleading online calculators.

In other words, ASIC made a relief decision that was **completely** proper, in response to unintended consequences arising from changes to the law. These are the sorts of decisions we make on a very regular basis. No fee was required to be paid in this case as the relief we provided was *class order relief* applying to all online calculators, and fees are only payable where an individual firm applies to have the law modified for their particular circumstances. Our decision showed no favouritism, and it was very clearly in the **public interest**.

Yes, ASIC did have a person involved in the relief team that was on secondment from a financial services firm. But that person was not a decision-maker and was only involved in assisting policy work that concerned the industry as a whole, rather than considering matters involving individual firms.

ASIC has robust procedures for managing conflicts and these procedures were applied in the case of this secondee.

More broadly, we stand 100 per cent by our decision on granting relief in 2005 for online super calculators. If we had our time again, we would make the same decision.

For the record, Mr Wheeldon was a junior lawyer who worked for ASIC for just nine months in 2004-2005.

Our senior executive leader Mr Mark Adams is a long-standing ASIC officer who has been involved in some of our organisation's major projects over the past two decades.

He is well respected internationally, having recently returned from a secondment at senior executive level in the Ontario Securities Commission.

Mr Adams is a hard-working and diligent public servant of the utmost integrity.

Mr Wheeldon's attack on ASIC staff and Mr Adams has no foundation. The decision he criticises was one that applied equally to all industry participants, and it was properly made.

Most importantly, ASIC's decision was unambiguously positive for millions of ordinary Australian super fund members who can access free, simple online superannuation and investment calculators.

We will provide the Committee with a detailed written response to the allegations against ASIC made by Mr Wheeldon at a later date.

We will also provide the Committee with a detailed written response to the allegations against ASIC made by Dr Stuart Fysh at a later date.

### **CFPL Update**

Last week, ASIC banned Mr Jade Zaicew, a former employee of Commonwealth Financial Planning Ltd (CFPL), from engaging in credit activities and providing financial services for a period of seven years.

Mr Zaicew's conduct was identified as part of an enforceable undertaking (EU) accepted by ASIC in October 2011 which required CFPL to conduct a comprehensive review of its risk management framework and legal and regulatory obligations regarding the provision of financial services, financial advice and the monitoring and supervision of its representatives.

Mr Zaicew is the eighth CFPL financial adviser we have banned in connection with the EU.

Mr Zaicew was banned from providing financial services as ASIC found that between August 2011 and May 2012, he engaged in misleading and deceptive conduct by:

- conducting unauthorised transactions on several client accounts
- including false information in three documents for the purpose of recording client instructions that were not in fact given, and
- backdating four records of advice contained on client files.

ASIC also determined that Mr Zaicew should be banned from engaging in credit activities because:

- he is not a fit and proper person to engage in credit activities in light of the misleading and deceptive conduct he engaged in while at CFPL, and
- he caused his company Lifeguard Private Wealth Pty Ltd (Lifeguard) to breach the credit legislation by representing on the company website that Lifeguard was able to engage in credit activity in circumstances where it was not licensed to do so.

Mr Zaicew has the right to seek a review of ASIC's decision to the Administrative Appeals Tribunal.

### **Improving ASIC**

As I said at our last hearing, ASIC has very much welcomed this Inquiry and is appreciative of the time and effort people and organisations have put into making submissions.

The overwhelming message I have heard is that we need to improve our communications and be more open and transparent.

We have taken this seriously and have already put in place a number of initiatives including:

- the publication of our Enforcement Policy, which I mentioned earlier;
- the introduction of bi-annual public Enforcement Reports;
- our increased commitment to publicising non-enforcement outcomes;
- new processes for consumers and investors reporting misconduct to us; and
- use of new media like Twitter, YouTube and Facebook.

We have also worked on improving our dealings with whistleblowers.

The changes we have implemented include:

- establishing Whistleblower Liaison Officers within all relevant ASIC teams – staff from our Misconduct and Breach Reporting team and the Whistleblower Liaison Officers have all received new training on awareness of whistleblower protections and handling whistleblower complaints. This will provide better, clearer and more regular communication to whistleblowers during investigations; and
- we have conducted a stocktake of matters involving whistleblowers, to ensure these are being given appropriate priority.

### **Closing remarks**

Chairman, as I mentioned before we have welcomed the Inquiry into ASIC's performance.

This has been a rigorous inquiry which has allowed many Australians to have their say. It is an inquiry which ASIC has taken very seriously and to which ASIC has devoted substantial resources.

We believe it has been an opportunity to hear what others think about ASIC and how ASIC can be improved, and also to provide our external stakeholders the chance to get a better understanding of the results ASIC has achieved and the tools we use to fulfil our role as a regulator.

We are grateful to the many people who have provided submissions to the inquiry. We have closely considered all of the submissions in an effort to learn as much as we can from them.

I particularly acknowledge the number of submissions that have been made by people who have incurred significant monetary loss and suffered serious financial hardship. We appreciate the difficult circumstances these people face and the trauma that it can bring and we thank them for their contribution to the inquiry.

Individual losses are distressing. However, the settings established by Parliament for our financial system are such that no financial regulator can prevent all risk of loss from occurring.

In closing, ASIC is committed to reviewing and improving the work we do and how we do it. To this end, we have formulated a number of new initiatives in response to issues raised in submissions, which we have discussed with the Committee.

Chairman, we are now happy to take questions.