SENATE ECONOMICS REFERENCES COMMITTEE
Inquiry into the performance of the Australian Securities and Investments Commission

Answers to questions on notice
Australian Securities and Investments Commission

This document contains ASIC's response to the written questions provided to ASIC on 3 April 2014 and additional Questions on Notice for ASIC from the Senate Inquiry hearing on 10 April 2014.

The Commonwealth Director of Public Prosecutions (CDPP) has provided input into the response where relevant.

Question 1

On February 4, 2009 Ms Casandra Francas a Delegate of ASIC made an order banning Roberto Gerald Catena from providing any financial services for a period of five years.

In her decision Ms Francas (paragraph 49) states "…between 19 July 2006 and (August 2006, there were no rumours of a merger of takeover of VSL."

At the Committal Hearing in the Melbourne Magistrates Court on 23 May 2011, Michael Desmond McCabe an Investigator with ASIC testified that in June 2008 he spoke to a fund manager who indicated there were rumours in the market place about a possible takeover of VSL.

- **Why were these witnesses not followed up and why were statements not taken from them?**
- **Was this information passed onto Ms Francas? If not why not?**

ASIC strongly rejects the allegation that it withheld evidence in the criminal prosecution or administrative action.

The fund manager who Mr McCabe spoke to did not indicate that there were rumours in the market about a possible merger or takeover of Vision Systems Limited (VSL). Rather, he said that he considered VSL to be 'vulnerable for a bid' and, separately, that there were 'rumours' in the market. When asked by Mr McCabe what those rumours were, the fund manager answered that he did not know. He specifically stated that he had no knowledge of a takeover involving VSL before purchasing shares in VSL, and that he did not purchase any VSL shares on the basis of any rumour.

ASIC obtained evidence of media and analyst research reports relating to VSL. This evidence showed that between June and August 2006, before the announcement of the takeover, there was press coverage suggesting that VSL was viewed as a potential takeover candidate because it had recently sold its fire and security business and as such was 'cashed up' rendering it ripe for a takeover, as distinct from any mention of a particular takeover.

This evidence did not contradict the allegation that Mr Catena was in possession of much more specific information concerning the likely price and timing of a takeover—information that was not generally available rumour and speculation. There was no need to obtain a statement from the fund manager because there was no additional relevant evidence which that fund manager could provide. The file note of Mr McCabe's conversation with the fund manager was disclosed in the McKenzie prosecution.

The evidence concerning media and analyst research reports was provided to Ms Francas (and was included in the criminal brief of evidence) and, as stated above, did not contradict the allegation that Mr Catena was in possession of much more specific information concerning the likely price and timing of a takeover—information that was not generally available rumour and speculation.

ASIC notes that if Mr Catena had knowledge of the takeover of VSL as a result of publicly available rumours and speculation in the market, he had opportunities to present that evidence to Ms Francas or to the Administrative Appeals Tribunal (AAT) when he sought a review of Ms Francas' decision.

Question 2

Paragraphs 18 and 19 of her decision refer to allegations of bias against Ms Francas. She settled the draft Areas of Concern prepared by the investigations team, however she stated "…no reasonable person would draw an inference that I will not bring an open mind to the matter simply because I settled the Areas of Concern."

How could she make such a determination? Effectively she was the judge, jury and executioner.

Ms Francas acted in accordance with ASIC's long-standing procedure for the conduct of the administrative hearings required by section 920A of the *Corporations Act 2001* (ASIC's power to make a banning order). That procedure is as follows:

(a) A draft notice of hearing setting out ASIC's concerns is provided to the delegate by the referring team, together with the documentary material the team considers supports those concerns.
(b) The delegate considers the draft notice and material to satisfy himself or herself that there is sufficient material to support the concerns. If there is not, no notice is issued. If there is, the delegate settles and issues the notice to the person the subject of ASIC's concerns (the candidate). The Full Federal Court has held that no case of apprehended bias is shown merely because the decision-maker has read relevant material before a hearing and has formed tentative views as to what the issues will be, and tentative views about those issues (see McLachlan v ASIC [1999] FCA 244).
(c) The delegate conducts the hearing at which the candidate can give evidence and make submissions in relation to the concerns set out in the notice of hearing.
(d) The delegate then makes a decision, taking into account all the information before them. If the delegate finds that, as a result of the evidence and submissions of the candidate, ASIC's concerns are not established, then no banning order will be made. If the delegate finds that ASIC's concerns are established, the delegate then decides whether to make a banning order.

Question 3

In paragraph 87, Ms Francas states "The conduct which I have found established against Mr Catena is not a particularly bad case of insider trading. It took place over a short period of time. Mr Catena did not profit himself." That being the case, why was Mr Catena given a five year ban?

ASIC has published Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98). Table 2 of RG 98 provides factors and examples of conduct relating to specific periods of banning. Insider trading falls in the banning from 3–10 years category in Table 2 of RG 98. A banning period of five years falls at the lower end of the range. In upholding ASIC's decision to ban Mr Catena for five years, the AAT said (at paragraph 99):

> Weighing up all factors, I have concluded that the appropriate period for which the applicant should be banned is at least five years. Indeed, it could be said that, in all the circumstances, including the failure of the applicant to show contrition and acceptance of responsibility, a period in excess of five years could well be justified.

A copy of the AAT's decision is available at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AATA/2010/340.html?stem=0&synonyms=0&query=title(yffm%20).

Question 4

In light of the sworn testimony of expert witnesses, the expert evidence (statements and reports) as contained in the Prosecution Brief and the decision in the McKenzie case, how was it alleged that the information was not publically available?

The evidence led in the matter of Messrs Catena, Hebbard and Nielsen was not the same as the evidence in the McKenzie matter. The case against Mr Catena was assessed by the CDPP in accordance with the Prosecution Policy of the Commonwealth. The CDPP also sought the advice of experienced senior counsel to assist it in this assessment.

Included in the brief of evidence against Mr Catena was a large amount of telephone recordings, between Mr Catena and various persons, which was used (in conjunction with other evidence) to establish a prima facie case with reasonable prospects of success in respect of all the elements of the offence, including that the information was not generally available.

There was sufficient evidence adduced before the jury capable of establishing each of the elements of the offences beyond reasonable doubt. There was no 'no case' submission submitted by the defence. However, the jury ultimately decided as is their function that they were either not satisfied to the requisite standard or were unable to agree on some of the counts.

Question 5

The magistrate in the McKenzie case stated "The conclusion is that the information publicly available was able to lead these persons to the conclusion that VSL could be the subject of a takeover….".

- **If ASIC did not accept the finding of Mr O'Day why did they not continue with their charges against Mr McKenzie?**
- **Why, with the same evidence and the same prosecution witnesses did ASIC and the Crown continue with their litigation?**

- **In light of the acquittal and the discontinuance why has ASIC not provided a clear answer as to their position as to why the banning order has not been lifted?**
- **Why have they refused to provide reasons as to why they will not confer with Mr Catena's lawyer when he has contacted them on numerous occasions?**

The decision not to proceed further against Mr McKenzie following the decision of Magistrate O'Day was made by the CDPP. It was not open to the CDPP to appeal the decision of Magistrate O'Day to discharge Mr McKenzie at committal. The CDPP undertook a review of all of the available evidence, including the evidence presented at the committal and Magistrate O'Day's ruling, and formed a view in accordance with the Prosecution Policy of the Commonwealth (relevantly paragraphs [6.28]–[6.32]) not to present an ex-officio indictment.

ASIC and the CDPP reject the suggestion that the prosecutions of Mr McKenzie and Mr Catena were based on the same evidence and same witnesses. While the prosecutions were factually related, the evidence in respect of Mr McKenzie and Mr Catena varied (particularly the recorded telephone conversations, which formed the key evidence in each matter).

ASIC can vary the banning order either on its own motion or on an application by Mr Catena. As at 3 April 2014, ASIC is not aware of having received any such application.

ASIC is not inclined to vary the banning order on its own motion. Parliament has, with the objective of protecting the public, given ASIC the administrative powers that were exercised in this (and other) banning actions. ASIC exercises these administrative powers in accordance with the principles of natural justice and procedural fairness. In the case of Mr Catena, he was afforded an opportunity to make submissions through his legal representatives (which he did by way of choosing to make written submissions) that were taken into account by ASIC's hearing delegate. The fact of acquittal by the jury in Western Australia highlights the difficulty of successfully prosecuting an insider trading case to the criminal standard of proof.

ASIC was, however, able to establish its concerns about Mr Catena's conduct to the civil standard of proof, being the balance of probabilities, and the banning order was made against Mr Catena. ASIC's decision to make the banning order was upheld by the AAT, Federal Court and Full Federal Court of Australia (see *YFFM and ASIC* [2010] AATA 340; *Catena v ASIC* (No. 2) [2010] FCA 865; *Catena v ASIC* [2011] FCAFC 32).

ASIC is unable to answer this question without particulars of the contact from Mr Catena's lawyers.

Question 6

Mr Catena was first examined by ASIC under a Section 19 notice in February 2007. In August 2008 Mr Catena was informed that ASIC planned to commence a hearing to institute a banning order against him.

A hearing was held in October 2008 and an order to ban Mr Catena was made in February 2009.

In February 2011 Mr Catena was charged with 20 offences of insider trading by the Crown.

Why did it take so long between the alleged offence and the placing of charges against Mr Catena?

Insider trading prosecutions are very often difficult and complex. This matter was no exception.

ASIC seeks to undertake its investigations as efficiently and as expeditiously as possible. The process of gathering information and obtaining admissible evidence for the preparation of criminal briefs of evidence by ASIC requires substantial time and resources. Similarly, the review of such briefs of evidence by the CDPP to determine whether a prosecution should be commenced in accordance with the Prosecution Policy of the Commonwealth requires substantial time and resources.

ASIC notes that Mr Catena was one of three persons who were being investigated on the basis of similar facts and similar information, and which resulted in the preparation and review of three criminal briefs of evidence at the same time.

Question 7

The Commonwealth's obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by the Commonwealth or an agency by factors including dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation, the prospects of success of legal proceedings and acting consistently in the handling of claims and litigation. Can ASIC please explain that in light of the Model Litigant Rules and the decision by Magistrate O'Day in the McKenzie case, why they proceeded with a three week trial in the Supreme Court of Western Australia when they had no prospect of success?

The Model Litigant Rules do not apply in criminal proceedings and the litigant in criminal prosecutions is the CDPP. Nevertheless, ASIC believes that at all times both it and the CDPP acted honestly and fairly and adhered to all prosecutorial duties.

ASIC's role as an investigative agency is to gather evidence and compile that material into a brief of evidence. The CDPP's role is to examine the brief of evidence and assess whether a prosecution should be commenced on the basis of the available evidence. This assessment is made independently of ASIC in accordance with the Prosecution Policy of the Commonwealth. The assessment that a prosecution should be commenced against Mr Catena was made by the CDPP after applying the criteria set out in the Prosecution Policy at paragraphs [2.1]–[2.14]. Following this assessment, ASIC, acting on the CDPP's advice, formally charged Mr Catena. Thereafter, the CDPP became responsible for conducting the prosecution, including deciding whether to continue or discontinue the proceedings at any point in time.

The CDPP Director, Mr Robert Bromwich SC, determined that the prosecution of Mr Catena should continue after giving consideration to the matters referred to in the No Bill submission of Mr Catena's lawyer and taking into account the ruling of Magistrate O'Day to discharge Mr McKenzie at committal.

While the CDPP had carriage of the prosecution at the time of the McKenzie decision, ASIC's view is also that, despite the McKenzie decision, there was more than sufficient evidence, including expert evidence, to support the prosecution of Mr Catena. The evidence led in the matter of Messrs Catena, Hebbard and Nielsen was not the same as the evidence led in the McKenzie matter.

As noted above, the evidence led by the CDPP at the trial was sufficient for the trial judge to leave the case to the jury for their determination—that is, there was sufficient evidence for the jury to convict the defendant. Pursuant to their function the jury decided that the evidence did not establish the defendant's guilt beyond reasonable doubt or were unable to agree.

ASIC notes that Mr Hebbard, a co-accused who was also a broker employed by Citigroup at the time, pleaded guilty to tipping inside information about VSL, on the basis he ought reasonably have known that he possessed information that constituted 'inside information' rather than knowing that he did. He was convicted by the WA Supreme Court.

ASIC has further confidential information relevant to this question. Should the Committee need additional information in response to this question ASIC would be happy to provide this information to the Committee on a confidential basis.

Question 8

Mr Catena and his co accused had to appear in court over 13 times prior to the matter going to trial. The first five appearances were due to the Commonwealth not being ready to proceed. Does ASIC believe these actions constitute adherence to the Model Litigant Rules?

As noted in the response to Question 7, the Model Litigant Rules do not apply in criminal proceedings and the litigant in criminal prosecutions is the CDPP. Nevertheless, ASIC believes that at all times both it and the CDPP acted honestly and fairly and adhered to all prosecutorial duties.

A number of pre-trial appearances are common in complex prosecutions. In this matter, those appearances included having to deal with a number of pre-trial applications brought by Mr Catena, including an application not to admit certain evidence and an application to vacate the original trial dates.

Mr Catena also applied, immediately before trial, to have the matter permanently stayed.

Dealing with such matters pre-trial may lengthen the period between the first appearance and trial, but it assists efficient case management and streamlines the trial process.

Question 9

Below were questions put to ASIC under notice by Senator Johnston. To date I am unaware of there has ever been a response to them.

- **What was the total cost incurred by the Commonwealth in preparation of the prosecution of all of the charges against all of these defendants?**

- **The decision of Magistrate W.J.G O'Day on 25 May 2011 was not the subject of an appeal or an exofficio indictment, why not?**
- **Was counsel's opinion obtained with respect to the likely success of such indictment and continuation?**
- **Were there other reasons or considerations for the decision not to proceed further against Mr McKenzie, following the decision of Magistrate O'Day and if so what were they?**
- **With respect to the prosecutions against Mr Nielsen, Mr Catena and Mr Hebbard, was counsel from the independent bar briefed for any hearings, direction hearings, mentions or trials and if so what were the fees for such proceeding in each event and what was the duration of each of the hearings, direction hearings, mentions or trials?**
- **Was this prosecution subject to evaluation against the criteria set out in "Prosecution policy of the Commonwealth"? If the answer is yes upon what basis did the prosecution proceed with the matter pursuant to such policy? Further to this if there was sufficient evidence which evidence was sufficient and if the prosecution was in the public interest specify which criteria was used for this public interest test?**
- **Given a hung jury in respect to a number of the charges against Nelson and Catena and the subsequent discontinuance of those proceeding was counsel's opinion sort in respect to the discontinuance? If so from whom and at what cost?**

A response to Senator Johnston's questions dated 14 June 2013 and posted 7 November 2013 has been provided by ASIC (with input from the CDPP) (Ref. No. BET 173–178). The response is public and can be found at www.aph.gov.au/~/media/Estimates/Live/economics_ctte/estimates/bud_1314/Treasury/answers/bet173-178.ashx.