Question No: QON **1**
Topic: **Disgorgement powers**
Politician: **Senator WHISH-WILSON**

Question:

Senator WHISH-WILSON: How long has ASIC been asking for disgorgement powers? Can you explain to the committee or give us an insight into why you have not been given those powers in the past?

Mr Savundra: I have to take on notice as to how long we have been pushing for those powers within government, but what I can say is we certainly set out the position in report 387, which we issued in March 2014. Certainly at least from March 2014 we have been seeking to create a conversation around penalties and also the issue of disgorgement.

Answer:

In March 2014 ASIC issued Report 387 Penalties for Corporate Wrongdoing, which outlines the penalties available for a range of corporate wrongdoing under legislation administered by the Australian Securities and Investments Commission (ASIC), to enable consideration of whether they are proportionate and consistent with those for comparable wrongdoing in other jurisdictions. This report canvassed the issue of disgorgement.

Question No: **2**
Topic: **ASIC action against directors of Storm Financial**
Politician: **Senator WHISH-WILSON**

Question:

Senator WHISH-WILSON: That was my understanding as well. It has a lower burden of proof. In relation to something like Storm Financial, could you tell the committee—I know it has only happened fairly recently and I did not have a chance to ask you this at estimates—were you happy with that result, in the end? That was a civil prosecution.

Mr Mullaly**:** Yes, we are happy that we were successful in it. I should note that the matter is still before the courts, because penalty has not been determined, in relation to that, nor have declarations been made. So we do need to be somewhat cautious about discussing it.

Senator WHISH-WILSON: Fair enough; I had better be careful then. How long did that prosecution take?

Mr Mullaly**:** I would have to take on notice the exact date. It is somewhere in the vicinity of at least five years, possibly more, since we instituted the proceeding.

Senator WHISH-WILSON: The answer may be very simple and might just be the burden of proof, but why did you not pursue criminal charges against some of the directors?

Mr Mullaly**:** I was not involved in the decision-making around that, so I would need to take it on notice to get an answer that goes a little bit beyond the supposition that we looked at the evidence, we got advice and came to the determination that it was unlikely we would have been able to get a successful prosecution up.

Answer:

ASIC commenced its civil penalty proceedings against Mr and Mrs Cassimatis, the Executive Directors of Storm Financial, in December 2010. There were a number of interlocutory challenges to ASIC's case, including an appeal, with consequent delays to the prosecution of the proceedings. The case did not proceed to trial until June 2016.

The action taken by ASIC against the directors was determined as the most viable legal action available on the evidence, following a thorough investigation and the obtaining of independent legal advice.

Question No: QON **3**

Question:

Senator WHISH-WILSON: The committee has heard harrowing individual stories of what the loss of their life savings and their whole life's work has meant to them as well as of suicide and all sorts of things. It certainly does harm.

Mr Savundra **:** We would be happy to provide additional information on that point to the committee if you would want that. I think the judicial authority supports that proposition too, and we endorse the DPP's submission. They say on page 3, citing some judicial authorities: Arguably, nothing deters would-be white collar criminals more than a realistic prospect of imprisonment. We could not agree more.

Answer:

As the current Chief Justice of the NSW Supreme Court has noted, there are some categories of offence, such as white-collar crime, for which the Courts have held that the general deterrence remains relevant in sentencing.[1] Chief Justice Bathurst specifically pointed to offences under the *Corporations Act 2001* including insider trading and market manipulation:

> *The passage of new legislation and the enforcement criminal sanctions in this area of itself will have a deterrent effect and general deterrence in this area still almost certainly has a role to play in the sentencing process.*

Justice Peter McClellan of the NSW Court of Appeal has suggested that the *severity* of sentences for white-collar criminals does have an effect on general deterrence.[2] Insofar as the research has shown that the "fear of being caught" is the most significant deterrent:

> *"…it must be remembered that the fear of being caught is in reality a fear of being convicted and sent to gaol for a period of time. Being caught and suffering only a monetary penalty would, I suggest, play quite differently in the mind of a potential tax evader. With respect to corporate fraud and illegal market manipulation, the possible length of a term of imprisonment may have different consequences."*

An important reason for general deterrence in relation to white collar offences is that such offences are typically crimes of contemplation.[3] As was observed in *DPP (Cth) v Gregory* [2011] VSCA 145 at [53]:

> "*[G]eneral deterrence is likely to have a more profound effect in the case of white collar criminals. White collar criminals are likely to be rational, profit seeking individuals who*

[1] Keynote address to the Legal Aid Criminal Law Conference, delivered by the Honourable Tom Bathurst, Chief Justice of NSW (1 August 2012) (http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst010812.pdf)

[2] Keynote address to the University of New South Wales Fraud and Corruption in Government Seminar delivered by the Honourable Justice Peter McClellan, "White Collar Crime: Perpetrators and Penalties" (24 November 2011) (http://www.austlii.edu.au/au/journals/NSWJSchol/2011/39.pdf).

[3] *R v Jacobson* [2014] VSC 592 at [74]; *R v Chan* [2010] VSC 312 at [22].

can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white collar criminals are also more likely to be first time offenders who fear the prospect of incarceration".[4]

Similarly in *DPP v Bulfin* [1998] 4 VR 114 at 131:

"The motivation to engage in conduct of the kind here under consideration may spring from many sources: a position of trust and the easy ability to abuse it; the enormous rewards that may be available; a position of high authority in some substantial enterprise and the offender's assumption that discovery or proof of wrongdoing can be avoided; greed or the burden of funding an extravagant lifestyle; weakness in succumbing to outside pressures to use deceitful means for business ends; and personal or corporate ambition, to name but a few. Whatever the motivation, offences of the kind here in question almost invariably involve a carefully calculated course of conduct over a long period, repeated deliberate acts of dishonesty, substantial amounts of money, and, frequently, losses (often tragic in their impact) to large numbers of small investors. The offender often holds a position making it possible, or has the ability, to disguise or camouflage the conduct in question. Detection is difficult, the investigation of the crime usually lengthy and very expensive, and the problems of trial and proof will frequently be extreme… ***The result of such considerations, in my view, is that the element of general deterrence will usually carry particular significance in sentencing for crimes such as the present****, both in relation to the total effective sentence and the non-parole period; together with a requirement for strong denunciation by the sentencing court."*[5]

More recently, the NSW Court of Criminal Appeal observed in *R v Pogson, Lapham and Martin* (2012) 91 ACSR 420; [2012] NSWCCA 225 at [141] – [142] (emphasis added):

"*Sentencing courts have a responsibility to ensure that the sentence imposed punishes the offender, denounces their criminal conduct and provides sufficient disincentive to others who may be tempted to offend, to ensure that they refrain from criminal activities.* ***Although some statements have been made suggesting that in relation to some offences general deterrence may be controversial, this is not the case with respect to crimes involving the market or other forms of business dealings***".

…It is of the utmost importance that when sentencing for market-related offences, the courts impose sentences of sufficient severity to ensure, as far as possible, that others who may be tempted to engage in dishonest conduct to the benefit of themselves, or a company in which they have an interest, are dissuaded from criminal activity.[6]

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[4] Endorsed in *Kamay v R* [2015] VSCA 296 at [42] & [51]. See also *Dragojlovic v R* [2013] VSCA 151 at [299].
[5] *DPP v Bulfin* [1998] 4 VR 114 at 131; endorsed in *R v Adler* [2005] NSWSC 274 at [47];
[6] See also *R v Pratten* [2014] NSWSC 396 at [49].

It has also been observed that in order to give practical effect to these principles, the "*real bite*" of general deterrence only takes hold when a custodial sentence is imposed.[7] And, in relation to insider trading, "*it is self-evident that the longer the sentence, the harder the bite*".

[7] *R v Hinchliffe* [2013] NSWCCA 327 at [276]-[278]; *R v Donald* [2013] NSWCCA 238 at [86]; *R v Richard* [2011] NSWSC 866 at [120]; *Braun v R* [2008] NSWCCA 269 at [85].