

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

Submission 223 – Laharum Bulk Handling

Laharum Bulk Handling Co Pty Ltd alleges that between 2008 and 2009, it was trading with a group of companies that, in 2009, were required to repay NAB \$40 million. However, the companies continued to take prepayments from Laharum and other companies but did not supply the required products as the prepayments were used to repay the bank. Laharum advised that court examinations have revealed that ASIC conducted an onsite visit to these companies head office as a result of the companies failing to file returns for the 2008, 2009 and 2010 financial years. However, ASIC did not take any action to wind up these operations.

Question: What investigation did ASIC undertake into the companies involved?

Answer:

ASIC understands that Laharum Bulk Handling Company Pty. Ltd. (ACN 006 068 962) raises concerns in its submission about its dealings with a fertiliser company group based in South Australia.

ASIC is aware of Laharum Bulk Handling's concerns. ASIC commenced a National Insolvent Trading Program surveillance activity in May 2009 into the fertiliser company after we received a breach report from the company's auditor under section 311 of the *Corporations Act* (Corporations Act) in April 2009. The National Insolvent Trading Program sought to:

- make company directors aware of their company's financial position;
- make directors of potentially insolvent companies aware of their responsibilities and the implications of continued trading if they know they are insolvent;
- encourage directors to seek external advice from accountants and lawyers on restructuring; and
- encourage directors to seek advice from insolvency professionals where appropriate, and to take action to appoint a voluntary administrator or liquidator where necessary.

The surveillance took place nearly two years prior to the collapse of the corporate group and involved meeting with the company's directors, and their advisers, to review the operations of the company for the purposes of ensuring compliance by directors of their duties as set out in section 180 of the Corporations Act and directors' duties to prevent insolvent trading under section 588G of the Corporations Act.

ASIC's correspondence required the company's directors to address each of ASIC's concerns and identify how the directors would discharge their obligations to prevent the company from trading while insolvent.

Given that the directors sought professional insolvency advice and had the apparent ongoing support of the company's secured lender and had confirmed that unsecured debts were continuing to be met as and when they fell due, ASIC again wrote to the company in September 2009 reminding them of their obligations to remain vigilant to avoid insolvent trading and to seek immediate, further professional advice if any event occurred which might

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lead to the directors being unable to discharge their duties pursuant to s588G of the Corporations Act.

The prime responsibility for avoiding insolvency rests with the directors of the company and ASIC took steps to ensure they complied with the requirements of the Corporations Act.

ASIC corresponded with the company about its failure to lodge its financial statements and directors' reports. However, given our previous regulatory action against the company and that the company subsequently entered external administration; we exercised our discretion not to pursue the company for its failure to lodge financial statements.

ASIC engaged with the external administrators following the appointment of Voluntary Administrators, and the subsequent appointment of liquidators by the Federal Court of Australia.

Question: Does ASIC have responsibility for companies taking payment for goods and not supplying them? If not, which agency does?

Answer:

As set out in ASIC Information Sheet 161 *Disputes about goods and non-financial services* and ASIC Information Sheet 173 *Disputes about unpaid debts*, ASIC does not intervene in disputes between commercial parties relating to the non-performance of a contract or non-payment of a debt. These matters relate to the contractual rights between the parties and ASIC considers that these matters are best resolved through communication between the parties or the parties seeking legal advice to enforce their rights. Consumers are also able to raise their concerns about these kinds of disputes with the Australian Competition and Consumer Commission and the state and territory consumer affairs agencies.

We note that creditors have the ability, and responsibility to their own companies, to take steps to recover their debt or mitigate their loss when experiencing difficulty recovering debts due from their private enterprise activities.

When a company may enter external administration, creditors can participate and make their claims to the external administrators by lodging proof of debts or exercising their legal rights, including any claims they have under contract, retention of title, other legal title claims. If a creditor is not satisfied with an external administrator's decision in relation to their claim, creditors have rights to make an application for a Court order.

ASIC has no role in assessing or adjudicating a creditor's claim in an external administration.

Question: Has ASIC taken action against the directors, or is it considering taking action? If not, why not?

Answer:

As discussed above, ASIC conducted a surveillance into the fertiliser company under our National Insolvent Trading Program that was in place at the time. We finalised our surveillance as its purpose was completed.

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ASIC has determined not to take any further action in relation to concerns about the directors of the fertiliser company. The information available to ASIC about these matters does not provide sufficient grounds for us to take further action. ASIC's position on how we select matters for formal investigation or enforcement action is set out in ASIC Information Sheet 151 *ASIC's approach to enforcement*.

This guide states that we consider a range of factors when determining which matters we will select for regulatory action, including whether the concerns suggests any breaches of the legislation we administer, whether we have sufficient grounds to suspect that a breach has occurred, and whether regulatory intervention would be for the benefit of the broader community beyond the affected individuals.

Creditors of the fertiliser company may wish to seek their own advice about pursuing their rights against the company.

Submission 246 (Dorman Investments Pty Ltd)

The submission claims that ASIC ordered the winding up of Co-Develop Australia in 2004, however, four weeks later the owner was allowed to raise up to \$56 million in capital under the name CoDevelop (i.e. without the hyphen). The submitters claim a string of failures followed. One of the failures was Citywide Cabinets, formerly EuroDirect. The submission claims that ASIC did not investigate their complaint about the actions of the liquidator. ASIC only asked for correspondence between the complainant and the liquidator, and the submission argues that this limited correspondence 'could in no way highlight the failure to follow procedure which resulted in the liquidator auctioning property which belonged to us and giving the proceeds to creditors'.

- Please outline the investigation ASIC undertook into the liquidator appointed to Citywide Cabinets.

Answer:

ASIC conducted its assessment of the Citywide Cabinets matter in 2013 which concerned conduct allegedly occurring in 2007 and which conduct involved agreements entered into 2005.

The dispute is based on the allegations made by the reporter, who is a shareholder of a failed company, pertaining to his purported rights over certain assets of the company which the external administrator sold at auction.

ASIC correctly:

- identified the regulatory issues for ASIC relevant to this report of misconduct;
- identified the relevant provisions of the Corporations Act;
- considered the information that ASIC received from the reporter and made appropriate enquiries, including antecedent searches concerning the subject;
- assessed the weight and quality of the available evidence;

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- assessed the matter overall; and
- concluded that there was insufficient evidence of a breach of the liquidator's duties under the Act to warrant further action.

ASIC advised the reporter of the alleged misconduct that ASIC has no role in adjudicating upon the legitimacy or efficacy of a shareholder's claim over the property in dispute.

The reporter contended that the Registered Liquidator failed in his duties to creditors and other stakeholders. ASIC reviewed the evidence available and found no basis for this contention as the liquidator met his duty in taking possession of the assets of the company and realising them for the benefit of creditors as a whole. Anyone else, who had a competing claim to those assets, has the responsibility of proving that claim. ASIC has no role in this process.

They were advised that, in the event that such a dispute cannot be resolved with an external administrator, a remedy for an aggrieved party is to appeal to the Court under section 1321 of the Act.

The reporter was advised of ASIC's review decision by way of letter dated 1 August 2013.

- Why did ASIC only request correspondence between the complainant and the liquidator? Was an assessment of these documents the extent of the investigation?**

Answer:

ASIC's review of the facts and circumstances pertaining to a private shareholder dispute is necessarily limited to the documents that exist and provided by the reporter of misconduct.

Importantly, as noted above, ASIC does not adjudicate in private disputes.

- What steps does ASIC undertake when investigating allegations of misconduct by liquidators?**

Answer:

We carefully consider how to respond to all potential breaches of the law, but we do not undertake a formal investigation of every matter that comes to our attention.

We consider a range of factors when deciding whether to investigate and possibly take enforcement action, to ensure that we direct our resources appropriately.

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The specific factors we consider will vary according to the circumstances of the case. Our priorities necessarily evolve and change over time and that influences our enforcement focus. Information sheet 151 enunciates these factors more fully.

We assess the seriousness of the alleged misconduct and particularly its market impact, which includes its impact on market integrity or the confidence of investors and financial consumers. The action we take will depend on the facts of each matter and will be heavily influenced by the evidence that is available to establish those facts.

We also look for the regulatory benefits of pursuing misconduct.

The action we take, if any, will vary according to circumstances of the matter at hand but ASIC will encourage private dispute resolution between those involved, if that is the most appropriate response especially in case of shareholder disputes, such as is the case in this instance.

We are less likely to investigate matters that would be better addressed by another agency or by private dispute resolution between those involved.

- **How many complaints do ASIC receive each year about the conduct of liquidators? (for the past three financial years). How many are escalated to an investigation? How many liquidators face enforcement action?**

How many complaints do ASIC receive each year about the conduct of liquidators for the past three financial years

Answer:

During calendar year of 2013, ASIC's Insolvency Practitioners stakeholder team considered 385 inquiries and reports of alleged misconduct by registered.

We individually assess conduct matters referred to us and, in instances where the matter does not warrant a referral for formal investigation, we record the information obtained as part of our profiling of registered liquidators.

Reports of alleged misconduct against registered liquidators remained stable at approximately 3% of total reports of misconduct that ASIC received during the period 2011 to 2013.

	2011	2012	2013
Total complaints and enquiries concerning registered liquidators	426	437	385

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Outcomes of complaints/enquiries concerning registered liquidators (by %)	2011 %	2012 %	2013 %
Provided assistance to resolve the complaint or enquiry	23	24	20
Insufficient evidence was identified to support the alleged breach	38	33	37
No breach of the Corporations Act identified	8	11	9
Referred to a specialist team within ASIC for further review	14	14	13
Referred to investigation	0	1	1
Referred to assist existing investigation or other surveillance	8	7	3
Action otherwise precluded	10	12	17
Total (rounded)	100	100	100

Submission 240 (Ms Dianne Mead)

In April 2005, under the advice of a financial adviser (a representative of the dealer group Wealthsure Pty Ltd) the submitter refinanced her home property and borrowed against the equity to invest on a second prospectus in Neovest. In 2013, it was discovered that 'the investment was illiquid, the Prospectus was flawed, associated entities were in receivership and along with other contradictions and unlawful acts, the dealer group told advisers the investment was not to be borrowed for'. ASIC issued a stop order in 2005 but only obtained an order to wind up the company in February 2008. The submitter notes that the company is still being wound up and the assets are being 'squandered away on legal and liquidator's fees'.

- **Why did it take three years for ASIC to obtain an order to wind up the company after the 2005 stop order?**

Answer:

ASIC commenced investigation into Neovest Limited on 26 September 2006 and filed an application with the Supreme Court of Queensland on 1 November 2007. The Supreme Court of Queensland ordered the winding up of Neovest Limited on 5 February 2008.

Prior to the Neovest Limited investigation, ASIC had conducted an investigation into related companies Neo Lido Pty Ltd and Neolido Pty Holdings Ltd, resulting in ASIC filing an application with the Supreme Court of Queensland on 6 June 2005. The Supreme

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Court of Queensland ordered the winding up of Neo Lido Pty Ltd and Neolido Holdings Pty Ltd on 25 November 2005.

- **Please outline and provide a timeline of ASIC's investigation.**

Answer:

Neo Lido Pty Ltd and Neolido Holdings Pty Ltd

Neo Lido Pty Ltd and Neolido Holdings Pty Ltd were involved in the development of residential and commercial property (mainly in Queensland) and had been in external administration since 27 September 2004. In June 2005, ASIC commenced an investigation into Neo Lido Pty Ltd and Neolido Holdings Pty Ltd following complaints and a surveillance review by ASICs National Insolvency Coordination Unit (NICU).

The investigation related to alleged insolvency of the companies, and potential dissipation of company assets.

On 6 June 2005, ASIC filed application to wind-up Neo Lido Pty Ltd and Neolido Holdings Pty Ltd.

On 25 November 2005, the Supreme Court of Queensland ordered the winding up of Neo Lido and Neolido Holdings, and appointment of a provisional liquidator.

On 24 May 2007, accounts lodged with ASIC by the liquidator indicated that Neo Lido Pty Ltd had liabilities of more than \$38 million and Neolido Holdings Pty Ltd had liabilities of more than \$29 million. Dividends were not expected to be paid to any class of creditor in either company.

Neovest Limited

Neovest Limited was a company linked to Neo Lido Pty Ltd and Neolido Holdings Pty Ltd (see above) which raised capital from the public between February 2004 and March 2005 by issuing redeemable preference shares. Funds were then lent to the Neo Lido Group of Companies (including Neo Lido Pty Ltd and Neolido Holdings Pty Ltd).

Neovest Limited was to receive interest on these loans and use the interest payments to pay dividends to the preference shareholders.

Neovest Limited raised over \$13 million and ceased paying dividends to shareholders in July 2005.

On 1 September 2006, ASIC commenced an investigation into Neovest Limited following concerns that the security taken by the company for its loans to Neo Lido and Neolido Holdings were almost exclusively third, fourth or fifth ranking mortgages over properties. At the time, Neo Lido Pty Ltd and Neolido Holdings Pty Ltd were already in default under earlier mortgages.

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On 1 November 2007, ASIC filed an application to wind up Neovest Limited on the grounds of insolvency or alternatively just and equitable grounds.

On 11 January 2008, ASIC received notification that a voluntary administrator had been appointed to Neovest Limited.

On 5 February 2008 the Supreme Court of Queensland ordered the winding up of Neovest Ltd on insolvency and just and equitable grounds, and the appointment of a liquidator.

- **If an order to wind up the company was obtained in February 2008, why is the company still being wound up?**

Answer:

ASIC is unable to comment on the specifics of the Neovest Limited winding up.

However, there are a number of reasons why a winding up may take years, including, for example, drawn out sale of assets and/or involvement in civil litigation.