



ASIC
Australian Securities &
Investments Commission

Committee	Senate Economics References Committee
Inquiry	Inquiry into Sterling Income Trust
Question No.	008
Reference	Spoken, 15 December 2021
Committee member	Senator Pratt

QUESTION

Senator PRATT: What are your section 19 powers, and what are the criteria that must be met before you use those?

Dr Bollen: The section 19 powers follow a formal investigation being declared, so they weren't used in the lead-up to the stop order. That is my information.

Ms Armour: Perhaps I could help.

Senator PRATT: Why weren't they used? Is there a threshold of evidence in order to use those section 19 powers?

Ms Armour: Yes.

Senator PRATT: What's that threshold?

Ms Armour: **We could, happily, send you the exact language on notice. Essentially, we have to have some grounds to suspect a breach of the law, so using the stop order is actually a faster way because we don't need those same grounds to take that action.** Under section 19, because we're using greater compulsion, we do need to have—we don't have to go into a section 13 investigation to do that.

Senator PRATT: What do you need to do in order to do that? I think that, if the stop order, in effect, didn't mean anything because they just rewrote it and put out a new one and—

Ms Armour: If you think about it, a lot of this is, if you like, almost like a triaged thing: there is a product in the market; you look at the product; you have concerns about what the disclosure about the product is. One of the first things you can do is get some information relatively quickly and issue a stop order. At least that stops further people investing.

ANSWER

Under section 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), ASIC may require a person to appear for examination on oath and to answer questions 'where ASIC on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating or is to investigate under Division 1' of the ASIC Act. Division 1 of the ASIC Act specifies ASIC's general and specific powers of investigation.

The threshold specified in section 19 "on reasonable grounds, suspects or believes" is used in a wide range of legislation, and its meaning is well-settled. It requires the existence of facts which are sufficient to cause a suspicion or belief in the mind of a reasonable person, requires the person exercising the power to be satisfied there are reasonable grounds for the suspicion or belief, and to actually suspect or believe.



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Question

ACTING CHAIR: With your indulgence, Senator Roberts, I will ask Commissioner Armour about this: that complaint which was made did not have an attached or stapled residential tenancy—is that correct?

Ms Armour: I'm taking my answer from our answer to the question on notice, which was back in 2019-20. We're happy to take on notice whether there was anything stapled to that.

ACTING CHAIR: I'm reading this. I have a few with me too. I would be interested to know in relation to it. As you know, in that question on notice which was provided, there were three prior issues which were raised. I think it would be helpful if ASIC could provide as much additional information with respect to those three issues as possible. I would certainly be interested to know whether or not any of them have the hallmarks of the attached residential tenancy as well as the purchase of shares.

Mr Longo: I can give you that assurance now. Those three matters are outside what this inquiry is looking at. I've said repeatedly—and I've tried to act in good faith with this inquiry—that the meeting with consumer affairs in March 2017 was a significant meeting. Without wishing to oversimplify, that's when some of the dots started getting joined up and that's when, as I think the evidence to the inquiry has shown, ASIC's interest in this matter really started. There's been a lot of evidence and back and forth about whether we should have done things more quickly or whatever, but, the way I'm looking at it—I wasn't around at the time; I'm trying to be objective and trying to be professional with the inquiry—to my mind, around March 2017 is a realistic moment to say: 'Well, there was that meeting with consumer affairs. We started talking with consumer affairs in a way that started looking at the issues that are the subject of this inquiry, and the rest is history.' Pre March 2017—

ACTING CHAIR: You've been very consistent in your testimony about the three prior complaints that were the subject of the answer to the question on notice that Commissioner Armour refers to. From your perspective, you're quite adamant and quite clear that these matters were totally disconnected from the matters which are the subject of this inquiry. Is that correct?

Mr Longo: That's correct. But, with respect, I do appreciate that people are wanting to understand: 'Why not? There were these three wrongs. Surely that must have got you thinking.' I respect that curiosity, if I can put it that way.

Senator ROBERTS: Concern.

Mr Longo: Concern, absolutely. I was concerned. When all of this came to light, Senator Roberts, with the help of my team I put a lot of time into really trying to understand what happened, and this is my view. It's my duty to give you my view. I think, from March 2017, as I've said to the team, to my mind, that's when the dots started getting joined. **I'm absolutely happy to come back to the committee.**

There have been a few QON submissions dealing with this point. It might be helpful to the committee to put it all in one place. Hopefully that will clear the air on it. As I've said from the beginning, we'll do that as quickly as we can, and if there are additional questions from the inquiry, saying, 'We still have some queries,' we'll deal with those, too, as best we can.

ACTING CHAIR: Excellent; thank you. Senator Roberts.

Answer

As set out in paragraph 146 of our initial submission to the inquiry, ASIC received three reports of suspected misconduct in 2015–16 relating to the Sterling Group. However, these did not relate to the SNLL product *nor* the Sterling Income Trust. These reports were assessed according to our normal regulatory criteria and at the time it was considered that no further action was warranted.

Prior to the Western Australian Department of Mines, Industry Regulation and Safety (Consumer Protection Division) (**WA DMIRS**) report on 17 March 2017, ASIC had received two reports of misconduct and one consumer complaint. The two reports were received on 3 February and 18 June 2015. The consumer complaint was received on 16 September 2016. Neither the reports nor the complaint related to the Sterling New Life Lease or the Sterling Income Trust. All three were assessed according to ASIC's normal regulatory criteria and it was determined that no further action was warranted.

The first report of suspected misconduct was from the Financial Services Ombudsman (**FOS**) on 3 February 2015. A retail investor was allegedly misled by Sterling Corporate Services (then known as Rex Corporate Pty Ltd) into investing in a wholesale trust in October 2012. Rex Corporate was not an authorised representative of an AFSL holder until November 2012.

Between 4 February 2015 and 5 May 2015, ASIC reviewed the materials and spoke with contacts at FOS. ASIC decided that no further action should be taken, due to the age of the alleged conduct, the fact that Sterling Corporate had since become an authorised representative of an AFSL licence holder, and the lack of relevant antecedents.

The second report of suspected misconduct was a referral from an ASIC staff member about a newspaper advertisement for a "free seminar on the benefits of co-ownership". The relevant ASIC team reviewed the advertisement and website for Sterling First Project Pty Ltd and, on 10 July 2015, recommended no further action because the company held a real estate licence and appeared to be offering real estate investment advice only (and therefore not in ASIC's jurisdiction).

On 9 September 2016, ASIC received a complaint from an individual who had invested in Sterling Residential Development Syndicate (Aust) Pty Ltd in respect of a property development scheme which promised returns of around 20% per annum. The individual complained that he had been misled about his ability to redeem his investment. Between 13 September 2016 and 23 January 2017, ASIC had several telephone calls with the complainant and reviewed the materials he provided. On the information provided, and from ASIC's further inquiries, ASIC formed the view that no further action was warranted in the circumstances.

The first report of misconduct to raise concern with us about the Sterling Income Trust and Sterling New Life Leases was the report from WA DMIRS in March 2017. The three earlier reports in 2015-16 did not relate to the tenancy products such as the Sterling New Life Lease.

The three early reports in 2015-16 were assessed according to our usual policies and procedures. We receive approximately 10,000 reports of misconduct annually and each are assessed by ASIC. ASIC is unable to take action in relation to all reports of misconduct; but we do assess each one and save them for information and intelligence purposes.

For more information on these three early complaints, see:

- [ASIC's response to Questions on Notice, SBT118](#) (Senate Economics Legislation Committee, Treasury Portfolio, Supplementary Budget Estimates, 2019–20),
- [ASIC's submission to the Sterling Income Trust Inquiry](#),
- [ASIC's response to pre-hearing Questions on Notice from Senator Pratt](#) as part of the Sterling Income Trust Inquiry, and
- Documents provided in response to the [Senate Order for the production of documents in relation to the Sterling Group](#).



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QUESTION

Senator ROBERTS: Can ASIC explain to this committee how it interprets the phrase 'reason to suspect', as detailed in section 13 of the ASIC Act?

ACTING CHAIR: I'm looking forward to this answer, Chair Longo!

Mr Longo: Well, there's a lot of jurisprudence on that question! We interpret that phrase in a conservative manner. If there are facts or circumstances that we think could point to a contravention then we may, but are not required to, commence an investigation. I think the practical answer to your question, just reflecting on it, is that it's a pretty low bar. I don't think anyone is going to tell you that a reason to suspect is a very high bar. It's a very low bar, and so it should be. You want agencies like ASIC being able to investigate things without having to jump over a high bar, because that wouldn't be in the public interest.

The critical question, Senator Roberts—and I hope you'll forgive me for saying this, because I've been saying it repeatedly through most of my professional life—is that we can't investigate everything. What tends to happen is that a lot of judgement, assessment and analysis goes into all the matters that come to our attention. The really hard part of our job, on the enforcement side, is choosing which ones to investigate, resource, have section 19 examinations for and issue document notices for and which ones not to. I know in this inquiry there have been a lot of questions about: 'What's going on here? Your investigation didn't start until May 2018. Why didn't it start sooner?' I'm not here to tell you that there was a big legal impediment. The situation unfolded. We made judgements based on what we knew at the time. We commenced an investigation when we did and we took the steps we took. But it is a low bar. The short answer to your question is: it's a low bar, and we have to make decisions about which things to investigate and which things not to.

Senator ROBERTS: Are there any internal criteria or operational procedures or guidance as to how section 13 powers are to be exercised by ASIC and when?

Mr Longo: Yes, there are.

Senator ROBERTS: Could we get them as a question on notice, please?

Mr Longo: This question has come up before. I'm looking at my general counsel.

Senator PRATT: That was me. I did ask that question before, and I think we were going to get that provided to us.

Mr Longo: It's not an uncommon question. We'll certainly share with the committee what we can. When I say 'what we can', there may be some material we would happily share with the committee on an in-confidence basis, because you will appreciate that, as to some of that internal material, it would not be in the public interest for the whole community to know about it! But we'll certainly provide you with what we can, and, where we think there's a sensitivity, we will ask the committee to accept that material in confidence.

Senator ROBERTS: Thank you, Mr Longo. Who, at what level of seniority within ASIC, is able to make a determination on whether ASIC can trigger section 13 powers?

Mr Longo: I was about to say 'relatively junior', but there's a system of delegation of powers that we use so that the commission itself isn't involved in every decision to commence an investigation.

Because of the range of matters that come to our attention, we have a process and a system for figuring out which ones to investigate. There's a governance structure, a committee structure, within ASIC that makes those decisions. I suppose we could include a description of that in the—

Senator ROBERTS: You're reading my mind now! Thank you very much—that's exactly where I was going.

ANSWER

When a matter is referred to an Enforcement team, we may commence a formal investigation to investigate suspected misconduct, to find out whether there is evidence that a contravention of the law has occurred and, if so, to gather that evidence to use in appropriate enforcement action. For example, this may be a civil action, a brief to the Commonwealth Director of Public Prosecutions (CDPP) to consider whether to lay criminal charges, or a brief to an ASIC delegate to consider whether to conduct an administrative hearing.

In undertaking formal investigations, we will use our compulsory information-gathering powers to collect documents and information. A formal investigation also allows us to use our power to conduct compulsory examinations of people who may have information that can assist in our investigation. During a formal investigation, we gather information from people and entities that are the subject of our investigation, and also from people and entities who are not suspected of any wrongdoing, but may have information that is relevant to our investigation.

Surveillances and investigations are both types of inquiries we make. A range of compulsory information-gathering powers are used in both types of inquiries to obtain the required information. The difference between the two types of inquiries lies in the range of information-gathering powers we are able to use, and the purpose for which the information is gathered.

Formal investigations occur when we suspect there has been a contravention of a law relating to our regulatory responsibilities, which include regulation of corporations, financial services and consumer credit. Only formal investigations can invoke the use of all our powers to conduct an examination and to request reasonable assistance. After a formal investigation begins, we can also apply for and obtain search warrants when the circumstances call for it. We seek to find out whether there is evidence that a suspected contravention has occurred. If that evidence exists, we consider what action should be taken.

Under section 13(1) of the ASIC Act:

“ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions) where it has reason to suspect that there may have been committed:

- (a) a contravention of the corporations legislation (other than the excluded provisions); or
- (b) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that:
 - (i) concerns the management or affairs of a body corporate or managed investment scheme; or
 - (ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.”

The operational procedure for the exercise of s13 ASIC Act powers is that ASIC assessment and supervision teams refer matters to an enforcement referrals committee consisting of senior executives and senior managers in ASIC’s Enforcement teams. The committee discusses the merits of the matters and they are either considered appropriate for referral to a s13 delegate, or they are declined and returned to the referring team. If the matter is appropriate for referral to a s13 delegate the committee assigns an enforcement staff member to be the case officer for the investigation, and a case supervisor. Case supervisors are executive level staff members, and generally, they have attended the enforcement referrals committee meeting where the relevant matter has been considered.

ASIC has delegated its powers under s13 of the ASIC Act widely, to staff members at all classification levels. In practice, the s13 power to commence an investigation is exercised by the case supervisor assigned to the matter by the referrals committee. As noted above, the case supervisor is an executive level staff member who has attended the enforcement referrals committee for the matter.