Parliamentary Joint Committee on Corporations and Financial Services

Statutory oversight of the Australian Securities and Investments Commission

May 2011

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Duties of the Committee

Section 243 of the *Australian Securities and Investments Commission Act 2001* sets out the Parliamentary Committee's duties as follows:

(a) to inquire into, and report to both Houses on:

(i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASX	Australian Securities Exchange
Corporations Act	*Corporations Act 2001*
The Directions	The Legal Services Directions, 2005
OLSC	Office of Legal Service Coordination
GFC	Global Financial Crisis

Chapter 1

Statutory oversight

1.1 The Parliamentary Joint Committee on Corporations and Financial Services was established by the *Australian Securities and Investments Commission Act 2001*. Section 243 specifies the committee's duties, which include:

> (a) to inquire into, and report to both Houses on:
>
> > (i) the activities of the Australian Securities and Investments Commission (ASIC) … or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed …

1.2 This report is presented in execution of the committee's duty under section 243(a)(i).

Gathering evidence

1.3 The committee held a public hearing on 11 March 2011 in Sydney to examine matters falling within ASIC's regulatory jurisdiction. The committee invited the Australian Securities Exchange (the ASX) and the Office of Legal Service Coordination (OLSC) to give evidence at the hearings. The committee thanks the ASX and OLSC for their significant contributions to the oversight process.

1.4 This report reflects evidence taken at the hearing. The witnesses who gave evidence are listed in Appendix 1. A copy of the Hansard transcript from the hearing has been tabled for the information of the Parliament and is available on the committee's website.[1]

Additional information

1.5 A number of questions were placed on notice at the hearing. Those questions, and responses to them, are published in Appendix 2.

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1 www.aph.gov.au/Senate/committee/corporations_ctte/asic/index.htm

Chapter 2

Matters considered at oversight hearing

2.1 The committee raised a number of matters with ASIC, the ASX and OLSC at the oversight hearing on 11 March 2011. These included:

- Market supervision:
  - ASX-ASIC coordination;
  - Market competition;
  - Broader market developments;
- Complaints-handling;
- Litigation:
  - Legal Services Directions;
  - Proceedings relating to the collapse of Storm Financial Ltd;
- Financial literacy;
- Freezing of investors' funds;
- Regulation of consumer credit; and
- Regulation of the not-for-profit sector.

Market supervision

ASX-ASIC coordination

2.2 The committee has previously noted the transfer of responsibility for supervision of real-time trading on Australia's domestic licensed markets from the ASX to ASIC.[1] ASIC explained that as a result of the transfer, the ASX has responsibility for market operation while ASIC has responsibility for market integrity rules.[2] The ASX described the demarcation in responsibilities as a 'regulatory versus non-regulatory distinction.'[3]

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1 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, pp 3–5.

2 Mr Mark Adams, Senior Executive Leader, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 25.

3 Mr Malcolm Starr, Executive General Manager, Regulatory and Public Policy, ASX, *Proof Committee Hansard*, 11 March 2011, p. 3.

2.3 There is potential for the responsibilities to overlap, as both the ASX and ASIC are concerned to ensure a transparent, effective market.4 The ASX argued that there is 'limited scope' for conflict between the ASX operating and ASIC market integrity rules. The committee was informed that ASIC and the ASX have established a compliance liaison committee that meets on a fortnightly basis to address issues of 'rule overlap.' Furthermore, the ASX noted that its rules are subject to ministerial disallowance, which both the ASX and ASIC commented could be used to address any conflict between ASIC and ASX rules.5

2.4 The ASX advised, and ASIC confirmed, that the compliance liaison committee oversees coordination of ASIC and the ASX's activities where these may overlap. The committee is updating the ASX-ASIC memorandum of understanding, and developing a protocol to coordinate enforcement and monitoring activities to avoid, for example, both agencies simultaneously conducting on-site broker reviews.[6] ASIC advised that the compliance liaison committee is also developing a protocol to govern continuous disclosure of information between the ASX and ASIC.[7]

2.5 At the oversight hearing in November 2010, held approximately four months after the transfer of market integrity responsibilities, ASIC advised that 'the time from identification of a problem through to a formal investigation has decreased.'[8] ASIC confirmed that the efficiencies gained through merging responsibilities for problem identification and investigation continued, advising that:

> ...out of our 24 matters that we have now sent through that have been approved for investigation 10 were taken on by deterrence teams within 30 days of the trading activity. Previously, ASIC would not really have seen a matter for maybe four to six weeks.[9]

2.6 The ASX suggested that the transfer would 'not necessarily' lead to improvements in market supervision, as the decision to transfer responsibility was in response to competition imperatives rather than any concern with the ASX's oversight activities. The ASX commented that the 'real test comes when you have additional market operators.'[10] However, the ASX concurred with the view that the transfer has removed 'double handling' and therefore resulted in a more efficient investigatory

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4 Mr John Yanco, Regional Commissioner for New South Wales, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 22.

5 Mr Kevin Lewis, Executive and Chief Compliance Officer, ASX, *Proof Committee Hansard*, 11 March 2011, p. 3; Mr Adam, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 25.

6 Mr Lewis, ASX, *Proof Committee Hansard*, 11 March 2011, pp 3–4; Mr John Yanco, Regional Commissioner for New South Wales, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 22.

7 Mr John Yanco, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 22.

8 Ms Belinda Gibson, Deputy Chairman, ASIC, *Committee Hansard*, 24 November 2010, p. 23.

9 Mr Yanco, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 27.

10 Mr Starr, ASX, *Proof Committee Hansard*, 11 March 2011, p. 6

process. Mr Kevin Lewis, Group Executive and Chief Compliance Officer, ASX, commented:

> One of the points that ASIC has made is that, because it is now doing the market monitoring itself and able to investigate straightaway, that certainly speeds up the process of taking enforcement action. I think that is unquestionably correct.[11]

Market competition

2.7 The Australian Government has granted a licence to Chi-X, subject to Chi-X meeting licensing conditions overseen by ASIC.[12] Amendments to market integrity rules and market regulation will be required to ensure consistency across a multimarket environment.

2.8 On 3 March 2011, ASIC announced a timeframe for the introduction of new market integrity rules to facilitate market competition.[13] In releasing the timeframe, ASIC advised that the timeframe takes account of the need for a seamless implementation of the new market integrity arrangements:

> We intend to implement a regulatory framework that reflects the minimum needed for the commencement of competition and that will minimise system changes for industry and maintain market integrity.
>
> We also intend to provide transitional arrangements for the rules that are likely to require more resources and capacity...
>
> We intend to consult on the additional rules needed in response to the wider market developments (e.g. relating to automated electronic trading and volatility controls). We intend to further consult with the aim of settling these additional rules in early 2012 (with sufficient lead time for transition and implementation). More details will be provided in coming months.
>
> We will work with Treasury, the ACCC and industry in considering the development of access arrangements to market operator services.[14]

2.9 In accordance with the timeframe, on 29 April 2011 ASIC released the final market integrity rules of general application that will 'provide the framework for the

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11 Mr Lewis, ASX, *Proof Committee Hansard*, 11 March 2011, p. 7.

12 The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, the Hon Bill Shorten MP, Assistant Treasurer, 'Government approves new financial markets competitor', Media release, 4 May 2011.

13 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, 3 March 2011.

14 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, Attachment 2, p. 2, 3 March 2011.

introduction of competition in equity exchange markets.' The majority of the new rules will apply from 31 October 2011.[15]

2.10 ASIC has also introduced market integrity rules specifically for the Chi-X market.[16] Mr Mark Adams, Senior Executive Leader, ASIC, explained that the Chi-X market integrity rules reflect the rules applying to the ASX:

> What we are intending to put in place, at first instance, [are] consistent rules across all market platforms which are based on the current ASX rules.[17]

2.11 The timeframe contemplates that subject to Chi-X receiving an Australian market licence and meeting ASIC's preconditions for commencement, Chi-X will commence operation in October/November 2011.[18] ASIC has advised that consequential amendments will be required for the market integrity rules specifically applying to the ASX market, and intends to issue these in October/November 2011.[19]

Broader market developments

2.12 The committee has previously noted ASIC's consultations on options to reform market structure and surveillance.[20] ASIC advised the committee that stakeholder feedback recommended that market integrity rules be considered in two phases; phase one to consider market competition issues and phase two to consider broader market developments.[21] On Friday 29 April 2011, ASIC announced that it will continue to consult on the need for additional market integrity rules to address broader market developments, with a view to finalising additional rules in early 2012. Matters that phase two will consider include volatility controls for extreme price movements and the regulation of dark pools.[22]

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15 ASIC, 'ASIC publishes final competition market integrity rules', Media release 11-87MR, 29 April 2011.

16 ASIC, 'ASIC publishes final competition market integrity rules', Media release 11-87MR, 29 April 2011.

17 Mr Adams, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 29.

18 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, Attachment 1, p. 2, 3 March 2011.

19 ASIC, 'ASIC announces timetable for the introduction of market competition', Media release 11-38MR, Attachment 1, p. 2, 3 March 2011.

20 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, pp 3–5.

21 Mr Adams, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 30.

22 ASIC, 'ASIC publishes final competition market integrity rules, Media release 11-87MR, Friday 29 April 2011; Mr Adams, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 30.

Committee view

2.13 The committee is concerned to ensure that the transfer of responsibilities from the ASX to ASIC leads to measurable improvements in market integrity. The committee notes the improvements in the time from identification to investigation. The committee will continue to raise this matter with ASIC, to determine whether improvements continue.

2.14 The committee will monitor the impact of increased competition on market integrity, and continue to seek ASIC's advice on this matter. The committee is also interested in the phase two considerations of whether additional market integrity rules are required, particularly in relation to dark pools, and will seek updates from ASIC about the progress of the phase two consultations.

Complaints-handling

2.15 ASIC receives approximately 14,000 complaints per year.[23] Of these, approximately 21 per cent relate to matters outside ASIC's responsibilities.[24] For the 2007–08 to 2009–10 financial years, on average a further 20 per cent relate to the same matters.[25] ASIC advised that each report of misconduct is formally assessed.[26] ASIC has established procedures for reviewing complaints, which can include information gathering from internal and external sources and consultations with the ASIC Deterrence team and Stakeholder teams to determine surveillance and compliance options.[27]

2.16 The committee was informed that ASIC's complaints handling policies require the agency to provide a response to complainants. ASIC's complaints handling policies recommend that ASIC respond to 70 per cent of complainants within 28 days.[28] ASIC advised that for the year-to-date, 80 per cent of complainants receive a response within this timeframe.[29] The committee raised with ASIC concerns that the committee has received that ASIC is not taking appropriate action in response to complaints. Mr D'Aloisio commented that ASIC is aware that some complainants may have this perception of ASIC's response to reports of potential misconduct:

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23 Mr Warren Day, Regional Commissioner, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 33.

24 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 33.

25 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

26 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

27 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

28 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 34.

29 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

> It is a problem that worries me, that worries the Commission, in the sense that we want to make sure that we are not seen to be dropping the ball in any cases and that we do discharge our responsibilities as a regulator.[30]

2.17 The committee was informed that the extent of information provided to the complainant can depend on the nature and assessment of the complaint. Where a matter is outside ASIC's responsibilities, ASIC seeks to refer the complainant to the appropriate government agency.[31] For complaints within ASIC's regulatory ambit, policies regarding market integrity, confidentiality and privacy can influence the level of information a complainant receives. ASIC advised that a measured, limited response can be required to avoid compromising market integrity:

> For Market Integrity matters, the acknowledgement letter advises complainants that they will not hear further from ASIC unless we need further information due to the sensitivity of these matters. These reports of misconduct need to be treated with sensitivity, because if the complainant was aware if ASIC was taking further steps, or misrepresents this, it has the potential to move the share price of a stock, possibly for no good reason.[32]

2.18 Mr Tony D'Aloisio, Chairman, ASIC, stated that ASIC's investigations into complaints are confidential, and explained that the confidentiality is to ensure fairness to the person investigated:

> But at the moment the default, if you like, is that the balance is in favour of individual rights and preserving those until such time as we feel there is a case to answer and it is going to court.[33]

2.19 In contrast to investigations, ASIC's litigation is on the public record. Mr D'Aloisio stated that the differing approaches to confidentiality have a bearing on ASIC's response to complainants:

> [The] line traditionally has been drawn that, once the investigation is complete, if ASIC decides to take action, it is announced and that then gives the public a right to know. The difficulty with that line has been that where ASIC decides not to take any action, that has not generally been announced or made known.[34]

2.20 Where litigation is commenced, for cases with a significant volume of complaints ASIC may adopt additional measures to inform the public of the progress of the case. For example, ASIC has developed a website to keep the public informed

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30 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 36.

31 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 35.

32 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

33 Mr Tony D'Aloisio, Chairman, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 37.

34 Mr D'Aloisio, AISC, *Proof Committee Hansard*, 11 March 2011, p. 37.

of the proceedings against Storm Financial Ltd (Storm Financial).[35] The website also contains confidential pages that provide information for investors.[36] A similar website was developed for ASIC's proceedings against Westpoint.[37]

2.21 The committee was informed that ASIC is reviewing options to improve communications with complainants:

> We are looking at what we can do to better improve that aspect of communication, of reassuring people that the matter is not dead or has not been lost sight of but at the same time balancing the rights of individuals. The other area that we have concerns about and are trying to grapple with is where you come to the view that ultimately a matter does not have the merit to proceed and how you then communicate that back to the individual. I am conscious of the problem, and we are trying to work it out.[38]

2.22 The review will consider what measures can be taken to decrease the time taken to respond to complaints, to ensure complaints are made to appropriate agencies at the outset, and to provide clear information about 'ASIC's attitude to certain complaints' (for example ASIC considers inter-director disputes to be private matters for the company to manage).[39]

2.23 The committee has previously commented that it would welcome an explanation of the trend for the number of complaints to increase per year.[40] ASIC considers that the trend is indicative of improved consumer literacy rather than a decrease in the quality of financial services. Mr Warren Day, Regional Commissioner, ASIC stated:

> As people become more informed, more financially literate, they are more likely to complain because they know who the players are, they know we exist, they know what our remit is; therefore they complain...[M]ore complaints shows an increase in financial literacy more than anything else.[41]

Committee view

2.24 Responding to complaints promotes market confidence, and is a key regulatory function. The manner in which complaints are handled affects public

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35 ASIC, 'Overview of ASIC's Storm website', https://storm.asic.gov.au/storm/storm.nsf (viewed 16 May 2011).

36 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 36.

37 ASIC 'Westpoint investors website', https://westpoint.asic.gov.au/ (viewed 16 May 2011).

38 Mr D'Aloisio, AISC, *Proof Committee Hansard*, 11 March 2011, p. 37.

39 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

40 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, p. 12.

41 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 45.

opinion about whether ASIC is effectively fulfilling its regulatory responsibilities. The committee notes with approval the percentage of complaints responded to within 28 days. It is apparent from the information provided to the committee that complaints are thoroughly assessed. The committee expects ASIC to provide complainants with sufficient information to assure them that the complaints have been assessed, without compromising the rights of persons investigated or market integrity. The committee looks forward to the outcomes of ASIC's review of what measures can be taken to improve communications with complainants.

Litigation

2.25 The committee routinely inquires into ASIC's involvement with civil and criminal litigation, and seeks information about the policies and practices that underpin the agency's litigation decisions. The committee notes that for the 2009–10 financial year ASIC concluded 156 matters.[42] For the same financial year, ASIC's spending on legal services exceeded that of other federal agencies. The agency's expenditure on legal services increased by approximately 14 per cent from $70.8 million in 2008–09 to $80.7 million.[43]

2.26 The committee was informed that 45 of ASIC's cases were resolved since the oversight hearing in November 2010. Of these, 41 were resolved in ASIC's favour. These matters include the Westpoint litigation, which ASIC anticipates will result in investors receiving $160 to $170 million of a total loss of $388 million, and the criminal proceedings against Mr Scott Kenneth Murray, Chief Executive Officer of Sonray Capital Markets Pty Ltd.[44]

Proceedings relating to the collapse of Storm Financial Ltd

2.27 ASIC has commenced several proceedings in response to the collapse of Storm Financial Ltd. These include civil penalty proceedings against Emmanuel Cassimatis and Julie Cassimatis as directors of Storm Financial, and compensation proceedings against parties including the Commonwealth Bank of Australia, Bank of Queensland Limited and Macquarie Bank Limited arising out of the entities' involvement in an alleged unregistered managed investment scheme operated by Storm Financial and alleged breach of contract, unconscionable conduct and liability as linked credit providers of Storm Financial under section 73 of the *Trade Practices Act 1974*.[45]

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42 ASIC, *ASIC Annual Report 09–10*, p. 16.

43 OLSC, *Legal Services Expenditure Report 2009-10*, 2010, p. 14.

44 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 19; ASIC, '11-29AD Sonray CEO pleads guilty', Media release, 22 February 2011.

45 ASIC, *Overview of ASIC's Storm Website*, https://storm.asic.gov.au/storm/storm.nsf (viewed 15 April 2011).

2.28 The committee was informed that dispute resolution has occurred and the matters are now before the courts. ASIC assured the committee that the agency is committed to progress the cases 'in the quickest possible time that it can given the court program and given the rights of the defendants to contest various issues.'[46]

2.29 ASIC's enforcement response to the collapse of Storm Financial also includes revoking the licence of a former authorised representative of Storm Financial, banning the financial adviser from providing financial services for four years. The ban follows ASIC's findings that the adviser contravened requirements under the *Corporations Act 2001* by providing inappropriate advice to a number of clients and making false and misleading statements.[47]

Legal Services Directions

2.30 As an agency under the *Financial Management and Accountability Act 1997*,[48] ASIC must comply with the Legal Services Directions in conducting, and in determining whether to conduct, litigation.[49] Mrs Janette Dines, Assistant Secretary, OLSC, advised that the directions were developed to promote the delivery of Commonwealth legal services 'in a consistent and coordinated manner so as to protect the Commonwealth's legal and financial position.'[50] The directions impose on Commonwealth agencies an 'obligation to act as a model litigant.' The model litigant obligations require agencies, including ASIC, to 'act honestly and fairly and with complete propriety in handling claims and litigation brought by or against them.'[51]

2.31 The Chief Executives of Commonwealth agencies are responsible for ensuring there are appropriate management strategies and practices in place to achieve compliance with the directions.[52] Mr D'Aloisio reported that, consistent with this requirement, the model litigant rules are 'part and parcel' of ASIC's litigation procedures.[53] The committee was informed that through the Chief Legal Office and General Council, ASIC has established procedures to 'track through complaints or

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46 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, pp 39 – 40.

47 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 19; ASIC, '11-32AD ASIC banks former Storm Financial adviser', Media release, 24 February 2011.

48 Department of Finance and Deregulation, 'Table of Agencies subject to the Financial Management and Accountability Act 1997', http://www.finance.gov.au/financial-framework/fma-legislation/fma-agencies.html (viewed 12 April 2011).

49 Clause 1.1, *Legal Services Directions 2005*.

50 Mrs Janette Dines, Assistant Secretary, OLSC, Commonwealth Attorney-General's Department, *Proof Committee Hansard*, 11 March 2011, p. 11.

51 Mrs Janette Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 11.

52 Clause 11.1, *Legal Services Directions 2005*.

53 Mr Tony D'Aloisio, Chairman, ASIC, *Proof Committee Hansard*, 11 March 2011 pp 32–33.

issues that may have been raised in relation to [ASIC's] compliance with those directions.'[54]

2.32 Mr D'Aloisio reported that the agency closely adheres to the directions,[55] and further stated:

> Our interests and the Attorney-General's interests are entirely consistent. At the end of the day we are a law enforcement agency and we work within law enforcement agency rules.[56]

2.33 In general, OLSC approves of ASIC's conduct in relation to the directions. Mrs Dines advised that ASIC actively complies with its obligations to inform the office of all potential breaches of the directions and complaints received about ASIC's conduct as a litigant; and confirmed that ASIC has a strong record of compliance with the directions:

> From everything we see, ASIC does take quite seriously the requirements and attempts to ensure that it complies with the kinds of standards of fairness that the model litigant obligations requires...[T]he majority of the model litigant complaints that the Office of Legal Services Coordination have looked at have been ones where ASIC has drawn the complaint to our attention, and we have generally not found a breach in those cases.[57]

2.34 ASIC has previously stated that the agency applies a 'considered and rigorous process' to determine whether to conduct litigation. The process includes consideration of whether litigation would be in the public interest and whether the case has 'more than reasonable prospects of success.'[58] ASIC confirmed this, commenting that:

> At the heart of it, at the end of the day, is the issue that, in undertaking any form of litigation you have to ask: is it a case where you have reasonable prospects of success as a matter of law? Secondly, is it in the public interest that you take that case on in that way? Those decisions are case by case decisions that the agency makes.[59]

2.35 It appeared that agencies may balance the two considerations. OLSC advised that:

> It is very explicitly recognised that there will be circumstances where, while technical legal advice would actually say that the Commonwealth's

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54 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 20110, p. 32.

55 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 32.

56 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 39.

57 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 14.

58 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 29 April 2010, pp 24 – 25.

59 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 33.

> prospects of success were limited, it would actually be appropriate because of those broader factors for an agency to initiate or pursue litigation.[60]

2.36 Regarding ASIC's role as a regulator, Mrs Dines noted that public interest considerations are of particular relevance:

> [J]ust being specific around ASIC...because of the nature of its regulatory functions it is not necessarily always clear-cut because you may have other regulatory objectives or specific things in your enforcement strategy...So we accept there is an additional level of sophistication that leaves it a little bit up to the judgement of the agency as to how you would make a decision in a particular circumstance.[61]

2.37 ASIC concluded that:

> ASIC is not required to report to OLSC on the matters which have not resulted in litigation. The Legal Services Directions...have limited application to such matters. The decision whether or not to progress a complaint or litigation is ultimately a regulatory decision informed by ASIC's statutory mandate rather than a legal decision to which the Directions apply.[62]

2.38 For the 2009-10 financial year, ASIC spent $50.2 million on internal legal services. In contrast, the cost of engaging external legal services totalled $30.5 million.[63] ASIC's expenditure on internal legal services exceeded that of other Commonwealth agencies, and increased by approximately 16 per cent from $43.3 million in 2008–09. ASIC's spending on external counsel was the second highest of Commonwealth agencies, increasing by approximately 10 per cent from $27.5 million in 2008–09.

2.39 It appeared that the directions can influence an agency's decision to engage internal rather than external legal counsel. Of particular relevance are ASIC's exemptions from two requirements under the directions. Mrs Dines advised that ASIC has greater flexibility to engage in-house counsel than most Commonwealth agencies, as the agency is exempt from the rule that in-house lawyers cannot act as counsel without the Attorney-General's prior approval.[64] The committee was informed that ASIC is also exempt from the $5 000 cap per day on the fees that may be paid to external counsel. With the approval of the portfolio minister, ASIC may engage external counsel at rates above $5 000, but not exceeding, $10 000 per day.[65]

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60 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 16.

61 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 17.

62 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

63 OLSC, *Legal Services Expenditure Report 2009-10*, pp 21, 27.

64 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, pp 13–14.

65 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 13.

2.40 There were two reasons for granting ASIC the exemptions. Mrs Dines stated that the exemption regarding in-house counsel is designed to promote cost-effective spending on legal services.[66] Second, the committee was informed that both exemptions facilitate the engagement of experienced, expert counsel. Mrs Dines explained that the cap on fees was granted following 'a significant period, over a couple of years, where ASIC consistently had difficulty in being able to engage counsel of a suitable stature and experience within the ceilings within the Legal Services Directions.' Similarly, the barriers to engaging in-house counsel were removed in 'recognition that, for many of the aspects or types of litigation that ASIC may undertake, the level of technical knowledge that an in-house lawyer can bring gives you a better result.'[67]

Committee view

2.41 The committee commends ASIC for its adherence to the Legal Service Directions. The committee may subsequently raise this matter with OLSC, to be satisfied that ASIC continues to comply with the directions and, in particular, the obligation to act as a model litigant.

2.42 The committee considers that ASIC must have ready access to highly qualified and experienced legal counsel to conduct litigation, and has previously commented that it is essential for ASIC to have dispassionate and expert legal opinion about the prospects of any proposed litigation.[68] The committee notes OLSC's advice that the exemption regarding the use of in-house counsel expires in June this year. It would be of significant concern were the Legal Services Directions to impede ASIC's access to high-quality legal services and thereby undermine ASIC's effectiveness as a regulator. The committee recommends that extending the exemption beyond June 2011 be promptly and carefully considered.

Financial literacy

2.43 On 15 March 2011, ASIC launched a new personal finance website 'MoneySmart'.[69] The website provides a range of calculators and tools to assist persons making financial decisions.[70] Subjects covered include budgeting, credit cards, loans, superannuation contributions and margin loans. Mr D'Aloisio explained:

> We see this website replacing [the FIDO website] and upgrading and providing interactive assistance to investors and financial consumers in

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66 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 13.

67 Mrs Dines, OLSC, *Proof Committee Hansard*, 11 March 2011, p. 13.

68 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, June 2010, p. 13.

69 http://www.moneysmart.gov.au/.

70 ASIC 'MoneySmart.gov.au – simple guidance you can trust', Media release 11-4MR, 15 March 2011.

> relation to superannuation and loans in a number of areas. It is very much part and parcel of our drive to improve our financial literacy in Australia.[71]

2.44 'MoneySmart' was launched as part of the National Financial Literacy Strategy, which ASIC developed in consultation with the Government, the Financial Literacy Board and industry and community groups.[72] The Strategy aims to 'enhance the financial wellbeing of all Australians by improving financial literacy levels'[73] through:

- Delivering quality financial literacy education to all Australians through schools, workplaces, higher education institutions and in the community;
- Providing all Australians with access to the information and tools they need to make good financial choices;
- Going beyond education to guidance and other strategies to enhance the financial well-being of Australians, including developing a new consumer website; and
- Developing partnerships between the various sectors involved in financial literacy work.[74]

2.45 As noted on the 'MoneySmart' website, ASIC has established a Twitter account. The account provides information to ASIC's 'registry customers', including companies, officeholders, registered agents and financial services and credit licences.[75] Mr Day stated that the account presents information through a medium relevant to the financial services industry.[76]

2.46 The committee notes ASIC's decision to target the quality of financial advice provided to people at retirement, through shadow shopping research. The research aims to target an area of growing need, with an increasing percentage of the population preparing for retirement.[77]

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71 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 20.

72 ASIC, 'MoneySmart.gov.au – simple guidance you can trust', Media release 11-4MR, 15 March 2011.

73 MoneySmart, *About the strategy*, http://www.financialliteracy.gov.au/about-the-strategy (accessed 2 May 2011).

74 ASIC, 'MoneySmart.gov.au – simple guidance you can trust', Media release 11-4MR, 15 March 2011.

75 ASIC, *ASIC's registry services Twitter pilot*, http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+Twitter+pilot?openDocument (accessed 2 May 2011).

76 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 45.

77 ASIC, 'ASIC begins shadow shopping research', Media release 11-53MR, 21 March 2011.

Committee view

2.47 The committee notes with interest the development of 'MoneySmart' and the interactive consumer information and tools it provides. The committee would welcome a comparison of the effectiveness of 'MoneySmart' with the FIDO website, and will raise this issue with ASIC at subsequent oversight hearings.

2.48 The committee has previously noted its interest in financial literacy among retirees.[78] The committee approves ASIC's research into financial advice provided to persons considering retirement, and will seek ASIC's advice about the outcome of this research.

Freezing of investors' funds

2.49 The global financial crisis (the GFC) resulted in a significant increase in the number of illiquid investor funds. In accordance with the Corporations Act, these funds were frozen, thereby suspending investors' rights to redeem their investments.

2.50 There are two methods by which investors may redeem the investments; first, fund managers may release monies back through a single offer released on a pro rata basis to interested investors, and, second, funds may be released in response to hardship applications.[79] Mr Greg Medcraft, Commissioner, ASIC, advised that as of 31 January 2011, 6,500 hardship applications had been received of which 4,300 have been approved. $114 million has been returned through hardship payments.[80] Mr Medcraft reported that the agency is generally satisfied with the process and timeframes for the release of funds.

2.51 Since January 2010, ASIC has received an average of 10 complaints regarding frozen funds per month. ASIC advised that the complaints can be categorised as:

> those raising initial concerns with ASIC about their inability to access their investment in the frozen funds; those complaining about a fund's failure to implement a hardship policy; and those who have been unsuccessful in attempting to access their funds.[81]

2.52 The committee was advised that, in relation to the management of investor funds, the lessons of the GFC are informing future market regulation:

> ...we have been consulting on benchmarks for the future of the mortgage trust sector. The hope is that in the future we will have benchmarks that will highlight the nature and liquidity of the underlying fund. Again it is what

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78 Parliamentary Joint Committee on Corporations and Financial Services, *Statutory oversight of the Australian Securities and Investment Commission*, February 2011, p. 13.

79 Mr Greg Medcraft, Commissioner, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 40.

80 Mr Medcraft, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 40.

81 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

> we always do: we look at what we have done in the past and what we can do today. We are trying to have a more robust sector for the future.[82]

Regulation of consumer credit

2.53 With the introduction of the National Consumer Credit Code in 2010, ASIC received responsibility for licensing and monitoring consumer credit providers. Mr D'Aloisio reported that the transfer of responsibility to ASIC 'is going extremely well.'[83] Of the 14,700 persons registered, 6,882 have applied for licences. Mr D'Aloisio advised that 4,387 licences have been granted and ASIC has approved an additional 1,044 applications.[84]

2.54 The committee has previously been informed that the introduction of the national consumer credit system was in part a response to the 'varying degrees of rigour' with which state and territory consumer credit schemes were enforced.[85] Mr Day stated that ASIC is closely monitoring consumer credit complaints, to promote from the outset 'as close to 100 per cent compliance as we can.'[86] ASIC considers that strong initial compliance with the requirements will 'set [the consumer credit] industry up for better compliance into the future.'[87] ASIC advised that to strengthen ASIC's response to consumer credit concerns, ASIC is also prioritising the development of the skills and expertise of its staff in consumer credit issues relating to the provision of credit services by unlicensed and unregistered persons.[88]

Regulation of the not-for-profit sector

2.55 Regulation of the not-for-profit sector is fragmented, with multiple agencies including ASIC having regulatory responsibilities for the sector.[89] The committee was informed that ASIC regulates approximately five per cent of the not-for-profit sector, having authority to regulate not-for-profit organisations that are constituted as companies limited by guarantee.[90]

2.56 For the 2007–08, 2008–09 and 2009–10 financial years, complaints regarding the not-for-profit sector comprise approximately 3 per cent of the total complaints

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82 Mr Medcraft, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 41.

83 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 20.

84 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 20.

85 Dr Peter Boxall AO, Commissioner, ASIC, *Committee Hansard*, 23 June 2010, p. 23.

86 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 44.

87 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 44.

88 Mr Day, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 44.

89 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, p. 116.

90 Mr John Price, Senior Executive Leader, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 46.

ASIC received.[91] ASIC stated that complaints relating to these not-for-profit organisations predominantly relate to internal matters such as 'control and decision-making within a company and access to financial reports.' ASIC advised that it considered such internal matters are for the organisations, rather than ASIC, to address.[92]

2.57 In its 2010 report *Contribution of the Not-for-Profit Sector*, the Productivity Commission recommended that, as an interim measure, ASIC assume responsibility for all regulatory functions relating to not-for-profit organisations.[93] The Australian Government is currently considering this proposal, with Treasury releasing a consultation paper that outlines options of the combined regulatory functions being undertaken by ASIC or the Australian Taxation Office.[94]

2.58 In relation to the possibility of taking responsibility for the not-for-profit sector, Mr D'Aloisio noted that ASIC 'has a lot on', and further argued that ASIC would require appropriate resources to undertake the additional responsibilities:

> ...we would need to be adequately resourced to do that, to add to our registries. It is something that would take some time and some resources to put in place.[95]

Committee view

2.59 The committee reiterates its view that the expansion of ASIC's responsibilities carries with it the risk of diluting expertise and resources. This risk can be mitigated through appropriately resourcing ASIC to undertake any new responsibilities.

Mr Bernie Ripoll MP

Chairman

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91 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

92 ASIC, answer to question on notice, 11 March 2011 (received 28 April 2011).

93 Recommendation 6.5, Productivity Commission, *Contribution of the Not-for-Profit Sector*, p. 152.

94 Treasury, *Scoping paper for a national not-for-profit regulator: Consultation paper*, January 2011, pp 22–23.

95 Mr D'Aloisio, ASIC, *Proof Committee Hansard*, 11 March 2011, p. 49.

Appendix 1

Public hearing

Friday 11 March 2011 – Sydney

Australian Securities and Investments Commission (ASIC)

Mr Tony D'Aloisio, Chairman

Mr Mark Adams, Senior Executive Leader

Mr Warren Day, Regional Commissioner

Mr Greg Medcraft, Commissioner

Mr John Yanco, Regional Commissioner for New South Wales

Australian Securities Exchange

Mr Kevin Lewis, Group Executive and Chief Compliance Officer

Mr John Price, Senior Executive Leader

Mr Malcolm Starr, Executive General Manager, Regulatory and Public Policy

Office of Legal Services Coordination

Mrs Janette Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department

Appendix 2

Answers to questions on notice

ASIC Oversight hearing, 11 March, 2011

Australian Investment and Securities Commission

Question on notice 1, (Proof Hansard, pp 33 – 35)

Topic: Duplication of Complaints

Mr Day—As you know, ASIC receives around 14,000 reports of misconduct, or complaints, a year. Of those, I think it is important to note that about 21 per cent are not in the jurisdiction. They relate to other things and there is no actual information there that gives grounds for an offence. So 21 per cent are not something that ASIC would ever be able to action, for those reasons. We count the 14,000 as everything that comes through the door. We register and acknowledge everything that comes through the door and everything gets considered, initially, in that space. We aim to do 70 per cent of that initial assessment within 28 days. So 70 per cent of those who put in a complaint will get a response within 28 days.

In terms of the criteria and the matrix of issues that will apply to that, our formal assessment takes into account the information that the report contains. We will look at other antecedents. Have we been told about that individual party before? We match up previous information out of our database. We will take into account other sources of information that we might have received from other agencies or from other parts of ASIC. We match all those up, so it is not just taken in isolation without the context of other things. It is an important component of what we do.

Mr ANTHONY SMITH—You said 14,000.

Mr Day—Yes.

Mr ANTHONY SMITH—You might want to take this on notice, but what proportion of that would be repeat business, where you have multiple complaints in an area? Would it be 50 per cent?

Mr Day—We refer to them internally as duplicates. Those are ones that are about the same thing. Or are you talking about a person who has come back more than once?

Mr ANTHONY SMITH—No—the same issue.

Mr Day—We could probably tell you that.

Mr ANTHONY SMITH—Do you want to take it on notice?

Mr Day—I am happy to take it on notice. The thing you need to be careful about with that, as Mr Ripoll would know, is in relation to a matter like Storm it is in the

hundreds. The commission said some time ago that they put a threshold that anything that has a certain number, like a hundred complaints, needs to go to the commission. I can tell you that what we would call a high-volume matter is something that has something like eight complaints. That is not to say that we do not get matters that have 50 to 100 complaints. That happens occasionally, although in the last 12 months there has been less of that.

CHAIRMAN—But there is no minimum requirement?

Mr Day—No.

CHAIRMAN—If there was just one complaint, if it was significant—

Mr Day—I would not be able to mention the details of them but I could point to a number of things in the last three months that have been accepted for further investigation by our deterrence teams that have been on the basis of one complaint and no other information. In terms of the threshold, it does not need more than one. But if you like, Mr Smith, I can still take on notice the question about—

Mr ANTHONY SMITH—I do not want you to create a bureaucracy. I am not going to hold you to precise percentages.

Mr Day—We will see what we can provide.

Mr ANTHONY SMITH—What I was really getting at is that, at any given point in time, 10 or 20 per cent—you tell us—might be an ongoing matter. For instance, there was one that was public last year dealing with some telecommunications and small business matters. There was a crossover with the relevant ombudsman, for instance. At any given point in time, I imagine, you would have a certain percentage that are ongoing and then you would have new complaints coming in. What you are saying is that the substance of just a single complaint is sufficient. That is really what I was getting at.

Response

ASIC has reviewed the complaints data for the last three years and identified those matters which were merged together for ease of handling. The table below shows the proportion of complaints raising the same issue since July 2007.

Year	**2007/2008**	**2008/2009**	**2009/2010**	**2010/2011 (Dec)**
Number of Complaints	11,436	13,633	13,372	7,370
% raising same issues	20%	24%	16%	16%

However, it may be that some of the remaining complaints will have raised duplicate issues to other complaints but were not identified in the review.

Question on notice 2, (Proof Hansard, pp 36 – 37)

Topic: Following up on complaints

CHAIRMAN—[...] Mr D'Aloisio, a complaint we often get into our offices or from people who write to us is that ASIC 'isn't doing anything about X, Y and Z', that there is no response or that you are not acting on what, on the surface, might appear to some people to be 'a case'—

Mr ANTHONY SMITH—It is still happening.

CHAIRMAN—Or it is still happening. A fund that has had some issues—perhaps fraud, and I could go through a number of specific ones. Generally speaking, we do get regular complaints. I want to give you the opportunity to satisfy us about this process of dealing with not just a complaint but with the matter, whether it is through litigation or through a particular action, that ASIC follows through on every single one as it were. That leads on from my question about the resourcing issue, but really I want to be confident—I am sure all the committee members want to be confident—that ASIC fulfils all of that to some satisfactory level, and hopefully that would then in turn satisfy people who complain about this view that either nothing or not enough is being done.

Mr D'Aloisio—It is a big question, Chairman. What I would like to do is not so much take it on notice but think about it a bit more and come back to you and give you an answer today as well. [...]

CHAIRMAN—Thanks for that. I appreciate that. So in terms of some follow-up that you said you would provide, maybe there are two particular areas of focus. One is that method of communication—while fully understanding what you have explained about what you can and cannot communicate, for all the right reasons—and maybe looking at how that is actually taken on board so that people, organisations or whoever it might be can feel satisfied that ASIC is undertaking its duties fully. So it is more of an opportunity for the commission to be able to give people some comfort that whatever it is that you are doing is satisfactory. The other one is around the idea or concept, certainly given what is portrayed to us as members of parliament, that a case might not be of interest to ASIC and there is a perception sometimes that, as has been explained to me, ASIC thinks it is too small, insignificant, not important enough, does not have enough public interest or whatever it might be. The complaint that is around is, 'Look, there is a case that exists but it's just not important to ASIC,' whereas it is important to the particular person that is raising the issue. So on those two themes there is maybe an opportunity to satisfy not only this committee but the public as well.

Mr D'Aloisio—Let me take both of those and we will give you a response. In giving you a response we will also do some internal spot reviews to illustrate our answer, to explain why our answer is what it is, so that it gives you a bit more meat—without naming individuals—about the issues that concern us when we balance individual rights against those of the public interest, the community interest, in trying to strike the right balance between keeping people informed and at the same time protecting those rights.

Response

Possible question: What does ASIC do when it receives a report of misconduct?

ASIC has a dedicated group, with staff in each of ASIC's offices, to receive, record, assess and refer reports of misconduct (complaints) that it receives, called Misconduct and Breach Reporting (MB&R). All such reports are received are registered in ASIC's internal and confidential national complaints management database within 1 business day of receipt. All reports of misconduct are acknowledged (insofar as the complainant provided contact details) by way of an acknowledgement letter and accompanying brochure explaining how ASIC deals with these reports. This acknowledgement letter is usually sent to the complainant on the day of registration of their complaint. For Market Integrity matters, the acknowledgement letter advises complainants that they will not hear further from ASIC unless we need further information due to the sensitivity of these matters. These reports of misconduct need to be treated with sensitivity, because if the complainant was aware if ASIC was taking further steps, or misrepresents this, it has the potential to move the share price of a stock, possibly for no good reason.

Once registered, reports of misconduct are preliminarily reviewed by a team leader who also classifies the matter in accordance with set keywords to enable ASIC to track and identify trends and enable accurate reporting. The team leader then allocates the matter to an appropriate M&BR analyst or lawyer for assessment.

ASIC is committed to finalising 70% of reports of misconduct received within 28 days of receipt. This commitment (as expressed in ASIC's Service Charter) reflects that ASIC may sometimes take longer to consider a complaint – for instance where the matter is complex or if ASIC determines that further evidence should be obtained prior to assessing the allegations of misconduct. Currently, for the year to date, ASIC is finalising around 80% within 28 days.

How does ASIC assess and prioritise reports of misconduct?

ASIC formally assesses every report of misconduct it receives to determine whether breaches of the legislation administered by ASIC may have occurred. As part of this process, we gather further information from internal and external sources to test the complaint (for example liquidator reports and AUSTRAC data), examine known history or intelligence about the subjects (including cross-referencing antecedent complaints, surveillances and investigations) and review the law to determine whether there has been a breach and if so, what action may be available to ASIC or the complainant to take.

Where a report of misconduct is assessed as being outside of ASIC's jurisdiction or where we believe there is no breach of the law, we will provide information to assist the complainant in resolving their issue. This may for example involve a referral to a more appropriate government agency or direct them to the Financial Ombudsman Service.

In cases where a suspected breach falling within ASIC's jurisdiction is identified, M&BR will consider whether to recommend further action on the basis of the following primary questions:

- What legal action can ASIC take?
- Is the evidence likely to be sufficient to support the allegations?
- How urgent and serious is the complaint, and would action support one of ASIC's stated priorities?
- If ASIC succeeds, will people behave better in future?

M&BR's recommendations are based on Commission priorities, Stakeholder and Deterrence Team priorities, as well as the above questions.

How does ASIC action reports of misconduct that are assessed as requiring action?

Matters considered to be serious enough are automatically escalated for SEL referral to an ASIC Deterrence team. Liaison is also undertaken with appropriate Stakeholder Teams within ASIC to ensure that the recommendation is appropriate.

Where a matter is considered to be of a systemic nature or where supporting evidence is lacking to warrant a formal Deterrence investigation, a referral to a Stakeholder Team for surveillance or compliance action may be considered.

Where a matter is referred to a Deterrence or Stakeholder Team, the file is transferred to that team for further consideration and potential action, and insofar as it would not jeopardise any potential investigation or action ASIC may be considering, the complainant is usually advised of this referral.

What does ASIC do when if it decides not to take action in respect of a report for misconduct?

Like other government agencies, ASIC is unable to pursue every potential actionable matter due to finite resources, competing priorities, lack of regulatory impact, lack of supporting evidence, lack of jurisdiction or alternative remedies available to the complainant to pursue.

In cases where ASIC decides not to take action in relation to a report of misconduct, the matter is recorded for intelligence purposes on an internal, confidential database to enable future cross-referencing, should further complaints or intelligence come to ASIC's attention. This approach ensures that ASIC is able to identify potential systemic issues and patterns of misconduct. Furthermore, assistance and information is provided to the complainant where possible, to assist in resolving the complaint or to help the complainant's understanding of other options that may be available to pursue privately.

In every case, the party reporting misconduct to ASIC is contacted to confirm whether or not ASIC will be considering the matter further and, where possible or required, why ASIC will not be actioning the matter further.

Further review and improvements

ASIC is reviewing the manner in which it communicates with those who report misconduct to it. In this, consideration needs to be given to legal or other reasons for not providing information about why ASIC is not taking action, or where it is, what the nature of that is and providing those who reported the misconduct with ongoing reports as to what ASIC is doing.

Further, the M&BR team is reviewing its handling of reports of misconduct to see what can be done to:

- speed the process up further;
- provide assistance sooner so the public can consider whether matters need to be raised with other agencies and not for ASIC unnecessarily; and
- provide clear and transparent information about what ASIC's attitude to certain complaints are (i.e. a large group of complaints relate to inter-director disputes in small proprietary limited companies, of which ASIC is generally of the view are private matters between the parties, which do not require ASIC to commit resources to as a matter of public policy).

This additional information, over time, will be available on ASIC's website to help the community make informed decisions and better understand how ASIC can assist them.

Question on notice 3, (*Proof Hansard,* p. 38)

Topic: Reporting on Cases which do not proceed to litigation

CHAIRMAN—[...] The Office of Legal Services Coordination relies on agencies like ASIC to provide them with details as to self-regulation in terms of any litigation that you are going to take on. Could you give us some idea of the level at which you do that?

Mr D'Aloisio—In addition to the certificate I give on compliance with Legal Services Directions, we report the cases we take on, the costs of counsel that we brief and the time. There is a range of reports that we provide back through—

CHAIRMAN—Does that include the cases that you do not take on? Does it go to the positive and the negative in terms of reporting?

Mr D'Aloisio—I will check that. I will take that one. I do not think it does go to the negative.

CHAIRMAN—I will explain why I am asking the question. I am assuming there is 100 per cent compliance and I am certainly satisfied that it is the case that ASIC does

report to the OLSC in terms of any potential breaches that ASIC might have and in terms of following the model litigant rules et cetera. But they are for all the cases that you do take on. What I am interested in is the decisions in the cases that you decide not to take on. So if there is a decision made, do you report that as well?

Mr D'Aloisio—If there is no case to answer or if a matter is a 'no further action'—or an NFA—I do not think we report that to the Attorney-General's Department. I will check. But in any event that material is available to us, to the commission and internally, and I can give those statistics to the commission. In other words, we can look at a 12-month period or whatever it is and outline the number of actions. We already report the investigations we take on—those where we are successful and those where we are not successful—and in that process we can also extract those where we decide that the evidence might be of a nature that requires no further action or where the public interest considerations are not met. We can give those numbers as well.

Response

ASIC is not required to report to OLSC on the matters which have not resulted in litigation. The Legal Services Directions 2005 (the Directions) have limited application to such matters. The decision whether or not progress a complaint or litigation is ultimately a regulatory decision informed by ASIC's statutory mandate rather than a legal decision to which the Directions apply.

ASIC provides a range of reports to OLSC. Some of these reports are required by the Directions, such as reports of any apparent or alleged breaches of the Directions (paragraphs 11.1(d) and 11.2 of the Directions) and reports on expenditure on legal services (paragraphs 11.1(ba) and (da) of the Directions). ASIC also has a number of reporting obligations arising from the two exemptions which have been granted to ASIC. These include a requirement for a quarterly report on all litigation being conducted by ASIC using its internal lawyers rather than external solicitors. They do not include any obligation to report on matters which have not proceeded to litigation.

The Directions apply to agencies' use of legal services and their handling of litigation and "claims". The Directions include a number of obligations which have to be fulfilled as part of a decision to commence litigation. They do not include any obligations that specifically address a decision not to commence litigation. At ASIC, such a decision may be made at a number of different stages along the process of progressing a complaint or investigation. Such decisions may involve obtaining internal or external legal advice and, when this occurs, the advice is obtained in accordance with those parts of the Directions which apply to the obtaining of legal advice. There is no general obligation to report decisions not to commence litigation to OLSC.

The term "claim" is not defined in the Directions but, based on the context in which it is used in the Directions, ASIC considers that it applies primarily to claims by or against the Commonwealth arising from matters such as claims for compensation against the Commonwealth or contractual matters involving the Commonwealth and another party. There are a number of obligations relating to the handling of claims, including the Appendix C to the Directions which requires monetary claims by or

against an agency to be settled in accordance with legal policy and practice. There is no general obligation to report claims, including claims that are resolved without litigation.

ASIC keeps statistics in relation to these matters for the purposes of internally managing the matters we decide to action or to take no further action on and to ensure effective planning in terms of staff and other resources needed to maximise our actions and support the community. We are continuing to look at ways in which we can make available these numbers for the information of the committee.

Question on notice 4 (*Proof Hansard*, pp 38 - 39)

Topic: ASIC, Model litigant rules and higher public interest

CHAIRMAN—Still on the theme of the model litigant rules, they are quite specific about how it all operates and the role that ASIC and other agencies need to play in adhering to those rules. Do you believe ASIC has a special case in the sense that there might be times when, rather than follow a settlement path, you have a higher public interest case because of giving examples to the market or setting a legal precedent or doing something which might have a further benefit?

Mr D'Aloisio—Do you mean outside the Legal Services Directions?

CHAIRMAN—Yes, where ASIC does make, or has the capacity to make, a decision not to follow model litigant rules on the basis that there is a higher public interest.

Mr D'Aloisio—I am not aware of any example where I have been involved or this commission has been involved in making that decision, that we would make a decision irrespective of the model litigant rules. Is there an example, Chairman?

CHAIRMAN—No.

Mr D'Aloisio—Our interests and the Attorney-General's interests are entirely consistent. At the end of the day we are a law enforcement agency and we work within law enforcement agency rules. There are some differences. For example, we can brief barristers probably more easily than some other agencies can in terms of some of the rules that are in place, but they are generally procedural rules. But on the substantive points of how we conduct litigation and judgments about what is in the public interest, I am not aware that we would say, 'Notwithstanding what the model litigant rules provide, we will go in this direction and then report it to the Attorney.' I have not had this question before—so it is not one that I have thought through—because the default always is that you are a Commonwealth agency and you comply with the agency rules. I do not see a circumstance right off. I am happy to think about it, Chairman.

CHAIRMAN—Okay. I will pursue it at some other point in time. I thought there might be a special case for ASIC where I think it would be a positive for ASIC to particularly go down a path which might not be entirely consistent with the model litigant rules because there is a higher public interest case.

Mr D'Aloisio—We will have a look at it. As for the most recent example, special leave to the High Court on James Hardie on an important point of law, when we looked at it we saw it affected ASIC and other agencies—probably ASIC more so—and the model litigant rules have provision for that. I will take it on notice.

Response

The *Legal Services Directions 2005* ***(the Directions)***, including the *Directions on the Commonwealth's Obligation to Act as a Model Litigant at Appendix B* ***(the Model Litigant Obligations),*** are not inconsistent with ASIC's statutory mandate or regulatory objectives. Compliance with the Directions is not discretionary but, in any event, ASIC has not identified a need to act in a manner inconsistent with the Directions.

Paragraph 4.2 of the states that:

> *Claims are to be handled and litigation is to be conducted by the agency in accordance with the Directions on the Commonwealth's Obligation to Act as a Model Litigant at Appendix B, noting that the agency is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution.*

ASIC is required to comply with the Directions under s55ZG of the *Judiciary Act 1903.*

In addition to the wording of paragraph 4.2 of the Directions set out above, Appendix B to the Directions sets out a number of other obligations to consider alternative dispute resolution and to limit the areas in dispute in litigation. Paragraph 2 of the Model Litigant Obligations contains a number of sub-paragraphs which set out various aspects of the obligations and relevantly include:

> *(d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate*
>
> *(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:*
>
> > *(iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution*
>
> *(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest,*

In each case, the requirement allows for each individual agency to determine what may constitute, for example, "the most suitable form of dispute resolution" (paragraph 4.2 of the Directions) or "methods that it considers appropriate to resolve the litigation" (paragraph 2(e)(iii) of the Model Litigant Obligations). Paragraph 2(h) of

the Model Litigant Obligations expressly refers to appeals being "justified in the public interest". For a regulatory and enforcement agency such as ASIC, consideration of what is "suitable" or "appropriate" will be made in the context of any regulatory outcome that ASIC seeks to achieve from litigation, consistent with its statutory mandate.

From time to time the most "suitable" or "appropriate" course for ASIC will includes some form of dispute resolution or settlement. ASIC regularly participates in dispute resolution of its enforcement matters and sometimes settles such matters. Prior to the commencement of litigation, ASIC will consider the available evidence and the regulatory responses available under the relevant statutes. These may include non-litigious outcomes such as the acceptance of enforceable undertakings.

Question on notice 5 (*Proof Hansard,* p. 41*)*

Topic: Complaints and frozen funds

CHAIRMAN—To follow up on the complaints area: can you give is an idea of the level of complaints and what they revolve around at the moment.

Mr Day—In relation to frozen funds?

CHAIRMAN—Yes.

Mr Day—I do not have that information in front of me, but we can provide that on notice.

CHAIRMAN—I would be interested to see. I assume there would be fewer complaints today.

Mr Day—Yes, without a doubt. As Commissioner Medcraft said, when we get those we are speaking to the relevant stakeholder team investment managers so we can facilitate and foster a discussion with the fund.

CHAIRMAN—Perhaps you could take on notice to provide the committee with a short brief on where it is today in terms of complaints, what the complaints are and if they are being resolved satisfactorily.

Mr Day—Sure.

Mr Medcraft—We have an information sheet that we publish online for investors in frozen funds. It advises them of their rights.

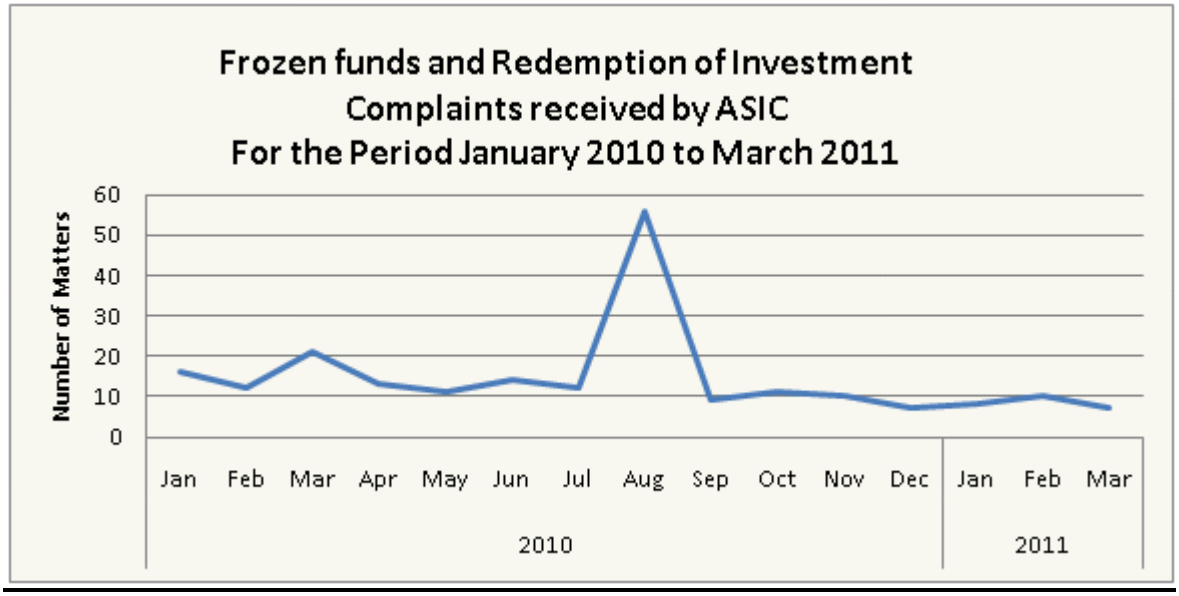
Mr Day—A lot of those in those circumstances we push back to the service that assists with that and gives them the information that Commissioner Medcraft referred to.

Response

The table below shows a monthly breakdown of the number of complaints ASIC has received about frozen funds since January 2010. The "spike" in August last year was due to a number of duplicate complaints raising concerns by unit holders in the Pacific First Mortgage Fund (formerly the City Pacific First Mortgage Fund) prior to the meeting held on 1 September 2010. The matter was referred to ASIC's surveillance team who raised the complainant's concerns with the Fund. The meeting went ahead on 1 September with the proposed resolutions failing to achieve the required majority. The fund has continued to update investors via its website.

Since then, the number of complaints received about frozen funds has declined to an average of approximately 10 per month. These largely fall into three categories - those raising initial concerns with ASIC about their inability to access their investment in the frozen funds; those complaining about a fund's failure to implement a hardship policy; and those who have been unsuccessful in attempting to access their funds.

Where complainants have come to ASIC for the first time, ASIC responds to them by providing ASIC's Information Sheet 111: information for investors in frozen funds. ASIC also advises complainants that the development of a hardship policy is a matter for the individual fund. Where complainants have made an unsuccessful application for funds, they are referred to the Fund's dispute resolution procedures.



Question on notice 6 (*Proof Hansard,* p. 43)

Topic: Statistics on prosecution of women

Senator STEPHENS—We cannot go past the 100th anniversary this week of International Women's Day and the discussion on women on boards and women as directors without talking about the gender breakdown of people who are being prosecuted, whether there is, as Pru Goward said this morning, an incredible risks to shareholders to try to increase the number of women on boards by taking some quite specific measures. How does the gender issue play out in terms of ASIC's compliance regime?

Mr D'Aloisio—It is certainly not an issue that has been raised with me. Obviously, as an agency, issues of gender do not really come into consideration in prosecutions and so on. But I am happy to look back at the statistics over 12 months—

Senator STEPHENS—That would be helpful.

Mr D'Aloisio—and just extract it for you on a statistical basis and provide it to you. It is an interesting point that has been raised.

Response

ASIC does not record the gender of directors of companies, nor does it categorise prosecutions in terms of gender. However, an analysis of the available information indicates that of the 454 individuals prosecuted by ASIC in 2010, 15% were women.

Question on notice 7 (*Proof Hansard,* p. 47)

Topic: Complaints about not-for-profit companies

Senator STEPHENS—The interesting issue for us is to what extent those organisations that are regulated by ASIC would have more or fewer complaints or compliance issues than any other organisations.

Mr Day—I can say off the top of my head that we occasionally get the odd complaint about a not-for-profit, but in terms of what level it is as a percentage of the population that we regulate, as John Price has pointed out, I would not be able to say now. I could take that away and come back to you about that.

Senator STEPHENS—It would be very helpful for us to understand the extent to which there are compliance issues within the ASIC regulatory framework.

Response

As at December 2010, ASIC 's records indicate that there were 1,796,738 companies registered in Australia of which 95 215 were not-for-profit (5.3%).

The table below shows the number of complaints received about not-for-profit companies as a proportion of all complaints.

Year	2007/2008	2008/2009	2009/2010	2010/2011 (Dec)
Number of Complaints	11,436	13,633	13,372	7,370
Number about not-for-profit companies	416	443	428	194
Proportion of Complaints	3.6%	3.2%	3.2%	2.6%

Question on notice 8 (*Proof Hansard*, p. 48)

Topic: Nature of issues raised in the not-for-profit sector

CHAIRMAN—In reference to the not-for-profit sector, are there any particular issues for ASIC in terms of its oversight of what is really just a small percentage of the whole sector in terms of their level of compliance as compared to the rest of the licensees that ASIC has?

Mr Price—It sort of goes back to Mr Day's comments a little earlier. I am certainly not aware of anything.

Mr Medcraft—I can probably comment, Mr Chairman, because I attended a session with you last year or the year before and I got some statistics on it, in terms of complaints, about two years ago. Most of the complaints were about governance coming from the not-for-profit sector, and we can come back with that. For the number of corporations that we have in this sector, the number of complaints was actually relatively high, but, as I said, the nature of them related to governance. That is my recollection, but we can come back with more detail.

Senator STEPHENS—It would be helpful if you could look at it again.

Mr Day—We can refresh the information about that.

<u>Response</u>

In the main, the issues raised in the not-for-profit sector appear to be internal issues as to control and decision making within the company and access to financial reports of not-for-profit companies. By and large ASIC sees these as internal matters to be resolved by the organisation and rarely require ASIC's intervention.

Australian Securities Exchange

Question on notice 1, (Proof Hansard, pp 5–6)

Topic: ASIC Report: *ASIC supervision of markets and participants*

CHAIRMAN—ASIC did a report last year on market supervision called REP 227: *ASIC supervision of markets and participants*. In there they refer to trading alerts, referrals on investigations and similar activities, including a whole range of other issues.

Mr Lewis—As I said, I have not read the report in detail. I am aware of it. I recently saw the press reports and some of the press releases on that.

CHAIRMAN—Can you take that on notice. I would be interested to hear the ASX's view on that particular report, whether there are any issues that come out of that and whether it is something that the ASX wants to comment on. I am happy for you to take that on notice. Just write back to the committee with your assessment or your opinion of the particular report.

Mr ANTHONY SMITH—Just on the question that the chair raises, if there is some sort of comparative analysis that you are able to do on what that report showed compared to the period prior to the handover that would be good. On notice is fine.

Mr Lewis—Yes. I certainly do remember reading the summaries in the press of the market surveillance activities that have been undertaken and the number of alerts that they were generating and the fact that the volume of alerts in their market monitoring system, which is known as SMARTS, was generating was in fact consistent with the volume of alerts that we were generating.

Response

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13 May 2011

Mr Tim Bryant
Secretary, Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Bryant,

Question on Notice from ASIC Oversight Hearing 11 March 2011

At the above-mentioned hearing, the Chairman noted that ASIC had published a report last year on market supervision entitled REPORT 227: *ASIC supervision of markets and participants* ("Report") and asked ASX, on notice, to make any comments it may have on the Report. Mr Anthony Smith also asked, on notice, if ASX could provide a comparative analysis of supervisory outcomes by ASX in the period before the Report compared to ASIC's supervisory outcomes in the period covered by the Report.

ASX notes, by way of background, that there was a press article in October 2010 alleging that ASIC's SMARTS computerised market surveillance system was generating significantly fewer alerts, compared to the numbers generated by ASX's SMARTS system beforehand.

As I indicated at the hearing, the alerts generated by SMARTS arise mostly from changes in the price and/or traded volume of securities above certain pre-defined thresholds. A significant proportion of the alerts generated by SMARTS are "false alerts", in the sense that the price or volume movement detected by SMARTS is often readily explicable by known market, sector or company specific events. The number of alerts generated in any given period can also be materially affected by the relative level of market volatility over that period. Hence, raw data as to the number of alerts being generated is not necessarily all that meaningful by itself and comparisons of the numbers of alerts generated across different periods can potentially be misleading.

With that qualification, I note that section B of the Report states that over the 5 months from 1 August 2010 to 31 December 2010, ASIC's SMARTS system generated 28,512 trade surveillance alerts. Broadly speaking, prior to the 1 August 2010 supervisory handover, ASX's SMARTS system on average used to generate between 5,000 and 6,000 alerts per month. Accordingly, ASIC's reported number of SMARTS alerts in the first 5 months of its assumption of responsibility for real-time market surveillance and supervision was broadly in line with ASX's experience.

By way of specific comparison, ASX's SMARTS system generated 18,638 alerts in the 3 months ended 31 March 2010 and 22,248 alerts in the 3 months ended 30 June 2010 (the latter quarter being one affected by a comparatively high level of market volatility, particularly in the month of May 2010).

Section B of the Report also states that ASIC commenced 67 preliminary enquiries for insider trading and 11 preliminary enquiries for market manipulation over the 5 months from 1 August 2010 to 31 December 2010.

By way of comparison, ASX commenced 38 preliminary enquiries for insider trading and 7 preliminary enquiries for market manipulation in the 3 months ended 31 March 2010 and 37 preliminary enquiries for insider trading and 4 preliminary

enquiries for market manipulation in the 3 months ended 30 June 2010. Again you will see that ASX's and ASIC's numbers are broadly comparable.

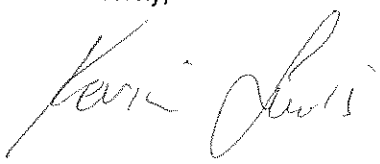
The only other observation I would make is in relation to the comment in the Report (on page 9) regarding the improvement in the time taken to get matters referred for investigation compared to "the previous situation where ASX would do the early detection and preliminary work and then the matter would be referred to ASIC's Deterrence team".

That comment and the outcome it reflects do not surprise ASX and should come as no surprise to any other informed commentator. The process agreed between ASX and ASIC for the referral of potential contraventions of the Corporations Act and/or ASX operating rules under section 792B of the Corporations Act specifically required ASX to complete a preliminary investigation of the matter to establish, as best it could, the facts grounding the contravention before formally referring the matter to ASIC. The timeliness of that investigation was heavily reliant on the timeliness of participants in responding to ASX's requests for information about matters of concern. Unlike ASIC, ASX does not have any police powers of search and seizure and it has no powers of enforcement against persons who are not privy to its operating rules (ASX's supervisory powers are grounded in its operating rules and in the law of contract -see section 793B of the Corporations Act - and are only enforceable against the market participants contractually bound by those rules). Further, once a matter was referred to ASIC by ASX, ASIC would inevitably have to conduct its own investigation in any event, resulting in a significant degree of "double handling".

Against that backdrop, it is not surprising that by directly taking over responsibility for detecting and investigating potential instances of market abuse in breach of the Corporations Act, ASIC has been able to shorten the overall time taken to conclude such investigations compared to the previous regime.

Please feel free to contact me if you wish to ask any further questions or if you wish me to amplify any of my comments above.

Yours sincerely,



Kevin Lewis
Chief Compliance Officer