

# **Australian Securities and Investments Commission**

## **answers to questions on notice**

**ASIC Oversight Hearing 17 June, 2009**

### **Question on Notice 1**

#### **ASIC 1 (Hansard p. 7) – Mortgage fund redemptions**

Mr PEARCE—What is your current assessment about the freezing of redemptions and what impacts are you seeing?

Mr D'Aloisio—The actual freezing of the funds, as you know, was across a significant number, and clearly what then happens is that as and when money is available in the fund some redemptions can occur and they will pro rata them across all holders. That is going on. I have not got numbers on what the rate of redemptions are but I would guess that it would still be quite low in terms of looking at where it is at, but we can get those numbers for the committee.

On the second issue, pretty soon after the freezing of the funds took place we did provide relief for hardship—in other words, we made provision to enable the trustees to be able to deal with hardship cases, subject to certain limits, so that people could access some of their funds. They did not have to do that on a pro rata basis; they could be selective. We understand there has been quite widespread use of that and it is working well. Again, we can get statistics for the committee on what the total value is of funds still frozen and what the hardship redemptions have been. I do not have them with me tonight but we can get them.

Senator BOYCE—When you give us those figures on the hardship redemptions, could you also tell us how many people took out right up to the cap, who redeemed as much as they were allowed to redeem, therefore suggesting that perhaps they would have redeemed more if they could have?

Mr D'Aloisio—Yes, we can do that.

...(Hansard p. 24)

Mr D'Aloisio—As I said earlier, the hardship arrangements that I think we are talking about are those around the mortgage trusts, the unlisted property trusts and so on. I can get some statistics for the committee around how many of these funds have been frozen, where they are at today, what hardship applications have come in, how they are being processed and what levels people are being paid out—if that covers it.

### **Response**

As at 12 August 2009 from our initial analysis we believe there are approximately 95 frozen Mortgage Trusts.

As at 18 August 2009 76 funds (including feeder funds) have applied for hardship relief (22 Responsible Entities)

These 22 Responsible Entities were contacted and asked the following questions:

How many hardship redemption applications have been received?

How many hardship redemption applications have been granted?

What is the average amount redeemed under hardship?

What is the process used to consider the applications?

Total redeemed to date under hardship

To date, we have information in respect of 50 funds (from 76 frozen so 66% response rate). The following information was derived from the information collected.

2051 hardship applications have been made with 1670 of these applications meeting the hardship criteria (over 82% approved)

The range of amounts paid out under hardship are at the lower end \$222 and \$126,999.50 at the upper end. The average of the averages provided was \$24,840

All of the Responsible Entities that responded to the questions provided information relating to the process they use in order to approve/deny hardship redemptions. Most have a panel or committee set-up to deal specifically with these requests. They have a criteria check-list & request documentation from the unit holder to show evidence of such hardship.

The approximate FUM for the 50 funds is \$21,680,522,811. To 18 August, these 50 funds in aggregate have paid \$45,226,679 under hardship which is 0.21% of FUM.

ASIC does not have access to members' individual balances so we are unable to provide exact data in relation to this question. From the data we do have, the average hardship withdrawal is beyond the \$20,000 amount indicating members are applying to redeem a proportion of their remaining investment above \$20,000. In order to provide further information regarding this we would need to compulsorily obtain further information from each of the operators who have the benefit of hardship relief. Rather than taking this action, ASIC has responded to industry feedback that the original cap should be broadened. ASIC has revised the hardship cap to allow members to make up to four hardship withdrawals per year up to a limit of \$100,000 worth of hardship withdrawals per year.

## **Question on Notice 2**

### **ASIC 2 (Hansard p. 11) – Project Mint**

Senator MASON—So you have 15 people at least working on it under Commissioner Gibson.

Mr D'Aloisio—I can get more specific data for you; I am just going on memory here. But certainly it was a significant project because, as you will recall, the market was in a tailspin and there were real issues of concern about the integrity of the markets.

### **Response**

To provide a full response to this question, it is necessary to divide Project MINT into its 3 phases:

Phase 1 commenced in March 2008, and related to rumours about five listed companies, and their satellites. Phase 1 has been completed. Twenty one ASIC officers worked on the various aspects of the project. The work was divided between six teams and many officers were assigned to more than one team. The teams were as follows: CEO Interviews (3 officers); Document Notices (5 officers); Evidence review & analysis (10 officers); Hedge Fund Surveillance (7 officers), Forensic Technology (3 officers), and, Project Management & Support (2 officers). None of the officers involved worked full-time on Project MINT. Two Market Integrity Deterrence projects were referred by the MINT team for investigation both of which were investigated by MI2 as priority projects from November 2008 until April 2009 utilising 8 Deterrence staff largely full time. Neither of these resulted in a prosecution.

Phase 2 commenced in August 2008, and relates to rumours circulating in August and September about one of the five companies in Phase 1. Enquiries are on-going. Three officers (2 of whom worked on Phase 1) have worked on this phase (none full-time). Five officers (including the three Phase 2 team members) worked on a Deterrence Market Integrity project referred for investigation by the Project MINT team namely, the investigation into false and misleading statements made by Richard MacPhillamy. A further matter is likely to be referred to Deterrence for formal investigation. One rumour involving an overseas hedge fund has been referred under the IOSCO MOU to a foreign regulator to investigate

Phase 3 commenced in February 2009, and relates to further rumours about the listed company in Phase 2. Enquiries are on-going. The same three officers who are working on Phase 2 have worked on this matter (none full-time).

Information derived from the MINT project is being used by Market Participants in its Broker Project. Six officers are working on this project under the supervision of Commissioner Gibson.

### **Question on Notice 3**

#### **ASIC 3 (Hansard p. 13) – Project Mint**

Senator MASON—How many prosecutions have ever been successful under 1041E of the Corporations Act? How many have ever been successful under that?

Mr D’Aloisio—Could you remind me of what 1041E is?

Senator MASON—Yes, it is off your press release.

Mr D’Aloisio—That must be the false—

Senator MASON—False or misleading rumours, which is what we are talking about I think.

Mr D’Aloisio—I do not think there has been a prosecution under that section.

Senator MASON—I thought that might be the answer.

Mr D’Aloisio—But that is false statements. There are also insider trading, market manipulation and continuous disclosure issues that can arise as well. We can provide statistics to the committee on our track record on those matters.

#### **Response**

ASIC has commenced one prosecution under s1041E, since it came into force. Anthony Rechner was convicted in 14/09/07 and received a 16 month suspended sentence. (Eagle Bay Resources Case).

To date, one broker has been banned as a direct result of the Project MINT investigation. On 13 March 2009, ASIC banned Richard Macphillamy from providing financial services for 18 months. ASIC found he did not comply with a financial services law (s1041H *Corporations Act 2001*) when he spread false and misleading information about Macquarie Group Limited (Macquarie) and the Macquarie Cash Management Trust (CMT).

## **Question on Notice 4**

### **ASIC 4 (Hansard p.26) - Mortgage fund redemptions**

CHAIR—So you are looking at that particular area and monitoring and keeping an eye on all these cases in terms of frozen funds?

Mr D'Aloisio—At the moment my knowledge is that we are monitoring them generally. Whether I need to check with our people whether they are specifically monitoring anyone that should have reopened that hasn't, I will take that on board and have a look at it.

CHAIR—Could you take that on notice in terms of providing us with some clarity?

Mr D'Aloisio—I will.

CHAIR—And also what the obligations are—what specific obligations these funds are under beyond their own determination.

Mr D'Aloisio—We can give you a briefing on that.

## **Response**

Once the responsible entity of a mortgage fund has frozen redemptions, is there an obligation on the responsible entity to resume redemptions?

There is no specific requirement in the Corporations Act for a responsible entity to allow members of a registered scheme to redeem their investment.

Redemptions are governed by:

The constitution of the scheme.

The responsible entity's general duties under the Corporations Act eg the act honestly, act in the best interests of members and with care and diligence (s601FC(1)(a)-(c)).

Usually where the responsible entity has suspended redemptions, the fund is not currently a liquid scheme. If the scheme is illiquid members are allowed to redeem only if the responsible entity makes a withdrawal offer. Generally there is no specific obligation on the responsible entity under the constitution to make a withdrawal offer while the scheme is illiquid.

However, the responsible entity's general duties, particularly to act in the best interests of members, may require it to make withdrawal offers and operate the scheme so that such offers can be made. This is particularly so where the scheme was marketed in a way that gave significant numbers of investors the expectation that they would be able to redeem.

The responsible entity may have an obligation to make available assets to enable a withdrawal offer by retaining cash that is received or by realising assets to the extent that this can be done without significant disadvantage to remaining members.

### **Question on Notice 5**

#### **ASIC 5 (Hansard p. 45) – Superannuation product action against Shaun White**

Ms GRIERSON—You have taken action against a husband and wife from Victoria. I think they pleaded guilty. Has that been concluded? It was regarding a superannuation product that they were—

Mr D’Aloisio—Can we take that on notice?

Ms GRIERSON—Okay.

Mr D’Aloisio—I recall the case; they did plead guilty—

Ms GRIERSON—I am just wondering if there are any others.

Mr D’Aloisio—but I cannot remember whether or not the case is concluded.

Ms GRIERSON—That case did attract media attention. Have there been any other people pursued?

Mr D’Aloisio—We will take that on notice if we may.

#### ***Response***

On 26 May 2009, Mr Shaun White pleaded guilty in Melbourne’s County Court to nine counts of theft, two counts of dishonest conduct in relation to a financial product and one count of conducting a financial services business without a licence.

The previous day, Ms Nicole White, had pleaded guilty to one count of aiding and abetting dishonest conduct in relation to a financial product.

A plea hearing is scheduled on 14 July 2009 at the Melbourne County Court, although the sentences may not be handed down on that day.

The charges relate to the couple’s involvement in PFS Business Development Group Pty Ltd, a company that specialised in the establishment of self-managed super funds during 2003 and 2004.

Mr White encouraged investors to roll their superannuation savings into self-managed funds established by the company. Through a power of attorney clause, which was not readily apparent to the clients, Mr White had access to the SMSF funds. The clause, contained in one of the documents used to set up the fund, appeared to authorise the company to deduct its fee for setting up the superannuation fund from the fund’s bank account and to make authorised investments. This clause, however, gave Mr White unlimited access to the fund’s account. Mr White then transferred investor funds from his investors’ accounts to his own account for his own use.

ASIC is currently also currently conducting investigations into other allegations of fraud on self-managed superannuants. As these are ongoing operational matters, we are not in a position to publicly comment any further.

## **Question on Notice 6**

### ***ASIC 6 (Hansard p. 54) – Storm Financial***

Senator WILLIAMS—Have you had an opportunity to have a look at that hearing of the Supreme Court of South Australia in relation to Mr Juvenivic that I tabled at the estimates?

Mr D’Aloisio—It is with my staff. I have not as yet. I will get back to you on that.

### **Response**

The decision that was tabled was *Forston Pty Ltd v Commonwealth Bank of Australia* [2008] SASC 49. In this matter the Commonwealth Bank of Australia (CBA) exercised its power as a mortgagee to sell a property when the mortgager defaulted on the loan. Section 420A of the *Corporations Act 2001* requires a mortgagee to take all reasonable care to sell the property for not less than market value when exercising this power. In *Forston*, the court held that the CBA had breached this duty of care. The court also held that, notwithstanding the CBA's breach, the property was sold for market price so no damages were payable.

In circumstances such as those in *Forston*, action that ASIC can take against the mortgagee (or *controller* for the purposes of the Act) for a breach of section 420A of the Corporations Act is limited:

the Corporations Act does not provide that a person is subject to a civil penalty, nor does it provide that a person is guilty of an offence, if section 420A is breached.

Technically, ASIC can commence proceedings on behalf of a person to whom a duty is owed under section 50 of the Australian Securities and Investments Commission Act 2001 to recover damages for a breach of duty. Ordinarily ASIC uses this power only where private remedies are not practically open to those who suffered the loss (for example, ASIC's actions on behalf of Westpoint investors). In this case, Mr Juvenivic had pursued those remedies. In any case, the court held that there was no loss resulting from the breach.

ASIC does not intend to take any action in response to the decision in *Forston*.