

Chapter 16

ASIC's response to reports or other indications of wrongdoing

16.1 Many submitters recalled their own personal experience of making a complaint or reporting a possible breach of the law to ASIC, or cited cases where ASIC should have paid attention to early indications of brewing trouble. They raised concerns that ASIC ignores or fails to take corrective action on emerging trends involving possible unscrupulous practices or corporate misconduct. The sources of such complaints were various and included: consumers or investors registering complaints with ASIC; operators within the financial services industry such as financial advisers alerting ASIC to poor behaviour or unsafe products; accountants and auditors filing statutory reports of suspected wrongdoing or misleading or inaccurate information; and liquidators identifying problems with the management of a company or conduct of directors. A number of whistleblowers also highlighted their concerns about ASIC failing to act effectively on their reports of possible corporate wrongdoing. In addition, ASIC has its own surveillance and detection programs designed to detect problems in the financial services industry.

16.2 In this chapter, the committee considers some of the reasons behind the many complaints about ASIC's inadequate response to complaints or reports of corporate wrongdoing.

Power to investigate

16.3 One of ASIC's broad powers is to investigate corporate wrongdoing, or as the Governance Institute of Australia put it, 'the forensic gathering of evidence in respect of suspect breaches of the law'.¹ The Rule of Law Institute of Australia referred to ASIC's wide range of powers to investigate, examine persons, inspect books, require disclosure of information, require persons to comply with an examination order, and tap telephones for suspected serious offences.²

Adequacy of ASIC's investigative powers

16.4 Regarding its responsiveness to early warnings of market problems, unsafe products or unscrupulous advisers, ASIC informed the committee that it works proactively to identify potential market problems in a number of ways, including:

- gathering and using industry intelligence;

1 Governance Institute of Australia, *Submission 137*.

2 *Submission 211*. ASIC's investigation powers are listed in Chapter 3.

- considering every complaint made to ASIC to identify issues it needs to act on;
- using formal sources of intelligence to detect individual misconduct and trends; and
- conducting surveillance and proactive sectoral health checks.³

16.5 Section 13 of the ASIC Act confers general powers of investigation, allowing ASIC to 'make such investigation as it thinks expedient'. The investigative powers under section 13 are triggered when there is suspicion of a contravention of the corporations legislation, or of a law relevant to the management or affairs of a company or involving fraud or dishonesty. While section 15 allows ASIC to investigate suspected breaches of the corporations legislation after receiving reports from receivers and liquidators, the provision does not compel it to do so. There is no statutory obligation on ASIC to investigate, or to take action following those investigations.⁴

16.6 The Rule of Law Institute of Australia was of the view that ASIC's investigative powers were 'more than adequate' and there could be 'no excuse of lack of powers'.⁵ In its view:

The problem is not a lack of power by ASIC. The various pieces of legislation empower ASIC, yet it is the failure to exercise them properly that has given rise to the issues the subject of the Inquiry.⁶

16.7 Indeed, no one seriously suggested that legislative impediments prevented ASIC from performing its investigative functions adequately.

ASIC's complaints management process

16.8 Mr Greg Tanzer, a commissioner at ASIC, explained that ASIC receives information from a number of sources, including a member of the public lodging a complaint or concern and ASIC's own intelligence. He explained that ASIC assesses and records the report and makes 'sure that we track everything that comes into the place'.⁷ The Misconduct and Breach Reporting team, currently headed by Mr Warren Day, is responsible for recording and assessing every report.⁸ Each case is assessed on its merits following a process whereby:

3 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 2.

4 Helen Anderson, 'Corporate insolvency and the protection of lost employee entitlements: issues in enforcement', *Australian Journal of Labour Law*, 26:1 (2013): 82.

5 Rule of Law Institute of Australia, *Submission 211*, p. 3.

6 Rule of Law Institute of Australia, *Submission 211*, p. 4.

7 *Proof Committee Hansard*, 20 February 2014, p. 38.

8 *Submission 45.2*, p. 89. It is a national team that has 90 full-time equivalent staff from a diverse range of backgrounds, including law, arts, accounting, economics, mathematics and business.

It goes through an initial assessment by a specialist. There are triage arrangements for something that obviously appears to be very significant or very urgent. For certain types of market matters we have a standing triage arrangement where it just gets referred straight from Mr Day's team through to one of the specialist teams. A specialist team will look at that and any other complaint that has been through Mr Day's team and reaches, if you like, a reasonable threshold.⁹

16.9 According to Mr Tanzer, ASIC has a dedicated team that considers 'particular small cases', so some resources are quarantined to manage those matters.¹⁰ He explained that ASIC was making much greater use of this triage approach 'to try to focus on the most important matters, allocate resources to them and try to move them along'.¹¹

16.10 Clearly, under the leadership of its commissioners, ASIC recognises the importance of being proactive. ASIC's triage system for managing complaints also seems to be a sensible and correct approach. Yet as the previous chapter highlighted, ASIC is perceived by many retail investors and professional bodies closely associated with the financial services industry as being reactive rather than proactive. The committee now considers the possible reasons for ASIC's slow response.

Volume of misconduct reports

16.11 ASIC maintained that it takes reports of misconduct seriously and assesses each report of misconduct it receives.¹² It highlighted the large number of reports of misconduct that are made, which range from failure to lodge a form to serious criminality. ASIC stated that it was:

...not possible or appropriate for ASIC to launch an investigation into the significant majority of reports we receive. We endeavour at all times to resolve matters, or assist the public in other ways that are often more appropriate and timely compared to an investigation.¹³

16.12 A number of submitters also noted the large volume of reports and complaints lodged with ASIC. They were of the view that the regulator does not have the resources to investigate the thousands of complaints submitted to it every year. For example, as cited in Chapter 5, the Consumer Credit Legal Centre (CCLC) stated that:

9 *Proof Committee Hansard*, 20 February 2014, p. 38.

10 *Proof Committee Hansard*, 20 February 2014, p. 38.

11 *Proof Committee Hansard*, 19 February 2014, p. 40.

12 A number of submitters provided correspondence from ASIC as attachments to their submission, which contain an explanation of section 13 of the ASIC Act and ASIC's discretion in determining whether further enquiries or investigations are warranted.

13 ASIC, *Submission 45.2*, p. 87.

ASIC cannot be expected to resolve each individual consumer dispute, nor would it be in the public interest. ASIC should carefully consider how to respond to all potential breaches of the law, but should not necessarily undertake a formal investigation of every individual complaint that comes to its attention.¹⁴

16.13 The Association of Financial Advisers also noted that ASIC receives a steady flow of relevant and meaningful information from industry and consumers that ASIC can then readily act upon. In its view, the complication is ASIC most likely receives a huge volume of disparate data that is more complex to compile and analyse. As noted earlier, reports of possible misconduct come from many and various sources—in 2012–13, ASIC received and assessed 11,682 reports of misconduct. It also received and assessed 6,985 statutory reports (from auditors and liquidators alleging suspicious activity) and 900 breach reports that related to managed investment schemes and AFS licensees.¹⁵

16.14 The committee understands the very large number of reports and complaints ASIC receives and appreciates that ASIC cannot act on every one.

Due process

16.15 Mrs Karen Cox, CCLC, acknowledged that the amount of time ASIC takes to act on a matter could cause a lot of consumer harm. Even so, she stated:

...the current regulatory options available do not give a lot of scope for doing anything other than following the usual process of investigation, gathering evidence and then finally taking action.¹⁶

16.16 The Consumer Action Law Centre recognised that:

It is difficult from the outside to know about internal ASIC processes and how those things are progressed, but when matters are identified by the stakeholder teams we deal with, there can be some time between that and any sort of enforcement action. Of course, they have to go through appropriate investigations, and that may well be the reason for the delay, but understanding that would be helpful.¹⁷

16.17 Indeed, a lack of understanding of ASIC's processes, legal obligations and unrealistic expectations could likely explain what appears to some as ASIC inaction. For example, the need to remain silent on investigations is a major consideration for ASIC. In this regard, the Consumer Action Law Centre understood that ASIC must comply with the confidentiality provisions in section 127 of the ASIC Act, which are

14 *Submission 194*, p. 16.

15 *Submission 45*, p. 87.

16 Mrs Karen Cox, Coordinator, CCLC, *Proof Committee Hansard*, 20 February 2014, p. 40.

17 Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Proof Committee Hansard*, 20 February 2014, p. 41.

'stricter in comparison to other consumer regulators such as the ACCC'. Nonetheless, it noted:

While confidential investigations are necessary for procedural fairness, confidentiality must be balanced with the public interest resulting from the public and consumers being confident that the regulator is responsive to complaints.¹⁸

16.18 The Governance Institute of Australia also referred to the confidentiality obligations placed on ASIC when conducting an investigation. In its view, this requirement may preclude 'public understanding of actions ASIC could be undertaking in relation to possible breaches by individuals and companies of duties and responsibilities'. It stated further:

ASIC is often viewed as acting tentatively in investigating and enforcing matters, yet under its legislative framework, ASIC will neither confirm nor deny that an investigation is underway unless it is in the public interest to do so. Confidentiality of surveillance and investigation is central to preserving the integrity of the market, but it results in external public parties being unable to objectively evaluate ASIC's actions.¹⁹

16.19 The Governance Institute noted the great deal of remedial action that occurs outside the public view.²⁰

16.20 The Law Council of Australia also cited the various comments or complaints from time to time about ASIC's approach to providing information about ongoing investigations. It referred to ASIC's Information Sheet 152, which outlines the regulator's position on making public comment. In that publication, ASIC's makes it clear that, in essence, ASIC's 'investigations should remain confidential unless the public interest requires some form of disclosure'. The Law Council pointed out that ASIC's usual practice is, therefore, 'not to make public comment about ongoing or potential investigations'. In its view:

ASIC's approach in this regard is undoubtedly the correct one in principle as a matter of policy and, for the most part, the correct one in practice. It would be, in the view of the Corporations Committee, quite inappropriate for a regulator of any kind to seek to use the mere fact of an investigation (when by definition no factual findings had been made and no decision had been taken to commence enforcement action) to achieve a broader regulatory outcome.

Moreover, the publication of mere allegations (that may or may not be ultimately proven) can be oppressive towards the individuals involved and damaging even if the allegations are not proven.²¹

18 Consumer Action Law Centre, *Submission 120*, p. 5.

19 Governance Institute of Australia, *Submission 137*, p. 4.

20 Governance Institute of Australia, *Submission 137*, p. 4.

16.21 Even so, the Law Council noted that, as a rule, it was true that ASIC 'should keep complainants informed of the progress of matters in respect of which a complaint has been made'.²²

Clarity in law

16.22 Ms Robbie Campo, Industry Super Australia, thought that the reason in part for systemic risks not being properly or adequately dealt with over the last few years was related to 'the fact that the problematic conduct is legal'. She explained:

The work that has been done more recently in terms of surveying the industry and understanding business models and drivers of conduct has meant that, particularly in relation to advice and super funds engagement with consumers, a much better job is being done. I think the key issue in past years is that it is hard for ASIC to engage in terms of systemic risk when the matters that are of most concern are actually allowed by the legal framework.²³

16.23 Mr David Haynes, Australian Institute of Superannuation Trustees, agreed that ASIC sometimes spends 'a disproportionate amount of time trying to work out whether particular behaviours are in fact proper and appropriate and requiring of investigation'.²⁴ He gave the following example of the promotion of low-fee and no-fee products, which, in his view were neither:

But ASIC seems to take a long time to actually come to a view about whether the manufacturers of those products are in fact operating appropriately within the regulatory framework or not. We say that there is, unfortunately, the opportunity for a lot of those products to be misrepresented for an extended period of time before there is any regulatory intervention.²⁵

16.24 Mr Haynes elaborated on his reasoning:

...it is more a matter of ASIC having some difficulties in understanding whether or not the claims of particular products are inside or outside of the law. They operate sometimes in a grey area. If people make money through buy-sell spreads or through money being invested in related companies

21 Corporations Committee, Business Law Section, Law Council of Australia, *Submission 150*, p. 5.

22 *Submission 150*, p. 5.

23 Ms Robbie Campo, Deputy Chief Executive, Industry Super Australia, *Proof Committee Hansard*, 20 February 2014, p. 34.

24 Mr David Haynes, Executive Manager, Policy and Research, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 20 February 2014, p. 34.

25 Mr David Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 20 February 2014, p. 34

where heavy fees are being paid, it is sometimes unclear whether those activities are outside of the law or not.²⁶

16.25 In his view, such products should clearly come under the law. He noted that 'there is then a policy question about whether the government needs to provide more clarity which would then assist ASIC in its enforcement'.²⁷

ASIC's investigative capabilities

16.26 Allowing for factors such as the volume of complaints ASIC needs to manage, many submitters still maintained that critical information escapes ASIC's attention. They argued that ASIC seems incapable of discerning from its databases the emergence of a potentially significant systemic or serious issue. A number of submitters argued that even when ASIC does take action, it is too late and the damage has already occurred.

Culture of receptiveness

16.27 Mr Lee White, the chief executive officer of the Institute of Chartered Accountants, noted that much of the work ASIC is undertaking to improve its ability to act effectively on complaints or reports of corporate wrongdoing was 'all around the mechanics and particularly the legal processes'. He understood that ASIC receives a lot of information from different sources but 'they are not joining up the dots as quickly as they should'.²⁸ Mr Alex Malley, chief executive officer of CPA Australia, agreed with this assessment suggesting further that:

...what is probably missing at the moment is there is not a sense that there is enough of that 'on the street'—having lived in business long enough—to know what a big issue is from a small issue; what a one-off issue is from a systemic issue.²⁹

16.28 Mr David Pemberton, a CPA who holds a public practicing certificate, argued ASIC needs to change its culture—not change its name or receive a bigger budget. In his words:

ASIC needs strong, active leadership. ASIC needs to credibly reconnect with professionals who are its best early warning system for the identification of domestic threats to Australia's economy.³⁰

26 Mr David Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 20 February 2014, p. 34.

27 Mr David Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 20 February 2014, p. 34.

28 Mr Lee White, Chief Executive Officer, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 19 February 2014, p. 47.

29 Mr Alex Malley, Chief Executive Officer, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 49.

30 Mr David Pemberton, *Submission 279*, p. 6.

16.29 Clearly, an important aspect of ASIC's investigatory function is simply being able to pick up on disquiet in the business world. Mr Justin Brand, who has experience in compliance and the operations management side of the financial advice business, also underscored importance of ASIC being receptive to the messages coming from the professional bodies. He stated:

ASIC often fail to recognise common interests and fail to engage effectively with licensees and advisers. The open engagement offered by ASIC seems to have traditionally been a lecture with a reluctance to tolerate dissent. On occasions, they don't even pretend to listen. In some circumstances, openness is inappropriate but care should be taken to ensure engagements are not exercises in antagonism and condescension.³¹

16.30 In respect of his particular case, Mr Peter Burgess, an experienced financial planner, attributed ASIC's failures to act and to keep him and his client apprised of its response:

...to a cultural lack of empathy and understanding as to what effect they can have to protect peoples' finances and why they ultimately do exist, which is to serve the public who contribute to their budget.³²

16.31 The Commonwealth Ombudsman, Mr Colin Neave AM, noted that all regulators confront the problem of developing appropriate priorities and internal systems. He referred to the triage system:

...whereby there is a responsibility within an organisation to have a look at what is coming through the door by way of complaints or contacts with the organisation and then having systems in place whereby the issue which is raised in correspondence, by a telephone call or however else it might be raised is sent down what could be described as the right path. If there are alarm bells ringing in relation to a particular issue, then that issue...might go down path A. If it is an issue about fees it might go down another path.³³

16.32 According to Mr Neave, a key issue is training staff to recognise when matters 'should be given attention and then sending them down that right path'. He explained:

One of the issues which I noticed over the years, both in the public and the private sector, is that sometimes the culture of an organisation will not necessarily be welcoming to a more junior officer wandering into the office of the commissioner and saying, 'By the way, I've just had this telephone conversation with someone and it really does worry me.' I think making sure that culture is present is also very important.³⁴

31 Mr Justin Brand, *Submission 129*, p. 2.

32 Mr Ben Burgess, *Submission 190*, p. 1.

33 Mr Colin Neave, Commonwealth Ombudsman, *Proof Committee Hansard*, 20 February 2014, p. 12.

34 Mr Colin Neave, *Proof Committee Hansard*, 20 February 2014, p. 12.

16.33 In his view, ultimately the following two critical elements are needed:

- the organisation has to be structured in such a way 'as to be able to deal with issues when they are, first of all, recognised'; and
- the organisation has to have a process whereby more senior people are readily available to deal with the issue once it is raised.³⁵

16.34 A former enforcement adviser at ASIC, Mr Niall Coburn, also underlined the importance of ASIC's culture, contending that ASIC appeared to lack 'a culture of urgency, proactivity and flexibility', with its processes driven by 'a management culture that has a wait-and-see attitude'.³⁶ He identified the need for ASIC to have the right attitude as well as the right skill set. He said:

...having the right individuals, in the right positions, who are experienced and know what to do if something crosses their desk. Complaints do elevate information quite fast. The issue I raise about complaints is in relation to serial issues. Do they combine those issues so that it comes up as a red flag? If it is a clear fraud—for example, Equity Trust was or LM was—then it goes to the top. It is escalated.³⁷

16.35 In Mr Coburn's words 'you do not send a chicken out to deal with a crocodile—ASIC are 'sending the wrong individuals to trace or deal with these wolves who have ripped off mums and dads and then escaped internationally'.³⁸ He observed further:

Often ASIC complaint staff are inexperienced in both commercial matters and understanding evidential issues. ASIC receives thousands of complaints and generally undertakes a perfunctory assessment resulting in the sending out of a standard letter which does not address the issues. There appears to be an inability to see red flags or to look at the serial offenders or individuals who may appear in the same group.³⁹

16.36 As an example, Mr Coburn suggested that if there were hundreds of complaints from individuals in a managed investment scheme, he doubted whether ASIC could pick up on the message or put it together and, if ASIC could, it would still fail to react.⁴⁰

35 Mr Colin Neave, *Proof Committee Hansard*, 20 February 2014, p. 12.

36 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 1.

37 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 4.

38 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 2.

39 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 1.

40 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 1.

16.37 Mr Justin Brand likewise questioned ASIC's capability to detect brewing problems in the corporate world:

ASIC do not appear to maintain an effective database of surveillances, findings and Notices—and certainly not one that allows interrogation and root cause analysis. ASIC do not retain, consider or exploit the information in their possession and they compound this failure with a difficulty in retaining corporate knowledge.⁴¹

16.38 Mr Peter Murray was of the view that ASIC needs to create within the organisation a 'hard hitting "Eliot Ness" compact action group...comprising expert experienced market players and those that can initiate serious action quickly and aggressively'.⁴²

16.39 The Association of Financial Advisers suggested that a dedicated complaints channel be made available to industry stakeholders and existing financial advisers to enhance the flow of information to ASIC. This would enable ASIC to respond to significant issues in a timelier manner.⁴³

Conclusion

16.40 ASIC relies heavily on others to watch out for, detect and report corporate wrongdoing; it then determines whether the information deserves closer attention. ASIC receives many thousands of complaints and reports and cannot possibly investigate them all. The committee understands that some complaints may simply be recorded on one of ASIC's databases. Further, the committee understands that ASIC must adhere to fundamental principles such as natural justice and follow due process, which means that ASIC cannot act precipitately.

16.41 The committee has considered the underlying reasons that give rise to the concerns held by many that ASIC ignores or fails to take corrective action on early warning signs of market or corporate misconduct, or on reports of such misconduct. ASIC has acknowledged that it needs to act in a more timely way and focus on the key issues. It is clear that any improvements in this area should come from within ASIC itself. ASIC should ensure that it has a receptive and open culture that encourages its personnel to report what they perceive as emerging problems and that its most senior staff welcome such an approach. ASIC also relies on those outside the organisation to alert it to problems. ASIC, together with the financial system gatekeepers, should be looking for better reporting systems that would assist ASIC to identify potential problems.

41 Mr Justin Brand, *Submission 129*, p. 2.

42 Mr Peter Murray, *Submission 164*, p. 5.

43 Association of Financial Advisers, *Submission 117*, p. 3.

Recommendation 18

16.42 The committee recommends that ASIC establish a dedicated channel for complaints from certain key professional bodies, industry bodies and consumer groups, as well as for accountants and financial advisers/planners.

Recommendation 19

16.43 The committee recommends that ASIC examine carefully:

- its triage system to ensure that the officers managing this process have the skills and experience required to identify complaints and reports of a serious nature requiring attention;
- its misconduct reports management system to ensure that once identified, a serious misconduct report is elevated and more senior people are available to deal with the issue; and
- its culture to ensure that those managing complaints and reports who wish to draw to the attention of senior officers what they perceive as a potentially serious matter are encouraged to do so; that is, for ASIC to foster an open and receptive culture within the organisation so that critical information is not siloed.

Recommendation 20

16.44 The committee recommends that ASIC look at the skills it needs to forensically and effectively interrogate its databases and other sources of information it collates and stores, with a view to ensuring that it is well-placed to identify and respond to early warning signs of corporate wrongdoing or troubling trends in Australia's corporate world.

Recommendation 21

16.45 The committee recommends that ASIC put in place a system whereby, after gross malfeasance is exposed, a review of ASIC's performance is undertaken to determine whether or how it could have minimised or prevented investor losses or consumer damage. Spearheaded by a small panel of independent, experienced and highly regarded people (with business/legal/academic/public sector and/or consumer advocacy backgrounds), together with all ASIC commissioners, this investigation would identify lessons for ASIC to learn and how to incorporate them into ASIC's mode of operation. The committee recommends further that their findings be published including details of any measures ASIC should implement.

