

Chapter 18

ASIC's handling of enforcement matters

18.1 Most of the submissions that discussed ASIC's enforcement action generally criticised ASIC for not taking enforcement action, or if ASIC did take action, it was argued that ASIC did not do this quickly enough or that the sanctions imposed were inadequate. However, the committee also received evidence that presented a different perspective on enforcement. This evidence highlighted the importance of proper process and the need for a government agency to act fairly and properly when considering and pursuing enforcement action. The committee also received evidence that raised questions about the capabilities and expertise of ASIC in undertaking enforcement action. This chapter explores these issues.

ASIC's use of publicity

18.2 One case of particular interest to the committee was the experience of Dr Stuart Fysh. Dr Fysh was an executive with BG Group, an international energy company involved in the exploration and production of gas. Following an ASIC investigation, Dr Fysh was prosecuted for insider trading. A jury found that Dr Fysh purchased shares in Queensland Gas Company Ltd (QGC) between 2 and 8 December 2007 while in possession of inside information concerning QGC that was not generally available. On 14 November 2012, Dr Fysh was sentenced to three and a half years in prison with a requirement to serve a minimum term of 12 months. However, on 17 July 2013 the NSW Court of Criminal Appeal quashed the convictions and Dr Fysh was released from prison that day.

18.3 It is not the role of the committee to assess and judge the merits of this particular case that ASIC pursued and the CDPP prosecuted, and the comments in this report should not be construed as doing this. In particular, the following statement from Mr Robert Bromwich SC, the CDPP, is instructive:

The prosecution bore the onus of proof in proving the charges against Dr Fysh. The fact that Dr Fysh was acquitted of two counts does not mean that those charges should never have been brought against him. It is entirely contrary to our entire system of criminal justice that an acquittal of itself means that a case should not have been commenced in the first place, and I reject such a proposition.¹

1 Mr Bromwich also stated that he accepts the decision of the Criminal Court of Appeal (CCA), however, he added that it is important to note 'that the CCA's observations about the Crown's submissions on appeal are not a criticism of the manner in which the prosecution ran its case at trial' and that '[i]n respect of the criminal proceedings no court has held that the case against Dr Fysh was fundamentally misconceived or that there was no evidence of an element of the offences charged'. Mr Robert Bromwich SC, Commonwealth Director of Public Prosecutions, answer to question on notice, no. 14 (received 22 April 2014), pp. 5, 8 and 9.

18.4 Nevertheless, the case does at least serve as a general reminder that a tremendous imbalance can exist when ASIC investigates an individual and causes them to be prosecuted on behalf of the Commonwealth. As Dr Fysh suggested, it is 'a mathematical certainty' that some of the people ASIC investigates will be innocent.² Further, specific aspects associated with how this enforcement action was managed, such as ASIC's public comments, warrant scrutiny.

18.5 The case taken against Dr Fysh has, in his words, had the 'truly crushing impact of seeing my career and reputation destroyed'.³ In particular, Dr Fysh was critical of how his reputation was damaged by ASIC's public statements *prior* to the finding of guilt at trial. In 2008, ASIC issued a media release announcing that it had obtained an asset preservation order against Dr Fysh and that ASIC was investigating his share trading. Dr Fysh argued that the freeze order was obtained with his full cooperation and, although this fact was in his view 'implicit' in ASIC's media release, this was a distinction 'not drawn by any journalist, news agency or prospective employer'.⁴ It is important to note that, according to Dr Fysh, it was at the end of 2010 that the CDPP and ASIC announced that they would charge him.⁵ The trial took place in 2012.

18.6 Dr Fysh provided a number of pointed criticisms of what he described as ASIC's 'announce early and announce big' media strategy. First, Dr Fysh highlighted the irreversible consequences of a public statement about an individual by ASIC:

Considering the overwhelming asymmetry between ASIC's resources and those of an individual, and the enthusiasm with which the media picks up on the regulator's announcements, it is incontrovertible that ASIC merely announcing its intention to investigate a named individual, of itself amounts to an immediate and irreversible punishment. Indeed, in my own case and others I have followed, the sentencing judge noted the personal disruption, loss of professional standing and reduced earning capacity suffered throughout a lengthy (just short of five years in my case) investigation and pre-trial procedure.⁶

18.7 Dr Fysh also queried the regulatory benefits arising from the statement being issued, compared to the implications for the individual:

Can any possible (and, I respectfully submit, highly questionable) benefit, such as by way of heightened deterrence, that might flow from ASIC's precipitate publicity in respect of those who are ultimately proven guilty, warrant the crushing blow to one who is innocent?⁷

2 Dr Stuart Fysh, *Submission 128*, p. 3.

3 Dr Stuart Fysh, *Submission 128*, p. 3.

4 Dr Stuart Fysh, *Submission 128*, pp. 2–3.

5 Dr Stuart Fysh, *Submission 128*, p. 4.

6 Dr Stuart Fysh, *Submission 128*, p. 1.

7 Dr Stuart Fysh, *Submission 128*, p. 3.

18.8 The media release issued by ASIC was compared with the 'tone and tenor' of statements by the police to the media. Dr Fysh observed that the police would not name individuals they are contemplating laying charges against.⁸ To further develop his argument that ASIC should be more careful with its public statements, Dr Fysh suggested that ASIC's criminal cases are more complex than those undertaken by the police:

ASIC works in a more complex space than policing agencies dealing with criminal cases where, by virtue of apparent facts and physical evidence, there will usually be little doubt that criminal conduct has occurred. The judgements ASIC has to make in determining criminality are more subtle than identifying a victim or looking for fingerprint and DNA matches.⁹

18.9 Dr Fysh also compared ASIC's public statements in his case with ASIC's guidelines. ASIC policy on public comment is contained in Information Sheet 152 and includes the following statement:

Importantly, if a matter is still in the investigation stage and an enforcement action has not commenced, it is generally accepted that a regulator such as ASIC must balance the public interest benefits of making a statement against the rights of the individual subject to the investigation.¹⁰

18.10 Dr Fysh asserted:

Categorically—clearly—that was not done, in my case. Now what I see is an organisation that is doing things wrongly and then wallpapering itself with best-practice notes, saying 'We won't do that.'¹¹

18.11 Dr Fysh also presented his hypothesis that as a result of the pre-investigation publicity brought by ASIC, ASIC may have 'predisposed itself to continued pursuit of allegations that were not supported by the facts'.¹²

18.12 Following the conviction being overturned on appeal, some of ASIC's media releases about charges being laid and the finding of guilt at trial remained on its website without reference to the NSW Court of Criminal Appeal's decision. Internet search results ranked the initial media release and related media coverage higher than any coverage of the outcome of the appeal. The appellate court's reasons for judgment were published in November 2013. On 11 March 2014, ASIC issued a one sentence media release titled 'Former BG executives [sic] insider trading conviction quashed'

8 Dr Stuart Fysh, *Submission 128*, p. 4.

9 Dr Stuart Fysh, *Submission 128*, p. 5.

10 ASIC, *Public comment*, Information Sheet 152, February 2012, p. 1.

11 Dr Stuart Fysh, *Proof Committee Hansard*, 2 April 2014, p. 1.

12 Dr Stuart Fysh, *Submission 128.1*, p. 1.

with a link to the court's reasons.¹³ Dr Fysh is of the view that although he wrote to ASIC about the lack of an update, ASIC only issued this media release and updated its website because of his submission to the committee's inquiry.¹⁴ In any case, that ASIC issued a media release in March 2014, when the Court of Criminal Appeal's reasons for decision were released in November, does appear far from ideal.

ASIC's response

18.13 ASIC provided the committee with a detailed supplementary submission on the case taken against Dr Stuart Fysh that rejected each allegation made by Dr Fysh. On the use of media, ASIC provided the following summary:

ASIC's media releases about the investigation were fair and accurate reports of public court proceedings and outcomes. They were issued in accordance with ASIC's media policy outlined in Information Sheet 152 *Public comment* (INFO 152) and reflect the fundamental principle of 'open justice'.

...

ASIC issued an editor's note containing the outcome of Dr Fysh's appeal the day after the Court of Criminal Appeal (NSW) overturned his convictions. In addition, at Dr Fysh's request, it issued a new media release in March 2014 about this outcome providing a link to the Court of Criminal Appeal (NSW) (already publicly available) reasons for the decision.¹⁵

18.14 ASIC also responded specifically to Dr Fysh's comments about the media release issued by ASIC in 2008 about the asset preservation order:

On 2 December 2008, ASIC commenced civil proceedings against Dr Fysh in the Supreme Court (NSW) that were separate and distinct from the criminal proceedings subsequently brought against him. ASIC produced sufficient evidence to persuade the court (on an *ex parte* basis) to make short-term asset preservation orders against Dr Fysh under s1323 of the *Corporations Act 2001*. Dr Fysh was then provided with ASIC's evidence and afforded the opportunity of challenging any aspect of it and contesting the continuation of the orders, but he chose to consent to the continuation of the orders. Following this, ASIC issued 08-85AD on 15 December 2008,

13 ASIC, 'Former BG executives insider trading conviction quashed', *Media Release*, no. 14-042, 11 March 2014. The text of the media release simply stated: 'Dr Stuart Alfred Fysh's 2012 conviction for insider trading was quashed by the NSW Court of Criminal Appeal in 2013' and contained a link to the court's reasons with limited background information attached.

14 Dr Fysh advised that he wrote to ASIC 'and said, "Come on, guys. You have seen what I have written to the Senate committee. I am really unhappy. Could you not at least acknowledge this on your website—you have a dozen headings up there that I am a crook. That is all that anyone who ever wants to deal with me is going to see." ASIC has put something up on their website. I suggested, "Why don't you put a link through to the findings of the Court of Criminal Appeal." Blow me down, they have done it. But let us not kid ourselves that they did it because little Dr Fysh wrote to them'. Dr Fysh suggested that ASIC acted because the committee or someone influential 'has said something'. *Proof Committee Hansard*, 2 April 2014, p. 3.

15 ASIC, *Submission 45.4*, p. 3.

which was a fair and accurate report of the court proceedings and outcome...Further, the proceedings were in open court and a matter of the public record (no non-publication orders were sought by Dr Fysh or imposed by the Supreme Court (NSW)). The publication of the advisory was in accordance with the fundamental principle of 'open justice'.¹⁶

Evidence on ASIC's use of publicity from other stakeholders

18.15 The committee sought and received the views of key stakeholders about ASIC's use of publicity and the expectations that should be held of ASIC in this regard. Professor Bob Baxt noted the implications of a regulator accusing an individual of misconduct and emphasised that the principle of a person being innocent until the courts find the person guilty needs to remain paramount:

Regrettably, far too often the media seems to work on the different assumption that as soon as someone alleges that something bad has happened with a company or in relation to the way in which people have behaved, then somehow or other that person or that company is immediately guilty and the regulator should have acted yesterday in ensuring that the people go to jail or that some other terrible penalty is put on them.¹⁷

18.16 Professor Baxt used an example associated with the National Companies and Securities Commission, the predecessor to ASIC, to warn about the consequences associated of unsubstantiated allegations being made public:

There was one very famous case of a raid on the offices of a stockbroker for alleged insider trading as a result of media speculation. That person was arrested. Tremendous publicity surrounded that person's life. That person committed suicide. Later it was established quite clearly that that person had been completely innocent of any breach of the law. It is that kind of psychology and approach by regulators that we need to avoid. And I think by and large ASIC has been relatively good at making sure that it does not jump the gun and create impressions of guilt before any inquiry has been held.¹⁸

18.17 The Corporations Committee of the Law Council of Australia's Business Law Section advised that it considered the approach taken by ASIC in Information Sheet 152 is 'the correct one in principle...and for the most part, the correct one in practice'. It emphasised the damage that allegations can have on an individual's reputation:

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

16 ASIC, *Submission 45.4*, pp. 3–4.

17 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 9.

18 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 9.

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.¹⁹

18.18 The Law Council did express some concerns about ASIC's use of publicity with infringement notices, where payment is not an admission of liability. The chairman of its Business Law Section made the following observation:

...people may pay infringement notices for a variety of reasons quite apart from whether they consider the allegation justified. I hope I may be forgiven for saying that a company might quite rationally pay an infringement notice simply to avoid paying their lawyers more to contest the notice.²⁰

18.19 Nevertheless, the witnesses that the committee questioned on this issue generally considered that ASIC is conservative in its approach to publicity:

You can compare and contrast that with, for example, Eliot Spitzer when he was state Attorney-General in New York, or Benjamin Lawsky, who is a director of the Department of Financial Services in New York at the moment, who is quite happy to leak the results of their investigations and to be quite aggressive in his use of public relations. I think the record shows that ASIC has actually been quite restrained.²¹

* * *

In fact, from time to time ASIC is actually criticised for keeping investigations close to its chest.²²

Committee view

18.20 Public comment about ASIC's activities or matters relating to its functions is a key part of ASIC's role. Statements by ASIC can help promote compliance with the law and are in accordance with ASIC's statutory objectives regarding the confident and informed participation of investors and consumers in the financial system. It also can promote public confidence in ASIC, something that is currently lacking in some quarters. However, the committee expects ASIC to carefully consider the benefits of public comment compared to the damage that can be caused by its statements, particularly if the comments are premature or ill-timed, or there is little deterrence or regulatory benefit that can be gained by the comment. The policies in place appear to be appropriate, although ASIC must ensure that it is vigilant in ensuring that they are applied in all cases, and that any public comments are made with a clear regulatory objective in mind.

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

20 Mr John Keeves, Chairman, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 20 February 2014, p. 2.

21 Professor Justin O'Brien, *Proof Committee Hansard*, 19 February 2014, p. 61.

22 Professor Dimity Kingsford Smith, *Proof Committee Hansard*, 19 February 2014, p. 62.

18.21 It is evident, however, that ASIC needs to be more alert and responsive to updating statements that have been previously published. The committee appreciates that ASIC maintains a useful historical record of its media releases. However, internet search engine results in particular can direct the public to out-of-date information and ensure ongoing reputational consequences for the individuals or organisations concerned. In the case of Dr Fysh, the timing of ASIC's media release advising of the appellate court's reasons for judgment, months after the reasons were published, gives the committee no reason to believe that ASIC would have updated its previous media statements about Dr Fysh had it not been prompted. ASIC should also change how the updates to past media releases are displayed—simple changes such as replacing the 'editor's notes' that are buried at the bottom of the online version of the media release with a more prominent warning that the information is out-of-date, perhaps immediately below the media release's heading, would seem more appropriate and helpful to readers.²³ ASIC should also put in place a procedure to ensure updates reflecting the outcome of an appeal are not overlooked. This issue does not appear isolated; the committee has found other examples.²⁴

Recommendation 29

18.22 The committee recommends that ASIC improve its procedures for updating past online media releases and statements to reflect recent court developments, such as the outcome of an appeal or when proceedings are discontinued. ASIC should ensure that these updates are made in a timely manner and published in a more prominent position than what currently occurs.

ASIC as a model litigant

18.23 The committee received submissions from individuals who have been subject to enforcement action by ASIC and were angry about ASIC's conduct. For example, one submitter told the committee:

I have grave concerns that ASIC has and is currently violating several of its obligations of rule-bound administration which has breached a multitude of serious principles including the allocation of rights and resources,

23 In this regard, ASIC may wish to consider the approach taken by the Australian Taxation Office, which publishes clear warnings designed to capture the reader's attention when legislative changes affect the interpretation of particular provisions of the tax law. For an example, see www.ato.gov.au/Business/Research-and-development-tax-concession/In-detail/Making-a-claim/175--Premium-research-and-development-tax-concession/.

24 For example, on 7 August 2013, ASIC issued a media release announcing that charges against a certain individual (named in the media release) had been discontinued. However, the editor's notes at the bottom of the 6 June 2012 media release announcing the charges do not reflect this—at the time of writing, the last entry in the editor's notes on the 6 June 2012 media release noted that the individual had been committed to stand trial. This is significant as the first result of an internet search on the individual was the 6 June 2012 media release, followed by media articles on the charges.

impartiality, distributive justice, rights of the individual and model litigant principles.²⁵

18.24 Mr Robert Catena, a former Citigroup stockbroker, provided the following statement:

In August 2008 I was advised that ASIC planned to have a hearing to institute a banning order against me. At the same time they also informed my lawyer that they had referred the matter to the...CDPP...for possible criminal proceedings. My lawyer then sought a stay of the proposed hearing until after the determination by the CDPP as to whether they would institute criminal proceedings against me. This was refused by the 'delegate'...(an employee of ASIC).

I was advised by my lawyer that her decision put me in a position where I would be denied natural justice, as anything I said to ASIC in my defence would be passed on to the CDPP. As I wanted to defend myself, my lawyer asked if ASIC would agree not to pass my testimony to the CDPP, but once again they refused. Therefore I was left in the insidious position of not being able to defend myself.

At this point I contend that...acting for ASIC denied me natural justice, engaged in PROCEDURAL UNFAIRNESS AND BREACHED THE MODEL LITIGANT RULES.²⁶

18.25 ASIC provided detailed answers to questions on notice in response to the allegations made by Mr Catena. In particular, ASIC noted that the Model Litigant Rules do not apply in criminal proceedings and that the CDPP conducted the prosecution. Nevertheless, ASIC believes that at all times both it and the CDPP 'acted honestly and fairly and adhered to all prosecutorial duties'.²⁷

18.26 There are examples of ASIC following its procedural fairness obligations, although they can raise further questions about the conduct of ASIC's investigations. For example, in May 2013, ASIC issued the following cryptic media release:

ASIC today provided an update on its proceedings against former Westpoint officers Norman Carey and Graeme Rundle.

ASIC alleged Mr Carey and Mr Rundle breached their duties as officers. The trial started in late April 2013...

During the course of the trial, ASIC located a document relevant to the charges. In accordance with ASIC's procedural fairness obligations, ASIC immediately disclosed the document and copies were given to Mr Carey and Mr Rundle, and the court.

Following an assessment of the document in the context of the prosecution's case, the Commonwealth Director of Public Prosecutions today advised the

25 Name withheld, *Submission 145*, p. 1.

26 Mr Robert Catena, *Submission 241*, p. 1 (emphasis in original).

27 ASIC, answer to question on notice, no. 10 (received 19 May 2014), p. 5.

District Court of Western Australia that the case should proceed no further and filed Notices of Discontinuance.²⁸

18.27 The Rule of Law Institute provided its view on the operation of the Legal Services Directions across all government agencies. It argued that the model litigant obligations need to be enforced by the Attorney-General:

It is not sufficient for breaches of the model litigant obligations to be paid for by way of costs orders made against government agencies in court cases, because ultimately it is the taxpayer who funds those costs. Government agencies must be subject to the law as much as individuals and organisations.²⁹

Use of expert witnesses

18.28 The evidence of particular experts relied on in prosecutions was also sharply criticised in some submissions. Individuals aggrieved by the enforcement action taken against them queried how ASIC and the CDPP could reasonably consider that the expert's evidence was suitable. For example, Mr Robert Catena relayed comments made by a magistrate in his committal hearing about the expert witness relied on by ASIC:

[Magistrate O'Day] states 'Unfortunately the expert evidence that was relied on with respect to the test of materiality in its present form, I don't think can be used by the court because it didn't adopt the test on materiality referred to in the Corporations Act, and therefore in my view cannot be relied on.'³⁰

18.29 Dr Stuart Fysh also outlined concerns about the expert witness relied on by ASIC and the CDPP in his case:

As the [NSW Court of Criminal Appeal] has accepted, most of ASIC's alleged 'inside information' was well known to the market, yet ASIC's so-called Expert asserted that every single piece of ASIC's alleged inside information was both unknown to the market and highly material. The Expert relied upon circular logic, namely that: 'As the companies' share prices hadn't risen prior to his trading, the information can't have been in the marketplace at that time'—which only makes sense if the information is material, one of the key issues the Expert was asked to opine on in the first place.

Well established requirements must be satisfied for an Expert to be accredited by the Court, in terms of relevant professional experience and transparent application of this experience to analysing the evidence forming the subject of their Expert Report. It was obvious that this Report was deeply flawed because it canvassed issues far outside the relevant area of expertise of the Expert. Unsurprisingly, the Trial Judge acceded to Defence

28 ASIC, 'Statement on ASIC action', *Media Release*, no. 13-105, 14 May 2013.

29 Rule of Law Institute of Australia, *Submission 211*, pp. 7–8.

30 Mr Robert Catena, *Submission 241*, p. 3.

requests to severely circumscribe the Expert's evidence—he was not allowed to be presented to the Jury as an Expert nor allowed to opine on the availability in the market of the alleged inside information.

Expert evidence doesn't have to be called in support of Insider Trading prosecutions but the [Court of Criminal Appeal] concluded that in my case, where the charges were technically and commercially complex, lack of Expert evidence regarding public availability and materiality left the Jury without a safe basis to reason its way to a conviction. The inadequacy of the Expert and his report were readily apparent to the Trial Judge and [Court of Criminal Appeal] Justices—and must surely have been clear to both ASIC and DPP. Why did ASIC persist when they had failed to commission an Expert Report that would materially assist them? ASIC needs to consider closely the commercial capabilities brought to bear when investigating me, and the quality of ASIC's decision-making.³¹

18.30 The former chairman of the Trade Practices Commission (now the ACCC), commented that regulators such as ASIC face restrictions about the money they can pay to secure and retain experts, both counsel and expert witnesses. He noted that the regulator faces strict guidelines about its resources, but can face defendants that do not face such limitations. He remarked that regulators are 'often prevented from hiring the best experts possible in order to conduct the relevant litigation'.³²

Staffing and organisational structure issues

18.31 As an agency that receives far more reports of misconduct than it could possibly investigate, and as a government body expected to act fairly and exercise its powers for the public good, ASIC has to exercise discretion and good judgement about what to investigate and how to do it. In doing this, ASIC relies heavily on the conduct and assessments of its employees, and the assessments that they make. This section examines evidence regarding the officers at ASIC that are responsible for managing enforcement action.

18.32 The committee received a small number of submissions that contained negative or unflattering comments about ASIC employees. Such evidence received by the committee can generally be categorised as questioning either the capabilities of the officers or their conduct and professionalism.

18.33 The committee recognises that the comments are of varying merit. As the committee is examining the performance of ASIC as an organisation, and the committee is aware that it is difficult for current or former public servants to respond to such claims, the committee has generally withheld the names of ASIC staff members in written submissions. Further, the following comment by ASIC's chairman should be noted:

31 Dr Stuart Fysh, *Submission 128.1*, p. 4.

32 Professor Robert Baxt AO, *Submission 189*, p. 7.

One of the disappointing things about some of the submissions was the inflammatory tone of criticisms made, particularly about ASIC's staff. ASIC has exceptional employees. They are men and women who work for the good of the community. That is because they believe in the public interest. They are skilled and they are committed to their work. Considering the difficult job they do, they should receive appropriate respect. Our people have diverse backgrounds. They have experience in law, accounting, financial services and other areas. Many have invaluable industry and consumer advocacy experience, and this means they understand how markets work and issues facing investors, consumers and wider industry. ASIC employees also undertake ongoing internal training and have access to industry secondment programs, which further develop their skills.³³

18.34 Nevertheless, the evidence received by the committee warrants consideration of how enforcement could be affected by staffing issues and the organisational structure within ASIC.

18.35 A strategic review of ASIC was undertaken following the appointment of Mr Tony D'Aloisio as chairman. That review, completed in 2008, recommended that the four directorates which ASIC then had (regulation, compliance, enforcement and consumer protection) be abolished. They were replaced by a larger number of 'outwardly-focused stakeholder teams covering the financial economy' and multiple enforcement teams each tasked with specific types of misconduct.³⁴ The clusters within which the enforcement and stakeholder teams are organised were introduced during 2011–12, in order 'to better reflect' ASIC's priorities.³⁵ This approach differs to that taken in other jurisdictions where dedicated enforcement divisions appear to be standard. For example:

- The US Securities and Exchange Commission (SEC) has five divisions and an additional 23 internal offices. One of the divisions is dedicated to enforcement; the remaining four are: Corporation Finance; Investment Management; Risk, Strategy, and Financial Innovation; and Trading and Markets. The SEC's regional offices report to both the Enforcement Division and the Office of Compliance Inspections and Examinations.³⁶

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

34 ASIC, 'ASIC announces results of its strategic review', *Media release*, no 08-93, 8 May 2008; Pamela Hanrahan, 'ASIC review should make it smarter', *Australian Financial Review*, 12 May 2008, p. 63.

35 ASIC, *Annual Report 2011–12*, p. 2.

36 US Securities and Exchange Commission, www.sec.gov/divisions.shtml (accessed 20 August 2013).

- The new US Consumer Financial Protection Bureau (CFPB), which enforces federal consumer financial laws, has a Supervision, Enforcement and Fair Trading Division, which includes an enforcement office.³⁷
- The new regulator of the financial services industry in the UK, the Financial Conduct Authority (FCA), likewise has a dedicated enforcement section (the Enforcement and Financial Crime Division).³⁸

18.36 The Community and Public Sector Union (CPSU) advised that the 2008 changes were 'fairly traumatic on staff at the time and caused quite a lot of defocusing in certain areas'. Since the 2008 restructure there 'has been a move back to a more coherent approach in the enforcement division', although the evidence handling unit within ASIC, which services multiple enforcement teams, is under significant pressure.³⁹ Overall, the CPSU considered that morale 'crashed' following the changes, but that it may be now recovering:

Staff are very focused on their job, want to achieve the best outcomes they can for the Australian public and are very dedicated to that. They put in lots of long hours, sometimes horrendous hours, to achieve that. I think morale has to be on the way up for that to be happening.⁴⁰

18.37 Ms Anne Lampe, a former ASIC employee and financial journalist, told the committee:

Whilst I worked at ASIC I had nothing but the highest regard for the committed and hard-working investigators and lawyers in the enforcement section of ASIC. But there seemed to be some blockage at the top. Action seemed always to be taken too late.⁴¹

18.38 A former enforcement adviser also commented on the commissioners and senior management. He focused on the qualifications and expertise of the senior officers, and suggested that the current composition may be impacting ASIC's approach to enforcement and how enforcement matters are handled:

There seems to be a lack of experienced staff with direct experience in successfully investigating and prosecuting complex corporate fraud matters. For example, as of today, not one person at the ASIC commission level or, at best, one or two senior executives have actual experience in conducting a criminal investigation or giving evidence in a court themselves. In other

37 US Consumer Financial Protection Bureau, www.consumerfinance.gov/the-bureau (accessed 20 August 2013).

38 UK Financial Conduct Authority, www.fca.org.uk/static/fca/documents/fca-organisational-chart.pdf (accessed 20 August 2013).

39 Mr Alistair Waters, Deputy National President; Mr David Mawson, ASIC Workplace Delegate, CPSU, *Proof Committee Hansard*, 19 February 2014, p. 64.

40 Mr David Mawson, ASIC Workplace Delegate, CPSU, *Proof Committee Hansard*, 19 February 2014, p. 65.

41 Ms Anne Lampe, *Submission 106*, p. [2].

words, how can you expect your staff to conduct a complex investigation or lead one when you have never done one yourself?⁴²

18.39 Another former employee suggested that ASIC loses cases because of financial constraints and limits on how their employees can be utilised:

[ASIC] think that they can win court cases doing 38 hours a week, when the other side are doing 90 hours a week. When I put in for my overtime on Nomura, it was rejected, but they were happy with the result and it was these same people taking a lot of the credit. However, if I had not done the work, the case would have been a disaster.⁴³

18.40 ASIC is also required to compete with private sector firms for suitably qualified and talented employees 'with the disadvantage of not being able to pay market-equivalent salaries for people with cutting edge legal and financial expertise and experience'.⁴⁴ Another challenge to attracting and retaining talented enforcement employees could be the nature of the work that enforcement employees are required to do compared to the opportunities available elsewhere. Former ASIC employee Mr Niall Coburn stated:

In my team we used to mentor the younger staff coming in. Lots of young people at ASIC now think there is no future for them in terms of experience. They are not given the opportunity to go to court. They are not given the opportunity, say, if they were in a law firm.⁴⁵

18.41 The competence of particular ASIC officers or teams was commented on by individuals that had experienced enforcement action brought by ASIC. Dr Stuart Fysh argued that ASIC 'absolutely failed to bring to bear the right sort of commercial competence in establishing the facts against me'. He provided the following reasoning:

...the gentleman who investigated on behalf of ASIC was a part-time investigator who had been brought back. He said in court, very clearly, that if the alleged inside information was out there, unless he could find evidence that BG [Group] was aware of the alleged inside information, he just ignored it. Of course, that is not the test.

What was the professional competence of that person? The answer is not to criticise that guy; the issue for the senior management of ASIC is: what are the standards of competence; what is the job description of an investigator? I guess the issue, for me, is what governance structures exist within ASIC so that you do not have that end-to-end responsibility of one person with all the imbedded assumptions he has?⁴⁶

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

43 Ocean Financial Pty Ltd, *Submission 248*, p. [1].

44 Corporations Committee, Business Law Section, Law Council of Australia, *Submission 150*, p. 2.

45 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 6.

46 Dr Stuart Fysh, *Proof Committee Hansard*, 2 April 2014, p. 1.

18.42 Dr Fysh questioned the internal structures within ASIC and suggested that ASIC should employ someone 'whose KPI, whose bonus, depends on killing ASIC cases' so that ASIC do not take cases where 'they would have ended up looking silly'.⁴⁷

Committee view

18.43 The above paragraphs indicate some disquiet about the expertise that ASIC brings to enforcement, both in terms of the expertise it secures through expert witnesses and the capabilities ASIC possesses in house. Before proceeding further, the committee wishes to acknowledge that ASIC's employees have committed themselves to public service and to achieving the best results for the Australian community. The committee thanks ASIC's employees for their hard work and dedication. Although some concerns have been considered, the committee has not entertained allegations that appear vexatious or simply attempt to 'name and shame' particular employees, rather than engage in a constructive discussion about ASIC's performance.

18.44 Like other organisations, ASIC is dependent on the good judgement and conduct of its employees. There will be individual cases where trust is misplaced, expertise is lacking or where honest mistakes will be made. There will also simply be differences of opinion about particular matters. After reviewing both the public and confidential submissions received during his inquiry, it would be wrong for the committee to conclude that there is a significant or widespread problem within ASIC regarding its employees. At this time, the committee has no reason to consider that ASIC cannot manage any issues about the conduct of individual employees by regularly reviewing its supervision and performance management arrangements to ensure they are best practice and vigilantly applied. For the avoidance of any doubt, the committee is only aware of isolated complaints regarding ASIC's employees, and the committee is confident that the vast majority of ASIC's employees perform their duties appropriately and as effectively as possible.

18.45 There are other ways to improve the expertise and skillsets of ASIC's staff. Increasing the use of secondments to other law enforcement agencies will allow new ideas about enforcement to infiltrate and be adopted within ASIC. ASIC also needs to be more willing to acknowledge that mistakes will occasionally be made and to identify ways to learn from them. When ASIC is unsuccessful in a court action, particularly if the court criticises how the matter was pursued, ASIC's leadership should mandate that a two-step assessment process be undertaken. The first step would be an internal review of how the case was managed. The second would be an independent review of the case and what went wrong, undertaken remotely from any officers engaged in the matter. The commission and enforcement teams would then be briefed on the findings and lessons identified by the independent review. The two-step process would allow ASIC officers to reflect on the case while also ensuring that

47 Dr Stuart Fysh, *Proof Committee Hansard*, 2 April 2014, p. 1.

another informed perspective is sought. The independent review is particularly important; the committee does not believe that ASIC should rely only on its own self-analysis. However, by conducting an internal review in addition to the external review, ASIC's commissioners and senior management will be able to compare the findings of both and then consider whether the assessment offered by the internal review is frank, truly reflective and indicates a culture that is receptive to identifying and implementing improvements.

Recommendation 30

18.46 The committee recommends that when ASIC has been unsuccessful in court proceedings both an internal review and an independent review of the initial investigation and case must be undertaken.

18.47 Finally, the committee notes that ASIC's skillset may be strengthened by other less direct means. A possible way to convince a greater number of talented individuals to undertake at least part of their career at the regulator is by an enthusiastic and energetic leadership at ASIC pursuing more high-profile enforcement cases, particularly through the courts. Building a reputation of a tough and effective agency will make it easier for ASIC to attract, employ and retain talented and driven individuals.

