

## Appendix 5

### Key enforcement matters

A5.1 This section contains summaries of selected key enforcement matters that ASIC has been involved in or that relate to ASIC's responsibilities.

A5.2 The summaries are not a detailed critique of the particular cases; rather, they are intended to provide basic information on major cases or investigations and to highlight the varied nature of misconduct or alleged misconduct ASIC may need to pursue. This section is also not an exhaustive historical record of ASIC's enforcement activities. With some exceptions, the cases selected generally were finalised in the past five years.<sup>1</sup> During this period, ASIC has had notable successes and certain cases it has pursued have resulted in judgments that clarified responsibilities and provided greater certainty, particularly regarding directors' duties. However, there are a number of matters where ASIC's approach has been widely questioned.

A5.3 The summaries are predominately based on material already on the public record, not evidence received and tested by the committee. Matters that have been discussed extensively in the body of the report, such as the Commonwealth Financial Planning matter, are not included here.

#### *James Hardie*

A5.4 ASIC was ultimately successful in the long-running James Hardie civil action; a case initiated in the NSW Supreme Court in February 2007 that ultimately ended up in the High Court.<sup>2</sup> It was found that the non-executive directors, and the general counsel and company secretary, breached their duty of care and diligence in that they knew or should have known that the compensation fund for victims of asbestos-related disease did not have sufficient reserves to meet the likely claims.<sup>3</sup> The High Court also vindicated ASIC's conduct of the case as a model litigant after rejecting the NSW Court of Appeal's criticism of ASIC for not calling a particular witness.

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1 Some particularly noteworthy historical cases outside this timeframe include: ASIC's investigation into the 2001 collapse of One.Tel and its unsuccessful court proceedings against One.Tel's former joint managing director, Mr Jodee Rich, and its former finance director, Mr Mark Silbermann; the action against Mr Rodney Adler (a former director of collapsed insurer HIH); and ASIC's unsuccessful insider trading case against Citigroup.

2 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345. ASIC had considered criminal proceedings, however, it concluded that there was an insufficient basis to commence any criminal proceedings against non-executive directors, and the CDPP decided that there was an insufficient basis to commence criminal proceedings against other individuals. ASIC, 'James Hardie Group civil action', *Media Release*, no. 08-201, 5 September 2008.

3 Market announcements claimed that the compensation fund would be fully funded.

A5.5 ASIC's chairman noted in late 2012 that ASIC 'has observed board engagement with disclosure has improved' as a result of the widespread publicity associated with this case.<sup>4</sup>

### ***Australian Wheat Board***

A5.6 The judicial inquiry into certain Australian companies in relation to the United Nations (UN) Oil-For-Food Programme (Cole Inquiry) examined transactions between the Australian Wheat Board (AWB) and the Iraqi Grain Board and how those transactions related to UN-imposed sanctions and Australian law. It found that there were circumstances where it might be appropriate for authorities to consider criminal or civil proceedings against AWB and various persons.<sup>5</sup> A taskforce consisting of ASIC, the Australian Federal Police (AFP) and Victoria Police was established in response to the findings of the Cole Inquiry. The AFP discontinued its investigation following legal advice.<sup>6</sup> ASIC did not pursue criminal proceedings, although it instituted six civil proceedings relating to directors' duties.<sup>7</sup> In a media release announcing the proceedings, ASIC advised that civil proceedings were preferred due to statute of limitation considerations.<sup>8</sup>

A5.7 Four of ASIC's proceedings have been concluded. ASIC ultimately settled the proceedings against the former managing director of AWB, Mr Andrew Lindberg. The Supreme Court of Victoria agreed to a proposed fine of \$100,000 and that Mr Lindberg be disqualified from managing corporations until 15 September 2014. The court also found that AWB's former chief financial officer (CFO), Mr Paul

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4 ASIC, 'Decision in James Hardie penalty proceedings', *Media Release*, no. 12-275, 13 November 2012.

5 Terence RH Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, vol. 1, November 2006, pp. xi, lxxxii.

6 AFP, 'AWB Task Force investigation', *Media Release*, 28 August 2009.

7 ASIC, 'ASIC's response to ABC TV's Four Corners' questions', 30 September 2013, [http://abc.net.au/4corners/documents/RBA2013/ASIC\\_response.pdf](http://abc.net.au/4corners/documents/RBA2013/ASIC_response.pdf) (accessed 1 October 2013), p. 1.

8 A relevant extract from the media release is as follows: 'Investigations into civil penalty proceedings was given more priority by ASIC because of the statute of limitation periods which apply to those actions and which do not apply to possible criminal proceedings (which investigations by ASIC continue). Commissioner Cole examined 27 contracts between AWB and the Iraqi Grain Board (IGB). The Corporations Act limits the time for the commencement of civil penalty proceedings to six years. The time limit had expired for 20 of the contracts when the Cole Inquiry concluded in November 2006 and two expired in February and June 2007'. ASIC, 'ASIC launches civil penalty action against former officers of AWB', *Media Release*, no. 07-332, 19 December 2007.

Ingleby, had breached his duties.<sup>9</sup> On 23 December 2013, ASIC announced that it discontinued proceedings against two former executives 'after forming the view that it was no longer in the public interest to pursue its claims'. Proceedings against the former chairman of AWB and another executive are ongoing.<sup>10</sup>

### **Centro**

A5.8 The global financial crisis limited the availability of debt funding and led to property values coming under pressure. Shopping centre owner and operator Centro nearly collapsed in December 2007 after it could not rollover its debt. It subsequently emerged that the 2007 annual reports of two Centro companies failed to disclose \$2 billion of short-term liabilities (those liabilities were instead classified as non-current) and guarantees of short-term liabilities of an associated company valued at US\$1.75 billion.<sup>11</sup>

A5.9 In October 2009, ASIC instituted civil penalty proceedings against then-serving and former directors and a former chief financial officer (CFO). The Federal Court found that the directors had breached their duties when they signed off on the financial reports.<sup>12</sup> The managing director and former chief executive officer (CEO) was fined \$30,000 and the former CFO was disqualified from managing corporations for two years.<sup>13</sup> In November 2012, ASIC accepted an enforceable undertaking from the former lead auditor of Centro that prevents the auditor from practising until 30 June 2015.<sup>14</sup> Some financial redress for shareholders was achieved as the result of a class action, with a \$200 million settlement reached with Centro and its auditors, PricewaterhouseCoopers.<sup>15</sup>

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9 ASIC successfully appealed the amount of the penalty imposed on Mr Ingleby by the Supreme Court of Victoria. ASIC and Mr Ingleby had recommended penalties of a disqualification of 15 months and a pecuniary penalty of \$40,000, however, Justice Robson set the pecuniary penalty at \$10,000. On appeal, the Court of Appeal increased the penalty to \$40,000. See ASIC, 'ASIC to appeal permanent stay on second AWB case', *Media Release*, no. 09-260, 17 December 2009; and ASIC, 'ASIC appeal upheld', *Media Release*, no. 13-055, 19 March 2013.

10 ASIC, 'Update on ASIC's proceedings against former directors and officers of AWB Limited', *Media Release*, no. 13-363, 23 December 2013.

11 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 at 297 [9].

12 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291.

13 *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430 at 433 [3]–[5].

14 ASIC, 'Former Centro auditor suspended', *Media Release*, no. 12-288, 19 November 2012.

15 *Kirby v Centro Properties Ltd (No 6)* [2012] FCA 650 (19 June 2012).

A5.10 ASIC considers that the Centro investigation is an example of how ASIC has improved the conduct of its investigations as the civil penalty proceedings against Centro were initiated within 13 months of the investigation commencing.<sup>16</sup>

### ***Andrew Forrest and Fortescue***

A5.11 ASIC was ultimately unsuccessful in the case it brought against Andrew Forrest and Fortescue Metals Group (Fortescue) related to ASX announcements and other statements made in 2004 and 2005 on agreements entered into with three state-owned entities of the People's Republic of China. ASIC's case was dismissed at trial in 2009. Its appeal to the Full Court of the Federal Court was successful in 2011; however, in 2012 the High Court upheld the appeals of Fortescue and Mr Forrest.

A5.12 The High Court criticised how ASIC's case was pleaded. Specifically, the court disapproved of how ASIC set out the case it sought to make<sup>17</sup> and how the allegations put by ASIC at trial changed on appeal. A relevant extract of the judgment follows:

The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations. As Keane CJ observed in his judgment in the Full Court:

*'The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues.'*

As already noted, ASIC's allegations were taken, at trial, to be allegations of fraud. Yet on appeal to the Full Court of the Federal Court, and again on the appeals to this Court, ASIC advanced its case on the wholly different footing that the impugned statements should be found to be misleading or deceptive. That is, whereas the case that was presented at trial focused upon the honesty of Fortescue, its board and Mr Forrest, the case which ASIC mounted on appeal focused on what it was that the impugned statements would have conveyed to their intended audience.<sup>18</sup>

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16 Tony D'Aloisio, 'Responding to the global financial crisis: the ASIC story', address to the Trans-Tasman Business Circle, 30 November 2010, [www.asic.gov.au](http://www.asic.gov.au) (accessed 3 October 2013), p. 14.

17 The reasons for judgment stated that ASIC's statement of claim did not identify the case it sought to make 'and to do that clearly and distinctly', adding that '[t]his is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law'. *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at 502 [25].

18 (2012) 247 CLR 486 at 503 [27]–[28].

## ***ABC Learning***

A5.13 Childcare provider ABC Learning Centres Limited entered voluntary administration in November 2008. After an ASIC investigation, criminal charges were laid against Edmund Groves and Martin Kemp, two former executive directors of ABC Learning Centres Ltd, for alleged breaches of their duties as directors.<sup>19</sup> Mr Kemp was found not guilty in June 2012.<sup>20</sup> Following this verdict, the CDPP decided not to proceed further with the prosecution against Mr Groves.<sup>21</sup> More recently, a criminal prosecution has commenced against the former CFO for allegedly authorising false or misleading information.<sup>22</sup> ASIC also investigated the auditor of ABC Learning and in August 2012 accepted an enforceable undertaking that prevents the auditor from practising for five years.<sup>23</sup>

A5.14 ASIC's investigation was questioned or criticised by various commentators, particularly after the charges against the founder of ABC Learning were dropped.<sup>24</sup>

## ***Collapsed property finance schemes, mortgage funds and debenture issuers***

A5.15 Over the past decade, several high-profile collapses have resulted in significant losses for retail investors, leading to criticism of ASIC and the introduction of regulatory changes. These collapses include Westpoint (2005), Fincorp (2007), Australian Capital Reserve (2007), Provident Capital (2012), Banksia (2012), Wickham Securities (2012) and LM Investment Management (2013).

A5.16 Westpoint in particular was a high-profile collapse that attracted some criticism of ASIC.<sup>25</sup> Westpoint's activities gained ASIC's attention in 2002.<sup>26</sup> In May 2004, ASIC instituted proceedings against a Westpoint company to seek a determination by the court on whether certain promissory notes offered should have

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19 ASIC, 'Former ABC directors charged', *Media Release*, no. 11-16, 28 January 2011.

20 ASIC, 'Former ABC director found not guilty', *Media Release*, no. 12-117, 5 June 2012.

21 ASIC, 'Former ABC directors charged', *Media Release*, no. 11-16, 28 January 2011.

22 ASIC, 'Former ABC Learning CFO charged', *Media Release*, no. 13-104, 10 May 2013.

23 ASIC, 'Former ABC Learning Centres auditor prevented from auditing companies for five years', *Media Release*, no. 12-186, 8 August 2012.

24 See, for example, James Thomson, 'ASIC and Eddy Groves: Not as easy as ABC', *Business Spectator*, 10 September 2012, [www.businessspectator.com.au/article/2012/9/10/education/asic-and-eddy-groves-not-easy-abc](http://www.businessspectator.com.au/article/2012/9/10/education/asic-and-eddy-groves-not-easy-abc) (accessed 9 October 2013); Adam Schwab, 'ASIC nails "getaway driver" in ABC Learning debacle' *Crikey*, 14 August 2012, [www.crikey.com.au/2012/08/14/asic-nails-getaway-driver-in-abc-learning-debacle](http://www.crikey.com.au/2012/08/14/asic-nails-getaway-driver-in-abc-learning-debacle) (accessed 9 October 2013); Michael Evans, 'ASIC's move as Groves "off the hook"', *Sydney Morning Herald*, 9 July 2012, p. 1.

25 Although ASIC defended its actions: see Mr Jeffrey Lucy, Chairman, ASIC, *PJCCFS Hansard*, Statutory oversight of ASIC, 13 June 2006, p. 3.

26 The Hon Peter Costello, *House of Representatives Hansard*, 21 May 2007, p. 137.

been offered as debentures or financial products under the Corporations Act.<sup>27</sup> At that time, ASIC 'was not aware of the apparently large scale involvement of licensed financial planners advising on Westpoint products'. Independently audited statements of other Westpoint companies filed with ASIC during 2004 did not raise any concerns.<sup>28</sup> Following Westpoint's collapse, ASIC took representative action against KPMG, the directors of nine Westpoint mezzanine companies, seven financial planners and State Trustees Limited.<sup>29</sup> ASIC ultimately settled the cases and obtained \$97.2 million in compensation.<sup>30</sup> Criminal proceedings against two former Westpoint officers were discontinued.<sup>31</sup> Ultimately, 31 individuals were either banned by ASIC or gave ASIC an undertaking that they would not engage in financial services.<sup>32</sup>

A5.17 The Westpoint matter led to ASIC imposing a regulatory obligation that requires additional disclosure if one of eight benchmarks set by ASIC for unlisted notes is not met.<sup>33</sup> The collapse of Banksia and other debenture issuers led to the previous government announcing that ASIC and APRA would consult on further reforms, such as capital requirements.<sup>34</sup>

### ***Opes Prime***

A5.18 Opes Prime Stockbroking Ltd was a provider of securities lending facilities that was placed in administration in March 2008.<sup>35</sup> An ASIC investigation following the collapse that led to two directors and founders of Opes Prime being jailed (although recently another director and founder was found to be not guilty). ASIC also helped facilitate a scheme of arrangement that resulted in ANZ and Merrill Lynch, the major financiers of Opes Prime, paying \$226 million to the Opes Prime liquidators. With other assets paid or recovered, approximately \$253 million was paid to Opes Prime's creditors.<sup>36</sup> This settlement is the largest compensation outcome achieved by

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27 ASIC, 'ASIC acts on mezzanine financing', *Media Release*, no. 04-157, 25 May 2004.

28 The Hon Peter Costello, *House of Representatives Hansard*, 21 May 2007, p. 139.

29 ASIC, 'Actions to obtain compensation for the benefit of investors', <https://westpoint.asic.gov.au/wstpoint/wstpoint.nsf/byheadline/Summary+of+claims?opendocument> (accessed 2 September 2013).

30 ASIC, *Submission 45.2*, p. 118.

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

32 ASIC, *Submission 45.2*, p. 27.

33 This is termed 'if not – why not' disclosure. The requirements are outlined in ASIC's Regulatory Guide 69.

34 The Hon Bill Shorten MP (Minister for Financial Services and Superannuation), 'Roadmap to a sustainable future for finance companies', *Media Release*, no. 93 of 2012 (22 December).

35 More detail about the collapse, see chapter 4 of Parliamentary Joint Committee on Corporations and Financial Services, *Financial products and services in Australia*, November 2009, Parliamentary Paper No. 321/2009.

36 ASIC, *Submission 45.2*, p. 106; ASIC, 'Opes Prime schemes of arrangement approved', *Media Release*, 09-135, 4 August 2009.

ASIC for consumers.<sup>37</sup> In a 2009 report, the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) provided the following helpful summary of the settlement:

The terms of settlement included an agreement by the regulator not to pursue ANZ and Merrill Lynch for an alleged contravention of the managed investment provisions of the Corporations Act...ASIC also agreed not to pursue directors of ANZ for civil penalty and compensation claims under section 181 of the Corporations Act. In accepting the scheme of arrangement, the Opes Prime liquidators and clients also renounced all claims and legal proceedings against Merrill Lynch and ANZ.<sup>38</sup>

A5.19 This agreement was criticised. For example, in 2010 Fairfax journalist Adele Ferguson concluded that following a collapse that 'unleashed havoc on the sharemarket, when ANZ and Opes Prime's other financiers, including Merrill Lynch, began selling down the broker's \$1.4 billion securities lending portfolio to recover secured loans', it was not 'a good look' for ASIC to have entered into an enforceable undertaking that allowed ANZ to sign a '\$226 million cheque in return for legal indemnity' before ASIC had completed its criminal investigation into Opes Prime.<sup>39</sup> Individuals aggrieved by the Opes Prime collapse also lodged submissions to this inquiry.<sup>40</sup> However, ASIC has previously rejected criticism about its actions relating to Opes Prime.<sup>41</sup> ANZ also told the committee that at no time did it have a relationship with Opes Prime's customers, and that while it acknowledges the hardship that Opes Prime's collapse caused, it does not believe this hardship resulted from ANZ's actions.<sup>42</sup>

### ***Storm Financial***

A5.20 Storm Financial was a financial advisory firm that collapsed in 2009. Clients, many being retirees or nearing retirement, invested through a high-risk model offered by Storm but many did not understand the level of risk involved. Approximately 3,000 investors were arranged by Storm to be double-gearred with loans against equity in their homes as well as margin loans.<sup>43</sup> When the share market experience a downturn in 2008, many investors received margin calls that they were unable to meet. How

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37 ASIC, *Submission 45.2*, p. 24.

38 PJCCFS, *Financial products and services in Australia*, November 2009, p. 64 (footnotes omitted).

39 Adele Ferguson, 'An inconvenient deal and a forgotten \$226m', *Sydney Morning Herald*, 12 January 2010, p. 20.

40 For example, see Mr Rob Fowler, *Submission 280*.

41 See ASIC, *Submission 378* to the PJCCFS inquiry into financial products and services in Australia, August 2009, p. 3.

42 ANZ, *Submission 216*, p. 5.

43 Australian Government, *Compensation arrangements for consumers of financial services: Report by Richard St. John*, April 2012, p. 55.

appropriate the advice the clients received has been the subject of dispute.<sup>44</sup> ASIC estimates that investors who borrowed from financiers to invest through Storm lost in total approximately \$830 million.<sup>45</sup>

A5.21 ASIC commenced an investigation into Storm in December 2008 and commenced negotiations on an enforceable undertaking.<sup>46</sup> Storm was placed into administration by the Commonwealth Bank of Australia (CBA) in January 2009. ASIC's legal proceedings against various banks and the directors of Storm (Emmanuel and Julie Cassimatis) commenced between November and December 2010. ASIC and the CBA settled in September 2012 with the CBA providing up to \$136 million in compensation for investors in addition to approximately \$132 million already provided by the CBA.<sup>47</sup> Compensation proceedings against the Bank of Queensland (BoQ), Senrac Pty Limited (Senrac) and Macquarie Bank on behalf of two former Storm investors were settled in May 2013. As the time of writing, judgment had not been given for the proceedings brought by ASIC against Storm, BoQ and Macquarie in relation to the unregistered managed investment scheme. Further, the proceedings against the Cassimatises are expected to continue in 2014.<sup>48</sup> ASIC did, however, successfully appeal against court approval of the \$82.5 million settlement between former Storm Financial investors and Macquarie Bank brought about by a class action after ASIC considered 'the differential distribution of the settlement funds resulted in a lack of fairness to the majority of the members of the class'.<sup>49</sup>

A5.22 The collapse of Storm Financial was considered by the PJCCFS as part of its 2009 inquiry into financial products and services. During that inquiry, ASIC rejected criticism of how its investigation of Storm was conducted.<sup>50</sup> Although the PJCCFS noted that ASIC may have recognised earlier that Storm's practices were problematic if ASIC's risk-based auditing processes were more effective,<sup>51</sup> ASIC's performance was not a central issue in the PJCCFS's report. Rather, that committee developed

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44 In its proceedings against the founder, ASIC is alleging that the Storm model provided 'one size fits all' financial advice, rather than advice related to each investor's individual financial circumstances. ASIC, 'Civil penalty proceedings against the Cassimatises', <http://storm.asic.gov.au> (accessed 18 March 2014).

45 ASIC, 'ASIC and CBA Storm Financial settlement', 8 March 2013, [www.asic.gov.au](http://www.asic.gov.au) (accessed 18 March 2014), p. 2.

46 ASIC, *Submission 378* to the PJCCFS inquiry into financial products and services in Australia, August 2009, p. 16.

47 ASIC, response to *Submission 276*, received 11 December 2013, p. 2.

48 See <http://storm.asic.gov.au>.

49 See <http://storm.asic.gov.au> and ASIC, 'ASIC successful in appeal against Storm settlement deal', *Media Release*, no. 13-214, 12 August 2013.

50 ASIC, *Submission 378* to the PJCCFS inquiry into financial products and services in Australia, August 2009, p. 3.

51 PJCCFS, *Financial products and services in Australia*, November 2009, p. 44.

proposals for legislative amendments that led to the previous government's FOFA reforms.

A5.23 This committee has received submissions that have criticised ASIC's performance in the context of the Storm Financial matter.<sup>52</sup> Among these were submissions from Levitt Robinson Solicitors, a law firm that instigated class actions on behalf of Storm investors, and from Storm Financial's former CEO Mr Emmanuel Cassimatis. ASIC addressed the Storm Financial matter in a written response to the Levitt Robinson submission.<sup>53</sup>

### *Stuart Ariff*

A5.24 Stuart Ariff was an insolvency practitioner who was banned from the profession for life in August 2009 and jailed in December 2011 after being convicted on 19 criminal charges brought by ASIC. ASIC's actions, however, were subject to significant criticism. A key concern was that ASIC only acted once concerns about Mr Ariff were raised in the media in 2007.<sup>54</sup> However, ASIC had received numerous complaints from 2005 onwards. This committee, in its 2010 report on liquidators and administrators, was sharply critical of ASIC's 'lack of responsiveness':

The committee queries why both ASIC and the [Insolvency Practitioners Association of Australia (IPAA)]...took so long to identify Mr Ariff as a practitioner that should be investigated...[T]hese agencies received numerous complaints on the matter from several parties, including:

- Mr Bernard Wood, who complained to ASIC twice in early 2005;
- Carlovers, which complained to ASIC three times between 2005 and 2007;
- the Armidale Dumaresq Council, which received acknowledgement of a complaint related to the YCW League Club, but has not heard from ASIC since;
- Mr Ron Williams, who lodged a complaint but was told by ASIC to refer the matter to the Office of Fair Trading or get legal advice; and
- Mr Bill Doherty, who complained to ASIC on three occasions and to the IPAA, CPA and [the Institute of Chartered Accountants in Australia] 'more than 50 times'.<sup>55</sup>

A5.25 Among other things, the committee recommended that ASIC's corporate insolvency responsibilities be transferred to the government agency that regulates

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52 See *Submissions 18, 41, 44, 82, 84, 87, 88, 90, 172, 236, 278 and 301*.

53 ASIC, response to *Submission 276*, letter dated 11 December 2013.

54 Senate Economics References Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, September 2010, Parliamentary Paper No. 179/2010, p. 52.

55 Senate Economics References Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia*, p. 70 (footnotes omitted).

personal insolvency practitioners (then known as the Insolvency and Trustee Service Australia, but now called the Australian Financial Security Agency). The previous government's response to the report did not accept that recommendation; however, it did undertake a consultation process on possible reforms.<sup>56</sup> Following this consultation process, an exposure draft of proposed insolvency law amendments was released but a bill to give effect to these changes was not introduced into the Parliament.

### ***Trio Capital***

A5.26 Trio Capital was a superannuation fraud that resulted in \$176 million in superannuation funds being lost or missing.<sup>57</sup> The PJCCFS, which conducted a dedicated inquiry into Trio Capital, was critical of ASIC's (and APRA's) 'slow response' to the fraud. The PJCCFS expressed surprise that 'there appears to have been very little follow up activity by APRA, ASIC and other authorities such as the AFP, to seek to recover outstanding moneys or to bring to justice those who have committed crimes which have led to great suffering on the part of Australian investors'.<sup>58</sup> In evidence to this inquiry, a former ASIC described the investigation of Trio Capital as 'example of what you would not do in an investigation'.<sup>59</sup>

A5.27 ASIC's enforcement action following the collapse of Trio Capital has resulted in 11 people being jailed, banned, disqualified or removed from the industry for a combined total of more than 50 years.<sup>60</sup> However, the PJCCFS considers that ASIC's enforcement action targeted a 'local foot soldier', but not those responsible for developing and implementing the scheme.<sup>61</sup> ASIC announced in June 2012 that it had formed the view that there was insufficient evidence to prove that Mr Jack Flader, the individual who was 'allegedly the ultimate controller of the Trio group', had broken Australian law.<sup>62</sup> ASIC has maintained this position since that announcement; in October 2013 ASIC issued a statement announcing that, despite its attempts to obtain extra evidence, ASIC was finalising its investigation into Mr Flader because of insufficient evidence.<sup>63</sup>

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56 Australian Government, *Government response to the Senate Economics References Committee report—The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, June 2011, p. 1.

57 PJCCFS, *Inquiry into the collapse of Trio Capital*, May 2012, Parliamentary Paper No. 138/2012, p. xvii.

58 PJCCFS, *Inquiry into the collapse of Trio Capital*, May 2012, p. xx.

59 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 3.

60 ASIC, 'Response to ABC TV's Four Corners' questions', 30 September 2013, [http://abc.net.au/4corners/documents/RBA2013/ASIC\\_response.pdf](http://abc.net.au/4corners/documents/RBA2013/ASIC_response.pdf) (accessed 1 October 2013), p. 1.

61 PJCCFS, *Inquiry into the collapse of Trio Capital*, May 2012, p. xxi.

62 ASIC, 'ASIC provides update on Trio', *Media Release*, no. 12-116, 5 June 2012.

63 ASIC, 'Update on Trio investigation', *Media Release*, no. 13-294, 29 October 2013. See also Mr John Price, ASIC, *PJCCFS Hansard*, Oversight of ASIC, 15 March 2013, p. 14.