

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2017 - 2018

Division/Agency: Australian Securities and Investment Commission

Question No: 88

Topic: ASIC Regulatory Guide 52

Reference: Hansard page 7 (31 May 2017)

Senator: Abetz, Eric

Question:

Senator ABETZ: The Australian. It is entitled: 'Directors can't expend public company money for just any purpose'. They rely on the case of Cowan v Scargill, but you will find that from the article. He then asserts or opines: 'Investors invest in particular companies because of the business carried on by the company. They should not have to first check on the social or political views of the directors.' It is suggested that where the expenditure of money or restriction on business activities has no reasonable connection with the business of the company, the directors have breached their duties and have not acted for a proper purpose as required by the Corporation Act.

Mr Medcraft: Thank you for raising that. We will have a look at it, and we will come back with an answer on notice.

Senator ABETZ: Thank you.

Mr Medcraft: It raises an interesting issue.

Senator ABETZ: Yes, as to whether or not that is an appropriate representation of the law as ASIC understands it. Then I understand you have RG 52, rules and guidelines 52. You are aware of that?

Mr Medcraft: RG 52?

Senator ABETZ: It is RG 52, 'Enforcement action submissions'. It is ASIC regulatory guide 52. I draw that to your attention as well. Could you have a look at that for us, please. It is in the context of this article written by Mr Speed.

Mr Medcraft: Whether we are consistent or disagree? Whether RG 52 is consistent with that?

Senator ABETZ: No, whether, in the past five years, ASIC has received any submissions under its RG 52 policy—I will use that as a term to encapsulate these matters—and whether you have received any complaints from people as to companies behaving in a particular manner, which is inconsistent with a thesis of Mr Speed's—

Mr Medcraft: I see. We get it.

Senator ABETZ: And then what are the procedures if an RG 52 complaint—if I can use that term—were made? Which officer would be assigned to that task? What assurances do we have that that particular officer is not engaged in or of a particular political or social persuasion in making that determination? I think there are some fairly important issues here.

Mr Medcraft: How we manage conflicts of interest?

Senator ABETZ: Yes, and whether public companies are now engaging for environmental reasons or social reasons which seem to be against the shareholder interest, possibly to make certain company directors and others feel warm-hearted within themselves and give them a public profile but at the expense of the shareholders and the commercial interests of the company.

Mr Medcraft: It is generally around the issue of corporate governance.

Senator ABETZ: Yes.

Mr Day: Are you asking for us as part of that answer to say how we deal with the conflicts or how we ensure that we have announced, if you like, the conflicts of our own staff in dealing with any complaints we might receive and that, to take your example, they declare their own political persuasions when they are receiving any complaints of that nature? Is that we are asking?

Senator ABETZ: Yes, and how you manage that. I think we can all very easily think of examples where somebody might have a particular environmental, religious or social persuasion and a particular company might be advocating in a different manner. If a complaint comes along, how do you ensure that that is treated—

Mr Medcraft: I understand.

Mr Day: We will take that on notice.

Mr Medcraft: We will take that on notice.

Answer:

The article referred to in the question is the author's interpretation and view of the law. In administering the law, ASIC is instructed by the relevant legislation and case law. It would not be appropriate for ASIC to comment specifically on this author's interpretation. However, the following information may be of use:

RG52

The purpose of ASIC's Regulatory Guide 52: *Enforcement action submissions (RG52)*, is to enable ASIC, where practical and appropriate, to have before it the views of persons under investigation at the time enforcement action is considered. ASIC may invite or agree to submissions on what enforcement action ASIC should take in response to findings made in an investigation. Since the introduction of RG52 in 1993, ASIC has no record of a formal request for, or receipt of, any submissions pursuant to RG52.

Further information on ASIC's enforcement policies and procedures can be found in Information Sheet 151: *ASIC's approach to enforcement*, and the Legal Services Directions 2017. These documents provide the framework for ASIC's management of enforcement actions, including opportunities for persons subject to enforcement action to provide information to ASIC, including consideration of alternative actions (for example, entering into an enforceable undertaking).

ASIC Staff: Conflicts of interest

ASIC is committed to a culture of high ethical standards and compliance, with the obligations on staff of the Commonwealth Government, including the Australian Public Service (APS) Values, Employment Principles and Code of Conduct, the *Public Interest Disclosure Act 2013* and the *Public Governance, Performance & Accountability Act 2013*. ASIC recognises the value of transparency and accountability in its administrative and management practices as outlined by the ASIC Values. ASIC undertakes a rigorous assessment of all employees prior to commencing duties, including pre-engagement assessments and relevant security checks.

In accordance with ASIC's policy on avoiding conflicts of interests and improper use of information, all staff must make full disclosure of interests and holdings biannually, including personal or outside interests that may expose ASIC or the individual to a conflict of interest. ASIC registers record these interests and are reviewed and approved by managers and senior executives, as required. ASIC staff are required (on an ongoing basis) to immediately disclose any potential or actual conflict of interest when they become aware of it.

Complaints about ASIC services, decisions, actions or officers

All complaints about ASIC's services, decisions, actions and officers are covered by ASIC's Complaint Management Policy, underpinned by ASIC's complaint management framework.

If a member of the public reporting suspected misconduct about a third party is unsatisfied with a decision of an ASIC officer, they are asked to contact the relevant ASIC officer to request a review. A more senior officer or designated review officer will conduct the review. Following this, if the reporter remains unsatisfied, s/he will be advised of their external review options, including the Commonwealth Ombudsman.

Where a member of the public has concerns with ASIC's processes or people, they may lodge a complaint through ASIC's Complaints Management System. Where the complaint relates a service provided by ASIC, or an action taken by ASIC, it will be referred to a complaints officer in the relevant area for action and resolution.

If the complaint concerns a complaint about an ASIC staff member, including a complaint that the officer has a conflict of interest in undertaking their duties, the complaint is referred to ASIC's Professional Standards Unit, where it is assessed by an independent unit contained within ASIC's Chief Legal Office. ASIC's process for dealing with complaints about ASIC staff is set out in ASIC's Information Sheet 107: *Guidelines for managing allegations of misconduct against ASIC staff members*. These complaints may be lodged by post, phone, online or via email.