

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Additional Estimates

10 – 11 February 2010

**Question: aet 49**

**Topic: Legal Proceedings - ASIC**

**Hansard Page: Written**

**Senator EGGLESTON asked:**

1. How many court proceedings are ASIC currently involved with? On notice, can ASIC provide a list of each current case and amount of money spent on each case to date?
2. What amount of money has ASIC spent on failed court cases in the past 12 months? Can ASIC also provide the amount of time spent on each case?
3. Has ASIC budgeted for the court appeals it is taking against the AWB, One.Tel and Andrew Forrest (of Fortescue)?
4. What are ASIC's procedures for critically analysing the strings of a prosecution and the likelihood of success? How does ASIC arrive at the economic and legal decision to continue a case? Does ASIC take its budget into account when making such a decision?
5. What advice did ASIC give the Government with regards the announcement of new laws improving ASIC's ability to telephone intercept and expanding the search warrant powers available to ASIC?
6. Given that ASIC has only prosecuted one case of insider trading and two of market manipulation over the 2009 financial year, why does ASIC feel that the new powers are warranted? Why are ASIC's current powers insufficient?
7. What funding is ASIC budgeting for to implement its new powers?
8. Finally, the Australian Financial Review reports that almost half of the 278 matters the ASX referred to ASIC for investigation since 2005 are yet to be finalised. Can ASIC give the exact number of cases that are yet to be finalised from 2005?
9. Are investigations by ASIC categorised in any way? Are certain cases given priority, or does the process work in a first in, first out basis.
10. Does ASIC have any ongoing cases that commenced prior to 2005? If so, can ASIC detail what these cases are and why they have not been finalised?

**Answer:**

1. There are currently 109 matters that ASIC has that involve litigation. Of these 109 matters, there are 127 sets of proceedings (either litigation on foot or decision under appeal) with 370 defendants. Of the 127 sets of proceedings, 16 are administrative proceedings, 49 are civil proceedings and 62 are criminal proceedings.

The table at Appendix 1 shows how much ASIC has spent to date on each of these matters. The figures are presented on the following basis:

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- the costs relate to the external costs of running the investigation and litigation. That is, they are the costs of services or goods acquired by ASIC in respect of the investigation or litigation. They do not include internal costs which are part of ASIC's business as usual budget, e.g. staff salaries;
- the costs identified relate to the whole project/activity and are not split up between the investigation and litigation aspects of the matter;
- these figures are less any costs orders ASIC obtained in its favour;
- these figures do not include any costs that might have been incurred by the Commonwealth Director of Public Prosecutions (CDPP);
- we have not included the names of the matters for operational reasons; and
- those matters that are funded by the enforcement special account are asterisked.

There are 14 matters in Appendix 1 that do not have any costs recorded against them. Out of the 14 matters, 13 matters have not incurred any external costs because they are criminal matters that have been referred to the CDPP. One matter has not incurred any external costs because it is an administrative matter involving a banning decision by an ASIC delegate that is being run internally.

2. There are 2 matters in the period 1 February 2009 to 1 February 2010 in which the final judgment or decision was not in ASIC's favour and ASIC has not appealed. Below is a table (Table A) that sets out the costs incurred by ASIC in those matters. The figures are presented on the following basis:

- The costs relate to the external costs of running the investigation and litigation. That is, they are the costs of services or goods acquired by ASIC in respect of the investigation or litigation. They do not include internal costs which are part of ASIC's business as usual budget, e.g. staff salaries; and
- the costs identified relate to the whole project/activity and are not split up between the investigation and litigation aspects of the project.

**Table A- Costs of matters not decided in ASIC's favour**

| Matter  | Type  | Decision Date | Decision              | Cost            |
|---|-------|---------------|-----------------------|-----------------|
| <b>One.Tel Limited</b>                                | Civil | 18/11/2009    | Judgment against ASIC | \$34,088,876.30 |
| <b>Westpac Banking Corporation - Debit Mastercard</b> | Civil | 15/12/2009    | Judgment against ASIC | \$108,239.09    |

The figures below in Table B represent an assessment of the hours spent on each of the matters by ASIC staff. The figures do not include the hours spent on each of the matters by counsel or external solicitors.

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**Table B- Hours spent by ASIC staff on matters not decided in ASIC's favour**

| Matter   | Hours spent |
|--|-------------|
| One.Tel Limited                                | 39193       |
| Westpac Banking Corporation - Debit Mastercard | 500         |

3. ASIC has decided not to appeal the decision of the NSW Supreme Court dismissing ASIC's civil penalty proceedings against One.Tel's former joint Managing Director, Mr Jodee Rich and the company's former Finance Director, Mr Mark Silbermann (10-34 AD, 26 February 2010).

In relation to the AWB proceeding the Court of Appeal of the Supreme Court of Victoria has heard and allowed the appeal by ASIC against the decision made by Justice Robson on 9 December 2009 to permanently stay ASIC's second civil penalty case against former AWB managing director Mr Andrew Lindberg. The cost of this appeal (together with the costs of the other aspects of this matter) were funded from ASIC's Enforcement Special Account (ESA), a fund set up specifically to provide funding for investigations and litigation that are activities of public interest, involve matter of importance for continued confidence in the corporate regulatory framework and are beyond the scale of activities normally undertaken by ASIC. The Court of Appeal of the Supreme Court of Victoria made an order that ASIC's costs of the appeal were to be paid by Mr Lindberg. In most cases, such a costs order covers about 60% to 75% of the costs of the proceeding.

Funds from the ESA have been budgeted for the costs of the appeal in the Fortescue matter.

4. During the course of each ASIC investigation, the investigation team continually assesses the material it collects during its investigation, to inform the course of the investigation and to assess whether the investigation should continue, and whether some form of deterrence action may be an outcome. In the majority of cases, the investigation team includes a lawyer, in all cases the investigation team has access to a lawyer. Each investigation team also has access to specialist legal assistance from ASIC's Chief Legal Office. This legal expertise informs the progress of the investigation.

If the view is formed by the investigation team that the material collected during an investigation appears to support the need for enforcement action to be taken, the process for deciding whether to take action and the type of action depends on the matter. The Commonwealth Director of Public Prosecutions (CDPP) is referred briefs where ASIC considers that a criminal prosecution is warranted. The decision whether to prosecute is then made by the CDPP.

All investigations are reviewed by the Senior Executive Leader of the relevant Deterrence Team periodically throughout their life. The more significant civil and administrative matters are referred to the Commission for decision on whether to commence deterrence actions, with a recommendation from the relevant Senior

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Executive Leader. Less significant matters are discussed with the Commission member who has oversight of that Deterrence Team. Civil litigation is not commenced unless a senior legal practitioner from ASIC's Chief Legal Office provides advice about the proposed proceeding and makes an assessment of prospects of success, and in a case of any significance, advice is also sought from the private bar.

The considerations that are taken into account when assessing the appropriate outcome of an investigation will vary with the nature of the investigation. Common considerations are the strength and prospects of the case together with the seriousness of the conduct, whether it has affected investors and if so how many and to what extent, whether the misconduct is on-going, the prospects of successfully achieving a deterrence outcome, how long that may take and the deterrence effect of that outcome in the market place. The economic cost of any deterrence action is considered as part of the decision-making.

5. ASIC made submissions to Treasury and the then Minister of Superannuation and Corporate Law about reforms to ASIC enforcement powers, and provided additional information to Treasury officers about the proposals as requested.
6. ASIC currently has under investigation or in preparation for litigation, a number of matters involving insider trading and market manipulation. ASIC has had 15 outcomes in relation to market manipulation and insider trading since January 2009 to date (see Appendix 2).

Insider trading and market manipulation are notoriously difficult to investigate because of the difficulty in obtaining direct incriminating evidence.

Telecommunications interception powers will provide a valuable new source of such evidence. While ASIC itself will not be able to exercise the new powers, or receive or use intercepted evidence in relation to its own investigations, it will be able to assist other agencies such as the Australian Federal Police (AFP) and Australian Crime Commission (ACC) which will be able to exercise the new powers and use intercepted evidence in relation to their own investigations.

Currently before ASIC can apply for a search warrant under the ASIC Act it must have first issued a notice to produce to the suspect and he or she must have failed to produce the relevant material. This unusual requirement gives a suspect advance notice of ASIC's interest in the relevant material and provides him or her with an opportunity to conceal or destroy incriminating evidence. The proposed reform to ASIC's search warrant powers will remove this requirement, bringing the power in line with virtually all other search warrant powers in this respect, and thereby enhance its value as an investigative tool. In addition, ASIC will continue to be able to apply for search warrants under the Crimes Act, but such warrants can only be sought under narrower circumstances and the material seized during the execution of such warrants can only be used for a narrower range of purposes. In particular, whereas material obtained pursuant to an ASIC Act search warrant can be used as evidence in civil, administrative or criminal proceedings, material obtained by ASIC pursuant to a Crimes Act search warrant can generally only be used as evidence in criminal proceedings.

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7. ASIC anticipates it will be able absorb any costs of implementing its new powers in its 'business as usual' budget. Each of these powers, although new to ASIC, is of a type which ASIC is in general terms familiar with using. For example, ASIC currently uses search warrant powers. While the proposed new powers will be different, and will require internal training and updating of procedures and templates, the changes to ASIC's search warrant powers will in the longer term contribute to greater efficiency in mixed criminal and civil investigations.

Although ASIC has not previously had access to telecommunications intercept material, ASIC staff have experience in dealing with highly sensitive information received from other agencies. While we anticipate that the proposed access to telecommunications intercept material will require a significant degree of internal training, and new procedures and templates and reporting systems, this will be required only for a relatively small group of staff within our deterrence teams.

8. ASIC considers every referral received from the ASX. The first step involves an initial assessment by ASIC's MarketWatch team to determine whether the referral requires further consideration by an ASIC Deterrence or Stakeholder team. This includes combining like referrals. From the 394 referrals received 16 were combined to result in 378 referrals being analysed. Of these referrals ASIC:

- Continues to conduct an initial assessment on 29 matters;
- determined that 181 referrals did not require further action; and
- referred 168 referrals to an ASIC Deterrence/Stakeholder team for further consideration.

Of the 168 referrals that were considered further by ASIC 64 remain ongoing. Of these 64 referrals, 1 referral dates back to 2005.

9. ASIC investigations are prioritised, depending on factors such as whether there is ongoing suspected misconduct which may need to be stopped, whether there is a need to preserve assets for investors who have suffered loss, the seriousness of the matter and the deterrent effect of taking immediate action.
10. ASIC has 11 cases that commenced prior to 2005 and are still ongoing, mainly because the case is awaiting trial or under appeal. See table at Appendix 3.

**Appendix 1- Matters currently under litigation as at 15 March 2010**

| No. | Project    | Sum of Amount   |
|-----|------------|-----------------|
| 1   | Matter 1   | -               |
| 2   | Matter 2   | -               |
| 3   | Matter 3*  | \$ 2,606,015.66 |
| 4   | Matter 4   | \$ 19,786.71    |
| 5   | Matter 5   | \$ 82,893.69    |
| 6   | Matter 6   | \$ 483.60       |
| 7   | Matter 7   | -               |
| 8   | Matter 8   | \$ 95,697.07    |
| 9   | Matter 9   | \$ 40,969.51    |
| 10  | Matter 10  | \$ 818.12       |
| 11  | Matter 11  | \$ 36,582.13    |
| 12  | Matter 12  | \$ 118,664.77   |
| 13  | Matter 13  | \$ 185,971.87   |
| 14  | Matter 14  | \$ 219.00       |
| 15  | Matter 15  | \$ 2,795.62     |
| 16  | Matter 16  | \$ 358.00       |
| 17  | Matter 17  | \$ 28,417.39    |
| 18  | Matter 18  | \$ 1,136.80     |
| 19  | Matter 19  | \$ 19,799.64    |
| 20  | Matter 20  | \$ 9,321.95     |
| 21  | Matter 21  | \$ 6,958.81     |
| 22  | Matter 22  | \$ 22,774.07    |
| 23  | Matter 23  | \$ 74,808.38    |
| 24  | Matter 24  | \$ 17,933.75    |
| 25  | Matter 25  | \$ 12,718.01    |
| 26  | Matter 26  | \$ 22,402.38    |
| 27  | Matter 27  | \$ 25,060.09    |
| 28  | Matter 28  | \$ 7,620.59     |
| 29  | Matter 29* | \$ 377,992.58   |
| 30  | Matter 30  | \$ 5,592.04     |
| 31  | Matter 31* | \$ 3,003,644.94 |
| 32  | Matter 32  | \$ 7,439.67     |
| 33  | Matter 33  | \$ 58,156.15    |
| 34  | Matter 34  | \$ 34,301.44    |
| 35  | Matter 35  | \$ 256,823.19   |
| 36  | Matter 36  | -               |
| 37  | Matter 37  | \$ 3,432.00     |
| 38  | Matter 38  | \$ 20,055.25    |
| 39  | Matter 39  | \$ 138,104.23   |
| 40  | Matter 40* | \$ 239,484.90   |
| 41  | Matter 41  | \$ 9,702.24     |
| 42  | Matter 42  | -               |
| 43  | Matter 43* | \$ 252,811.78   |
| 44  | Matter 44  | -               |
| 45  | Matter 45  | \$ 19,734.89    |
| 46  | Matter 46  | -               |
| 47  | Matter 47  | \$ 37,570.80    |
| 48  | Matter 48  | \$ 23,692.09    |
| 49  | Matter 49  | -               |
| 50  | Matter 50  | -               |
| 51  | Matter 51  | \$ 17,573.00    |
| 52  | Matter 52  | \$ 13,380.67    |
| 53  | Matter 53  | \$ 95.00        |
| 54  | Matter 54  | \$ 101,811.97   |
| 55  | Matter 55  | \$ 6,000.00     |
| 56  | Matter 56  | \$ 294,370.79   |
| 57  | Matter 57  | \$ 6,055.25     |

| No. | Project     | Sum of Amount           |
|-----|-------------|-------------------------|
| 58  | Matter 58   | \$ 657.00               |
| 59  | Matter 59   | \$ 226,070.92           |
| 60  | Matter 60   | \$ 274,146.65           |
| 61  | Matter 61   | \$ 209,886.63           |
| 62  | Matter 62*  | \$ 471,562.25           |
| 63  | Matter 63   | \$ 18,116.99            |
| 64  | Matter 64   | \$ 2,004.00             |
| 65  | Matter 65   | \$ 166,653.01           |
| 66  | Matter 66   | \$ 172,853.37           |
| 67  | Matter 67   | \$ 9,367.73             |
| 68  | Matter 68   | \$ 40,092.66            |
| 69  | Matter 69   | \$ 16,598.68            |
| 70  | Matter 70   | \$ 1,453.75             |
| 71  | Matter 71   | \$ 78,434.35            |
| 72  | Matter 72   | \$ 872.50               |
| 73  | Matter 73   | -                       |
| 74  | Matter 74   | \$ 10,501.39            |
| 75  | Matter 75   | \$ 1,152.70             |
| 76  | Matter 76   | \$ 1,081.00             |
| 77  | Matter 77   | \$ 73,085.20            |
| 78  | Matter 78   | \$ 25,903.14            |
| 79  | Matter 79   | \$ 3,346.36             |
| 80  | Matter 80   | \$ 165,547.60           |
| 81  | Matter 81   | \$ 18.09                |
| 82  | Matter 82   | \$ 42,853.62            |
| 83  | Matter 83   | -                       |
| 84  | Matter 84   | \$ 77,629.25            |
| 85  | Matter 85   | \$ 629.00               |
| 86  | Matter 86   | -                       |
| 87  | Matter 87   | \$ 17,614.80            |
| 88  | Matter 88   | \$ 3,424.09             |
| 89  | Matter 89   | \$ 89,921.30            |
| 90  | Matter 90   | \$ 283,773.76           |
| 91  | Matter 91   | -                       |
| 92  | Matter 92*  | \$ 226,899.22           |
| 93  | Matter 93*  | \$ 89,119.16            |
| 94  | Matter 94*  | \$ 12,641.00            |
| 95  | Matter 95*  | \$ 177,933.60           |
| 96  | Matter 96*  | \$ 214,355.42           |
| 97  | Matter 97*  | \$ 6,483.18             |
| 98  | Matter 98*  | \$ 447,499.88           |
| 99  | Matter 99   | -                       |
| 100 | Matter 100  | \$ 173,529.83           |
| 101 | Matter 101  | \$ 1,685.50             |
| 102 | Matter 102  | \$ 16,214.94            |
| 103 | Matter 103* | \$ 437,675.70           |
| 104 | Matter 104* | \$ 3,521,606.47         |
| 105 | Matter 105* | \$ 1,709,986.82         |
| 106 | Matter 106* | \$ 61,788.99            |
| 107 | Matter 107* | \$ 135,450.34           |
| 108 | Matter 108* | \$ 4,906.79             |
| 109 | Matter 109* | \$ 4,101,351.61         |
|     |             | <b>\$ 22,192,412.72</b> |

\* Enforcement special account funded

## Appendix 2

Market Manipulation - 10

Insider Trading - 5

# Criminal Convictions

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| Category            | Subject and allegation                           | Sentence  | Media Release                  |
|---------------------|--|---|--------------------------------|
| Insider Trading     | John Francis O'Reilly engaged in insider trading | Ten months, immediately released upon entering into a recognisance of \$500 to be of good behaviour for a period of 18 months, fined \$30,000, an order of \$61,600 under the <i>Proceeds of Crime Act 2002</i> . | <a href="#"><u>10-80AD</u></a> |
| Insider Trading     | Mukesh Panchal engaged in insider trading        | 2 years (non parole period of 14 months)  | <a href="#"><u>09-71</u></a>   |
| Market Manipulation | Richard Wade engaged in market manipulation      | 15 months imprisonment, fully suspended   | <a href="#"><u>09-19</u></a>   |
| Market Manipulation | Rocco Musumeci engaged in market manipulation    | 7 months imprisonment, fully suspended  | <a href="#"><u>09-19</u></a>   |
| Market Manipulation | Geoffrey Newing engaged in market manipulation   | 22 months. To serve six months before being released on a recognisance release order.   | <a href="#"><u>10-58AD</u></a> |

# Civil Penalties

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| Category            | Subject and allegation   | Outcome   | Media Release                  |
|---------------------|--|---|--------------------------------|
| Market Manipulation | Dr Martin Soust, former chief executive officer of listed biotechnology company, Select Vaccines Limited, engaged in market manipulation | Pecuniary penalty of \$80,000 and disqualified from managing a corporation for 10 years | <a href="#"><u>10-88AD</u></a> |

# Financial Services Bannings

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| Name            | Misconduct   | Length of ban | Media Release                   |
|-----------------|--|---------------|---------------------------------|
| Jeremy Slater * | Engaged in market manipulation, misleading and deceptive conduct and | 7 years       | <a href="#"><u>AD09-141</u></a> |

|                         |   |  |                        |
|-------------------------|---|--|------------------------|
|                         | <b>unauthorised discretionary trading</b> |  |                        |
| Newton Chan             | Engaged in market manipulation            | 5 years  | <b><u>AD09-147</u></b> |
| Mark McKenzie           | Engaged in insider trading                | 3 years  | <b><u>10-08AD</u></b>  |
| Peter Cameron           | Engaged in market manipulation            | 6 years  | <b><u>09-21</u></b>    |
| <b>Clive Henley *</b>   | <b>Engaged in market manipulation</b>     | <b>10 years</b>                                | <b>No MR</b>           |
| <b>Roberto Catena *</b> | <b>Engaged in insider trading</b>         | <b>5 years</b>                                 | <b>No MR</b>           |
| Colin Hebbard           | Passed on inside information to clients   | 5 years  | <b><u>09-16</u></b>    |
| <b>Shaun Bond *</b>     | <b>Engaged in market manipulation</b>     | <b>5 years</b>                                 | <b><u>08-27</u></b>    |
| Michael Kirwan          | Engaged in market manipulation            | 5 years (as result of Enforceable Undertaking) | <b><u>09-01</u></b>    |

\* Under appeal



### Appendix 3- Ongoing cases that commenced prior to 2005.

| Matter   | Start Date | Status as at 12 May 2010   |
|--|------------|--|
| Murray River Limited                                   | 17/05/2001 | Matter is under appeal by the defendant who sought reduction of his disqualification period, defendant now seeking special leave to the High Court.  |
| Koch & Associates Pty Ltd                              | 29/05/2001 | Koch absconded from jurisdiction in 2001. He was extradited back to Australia in January 2007. Trial in the County Court of Victoria commenced 7 April 2010, is currently still being heard.                               |
| Harts Australasia Ltd                                  | 22/02/2001 | Trial set down for 16 August 2010 in the New South Wales District Court.   |
| Westel Limited   | 4/04/2002  | Charges were laid and warrants issued for the arrest of the suspect. The warrants remain unexecuted as the suspect cannot be located.  |
| Bustan Australia Holdings Pty Limited                  | 5/08/2002  | A contested committal hearing in the Melbourne Magistrates Court has been scheduled for 18 October 2010.   |
| Residential Foundation Systems (RFS-Australia) Pty Ltd | 23/07/2002 | The matter has been listed for trial in the County Court of Victoria for 21 February 2011.   |
| JUWONO, Stephen Budianto                               | 28/10/2002 | Charges were laid and an arrest warrant was issued for Juwono in 2003. Juwono left the jurisdiction before the arrest warrant was issued and has not returned to the jurisdiction.   |
| Sunset Capital Pty. Ltd                                | 16/10/2003 | Trial date for defendants set down for 26 July 2010 in the County Court of Victoria.   |
| Kenlyn Business Services Pty Ltd                       | 12/12/2003 | The defendants, Ms Marianna Casella, Mr Peter Stokes and Mr Ken McDowell, were convicted and sentenced on 6 November 2009. Ms Casella and Mr Stokes have appealed their convictions and their appeals are yet to be heard. |
| Matter where a court suppression order is in place.    | 17/09/2003 | The matter went to trial earlier this year. The proceedings and outcome are currently the subject of a court suppression order.  |
| Total Quality Milk Pty. Ltd                            | 16/10/2003 | Matter scheduled for mention on 19 July 2010 in the Supreme Court of Tasmania.   |