

Australian Institute of Superannuation Trustees



14 September 2013

Mr Tim Bryant
Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: economics.sen@aph.gov.au

Dear Mr Bryant,

Senate Economics References Committee: Inquiry into the performance of the Australian Securities and Investments Commission

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's \$500 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

We offer these comments in relation to ASIC's role as the financial services regulator. AIST has seen ASIC develop over the years, both with its current administration, and under previous ones. Our comments will be limited to our general view of the regulator's role with respect to superannuation; however, we may offer comments in passing that relate to related activities by the regulator, such as financial planning.

ASIC investigations

In July 2013, Michael Quilter wrote in *Business Spectator*¹ that the general delay in responding to concerns by whistleblowers involved in the Commonwealth Financial Planning Limited (CFPL) case has been the major reason for this investigation.

Whilst we believe that questions should be asked as appropriate with respect to the alleged delay of 16 months, as with all investigations of wrongdoing, we encourage a rigorous approach to evidence and the rule of law. We note that at the end of this investigation, ASIC was able to respond by banning seven advisers and 1,127 customers being compensated. Our concerns are

¹ Quilter, M. 2013. *A critical eye into ASIC's performance*. [online] Available at: <http://tinyurl.com/o5ces6b> [Accessed: 18 Oct 2013].



that in the haste to uncover why there was a delay in this case, the possibility that this investigation may not have been as successful as it was.

Quilter quotes figures in his article further emphasising that ASIC pursues nearly 200 investigations a year, and where litigation is required, is successful 90% of the time. This is a remarkable statistic, however it is notable that where ASIC fails to secure a 'win' such as in high profile cases (e.g. Jodee Rich), this can overshadow ASIC's success rates.

Indeed, the general consensus that in the case involving Rich, ASIC significantly rushed their case alleging misleading conduct and were found not to have enough evidence to successfully prosecute.

Whilst we support this inquiry examining the circumstances involving the CFPL case, the broader question must be whether ASIC are adequately resourced to perform their role.

Enforceable undertakings

A concern privately raised with this organisation extends to the use of enforceable undertakings by the regulator. We note that as of today, 20 enforceable undertakings appear in the register² for the year to date.

A member relates the following story:

[This is a story] from my own experiences at [redacted]. Nearly 200 members were rolled out of [redacted] based on false information provided by a financial planner. I went to ASIC to complain on behalf of [redacted]. ASIC said they couldn't act as they needed a member to make an actual complaint. It took a while to find someone to put pen to paper – even though members had been verbally complaining. The end result was an enforceable undertaking that the planner had to write to ex members and tell them (basically) that he had lied to them. Ex-members chose not to leave the planner. This led me to agree with other comments about how enforceable undertakings are toothless (letters, all sound nice, etc etc) – a clear message needs to be sent so reality hits home.

We echo these concerns and suggest that stronger punishments may be more effective deterrents.

ASIC guidance

It is not just at the investigation and enforcement end where ASIC's work takes it. Our members are more interested in the work that ASIC undertakes to ensure that cases do not end up in court.

² Asic.gov.au. 2013. *Australian Securities and Investments Commission - Enforceable undertaking register: list*. [online] Available at: <http://tinyurl.com/mc3j3> [Accessed: 18 Oct 2013].



ASIC's guidance extends from information sheets and FAQs through to more formal regulatory guidance, finishing up with class orders that ASIC publishes. We are aware of six different pieces of consultation that ASIC are conducting that has either concluded in the last fortnight, or is presently consulting on. AIST applauds the approach to consultation made by ASIC, and draws particular attention to ASIC's series of regulatory guides, which are valued sources of guidance throughout the industry.

Twin regulator approach

AIST supports the twin peaks approach to regulation in this country and draws the Committee's attention to the respect that this approach is regarded internationally. The PEW Charitable Trusts foundation set up its Financial Reform Project in response to the Global Financial Crisis, reviewing different regulatory set-ups globally.

In 2009, it reached the conclusion that³:

In its blueprint for reform, the Paulson Treasury pointed to the Australian regulatory system as one that had many strong characteristics and our summary supports that view. Australia does not have a major financial hub and cannot provide a direct model for the United States, but the overall regulatory structure created in Australia and the care given to its implementation are strengths we should emulate.

The report had set out to review regulatory systems globally, investigating the UK, Australia, and other countries. In particular, the report drew attention to the amount of attention that went into building the regulatory framework after the Wallis inquiry.

AIST welcomes a new financial services inquiry, and considers that, 17 years onwards, the recommendations raised in the Wallis Report and subsequently implemented should be assessed in terms of how effective they have been.

We note that some of the shortcomings of this dual regulator approach have been documented. In a speech to APRA's executive team, Greg Medcraft, the current Chair of ASIC, said that⁴ although there are sometimes conflicting objectives in working with APRA, there are a series of protocols which ensure that actual conflicts are kept to a manageable minimum, including:

- Designated contacts
- Memoranda of understanding

³ Fresh, A. and Baily, N. 2009. *What does international experience tell us about regulatory consolidation?*. [pdf] PEW Economic Policy Department Financial Reform Project.

⁴ Medcraft, G. 2011. *Speech to Australian Prudential Regulation Authority leadership team*. [pdf] Sydney: Australian Securities and Investments Commission. <http://tinyurl.com/mvrhlnn>

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- Joint protocol documents
- A series of ongoing discussions and liaisons, either involving Treasury or not.

We wish to advise that we are willing to assist the Committee with any further information relating to our submission, including public hearings.

Yours sincerely,

Tom Garcia
Chief Executive Officer