

Australian Securities and Investments Commission
Answers to Questions On Notice
House of Representatives Standing Committee on Economics | Public hearing, 29 March 2021

Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC01QW
Topic	Notifications to ACLEI
Reference	Written
Committee member	Mr Jason Falinski MP

Question:

Has there been any report or allegation of corruption related to any of ASIC's law enforcement activities that has been formally notified to the Australian Commission for Law Enforcement Integrity (ACLEI) by the Chair since the new laws came into effect 1 January 2021?

Answer:

At the time of writing, two matters have been formally notified to ACLEI. Pursuant to s 26(1)(b)(iii) of the LEIC Act, the first matter was assessed by ACLEI and referred back to ASIC to conduct an investigation in line with its internal guidelines and procedures without ACLEI management or oversight. This matter remains under investigation, and ASIC is providing s64 progress reports to the Integrity Commissioner as required. The second matter was recently notified to ACLEI and is currently under assessment.

Australian Securities and Investments Commission
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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC02QW
Topic	ASIC information sheet 152
Reference	Written
Committee member	Mr Jason Falinski MP

Question:

In regards to the above, you state that:

“The responsibility for ensuring the accuracy of details of individuals named in media releases, such as the person’s profession, lies with the case officer and senior manager who are most familiar with the matter. The case officer prepares a first draft of the media release, in accordance with ASIC’s internal guidelines, and is responsible for ensuring that the proposed media release is accurate... where necessary other business units including its legal office were involved in drafting announcements around enforcement action, and that for significant media releases, approval by a commission member is also required”.

- a) ASIC refers to its internal guidelines. They also have external guidelines, published as INFO sheet 152 <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/public-comment-on-asics-regulatory-activities/> . Are your internal and external guidelines consistent? To avoid any doubt that the guidelines are not the same, or inconsistent, will ASIC as a transparent regulator undertake to publish both sets of guidelines? For the purposes of comparison: would ASIC find it acceptable for an Australian financial institution or superannuation fund to have two sets of guidelines: one internal, and one external? Should you not have just one guideline?
- b) How do you the manage against conflict risk of a case manager, and ensure detached rational decision making consistent with the law?

Answer:

- a) ASIC does not propose to publish the Policy on the basis that it has been prepared only for internal use by staff and its publication would not generally assist external parties any further in understanding ASIC’s approach to public comment. ASIC considers that INFO 152 provides the necessary information to external parties about ASIC’s approach to public comment.
- b) ASIC staff members are expected to act with professionalism, integrity and impartially when dealing with the public and stakeholders, including when publishing media releases. These obligations are reflected in ASIC’s Code of Conduct. Furthermore, INFO 152 and the External Communications Policy set out the approach that ASIC staff must take in respect of external communications. ASIC’s procedures provide an appropriate check in ensuring that the details contained in media releases are accurate noting that numerous staff are involved in the drafting and review of ASIC’s media releases. ASIC considers that these measures ensure that its external communications are accurate, balanced and fair.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC03QON
Topic	SMSF red flags
Hansard page reference	23
Committee member	Mr Tim Wilson MP

Question:

CHAIR: I get it, Mr Shipton. I'm not trying to be obtuse. But this goes back to a fundamental capacity issue. I'll just highlight that example again: out of the maximum contribution that could be made into a fund of that year, you're saying that half went on essentially administering the fund. What I'm saying is that I accept that you see that there was a problem and I accept that you're saying it's a lesson learnt, but it raises a fundamental issue of the organisation's understanding that it was prepared to not apply sufficient scrutiny or question whether the data it had was wrong or insufficient enough to publish. Could you on notice give us an outline of the steps that were taken that led to that publication. Who sourced the data? Who drafted the fact sheet? Who then approved it and sent it on for publication? This to me is a fundamentally critical issue about the competence of ASIC.

Answer:

1. The SMSF fact sheet was drafted by ASIC with input from the ATO.
2. The data relating average costs was sourced from the ATO's [Self-managed super funds: a statistical overview 2016–17](#). This was the most up to date information available at the time.
3. The SMSF fact sheet was approved by the ASIC Commission for publication on 13 August 2019.
4. We note that members can make concessional and non-concessional contributions to an SMSF and many SMSFs have more than one member.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC04QON
Topic	Super investigations
Reference	Spoken, Hansard page 24
Committee member	Mr Tim Wilson MP

Question:

CHAIR: Obviously this issue has been consistently raised, and you can tell my frustration with it. ASIC recently announced at least two—and there are potentially more—investigations into industry super funds that were found by ASIC to have done wrong. So far we're aware of one with Rest and another one with Aware Super. Are you currently in the process of either investigating or considering further action against other super funds?

Mr Shipton: I'll hand to my colleague Commissioner Press.

Ms Press: Yes, we are. We have around 20 investigations currently underway. Those investigations are across all sectors of the industry.

CHAIR: Could you at least give us some guidance: are half of them retail and half of them industry, and are any of them government?

Ms Press: I would have to take that on notice to make sure that I don't mislead and guess, but I can tell you that there are a number across the different sectors. I'll take it on notice and get back to you on the split.

Answer:

ASIC has 19 current investigations that were commenced under section 13 of the Australian Securities and Investments Commission Act 2001 in relation to superannuation trustees. These are matters in formal investigation and ASIC is also considering a range of matters that are not yet at that stage. Of the 19 investigations, 17 relate to retail superannuation funds and 2 relate to industry superannuation funds. Five of these investigations relate to matters considered at the Financial Services Royal Commission. ASIC does not have any investigations on foot concerning government superannuation funds.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC05QON
Topic	Retail Employees Superannuation Trust (REST)
Reference	Spoken – Hansard, 29 March 2021, p. 24
Committee member	Mr Tim Wilson MP

Question:

CHAIR: I understand. ASIC recently announced it was commencing legal proceedings against Rest for unlawfully preventing members from rolling over their super to another fund. I don't expect ASIC to comment on these matters, which are before the court; however, Rest has issued a press release discussing how it is remediating customers for its misconduct. ASIC does regularly report on the remediation programs of other institutions, so how much is Rest remediating to its customers?

Ms Press: I am aware of the remediation program that is underway. Having said that, I do not believe that this is one that we are reviewing, unlike the—

Ms Chester: We are monitoring it.

Ms Press: We are monitoring it, but we're not fully reviewing it. I will need to take on notice exactly what the numbers are.

Answer:

Retail Employees Superannuation Pty Limited, as trustee of the Retail Employees Superannuation Trust (**REST**), is remediating current and past members in relation to delayed or partial rollovers from REST as a result of REST's conduct (**REST Remediation**). APRA is reviewing the REST Remediation because it follows a breach report of this matter by REST to APRA.

ASIC is not involved in ongoing monitoring of the REST Remediation and does not have current information about the amount of money REST is remediating to former members who are included in the REST Remediation.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC06QON
Topic	REST - remediation
Reference	Spoken – Hansard, 29 March 2021, p. 24
Committee member	Mr Tim Wilson MP

Question:

CHAIR: Thank you. We look forward to that data. Does ASIC know whether Rest customers are being remediated out of fund reserves or out of other forms of member savings?

Ms Press: My understanding is the remediation is from the operational risk financial reserve. One of the reasons that they would have established an ORFR would be to remediate members. I can take on notice exactly where the money is coming from. They would have a number of different reserves.

Answer:

REST has informed ASIC that it would be funding remediation from its Operational Risk Financial Requirement Reserve. REST confirmed that it had obtained legal advice about the use of its fund reserves.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC07QON
Topic	Remediation
Reference	Spoken – Hansard, 29 March 2021
Committee member	Mr Tim Wilson MP

Question:

CHAIR: I understand that First State Super, now Aware, has also remediated its members over \$100 million for fees-for-no-service financial advice breaches. ASIC mentioned this in its press release. Was all of the \$100 million paid out of members' retirement savings, or was paid out of some other financial vehicle?

Ms Press: My understanding is that the Aware remediation was from StatePlus, which is a different institution and is not a super fund. I can take on notice exactly where that money is coming from.

CHAIR: How is it acceptable for another institution to pay for the remediation of a super fund?

Ms Press: The Aware issue that I think you're talking about was actually StatePlus, which is owned by Aware, but a subsidiary of it.

CHAIR: If it's part of StatePlus, from what pool of money was that then taken?

Ms Press: Again, my understanding is that it was taken from StatePlus revenue, but I would need to take that on notice to be absolutely clear.

CHAIR: Yes, take that on notice.

Answer:

ASIC has a current court action in relation to fees for no service conduct (**FFNS**) of Aware Financial Services Australia Ltd (**Aware Financial Services**), a financial advice business owned by Aware Super Pty Ltd, as trustee of Aware Super Fund (**Aware Super**).

ASIC monitored a related \$105 million remediation program carried out by Aware Financial Services (then trading as StatePlus) to remediate consumers harmed by its FFNS conduct. That remediation was completed in 2019. ASIC's understanding is that the remediation was paid by Aware Financial Services.

Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC08QON
Topic	Remediation
Reference	Spoken, Hansard, 29 March 2021, p. 24-25
Committee member	Mr Tim Wilson MP

Question:

CHAIR: I'll ask them next and keep that one going. ASIC recently consulted with industry on remediation as a topic but was then silent on the source of moneys that can be used for remediation. This is important, given there are inconsistent practices across the industry. Is ASIC making it clear, in its final guidance, whether funds can use members' savings and reserves to remediate customers?

Ms Chester: We'll take that question on notice—only because it is draft guidance at the moment. I know that there have been a number of roundtables, including involving superannuation funds. We'll get an update on that and share that with you as a question on notice.

CHAIR: Just for clarity, then, would ASIC accept a retail super fund remediating members for misconduct out of members' savings?

Ms Press: If the retail fund had established a financial reserve and if one of the reasons for establishing that reserve was to pay remediation, then I would argue, hypothetically, yes. Again, I think it depends on the circumstances.

Ms Chester: There are different obligations of board directors and trustees of super funds when it comes to making decisions of where monies are to be sourced for remediation and other matters. I suspect that might be an issue for APRA, with respect to the trustee of the superannuation funds. Again, we'll take that on notice, seek guidance and see what has come up in the consultation we've had with industry folk since releasing the draft guidance late last year.

Answer:

In relation to the Chair's first question, we are not in a position to comment on what positions ASIC will take in its updated remediation guidance at this stage of our review.

ASIC is holding a two-stage consultation process in relation to our update of Regulatory Guide 256: *Client review and remediation conducted by advice licensees (RG 256)* to potentially cover more products and conduct. Submissions to the first stage of public consultation closed on 26 February 2021 (see Consultation Paper 335 – *Consumer Remediation: Update to RG 256*). The second consultation stage will include a draft of the updated RG 256 for feedback. We anticipate that the draft will be released for consultation around the middle of 2021.

In relation to the Chair's second question, monies for remediation may come from a variety of sources, depending on the circumstances. Trustees are responsible for determining the source of remediation monies having regard to their legal obligations.

The Operational Risk Financial Reserve (**ORFR**) may be available to pay remediation, depending on the circumstances. The ORFR is designed to provide compensation to members in relation to operational risks. Payment must be within the scope of the relevant APRA prudential regulations (SPS 114 and SPG 114 – *Operational Risk Financial Requirement*) and the relevant reserving policy of the fund in question.

Where the monies for remediation come from depends on who bears responsibility for a failure. If the remediation arises from activity that amounts to a breach of trust by a trustee and the trustee should be personally liable for the remediation, then s56(2)(a) of the SIS Act might operate as a legal prohibition on payments of remediation from the fund

Trustees should obtain legal advice in relation to their right to use particular monies. Those rights depend on the nature of the trustee's conduct, the fund's trust deed as affected by s56 of the SIS Act, and any other relevant factor. Such relevant factors may include the provisions of a trustee's insurance contract.

APRA is doing some work on the reserving practices of superannuation funds. ASIC is working with APRA in relation to this. The work is in its early stages.

Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC09QON
Topic	Super funds investigations
Reference	Hansard, 29 March 2021
Committee member	Mr Tim Wilson MP

Question

CHAIR: So you're actually saying there are industry super funds that are engaging in behaviour that is essentially trying to prevent members from moving or using their own money and you're not taking action against said funds because you don't think that they are as big a fish or as concrete an example as Rest?

Ms Press: Each time we take an action in court, we have to weigh up: how egregious the behaviour is, how extensive the behaviour is, how likely we are to win and whether or not there is a deterrent effect. There are many, many things that we take into consideration.

CHAIR: Sure, but the critical point is that you are aware of other examples where other funds are doing this and you've chosen not to take action—I know that's the decision of ASIC; they've got to make that decision—but you are aware of other funds engaging in the same conduct and you're not taking action.

Ms Press: Right now I'm not aware of any fund currently engaging in that action. I am aware of historical behaviour and historical conduct, but I'm not aware of any current conduct.

CHAIR: Okay. Are you able to provide information on which funds have done that in the past?

Ms Press: I would have to take that on notice. I'd need to get advice from our chief legal officer on whether or not we are able to provide that advice. We don't normally comment on investigations that are closed.

Answer

REST-like conduct is the imposition by a trustee of a business rule or other restriction that seeks to restrict the ability of members to make a full withdrawal of their superannuation balance from the fund, based on the members employment status.

ASIC is aware of one other fund that might have potentially had a similar business rule in place. We understand that the fund had a business rule in place from June 2017 to July 2018 that meant that members of the fund were asked to wait for the final contribution from their employer before withdrawing from the fund.

Unlike REST, we understand that the business rule of the other fund did not prevent members from making a full withdrawal, and that their application would still be processed.

ASIC understands that the fund ceased this practice following engagement from APRA in July 2018.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC10QON and ASIC11QON
Topic	AustralianSuper
Reference	Spoken, Hansard, 29 March 2021, p. 26
Committee member	Mr Tim Wilson MP

Question:

CHAIR: Has AustralianSuper been blocking any rollovers?

Ms Press: I would have to take that on notice. I'm not aware of that. But we can take on notice whether we have been made aware of any blockage.

CHAIR: Alright. Finally—and I'll ask this question, and then the deputy chair can take over—has ASIC progressed the evidence that this committee has provided to it of the potential for insider trading around the sale or the movement of capital between unlisted and listed entities at different points in the cycle around March and April last year? If so, how far has that progressed?

Ms Press: We are progressing that matter. Again, I will need to take on notice exactly how much I can say. I'm sorry, Mr Wilson, but it is a matter that is under investigation, and we don't normally comment on those matters.

Answer:

In relation to the Chair's first question on AustralianSuper, ASIC is not aware of the fund having business rules and procedures of the kind used by REST blocking or otherwise inhibiting rollovers of members' money. If there are particular specific concerns in respect of AustralianSuper's conduct relating to member rollovers that are communicated to ASIC, ASIC will consider them.

In relation to the Chair's second question, we have been examining information in relation to switching activity by trustees and senior executives following unlisted asset revaluations during 2020, and the funds' conflict management policies. ASIC is continuing to exchange information with APRA in relation to this matter. ASIC is unable to comment on the specifics of the surveillance.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC12QON
Topic	ASIC vs Mitchell
Reference	Spoken, Hansard page 28
Committee member	Dr Andrew Leigh MP

Question:

ACTING CHAIR: Do you think ASIC made a mistake in not appealing the Mitchell decision? There were a number of circumstances of that case that seemed to concern ASIC at the time, particularly Justice Beach directly calling a witness, Mr McWilliam, and then the decision not to allow ASIC to use the excerpts of the transcript of Mr Healy's examination. One of the criticisms made of ASIC in the Hayne review was that you didn't litigate enough. I suppose the question now is: are you making the mistake of not appealing enough?

Mr Shipton: We're not going to make comment on a court matter or His Honour's comments. I will point out that that was a significant penalty for ASIC. There is actually an important deterrence impact in that judgement. We've looked at that case. We look at all of our cases, and we decide what the next steps are. We've decided to accept His Honour's judgement and I think that's where we should leave it.

ACTING CHAIR: You're not concerned that that might limit future civil penalties that you're able to bring to similar cases, that it sets a worrying precedent?

Mr Shipton: Again, I'm not going to comment on that particular case. We've done lots of thinking around directors' duty, we've done lots of thinking around our enforcement action in this regard and we have confidence that we are going to be an effective regulator and, when necessary, enforcer of the laws moving forward.

ACTING CHAIR: Mr Crennan would have been in charge of making the decision of whether or not to lodge an appeal. Which commissioner within ASIC made the decision not to appeal after Mr Crennan stepped down?

Mr Shipton: Just to be clear on the governance perspective, the commission sitting as the commission enforcement committee makes all strategic and all significant decisions. Most of the time, we do this on the recommendation of the executive team. I'm not going to comment on the internal processes in one particular case except to say that I'm personally very comfortable with the overarching governance decisions that we make in relation to that matter and other matters when it comes to appealing or not appealing, or for that matter, taking cases to court in the first place.

ACTING CHAIR: Were you still on board with ASIC when that decision was made, or was that decision made after you stepped aside?

Mr Shipton: I'll take this on notice, but I understand that both Mr Crennan and I were in the office or on duty around the time that the decision was handed down.

Answer:

The decision to not appeal against the liability judgment delivered in ASIC's civil penalty proceedings against Mr Stephen Healy and Mr Harold Mitchell was made at a meeting of the Commission Enforcement Committee on 12 August 2020. All ASIC Commissioners were in attendance at that meeting, including the ASIC Chair, James Shipton, and Deputy Chair, Daniel Crennan.

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC13QON
Topic	Timeshare investigation
Reference	Spoken, Hansard page 29
Committee member	Dr Andrew Leigh MP

Question:

ACTING CHAIR: You announced at the end of 2019 that you were commencing a formal investigation of a timeshare provider. We do know that time share can trap unwary consumers. CHOICE has one particularly egregious example of a 99-year time share costing \$2,200 a year, rising at nine per cent a year, which was sold. What's the status of the investigation you have? Let's start with that formal investigation.

Ms Chester: I think the sound of silence means that I should take that question, Dr Leigh. I'm going to have to take that one on notice. I haven't had a recent update on that investigation, Dr Leigh, and, apologies, my notes don't help me either. I'll have to come back to you on that one.

Answer:

The investigation in relation to a timeshare company that was announced in 2019 is ongoing. ASIC is unable to comment further because this is an ongoing investigation.

Australian Securities and Investments Commission
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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC14QON
Topic	Disclosure of JobKeeper receipts by listed entities
Reference	Pages 29 and 30
Committee member	Dr Andrew Leigh MP

Question:

ACTING CHAIR: Thank you. I just want to move to a different issue. The disclosure by listed entities of their JobKeeper receipt has been potentially the only way the Australian public have been able to understand where JobKeeper money has gone. A range of firms have bundled together JobKeeper with other wage subsidies that they've received. Does ASIC consider that to be appropriate disclosure?

Ms Armour: From our perspective, we expect firms to be providing disclosure that gives enough information to investors about the firm's prospects and opportunities. Whether or not the bundling is problematic really will depend on the particular circumstances, but it is something we are focused on. We have been very clear to firms that we are looking at that in our review of financial reports and we are monitoring that.

ACTING CHAIR: Has ASIC gone to any firms to let them know that it thinks their JobKeeper disclosure has been inadequate?

Ms Armour: I would have to take on notice further information. I know we've been having conversations with firms as part of our regular monitoring, but I would need to come back to you on whether we've specifically raised the question of inadequacy.

ACTING CHAIR: I'd be grateful if you could get back to me firstly on the threshold question of whether you've raised it with any firms and, secondly, how many firms it's been raised with. What about the issue of JobKeeper repayments. Have you any concerns about the way in which firms are disclosing that to the market? Obviously, JobKeeper repayment is welcome, but I noticed the Australian Taxation Office observing a pretty big disparity between the share of firms who said they will repay and the share of firms who actually sent a cheque to the tax office.

Ms Armour: That is an issue that we're alive to and monitoring. We're interested in making sure firms have actually done what they've publicly said that they will be doing and that their financial reports are reflecting that. At this stage I am not aware that we have any particular concerns with any particular firm, but, again, I'd be happy to come back and clarify that on notice.

ACTING CHAIR: What about with corporate groups? Does ASIC consider it appropriate that disclosure is rarely made at the subentity level and tends to be made only for the aggregate group?

Ms Armour: That generally reflects the legal position for the consolidated financial reports in a country. That's really an issue that I think is for both parliament and the accounting bodies. Obviously we have an interest in it as well, and the broader market has an interest as well, but that is effectively our system at the moment.

ACTING CHAIR: Wouldn't it be of interest or material to investors to know which parts of an entity were doing so poorly that they received JobKeeper?

Ms Armour: Yes, that may be material. If that's material, I think they would be required to flag that. It's not just in the accounting statements; there's also an operational and financial lists

report that's required in a group's annual reports, and we'd be expecting anything like that that's material for a key part of the operations of a group to be flagged.

ACTING CHAIR: Thanks very much. I'll hand over now to Ms Hammond not only for questioning but to take the chair.

Answer:

JobKeeper receipts

“ASIC Media Release 20-157MR *Focuses for financial reporting under COVID-19 conditions* and a Frequently Asked Question on the ASIC website on reporting under COVID-19 conditions at 30 June 2020 said that:

“Entities should appropriately account for each type of support and assistance from government, lenders, landlords and others. Both the financial report and OFR should prominently disclose significant amounts, the commencement date and expected duration of support or assistance. Examples include JobKeeper, land tax relief, loan deferrals and restructuring, and rent deferrals and waivers.”

[Note: The OFR (Operating and Financial Review) accompanies the financial report of a listed entity and includes information on underlying drivers of financial results and the future prospects of the entity.]

Similar comments appeared in ASIC Media Release 20-325MR *ASIC highlights focus areas for 31 December 2020 financial reports under COVID-19 conditions*.

Company financial reports under the *Corporations Act 2001* are required to comply with accounting standards. The accounting standards do not specifically require separate disclosure of JobKeeper receipts. However, the receipts would require disclosure if the information is material in the context of the overall financial report. Information is material if it could be reasonably be expected to affect decision-making by primary users of the report - generally investors, potential investors, lenders and creditors. The JobKeeper receipts may be small compared to total revenue for many companies.

Where companies report on a consolidated basis covering the company and its controlled entities, the requirements apply to those consolidated figures. The company is not required to disclose amounts separately by entity in the group. However, subsidiaries that are required to prepare and lodge their own financial reports may be required to disclose amounts in those financial reports.

ASIC reviewed 170 financial reports of listed entities and other public interest entities for years ended 30 June 2020. These reviews focussed on matters such as asset impairment, provisions and going concern disclosures under COVID-19 conditions. The adequacy of disclosures concerning JobKeeper receipts was also considered.

ASIC made enquiries of four entities about the amount of the JobKeeper receipts and/or their disclosure. Having regard to information and explanations obtained from the companies, we determined that there were no matters requiring further action.

JobKeeper repayments

Some companies have made voluntary repayments of JobKeeper amounts during the first months of 2021. Such repayments should be disclosed where they material in the context of the overall financial report.

Companies are unlikely to have yet produced financial reports that cover the periods in which any repayments have been made. For example, financial reports for years ending 30 June 2021 are not required to be lodged until the second half of 2021. However, a very material repayment made after 31 December 2020 may be required to be disclosed in the notes to a company's financial report for the year ended 31 December 2020.

We are identifying companies that have publicly stated that they are making a JobKeeper repayment. We may contact selected companies or the ATO for evidence that a repayment was made.

Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC15QON
Topic	Relationship between ANAO and ASIC
Reference	Spoken / Hansard page 29
Committee member	Dr Andrew Leigh MP

Question:

ACTING CHAIR: Doesn't ASIC have a role in overseeing the ANAO to some degree as well?

Ms Armour: We have had a memorandum of understanding with the ANAO whereby our financial reporting and audit team provides an oversight of the ANAO's own audit practices so that there is a complete feedback loop for the ANAO. That is a separate arrangement that we have.

ACTING CHAIR: How do conflicts get dealt with in that regard?

Ms Armour: It's quite separate from the ANAO. It is dealt with under a memorandum of understanding. I will have to come back to you to clarify whether that memorandum of understanding is still in place, but it historically has been in place. It's dealt with by the team at ASIC who look after our regulation of the audit industry, so it's a separate team from the operational team at ASIC, who look after ASIC's affairs. It is dealt with at a regulatory level by the senior executive and the executive directors responsible for that area. It doesn't come to the commission; the commission don't give comments on the feedback that those teams give to the ANAO. And then the ANAO team that deals with ASIC's financial reporting is a different team from the people to whom the ASIC team report.

ACTING CHAIR: Given that conflict of interest includes perception of conflict of interest, could you all, on notice, clarify publicly the relationships between the ANAO and ASIC and also who signs off on what within ASIC. That might be useful.

Answer:

Reviews of the ANAO work by ASIC

Since 2018 ASIC has an arrangement with the ANAO for ASIC's Financial Reporting and Audit team to conduct external independent reviews of the ANAO's quality assurance framework, using ASIC's methodology for reviewing private sector audits.

These reviews are independent of the ANAO's audit of ASIC's financial statements and have been or are conducted under the oversight of ASIC's now Chief Accountant and Senior Executive Leader, Insolvency Practitioners/Senior Executive Leader, Financial Reporting and Audit, with reports being provided directly to the Auditor General. The ASIC reports for the 12-month periods ended 30 June 2019 and 30 June 2020 were signed by the ASIC's now Chief Accountant. The report for the 12 months ending 30 June 2021 will be signed by the now Senior Executive Leader, Insolvency Practitioners/ and Senior Executive Leader, Financial Reporting and Audit.

The ASIC staff involved in the reviews do not report to the ASIC Commissioners on any aspect of these reviews. ASIC's reviews of the ANAO's quality assurance framework and audits does not involve reviews or testing of the ANAO's audit of ASIC's financial statements or any other ANAO work relating to ASIC.

The ASIC staff involved in the reviews of the ANAO's quality control systems and audits do not provide comment or advice to ASIC on any matters relating to ASIC's financial report, ASIC's accounting treatments or any other matters relating to the ANAO's audit of ASIC's financial statements.

Reviews of ASIC's financial statements by the ANAO

The ANAO's audit of ASIC's financial statements is coordinated through ASIC's Chief Financial Officer under the oversight of ASIC's Audit Committee.

The ASIC Chair and CFO sign ASIC's financial statements which are independently audited by the ANAO.

The ASIC Commission review the financial statements and make a recommendation in relation to the Chair's signing of ASIC's financial statements..

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Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC16QON
Topic	Mark Peart
Reference	Hansard, 29 March 2021, p. 33
Committee member	Dr Daniel Mulino MP

Question:

Dr MULINO: I wanted to start with some matters that have been covered in media reports in Toowoomba, some of which have appeared in the Chronicle. They relate to a businessman, Mr Mark Peart, who has been the director of five businesses which have fallen into external administration, I think over the last couple of years, costing creditors some hundreds of thousands of dollars, the most recent one of which is Homestead Highfields. ASIC records indicate that the company has no assets and owes 10 unsecured creditors \$526,000. Some of the local media reporting of this reports comments from Nikhil Khatri of Worrells, that there's been behaviour which he finds very concerning. My understanding is that, in relation to the fourth of the five companies that have gone into administration, a Mareva order, in December 2019, Mr Khatri reached out to ASIC seeking additional funding in order to undertake receiver duties properly. Firstly, is ASIC aware of this potential pattern of behaviour? And, secondly, does ASIC have any comments on the fact that somebody from Worrells had reached out to them in relation to the fourth business wind-up?

Ms Armour: Dr Mulino, I'm sorry—I think I'll have to take those questions on notice. I don't have the detail in front of me to address the specifics of those questions. If it's okay, I'll take them on notice and bring you back the detail I can. We have what's called the Assetless Administration Fund, which is administered by ASIC, where we make funds available to administrators and liquidators to potentially pursue actions in cases where a company or an entity is insolvent and there is a prospect of wrongdoing and they're in a position to do that. I don't know in this case whether this matter is one that's been associated with that fund or an application to that fund, so I would have to come back to you on that.

Answer:

ASIC is aware that Mr Mark Peart was a director of four companies which were placed into liquidation in the past seven years. These are:

- Homestead Highfields Ltd ACN 623 091 707 (In liquidation)
- Kin Kin 75 Pty Ltd ACN 608 371 900 (In liquidation)
- Mareeba 01 Pty Ltd ACN 093 259 860 (In liquidation)
- Kilcoy 21 Pty Ltd ACN 607 369 246 (Deregistered)

Another company Kilcoy 27 Pty Ltd ACN 169 593 560 went into voluntary administration on 22 October 2018 and then Deed of Company Arrangement on 28 November 2018 but returned to the management of director Mrs Fiona Peart on 1 May 2019.

In relation to Mareeba 01 Pty Ltd (in liquidation), our records confirm that Mr Nikhil Khatri was appointed as liquidator on 5 December 2019, after a period of voluntary administration.

Generally, where an administration is without funds, a liquidator can apply for funding from ASIC via the Assetless Administration Fund (AA Fund). The AA Fund offers funding to liquidators to investigate the affairs of a company and prepare a report to ASIC, which then helps us decide whether to commence enforcement action. One type of AA funding application is for 'Director Banning' in circumstances where a director qualifies for administrative banning under section 206F of the Corporations Act. Director Banning applications are capped at \$11,550 (GST inclusive).

All ASIC decisions to grant AA funding to liquidators are recorded on a publicly available website www.grants.gov.au, however only the name of the liquidator (recipient), date of grant, grant term and value of grant awarded are recorded. Specific company details are not recorded and are not searchable on that website.

We receive all liquidator reports and AA funding applications in confidence. We will generally make public comment about our regulatory actions, including investigations when the matter is before the courts or when we secure a regulatory outcome. For these reasons, we cannot comment on any action taken or not taken.

We weigh every report of misconduct (including liquidator reports) that we receive against four basic questions:

- What is the extent of harm or loss?
- What are the benefits of pursuing the misconduct?
- How do the other issues, such as the type and seriousness of the misconduct and the evidence available, affect the matter?
- Is there an alternative course of action?

See [Information Sheet 153](#) *How ASIC deals with reports of misconduct*

[Information Sheet 151](#) *ASIC's approach to enforcement*

[Information Sheet 152](#) *Public comment on ASIC's regulatory activities*

Australian Securities and Investments Commission
Answers to Questions On Notice
House of Representatives Standing Committee on Economics | Public hearing, 29 March 2021

Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC17QON
Topic	Jason Bettles, Mark Peart and Crowdfunding
Reference	Hansard, 29 March 2021, p. 33
Committee member	Dr Daniel Mulino MP

Question:

Dr MULINO: Thanks. I have a couple of questions for you to take on notice. Firstly, what is ASIC's awareness of the pattern of behaviour? My understanding is there are five companies involved. As I mentioned, my understanding is that the fourth of them involved a specific request from Mr Nikhil Khatri. I have an additional question which will obviously have to go on notice. Again, this was reported publicly. My understanding is that Mr Jason Bettles, again of Worrells Solvency and Forensic Accountants, is conducting the administration of Homestead Highfields. I understand that Mr Bettles has been the subject of an ASIC investigation and potential action. I'd be interested in any information on that. Obviously, that would be a situation which would be potentially complicated by the fact that a company is being wound up with very few assets and the person administering that process is themselves being investigated. If there are any conclusions as to a potential pattern of behaviour, what are ASIC's overall conclusions as to Mr Peart's fitness and sustainability to act as a director? There has been the allegation, which I would appreciate ASIC's observations on, that some of these companies changed their names some weeks before the businesses were placed into administration and that Mr Peart's wife was made a director. I'd appreciate it if ASIC could comment on that. My understanding is that Mr Peart is currently still raising funds in relation to other entities and is using crowdfunding platforms for that purpose. I have a couple of questions around crowdfunding regulation more generally. My understanding is that there are something in the order of nine, 10 or 11 licences for crowdfunding at the moment, and we're talking about funds where in the order of hundreds of millions of dollars are being raised. I'm interested in how closely ASIC tracks the activities of those platforms and funds that are raised through them.

Ms Armour: There is a limited crowdfunding regulatory regime in Australia, which was introduced in the last few years. We do track the activities. I'm not sure whether the situation you're talking about is something that comes within our regulatory regime or is outside of it, but we'd be happy to look at it further. In the regulatory regime we administer, there are limits on the amounts that can be raised by each crowdfunding activity. That's my understanding. We'd be happy to give you more information about that as well.

Dr MULINO: I'd be also interested in ASIC's visibility of the number of companies that have raised capital on these platforms over the last few financial years and the quantum of funds that has been involved.

Ms Armour: Yes.

Dr MULINO: Also, to the extent that ASIC has visibility, how many of these companies have gone into administration, or how many situations have there been in which shareholders have lost their investments?

Ms Armour: Sure. We'll do the best that we can there. Of course, you understand that, where investments are raised from what's called the wholesale or sophisticated market, we won't have as much ready information, but we will bring you the best information we can.

Dr MULINO: That would be appreciated. I do understand that there is a trade-off here, in that the whole purpose of this area of fundraising is, in a sense, to reduce the level of formality and oversight—

Ms Armour: Yes.

Dr MULINO: but I imagine that ASIC would be wanting to monitor the extent to which investors are getting bad outcomes in order to see whether the regulatory balance is right.

Answer:

Mr Mark Peart

ASIC is aware that Mr Mark Peart was a director of four companies which were placed into liquidation in the past seven years. These are:

- Homestead Highfields Ltd ACN 623 091 707 (In liquidation)
- Kin Kin 75 Pty Ltd ACN 608 371 900 (In liquidation)
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See [Information Sheet 153](#) *How ASIC deals with reports of misconduct*

[Information Sheet 151](#) *ASIC's approach to enforcement*

[Information Sheet 152](#) *Public comment on ASIC's regulatory activities*

Mr Jason Bettles

ASIC has current proceedings before the Court concerning Mr Jason Bettles and is unable to comment beyond information that ASIC has published to date concerning this matter. On 7 November 2019 ASIC filed proceedings in the Federal Court in relation to conduct by Mr Jason Bettles. Mr Bettles was the liquidator of the Members Alliance Group of companies from 22 July 2016 until his resignation on 13 July 2017.

ASIC has requested the Federal Court inquire into Mr Bettles' conduct during his administration of those companies as ASIC is concerned Mr Bettles:

- failed to maintain independence;
- did not exercise the degree of care and diligence required of a liquidator; and
- failed to discharge his obligations as a liquidator.

The application is made under section 45-1 of the Insolvency Practice Schedule (Corporations), being Schedule 2 to the Corporations Act 2001 (Cth). The Statement of Claim sets out these concerns in more detail and is available on ASIC's website [here](#).

Further information can be found in ASIC's media release available [here](#). The matter will be heard in the Federal Court and it has not been listed yet for a hearing. There are currently no restrictions preventing Mr Bettles from acting as a liquidator.

Company director and name changes prior to liquidation

ASIC can and does disqualify persons from managing corporations for up to five years if within the last seven years, the person has been an officer of two or more failed corporations pursuant to section 206F of the Corporation Act. This applies to current directors as well as persons who have held officeholder positions within 12 months of a liquidator being appointed.

Before ASIC can disqualify a person, we require liquidators to lodge reports for at least two of the companies that have failed in the past seven years. Any action we take to disqualify is aimed at protecting the public, consumers, creditors and employees. Furthermore, we may also take separate criminal or civil action if we consider that the allegations are serious, there is admissible evidence and if it is in the public interest to do so.

Company name changes do not affect our consideration on whether someone is able to be disqualified or not, as the unique Australian Company Number (ACN) attaching to each company remains constant if the company decides to change its name.

As mentioned above, our inquiries and consideration as to appropriate regulatory options that may be available are continuing.

Mr Mark Peart's fundraising activities using crowdfunding

Open source searches indicate that Mr Peart raised funds for DIT Agtech Limited (formerly known as D.I.T Technologies Ltd), a company he is currently a director of, using crowdfunding platform Birchal in October to November 2020 and crowdfunding platform Equitise in 2018-19.

Birchal's website indicates \$842,623.50 was raised from 361 investors and the offer met the minimum target and closed on 5 November 2020 (see <https://www.birchal.com/company/dittechnologies>). Equitise's website indicates \$656,500 was raised from 115 investors in 2018-19 (see <https://equitise.com/blog/successful-case-study-dit>).

ASIC is not aware of any other crowdfunding activity.

The crowdfunding regime generally

The equity-based crowd-sourced funding (CSF) regime commenced in October 2017. In January 2018, ASIC issued the first Australian Financial Services (AFS) licence authorisations to CSF intermediaries.

The CSF regime reduces the regulatory requirements for eligible small to medium-sized companies raising equity capital from retail investors. The CSF regime is available to unlisted public companies and proprietary companies with less than \$25 million in assets and annual revenue. Offers must be made through an AFS licensed CSF intermediary's platform using a CSF offer document. Eligible companies can raise up to \$5 million in any 12-month period under the CSF regime.

Since the inception of the CSF regime until 31 December 2020, 118 successful offers have been made, raising \$75 million (\$635k average) from 55,000 investors, whose average investment has been \$1,348¹

There are currently 15 licensed intermediaries, with the market being dominated by three intermediaries being: Birchal, Equitise and Onmarket Bookbuild. Many of the other intermediaries have yet to host a successful offer.

By design, ASIC has limited day-to-day oversight of offers made under the CSF regime. Instead, the CSF intermediaries (which must hold an AFS licence) play a gatekeeper role which involves performing checks on the offering company, its directors and the CSF offer document.

¹ Birchal's 2020 CSF yearbook – see: <https://pages.birchal.com/birchal-csf-yearbook-2020>

Further, unlike prospectuses, CSF offer documents are not required to be lodged with ASIC. Consequently, ASIC does not have a readily available record of companies that have made CSF offers and have subsequently gone into administration or have otherwise failed.

ASIC has published two comprehensive regulatory guides to assist the market: [RG 261 CSF: Guide for companies](#) and [RG 262 CSF: Guide for intermediaries](#). These set out ASIC's role in overseeing CSF and our powers (which includes a stop order power if we are concerned about the disclosure in a CSF offer document). We have surveillance and compliance programmes in place for all our AFS licensees, including licensed CSF intermediaries. We also monitor any reports of misconduct specific to this sector as well as providing general support for any questions that intermediaries may have.

Australian Securities and Investments Commission
Answers to Questions On Notice
House of Representatives Standing Committee on Economics | Public hearing, 29 March 2021

Division/Agency	Australian Securities and Investments Commission
Question No.	ASIC18QON
Topic	Xinja Bank Limited and Crowdfunding
Reference	Hansard, 29 March 2021, p. 34
Committee member	Dr Daniel Mulino MP

Question:

Dr MULINO: ... Could you follow this up on notice: I understand that depositors with neobank Xinja, which recently lost its licence, received all or most of their cash back but that the equity investors have lost their investments. Anything that you could provide on that, on notice, would be interesting.

Answer:

Xinja Bank Limited (Xinja) was, until recently, an Authorised Deposit-Taking Institution regulated under the *Banking Act 1959* (Banking Act) by the Australian Prudential Regulation Authority (APRA).

On 16 December 2020 APRA published a media release noting the announcement that day by Xinja that it intended to return all funds to depositors and ultimately relinquish its banking licence.

On 19 January 2021 APRA announced that the return of deposits had been completed by Xinja transferring the remaining 4,176 accounts with balances totalling \$65,809 to the National Australia Bank Limited. The transfer was approved by APRA under the *Financial Sector (Transfer and Restructure) Act 1999* and the Banking Act.

Although Xinja has ceased to engage in banking business, it is (to our knowledge) still operating as a registered company and has not been wound up or placed into administration. Accordingly, any financial losses incurred by the company have not crystallised as permanent capital losses to the equity investors. We understand that, at a recent extraordinary general meeting held in February 2021, shareholders voted on a non-binding poll in favour of re-launching the company as an online wealth platform. It was reported that shareholders did not vote in favour of a voluntary solvent winding-up of the company.

We note that although Xinja has raised some equity through Crowd-Source Funding (CSF) under the CSF regime, the majority of Xinja's equity capital has so far been provided by wholesale or sophisticated investors.

ASIC's oversight of offers made under the CSF regime is summarised in the response to ASIC16QON.