

Chapter 5

The investigation by ASIC

5.1 The Australian Security and Investment Commission (ASIC) submitted that, in January 2006, following the release of the final report of the Independent Inquiry Committee (IIC) and the subsequent announcement of the Cole inquiry, ASIC took the decision not to investigate potential breaches of the Corporations Act, to avoid impinging on the jurisdiction of the Cole inquiry. During this period, 20 of the 27 AWB wheat supply contracts fell outside the relevant statutory time limits regulating the commencement of civil actions. Between February and August 2007, when ASIC had allocated nine of its staff to the Taskforce, two more contracts were affected by the statutory limitation period.¹

5.2 Mr Nick McKenzie argued that this was not a sound excuse for failing to pursue the earlier contracts. He claimed that by the time that the IIC had tabled its report, ASIC would have known that there was a likelihood of the need for a corporate malfeasance investigation in Australia. Mr McKenzie stated that:

ASIC could have turned its mind to how it could have best investigated corporate offences flowing from this conduct, if they did indeed exist at the time that Mr Volcker tabled his report and then during the life of the royal commission. Indeed, law enforcement agencies can work at the same time that a royal commission is doing its work, as long as they are mindful of stepping on toes and legal practicalities.²

Commencement of the parallel investigation

5.3 As noted in chapter 4, ASIC left the Taskforce in late August 2007 in order to pursue its own parallel investigation. As noted by ASIC, initially, the scope of the investigation was into suspected contraventions of various sections of the Corporations Act, the *Criminal Code* (Cth) and the *Crimes Act 1958* (Vic) arising out of the five contracts that still fell within the statutory limitations period. The scope of the investigation was narrowed in July 2008 to only cover suspected contraventions of the Corporations Act to avoid overlap between the ASIC investigation and that of the Taskforce.³

5.4 As explained by Mr Jason Young, a former ASIC officer, the initial stages of the ASIC investigation involved long periods of idleness. The investigatory team 'were not getting much direction of what to do'. However, as described by Mr Young:

...all of a sudden after a number of months, there was a belated awareness from the law component of the [investigation] that we were rapidly approaching a period where the last few contracts were going to expire in

1 ASIC, *Submission 2*, pp 5-6.

2 Mr Nick McKenzie, *Committee Hansard*, 16 October 2014, p. 27.

3 ASIC, *Submission 2*, p. 7.

relation to the statutory limitations upon filing for litigation. Then it was all hands on deck, and, in the handing out of persons of interest...⁴

5.5 ASIC submitted that as the statutory time limit for the final five AWB Ltd contracts was due to expire on 20 December 2007, it decided to increase the number of staff involved in the investigation so as to more expeditiously determine whether civil proceedings could be pursued. On 19 December 2007, ASIC commenced civil proceedings in the Supreme Court of Victoria against six former AWB Ltd officers, alleging that they had contravened sections 180 and 181 of the Corporations Act as a result of conduct associated with the five remaining contracts.⁵

ASIC's coercive powers

5.6 ASIC explained that, as part of its investigation, it used its compulsory witness examination and document gathering powers contained in section 19 and Division 3 of Part 3 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) respectively.⁶ As noted by Ms Leonie Wood of Fairfax Media, ASIC's coercive powers are unique. The AFP does not have the same coercive powers and, as such, suspects could simply decline to answer the AFP's questions until confronted in court.⁷ Given the compulsory nature of ASIC's powers, they have been made subject to certain restrictions, as outlined in subsection 127(1) of the ASIC Act. However, subsection 127(4) of the ASIC Act, when read with the decision of the High Court in *Johns v Australian Securities Commission*,⁸ would allow for the chairperson of ASIC to release information to other agencies (a subsection 127(4) release), after any party whose interest may be materially adversely affected is offered the opportunity to make a submission on the proposed release.⁹

Problems with releasing information to the Taskforce

5.7 As mentioned in chapter 4, ASIC noted that, in early 2008, in response to a request from the AFP for a subsection 127(4) release, ASIC wrote to various witnesses to provide them with an opportunity to be heard or to make a submission on the proposed release. On 2 September 2008, a delegate of the chairman of ASIC authorised the conditional disclosure of information to the AFP. However, before the information was delivered, on 11 September 2008, AWB Ltd commenced proceedings in the Federal Court to challenge the decision to release information. The court dismissed the application and AWB Ltd appealed this decision. The decision of the Full Court of the Federal Court was reserved until 30 November 2009, after the

4 Mr Jason Young, *Committee Hansard*, 16 October 2014, p. 23.

5 ASIC, *Submission 2*, pp 7-8, 10.

6 ASIC, *Submission 2*, p. 8.

7 Leonie Wood, 'ASIC to reveal interviews', *The Age*, 1 May 2008, <http://www.theage.com.au/business/asic-to-reveal-interviews-20080430-29tj.html> (accessed 27 February 2014).

8 *Johns v Australian Securities Commission* (1993) 178 CLR 408.

9 ASIC, *Submission 2*, p. 11.

Taskforce had been disbanded, when the appeal was dismissed by consent. As a result, the Taskforce was not able to access the information gathered by ASIC using its coercive powers.¹⁰

5.8 Mr Chris Savundra of ASIC listed four legal obstacles to the dissemination of information gathered using ASIC's coercive powers. Mr Savundra noted:

The first is that the use of ASIC's powers for the purposes of obtaining information for another agency or task force is probably beyond legislative power. The second is that while ASIC is authorised in certain circumstances to release information it obtains through an investigation to other agencies, including the AFP, ASIC needs to consider each piece of information on an item by item basis before it exercises that discretion to disclose and release the information to another agency or to a taskforce... The third reason really flows on. It is that, in making a decision to release, ASIC will usually have to afford procedural fairness to persons who are potentially affected by the release...and...the fourth point, which is that section 102(5) of the ASIC Act provides that the exercise of an ASIC power must be done at ASIC's direction. This was an AFP led taskforce under the management and direction of the AFP. So there was another legal impediment there around the use of our powers within the context of a taskforce that was being led by another agency.¹¹

5.9 Mr Savundra confirmed that ASIC did not exercise any of its powers under the ASIC Act during the six-month period that its officers were engaged in the Taskforce.¹² Then, when questioned why ASIC joined the Taskforce when ASIC would have known, or should have known, that its powers would be limited and it would be constrained in its ability to successfully pursue civil proceedings, Mr Savundra speculated that one reason could have been that ASIC could provide the Taskforce with its expert knowledge of corporations law.¹³

The court proceedings

5.10 As stated by ASIC, on 12 November 2008, Justice Robson of the Supreme Court of Victoria ordered a stay of the civil proceedings against five of the six former AWB officers, explaining that it would not be fair or just to make a defendant waste resources on defending a civil action when those resources may be needed to defend a criminal action that might arise from the Taskforce. However, the action against Mr Lindberg, the former Chief Executive of AWB, was not suspended. This action was concluded on 9 August 2012 with Justice Robson ordering the disqualification of Mr Lindberg as a company director for a period of three years and the payment of a pecuniary penalty of \$100,000.¹⁴

10 ASIC, *Submission 2*, pp 11-12.

11 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 10-11.

12 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 11.

13 Mr Chris Savundra, ASIC, *Committee Hansard*, 16 October 2014, p. 11-12.

14 ASIC, *Submission 2*, pp 13 and 18.

5.11 As noted by ASIC, on 2 August 2010, Justice Robson lifted the order staying the civil actions against the other five former officers of AWB Ltd. Only one other action, against Mr Paul Ingleby, the former Chief Financial Officer of AWB Ltd, has been successful. However, there are two ongoing actions that are currently listed in the Supreme Court of Victoria, against Mr Trevor Flugge, the former Chair of AWB Ltd, and Mr Peter Geary, the former General Manager for Trading in AWB Ltd. As noted by ASIC, at a directions hearing on 25 September 2014 the two matters were listed for trial on 5 October 2015 and the expected duration of the trial is 10 weeks.¹⁵

5.12 On 23 December 2013, by consent of all parties, ASIC discontinued its proceedings against Mr Charles Stott, a former General Manager of International Sales and Marketing for AWB (International) Ltd and Mr Michael Long, Mr Stott's successor, as it was determined by ASIC that it would not be in the public interest to continue with them and the final two actions are ongoing.¹⁶

Possible criminal actions under the Corporations Act

5.13 As explained by ASIC, on 26 May 2010, ASIC terminated its investigation into suspected contraventions of criminal provisions of the Corporations Act.¹⁷ ASIC accepted the findings of the Cole inquiry that criminal offences may have occurred. However, ASIC submitted:

Commissions of Inquiry established under letters patent sometimes find that criminal offences may have occurred and refer such matters to investigative agencies, however, in arriving at these findings such Commissions generally do not have to base their findings on evidence admissible in a Court... In the event that ASIC considered that the evidence gathered during its investigation supported a successful criminal prosecution of any person associated with AWB's supply of wheat to Iraq, ASIC would have adopted that course instead of embarking upon—or continuing with—civil penalty proceedings against that person.¹⁸

15 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, Question 5.

16 ASIC, *Submission 2*, pp 14-16 and 24.

17 ASIC, *Submission 2*, p. 24.

18 ASIC, *Submission 2*, p. 17.

5.14 When asked whether ASIC considered the possibility of opening up an investigation into ABW Ltd for misleading the stock exchange, ASIC responded that it had formed the view that it would limit the scope of its investigation to the specific contraventions highlighted in the Cole inquiry report. However, ASIC followed the proceedings of *Watson and Watson v AWB Ltd*¹⁹ and filed a Notice of Motion supported by an affidavit to obtain access to the transcript of the trial. As ASIC explained:

Following the class action settlement which resulted in AWB making a payment of \$39.5 million (inclusive of legal costs) to the plaintiffs, no formal further consideration was given by ASIC to commencing a separate investigation into AWB [Ltd] and possible false or misleading statements that it may have made to the market.²⁰

Problems faced by ASIC when pursuing large corporate entities

5.15 Mr John Addis, in his article for Fairfax Media, argued that when trying to effectively pursue matters against large corporate entities ASIC finds itself in 'in an unenviable position'. Mr Addis claims that:

- the institutions that ASIC needs for support often consider white-collar crime to be a lesser offence;
- the maximum penalties are not high enough and the punishments are not strong enough to act as effective deterrents; and
- the high costs of investigating and prosecuting large corporate entities for potential contraventions make it harder for ASIC to justify pursuing these entities, given the parallel imperative to raise funds for the government.²¹

5.16 The Senate Economics References Committee (Economics Committee) which, in its report on the inquiry into the performance of ASIC, commented on penalties by stating:

It is important that the penalties contained in legislation provide both an effective deterrent to misconduct as well as an adequate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties undermine the regulator's ability to do its job: inadequately low penalties do not encourage compliance and they do not make regulated entities take threats of enforcement action seriously. The committee considers that a compelling case has been made for the penalties currently

19 *Watson and Watson v AWB Ltd* [2007] FCA 1367.

20 ASIC, *Answers to questions on notice from public hearing on 16 October 2014*, Question 12.

21 Mr John Addis, 'Why ASIC lets the big fish go', *The Sydney Morning Herald*, 25 February 2014, <http://www.smh.com.au/business/intelligent-investor/why-asic-lets-the-big-fish-go-20140225-33diw.html> (accessed 19 February 2015).

available for contraventions of the legislation ASIC administers to be reviewed to ensure they are set at appropriate levels.²²

5.17 The Economics Committee also acknowledged that financial constraints affect the capacity of ASIC to act as a corporate regulator. The Economics Committee stated that 'ASIC's long list of regulatory tasks and the resources available to ASIC to perform these tasks clearly act as constraints on its ability to meet expectations the public and stakeholders may have'.²³

22 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 367, http://www.aph.gov.au/parliamentary_business/committees/senate/economics/asic/final_report/~media/committees/senate/committee/economics_ctte/asic/final_report/report.pdf (accessed 19 February 2015).

23 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 414.