# SUBMISSIONS TO THE SENATE ENQUIRY INTO THE PERFORMANCE OF ASIC

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## INTRODUCTION

These submissions deal with ASIC Enforcement Directorate and relate to current investigative concerns regarding the non-protection of investors following the Global Financial Crisis (**GFC**) which began in 2008. ASIC is able to deliver on medium complex investigations, however, it struggles to successfully investigate large complex matters because it has limited skilled staff able to deliver on these major projects. In order to protect Australian and international investors, the solution is to make ASIC more timely and relevant in active complex enforcement matters.

## SUMMARY OF CONCERNS

ASIC is in the position of having a wide enforcement portfolio that is trying to investigate and prosecute 21st Century economic and investment crime with 19th Century legislative tools that are outmoded, slow and incapable of protecting the interests of Australian and international investors. The procedures and laws need to be re-configured to take into account the sophistication of offshore companies, electronic transfers, offshore jurisdictions and the non-qualification requirements of directors.

### *The need to enhance Enforcement*

Since 2008 the Enforcement Directorate in ASIC has been eroded to the extent that, in reality, there is currently only a handful of ASIC Enforcement staff who are capable of handling large complex investigations and who, most importantly, are able to deliver a prosecution result. There is an overlay of management that is senior but not operational, and who are often not at the coalface in relation to pursuing complex investigations and rely on external senior counsel. Very few senior ASIC staff, at either Commission or Senior Executive level, has direct operational experience in successfully conducting and prosecuting large investigations themselves - resulting in *duplication and unacceptable prosecution delay.* The ASIC heads of enforcement at Senior Executive level have managerial experience, but little or no experience in first- hand investigating nor in prosecuting complex corporate crime themselves.

From my experience, a good benchmark to measuring the ability of senior enforcement staff to competently investigate a criminal case is to determine whether or not they have previously undertaken a criminal investigation, and **personally** prepared a brief of evidence which has been fully contested at trial with a successful outcome. As a rule of thumb, it is only after an investigator has been in court and tested, that an investigator will have the depth of knowledge and skill- sets required to competently manage and/or undertake complex criminal investigations.

***Commonwealth Director of Public Prosecutions and ASIC***

There is a duplication of resources between ASIC and the Commonwealth Director of Public Prosecutions (**CDPP**) in relation to complex corporate investigations, with the unacceptable consequence that it takes three to five years to conclude a complex investigation. ASIC should be given the power to both investigate and lay charges in criminal matters, allowing the CDPP or ASIC to prosecute matters. There are similar structures in overseas jurisdictions – such as the UK Serious Fraud Office - where crime commissions can investigate and lay charges.

The time taken by the CDPP is just one matter noted by ASIC as a contributory factor to the lengthy time it takes from the commencement of an investigation to the laying of charges. There are numerous other general reasons put forward by ASIC for the delays, including the investigation stage:

- Volume of evidence
- Slow production of evidence
- Location of evidence
- LPP
- Collateral requests, such as FOI, subpoenas and s25 requests for release of transcripts.

Whilst all these factors are legitimate, more importantly is the level of knowledge, skills and experience of ASIC staff in conducting focussed complex criminal investigations. The competence of staff is not only of significance in their ability to prepare a comprehensive brief of evidence but, most importantly, in their ability to deal, negotiate and respond to requests and queries/barriers presented by the CDPP.

At para 468 (page 129) ASIC's submission states the CDPP takes approximately 42.6 weeks from handover to when charges are laid. As you and I know, the time is in fact much longer for complex matters.

In the event it is proposed to continue with the current regime (of ASIC investigating and CDPP prosecuting) then the current relationship between ASIC and the CDPP needs to be substantially improved.

The CDPP is notoriously risk averse, and when a CDPP officer (who is not confident or lacks experience) receives a brief from a relatively inexperienced ASIC staff member it is a recipe for protracted delay and potential disaster. These are potential motherhood issues that should not be dismissed as I believe the lack of experience of ASIC staff, coupled with the risk averse/inexperienced CDPP, are 2 major contributing factors to the inordinate delays in commencing proceedings and the paucity of successful prosecution outcomes in the more complex criminal matters.

***Consideration to a new specialised judicial process***

Consideration should be given to setting up a separate specialised court or tribunal to deal with Civil and Criminal matters in relation to investor losses, or protecting investors.

As mentioned, investor losses run into billions of dollars and, ultimately, many of these Australian investors will now need to rely upon the pension in their old age. There doesn't appear to be a forum that captures the scale/value of investor losses.

***Enhance cross-border co-operation***

In theory, there is nothing to stop ASIC from tracing investor funds in other jurisdictions, and obtaining civil court orders in offshore jurisdictions to maintain the status quo. ASIC does not aggressively pursue defrauded funds off-shore.

There needs to be more co-operation in terms of practical operational assistance from the Australian Federal Police (**AFP)**, International Organisation of Securities Commissions (**IOSCO**) and Interpol to effectively find and return investor funds from questionable offshore jurisdiction involving corporate or director fraud. For example, in the Trio Capital case, approximately $125 million was defrauded from investors and never returned – ASIC did not act to preserve these funds in a timely manner. Currently, as in the LM Investments case, directors transferred millions of investor funds offshore and, to my knowledge; these have not been traced or pursued. Arrangements should be made whereby ASIC jointly works with the AFP in providing sources of information and, if necessary, going to offshore jurisdictions to commence protective court proceedings on behalf of investors whose funds have been transferred out of Australia in circumstances of fraud.

***Potential overuse of enforceable undertakings as a remedy***

ASIC Regulatory Guide 100 – Enforceable Undertakings, states at paragraph 100.21 as follows:

"We will not accept an enforceable undertaking:

(a) instead of commencing criminal proceedings against a party; or

(b) to secure payment of a pecuniary civil penalty (see RG 100.22-RG 100.23); or

(c) after a matter has been referred to a specialist body (see RG 100-29) or

(d) in cases of deliberate misconduct, fraud, or conduct involving a high level of recklessness (except where the acceptance of an enforceable undertaking best serves an urgent protective purpose and is not a bar to later court action); or

(e) for trivial matters; or

(f) as an alternative form of relief if conditional relief has not been complied with."

There is a concern, from my limited understanding of the Trio Capital matter where investors lost $125 million, that enforceable undertakings have been adopted as the appropriate remedy in circumstances where serious criminal conduct involving forgery has been alleged – because it's all too hard to mount a complex criminal investigation!

Due to the time, cost and complexity of establishing that criminal offences have been committed, there may be a tendency for ASIC to adopt the more expedient outcome of an enforceable undertaking.

***Ineffective Managed Investment Schemes Legislation under the Corporations Act***

Since the GFC, approximately one billion Australian dollars has been lost to Australian and international investors in relation to Managed Investment Schemes that are registered and licensed by ASIC. These schemes replaced the old trustee fund arrangements, and were introduced under the Corporate Law Reform Act in 1992. The new responsible entity structure (which replaced trustees) allows for conflicts of interest and low-grade risk management programs.

The civil and criminal provisions under the Corporations Act (that were supposedly drafted to pursue criminal contraventions) are incapable of being used because of their cumbersome drafting and high onus of proof[1]. To my knowledge, there have been no prosecutions under section 601ED of the Corporations Act, even though millions of elderly investors have lost funds in fraudulent circumstances under these schemes. The entire managed investment chapters and contraventions need reform. As we have seen, this area is a recipe for disaster and does not protect investor interests.

**Senators, thank you for considering my submissions. I would be happy to expand on any of the issues that I have raised should you require me to do so.**

[1] The decision in R v Donaldson and Poumako (2009) SASC 31 (19/2/2009) in effect requires the prosecution to establish knowledge of the wrongdoing which in the case of managed investment schemes is often problematic.