



**ASIC**  
Australian Securities &  
Investments Commission

<b>Committee</b>	<b>Parliamentary Joint Committee on Corporations and Financial Services</b>
<b>Inquiry</b>	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament
<b>Question No.</b>	048-02
<b>Date</b>	12 January 2022
<b>Topic</b>	Insider Trading
<b>Reference</b>	Written Question on Notice
<b>Committee member</b>	Senator Bragg

**Question**  
**QoN048-02**

Commissioner Press stated at hearings on 26th November that 23 super funds were being 'looked at' for insider trading, and that ASIC was investigating a number of others. ASIC identified 67 individuals, comprising directors, executives, and related parties.

a. I was wondering if a breakdown could be provided of the 67:

- How many were directors?
- How many were executives?
- How many were related parties?
- Of these related parties, are you able to identify if this involved directors or executives disclosing sensitive information?
- How many actual trades were undertaken?

Commissioner Press stated in QoN 007, that ASIC then whittled the list of 67 down to four, and excluded based on the following criterion:

- Trades that did not occur within close proximity to the revaluation of unlisted assets
- Trade between operations that were not referable to unlisted assets
- Trades by individuals without access to sensitive information
- Trades where the individual suffered a financial loss or placed themselves at a disadvantage by switching options

- b. Are you able to confirm that excluding based on this criterion would not capture the following instances:
- Where directors or trustees made investment decisions by virtue of their position
  - Where related parties made investment decisions on the basis of inside information
- c. If you cannot confirm that, what further action is ASIC taking to ensure that executives, directors, and related parties are acting within the scope of the law?
- d. Is any further action necessary to ensure that super fund trustees are fulfilling their obligations to their members?
- e. What additional information did ASIC seek from the 67 individuals which were examined?
- f. What additional information did ASIC seek in respect of the four cases it has identified for further investigation?

Please detail the actual trades, (including which funds and which executives or trustees), which were alleged to have been contrary to the spirit of the law or directly contravening the law in these four cases.

- g. Is ASIC confident of prosecution under the current law or is law reform required to deliver future prosecutions?
- h. What directives have been provided to the superannuation funds concerned in these four cases to ensure there is no further contravention of the law?
- i. If a super fund trustee switches superannuation products on the basis of information gained in their capacity as a trustee, is that, in general terms, a breach of their legal obligations?

### **Answer**

At the outset we note that the matters about which ASIC has conducted surveillance do not constitute 'insider trading' for the purposes of s.1043A of the *Corporations Act 2001*. As we have previously stated publicly the statutory offence of insider trading requires the acquisition or disposal of a new financial product (see [21-282MR Surveillance of investment switching by super fund executives identifies concerns with trustees' conflicts arrangements](#)).

We also wanted to take the opportunity in answering this question on notice, to inform the Committee that the number of individuals the subject of ongoing ASIC review has expanded from four to 64. This increase captures individuals previously not the focus of ASIC's enquiries at the time of answering QoN 007 of 2021. We have included new individuals in the pool that are the subject of ongoing ASIC review following a review of the application of the criteria previously used to exclude individuals. This figure of 64 does not include any of the persons previously excluded by the processes described in response to QoN 007 of 2021. ASIC has yet to finalise its position in relation to those 64 individuals.

**a.**

Of the 67 individuals previously identified:

- 30 were directors;
- 29 were executives; and
- 8 were related parties.

In total, these individuals accounted for 162 trades across the 23 superannuation funds reviewed, between January and December 2020.

**b.**

Our surveillance was focused particularly on transactions occurring with the benefit of knowledge about valuations of assets. Excluding persons from our further surveillance on the basis outlined above is consistent with there being no reasonable basis to suggest that the switches of investments by directors, executives or related parties benefited from access to sensitive information.

**c.**

ASIC does not believe further action is required in relation to those individuals based on information currently known to us. We are currently considering whether further information received in relation to those individuals not excluded suggests misuse of information has occurred.

**d.**

To help ensure that directors of superannuation trustees are operating within the law, we issued letters to trustees in relation to the deficiencies in their conflict management arrangements identified during our review, and we will be conducting follow-up reviews to check that the issues have been addressed.

**e. and f.**

In relation to the 63 individuals that were excluded on the bases identified by the Senator, we did not seek additional information. In relation to the four not excluded this way, ASIC issued compulsory notices to produce documents on 30 September 2021. These notices sought:

- further details of valuations;
- email records between individuals and investment committees;
- email records in which individuals were copied into valuations;
- superannuation account details/ transaction records of the individuals;
- books evidencing switch requests made by individuals; and
- books relating to unit pricing between March-April 2020.

ASIC has separately written to the Committee in respect of its request for details of the 'actual trades', but note ASIC's enquiries into these individuals are yet to be finalised.

**g and h.**

The prospects of successful enforcement action in relation to particular matters are assessed based on the specific factual circumstances pertaining to the alleged misconduct. As indicated in our

response to sub-question (c), at this stage, ASIC does not believe further action is required in relation to the majority of investment switches reviewed in our surveillance.

In relation to individuals the subject of ongoing review, ASIC is conducting further investigation and making further enquiries as necessary.

As to whether the area more generally is amenable to, or would benefit from, law reform, that is a matter for Government and Parliament noting that currently the most relevant enforcement action against individuals would arise under directors and officers duties set out in the Corporations Act.

**i.**

Whether or not a particular situation involving a director of a superannuation trustee switching superannuation products on the basis of information gained in their capacity as a director constitutes a breach of their legal obligations will depend on the facts and circumstances. For example, a breach of section 183 of the *Corporations Act 2001*, would require that the director personally gained or acquired a gain for a third party.