

Our ref: A257594

20 May 2014

Dr Kathleen Dermody  
Committee Secretary  
Senate Economics References Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Dr Dermody

Thank you for your letter of 12 May 2014 in relation to the evidence given to the Senate Economics References Committee (the Committee) by Mr James Wheeldon at a public hearing into the performance of the Australian Securities and Investments Commission (ASIC).

Mr Wheeldon, a former ASIC employee, alleged that in 2004 and 2005 ASIC was unduly influenced by an industry association in granting relief under the *Corporations Act 2001*. The application for relief related to the use of online financial calculators. Mr Wheeldon alleged that an employee of MLC, a company that was a member of the industry association, was seconded to ASIC and played a key role in securing the outcome sought by his employer. Mr Wheeldon also alleged that ASIC misled Parliament in the text of the explanatory statement tabled along with the class order that granted the relief.

You advise that the Committee is considering the evidence heard during the inquiry and that it will shortly consider its final report and recommendations. You indicate that the Chair of the Committee, Senator Mark Bishop, is concerned about the possible conflict of interest raised by Mr Wheeldon's evidence and ASIC not taking account of Mr Wheeldon's concerns.

You ask whether a Committee request that the Commonwealth Ombudsman examines the matter would be an appropriate request that falls within the remit of my office, and how such a request might be formulated.

The Commonwealth Ombudsman's statutory roles include investigating complaints about the administrative actions of Australian Government officials and agencies, and undertaking investigations of administrative action on an 'own motion' basis.

ASIC is an Australian Government agency within the jurisdiction of the Commonwealth Ombudsman and allegations relating to how ASIC dealt with a conflict interest matter are certainly issues which my office is able to consider. I see no legal or jurisdictional barriers to my office investigating ASIC's handling of the alleged conflict of interest and Mr Wheeldon's concerns.

However, the Ombudsman is not authorized to investigate action that constitutes proceedings in Parliament (as defined under s16 of the *Parliamentary Privileges Act 1987*). My office is, therefore, unable to consider the allegation that ASIC misled Parliament in its explanatory statement tabled with the class order that granted the relief.

I would also note that, in practical terms, a potential obstacle is likely to be the amount of time which has elapsed since the events in question. The Ombudsman Act provides my office with wide-ranging powers to obtain information, including powers to:

- require a person or an agency to provide documents or other written records
- require a person to attend a specified place and answer questions
- examine witnesses on oath or affirmation; and
- visit agency premises and inspect documents.

However, noting that 10 years has elapsed since the events alleged to have taken place by Mr Wheeldon, there is a risk that files and documents relevant to any possible investigation by my office may no longer exist and that recollections of the individuals involved may be less reliable.

As an independent and impartial statutory officer, the Commonwealth Ombudsman investigates in private and as the Ombudsman sees fit. Therefore, while it would be appropriate for the Committee to request that the Ombudsman consider the issue, whether my office takes up the request is a matter for my discretion. In this case, in the absence of a direct complaint to my office, any investigation I would be minded to undertake would be carried out of my 'own motion' and would be likely to involve the use of formal powers. At the end of such an investigation I could consider issuing a public report or statement, if I believed it was in the public interest to do so.

Thank you for seeking my comments on the possible request by the Committee.

Yours sincerely

Colin Neave  
Commonwealth Ombudsman