Inquiry into Australian Securities and Investments Commission investigation and enforcement

Further submission by the Australian Securities and Investments Commission: Specific matters raised by witnesses during the 4 October and 1 November 2023 public hearings

22/12/2023

Contents

Overview 3
1. Farmers and agricultural loans 3
2. Mr David Sutton and Aus Streaming Limited 6
3. Kalkine 8
4. DW8 9
5. IPO matter 9
6. Prime Trust 12
7. Mr Gabriel Bernarde 15
8. Aust Home investments 17

Overview

1 This submission responds to evidence provided by witnesses to the inquiry during the Committee hearing 4 October and 1 November 2023.

2 We have listened to the evidence presented to the Committee. We appreciate the Committee is seeking to understand how ASIC undertakes enforcement work and the role of information provided to ASIC by the public.

3 Given the nature of ASIC's enforcement work, we may not necessarily be able to provide reporters of misconduct explanations of how we use information provided to ASIC, however reports of misconduct are an important source of intelligence for ASIC. We use reports of misconduct, together with all the intelligence we collect, to detect misconduct, identify patterns, trends, and broader systemic problems that may require our intervention.

1. Farmers and agricultural loans

4 We acknowledge the difficulties small business and farm owners have experienced in the past in relation to agricultural loans.

5 The issues raised by Mr Niall Coburn and Mr Gerard O'Grady at the public hearing on 4 October 2023 have been extensively examined by ASIC over many years, and by the Banking Royal Commission, which devoted several chapters to agricultural loan issues in the Interim and Final Reports.

6 We reject submissions made to the Committee that ASIC did not properly consider reports of misconduct made over the years in relation to farming loans.

7 Given the laws in place at the time of the conduct (which occurred from 1997 to mid-2010s) and ASIC's limited jurisdiction in relation to commercial lending, the main applicable provision is unconscionable conduct under the ASIC Act. In each case, the available evidence did not support such an action.

ASIC's consideration of issues relating to agricultural loans

8 The laws and protections for commercial and small business loans are not as strong as for individual consumers. The responsible lending provisions provide some consumer protection, however, these are only applicable to

consumer loans under the Credit Act, and do not apply to commercial lending.

9 The ASIC Act does provide some general protections for commercial borrowers, for example, by prohibiting unconscionable conduct, misleading or deceptive conduct. However, we did not find the available evidence in each case supported a contravention of these provisions.

10 Protection against unfair contract terms only applies for standard form small business contracts entered into or varied from 12 November 2016. The reports lodged with ASIC between 2011-2013 related to small business contracts that pre-dated these reforms.

11 We have also not found evidence that a bank has systemically acted unconscionably in relation to farming loans. This is consistent with findings of the Banking Royal Commission which made no referrals to ASIC of bank misconduct involving agricultural loans, no finding of systemic misconduct or unconscionable conduct by the banks, and no adverse comment in relation to ASIC's conduct involving farming loans. In addition, each farmer's experience involved individual circumstances, including contracts with different terms and conditions with many different lenders.

12 In relation to Mr O'Grady's evidence to the Committee, we initially assessed his reports of misconduct in 2013 and found no evidence of breaches of the bank's regulatory obligations. ASIC met with Mr O'Grady at the time to communicate our findings and have confirmed our position in writing. ASIC has also written to a parliamentarian who made enquiries on Mr O'Grady's behalf in 2016.

13 In relation to Mr Coburn's submissions during the public hearing, we have not been provided with details of the 63 farmers Mr Coburn represents. However, in July 2022, ASIC received letters from 29 people raising similar concerns as Mr Coburn's written submission. The letters were all in the same format and contained nearly identical statements. ASIC considered each person's situation individually and the issues they raised as a whole. These letters identified different experiences in relation to matters between 1997 and mid-2010. Most had reported these matters to ASIC many years earlier, closer to the time they experienced hardship. At the time of receiving those earlier reports, we considered the individual circumstances of each reporter against laws in ASIC's jurisdiction and did not identify illegal conduct or systemic misconduct by the banks. After receiving the 29 letters in 2022, we wrote responses to each person and advised we would not be taking action for various reasons, depending on the issues raised.

14 In his evidence at the public hearing, Mr Coburn suggested in Mr O'Grady's case 'it would be an unconscionable conduct case that ASIC could easily take on.' He further noted that 'many of the farmers in this situation have

outlined that there is predatory, asset-based lending.' He suggested that this may be a strategic priority for ASIC and therefore ASIC should pursue the conduct in line with its approach outlined in Information Sheet 151.

15 Asset-based lending is not illegal in commercial loan agreements and is quite common. The practice itself in commercial loans cannot be considered unconscionable conduct. Unconscionability generally requires a moral fault or lack of ethics and is unlikely to be demonstrated where the parties have adhered to a contracted bargain.

16 These issues were considered in detail in Chapter 6 of the Banking Royal Commission 2018 Interim Report on agricultural lending. While the Interim and Final reports identified challenges in agricultural lending, they did not conclude that banks had engaged in unconscionable conduct. Issues relating to banks' treatment of commercial loans with allegations of engineered default were also considered in the 2015 House of Representatives Inquiry into Impairment of Customer Loans. In our submission to that inquiry, we identified the following features that were common to a number of matters:

> - Concerns that the banks had imposed unfair terms or used their strong bargaining position to disadvantage debtors could not be made out on the evidence presented, taking into account the commercial relationships between the parties. It appeared that the lenders were enforcing their contractual rights under the loan agreements.
> - The lenders had generally expressed a willingness to negotiate amended repayment arrangements for the loans once the debtors entered financial difficulty or default, and had provided commercial terms for repayment once the debtors had entered default. Debtors generally sought more generous amended repayment terms, and were dissatisfied with or could not meet the lenders' proposed amended terms.
> - The lenders had pursued recovery of the loans through courts, and had received court orders enforcing the terms of the loan contract and to recover on the loan.
> - Some of the debtors had brought private action against the lenders or sought to defend the lenders' recovery proceedings against them on various grounds, and the courts had not found in the debtors' favour or the parties settled the proceedings confirming repayment obligations.

17 We note that since the matters raised by Mr Coburn and Mr O'Grady, there have been significant changes as a result of the Banking Royal Commission's recommendations to improve the way banks handle distressed agricultural loans. For example, changes have been made to the Banking Code of Practice (the Code) including in relation to farm debt mediation. However, ASIC does not have the function of enforcing the Code, as it is an industry owned code of conduct. Sanctions for breaches of the Code can be applied by the Banking Code Compliance Committee and individual/small

business banking customers can take breaches through internal dispute resolution and to the Australian Financial Complaints Authority (AFCA).

18 AFCA has the ability to resolve disputes for small businesses under certain monetary caps, as did its predecessors. ASIC is unable to intervene in decisions by AFCA or its predecessors.

19 There are State-based farm debt mediation schemes in NSW, Victoria, Queensland, SA and a voluntary scheme in WA. There is no national scheme. After the Royal Commission in 2019, the Australian Government developed a National Better Practice Guide for farm debt mediation arrangements to improve consistency between the jurisdictions. In addition, law reform was implemented in 2016 which introduced unfair contract terms for small business lending,

2. Mr David Sutton and Aus Streaming Limited

20 We note Mr Stephen Helberg's evidence at the public hearing on 4 October 2023 that he and other investors had engaged with ASIC from 2021 about Mr Sutton, Mr Turner and Aus Streaming Limited, and they only received an acknowledgement from ASIC that the information had been received. Mr Helberg also indicated that he had offered multiple times to assist ASIC with its investigation, including to provide information, and that ASIC declined. We outline below ASIC's action in relation to this matter and our interaction with Mr Helberg.

ASIC's action in relation to Mr Sutton and Aus Streaming

21 ASIC's investigation of Mr Sutton and Aus Streaming Limited involved extensive reviews of documents obtained using ASIC's compulsory evidence gathering powers, as well as interviews conducted with numerous witnesses on a voluntary basis or by way of section 19 examinations. Based on ASIC's review of evidence gathered during our investigation, we found that:

(a) the investments involved speculative shares of mostly offshore entities;

(b) the offshore entities were structured so that the alleged value in them was based on other shareholdings or interests in further offshore entities or projects;

(c) several offshore individuals played a significant role;

(d) there was a significant flow of funds offshore.

The evidence gathered was not to the standard necessary to establish criminal conduct by persons of interest in Australia.

22 In July 2023, we permanently banned David Sutton from having any involvement in financial services and from managing corporations for five years. We also cancelled the Australian Financial Services Licence of McFaddens Securities Pty Ltd (which we understand is now in liquidation and of which Mr Sutton was the sole director). If David Sutton or McFaddens Securities Pty Ltd contravene these administrative orders then ASIC will consider taking further action.

Our interaction with Mr Helberg

23 For completeness, we note that prior to the period referred to in Mr Helberg's evidence, we spoke with Mr Helberg in 2017. This followed a report of misconduct from another person which did not allege fraud, but raised issues about fundraising activity by Aus Streaming Limited. The reporter provided us with Mr Helberg's contact details and we spoke to Mr Helberg to obtain more information about the company. Mr Helberg's information was assessed together with all available information. ASIC decided not to take further action as external administrators were appointed to Aus Streaming Limited on 3 February 2018, who were then responsible for conducting investigations into the company's affairs. This position is consistent with ASIC's public Information Sheet 175.

24 In 2022, while we did not receive reports of misconduct directly from Mr Helberg, ASIC received multiple reports of misconduct from investors raising issues about Mr Sutton's conduct between 2019 to 2023.

25 We commenced an investigation in March 2022 and contacted Mr Helberg in July 2022 to follow up on an affidavit that he had provided in relation to the liquidation of Aus Streaming Limited.

26 That initial contact included a request to provide us further documentation, which was provided, assessed and used to assist the investigation. There has also been some ongoing contact with Mr Helberg in which we indicated our investigations are ongoing but we could not go into any specific detail.

27 While we have engaged in various communications with Mr Helberg, we elected not to conduct a formal interview with him. Based on the information that Mr Helberg provided (which included a comprehensive affidavit that detailed the evidence he could give, as well as other evidence that had been gathered), ASIC did not consider a formal interview with Mr Helberg was necessary.

28 Tactical decisions of this nature as to whether a formal interview ought to be conducted are made in investigations on a regular basis and for many different reasons, including an assessment as to whether a formal interview would likely yield any further evidence than that already in ASIC's

possession. This ensures efficient use of ASIC's finite investigation resources.

29 Given the allegation presented to the Inquiry, ASIC contacted Mr Helberg to ascertain whether he had any evidence that might support further investigation being undertaken. Based on the information provided, ASIC is intending to make no further enquiries.

30 Mr Helberg in his evidence suggested that ASIC does not use its data analytics to identify systemic issues. ASIC has a robust system in place to identify systemic issues arising from reports of misconduct. Our initial assessment team triages each report of misconduct by conducting searches on our confidential internal databases to check the history of the subjects before making a risk assessment and allocating resources accordingly.

3. Kalkine

31 We note Mr Pitts' and Mr Weatherstone's evidence at the public hearing on 4 October 2023 referring to Kalkine. As noted in our supplementary submission on 29 September 2023, *Question on Notice Set 9,* question 5 of *Question on Notice Set 49* and *Question on Notice Set 60*, ASIC has an open investigation into Kalkine Pty Ltd.

32 As outlined in *Question on Notice Set 60*, the reports of misconduct ASIC received about this matter provided limited information about the nature of advice being offered as part of a subscription service. Some reports were anonymous, and many were based on limited interaction with cold callers. Concerns raised included: providing personal financial advice outside of Kalkine's authorisation, poor service or no service, breaches of the anti-hawking provisions, problems with Kalkine's complaints handling processes, training and competency of overseas based staff and misleading conduct.

33 We have interviewed multiple investors and we have reviewed transcripts of many call recordings as part of our investigation. We are aware of 72 complainants who have lodged complaints with AFCA, some of whom have also lodged reports of misconduct with ASIC. We have attempted to contact 62 of these complainants. Many of them did not respond to our communications. Of the complainants that have responded, 27 have participated in a voluntary interview with ASIC. These interviews were conducted between February and October 2023.

34 We have not yet reached any conclusion in relation to whether any regulatory action is available to be taken against Kalkine, including in relation to the allegations that Kalkine is providing unlicensed *personal*

financial advice. Kalkine holds an Australian Financial Services Licence to provide *general* advice only.

35 We note Mr Pitts evidence refers to a 'new company called SivaStatz' Our investigation has been expanded to include the website 'SivaStatz' recently set up by Kalkine under the company name Sivadata Pty Ltd (Sivadata) and associated entity Kalkine Media Pty Ltd (Kalkine Media). SivaStatz is a general information website and Sivadata does not hold an AFS licence. ASIC is investigating whether Sivadata and Kalkine Media are nevertheless providing financial product advice to clients.

4. DW8

36 Mr Walden in his evidence at the public hearing on 4 October 2023 referred to having raised concerns with ASIC about insider trading relating to DW8.

37 In 2022 and 2023, we received multiple reports from shareholders or anonymous persons raising concerns about possible insider trading by a director of the company who had sold shares ahead of company announcements. The information provided to ASIC related to publicly available information. We did not take further action as the information available was not of sufficient substance or quality to warrant such action.

38 Between 2019 and 2022, we received reports from concerned shareholders that the company's share price was being manipulated to pump up the price. Material provided largely consisted of public information available via statements on websites. ASIC assessed the allegations and did not take further action because there was no information that indicated there was a breach of the law.

39 We also use our market surveillance system and access to other intelligence that is not available publicly to identify and review unusual movements in price and trading volumes. Information from reports provided by members of the public can in certain circumstances be used to supplement this.

5. IPO matter

40 Mr Walden also spoke about a 'fraudulent IPO' which he raised with ASIC. Mr Walden acknowledged that ASIC acted quickly to request further information and require the company to lodge a supplementary prospectus addressing the misinformation. However, he asserted that the initial and supplementary prospectus 'were still severely lacking in detail' and was critical that ASIC 'allowed' the company to list on the ASX.

41 Based on the information available to us at the time, including the evidence provided by Mr Walden, there was insufficient evidence to establish that the company's business model was fraudulent. We did, however, identify a number of issues that needed to be rectified by the company and which we requested to be addressed through a series of measures including supplementary disclosure, changes to business practices and policies, and removal of certain statements from the company's website. Many of the outcomes achieved were as a direct result of the intelligence received from Mr Walden and, in ASIC's view, adequately addressed Mr Walden's concerns.

ASIC's role is to identify disclosure deficiencies, not 'approve' IPOs

42 Mr Walden's evidence misconstrues ASIC's role in relation to prospectuses.

43 It is not ASIC's role to approve IPOs. ASIC does not regulate the merits of investments. Where a prospectus meets our risk criteria, ASIC's role is to review the prospectus for disclosure deficiencies and contraventions of the Corporations Act. If we identify deficiencies in the disclosure document, such as statements that we consider may be misleading or deceptive or where there is an omission of information required to be provided under the legislation, it is our practice to engage with the company or its legal representatives to seek corrective disclosure. If we are unable to obtain sufficient corrective disclosure, ASIC may choose to pursue a stop order to permanently stop that particular offer being made.

44 We have powers to prevent the offer, issue, sale or transfer of securities under a disclosure document lodged with ASIC where, in our view:

(a) the document contains a misleading or deceptive statement;

(b) there has been an omission of information required to be provided under the legislation;

(c) a new circumstance has arisen since the disclosure document has been lodged; or

(d) the disclosure is not worded and presented in a clear, concise and effective manner (see paragraph 340 of RG 254).

45 We do not, however, provide 'approval' for an IPO to proceed.

46 Additionally, our review of a prospectus does not consider whether the securities offered are desirable investments.

ASIC's action in relation to the IPO

47 At the time the prospectus was lodged, we reviewed the prospectus and raised disclosure deficiencies with the company's lawyers within the

exposure period time frame set in the Corporations Act (7 days). The company then lodged a supplementary prospectus containing additional disclosure addressing the disclosure deficiencies.

48 A report of misconduct was received a month later from Mr Walden, shortly before the proposed listing date on ASX. After carefully reviewing the evidence provided, we further engaged with the company's lawyers, including requesting details in relation to specific elements of the company's business model, resourcing, policies and practices. The company lodged a second supplementary prospectus providing additional disclosure. The company also took steps to correct certain deficiencies on its website and to change its business policy and practice.

49 Contrary to Mr Walden's evidence, ASIC was not prompted to review the company by the ASX. We made these enquiries in a timely manner in recognition of the proposed listing date and the nature of the allegations in the report of misconduct.

50 Following our enquiries and the lodgement of supplementary disclosure to address the concerns ASIC raised, our view was that the company had adequately addressed the disclosure deficiencies identified. We formed the view that together the supplementary prospectuses provided sufficient additional detail on the company's business model and how the company proposed to generate revenue.

51 Mr Walden's evidence referred to ASIC having 'had the opportunity to not let the IPO proceed.' We note that listing decisions are a matter for the market operator, in this case the ASX. As part of ASIC's review, we considered whether the disclosure documents contained misleading or deceptive statements or if there was an omission of information required under the Corporations Act, and whether that disclosure or omission was "materially adverse" from the point of view of an investor and therefore, whether withdrawal rights should have been offered to applicants of the offer. We concluded that the requisite threshold of any disclosure deficiencies being "materially adverse" for an investor was not met.

52 As explained below, our review of the available information did not support the allegation of fraudulent activity made by Mr Walden. Concerning Mr Walden's suggestion that the business model was 'unviable' and 'was never going to deliver shareholder returns', our review of disclosure documents does not consider the merits of the offer or whether the securities offered are desirable investments.

Evidence of fraud

53 In addition to Mr Walden's evidence about a 'fraudulent IPO' during the hearing on 4 October 2023, Mr Walden's submission to the Committee

(Submission 61) states that ASIC 'seemed to agree with the evidence of fraud presented'.

54 Based on our enquiries, our view was that there was insufficient evidence to substantiate allegations that the company, its business model or the IPO itself, were 'fraudulent'.

55 We further wish to clarify that at no time in our correspondence with Mr Walden did we state that we 'agree with the evidence of fraud'. After receiving Mr Walden's report of misconduct, we requested further information from Mr Walden to better understand the allegations being made. Such a request for further information should not be interpreted as an indication that we agree with the allegations made in a report of misconduct.

6. Prime Trust

56 We note the evidence provided to the Committee at the public hearing on 4 October 2023 by the Prime Trust Action Group. The Prime Retirement and Aged Care Property Trust (the **Prime Trust**) collapsed in 2010.

57 We outline below ASIC's action on this matter and the claim for compensation by investors under the Scheme for Compensation for Detriment caused by Defective Administration (**CDDA scheme**). We also respond to certain evidence provided to the Committee at the hearing.

Our concerns and action taken

58 Prior to the collapse of Prime Trust in 2010, ASIC had received 40 reports in relation to Australian Property Custodian Holdings Ltd (**APCH**), the responsible entity of Prime Trust.

59 While several earlier reports concerned contractual matters in relation to which ASIC took no action, in 2006 we became concerned about three reports from investors relating to the provision of unlicensed advice. We took action to ban the advisor engaging in unlicenced conduct for two years.

60 In 2006 we were also concerned about five reports received regarding alleged conduct by a director. This did not lead to regulatory action as that director had already resigned, and there was not sufficient information to indicate a breach of the law.

61 Between 2006 and 2007, we became concerned about the adequacy of disclosure in APCH's Product Disclosure Statements (**PDS**). In July 2006, we issued an interim stop order which resulted in APCH issuing a Supplementary PDS. We subsequently raised further concerns with APCH, which resulted in the issue of a further supplementary PDS in July 2007. The

2007 Supplementary PDS provided further disclosure on certain matters, including the status of court proceedings commenced by ASIC in September 2004 against companies of which the managing director of APCH was a director.

62 In 2007 and 2008 we received two reports relating to APCH's market performance. In 2008, a reporter advised of a slump in the share price and in 2008 a reporter alleged market manipulation. ASIC did not formally investigate any of the reports of misconduct or take further action as the information available was not of sufficient substance or quality to warrant such action.

63 In 2009 we received six reports, of which three were from the same person. Reports variously raised concerns about the charging of fees by APCH, scheme meetings, and the conduct of an adviser that sold investments in Prime Trust. ASIC did not formally investigate any of the reports as ASIC had already taken action against the relevant adviser. ASIC does not intervene in the management of meetings and the fees charged were in accordance with disclosure documents and investors were able to access internal and external dispute resolution services.

64 In 2010 we received 20 reports from investors. Three were from the same person. All twenty reports raised concerns about the high level of fees being charged by APCH and the fall in value of the investment. ASIC commenced a surveillance to conduct further inquiries into APCH and Prime Trust in August 2010. ASIC also received a large volume of reports in late 2010 and 2011 after the collapse of Prime Trust, when administrators and receivers were appointed to ACPH. These reports were largely from investors in a template format and very similar in content. The substance of these reports was to request ASIC investigate the conduct of the responsible entity and its directors.

65 In August 2010, we commenced enquiries and subsequently an investigation into Prime Trust. As part of our investigation, we considered various related party transaction arrangements and potential conflicts of interest.

66 In August 2012, we commenced civil penalty proceedings in the Federal Court against APCH, the responsible entity of the Prime Trust. Central to the case was our concern regarding whether APCH and the former directors satisfied their duty under the Corporations Act to act in the best interests of the members of the scheme and to refrain from making improper use of their position as an officer to cause detriment to the members of the scheme. ASIC sought orders for the disqualification of the former directors from managing corporations and the imposing of pecuniary penalties.

67 In December 2013, Murphy J of the Federal Court found that the directors had breached their duties and in December 2014 disqualification and

pecuniary penalty orders were made against the five former directors. In 2016, those orders were set aside by the Full Court of the Federal Court after an appeal by the directors, with ASIC then seeking special leave to appeal to the High Court in respect of all but one former director.

68 In December 2018, the High Court unanimously allowed ASIC's appeals, finding that ASIC had succeeded in two of its three grounds of appeal.

69 In October 2019 and following the High Court's decision, the Full Court of the Federal Court reinstated the original pecuniary penalties and periods of disqualifications imposed by Murphy J (save for orders made in relation to one original respondent director).

Claim for compensation by investors

70 We are aware that the Prime Trust Action Group has sought to advance claims for compensation by investors in Prime Trust under the CDDA scheme.

71 ASIC is not authorised to consider claims made under the CDDA scheme. This position has been communicated to the Prime Trust Action Group.

72 We reject the assertion in evidence provided to the Committee that this has created a situation where ASIC cannot be held accountable for its actions. Information about how the general public can make an act of grace claim is set out on our website: see Financial compensation schemes | ASIC. The act of grace scheme applies to ASIC and is administered by the Department of Finance. The mechanism provides a discretionary power to allow payments to be made if the Finance Minister or their delegate considers there are special circumstances and it is appropriate.

73 Act of grace applications were received by the Department of Finance from SR Group as representatives on behalf of Prime Trust investors.

APCH's Australian financial services licence

74 We also reject the allegation by Mr O'Reilly at the hearing on 4 October that ASIC contravened the Corporations Act by having issued and 'reissued' an Australian financial services (AFS) licence to APCH, and by having insisted a particular individual be the key person under the licence.

75 Prior to the collapse of Prime Trust and having regard to the information that ASIC had in its possession, ASIC formed the view that no licensing action should be taken, noting that under the Corporations Act, there is no requirement to continuously monitor the good fame and character of responsible officers of a licence holder.

76 APCH was granted a dealer's licence in 2001, prior to the introduction of the current AFS licence regime. At the time, s784 of the *Corporations Act 2001* provided that ASIC *must* grant a licence unless it had reason to believe that the applicant would not perform their duties efficiently, honestly and fairly. No matters of concern had been raised in relation to the responsible officer of APCH that would provide a basis for ASIC to form such a belief.

77 ASIC granted APCH an AFS licence in 2003 following the transition to the AFS licensing regime. As part of this transition process, APCH and its responsible officers were not subject to the good fame and character test in s913B(3) of the Corporations Act as they already held a dealer's licence. This is because s1433(2)(c) of the Corporations Act provided that for a holder of a dealer's licence, s913B applied as if certain subsections, including s913B(3), were omitted.

78 We did not subsequently 'reissue' this AFS licence to APCH. The licence was varied in 2005 to expand APCH's authorisation, and in 2007 to authorise APCH to operate another registered managed investment scheme. ASIC was not required under the Corporations Act to consider matters of good fame or character, or whether the responsible officers would perform their duties 'efficiently, honestly and fairly', in making these variations.

79 Further, APCH nominated its sole responsible officer in its AFS application. It is our practice generally to name such a person as a key person on the licence. This is primarily to identify the individual or individuals on whom the entity depends. We did not nominate or insist on this individual to be the key person under the licence.

7. Mr Gabriel Bernarde

80 We refer to evidence provided by Mr Gabriel Bernarde to the Committee at the public hearing on 1 November, and provide clarification on our investigation into trading activity by Mr Bernarde.

81 In March 2021, we commenced an investigation into suspected insider trading by Mr Bernarde following receipt of information from multiple sources between October 2020 and January 2021, together with insights from our own analysis of Mr Bernarde's trading activity.

82 We identified suspicious trading in nine entities listed in multiple jurisdictions shortly ahead of (and in some instances only hours before) the release of price-sensitive announcements or events, including by purchasing contracts-for-difference (CFDs) prior to takeover announcements. Three of the suspicious trades involved short (sell) positions, while the remaining six suspicious trades involved long (buy) positions. We were concerned these trades were suspicious including because they were inconsistent with Mr

Bernarde's usual trading pattern and because he appeared to be willing to risk more money in relation to the suspicious trades.

83 We determined that search warrants would be necessary to maximise our chances of securing evidence of suspected insider trading. Insider trading is a serious criminal offence carrying a maximum sentence of 15 years imprisonment. The exercise of search warrants powers is subject to judicial oversight: only a magistrate or judge can issue a search warrant and they must be satisfied by the evidence that there are reasonable grounds for believing that there is, or will be evidence as to the commission of an indictable offence.

84 We executed the search warrant at Mr Bernarde's residence in August 2021. We reviewed the evidence seized during the search warrant and conducted other investigative steps including conducting an examination of Mr Bernarde under s19 of the ASIC Act. In December 2021, we finalised our investigation after forming an assessment that the evidence available was insufficient to establish insider trading to the necessary standard.

85 The Committee has heard evidence referring to a 'gag order'. This is incorrect. As part of our investigation, we required Mr Bernarde to attend an examination conducted under s19 of the ASIC Act. We issued Mr Bernarde with a confidentiality direction during the s19 examination. We make such directions during examinations to ensure that ASIC's investigation is not undermined by the disclosure of the nature of the questioning in the examination to the public or other persons who might later be examined. This requires participants to not disclose what was asked and said during the examination, but it does not preclude the sharing of information that does not relate to the examination. The direction to Mr Bernarde ceased to be effective in November 2022.

86 The evidence presented to the Committee also referred to whistleblowers. As far as ASIC is aware, Mr Bernarde was not an eligible whistleblower under the *Corporations Act 2001*. Short seller reports made public do not fall within the definition of qualifying whistleblower disclosures under the Corporations Act.

87 We note there was some suggestion that ASIC targets short sellers. ASIC does not have a policy on short selling. However, there are laws that may apply to short selling activity and ASIC has published guidance on this, as well as our expectations about the importance of maintaining market integrity:

- Reg Guide 196 – Short selling contains guidance about the short selling provisions of the Corporations Act 2001 and the Corporations Regulations 2001 as they relate to securities, managed investment

products and certain other financial products, including ASIC's expectations in relation to the reporting of short sales.

- Info Sheet 255 – Activist short selling campaigns in Australia contains guidance in relation to ASIC's expectations to promote market integrity during activist short selling campaigns.

8. Aust Home investments

88 We note the evidence by Mr O'Chee to the Committee at the public hearing on 1 November regarding Aust-Home Investments.

89 This is a very old matter undertaken in 1991 by ASIC's predecessor the Australian Securities Commission (ASC).

90 The matter was considered by the Federal Court and Queensland Supreme Court and was subject to detailed oversight by parliamentary committees at the time.