



**ASIC**  
Australian Securities &  
Investments Commission

# **Inquiry into Australian Securities and Investments Commission investigation and enforcement**

## **Supplementary submission by the Australian Securities and Investments Commission**

August 2023

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## A Overview

- 1 The Australian Securities Investments Commission (ASIC) makes this supplementary submission to the *Inquiry into Australian Securities and Investments Commission investigation and enforcement* (Inquiry) in response to the letter dated 11 August 2023 from the Chair of the Senate Economics Reference Committee (Committee).
- 2 Our submission addresses the following ASIC matters:
  - (a) Investigations into suspected misconduct relating to Nuix Limited, including suspected insider trading in shares of Nuix (see Section B).
  - (b) The surveillance into the switching of investment options by directors and executives of superannuation trustees (see Section C).
  - (c) The investigation into suspected misconduct by ALS Limited (see Section D).
  - (d) The consideration of possible insider trading involving shares of Magnis Energy Technologies Limited (see Section E).
- 3 In each of these matters we carefully examined allegations about potential misconduct within our remit. We undertook a detailed and thorough assessment of the evidence and used ASIC's compulsory information gathering powers. In three of those matters we conducted extensive investigations. We took enforcement action where it was available and appropriate. We had to concede that no further enforcement action could be taken regarding the other allegations, as the evidence would not enable us to prove those allegations in a court of law. In the fourth matter the evidence available was so limited that it did not justify the commencement of an investigation.

### **Our enforcement record**

- 4 We reject the recent criticism arising from the Inquiry regarding ASIC's enforcement record. That criticism appears to ignore ASIC's actual enforcement record and the changes ASIC has made to strengthen its approach to enforcement since the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. In this respect, we refer to the remarks of ASIC's Chair, Joe Longo, in his opening statement to Inquiry's hearing on 23 June 2023: see the appendix.

- 5 ASIC is a law enforcement agency. We have been, and continue to be, an active and effective litigator. Our enforcement outcomes in 2022–23 included:
- (a) 32 new criminal proceedings commenced and 44 criminal proceedings completed;
  - (b) 35 individuals and entities convicted, with 21 custodial sentences and 14 non-custodial sentences imposed;
  - (c) 62 new civil proceedings commenced and 52 civil proceedings completed;
  - (d) \$185.4 million in civil penalties imposed by the courts;
  - (e) 106 individuals or companies removed, restricted or banned from providing financial services or credit, and 32 individuals disqualified or removed from managing companies; and
  - (f) 20 infringement notices issued, with \$6.7 million in infringement notice penalties paid.
- 6 In relation to insider trading, which appears to be a particular focus for this Inquiry, we have a strong and consistent record of convictions: see the opening statement of ASIC’s Chair in the appendix. We encourage the Committee to look at the research, which has consistently assessed Australian’s equity markets as one of the cleanest globally. See, for example, SS&C Intralinks, [2020 M&A leaks report](#) [PDF 386 KB], October 2020.

### **Our approach to this submission**

- 7 This submission provides the Inquiry and the public with information about how the relevant matters came to our attention, the key investigative steps we undertook, and the analysis and decision-making processes that informed our decision to take no further action in each matter.
- 8 In this submission we also address recent commentary about our cooperation with the Inquiry and our deep concerns about the impact of this Inquiry making public information and documents provided to ASIC in confidence, including by whistleblowers and under compulsion: see Section F.
- 9 This submission should be read in conjunction with [Inquiry into Australian Securities and Investments Commission investigation and enforcement: Submission by the Australian Securities and Investments Commission](#), February 2023.

## B Nuix investigations

### Key points

ASIC has conducted extensive investigations into various reports of alleged misconduct by Nuix Limited (Nuix) and its officers and directors.

These investigations included executing search warrants, issuing statutory notices, conducting section 19 examinations, obtaining information from other regulators, and considering significant volumes of documentary evidence and other materials. We also engaged with a whistleblower and their legal representatives.

As a result of these investigations, we commenced civil penalty proceedings in the Federal Court alleging breaches of continuous disclosure obligations and misleading or deceptive conduct by Nuix. We also commenced proceedings against the entire Nuix board at the relevant time for breaches of directors' duties.

As to the allegations we have investigated and not taken further action:

- In relation to the Nuix initial public offering (IPO) prospectus issued in November 2020, we did not find sufficient evidence to establish that the relevant revenue forecast in the prospectus lacked reasonable basis, or that Nuix made false or misleading statements in its IPO prospectus about that forecast.
- In relation to suspected insider trading by the former CFO of Nuix, Stephen Doyle, and his brother, Ross Doyle, our investigation did not identify any direct evidence of Stephen Doyle communicating inside information to Ross Doyle or of Stephen Doyle procuring Ross Doyle to dispose of the Nuix shares on Stephen Doyle's behalf.
- In relation to Macquarie Capital, the joint lead manager and underwriter of the Nuix IPO, we investigated concerns that it did not have adequate arrangements in place for the management of conflicts of interest. We did not find sufficient evidence to establish a contravention.

We have also commenced a new investigation into suspected insider trading in Nuix shares by the CEO of Nuix between 5 and 8 September 2022, and suspected false information being provided in Nuix's response to an ASX query on 14 September 2022. This investigation is continuing.

### Timeline of the Nuix investigations

- 10
- Since 2020, we have examined various allegations about potential misconduct involving Nuix and taken enforcement action where it has been available. Our work has involved a number of matters, as outlined below.

- 11 We reviewed the Nuix IPO prospectus in November 2020. ASIC’s role in that review and our consideration of information from a whistleblower has been the subject of detailed scrutiny at the Joint Parliamentary Committee on Corporations and Financial Services (PJC). Our approach is set out in questions on notice and [our letter to that Committee on 9 July 2021](#) [PDF 246 KB].
- 12 Between June 2021 and January 2022, we conducted a comprehensive investigation into potential false or misleading statements by Nuix in its IPO prospectus, focusing on the forecasts published in that prospectus.
- 13 Between May and December 2021, we investigated whether Macquarie Capital, the joint lead manager and underwriter of the Nuix IPO, had adequate arrangements in place for the management of conflicts of interest.
- 14 Between May 2021 and September 2022, we conducted an investigation into suspected insider trading by Nuix’s former CFO Stephen Doyle, his brother Ross Doyle, and a company controlled by Ross Doyle.
- 15 In August 2021, we expanded our insider trading investigation to also investigate suspected breaches of continuous disclosure obligations and directors’ duties by Nuix and its board, relating to market announcements about Nuix’s results for the first half of 2020–21.
- 16 On 28 September 2022, we commenced civil penalty proceedings in the Federal Court alleging breaches of continuous disclosure obligations and misleading or deceptive conduct by Nuix, and for breaches of directors’ duties by the Nuix board at the relevant time: see Media Release ([22-262MR](#)) *ASIC sues Nuix and its board for continuous disclosure and directors’ duties breaches* (29 September 2022).
- 17 On 10 May 2023 we commenced a new investigation into suspected insider trading in Nuix shares by the CEO of Nuix between 5 and 8 September 2022, and suspected false information being provided in Nuix’s response to an ASX query on 14 September 2022. This investigation is continuing.
- 18 While we are unable to provide any comment on our ongoing investigation, we have set out details of our closed investigations below.

## Concerns underpinning our investigations

### Insider trading concerns

- 19 The Committee is particularly interested in the investigation we conducted between May 2021 and September 2022 into the suspected communication of inside information and insider trading of Nuix shares in contravention of

s1043A(1) and (2) of the *Corporations Act 2001* (Cth) (Corporations Act). This investigation was focused on Nuix's former CFO Stephen Doyle, his brother Ross Doyle, and Black Hat Pte Ltd (Black Hat).

20 We suspected that:

- (a) Stephen Doyle, as the CFO of Nuix, had access to inside information about Nuix's results for the first half of 2020–21 (HY results), which were released to the market on 26 February 2021. The HY results recorded a 4% reduction in Nuix's year-on-year revenue and that Nuix was tracking slightly below its forecast run rate. While the HY results re-affirmed Nuix's full-year guidance, Nuix's share price fell 32.44% the day the HY results were released;
- (b) Stephen Doyle may have communicated that inside information to his brother, Ross Doyle, before the information was released to the market; and
- (c) Ross Doyle and Black Hat (of which Ross Doyle was a director) had sold the entirety of their shareholdings in Nuix for approximately \$17.8 million between 22 January to 12 February 2021 (inclusive) while in possession of inside information, avoiding a total loss of approximately \$5 million.

21 The suspected conduct was of significant concern to ASIC because insider trading is a serious criminal offence; it undermines the integrity of financial markets that are otherwise assumed to be fair and transparent. Misconduct that damages market integrity, including insider trading, is an enduring enforcement priority for ASIC. People who insider trade exploit an unfair advantage that, in turn, undermines trust in market fairness and efficiency. In this case, the suspected insider trading resulted in substantial loss avoidance.

### **False or misleading statement concerns**

22 Nuix listed on ASX following an IPO in November 2020 in which it raised \$953 million. Within the first six months of listing, it downgraded its 2020–21 revenue forecast by 10%. Given the downgrade and resulting share price fall, we were concerned about whether the information disclosed in Nuix's IPO prospectus was false or misleading, and whether there was a reasonable basis for the relevant forecast.

23 Accurate financial reporting of information is fundamental to confidence in financial markets, to enable investors to be reliably informed on risks and sensitivities that can affect a company's ability to achieve revenue forecasts.

### **Conflicts of interest concerns**

24 Australian financial services (AFS) licensees must have in place adequate arrangements for managing conflicts of interest that may arise wholly, or

partially, in relation to activities undertaken in the provision of financial services covered by their licence.

- 25 We investigated concerns that Macquarie Capital did not have the necessary measures and safeguards in place to manage its conflicts of interest when:
- (a) a related entity owned and controlled 76.2% of Nuix issued shares before the IPO and stood to receive a significant profit from the sale;
  - (b) Macquarie Capital were remunerated for their role as the joint lead manager and underwriter of the Nuix IPO; and
  - (c) two employees of Macquarie Group were members of the Nuix board at the time the IPO prospectus was lodged.

## How we became aware of the matter

- 26 In March 2021, shortly after Ross Doyle's and Black Hat's Nuix shareholdings were sold, we were notified of the potentially suspicious trading by a broker. The notification came through a suspicious activity report submitted to ASIC under the *ASIC Market Integrity Rules (Securities Markets) 2017* and a suspicious matter report submitted to AUSTRAC. We considered these reports of alleged misconduct, undertook further inquiries and analysis and commenced a formal investigation.
- 27 In April 2021 Nuix downgraded its revenue forecast, which led to a further drop in its share price and attracted increased media reporting. We undertook a preliminary assessment and decided to commence an investigation into concerns about potential false or misleading statements and conflicts of interest.

## Key investigative steps we undertook

- 28 On 4 May 2021, we commenced a formal investigation into potential insider trading and communication of inside information under s13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). The investigation was identified as strategically significant for ASIC given:
- (a) the suspected misconduct in this case was serious. The loss avoided by the alleged conduct was substantial and the steps we suspected had been taken to obscure the conduct were complex;
  - (b) Stephen Doyle, as the person suspected of communicating inside information, was a 'true insider' as the CFO of Nuix; and
  - (c) this was anticipated to be a high-profile matter, given significant media attention on other matters involving Nuix at the time.



29 On 28 May 2021, we commenced a formal investigation into a suspected contravention of the general AFS licensee obligations (s912A of the Corporations Act) by Macquarie Capital in relation to its arrangements for managing conflicts of interest arising from its role in the Nuix IPO.

30 On 18 June 2021, we commenced a formal investigation into whether:

- (a) Nuix's accounts were materially false in not recognising revenue in accordance with accounting standards; and
- (b) the IPO prospectus contained false or misleading statements about Nuix's 2020–21 revenue forecast.

31 The investigations were considered strategically significant for ASIC. Regular updates on the progress of the investigation were provided to, and key decisions were approved by, Senior Executive Leaders in the Enforcement team and the Commission.

### **Insider trading and continuous disclosure investigation**

32 It was an integral component of ASIC's initial investigation strategy that search warrants would be necessary to maximise our chances of securing evidence of suspected insider trading. The planning and execution of search warrants requires careful strategic investigative planning and the commitment of significant resources from ASIC, as well as resources from the relevant partner agency (e.g. the Australian Federal Police or state or territory police).

33 As a preliminary step, we obtained information and documents relating to Stephen and Ross Doyle (the persons of interest), Black Hat and the relevant transactions. This included using ASIC's coercive powers under the ASIC Act and the Corporations Act. We issued more than 21 statutory notices to 9 entities. We obtained the bank and trading account information of the persons of interest and their related parties, details for certain accounts and associated transactions, internet protocol (IP) address access data, call records, AUSTRAC records, and information about the location and movements of the persons of interest.

34 The information obtained at this stage of the investigation informed our decisions in May and June 2021 to:

- (a) expand the scope of the investigation to include suspected contraventions of the proceeds of crime provisions in the *Criminal Code Act 1995* (Cth) (see s400.2 and 400.3) and make a referral to the Australian Federal Police Criminal Assets Confiscation Taskforce;
- (b) engage external solicitors and counsel, and make an *ex parte* application in the Federal Court under s1323 of the Corporations Act for orders to

prohibit Ross Doyle from leaving Australia without the consent of the court; and

- (c) apply for search warrants for residential and business premises related to the persons of interest with the support of affidavits of ASIC investigators.

35 Before the execution of the search warrants, our investigation was covert. We considered that the potentially incriminatory nature of the material we would be seeking under the search warrants created a real risk that evidence might be concealed or destroyed, and that the relevant material would not be produced if it was sought under a statutory notice process. Deliberate decisions were made about when to apply for search warrants and to seek the travel restraint order against Ross Doyle based on information ASIC obtained about his imminent plans to leave Australia.

36 In late June 2021, the search warrants were executed, and hard-copy materials and electronic devices were seized from the relevant premises. In parallel, we obtained orders from the Federal Court restraining Ross Doyle from leaving Australia.

37 After the execution of search warrants, with the investigation overt, we issued notices to the persons of interest requiring them to appear for examinations under section 19 of the ASIC Act (section 19 examinations).

38 Following a preliminary review of the evidence we gathered, we expanded the scope of the investigation to include suspected contraventions of the continuous disclosure obligations and directors' duties.

39 Between July 2021 and July 2022, we dedicated substantial resources to progressing the investigation. Our work included:

- (a) issuing further statutory notices to 12 relevant entities and 12 individuals;
- (b) conducting section 19 examinations with the persons of interest over a number of days and with 9 witnesses;
- (c) obtaining information from other regulators under the International Organization of Securities Commission (IOSCO) Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information; and
- (d) reviewing and analysing the significant volume of documentary evidence and other materials we obtained, including the material seized under the search warrants. The volume of material obtained in the investigation was vast and included over 50,000 documents and 14 electronic devices.

## **False or misleading statement and conflicts of interest investigations**

- 40 The investigations into potential false or misleading statements and concerns about conflicts of interest management were conducted in close coordination. Both investigations related to the conduct of the Nuix IPO and there was significant overlap in the persons and entities that could provide information relevant to the investigations.
- 41 The primary investigation tasks we undertook included:
- (a) reviewing and analysing significant volumes of material gathered during the insider trading and continuous disclosure investigations;
  - (b) issuing additional statutory notices to 4 separate entities and 14 individuals;
  - (c) conducting interviews and section 19 examinations with at least nine current and former representatives of Nuix, Macquarie Capital and PwC;
  - (d) communicating with the whistleblower and the whistleblower's legal representatives;
  - (e) reviewing and analysing more than 35,000 documents (separate from the material from the insider trading and continuous disclosure investigation); and
  - (f) using our specialised accounting personnel, assessing the impact of risks on the revenue forecasts adopted by Nuix.
- 42 We also engaged an independent professional advisory firm and external solicitors and counsel to assist with considering and advising on potential causes of action.

## **Our assessment and outcome**

### **Insider trading concerns**

- 43 In September 2022, after a careful assessment of the evidence gathered in the investigation, we decided to finalise the insider trading investigation. This was because our investigation did not identify any direct evidence that Stephen Doyle communicated the inside information to Ross Doyle or that Stephen Doyle had procured Ross Doyle to dispose of the Nuix shares on Stephen Doyle's behalf. This is despite our investigation having identified evidence to establish that, at the relevant time, Stephen Doyle was in possession of inside information by virtue of his then role as CFO of Nuix because he had been informed of the substance of the HY results before they were announced to the market.

44 Critically, to establish the communication of inside information and insider trading, we would need to prove to a court that (among other things) Stephen Doyle both:

- (a) was in possession of inside information, which he knew or ought to have known was not generally available and was material; and
- (b) either communicated the inside information to Ross Doyle, who he knew or ought to have reasonably known was likely to sell shares in Nuix, or procured Ross Doyle to dispose of Nuix shares.

45 Without direct evidence, any allegation that Stephen Doyle communicated inside information to Ross Doyle would depend on an entirely circumstantial case. That is, we would be asking a court to draw an inference that such communication occurred based on the evidence available, but without any direct evidence of the communication. In such a case, we would need to exclude—either beyond reasonable doubt in a criminal prosecution or to the *Briginshaw* standard of proof in civil penalty proceedings—all reasonable hypotheses consistent with innocence.

46 We concluded, after careful consideration of the necessary evidentiary threshold, that the evidence obtained during our investigation was not sufficient to exclude alternative explanations for the communications between the brothers and other notable characteristics of the trades. For example:

- (a) While there was evidence that Stephen Doyle and Ross Doyle communicated around the time of the Nuix trades, there was no evidence that such communications were about inside information or that their communication patterns were unusual for brothers who lived together at various times and spoke regularly on the phone.
- (b) While the structure of overseas entities being used to trade the shares and the timing of the relevant trades were suspicious, these were not sufficient evidence prove the communication of inside information.

47 There was also documentary evidence to support aspects of the explanations provided by the persons of interest in various section 19 examinations about their trading and the structure of their holdings of Nuix shares.

48 Our investigation was comprehensive. Commensurate with the seriousness of the suspected misconduct, we used a range of investigatory tools (including search warrants and coercive statutory powers) and dedicated significant resources to progress the investigation.

49 In these circumstances, and based on our extensive experience in investigating and supporting the prosecution of insider trading offences, we determined that no further investigative steps could be carried out to overcome the evidentiary issues with prosecuting the suspected conduct. The nature of proving insider trading offences is such that, despite the significant

resources we devote to the investigation, sometimes there is simply not enough evidence to meet the requisite evidentiary threshold.

### **Continuous disclosure concerns**

50 As a result of our investigation, on 28 September 2022 we commenced civil penalty proceedings against:

- (a) Nuix for alleged continuous disclosure breaches and misleading or deceptive conduct; and
- (b) Nuix's board at the relevant time for breaches of their directors' duties.

51 Our proceedings allege that:

- (a) Nuix made misleading or deceptive statements when reaffirming the 2020–21 revenue forecasts it made in its IPO prospectus about statutory revenue and annualised contract value (ACV) in announcements to the ASX on 26 February 2021 and 8 March 2021;
- (b) at the time of these announcements, Nuix was aware that the ACV for 2020–21 was likely to be materially below forecast, which made those announcements misleading and gave rise to the need for corrective disclosure;
- (c) Nuix breached its continuous disclosure obligations by failing to:
  - (i) disclose its ACV results for the first half of 2020–21 from 18 January 2021 until 26 February 2021, when it published its HY results;
  - (ii) make corrective disclosure regarding the announcements made to the ASX on 26 February and 8 March 2021, or announce a downgrade; and
  - (iii) announce a downgrade to its 2020–21 revenue forecasts from 13 April 2021 after its 2020–21 ACV and statutory revenue had been reforecast by the company. A downgrade was not announced until 21 April 2021; and
- (d) Nuix's directors breached their directors' duties by failing to take reasonable steps to prevent Nuix from making misleading statements and breaching its continuous disclosure obligations.

### **False or misleading statement concerns**

52 In February 2022, we determined that no enforcement action could be taken in relation to the concerns that the 2020–21 revenue forecast in the IPO prospectus lacked reasonable basis. This decision was based on the following factors:

- (a) We identified and quantified the risks to the forecast that Nuix and PwC knew or should have known at the time the IPO prospectus was

- published. In assessing if there was a reasonable basis for a forecast in a prospectus, reasonableness can only take into account the information available at the time the prospectus was issued.
- (b) After a detailed investigation, we identified three potential risks to the revenue forecast that could have reasonably been known at the time the forecast was being formulated:
- (i) an inability to convert existing customers into multi-year contracts for which all revenue could be recognised upfront;
  - (ii) potential inaccuracies in the risk and sensitivity analysis conducted by PwC; and
  - (iii) whether the 2020–21 revenue forecast sufficiently took into account the movement of customers to consumption licences, which would require revenue to be spread over the life of the contract rather than upfront.
- (c) Our assessment showed that had *all three* risks materialised during the forecast period, the *total* downward impact of those risks on Nuix’s actual revenue for 2020–21 would be between 3.4% and 8%. Further, at the time Nuix published the IPO prospectus, there were other factors that could support a positive impact on the revenue forecast, including historical performance and growth trends. Therefore, we considered there was insufficient evidence to prove a lack of reasonable basis for the revenue forecast.
- (d) We determined that the IPO prospectus included both general and specific disclosures of risks and assumptions used in formulating the revenue forecast, which provided sufficient guidance to users about the presence of risk factors that could affect Nuix’s ability to achieve its 2020–21 revenue forecast.

### **Conflicts of interest concerns**

53 In December 2021, we determined that no enforcement action could be taken in relation to the management of conflicts of interest. We reached this decision due to there being insufficient evidence to prove that Macquarie Capital has contravened the general AFS licence obligations (s912A of the Corporations Act) in relation to their conflicts of interest management.

54 This was because of the following factors:

- (a) The IPO prospectus contained disclosures about the relationship between Macquarie Capital and its related entity that was a controlling shareholder of Nuix.
- (b) There was another independent third party acting in the role of joint lead manager and underwriter of the IPO, which undertook its own due diligence and verification processes.

- (c) Macquarie Capital had in place a number of general and specific arrangements to manage its conflicts of interest that arose because of its role as joint lead manager in the IPO. These include documented policies and procedures, a conflicts clearance process undertaken by its Compliance team, restricted access and segregation of records, and specific protocols relating to maintaining the confidentiality of deal information.
- (d) There was no evidence of inappropriate activity or misconduct arising from conflicts of interest to support a case that the arrangements in place were not adequate in all the circumstances. There was no evidence to indicate that the communications between the Macquarie Capital team acting as joint lead manager and the two Macquarie Group employees on the NuiX board resulted in any inappropriate activity, misconduct, or undue influence in respect of the IPO.

55 We did, however, identify areas for improvement in Macquarie Capital's conflicts management arrangements, namely in the monitoring and supervision of its conflicts processes. These findings were communicated to our Market Supervision team to form part of our ongoing supervision of Macquarie Capital.

## C Conflicted superannuation switching surveillance

### Key points

Between November 2020 and August 2022, we conducted a surveillance into whether executives and directors of superannuation funds were taking unfair advantage of their access to information about out-of-cycle revaluations of unlisted assets held by superannuation funds. This was in response to concerns that, during a time of market upheaval, they may have used this information to switch investment options or engage in transactions in the fund for personal gain.

We were concerned that this switching activity might point to poor arrangements for the management of conflicts of interest or the potential breach of directors' duties.

Following a detailed review, we determined that the evidence available was so limited that it did not justify the commencement of an investigation into any potential breaches of the directors' duties or other relevant laws by individuals who transacted during the period the subject of our surveillance.

We identified that many of the individuals who transacted did so in relation to investment options that had little to no exposure to unlisted assets, at times with no connection to the valuation cycle for the assets. Many transactions would also have been contrary to the individual's financial interests if they had access to any inside knowledge about the valuations (i.e. the individuals lost money). Based on the information provided by superannuation trustees, many of these individuals also had no direct or indirect access to information about the valuations or the timing of them.

We communicated with trustees about deficiencies in the conflicts management frameworks of the superannuation funds. Superannuation funds the subject of our surveillance improved their relevant policies and procedures as a result of commitments we obtained from superannuation trustees. We also shared our insights with the Australian Prudential Regulation Authority (APRA) to help it drive better practices across industry through its supervision and prudential framework.

### Concerns underpinning the surveillance

- 56 We commenced a surveillance in November 2020 into concerns about executives and directors of superannuation funds taking unfair advantage of access to information about out-of-cycle revaluations of unlisted assets held by superannuation funds.
- 57 The COVID-19 pandemic caused significant decline in the value of assets held by superannuation funds. To ensure the accuracy of unit prices for



superannuation funds, trustees or their investment managers performed ad-hoc, out-of-cycle revaluations of unlisted assets (which were otherwise typically performed quarterly) and updated the unit prices accordingly. Executives and directors with access to information about when the out-of-cycle revaluations would occur may then have been able to use this knowledge to pre-emptively exit investment options when the fund was at its existing higher pre-revaluation price and move to another investment option with lower exposure to unlisted assets. This switching activity could have resulted in financial gain for those individuals at the expense of other fund members.

- 58 This issue was of strategic significance because we were particularly concerned about the effective management of conflicts of interest within superannuation funds in the context of increasing consolidation and internalisation of investment management functions. We also wanted to ensure executives and directors within superannuation funds adhered to the accountability standards expected of significant financial services operations.
- 59 Between November 2020 and August 2022, we undertook a surveillance of the 2020 fund transaction activity of executives and directors of superannuation funds, and related parties of these individuals. We also looked at the conflicts management frameworks of superannuation funds concerning fund transaction activity by executives, directors and their related parties. The objectives of this surveillance were to:
- (a) identify any suspicious trading activity by directors, executives or their related parties that may provide evidence of a breach of the Corporations Act; and
  - (b) ensure that superannuation trustees have adequate controls and processes in place to manage potential conflicts of interest, including potential conflicts around investment switching by directors, executives or their related parties.
- 60 As part of our surveillance we considered whether the conduct of individuals could breach the insider trading provisions in the Corporations Act. We found that generally it could not. As a matter of law, simply switching between options within a superannuation fund does not involve the disposal of or acquisition of a new financial product (as the switching takes place as part of an existing interest in a financial product, being the fund). In order for conduct to contravene the insider trading provisions, an individual must either apply for, acquire, or dispose of financial products or enter into agreements to apply for, acquire or dispose of, financial products: see s1043A of the Corporations Act.
- 61 We also considered whether the conduct might amount to other contraventions, such a breach of directors' duties due to the improper use of information.

## How we became aware of the matter

- 62 On 23 October 2020, as part of the House of Representatives Standing Committee on Economics questions concerning the [ASIC Annual Review 2019](#), Tim Wilson MP (then the House Committee Chair) raised with ASIC the issue of switching activity by executives of superannuation funds. There was concern that those executives were exploiting and benefiting from inside knowledge about the changes in valuations of unlisted assets during a time of market upheaval.
- 63 The House Committee had previously asked superannuation funds questions on a range of issues, including the funds' policies and practices regarding switching activity by trustees, executives and employees following the revaluation of unlisted assets and their related conflicts management.

## Key investigative steps we undertook

- 64 In November 2020, based on the funds' responses to the House Committee's questions and our engagement with APRA, we identified 25 funds, covering a cross-section of retail and industry funds, to be the subject of our surveillance. This figure was subsequently reduced to 23 funds after initial inquiries identified that two funds did not hold any unlisted assets.
- 65 We first issued compulsory statutory notices to the 23 superannuation funds, seeking information and documents about the following topics:
- (a) conflicts management frameworks, particularly conflicts of interest policies and practices relevant to fund transactions by directors, executives and their related parties;
  - (b) transactions by directors, executives, and their related parties, including:
    - (i) any change to the investment option or investment strategy that an executive, in their capacity as a member of the fund, directed the fund to allocate their contributions to; and
    - (ii) an executive making additional contributions to, or withdrawals from, an existing investment option, but not including existing ongoing regular superannuation guarantee contributions;
  - (c) details on valuations of unlisted assets undertaken in the period;
  - (d) in relation to a subset of individuals, their access to information around the time of the revaluations of unlisted assets, their switch requests and instructions; and
  - (e) oversight and compliance reviews.
- 66 The response to the first round of statutory notices identified 127 individual directors, executives and their related parties who made at least one trade

during the period from 1 January to 18 December 2020. The notices also produced over 1,700 documents for ASIC's review and analysis.

67

We undertook the following key steps to determine whether any enforcement action should be taken:

- (a) We analysed the list of transactions based on the timing and nature of the transactions, including any switching activity that took place during key revaluation periods for each fund.
- (b) We excluded transactions that met the following criteria:
  - (i) transactions that did not occur in close proximity to the revaluation of unlisted assets;
  - (ii) transactions between options that did not include investments in unlisted assets;
  - (iii) transactions by individuals without access to sensitive information;
  - (iv) transactions where the individual suffered a financial loss or placed themselves at a disadvantage by switching options; and
  - (v) transactions other than switches where the conduct was the opposite of what we could expect if the individual had confidential fund knowledge, such as making an additional contribution rather than a withdrawal.
- (c) We sought further information about a small subset of individuals, to ascertain whether they had any access to information around the time of the revaluations of unlisted assets and to understand the circumstances surrounding their request to exit or change investment options. This review identified that, in relation to the transactions of interest, the individuals either:
  - (i) requested a switch before a revaluation was requested and there is no evidence suggesting the individual had knowledge of the upcoming revaluation request;
  - (ii) were not involved in any decision to perform a revaluation—such decisions were made by external investment managers, and there is no evidence suggesting the individual had access to information about the timing of the revaluations; or
  - (iii) had no knowledge of the revaluation in the period before the switch, and they had sought and obtained clearance and approval for the switching activity from the fund's legal team and chief investment officer.
- (d) We also performed a follow-up review of some transactions, out of an abundance of caution, to consider, for example, whether:
  - (i) the transaction took place in close proximity to an out-of-cycle revaluation or a period of significant market fluctuation;

- (ii) the individual had access to valuation information;
  - (iii) there was an apparent gain made from the transaction; and
  - (iv) the particular pattern of trading was unusual.
- (e) We reviewed and assessed the information produced by the trustees about their conflicts management frameworks and oversight and compliance reviews.

## Our assessment and outcome

### Individuals involved in switching activity

68 Our surveillance did not identify any potential breaches in relation to any individual, and in March 2022 we decided that we would take no further action against any individual for switching activity. We reached this view based on a careful and methodical assessment of the information we obtained under statutory notices issued to the various trustees.

69 Our assessment was that:

- (a) there was no evidence to suggest that an individual who was an officer of the superannuation fund had knowledge of the revaluation and switched investment options as a result of that knowledge; and
- (b) therefore, there was insufficient evidence of a breach of directors' duties or any other law administered by ASIC to commence a formal investigation under s13 of the ASIC Act. That is, we had not identified any suspicious transactions for that question to arise.

### Review of conflicts management policies and procedures

70 Our surveillance identified concerns about the state of conflicts management frameworks, policies and practices across the industry in relation to fund transactions by directors and executives who may be in possession of confidential fund information.

71 In October 2021, we issued a media release to provide an update on the progress of our surveillance and to call the industry to action to improve their conflicts management policies. We issued the media release because there was strong public interest in this surveillance, and it was important to ensure clear messaging to the industry when APRA was also releasing announcements about its related work.

Note: See Media Release ([21-282MR](#)) *Surveillance of investment switching by super fund executives identifies concerns with trustees' conflicts arrangements* (27 October 2021).

72 In November 2021, we issued findings letters to the trustees of each of the 20 superannuation funds that had received statutory notices. Three of the trustees in the original cohort of 23 had subsequently merged and no longer existed, and as such did not receive findings letters. These letters outlined our concerns with their respective policies and requested that trustees improve their existing conflicts management frameworks within six months of the findings letter. Generally, ASIC's suggestions to the funds included:

- (a) ensuring policies identify the director, executive or related party's own membership in the fund as a relevant interest and mandate the need for their transaction activity to be adequately controlled; and
- (b) implementing controls, such as regular reviews of policies and practices, pre-approval processes, blackouts and bans on switching at particular times, and increased oversight of fund transactions by directors, executives and their related parties.

73 We also requested copies of the revised policies and procedures once the relevant improvements had been made. Trustees with more significant policy deficiencies (9 out of 20 trustees) were also asked to provide interim updates three months after receiving the findings letter to inform ASIC on their progress.

74 In the trustees' final six-month updates, trustees set out that they had either implemented or committed to implement a range of changes to improve arrangements for managing conflicts. These changes included:

- (a) updating or establishing policies and practices to address the deficiencies we highlighted by:
  - (i) identifying switching investment options as a potential conflict of interest;
  - (ii) incorporating steps to prevent inappropriate transactions (such as introducing blackout periods or transaction windows); and
  - (iii) expanding conflicts arrangements to cover transactions by related parties of directors and senior executives;
- (b) increasing board-level engagement so there is greater board oversight, input and direction. For instance, increased monitoring of staff transactions and reporting back to the board, including on switching activity;
- (c) increasing staff awareness of the policies and their obligations through greater internal communication and training; and
- (d) undertaking an independent review of the trustee's broader conflicts management frameworks.

75 In April 2022, we published a final media release about our surveillance. We outlined that we had received commitments from trustees to improve their

conflicts management arrangements and noted that, following our surveillance into individual switching activity during 2020 by directors, executives and their related parties, no further action was warranted against any individuals identified in the transactions.

Note: See Media Release ([22-081MR](#)) *Superannuation trustees strengthen governance practices following ASIC surveillance of investment switching* (6 April 2022).

- 76 By July 2022, we received confirmation from all of the trustees that they had addressed our concerns about their conflicts management arrangements, including inadequacies in their conflicts of interest, fund transaction and valuation policies.
- 77 This work resulted in significant improvements to the conflicts management frameworks, policies and procedures for the trustees in the surveillance. We have also continued to engage with APRA to more comprehensively ensure all trustees have appropriate policies and procedures in place to manage possible conflicts of interest in relation to fund transaction activity by directors, executives and their related parties.
- 78 We concluded our engagement with the trustees in August 2022, when we wrote to them acknowledging the changes they had implemented in response to our thematic review. These communications also noted that our views on the trustees' responses would be shared with APRA, which would consider what, if any, further supervisory actions may be appropriate.

## D ALS Limited

### Key points

In November 2019, we became aware of concerns regarding discrepancies in TerraCom Limited's (TerraCom) coal quality, based on coal quality certificates prepared by ALS Limited (ALS). These concerns were raised through a whistleblower disclosure and subsequent media reporting.

In June 2020, we commenced investigating possible breaches of directors' and officers' duties under the Corporations Act and fraud under the *Crimes Act 1900* (NSW) in relation to ALS. At the time, we were already investigating the conduct of TerraCom and its directors and officers.

Our investigation involved examining extensive documentary and other evidence. The evidence we obtained corroborated statements made by ALS that coal quality certificates had been amended without justification. However, there was insufficient evidence that any director or officer of ALS was involved in the falsification practice, instructed it to occur or knew of it while it was occurring. We also did not identify conduct amounting to whistleblower victimisation or false or misleading market disclosures.

In the absence of any action being available against a listed entity, being ALS, or its officers, we decided to focus our regulatory efforts on pursuing the conduct of TerraCom and its officers.

### Concerns underpinning the investigation

79 In April 2020, we commenced an investigation into ASX-listed TerraCom following allegations of discrepancies in TerraCom's coal quality results prepared by ALS. On 28 February 2023, we commenced civil penalty proceedings against TerraCom, its managing director, chief commercial officer, former chair and a former director.

Note: See Media Release ([23-045MR](#)) *ASIC sues TerraCom Limited, its managing director, chief commercial officer, former Chair and a former director* (1 March 2023).

80 Between June 2020 and September 2022, we also investigated reports that ALS—an ASX-listed company that provides, among other things, coal testing and certification services—had falsified coal quality certificates between 1 October 2007 and 31 March 2020 through its subsidiaries, ACIRL Quality Testing Services Pty Ltd and ACIRL Pty Ltd. Coal quality certificates are used by coal sellers to attest to coal quality when sold.

81 Both investigations were significant matters for ASIC. The suspected misconduct was of substantial scale and involved two listed companies. ASIC does not have direct regulatory oversight for the accuracy or otherwise

of coal quality certificates, as they are not financial products. However, we were concerned that the suspected misconduct had the potential to undermine market integrity and investor confidence.

82 In relation to ALS, the market significance of the matter was shown by the decrease in ALS' share price when it announced it was conducting an internal investigation into the falsification conduct. We considered that successful proceedings, if the evidence supported it, would send a strong deterrent message about contraventions within ASIC's jurisdiction. There was also public interest in the matter, with ongoing media reporting during and after ASIC's investigation concluded.

83 Our investigation into ALS considered whether the falsification conduct could amount to breaches of directors' duties (s180, 181 or 184), breaches of the continuous disclosure obligations (s674) or falsification of books or false information (s1307) under the Corporations Act, or fraud under s192E of the *Crimes Act 1900* (NSW).

## How we became aware of the matter

84 The matter was first brought to our attention in November 2019 when the Australian Federal Police referred a matter involving a whistleblower to ASIC. The whistleblower alleged their employment with TerraCom had been unjustly terminated for refusing to participate in a scheme between it and ALS to falsify coal quality certificates.

85 On 24 February 2020, the *Australian Financial Review* (AFR) published an article reporting on proceedings that the whistleblower had commenced against TerraCom shortly after their employment was terminated.

86 In response to the AFR article, ALS made an ASX announcement that:

- (a) ALS had appointed external advisers to conduct an independent forensic investigation into its certification of coal samples;
- (b) preliminary investigations had identified that a number of certificates of analysis issued from two laboratories were amended before issue without proper justification; and
- (c) four staff members of ALS's coal superintending unit had been suspended pending the outcome of the ongoing investigation.

87 TerraCom also made an ASX announcement, but denied the whistleblower allegations contained in the AFR article. TerraCom stated that it had ordered PwC to investigate the allegations and that it found no evidence of wrongdoing.



- 88 On 2 April 2020, ALS announced that it had completed its investigation and found that, since 2007, approximately 45 to 50% of its coal quality certificates had been manually amended without justification. The announcement stated that no evidence of bribery or other third-party payments involving ALS staff were found. It noted that the employment of the four suspended staff members was terminated and that ALS was in the process of referring the matter to the NSW Police.
- 89 Also on 2 April 2020, we commenced our investigation into TerraCom. The investigation concerned the conduct of TerraCom's directors and officers following the publicly reported whistleblower allegations and the alleged discrepancies in TerraCom's coal quality results prepared by ALS.
- 90 We subsequently liaised with NSW Police in relation to ALS' self-report, their internal investigation, and the materials police seized from ALS under a search warrant. We ultimately obtained from the NSW Police a large number of documents.

## Key investigative steps we undertook

- 91 On 30 June 2020, we expanded the existing investigation into TerraCom to include ALS' suspected falsification conduct.
- 92 Over a period of over two years, we completed an extensive investigation into the suspected misconduct of ALS and its current and former officers and employees.
- 93 Throughout the investigation, we used ASIC's coercive powers to compel the production of documents, to gather information about the suspected misconduct and to explore various lines of inquiry as new information came to light. Our investigative steps included:
- (a) issuing eight statutory notices to ALS and its forensic investigator (McGrathNicol) to gain a thorough understanding of the alleged misconduct;
  - (b) reviewing and analysing significant volumes of documentary evidence. We obtained nearly five and a half million documents during our investigation; and
  - (c) conducting section 19 examinations of 13 individuals, with the main focus being current and former ALS employees. The purpose of the examinations was to gain evidence about the extent of the falsification conduct and the knowledge of it within the ALS business. Some key persons of interests were examined more than once to ensure that all relevant questions had been put to them as the investigation developed.

- 94 In January 2021, and as we gained a better understanding of the falsification conduct, we wrote to a number of mining companies that used ALS's coal certification services. We requested that they make inquiries into the alleged falsification conduct and encouraged them to make any necessary market disclosures. All companies we contacted about the falsification practice (including TerraCom) informed ASIC that they had conducted internal reviews and found no evidence of misconduct. We took this action to remind listed companies of their continuous disclosure obligations.
- 95 We also liaised with a domestic accreditation organisation, the National Association of Testing Authorities (NATA), and the international association representing independent testing, inspection and certification (TIC) companies, the TIC Council, regarding their oversight of ALS and its accreditation to continue providing testing services.
- 96 We met with representatives of the Commonwealth Department of Industry, Science and Resources regarding, among other things, NATA's oversight and general misconduct in the coal industry.
- 97 We deployed significant resources internally to review the voluminous evidence obtained during the investigation. As the scope and complexity of our investigation increased, we also engaged external solicitors to help review evidence and consider potential causes of action.
- 98 Regular updates on the progress of the investigation were provided to, and key decisions were approved by, Senior Executive Leaders in the Enforcement team and the Commission.
- 99 We have also liaised with APRA and the Australian Competition and Consumer Commission (ACCC) on the ALS and TerraCom investigations, including releasing documents (including examination transcripts) to the ACCC.

## **Our assessment and outcome**

### **ALS investigation**

- 100 Following extensive consideration of this matter, we determined that there was insufficient evidence that any current or former director or officer of a listed entity, being ALS, was involved in the falsification practice, instructed it to occur or knew of it while it was occurring.
- 101 We identified that the people directly involved in the falsification conduct were limited to relatively junior staff who had acted without the knowledge or consent of senior management of ALS Limited or its board. These staff were not officers for the purposes of the Corporations Act.

102 An officer of ACIRL Quality Testing Services Pty Ltd and ACIRL Pty Ltd appears to have had some knowledge of the practice occurring within the entity; however, their awareness was limited to a brief period of time shortly before the falsification practice ended.

103 That officer and the individuals involved in the conduct did not derive any direct benefit from the conduct, and suffered employment consequences (including, in the case of one, employment termination).

104 Further, the investigation did not reveal conduct amounting to whistleblower victimisation or false or misleading market disclosures.

105 In the absence of any action being available against a listed entity, being ALS, or its officers, we decided to focus our regulatory efforts on pursuing the conduct of TerraCom and its officers.

### **TerraCom investigation**

106 On 28 February 2023, we commenced civil penalty proceedings in the Federal Court against:

- (a) TerraCom for engaging in whistleblower victimisation (contravening s1317AC of the Corporations Act); and
- (b) TerraCom's managing director, chief commercial officer, former chair, and a former director and deputy chair for breaches of the Corporations Act, including directors' and officers' duties (s180(1)), giving false or misleading information to the ASX (s1309(2)), and victimisation of a whistleblower (s1317AC).

## E Magnis Energy Technologies Limited

### Key points

In 2020 we received a number of reports of misconduct from the public about Magnis Energy Technologies Limited (Magnis). These included allegations of disclosure of inside information to shareholders before disclosure to the market, false or misleading statements, and market manipulation.

Following an initial assessment, we commenced an investigation into suspected market manipulation and a failure to comply with requirements to notify the market of relevant shareholding in the company.

We undertook extensive inquiries, including executing a search warrant, conducting section 19 examinations and examining more than 8,000 documents.

We found there was no direct evidence of an intention to manipulate the price of Magnis' shares, the trading patterns did not support a circumstantial case of manipulative intent, and there were evidentiary challenges in proving that the person of interest was responsible for entering the relevant orders into the market. The circumstances of any failure to notify breach was technical in nature and, in this case, we did not identify any harm to investors arising from the conduct.

In relation to the allegations of insider trading, we found insufficient evidence to support that any information shared was 'material', which is necessary to meet the definition of 'inside information'.

We did not identify any further lines of inquiry that would elicit the evidence required to make out the alleged contraventions. Accordingly, in November 2022 we concluded our investigation with no further action.

We have commenced a new investigation into suspected false or misleading statements and breaches of continuous disclosure obligations by Magnis. This investigation is continuing.

### Concerns underpinning the investigation

107      Between March 2021 and November 2022, we conducted an investigation into various allegations concerning Magnis, an ASX-listed lithium-ion battery company. Our investigation concerned allegations that Magnis' share price had been manipulated (in contravention of s1041A and 1041B of the Corporations Act) and a director had failed to notify the market of their shareholdings in the company (in contravention of s205G of the Corporations Act).

- 108 In the course of our investigation, we also considered other allegations that arose from reports of misconduct concerning Magnis. These included allegations about the communication of inside information to potential and certain current shareholders before general disclosure to the market.
- 109 Market manipulation is an enduring enforcement priority for ASIC. It is serious misconduct that undermines confidence in the integrity of Australia's financial markets. We commenced an investigation given the alleged conduct involved a publicly listed company and because the allegations related to a person who held a senior role within Magnis.
- 110 In July 2023, we commenced a new investigation into suspected false or misleading statements and breaches of continuous disclosure obligations by Magnis. This investigation is continuing.
- 111 While we are unable to provide any comment on our ongoing investigation, we have set out details of our closed investigation below.

## **How we became aware of the matter**

- 112 In 2020, we received a number of reports from the public about suspected misconduct concerning Magnis. In February and March 2020, we received three complaints alleging that the person of interest was engaging in insider trading by sharing inside information with certain current or potential shareholders. The complaints also set out other concerns, including market manipulation. In July 2020, we received further anonymous reports of misconduct, raising concerns about suspected manipulation of Magnis' share price.
- 113 We considered these reports and undertook further inquiries and analysis. We decided to commence an investigation into the concerns relating to suspected market manipulation and a failure by a director to notify the market of their shareholdings in the company.

## **Key investigative steps we undertook**

- 114 On 23 March 2021, we commenced a formal investigation. The key focus of our investigation was our suspicion that there may have been manipulative trading in the form of price support when Magnis' share price reached a multi-year low. We suspected that a third party's account was being used by the person of interest to make these trades.
- 115 In deciding to focus on these matters, we also assessed the insider trading allegations and formed the view that the information being communicated did not meet the materiality threshold for 'inside information' in the

Corporations Act. This is because the information alleged to be communicated was either general in nature or did not affect the Magnis share price when subsequently disclosed to the market.

- 116 At an early stage in the investigation, we determined that search warrants would be necessary to maximise our chances of securing evidence of the suspected market manipulation. On 15 September 2021, a search warrant was executed at the person of interest's residence. The timing of the warrant was impacted by resourcing requirements within ASIC and the Australian Federal Police, and COVID-19 lockdown restrictions.
- 117 Following the execution of the search warrant, we progressed the investigation by:
- (a) conducting detailed and extensive analysis of trading in Magnis shares for indications of manipulative trading;
  - (b) issuing 26 statutory notices to various entities and individuals;
  - (c) reviewing the large number of documents and other material we obtained from the notices and under the search warrant. We had obtained approximately 75,000 emails and chats from the person of interest's phone and email accounts under the search warrant; and
  - (d) conducting a section 19 examination with the person of interest and voluntary interviews with other witnesses.
- 118 Regular updates on the progress of the investigation were provided to, and key decisions were approved by, Senior Executive Leaders in the Enforcement team and the Commission.

## **Our assessment and outcome**

### **Market manipulation**

- 119 Our analysis of the evidence obtained from the investigation revealed that:
- (a) there was no direct evidence of an intention to manipulate the price of Magnis' shares;
  - (b) the trading patterns did not support a circumstantial case of manipulative intent; and
  - (c) there were evidentiary challenges in proving that the person of interest was responsible for entering the relevant orders into the market.

### **Failure to notify**

- 120 We found that a breach of the requirement to notify the market of relevant interest in the company was potentially arguable. However, the

circumstances of the breach were technical in nature and, in this case, we did not identify any harm to investors arising from the conduct. This is because the non-disclosure related to the acquisition (and not the disposal) of shares. There was no clear motive for concealing the interests as, generally speaking, a director buying shares in the company sends a message of confidence to the market (as distinct from concealing a sale of shares). There was also evidence of other mitigating circumstances.

### **Other allegations**

- 121 The evidence obtained over the course of the investigation confirmed that there was insufficient basis for ASIC to conduct further investigation into other allegations in reports of misconduct that we received.
- 122 In relation to insider trading, this was because a detailed review of the person of interest's communications did not reveal any communications with current or potential shareholders that would support insider trading allegations. The information shared by the person of interest with shareholders and potential shareholders was not sufficiently material to constitute 'inside information' for the purpose of s1043A(2) of the Corporations Act. The communications we reviewed contained general commentary about what the company is doing and generally promoted buying Magnis shares. To the extent that any information was later announced to the market, it did not appear to generate any significant market reaction.
- 123 Given these findings, in November 2022 we closed the investigation.

## F ASIC's approach to enforcement and this submission

### Enforcement is a critical part of ASIC's statutory objectives

124 ASIC is a law enforcement agency. We dedicate our expertise, resources and time to maximising regulatory impact and reducing harm to consumers and markets by detecting, disrupting, investigating and responding to unlawful conduct.

125 We pursue court-based outcomes and substantial penalties to hold to account those who contravene the law and to deter similar misconduct in the future. We do this based on the available evidence, the likelihood of a successful conviction, and our strategic and enforcement priorities. We achieve our greatest impact when we take targeted and proportionate enforcement actions in close coordination with our regulatory and surveillance functions to change behaviours.

### ASIC is successful in identifying and convicting insider trading

126 Prosecuting insider trading is an enduring enforcement priority for ASIC. Insider trading undermines market integrity and public confidence in those markets. It is widely accepted that this unlawful conduct is hard to detect and pursue. This is because the successful prosecution of insider trading usually requires direct evidence of what the individual said or communicated to prove that price-sensitive information was supplied.

Note: See *R v Nicolas Glynatsis* [2013] NSWCCA 131, at paragraphs 39 and 70; *R v Jeffery Bateso* [2011] NSWSC 643, at paragraph 38; J Overland, '[The future of insider trading in Australia: What did Rene Rivkin teach us?](#)', *Deakin Law Review*, 2005, 10(2):708–730, at paragraphs 1 and 4; S Rubenstein, 'The regulation and prosecution of insider trading in Australia: Towards civil penalty sanction for insider trading', *Company and Securities Law Journal*, 2002, 20:89–113, at pp 103–108.

127 Deciding whether to prosecute insider trading is a serious matter, which requires ASIC to determine whether there is sufficient evidence to substantiate a criminal legal action. It is not our decision alone. Once we determine there is sufficient evidence to prove criminal conduct took place, we may refer a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP then independently assesses the available evidence in deciding whether to bring criminal charges.



128 The information provided in this submission demonstrates the intensity of resource allocation required for a thorough investigation into insider trading. Such investigations can also range across several years. While the Nuix investigation failed to reach the threshold for a successful prosecution, there are many other instances where ASIC has successfully secured convictions. Over the past three years we have commenced 33 insider trading investigations and have laid 29 charges against 9 individuals in relation to this conduct. We have obtained six criminal convictions.

Note: See, for example, Media Release ([23-124MR](#)) *Vaughan Bowen indicted on insider trading charges* (12 May 2023) and Media Release ([23-161MR](#)) *Former CFO of Big Un Limited charged with insider trading* (13 June 2023).

129 Due to our efforts in identifying and pursuing suspected insider trading, the Australian equity market is one of the cleanest globally. Independent research showed that Australia is the cleanest market in terms of merger and acquisition leaks among a sample of global peers (an average of 3.5%, compared to the global average of 8.7%): see SS&C Intralinks, [2020 M&A leaks report](#) [PDF 386 KB], October 2020.

## We will continue to be transparent with and assist the Inquiry

130 We provide this submission following correspondence with the Chair of the Committee regarding questions on notice about these ASIC matters, the Senate's Order for the Production of Documents of 20 June 2023, adopting the recommendations of the Committee's [Australian Securities and Investments Commission investigation and enforcement—Interim report: Public interest immunity claims](#) (the Interim Report), and the Committee's acceptance of ASIC's offer to provide a public submission about these matters.

131 ASIC has been, and will continue to be, as open and transparent as possible with the Inquiry. We have always understood and acknowledged the important oversight role of Parliament and its committees over the affairs of ASIC, and its powers to conduct inquiries into matters of concern, to require the production of documents and to take evidence.

132 We have sought to demonstrate our commitment to transparency with the Committee and assisting the Inquiry by providing this public submission. That interest is necessarily balanced against:

- (a) the interests of persons who interact and cooperate with ASIC's investigations on the expectation that such information is private and confidential (including confidential sources of information and persons who have been compelled to provide answers to questions without a right to silence). Concerns have been raised with us about the disclosure

- of third party confidential information as part of our responses to this Inquiry;
- (b) the public interest in not disclosing confidential law enforcement methodology and processes that, if revealed, may enable perpetrators to evade the law in the future; and
  - (c) the public interest in not revealing information that may prejudice relating ongoing proceedings (e.g. our ongoing civil penalty proceedings against TerraCom and Nuix).

### **We remain concerned about the public disclosure of sensitive law enforcement information**

- 133 We remain deeply concerned about the impact of this Inquiry making public information and documents that have been provided to ASIC in confidence, including by whistleblowers and under compulsion. This could have a lasting negative impact on those third parties directly involved, the way people interact and cooperate with our investigations, and ASIC's future enforcement work. We set out these issues in detail in the [ASIC Chair's letter to the Committee dated 8 August 2023](#) [PDF 205 KB]. Other enforcement agencies that rely on the provision of confidential information and the use of compulsory powers will also feel the effect.
- 134 We remain open to providing further information to the Committee about the investigative steps undertaken and the factors that informed our decisions in these matters in a private or in-camera briefing.

## Appendix: Opening statement by ASIC Chair Joe Longo at the Inquiry—23 June 2023

I am pleased to have the opportunity to appear before the Committee today. Before I begin my substantive remarks however, I want to say this.

Clearly there are a number of positions which the Chair has taken in Parliament, and that this Committee has taken in its interim report, which are highly critical of ASIC.

As its Chair, I feel duty bound to respond on ASIC's behalf. I take ASIC's responsibility to be accountable and transparent very seriously. I am sure you would not expect anything less of me.

With that in mind, I wish to make clear that I reject the interim report's findings and the statements made in Parliament about ASIC's insider trading and general enforcement record.

### **ASIC unequivocally rejects any assertion of obfuscating or obstructing**

Taking each in turn, let me *first* say that ASIC unequivocally rejects any assertion of an intent to obfuscate or obstruct the Committee.

There is absolutely no evidence to support that assertion.

Nor is there any evidence to support the assertion that ASIC attempted to undermine and influence the process of the Inquiry from the outset. ASIC is accountable to Parliament. This Inquiry is an important part of ASIC's oversight.

ASIC is taking an open, constructive and cooperative approach to this Inquiry. We have provided a detailed submission to the Inquiry which sets out our approach to investigations and enforcement.

This has included how we develop our priorities to target areas we consider to be of greatest regulatory harm, and how we assess reports of potential misconduct and other intelligence sources, to identify matters for investigation and possible enforcement actions.

As the Interim Report itself notes, we have answered 104 out of 109 questions on notice relating to individual matters to assist the Committee. We have not refused to answer questions on these individual matters.

## **ASIC is a law enforcement agency and we must protect the rule of law**

However, ASIC is a law enforcement agency. And as a law enforcement agency, like the AFP, ATO and other agencies, there are limits on what documents we can share. We need to ensure that our current and future work is not adversely impacted through public disclosure of our investigative files, transcripts, and our legal advice.

Information about closed investigations can still prejudice ASIC's related and future investigations. It can disclose ASIC's methods and legal advice and also adversely impact people who have assisted ASIC and, of course, unfairly prejudice people who have been the subject of our investigations.

As we have set out in our letters to the Committee, we wish to be open and transparent with the Inquiry. But we need to raise objections to requests for evidence where it is necessary to do so to protect the rule of law and ASIC's future effectiveness as a law enforcement agency. This is consistent with the longstanding practice of parliamentary committees in Australia.

In the meantime, we are now giving further consideration to the orders made by the Senate and the Committee's Interim Report.

## **ASIC has a strong record on insider trading prosecutions**

*Secondly*, in relation to the assertion that if you engage in insider trading in Australia you will get away with it: all the evidence proves this could not be less accurate. It is incorrect.

ASIC has a strong and consistent record of insider trading convictions.

We provided statistics about our insider trading enquiries, investigations and outcomes in response to Questions on Notice. And I once again emphasise them here.

Over the past three years we have commenced 33 insider trading investigations and have laid 29 charges against 9 individuals in relation to this conduct. We have obtained six criminal convictions.

Most recently the former CFO of Bigun has been charged with insider trading.

In March a former director of Tesla Motors Australia was sentenced for insider trading.

And I'm sure many of you will recall the high profile ASIC, DPP and AFP insider trading investigation and prosecution that was featured on ABC's Australian Story in September 2021 and gained world-wide prominence. In that case, two people were sentenced to jail terms of over 7 years and over

3 years in the Victorian Supreme Court for their roles in Australia's largest insider trading scheme totalling \$7 million.

In case the numbers do not make it clear, let me say it plainly.

Insider trading is an important priority for ASIC. We know it can undermine market integrity and public confidence in our financial markets. It has long been recognised as conduct that can be challenging to detect and pursue. Our insider trading detection technology is both award-winning and world-class.

Deciding whether to prosecute insider trading is a serious matter, which requires us to determine whether there is sufficient evidence to substantiate a criminal legal action. Nor is it our decision alone. Once we refer a brief of evidence to the Commonwealth Director of Public Prosecutions, the CDPP looks independently at the evidence in deciding whether to bring criminal charges.

### **ASIC's enforcement record is strong**

*Thirdly*, we entirely reject assertions that ASIC is a weak corporate regulator. On the contrary, we have been, and continue to be, an active and effective litigator.

Over the past three years, we have commenced over 125 criminal actions, resulting in 92 criminal convictions and 39 custodial sentences. Our criminal actions have also resulted in well over \$2 million in fines. In the same period, we have commenced close to 200 civil actions, resulting in over 130 successful civil claims and more than \$500 million in penalties imposed by the courts.

It would be hard to find a day when ASIC is not in a State or Federal Court somewhere in the country.

I have said before, I'm committed to making ASIC an ambitious and confident regulator.

Enforcement is at the heart of what we do.

Together with the regulatory and supervisory work we do, it supports Australia's strong financial system and markets.

I'd now like to confirm who I am appearing with today. I'm joined here in Melbourne by Executive Director of Financial Services Enforcement Tim Mullaly and our General Counsel Chris Savundra. Deputy Chair Sarah Court is appearing via video from Adelaide, and Chief Operating Officer Warren Day is appearing from Canberra.

We all look forward to answering the Committee's questions.