



ASIC
Australian Securities &
Investments Commission

Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament
Question No.	048-03
Date	12 January 2022
Topic	Insider Trading
Reference	Written Question on Notice
Committee member	Senator Bragg

Question

QoN048-03

I refer to the following article in Investor Daily, dated 27th October 2021. The article is titled 'ASIC identified conflicts of interests by super trustees management'. The article states the following 'ASIC will consider regulatory action if misconduct causing consumer harm is identified'.

- a. Is that a correct statement of ASIC's enforcement policy?
- b. Where does this come from? Is that a legal requirement, or is it internal ASIC policy?

Answer

Consideration of consumer harm is not a legal requirement but consumer harm is one of a number of factors that ASIC considers when exercising its enforcement discretion.

Our policy and approach to enforcement is set out in information sheet 151 (INFO151) 'ASIC's approach to enforcement'.

We carefully consider how to respond to all potential contraventions of the law, but we cannot undertake a formal investigation of every matter that is brought to our attention. Rather, we are selective about the matters we pursue to ensure we use our resources to target misconduct effectively.

We consider a range of factors when deciding whether to investigate and possibly take enforcement action, including:

- whether taking enforcement action would prevent or address significant harm to consumers, markets or our financial system, giving particular attention to matters that align with our strategic priorities or otherwise involve harm to vulnerable consumers, predatory, systemic or widespread harm, conduct that is likely to have a significant market impact, or conduct that has recently emerged or is part of a growing trend;
- whether taking enforcement action would have a broader public benefit such as through sending an effective deterrence message to the market, testing or clarifying important legal

obligations, or would otherwise address misconduct that is likely to continue or escalate or maintain public trust and confidence in our financial system and markets;

- the issues specific to each case, including whether the matter is within our jurisdiction, the nature of the misconduct (such as whether it was dishonest, deliberate or reckless), the level of impact on consumers, and whether reliable evidence is in our possession or likely to become available to prove the alleged misconduct; and
- whether the conduct would be more appropriately addressed through using our other regulatory tools, such as engagement with stakeholders, surveillance, guidance and education, or by another agency or through use of private dispute resolution between those involved.

Whether or not ASIC may choose to take regulatory action will therefore depend on the facts and circumstances of any given case, and is not limited to situations of financial loss by consumers.

(QoN048-03 – Continued)

- c. Does a breach of fiduciary duty always lead to consumer harm?
 - i. What about where a super fund trustee has profited from their position based on inside information?
 - ii. Or where there is a clear conflict of interest for the position of a super fund trustee?
- d. Does a breach of director's duties always lead to consumer harm? Does insider trading always cause consumer harm? So why is always giving the green light to superannuation trustees - effectively saying you can break the law with impunity, so long as you don't harm consumers?
- e. Did ASIC apply this policy when it whittled down the list of 67 to 4 (see QoN048-02)?
- f. If so, is ASIC able to confirm that in none of the 63 excluded instances, an actual breach of the law was identified?
- g. Can you confirm that ASIC did not identify any instance of trustees/managers/third parties breaching their fiduciary duties to members?
- h. Can you confirm that ASIC did not identify any instance where trustees/managers/third parties profited from product switching?
- i. Has ASIC referred any of these matters to the Commonwealth Director of Public Prosecutions?
- j. Has ASIC made any administrative enforcement decision in relation to these matters?
- k. Can you please provide an update on what action ASIC is currently taking, noting that this activity may breach other relevant laws?

Answer**c. and d.**

As noted above, ASIC's approach to enforcement is not solely predicated on the presence of financial loss by consumers. We carefully consider how to respond to all potential contraventions of the law, but we cannot undertake a formal investigation of every matter that is brought to our attention. Rather, we are selective about the matters we pursue to ensure we use our resources to target misconduct effectively.

We note for completeness, ASIC has in the past prosecuted individuals for breaches of directors duties, fiduciary duties and for insider trading.

ASIC applied a range of factors in excluding the 63 individuals, including both the criteria identified in QoN048-02 and ASIC's approach to enforcement.

Whether and to what extent a breach of fiduciary duty, a breach of directors duties or insider trading cause consumer harm would need to be assessed on a case-by-case basis.

e., f and g.

We confirm that, of the 63 excluded instances, ASIC did not identify anything to suggest breaches of statutory obligations. In those cases, ASIC also confirms that it did not identify anything to suggest information was misused, and therefore a breach of fiduciary obligations had occurred.

h.

As part of our analysis, ASIC excluded cases where switches resulted in losses, as well as those in which there was no suggestion of misuse of information. ASIC has yet to finalise its position in relation to those remaining cases in which switching occurred and a gain was made.

i. and j.

ASIC has not referred any of the matters to the Commonwealth Director of Public Prosecutions, nor has it taken any administrative enforcement actions in respect of the relevant conduct.

k.

ASIC is currently considering whether further information received in respect of the four instances not excluded suggests misuse of information for personal gain occurred. In addition, ASIC is more generally actively engaged in reviewing and improving the conflicts policies and trustee oversight as described above in response to question QoN048-02d.