



**ASIC**  
Australian Securities &  
Investments Commission

<b>Committee</b>	Parliamentary Joint Committee on Corporations and Financial Services
<b>Inquiry</b>	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
<b>Question No.</b>	023
<b>Date</b>	23 February 2023
<b>Topic</b>	DH Flinders
<b>Reference</b>	Spoken, 23 February 2023, Hansard page 22
<b>Committee member</b>	Senator Louise Pratt

## Question

**Senator PRATT:** Can I ask for an update on conversations with victims of the **Sterling Group**? There might not have been any for some time, but I haven't been on this committee for a while. I think we discussed last time the fact that ASIC had been talking to victims of Sterling and interviewing them. I want any outcomes or detail from that, please.

**Mr Longo:** I met with some of the victims from the collapse of the Sterling Income Trust around December 2021. That coincided, I think, with the Senate inquiry, which I know, Senator Pratt, you were intensely engaged with. Since then, to the best of my knowledge, I haven't had any further contact with those people. In the meantime, there has been some other work going on at ASIC to deal with the fallout from that collapse. I might ask either Chris Savundra or Sarah Court to tell us a little more about that.

**Senator PRATT:** Yes; I'd be very happy to have an update on that, please. I know that Mr Robert Patrick Marie is banned. I did note that it was only for four years. If you look at the grubby history of some directors, in terms of the consistency of their collapsed companies, four years seems pretty light. I note that the press release kind of says, 'Yay, he's banned,' and then in a footnote on the link in the website I see that it's only for four years.

**Mr Savundra:** I could respond to your first question about contact with investors. As part of our ongoing investigation, we have engaged with certain investors. As part of that engagement, we are continuing to liaise with AFCA and the WA department of consumer protection. We also met, I think late last year, with Circle Green. As part of our engagement with certain investors, we have been encouraging some of them to consider submitting AFCA claims, where we think that they ought to do so. That's the nature of the engagement.

**Senator PRATT:** Is that because they've still got a claim against an entity that is not covered under the Compensation Scheme of Last Resort, from which they were excluded by the legislation recently, or are we still looking at how we might make some money available in this context via the Compensation Scheme of Last Resort or some other mechanism?

**Mr Savundra:** It's not the Compensation Scheme of Last Resort; it's a very small number of investors where we believe that, despite the DH Flinders case—

**Senator PRATT:** Good.

**Mr Savundra:** AFCA may have jurisdiction. I stress that it's only a limited number, but we're keen to encourage those investors—

**Senator PRATT:** But it would be all of the investors that were affected by the DH Flinders case, to start with.

**Mr Savundra:** No. The effect of the DH Flinders case is that AFCA didn't have jurisdiction. Obviously, it turns on the facts of the case for each investor. We believe that there's a limited number where—

**Senator PRATT:** Why do you think the DH Flinders case can be overcome?

**Mr Savundra:** Senator, I'll need to take that on notice. I don't have that detail at hand; I can't recall it off the top of my head. The key message I'm wanting to get across is that a number of investors were encouraged not to put in AFCA claims, despite what ASIC had encouraged investors to do.

**Senator PRATT:** I understand that.

**Mr Savundra:** We were heavily criticised, as you will recall, for encouraging investors to put in AFCA claims. We did so because of the forthcoming Compensation Scheme of Last Resort.

**Senator PRATT:** I was encouraging them to do that, too, in the hope that the Compensation Scheme of Last Resort would be useful to them.

**Mr Savundra:** We certainly have not given up looking to encourage investors to seek compensation where they can.

### **Answer**

Under law, licensees are responsible for the conduct of their authorised representative, whether or not the representative's conduct is within authority (s917B of the Corporations Act and ss75-77 of the National Credit Act). A consumer can pursue remedies for damage caused by the conduct of an authorised representative acting beyond the authority of their licensee in court. The effect of the decision in *D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 (DH Flinders) was that under the AFCA scheme rules (as interpreted by the court), AFCA did not have jurisdiction to deal with such complaints against licensee members or provide remedies for damage caused by representatives acting without authority.

On 5 January 2021, ASIC made regulatory requirements under section 1052A(b) of the Corporations Act, issuing the *ASIC Corporations (AFCA Regulatory Requirement) Instrument 2021/0002* (the Instrument). The instrument required AFCA to amend the scheme rules to close the jurisdictional gap created by the DH Flinders decision. The rule change took effect on 13 January 2021.

The AFCA Rules change was prospective, so complaints lodged with AFCA from 13 January 2021 on are unaffected by the DH Flinders decision and AFCA can deal with them. For complaints lodged prior to 13 January 2021, the DH Flinders decision applies and, to the extent that the complaint relates to the conduct of an authorised representative acting beyond the authority of their licensee, that part of the complaint is outside AFCA's jurisdiction and can't be dealt with.

We are continuing to liaise with a small number of SNLL tenant investors who we believe may not be affected by the DH Flinders case because those investors made investments in the SIT after Libertas Financial Planning Pty Ltd took over from Theta Asset Management Limited as AFS Licensee authorising Sterling Corporate Services Pty Ltd to give general advice and deal in relation to the SIT. Those investors may not be affected by DH Flinders because the conduct of Sterling Corporate Services was within the scope of this authorisation.