

**Senate Economics Legislation Committee**  
**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Additional Estimates

2015 - 2016

**Department/Agency: Australian Securities and Investment Commission**

**Question: AET 124-130**

**Topic: Insider Trading**

**Reference: written - 17 February 2016**

**Senator: Dastyari, Sam**

**Question:**

**Insider Trading**

**Background**

On 22 December 2015, media release 15-406MR stated that following an investigation, ASIC had accepted enforceable undertakings (EUs) from Sydney stockbroker Mr Angus Aitken and his employer Bell Potter Securities Limited (Bell Potter).

ASIC's investigation found that on 21 May 2013, Mr Aitken sent an email to Mr Philip King of Regal Funds Management, without his client's knowledge or consent, about information he had obtained about his client's possible intentions to sell securities of Ten Network Holdings.

King made \$80,000 in seven minutes buying what Aitken told him were "cheapies".

**Questions**

124. Was this a clear-cut example of Insider Trading?

125. If you, or I, stole \$80,000, would we go to jail?

126. Can you please explain: why did ASIC accept EUs, rather than prosecuting Angus Aitken of Bell Potter and Phil King of Regal Funds Management?

127. Please you please explain why none of Mr Aitken, Mr King, Bell Potter or Regal were required to admit to any contraventions in their EUs.

128. How many other cases of securities insider trading have been settled with EUs? Prosecutions?

129. How prevalent is insider trading in Australia?

130. Is Australia a paradise for insider trading?

**Answer:**

124.

No.

There are three forms of insider trading contravention under the Corporations Act: dealing (s 1043A(1)(c)), procuring (s 1043A(1)(d)), and communicating/tipping (s 1043A(2)). Each of the contraventions requires proof that:

- the relevant information was possessed by the defendant
- the relevant information was not generally available
- the relevant information was material
- the defendant knew, or ought reasonably to have known, that the relevant information was not generally available and material
- the defendant did a prohibited act - dealt, procured or communicated.

The insider trading provisions are complex. A contravention requires proof by evidence. It cannot be assumed that a person engaged in insider trading simply because he or she appears to have had access to confidential information, traded and made a profit.

125.

There was no evidence or suggestion of stealing in this matter.

As recorded in the enforceable undertakings, ASIC held concerns:

- about the way in which Mr Aitken handled and disclosed information about an institutional client's possible selling intentions
- that Mr Aitken knew, or ought reasonably to have known, that the information he provided to Mr King was, or was likely to have been, confidential client information, and that its dissemination may have been contrary to the interests of his client
- that Mr King, by virtue of his position and experience, knew, or ought reasonably to have known, that the information he received from Mr Aitken was, or may have been, confidential, and that its dissemination to him may have been contrary to the interests of Mr Aitken's client
- that instead of avoiding any use of the information he received from Mr Aitken, Mr King caused Regal Funds Management to short-sell TEN shares

Under the enforceable undertakings, Mr Aitken and Mr King each undertook to make a payment of \$80,000 to Financial Literacy Australia Limited, reflecting the approximate profit on Mr King's short-sale of TEN shares on behalf of Regal Funds Management.

The sentence for a stealing conviction is determined by a judge, not an investigative or prosecutorial authority. The imposition of a custodial sentence will depend upon the facts, the offence charged, and various other matters which may be taken into account in sentencing.

126.

ASIC took a serious view of the misconduct described in the enforceable undertakings and, after a thorough investigation, considered all possible regulatory options in light of the evidence that had been obtained or was known to be obtainable. ASIC concluded that the enforceable undertakings were a more effective, appropriate and timely protective outcome than pursuing other action.

ASIC did not accept the enforceable undertakings as an alternative to taking punitive enforcement action such as civil or criminal proceedings. ASIC can only take civil or criminal action where there is sufficient and available evidence to do so.

127.

ASIC's published guidance states:

"[ASIC] will not generally accept an enforceable undertaking in which the promisor does not at least acknowledge that ASIC's views in relation to the misconduct which gave rise to the enforceable undertaking are reasonably held" - ASIC Regulatory Guide 100, Enforceable undertakings, at [100.40].

The enforceable undertakings in this matter were consistent with this published policy position. Mr Aitken, Mr King, Bell Potter and Regal each acknowledged ASIC's concerns and that they were reasonably held.

128.

ASIC has not accepted an enforceable undertaking based on insider trading allegations.

ASIC's published guidance states that ASIC will not accept an enforceable undertaking instead of commencing criminal proceedings against a person, to secure payment of a pecuniary civil penalty, or in cases of deliberate misconduct, fraud, or conduct involving a high level of recklessness (except for an urgent protective purpose) - ASIC Regulatory Guide 100, Enforceable undertakings, at [100.21].

ASIC views insider trading as serious misconduct which should generally be prosecuted as a criminal offence where there is sufficient and available evidence to do so. Since 2009, 39 persons have been prosecuted for insider trading as a result of ASIC investigations, with a success rate of 82.9% (29 convictions) in the 35 cases in which liability has been determined 3 matters are currently before the courts.

129.

There is no way of precisely measuring the prevalence of insider trading activity in Australia.

Internal analysis by ASIC suggests that over the past decade, there has been a general decline in anomalous trading activity ahead of material price sensitive announcements. As a rough indicator or proxy of insider trading activity and information leakage, the decline in anomalous trading activity points to an improvement in market integrity and a reduction in the prevalence of insider trading. ASIC's internal work is complemented by at least one international study on market cleanliness which has made consistent findings.

130.

See the answer to question 129 above.