

## Senate Economics Legislation Committee

### ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimate, 16 & 17 February 2005

**Topic: ASIC – investigations into Individuals/Organisations**

**Senator Sherry asked:**

- 1. In a situation where ASIC applies a penalty or ban to an individual or organisation that is subsequently overturned or downgraded what steps does ASIC undertake to communicate the changes?**

#### *Media releases*

ASIC's policy on when it will comment publicly is set out in Policy Statement 47.

Circumstances where ASIC will issue media releases include:

- the outcome of administrative proceedings (including appeals to the Administrative Appeals Tribunal) or when the commencement of the proceeding has been given publicity or when a penalty is imposed
- the settlement or outcome of civil proceedings
- the outcome of matters appealed by ASIC
- the outcome of any charges, including withdrawal of charges, acquittal or successful prosecution

#### *ASIC Gazette*

ASIC is required to publish in the *Gazette* a notice of variation, suspension, revocation of a suspension or cancellation of an Australian financial services licence: s915F(2) of the *ASIC Act*.

ASIC is required to publish in the *Gazette* a notice of a banning order, or variation or cancellation of a banning order: s920E(2) of the *ASIC Act*.

#### *Disqualified and Banned register*

The Banned and Disqualified Registers list people who have been disqualified from involvement in the management of a corporation, or banned from practising in the financial services industry. If a banned or disqualified person is reinstated, the register is amended accordingly.

#### *Written communication*

Depending on the circumstances, if ASIC has had prior written communications with clients of an entity that has been the subject of administrative sanctions, ASIC may write to the clients advising them of any changed circumstances.

**2. If a person has appealed to the Administrative Appeals Tribunal as a result of an ASIC determination and the case is set aside or downgraded what rights does an individual have to seek redress for loss of a business or reputation?**

There are no statutory rights of redress as a result of an ASIC determination.

**3. What information or evidence is required prior to ASIC launching an investigation into an individual or an organisation?**

ASIC makes detailed inquiries before deciding to commence a formal investigation. ASIC may gather information informally, or it may use its statutory powers, such as its power to inspect books under s29 of the *ASIC Act*.

Examples of informal information gathering include:

- researching an individual's or organisation's background through various information sources such as company registers and registers of banned or disqualified persons;
- seeking voluntary cooperation or assistance from witnesses or informants.

The *ASIC Act* provides three grounds for the commencement of a formal investigation: suspicion of a contravention or unacceptable circumstances (s13); ministerial direction (ss14–14A); or the report of a receiver or liquidator (s15).

Section 13 of the *ASIC Act* empowers ASIC to initiate an investigation if one of the following conditions is satisfied:

- where ASIC has reason to suspect that there has been a contravention of the Corporations Act or the *ASIC Act*.
- where ASIC has reason to suspect that unacceptable circumstances have or may have occurred in relation to a takeover

Section 13 of the *ASIC Act* requires that ASIC have reason to suspect that a contravention of the law may have been committed. This means that a suspicion must be held, and there must be reasons on which to base the suspicion. There does not necessarily have to be a belief that an event has occurred. A suspicion may be based on material that is not admissible evidence.

ASIC's formal investigation powers provided by section 13, 14 and 15 of the *ASIC Act* are for the purpose of gathering evidence and enabling ASIC to make an informed decision about whether there has been a contravention of the law that it administers.

In addition to the broad investigative powers contained in section 13 of the *ASIC Act*, ASIC also has specific powers to commence an investigation under other legislation it administers, including:

- *Retirement Savings Accounts Act 1997* (Cth) (RSA Act)– ASIC has investigation powers under the RSA Act, including power to issue notices to produce books and notices to attend for oral examinations.
- *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act)– ASIC has power to investigate suspected contraventions of the SIS Act by superannuation trustees and has supervisory functions in relation to superannuation funds. Its

investigation powers are contained in Pt 25 of the SIS Act, and include power to obtain information and freeze assets, and power to issue notices to produce books and notices to attend for an oral examination.

**4. Does ASIC seek to determine the bona fide nature of complaints or allegations before an investigation is commenced?**

ASIC acknowledges that from time to time it may receive complaints from people who are actuated by malice. However, the focus of ASIC's inquiries and investigations is to establish whether there have been contraventions of the laws it administers.

As discussed at 3 above, ASIC uses a variety of methods to investigate a complaint and to establish if there is any substance to the complaint before commencing a formal investigation.

**5. Does the making of an allegation take precedence over the nature and character of the person making the allegation?**

ASIC's entire focus in an investigation is to determine if there is substance to a complaint or allegation, and whether such complaint or allegation evidences breaches of the corporations laws.

As indicated in 3 above, ASIC makes informed decisions as to whether there have been contraventions of the law.

**6. During the course of an investigation does ASIC allow its officers to discuss the case with parties not directly involved in the matter?**

During the course of an investigation, ASIC officers obtain access to information through the use of compulsory powers. This information is generally "confidential". There are specific statutory obligations of confidentiality upon ASIC staff including:

- section 127 of the ASIC Act, which requires ASIC to take reasonable measures to prevent unauthorised use and disclosure of information received in confidence or which is protected information;
- The *Privacy Act 1988* (Cth), which imposes strict obligations on ASIC and its staff in relation to handling and management of personal information;
- The *Freedom of Information Act 1982* (Cth), which sets out the regime by which members of the public can gain access to information in ASIC's possession.

ASIC staff are permitted to disclose confidential information in limited circumstances to assist with an investigation.

**7. What is the position of ASIC if a person subject to investigation is unable to attend hearings due to illness or family circumstances?**

ASIC is receptive to any reasonable request, and a hearing would be adjourned where a person was unable to attend.

**8. Other than the Administrative Appeals Tribunal do individuals or companies have any redress to other authorities or courts once an investigation has been commenced?**

An appeal to the Administrative Appeals Tribunal is possible only once a decision has been made by ASIC and not during the course of an investigation. ASIC's decision to commence an investigation is not a reviewable decision under the *Administrative Appeals Tribunal Act 1975* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The Commonwealth Ombudsman investigates complaints relating to administrative actions by ASIC.

In circumstances where there is an allegation that ASIC has used its investigative powers unlawfully or has acted beyond its power, a legal challenge can be commenced through the Courts.

**9. What are the legislative or legal protections afforded to an individual or company under investigation?**

As set out in response to question 3 above, ASIC can only commence an investigation in certain circumstances prescribed by statute.

As set out in response to question 8 above, ASIC's use of its powers is supervised by the Courts and the Commonwealth Ombudsman.

ASIC's investigative powers under the ASIC Act form an integrated regime which provides various protections for those who are affected by the use of powers. In the case of each provision, the legislation sets out limits as to when the powers may be used. Powers available to ASIC under other legislation are subject to similar limitations.

Section 92 of the *ASIC Act* affords protection from civil liability to persons who are required to provide assistance to ASIC or attend an examination. This protection does not extend to the voluntary provision of assistance.

**10. Does ASIC ever suggest to investors that they launch a class action against companies or individuals providing services whilst the investigation is ongoing?**

ASIC generally encourages private litigants to obtain their own legal advice in respect of actions to protect their own interests.

**Additional Question (from PJC Hearing in March 2005)**

**What was the total number of litigation proceedings commenced by ASIC during the 2004-05 year?**

As at 31 March 2005, the total number of litigation proceedings commenced by ASIC, since 1 July 2004, was 330. This includes 42 criminal proceedings, 247 civil proceedings and 41 administrative.