



ASIC

Australian Securities & Investments Commission

Inquiry into financial related crime: Submission by the Australian Securities and Investments Commission

September 2014

ASIC's submission

- 1 ASIC welcomes the opportunity to contribute to the Parliamentary Joint Committee on Law Enforcement's¹ inquiry into financial related crime. Our submission provides information on:
 - (a) ASIC's role and responsibilities;
 - (b) types of financial crime, and examples of ASIC's enforcement activities;
 - (c) ASIC's support for a Commonwealth multi-agency taskforce for combatting financial crime;
 - (d) ASIC's relationship with other Australian agencies involved in combatting financial crime (including other criminal law enforcement agencies); and
 - (e) options for improving ASIC's investigative powers.
- 2 We would be happy to provide further, more specific, information where the committee considers it would assist the inquiry.

ASIC's role in combatting financial crime

- 3 ASIC is a primary law enforcement agency in the fight against financial crime.
- 4 ASIC regulates Australian companies, financial markets, financial services organisations, and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.
- 5 Given that financial markets and large pools of savings will attract those with criminal intent,² combatting financial crime is a key part of our remit. Where we detect serious misconduct that is intentional, dishonest or highly reckless, we may take criminal enforcement action. Between 2010 and 2013, we completed 79 criminal proceedings with outcomes including the imposition of fines and jail terms.³
- 6 This submission provides an overview of:
 - (a) our regulatory role;
 - (b) examples of the types of financial crime we take action against; and
 - (c) some enforcement case studies.⁴

¹ The role of the committee includes monitoring and reviewing the performance of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP).

² The Australian Crime Commission (ACC) report, *Organised crime in Australia 2013*, recognises that fraud-based serious financial crimes are a significant risk for the integrity of the Australian economy, financial markets, regulatory frameworks and revenue collection.

³ See ASIC's main submission to the Senate inquiry into the performance of ASIC, p. 6.

⁴ For more information, see ASIC's six-monthly reports that outline our enforcement outcomes:

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports+on+ASIC+enforcement+outcomes?openDocument>.

Financial services

- 7 As the financial services regulator, we have responsibility for investor and consumer protection in financial services. We administer the Australian financial services (AFS) licensing regime and monitor financial services businesses to ensure that they operate efficiently, honestly and fairly. These businesses typically deal in superannuation, managed funds, deposit and payment products, shares and company securities, derivatives and insurance.
- 8 As the financial services regulator, we play a leading role in combatting investment fraud targeting Australian investors. Investment fraud often involves breaches of the *Corporations Act 2001* (Corporations Act)—including, for example, engaging in dishonest conduct in relation to a financial product or service: s1041G.

Example: Investment fraud

Graeme Hoy

In March 2011, Graeme Hoy was sentenced to 13 years imprisonment following an ASIC investigation into the collapse of the Geelong-based company, Chartwell. The investigation uncovered that the collapse of Chartwell, in April 2008, was a direct result of Mr Hoy operating one of Australia's largest Ponzi schemes, with investors owed in excess of \$82 million.

Mark Letten

In August 2014, Mark Letten was sentenced to five years and eight months imprisonment on charges brought by ASIC.

He operated 21 unregistered managed investment schemes relating to property development. He also dishonestly used his position as a director and carried on a financial services business without a licence. Investors suffered losses of at least \$67 million.

Consumer credit

- 9 As the consumer credit regulator, we license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers). We ensure that credit licensees meet the standards—including their responsibilities to consumers—that are set out in the *National Consumer Credit Protection Act 2009* (National Credit Act).
- 10 ASIC has targeted surveillance activity to identify loan fraud involving false loan applications and related documents. In terms of enforcement outcomes, we have banned a number of persons since the introduction of the National Credit Act. We have also obtained several criminal convictions for loan fraud, which indicates the seriousness of this activity.

Example: Falsifying loan documents

This year, a former finance broker was convicted of two fraud charges following an ASIC investigation.

Riyanka Puteri Shiraz admitted to using the identities of former clients to defraud a finance company to purchase two cars, sell them to friends and keep the cash from the sale.

The fraud occurred in July and August 2012 when Ms Shiraz worked as a business manager with finance broker We R Finance Pty Ltd.

Ms Shiraz was ordered to enter into two good behaviour bonds of 18 months and two years, to be served concurrently.

Financial markets

- 11 As the financial markets regulator, we assess how effectively financial markets are complying with their legal obligations to operate fair, orderly and transparent markets. We also advise the Minister about authorising new markets. On 1 August 2010, we assumed responsibility for the supervision of trading on Australia's domestic licensed equity, derivatives and futures markets.
- 12 In our role as the markets regulator, we are responsible for detecting and taking action against market misconduct. Market misconduct can have a significant negative impact on confidence in Australia's financial markets. This weakening confidence can lead to changes in broader market behaviour and pricing, and flow on to other adverse effects on the economy.
- 13 An example of market misconduct is insider trading. Insider trading occurs where a person who is aware of confidential, price-sensitive information that would be expected to affect the value of particular securities trades, or procures another person to trade, in those securities, or discloses that information to another person likely to trade in those securities. It is an activity that cheats investors and creates an unfair market.

Example: Insider trading

In December 2010, John Hartman, a former equities dealer, pleaded guilty to 25 charges of insider trading for allegedly procuring a friend to 'front run' contracts for difference, making a profit of over \$1.59 million. He received three years imprisonment,⁵ and his profits were recovered under the *Proceeds of Crime Act 2002*.

⁵ Mr Hartman was originally sentenced to 4.5 years imprisonment. He was re-sentenced on appeal to an overall term of three years imprisonment with a single pre-release period of 15 months.

Corporations

- 14 As the corporate regulator, we ensure that companies, schemes and related entities meet their obligations under the Corporations Act. We register and regulate companies at every point from their incorporation through to their winding up, and ensure that company officers comply with their responsibilities.
- 15 Directors, company officers, auditors, liquidators and market participants play a key role in ensuring that Australia's financial markets are fair and efficient. We take enforcement action against these gatekeepers to promote fair and efficient financial markets.

Example: Failure to act in the best interests of the company

Ronald David Williams and Gary David Maile, former directors of Selection One Finance Pty Ltd (Selection One), borrowed funds from investors for approximately 12 months at an interest rate of 3% per month, or 36% per year.

Mr Williams and Mr Maile represented to investors that the funds would be on-lent to third parties as short-term loans at 6% per month, thus allowing the high returns to investors. The proportion of money actually on-lent to borrowers was very small compared to the amount of investor funds received. Selection One's poor financial performance meant it was only able to survive by raising new investors' funds to pay the high rate of interest promised to its existing investors.

Selection One's poor performance was not disclosed to new or existing investors and Mr Williams and Mr Maile did not take any steps to alter or abandon the company's high-risk business model, continuing to encourage investors to invest in Selection One.

On 3 March 2009, Selection One was placed in voluntary administration with outstanding debts of approximately \$20.92 million owed to 88 investors.

Both Mr Williams and Mr Maile were sentenced to four years and three months imprisonment with a non-parole period of 16 months.

- 16 ASIC is targeting company directors with a history of failed companies as part of a surveillance program to combat illegal phoenix activity. Phoenix activity is the fraudulent act of transferring the assets of an indebted company into a new company to avoid paying creditors, tax or employee entitlements. The new company, usually operated by the same director, continues the business under a new structure to avoid its responsibilities to its creditors. Figures put the cost of this activity to the Australian economy at more than \$3 billion annually.⁶

⁶ Research compiled for the Fair Work Ombudsman by PriceWaterhouseCoopers in 2012. The report, *Phoenix activity: Sizing the problem and matching solutions*, is available at www.fairwork.gov.au.

- 17 ASIC is part of a whole of government initiative to regulate illegal phoenix activity, and is a member of the Inter-Agency Phoenix Forum, which comprises 13 Commonwealth government agencies, including the Australian Taxation Office (ATO), Australian Crime Commission (ACC) and Fair Work Ombudsman. In the past two years, ASIC has taken action to ban 117 people from being involved in the management of a company, where they have been involved in more than two companies that have failed to pay more than 50 cents in the dollar to creditors.

Commonwealth multi-agency approach to combatting financial crime

- 18 ASIC supports a coordinated, multi-agency taskforce approach to combatting serious financial crime. We believe that this approach will be most effective where there are appropriate information-sharing powers between the key agencies responsible for combatting financial crime and the taskforce is specifically funded.
- 19 At present, the general sharing of information between agencies, such as ASIC and the Australian Federal Police (AFP) or the ATO, are severely restricted by our respective obligations around the use and disclosure of confidential information. The ATO, in particular, has significant limitations in disseminating information to other agencies outside of matters that are being investigated by prescribed taskforces such as Project Wickenby (see below).
- 20 A simplified and streamlined approach to information sharing would be of advantage to those agencies that have responsibility for investigating financial crime.
- 21 Project Wickenby and the Fraud and Anti-Corruption Centre (FAC Centre) are good examples of a coordinated, multi-agency approach to investigating financial crime.

Project Wickenby

- 22 Project Wickenby is a cross-agency taskforce targeting Australians involved in tax evasion, avoidance and crime to protect the integrity of the Australian financial and regulatory system. It is led by the ATO and involves the AFP, ACC, ASIC, the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Commonwealth Director of Public Prosecutions (CDPP).
- 23 The taskforce makes use of the combined powers and capabilities of its member agencies to identify and take action against a range of illegal offshore schemes and their participants and promoters.

Fraud and Anti-Corruption Centre

- 24 ASIC is a participant in the FAC Centre, which was formally announced by the Minister for Justice on 31 July 2014.
- 25 The objective of the FAC Centre is to deliver a collaborative Commonwealth multi-agency approach to the Australian Government's law enforcement capability and response to fraud, corruption and foreign bribery. This will ensure that serious fraud and anti-corruption issues are dealt with in the most effective manner.
- 26 The FAC Centre is hosted by the AFP and is a joint initiative with the ATO, ACC, Department of Human Services, Department of Immigration and Border Protection, Department of Foreign Affairs and Trade, Department of Defence, Australian Customs and Border Protection Service and ASIC. The FAC Centre will be resourced by the AFP, with partner agencies contributing seconded members with relevant areas of expertise.
- 27 ASIC has seconded a lawyer, experienced in Corporations Act investigations and enforcement matters, from ASIC's Enforcement team to the FAC Centre to assist on foreign bribery matters.
- 28 A recent example of the effectiveness of the FAC Centre approach is the arrest and charging of two men for offences relating to insider trading, money laundering, corruption and abuse of public office involving sensitive Australian Bureau of Statistics (ABS) information.

Example: Joint AFP and ASIC operation

A joint operation was launched by ASIC and the AFP after suspicious trading in foreign exchange derivatives was identified and monitored. The AFP and ASIC worked closely together on this serious and complex investigation, utilising the resources and expertise of both agencies—ultimately leading to the arrest of two men for offences relating to insider trading, money laundering, corruption and abuse of public office.

Authorities discovered that Lukas James Kamay, an employee of the National Australia Bank (NAB), appeared to be receiving sensitive information from Christopher Russell Hill, an employee of the ABS. It was alleged that Mr Kamay obtained market-sensitive information before its official release by the ABS, then used it to enter into foreign exchange derivative products and personally profited from favourable movements in the prices of those derivatives. This trading activity, occurring between August 2013 and May 2014, resulted in profits of approximately \$7 million.

On 16 September 2014, Mr Hill pleaded guilty to six charges, including one joint commission insider trading charge and four abuse of public office charges, and Mr Kamay pleaded guilty to six charges, including one joint commission insider trading charge and three insider trading charges.

ASIC's relationship with other Australian agencies

29 Currently, the Commonwealth's approach to responding to serious financial crimes is through stand-alone agency operations, joint agency operations and designated operational cross-agency taskforces. The Commonwealth's core enforcement agencies working on financial crimes are ASIC, the AFP and the ATO, along with the ACC and AUSTRAC, and supported by the legal frameworks of the Attorney-General's Department and Commonwealth Director of Public Prosecutions.

30 ASIC is committed to building strong relationships with these partner agencies, and supports a coordinated and strategic approach to combatting financial related crime in the future.

Australian Federal Police

31 ASIC liaises with the AFP at strategic and operational levels.

32 ASIC officers work with their AFP counterparts at a number of regular inter-agency forums, including the Heads of Commonwealth Operational Law Enforcement Agency (HOCOLEA) sponsored working groups (e.g. on carbon pricing), the Australian Criminal Intelligence Forum (ACIF) and the AFP-chaired Opal group on identity fraud. ASIC also maintains regular contact with the AFP's Criminal Assets Confiscation Taskforce, High Tech Crime Operations and Intelligence units.

33 ASIC and the AFP routinely refer matters to one another when the matter falls more appropriately within the other's jurisdiction, and share intelligence and information on a regular basis. ASIC provides the AFP with access to our Companies Register, and the AFP provides intelligence reporting to ASIC when a matter involves company activity.

34 ASIC has collaborated with the AFP recently in a number of matters, including a project that examined high-risk financial fraud threats and discussions regarding the involvement of ASIC-regulated entities in organised crime and tax fraud.

35 ASIC recently executed a new memorandum of understanding (MOU) with the AFP, which covers our general relationship, information sharing and operational interaction, and clarifies our respective responsibilities in relation to overseas bribery matters.

Australian Taxation Office

36 ASIC has a close strategic relationship with the ATO. ASIC and the ATO signed a new MOU on 24 December 2012, which sets out the high-level parameters by which the agencies work together on areas of common risk.

- 37 ASIC and the ATO have established information-sharing guidelines to clarify how and when information should be shared. Information is released through one formal channel with a single point of contact at each agency. This approach ensures appropriate record keeping, minimises the risk of a request being missed and allows the liaison staff to develop an enhanced understanding of the needs of the other agency.
- 38 ASIC and ATO staff often attend regular and risk-specific working groups to discuss strategic matters and operational risks, and exchange ideas and information to mitigate those risks. Examples include the self-managed superannuation fund (SMSF) working group, the financial products working group, and the inter-agency phoenix working group.
- 39 ASIC and the ATO hold a National Liaison Committee meeting every six months where senior staff of both agencies discuss issues of strategic importance, the effectiveness of information exchange, the utility of ongoing working groups and specific operational matters (such as Project Wickenby).

Australian Crime Commission

- 40 ASIC has a strong relationship with the ACC. The Chairman of ASIC is an ex-officio board member of the ACC and attends ACC board meetings every three months. ASIC is one of only six Australian government agencies represented on the ACC board.
- 41 ASIC also participates in cross-agency standing forums coordinated by the ACC, which meet regularly to discuss ongoing matters relating to financial crime. Among these, the ACIF is Australia's premier meeting of heads of intelligence in law enforcement. ASIC is a founding member of the ACIF.
- 42 ASIC and the ACC have seconded officers between them as required by various operations and taskforces. Three ASIC officers are currently seconded to the ACC as part of two ACC projects. The ACC has provided a part-time secondee to ASIC to work on the intelligence nexus between criminal law enforcement and corporate regulation.
- 43 In September 2014, ASIC and the ACC signed an MOU on cooperation and information sharing.

Australian Transaction Reports and Analysis Centre

- 44 AUSTRAC is Australia's anti-money laundering regulator and specialist financial intelligence unit. It oversees compliance with the reporting requirements of the *Financial Transaction Reports Act 1988* and compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* by a wide range of financial services providers, the gambling industry and other entities.

45 The information and reports that AUSTRAC obtains can be extremely useful to ASIC in administering the Corporations Act and identifying high-risk entities. ASIC has entered into an MOU with AUSTRAC. This MOU sets out the basis for collaboration, cooperation and mutual assistance between the agencies.

46 ASIC and AUSTRAC have both nominated liaison staff responsible for managing the relationship and monitoring referrals of information between the agencies. Regular meetings are held between the agencies to facilitate close cooperation and ensure that the liaison arrangements are working effectively.

Commonwealth Director of Public Prosecutions

47 The CDPP's functions and powers are set out in the *Director of Public Prosecutions Act 1983* and include the responsibility for prosecution of offences against Commonwealth law.

48 ASIC and the CDPP have established an MOU, which sets out the principles underpinning the relationship between ASIC and the CDPP, and outlines the circumstances in which ASIC refers matters to the CDPP for prosecution.

49 Although ASIC has the power to cause a prosecution to begin, in practice, the CDPP subsequently conducts most prosecutions for Commonwealth offences. Consistent with the MOU, ASIC will refer a brief of evidence to the CDPP and obtain its advice before commencing any prosecution for a serious offence. ASIC and the CDPP hold regular liaison meetings to discuss the progress of criminal matters. This includes discussions regarding matters that are still being investigated by ASIC, matters that are being assessed by the CDPP, matters for which ASIC is conducting a summary prosecution and matters in various stages of a criminal prosecution.

50 ASIC and CDPP staff have also conducted and participated in joint training conferences. There have also been secondments of staff between ASIC and the CDPP.

State and territory police services

51 ASIC works closely with the police services in each state and territory.

52 ASIC currently has MOUs in place with some state police services, such as Victoria Police, South Australia Police and Queensland Police. ASIC intends to initiate discussions with other state and territory police services, with a view to agreeing on an MOU on similar terms to the one we entered into with the AFP.

53 ASIC has appointed liaison officers who are responsible for managing our relationships with the state and territory police services. In broad terms,

these relationships involve the sharing of information, referral of matters, joint operations, and operational and training assistance.

- 54 A recent joint operation between ASIC, Queensland Police and the ACC was Operation 'Juliet Dynamite'. Operation Juliet Dynamite involved the investigation and disruption of an organised criminal enterprise operating investment frauds on the Gold Coast. ASIC took injunctive action in the Queensland Supreme Court and assisted Queensland Police and ACC officers in the execution of multiple search warrants leading to the arrest of five people.

Heads of Commonwealth Operational Law Enforcement Agencies

- 55 ASIC is a member of the HOCOLEA. Through the HOCOLEA, ASIC engages with the law enforcement community to identify and collaborate on issues where there is jurisdictional overlap.
- 56 Currently hosted by the Attorney-General's Department, the HOCOLEA forum is attended by ASIC's Chairman/Commissioners and Chief Legal Officer, and meets two to three times per year. Through the HOCOLEA, ASIC is involved in policy-level discussions and initiatives with a wide range of Australian government agencies.
- 57 ASIC has been involved in the recent development of several HOCOLEA initiatives, including the Organised Crime Compendium, and the Organised Crime Strategic Framework Taskforce.

Potential improvements to ASIC's investigative toolkit

- 58 In order to effectively carry out our role as an effective law enforcement agency against financial crime, ASIC needs a broad and effective enforcement toolkit.
- 59 An important part of modern corporate and financial investigations involves piecing together complex information to reconstruct events and establish that misconduct has occurred. Search warrants, and access to intercept telecommunications information, are important investigative tools. There is scope to improve ASIC's investigative powers in both of these key areas.

Search warrants

- 60 ASIC has access to search warrant powers under both the *Commonwealth Crimes Act 1914* (Crimes Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). However, neither is entirely satisfactory:

- (a) the powers under the ASIC Act only authorise a limited range of search activities (e.g. entering premises and taking possession of ‘particular’ books, which ASIC must attempt to name in applying for a warrant), posing significant practical difficulties for ASIC; and
 - (b) by contrast, the Crimes Act authorises a far larger range of search activities (e.g. examining electronic equipment at the searched premises). However, the Crimes Act only authorises searches relating to suspected criminal offences, whereas the ASIC Act allows for searches relating to all of the provisions under ASIC’s jurisdiction, including civil penalty provisions and administrative remedies.
- 61 The execution of warrants typically occurs at an early stage of an investigation, before it is known whether or not there will be sufficient evidence to commence:
- (a) criminal prosecution and civil penalty proceedings;
 - (b) a civil penalty proceeding only; or
 - (c) some alternative form of enforcement action.
- 62 In practical terms, the difficulties posed by the gaps in ASIC’s search warrant powers could mean that the early choice of which type of search warrant to obtain could ultimately determine what type of enforcement action can be taken, rather than this being determined by considering the relative merits of each type of action for that matter.
- 63 A simple but effective change would be to expand the search warrant powers in the ASIC Act, so that they:
- (a) are as procedurally broad as those in the Crimes Act; but
 - (b) allow ASIC to collect information that could ultimately be used as evidence in any of the types of enforcement action ASIC may take.

Access to intercepted telecommunications information

- 64 ASIC is not currently permitted to receive or intercept telecommunications information, which seriously hinders our ability to enforce the law in a modern corporate world.
- 65 Access to intercepted telecommunications information can be a valuable investigative tool—particularly in the case of market misconduct, which is generally conducted opportunistically and with rapidity, via telephone or text messages (SMS), rather than being planned and documented in writing.
- 66 Given the increasing prevalence of the use of Voice over Internet Protocol (VOIP) for telephones and social media applications such as Skype and Facebook for calls and instant messaging, we expect that traditional sources of telecommunications information such as call charge records will be of

very little use in the near future, particularly with the advent of the national broadband network.

- 67 Some law enforcement agencies (e.g. the AFP) can intercept telecommunications under the *Telecommunications (Interception and Access) Act 1979* (TIA Act). However, ASIC is not an ‘interception agency’, as defined in s5(1) of the TIA Act, so we cannot obtain warrants to intercept telecommunications, and are not eligible to receive ‘lawfully intercepted information’ from other agencies under s68 of the TIA Act. Accordingly, we are not currently able to receive or use ‘lawfully intercepted information’ for the purpose of any of our investigations or prosecutions.
- 68 This can lead, for example, to situations where other agencies detect possible market misconduct offences through intercepted information, but cannot pass this on to ASIC. We propose that, where it is appropriate to do so, ASIC should be authorised to receive intercepted telecommunications information from ‘interception agencies’.