



Australian Securities and Investments Commission's New Corporate Plan and Enforcement Activity

Key Points

- The Australian Securities and Investments Commission ("ASIC") has released its Corporate Plan for 2015–16 to 2018–19 which raises a number of key challenges such as:
 - gatekeeper culture;
 - balancing consumer protection with a free-market based system;
 - technology—cyber attacks and digital innovation; and
 - globalisation.
- ASIC has released its report on enforcement outcomes for January to June 2015 which provides an insight into the level of ASIC activity and areas of focus.
- ASIC has determined to more routinely utilise its power to make an order to recover investigation expenses and costs where that investigation has led to a successful prosecution or civil proceeding against a person.

- promote investor and financial consumer trust and confidence;
- ensure fair, orderly, transparent and efficient markets; and
- provide efficient and accessible registration.

These priorities are essentially the same as those previously adopted, with the exception that efficiency has been added as a goal in relation to markets.

ASIC explains that it employs a "detect, understand and respond" approach with the response including education, guidance, surveillance, enforcement and policy advice to the government. However, ASIC also takes the view that it is a law enforcement agency with 70 percent of its regulatory resources devoted to surveillance and enforcement.

Key Challenges

Gatekeeper Culture. Culture has attracted significant attention after the global financial crisis and the rigging of financial benchmarks such as LIBOR. ASIC's report on enforcement outcomes for January to June 2015 defines "culture" as a set of shared values or assumptions which

ASIC Strategic Priorities

ASIC has released its Corporate Plan for 2015–16 to 2018–19 which sets out its strategic priorities as being to:

can influence an organisation's attitudes and behaviours toward clients and compliance.

ASIC uses the term "gatekeepers" broadly to include directors, auditors, insolvency practitioners, the responsible entities of managed investment schemes, lenders, market operators and participants including issuers, brokers and investment banks.

ASIC's focus on culture will include specifically targeting the following:

- reward and incentive structures, including training, promotions and remuneration;
- whistleblowing policy;
- conflicts of interest;
- handling of confidential information; and
- corporate governance frameworks and compliance systems.

ASIC also makes clear that a major focus will be "holding gatekeepers to account". While seeking to pre-empt contraventions through correcting culture is a focus of ASIC, it will also rely on the traditional approach of enforcement.

Balancing Consumer Protection with a Free-Market Based System. In addition to the focus on gatekeepers, ASIC will also seek to improve the resilience and knowledge of consumers. This is planned to occur through improving financial literacy and seeking to understand consumer decision-making through behavioural economics and cognitive limitations that give rise to bounded rationality.

Technology—Cyber Attacks and Digital Innovation. Cyber attacks are seen as a systemic risk because they destabilise markets. ASIC reports that in 2013, cyber attacks affected five million Australians at an estimated cost of A\$1.06 billion, and the estimated annual cost of cyber attacks to the global economy is more than US\$400 billion.

ASIC will place a greater focus on increasing awareness of this issue and assisting regulated entities to identify potential

weaknesses. Regulated entities will need to take steps to protect themselves and be mindful of reporting obligations.¹

Digital innovation can provide new ways to raise funds and invest. Current examples of digital innovation include:²

- peer-to-peer lending/marketplace lending;
- robo-financial advice;
- crowd funding, and
- payment infrastructures (e.g. digital currencies and Apple Pay).

However, digital innovation is seen as a risk by ASIC where consumers misunderstand the financial products or services on offer, including costs and risks, or complex products are mis-sold to consumers.

While ASIC employs technology as an aid to its enforcement efforts, such as its Market Analysis Intelligence (MAI) system that gathers, matches and analyses data to detect suspected misconduct in real time, this may be substantially increased through ASIC being one of the agencies authorised to view metadata retained by telecommunications companies pursuant to the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

Previously ASIC could access telecommunications data (e.g. who called whom and when) and, via warrant, stored communications in order to investigate white collar crime. These avenues will continue to exist, but in addition, metadata for the past two years will be maintained by Australian telecommunications companies and accessible by ASIC.

Globalisation. Inbound and outbound cross-border investment linked to Australia is growing. The impact is explained by ASIC as follows:

In the March quarter of 2015, 45% of Australian listed equities were held by foreign investors. Over the past decade, the proportion of non-financial corporate debt issued offshore has risen strongly to 75% as at June 2015. The total level of Australian investment abroad reached

1 See ASIC, "REP 429 Cyber resilience: Health check" (19 March 2015).

2 See Greg Medcraft, Chairman, Australian Securities and Investments Commission, "Stability in prudential regulation and the impact of new technologies on market dynamics", Boao Forum for Asia, Sydney, Australia, 30 July 2015.

\$2.1 trillion in the March quarter of 2015, split almost equally between equity and debt investments. This represents a 23% increase from the level a year before.

This has a number of consequences. Overseas investors require an understanding of Australian law, in particular the relevant regulatory regimes that govern, and outbound investors need to understand the jurisdictions in which they are investing. Concern has also been expressed about global misconduct or misconduct that crosses borders such as Ponzi schemes in off-shore locations. This may see regulators cooperating in both investigations and enforcement matters.³

Recent Enforcement Activity

ASIC's report on enforcement outcomes for January to June 2015 advises that during that period, ASIC:

- commenced 136 investigations;
- completed 137 investigations;
- charged 10 individuals with a total of 82 criminal charges;
- banned 25 individuals from the financial services or credit industries;
- accepted six enforceable undertakings; and
- disqualified 19 directors.

In the previous six months, 1 July 2014 to 31 December 2014, ASIC commenced 94 investigations. It also completed 94 investigations. It charged 14 individuals with a total of 173 criminal charges. ASIC also banned and suspended individuals from the financial services industry, accepted enforceable undertakings and disqualified 16 directors.

Directors and Officers. In the January to June 2015 period, directors and officers were subject to the following penalties:

- sentencing a chief financial officer who knowingly made available false or misleading information about the affairs of the corporation to 18 months' imprisonment, wholly suspended;
- banning a director for breach of his director's duties and failing to comply with financial services laws from

managing corporations for five years, and from providing financial services for seven years;

- sentencing a person who managed a company while disqualified to six months in jail, wholly suspended, upon entering into a three-year good behaviour bond; and
- sentencing a person who lodged false documents and obstructed ASIC to eight months' imprisonment, to be served by way of an intensive correction order.

Market Integrity. ASIC continued its prosecutions in relation to insider trading with two criminal cases in the period. There were also two criminal cases in relation to market manipulation. Administrative remedies were also deployed in relation to market manipulation, continuous disclosure and market integrity rules.

Financial Services. In the first half of 2015, ASIC achieved five criminal outcomes, 25 financial services or credit banings, seven licence cancellations and suspensions and 49 infringement notices.

Recovering the Cost of Investigations

Generally, ASIC must pay the expenses of investigations it conducts. However, under s 91 of the *Australian Securities and Investments Commission Act 2001* (Cth), ASIC may make an order to recover investigation expenses and costs where that investigation has led to a successful prosecution or civil proceeding against a person.

This power allows ASIC to make an order to recover investigation expenses and costs, including, for example:

- salary costs for ASIC staff who have worked on the investigation;
- travel expenses when ASIC has needed to interview witnesses;
- the cost of external legal counsel; and
- the cost of employing an expert to perform an analysis.

Investigation expenses and costs are not the same as litigation costs that may be awarded by a court.

³ See Peter Kell, Deputy Chairman, Australian Securities and Investments Commission, "The changing perimeter of securities regulation: The perspective from Australia", Berle V Conference, Capital Markets, the Corporation and the Asian Century: Governance, Accountability and the Future of Corporate Law, Sydney, 13 May 2013.

ASIC has issued Information Sheet 204, *Recovery of investigation expenses and costs* (July 2015) which sets out how ASIC will determine whether to seek recovery of its costs. The factors to be considered by ASIC include:

- impecuniosity of the person;
- exceptional hardship to the person;
- the amount recoverable;
- extent of ASIC's success in the proceedings, including the degree of culpability proven against the person;
- likely effect on victims, such as whether it may impede the provision of compensation; and
- degree of cooperation.

ASIC will also provide a person against whom they are considering making an order an opportunity to make submissions in relation to the order and its quantum. A decision by ASIC to issue an order can be the subject of an application for review to the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The new approach will apply to investigations from 29 July 2015 as well as all investigations started before this date, where an outcome has not yet been agreed.

ASIC's new policy will create a further cost that may be used to seek to persuade entities subject to investigation to co-operate with ASIC. Directors and officers will also need to check that their insurance responds to this new category of costs.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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