



**ASIC**

Australian Securities & Investments Commission

# Setting the record straight: ASIC, bribery and enforcement action

*A speech by Greg Medcraft, Chairman,  
Australian Securities and Investments Commission*

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## **CHECK AGAINST DELIVERY**

### **Introduction**

Hi everyone. Thanks for having me.

As always, it's great addressing Australia's largest international Chamber of Commerce and arguably Australia's premier international business organisation.

I spent nearly a decade working in investment banking in the United States before returning to Australia in the late 2000s. My time in the United States, and my role as Chair of the International Organization of Securities Commissions (IOSCO), has made me acutely aware of the importance of a strong business dialogue. Especially, between two close partners like Australia and the United States.

At ASIC, I'm proud to say we have a close relationship with our sister regulators, the US Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). For instance:

- We work closely with the SEC and CFTC on a number IOSCO policy committees and task forces.
- We are negotiating a Memorandum of Understanding (MOU) with the CFTC at the moment. This will facilitate United States reliance on Australian regulation under over-the-counter (OTC) derivative reforms and will minimise red tape for Australians dealing with those in the United States.
- Lastly, former SEC Chairman, Elisse B Walter, was the keynote speaker at ASIC's Annual Forum in March this year. We hope to have some of her former high-profile colleagues speaking at our March 2014 Annual Forum. This will be about regulating for real people, markets and globalisation.

Today I wanted to speak about ASIC's handling of foreign bribery cases – something that has received a lot of media lately. In particular, I want to discuss our involvement in these cases.

Before I do that, I thought I'd briefly overview how ASIC works.

### **About ASIC**

ASIC is Australia's corporate, markets and financial services regulator. We have a growing regulatory remit and operate in a dynamic and complex

environment. In particular, market-based financing is seen as a key source of funding economic growth in the next decade.

In this environment, we remain committed to achieving our strategic priorities:

- confident and informed investors and financial consumers
- fair and efficient financial markets
- efficient registration and licensing.

The environment in which ASIC operates presents three major challenges. They are:

- 1 *Structural change*: In particular, the shift of savings out of the banking sector into the superannuation and funds management sector.
- 2 *Financial innovation-driven complexity*: Here the regulatory challenge is to assist industry in harvesting the opportunity from innovation in products, markets and technology while mitigating the risks to our strategic priorities.
- 3 *Globalisation*: The global integration of financial markets facilitates the flow of capital across borders to fund economic growth, but it also creates risk and regulatory challenges. This includes internationally consistent regulation and responding to global misconduct such as cybercrime. The global cost of cybercrime is estimated at US\$115 billion per year.

As a regulator, we are working with industry and using our regulatory tools to harvest the opportunities that these challenges create to fund economic growth, while mitigating the risks.

These challenges also shape how we go about achieving our strategic priorities using our limited resources.

## **Bribery allegations and ASIC**

Now to move on to the main topic for today – ASIC’s role in investigating foreign bribery allegations. There has been plenty of media in the past fortnight about this. A lot has been written, much of it has been ill-informed in describing ASIC’s role. Today I want to set the record straight, I will talk about:

- taking action against public companies
- responsibility for bribery
- ASIC’s relations with the Australian Federal Police (AFP)
- the difference between criminal and civil proceedings
- the AWB case

- bribery and directors' duties breaches
- the *Centro* principles on directors' duties
- our approach to enforcement and surveillance.

## Taking action against public companies

First, I would like to generally address an issue raised with me over the past fortnight –

That is, why ASIC generally focuses enforcement actions for corporate governance on public companies, not proprietary ones.

It is because ASIC is all about ensuring confident and informed investors and fair and efficient markets. These are two of the strategic priorities I mentioned earlier.

We have limited resources, so we take on cases where the wrongdoing might affect a wider range of shareholders, especially mum and dad investors. That is, companies where the extent of harm or loss has a broader market impact.

## Responsibility for bribery

Bribery of foreign officials falls under the *Criminal Code Act 1995* and is a law mainly enforced by the AFP, not ASIC.

This means it is the AFP that is responsible for investigating foreign bribery and corruption, and taking criminal action through the courts. They are the bribery specialists:

- they have a dedicated Fraud and Anti-Corruption Centre
- they have officers in foreign jurisdictions as well as forensic accountants and lawyers
- they have access to international intelligence, such as Interpol.

The Organisation for Economic Co-operation and Development (OECD) recognised this in its report last year on Australia's anti-bribery regime. They also noted that ASIC does not have legislated jurisdiction in relation to foreign bribery. Here, our role is limited to investigations about the corporations legislation.

## Relations with the AFP

We work closely with the AFP and have recently signed an MOU with them:

- It spells out the ‘who, what, why and how’ of our relationship.
- It also deals with bribery and how we coordinate with them to achieve the best enforcement outcome we can for the Australian public – whether this is through criminal or civil action.
- In the small number of cases where a company is involved in bribery it might mean the directors are liable for breaches of the Corporations Act, for example, their directors’ duties. This will be an issue for ASIC.

## **Criminal vs civil proceedings**

Any directors’ duties investigation will ordinarily happen after the criminal investigation. Here’s why – it is a fundamental principle that a defendant in a criminal prosecution has a ‘right to silence’.

This would be compromised by allowing civil proceedings with similar facts to take place if a person is also a defendant or witness.

Courts will protect this right by delaying the civil proceedings until the criminal case is completed.

## **Penalties**

Then there are the penalties. Under the civil penalty provisions in the Corporations Act, the maximum penalty for a directors’ duties breach is a \$200,000 fine and banning as a director. Remember, that is the maximum.

In comparison, the maximum for the criminal offence of bribing a foreign public official is 10 years gaol or a \$1.7 million fine, or both – and then, after they get out of gaol, they are automatically banned from being director for five years.

What do you think has the biggest deterrent effect – a fine or gaol? Losing some of your money, or losing all of your liberty?

My point is that in any foreign bribery investigation, criminal proceedings are the main game. ASIC cannot, and will not, do anything to jeopardise the success of criminal actions, taken by the AFP. This is something the media has mostly chosen to ignore.

It is often extremely difficult to run parallel investigations. It results in duplication of resources and added pressure on witnesses who may already be reluctant to help. In turn, it will typically result in investigators ‘tripping over’ each other – achieving unsatisfactory outcomes for both the AFP and ASIC.

However, ASIC will take action and run a parallel bribery investigation concerning directors' duties when warranted. Factors that we consider include:

- if there is a risk the six year time limitation for civil proceedings will prevent ASIC bringing proceedings
- the impact of the conduct on the market and retail investors, including whether the conduct is ongoing or the relevant directors are still on the Board
- if the bribery materially damages the company
- if the bribery involves a publicly listed company
- if ASIC's investigation will not adversely impact AFP's criminal investigation
- whether we consider that AFP action alone is an appropriate response.

We also consider factors that we take into account for all enforcement action, these are:

- the extent of the harm or loss
- the cost versus the regulatory benefit, including the alternative action that is available, and
- importantly, the available evidence.

I will talk more about these later.

## **The AWB case**

You might remember the AWB case. The case is complex. In a nutshell, it started several years ago and involved AWB allegedly making payments to Sadaam Hussein's Iraqi regime contrary to UN Security Council sanctions.

The matter resulted in the Cole Commission of Inquiry and ASIC pursuing directors' duties breaches against six AWB officers.

We began the matter in December 2007. The case is still going on almost seven years later. We have had a few wins, our biggest was against former Chief Executive, Andrew Lindberg, who copped a \$100,000 fine and a 27 month ban. Former Finance Chief Paul Ingleby also got a \$40,000 fine and was banned for 15 months. Proceedings against the four other officers are ongoing.

And the cost?

Over seven years, ASIC has spent many, many millions of dollars on the AWB litigation. This is because, like criminal cases, running a civil case

with an international dimension is never straightforward. This is magnified if it involves allegations of overseas corruption.

## **Bribery and directors' duties breaches**

Before any director's duty breach can be established, you ordinarily need hard evidence that the underlying bribery actually took place. It might be easy to show a company paid an agent a big commission, it is another thing to secure evidence to prove this money was offered to bribe the foreign official. This is because the money is usually paid to overseas middlemen who are unlikely to cooperate with any investigation and may not be compelled to do so.

For a successful directors' duties prosecution involving bribery you normally need three things:

- 1 evidence of the bribery
- 2 demonstration of director negligence
- 3 likelihood of the company suffering harm as a result of this negligence.

## **The *Centro* principles and directors' duties**

Two years ago ASIC won a big case in the Federal Court against former directors of property company Centro. The case provided valuable principles, which I think can be applied to all public company directors. These lessons are:

- 1 *Scepticism*: Directors must question the information provided to them. There is no defence for wilful blindness.
- 2 *Accounting knowledge*: Directors are expected to have financial literacy and basic accounting knowledge.
- 3 *Accountability and control*: It is up to directors to ensure the executive has systems, protocols and controls to ensure sound corporate governance. It is about having the right level of risk management.

If we are talking about international bribery, then directors' duties breaches' are all about the first and third points. That is, insufficient scepticism and a failure of accountability and risk management.

If companies operate in sectors or jurisdictions that are known to have a high risk of bribery, they need to ensure they have appropriate policies in place to mitigate the risk.

My message to corporates on bribery is this – don't let it get to that. Have the systems, and the procedures, and the protocols to create a culture where bribery cannot exist.

## **ASIC's approach to enforcement and surveillance**

The recent media coverage has centred on ASIC and its supposed slowness to act. Against this background it's worth discussing how ASIC selects the cases we pursue – and why it takes the time it does.

Considering the thousands of matters we look at, enforcement action is comparatively less frequent. This is because before we investigate we consider three broad factors:

- 1 *The extent of harm or loss*: For example, have many people lost money? Is a matter so far-reaching and so egregious it must be investigated?
- 2 *Cost vs regulatory benefit*: That is, what are the regulatory benefits of pursuing misconduct compared to the cost. We will also consider alternative action that is available to us or others.
- 3 *Available Evidence*: Our cases have to stand up in court, so they need to be based on hard fact, not rumour or hearsay. What might make good newspaper copy, will not always make good court evidence.

At ASIC, many potential legal breaches are brought to our attention. These can come from: public tip-offs; whistleblowers; other agencies like the AFP; statutory reports from auditors and other gatekeepers; and from our own surveillance.

As part of my Chairmanship I have made it my business to devote a significant portion of ASIC's budget to proactively looking at industries so we can jump on problems before they get out of control. In fact, last financial year ASIC conducted more than 2,150 high-intensity surveillances.

### **ASIC's enforcement record**

More broadly, ASIC's record on punishing wrongdoers is solid. Last year we:

- completed 187 investigations
- kicked 88 people out of the financial services industry
- convicted 22 people and had 9 sent to jail

And, this doesn't even include our 528 summary prosecutions.



## Conclusion

Enforcement is all about punishing wrongdoing and through that shaping the behaviour of the people we regulate. It is a contested process that takes time and resources. It is not always simple and rarely swift. Despite this, we are focused on taking enforcement action when we need to. We do not shy away from big cases.

Taking enforcement action is fundamental to ASIC and our priorities of:

- ensuring investors are confident and informed
- fair and efficient markets.

Foreign bribery cases are no different. We are prepared to run civil proceeding alongside the AFP's criminal ones when it is warranted. Our actions in the AWB case demonstrate this.

Lastly, I want to reiterate that directors also have a role to play in minimising bribery. If there is a high risk of bribery, they need to ensure they have appropriate systems, procedures and protocols to mitigate the risk.