



**ASIC**

Australian Securities & Investments Commission

# ASIC's 20 year anniversary

*A speech by Tony D'Aloisio, Chairman,  
Australian Securities and Investments Commission*

*Opening and welcome address, Summer School 2011, 'The New  
Regulatory Landscape'*

21 February 2011

Good morning and welcome to ASIC's Summer School 2011. I am Tony D'Aloisio, Chairman of ASIC and on behalf of my fellow Commissioners—Dr Peter Boxall, Michael Dwyer, Belinda Gibson, Greg Medcraft and Shane Tregillis—I would like to thank you all for being here and supporting this important event.

Summer School offers a unique opportunity, both to get to grips with what is happening in the markets and to meet and network with other participants from Australia and around the world. For those of you visiting Sydney, we hope you enjoy our wonderful city and all that it has to offer.

We have over 400 participants this year, which breaks the record set last year and includes both domestic and international attendees as well as some 40 ASIC staff. ASIC's senior leaders, Regional Commissioners and Commissioners are also present. We see this event as an important way for ASIC to stay close to the markets we regulate and I would encourage you to take the opportunity to introduce yourselves to our people over the next 3 days. In addition, we will be making the presentations available to all ASIC staff to keep them informed of the key themes discussed.

We have been fortunate to secure an impressive list of speakers and panellists again this year. Each is a leader in their field and I would like to thank them at the outset for giving up their time to provide us with their expertise.

Bios for all speakers and panellists are in your packs. Please refer to them because we will save time by not reading them out during introductions for the sessions.

You will also find the full conference program in your packs. In recent years, Summer School has focused on the impact of the Global Financial Crisis and the changes it has brought to securities regulation. This year, we are focused on events closer to home and looking at 'the new regulatory landscape' or life after the GFC.

I won't go through the program in detail but I'm sure you will agree it promises to be stimulating and thought provoking, and one which will encourage you to participate and interact.

## **20 years of ASIC**

I hope you will have also noticed that ASIC turns 20 this year. This is an important milestone for us as a regulator and for Australia as a whole. It is particularly important to ASIC staff—men and women who have devoted their energies to making a difference in public service. Today we have some 233 of our staff (around 10%) who have been with ASIC over that 20 year period.

ASIC commenced its regulatory role as the ASC (Australian Securities Commission<sup>1</sup>) on 1 January 1991. Its formation followed a particularly tumultuous period in Australian business that saw the rise and fall of numerous high-profile entrepreneurs, companies and investment schemes in the late 1980s.

When the Corporations Legislation Amendment Bill (which embodied the new national scheme for corporate regulation and saw the formation of the ASC) was introduced into Parliament in 1990, the then Attorney General Michael Duffy said:

There is, I think, no doubt that the closing years of this decade will be remembered as one of the bleakest chapters in Australian corporate history ... Tragically, these collapses have brought with them some appalling losses of shareholders' and investors' funds. They have also brought to light evidence of outrageous irresponsibility and excesses on the part of the directors and management of some major corporations ...<sup>2</sup>

Fast forward 20 years and I think we can be struck by a sharp contrast.

Australia has just experienced a crisis of much greater proportions—the GFC. Yet it is acknowledged domestically and internationally that Australia's corporate regulatory system performed better during the GFC to maintain market integrity and protect investors than its overseas counterparts—and certainly better than it did in the late '80s.<sup>3</sup>

On 27 June 2010, the Australian Treasurer, the Hon Wayne Swan, said:

Our financial systems remain sound, underpinned by strong regulation and, importantly, effective supervision. Our Governments were not called on to bail out major financial institutions—in stark contrast to the experience of the US and Europe. And our public finances remain among the strongest in the world.<sup>4</sup>

The impact of the GFC on securities and investments markets in Australia (where ASIC has prime responsibility) was clearly less than in the comparable markets of the United States, the United Kingdom and, more broadly, Europe.

This can be illustrated by looking at the effect on institutional and retail investors.

At the institutional level: Australian financial institutions did not record significant losses from holdings in asset-backed securities (primarily residential mortgage-backed securities). The quality of the great majority of Australian assets underlying asset-backed securities remained high throughout the crisis.<sup>5</sup>

Further, Australian institutions were not exposed to any significant degree to the more exotic securitisation products, such as collateralised debt obligations (CDOs) and CDO squareds.<sup>6</sup>

At the retail level, we saw that although household assets (defined as both financial assets, such as shares and deposits, and physical assets) declined, the declines were not as significant as in overseas markets and our rebound was faster.<sup>7</sup>

However, there was an impact, especially at an individual investor level. This included major corporate collapses or near collapses (e.g. ABC Learning, Allco and Babcock & Brown) during the GFC. These totalled around A\$66 billion (between 2007 and mid-2009), representing a slightly greater proportion of GDP than the A\$20 billion lost in major collapses during the turmoil of the late 1980s.

Other collapses had a particularly sharp impact on retail investors. These included Opes Prime, where we saw stock lending being used at the retail level, and Storm Financial, where margin lending was used to excessively leverage investments.<sup>8</sup>

It was, however, particularly encouraging to see that many retail investors had adopted strategies that helped them to minimise the impact of the GFC. This included asset diversification and a reasonable understanding of risk.

For example, we did not see a proliferation of stock lending and margin lending schemes that had been designed for the institutional sector brought into the retail sector. Opes Prime and Storm were notable exceptions.

So, Australia did not escape the GFC unscathed. However, it did not experience system-wide failures and its regulatory regime proved robust.

Generally speaking, regulators and regulatory systems are tested in times of crisis and I am confident that our system performed well during the GFC.

This is clearly valid for our banking and financial markets, which are the responsibility of the Australian Prudential Regulation Authority (APRA) and Reserve Bank of Australia (RBA). It is also valid for the securities and investments markets, where ASIC has prime responsibility.

Let's look more specifically at why that was the case for the securities and investments markets which we regulate. I will make three points.

### **First point: The Australian financial regulatory regime has a robust architecture.**

The appropriateness of Australia's regulatory architecture can be evidenced largely by the fact that it has not needed major changes as a result of the GFC.

The reason we have a robust regulatory system in place does not necessarily lie in greater foresight of the crisis. Rather, it lies in the fact that Australia went through a series of mini-crises since floating the currency in 1983 (as

did Canada, which for similar reasons had a sound financial and oversight system going into the GFC).

The 'recession we had to have', the difficulties of the State Banks and the collapse of Estate Mortgage brought with them the Wallis Inquiry and changes that strengthened Australia's regulatory architecture (e.g. the twin peaks model). This was further strengthened following the collapse of HIH.

The regulatory changes that came out of these events provided important safeguards in minimising the excesses witnessed in other countries during the GFC. These included the introduction of a strong regulatory regime and licensing system for financial sales, advice and dealings in relation to financial products. Australia's Product Disclosure Statement (PDS) regime also helped highlight the downside of riskier product offerings to retail investors,<sup>9</sup> and the regulatory framework around managed investment schemes has discouraged Ponzi-type schemes, like Madoff.

### **Second point: Over its history, ASIC has played an important role in the oversight and enforcement of the securities and investment markets.**

The GFC tested two significant aspects of ASIC's work— its enforcement actions and its oversight and supervisory work, which focus on lifting standards of behaviour in our markets.

ASIC's record in law enforcement has been significant and is important for general deterrence (i.e. to deter misbehaviour, particularly as crises loom and during those crises). Over its two decades of being 'on the beat', ASIC has:<sup>10</sup>

- Commenced an average of 258 investigations per year, and
- Had an average 'success' rate (civil and criminal litigation) of 84% each year. For the last 10 years, that would be around 250 criminal and civil successful outcomes each year.
- There have been 28 criminal convictions per year on average—a total of 561 persons convicted. The average custodial sentence has been 2.2 years for each criminal offence (in all 1,244 years).

### **Focus on major cases**

I should say, as an aside, that these statistics might come as a surprise to some. Like other Chairmen before me, I'm conscious there is a high level of interest in the major cases that we pursue, and particularly the media focus on those where we might fail to secure convictions or other successful outcomes.

What is significant about ASIC's approach to enforcement is that it remains focused on whether there is a case to take action and whether it is in the

public interest to take that action, rather than simply winning. It is to the credit of all Chairmen and Commissioners that ASIC has run cases that meet the model litigant standards and are in the public interest.

For example, speaking in 2002, then Chairman David Knott said:

Am I conscious of the risk of failure? The answer is yes, there's always substantial risk if a high profile prosecution is unsuccessful. But if we're not prepared to take those risks, I don't think we can ever be a successful companies and securities regulator.

Needless to say, as the current Chairman, I agree entirely!

Our track record on major cases is stronger than might be generally understood from media coverage which tends to highlight the losses. We have certainly won more often than we've lost. Over the past 20 years, there have been 68 major matters. These are cases like One.Tel, Rivkin, Rothwell and Spedley that are listed in detail in our Annual Reports.

Of these 68 cases, 57 have been finalised and 11 are in the process of resolution. Of those 57, 40 covered criminal issues. On criminal cases we had a success rate of over 63%. 26 of the 57 were civil cases, of which we won 10, settled 13 and lost two in court. Depending on how you view settled cases (we think they are wins) this too is a significant percentage, with an overall success rate of 88% for major civil matters.<sup>11</sup>

## Improving corporate behaviour and lifting standards

To return to why Australia survived the GFC in good shape, in addition to being 'on the beat' with enforcement, it is important to acknowledge ASIC's 20-year focus on improving corporate behaviour and lifting standards. This can be grouped into eras by reference to a Chairman, although it is important to note that these eras built on the work of the National Companies and Securities Commission (NCSC) and Leigh Masel's and Henry Bosch's terms as Chairmen of that body, which predated the ASC.

- Tony Hartnell's era 1989–1992:
  - overseeing the formation of the ASC, from its very beginnings, to its operation as a working regulator.
  - transforming the speed at which company transactions could be undertaken, by setting up cutting-edge information systems for company data.
  - taking the first steps to establishing the ASC's credentials as an effective enforcer of the law, by initiating a substantial and well-publicised program of enforcement activities, and by 'negotiating' an effective working relationship with the Commonwealth Director of Public Prosecutions.
  
- Alan Cameron's era 1993–2000 (longest serving Chairman):

- developing ASIC's role as a standard-setter for behaviour in the market, for example, by publishing a large body of policy and practice guidance.
- capitalising on ASIC's new role in consumer protection after 1998, by leading the development of consumer publications and campaigns.
- David Knott's era 2001–2003:
  - overseeing the implementation of financial services reform. This required ASIC to licence 3,853 businesses during the transitional period, and to take a leading role in providing guidance to the industry on how to comply with the new regime.
  - developing and maintaining a strong reputation for ASIC as a visible and effective enforcer of the law.
- Jeff Lucy's era 2004–2007:
  - continuing diligence in pursuing companies and individuals who had breached the law. This was demonstrated by tangible results—a clear example being the successful convictions of former HIH directors Rodney Adler and Ray Williams.
  - laying the foundation for an ASIC that is much more proactive in working with participants to lift standards of corporate behaviour and market integrity.<sup>12</sup>

**Third point: The current Commission has made further important contributions, many of which assisted Australia during the GFC.**

The current Commission has:

- increased focus and resources on improving confidence in the integrity of our financial markets. The result is a significant increase in convictions for insider trading, market manipulation and other market related offences.<sup>13</sup>
- increased focus and resources on assisting and protecting retail investors and financial consumers. This has extended from improved guidance and education to compensation actions (e.g. Westpoint and Opes Prime) and to criminal prosecution to deter misbehaviour.
- led a change in culture or approach with ASIC being more forward-looking and engaged with stakeholders (e.g. work on CFDs and our new website for retail investors and consumers).
- demonstrated a preparedness to enforce the law at all levels of business and to test the law when it is in the public interest to do so (e.g. Storm Financial, Fortescue, Centro, James Hardie and Westpoint).

- taken over responsibility for the regulation of consumer credit, and assumed responsibility for the supervision of trading on Australia's domestic licensed equity, derivatives and futures markets.

Importantly, this Commission needed to respond to the GFC. Here judgments made by a regulator need to be timely and considered, and achieve the right balance in maintaining confidence in the markets and responding to potential problems. Key actions we took to minimise the impact of the GFC included:

- *Banning short selling*—which may have seemed sudden at the time but was the culmination of work that commenced well before 2008.
- *Rumourtrage*—through 'Project Mint' we actively moved in to review materials and messages being sent to the market. This was designed to both punish wrongdoing and to disrupt market rumours by letting participants know we were watching, the objective being to restore investor confidence.
- *Frozen funds*—many investors had their investments frozen during the downturn. We know the total reached at least A\$22 billion. To reduce stress on retail investors, ASIC introduced measures to allow investors to withdraw their investments on grounds of financial hardship.
- *Capital raisings*—ASIC put in place measures to facilitate capital raisings. In the 2008–09 financial year, total secondary equity raisings were almost A\$90 billion, compared with A\$60 billion in the pre-GFC year of 2006–07. These raisings were among the highest in the world and important in recapitalising our corporations.<sup>14</sup>

In addition, ASIC continued to take strong enforcement action to deter misbehaviour. Since 1 January 2009, ASIC has commenced 334 new investigations. Many of these relate to events or collapses or matters that arose as a result of the GFC. Specific matters that arose in that period and remain before the courts include Centro, Octaviar, Chartwell and Opes Prime.<sup>15</sup>

Importantly, we have seen significant improvement in the time taken to deal with wrongdoing.<sup>16</sup> This is an area where we have been criticised in the past. In the US, Madoff is often cited as an example of swift enforcement action. However, it is important to remember that the SEC commenced its first examination and investigation of Madoff in June 1992 but did not achieve a conviction until June 2009.<sup>17</sup> In our case, something akin to the Madoff-type situation is Astarra/Trio, where the period from commencement of investigation to court appearance with guilty plea was 14 months.<sup>18</sup>

While there are other factors to explain why Australia fared better than many countries during the GFC, like a strong economy, a strong banking sector and a positive corporate ethical culture, the strength of Australia's financial



regulatory architecture and ASIC's role in enforcement (general deterrence) and improving standards were clearly important. Cumulatively, they, along with the regulatory regime, put us in a sound position when the GFC hit.<sup>19</sup>

## Conclusion

In summary, the past 20 years has seen a real change in the securities and investments regulatory landscape in Australia. This is exhibited by the contrast between where we were following the late '80s crisis and how we performed during the GFC. There are many reasons why the Australian markets fared relatively well during the GFC, but I'm pleased to say ASIC's role and cumulative developments in regulation were both important factors.

What we have seen is the maturing of ASIC, from its birth under the safe hands of Tony Hartnell to adulthood today. Its response to the GFC shows the maturity you would expect of a well-established (adult) regulator.

I believe the last 20 years have also seen the development of what I would call 'brand ASIC'. The perception of ASIC has, in my view, moved away from it being seen through a Chairman or set of Commissioners. ASIC is now a respected regulator with its own identity. While Chairmen and Commissioners will come and go, the organisation and the contribution it makes will continue. In the end, it is the staff that make an organisation. They deserve full credit for the organisation's achievements.<sup>20</sup>

ASIC deserves to celebrate the difference it has made over the past 20 years. This includes its time as the ASC, and is thanks also to the pioneering work of the NCSC.

Thank you as well for supporting this event. I hope you find it valuable and enjoyable.

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## Notes

<sup>1</sup> The Australian Securities Commission (ASC) changed its name to the Australian Securities and Investments Commission (ASIC) on 1 July 1998.

<sup>2</sup> The Hon Michael Duffy MP, Commonwealth Parliamentary Debates. House of Representatives, 8 November 1990.

<sup>3</sup> This was confirmed by ASIC's own stakeholder survey in 2010. As one respondent said: 'All of the Australian regulators have responded well to the GFC—in particular APRA, the RBA and Treasury have been heavily involved in GFC decisions. The Australian regulators as a whole performed pretty well and Australia is generally recognised around the world as having managed the GFC in a very effective way.'

<sup>4</sup> The Hon Wayne Swan MP, Emerging from the Crisis: the G20 and the Asia-Pacific. Address to Canada 2020 and the Canadian Australian Chamber of Commerce. Toronto, Canada. 27 June 2010 (Australia Time).

<sup>5</sup> By early 2009, arrears on Australian prime residential mortgage backed securities (RMBS) averaged around 1.8% of amounts outstanding. This is small in absolute terms and is only moderately higher than the pre-GFC average of around 1.1% in 2006 and 2007. For sub-prime mortgages, arrears rose to around 17.0% in early 2009, again only moderately above the average in 2007 and 2007 of around 12.4%.

<sup>6</sup> At the height of the GFC, there was approximately A\$17 billion invested in CDOs in Australia, with minimal losses. To put this in perspective, CDO-related losses incurred by US insurer AIG alone amounted to US\$35 billion by late 2008.

<sup>7</sup> Net household assets in Australia fell by just 3% per annum during each of financial years 2007–08 and 2008–09, before expanding by 8% in the following year (2009–10). This is a much stronger result than say, in the United States, where the household balance sheet contracted by 10% in financial year 2007–08 and by 17% in 2008–09, before a smaller 7% recovery in 2009–10.

<sup>8</sup> There were other impacts:

- We saw retail investors impacted by frozen funds. At least around A\$22 billion were frozen.
- We saw some, although limited, exposure of retail investors to CDOs through Basis Capital and Absolute Capital.
- We saw difficulties with forestry and agricultural managed investment schemes. Great Southern and Timbercorp, the two highest profile cases, had A\$3 billion in funds under management, though the full extent of losses will not be known for some time.

<sup>9</sup> The marketing arms of global investment banks (many of which had extensive operations in Australia) would not ordinarily have missed the opportunity to bring these products into Australia. Part of the reason for less attraction to marketing these products may well have been our disclosure laws (e.g. the PDS).

<sup>10</sup> Source: ASIC Annual Reports.

<sup>11</sup> Source: ASIC Annual Reports.

<sup>12</sup> Two examples of these efforts were an increased focus on compliance and surveillance in the superannuation industry and the introduction of an audit regulation team.

<sup>13</sup> Between 1 January 2009 and 31 December 2010, ASIC has had 31 successful market integrity related outcomes. This includes seven significant outcomes for insider trading, six significant outcomes for market manipulation, three significant continuous disclosure outcomes and four for other market integrity offences. Eleven people have also been banned.

<sup>14</sup> ASIC provided class order relief to help promote the issue of vanilla corporate bonds to retail investors. The ASIC initiatives simplified the disclosure requirements for certain offers of listed vanilla bonds by allowing such offers to be made with reduced disclosure under a short-form prospectus. The measures also allowed vanilla bonds to be offered under a two-part prospectus. Around A\$150 million has been raised under this relief. ASIC has also provided class order relief to facilitate offers of convertible notes to wholesale investors. Furthermore, we have streamlined the equity raising process, including making it easier to include a retail component in an equity offer by expanding situations where a full prospectus or PDS is not required.

<sup>15</sup> **Centro:** ASIC launched civil penalty proceedings in the Federal Court on 19 October 2009 against current and former directors and a former chief financial officer (CFO) of various entities within the Centro Properties Group and Centro Retail Group.

**Octaviar:** ASIC commenced civil penalty proceedings in the Supreme Court of Queensland on 29 October 2009

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against five former officers of various entities within the Octaviar (formerly MFS Limited) group of companies, in relation to the use of A\$147.5 million in funds of the Premium Income Fund.

**Chartwell:** ASIC conducted an extensive investigation into the affairs of Chartwell Enterprises Pty Ltd, which collapsed owing investors approximately A\$70 million. The company had been operating as a Ponzi scheme. As a result of our investigation, the former company secretary, Mr Ian Rau, was sentenced on 19 August 2010 to two years and seven months imprisonment on eight charges, and his co-accused, director Mr Graeme Hoy pleaded guilty to 47 charges on 9 December 2010.

**Opes Prime:** On 6 January 2010, ASIC brought criminal charges against the directors of Opes Prime Stockbroking. The charges relate to breaching their duties as directors.

<sup>16</sup> The matters mentioned in the previous footnote ranged from 5 to 34 months from detection to court action.

<sup>17</sup> SEC carried out numerous investigations of Madoff from as early as 1992, but no substantive action was taken for many years. Madoff was charged on 11 December 2008. He officially pleaded guilty on 12 March 2009 and was convicted on 29 June 2009.

<sup>18</sup> On 7 December 2010, former director of investment manager Astarra Asset Management Pty Limited Mr Shawn Richard pleaded guilty to two charges of dishonest conduct in the course of carrying on a financial services business and admitted a third charge of making false statements in relation to financial products. ASIC's investigation began on 2 October 2009 and looked at conduct between 2005 and 2009.

<sup>19</sup> This is borne out by our own Stakeholder Survey in 2010 where the Allen Consulting Group says: 'Stakeholders are positive in their assessment about the performance of Australia's capital markets and ASIC's efforts to manage the domestic and international implications of the global financial turmoil' (p.7). Contrast that to the result recently of the Financial Services Practitioner Panel survey on the performance of the FSA in the UK: 'Only a fifth of firms (19%) felt that the FSA's response to the crisis had been effective and the majority of firms (69%) disagreed that this was the case. Less than a quarter of firms (23%) felt that the response had been proportionate for the industry as a whole. The majority of firms (84%) thought that the FSA's domestic reputation had been damaged by the financial crisis and 61% that its international reputation had been damaged.'

<sup>20</sup> ASIC currently has 1931 staff (as per the 2009–10 Annual report) and has averaged around 1400 staff over each of the past 20 years.