



ASIC

Australian Securities & Investments Commission

REPORT 299

ASIC enforcement outcomes: January to June 2012

September 2012

About this report

This report outlines enforcement outcomes achieved by ASIC during the period 1 January 2012 to 30 June 2012. The report identifies categories of gatekeeper against whom enforcement action was taken and highlights examples of conduct targeted during this period.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation;
- explaining how ASIC interprets the law;
- describing the principles underlying ASIC's approach;
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence)

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Previous reports on ASIC's enforcement outcomes

Report number	Report date
REP 281	March 2012

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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Overview

Our enforcement powers

- 1 ASIC's agenda is based on three strategic priorities, around which we organise our business:
 - (a) confident and informed investors;
 - (b) fair and efficient markets; and
 - (c) efficient registration and licensing.
- 2 The key regulatory tools we use to achieve these priorities are:
 - (a) engagement with industry and stakeholders;
 - (b) surveillance;
 - (c) guidance;
 - (d) education;
 - (e) policy advice; and
 - (f) enforcement action.
- 3 This report focuses on one of these tools—enforcement action—which is used by us to deter misconduct.
- 4 As part of ASIC's commitment to improving the transparency of its enforcement approach and increasing public understanding of how and why we take enforcement action, ASIC has released a number of publications explaining our approach to enforcement.¹
- 5 This report is the second of ASIC's six-monthly enforcement reports. The first report is available at www.asic.gov.au/reports.

The role of gatekeepers

- 6 Gatekeepers perform an important role in the Australian financial system. Their work contributes to the confidence investors have in the financial system. Broadly, the term 'gatekeepers' includes advisers, auditors, directors, liquidators, custodians, product manufacturers and distributors, market operators and brokers.

¹ See Information Sheet 151 *ASIC's approach to enforcement* (INFO 151), Information Sheet 152 *Public comment* (INFO 152) and Regulatory Guide 100 *Enforceable undertakings* (RG 100).

- 7 Functions undertaken by gatekeepers include:
- (a) verification, certification, approval and recommendation of products and services offered to investors;
 - (b) monitoring of compliance by entities and their management through their privileged access to information; and
 - (c) performance of a private supervisory role through the detection and deterrence of misconduct.
- 8 By properly performing these functions, gatekeepers encourage sound investment practices, detect and prevent market failures, and promote market integrity.
- 9 Enforcement action against gatekeepers is consistent with community expectations that gatekeepers will act with honesty, diligence, competence and independence in the performance of these functions. The essential content of these principles is neither complicated nor technical: see paragraphs 10–14. Failing to live up to these expectations can have significant ramifications—including permanent banning from providing financial services or imprisonment.

Honesty

- 10 Put simply, in the context of financial markets, honesty means: do not lie or mislead, do not steal others' money, do not knowingly abuse your position or exploit the trust of the investing public. Behaviours identified by ASIC during the relevant period that breach this standard include knowingly issuing misleading statements, stealing from clients and falsifying documents, such as the case of Sydney-based financial adviser Susan Heathwood, who was permanently banned from providing financial services after she falsified more than 60 insurance policies in order to collect the resulting commissions: see Example 1.

Diligence

- 11 Participants in financial markets must exercise their duties with appropriate care and attentiveness. This means that advice, decisions or actions must be properly considered and appropriate in the circumstances. This standard was absent from the conduct of Michael Grochowski of Victoria, director of Sovereign MF Limited, whose lack of diligence in running a managed investment scheme resulted in a four-year ban from providing financial services: see Example 12.

Competence

- 12 All Australian financial services (AFS) and credit licensees must meet legislative and regulatory requirements for training, licensing, registration and conduct. Licensees are responsible for ensuring that they understand and comply with these requirements. An important part of ASIC's work in this area is removing unlicensed operators, such as Victor Manatakis of Victoria, whose payday lending business engaged in unlicensed credit activities: see Example 15.

Independence

- 13 AFS licensees and credit licensees must have adequate arrangements for managing conflicts of interest that may arise in relation to the provision of financial services or credit services by the licensee or its representatives. The conflicts management obligation generally involves controlling, avoiding and disclosing conflicts of interest.
- 14 Being seen to be independent is another key aspect of independence. Requirements in the *Corporations Act 2001* (Corporations Act) for the rotation of auditors help to uphold this principle, as in the case of Graham Abbott, who breached his obligations by playing a significant role in audits of a number of listed companies over successive financial years: see Example 19.

Purpose and scope of this report

- 15 The *Australian Securities and Investments Commission Act 2001* (ASIC Act) directs ASIC to 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it'.
- 16 This report summarises key enforcement outcomes achieved by ASIC from 1 January 2012 to 30 June 2012 under our legislative mandate.
- 17 The examples in this report highlight the kinds of behaviours we believe breach the core principles of honesty, diligence, competence and independence, as outlined above. In the case of directors in particular, they relate to a wide range of matters, from serious non-compliance with directors' duties to minor regulatory breaches, such as record-keeping type offences.
- 18 The report is organised according to ASIC's strategic priorities:
- (a) confident and informed investors (see Section A);
 - (b) fair and efficient markets (see Section B); and
 - (c) efficient registration and licensing (see Section C).

- 19 Appendix 1 of the report provides statistics about our enforcement outcomes and an explanation of the methodology for compiling this data. Appendix 2 provides a schedule of media releases that correspond to the enforcement outcomes in this report.
- 20 The total number of enforcement outcomes in this report is comparable to that reported in the previous period, while the number of pending outcomes is higher.² However, comparisons between the two reports have some limitations. This is because no two enforcement actions are the same. For example, there may be differences in the number of respondents or defendants or the level of cooperation shown by them, the complexity or seriousness of the allegations, the availability of evidence, the number of charges brought, the time taken to bring the proceeding to trial, or the length of the hearing period. In addition, this report does not include a range of less formal processes we undertake to enforce the law: see paragraph 60.

² See Report 281 *ASIC enforcement outcomes: July to December 2011* (REP 281).

A Confident and informed consumers and financial investors

Key points

This section highlights enforcement outcomes against providers of financial services or financial products who failed to perform their duties with sufficient honesty, diligence, competence or independence.

Each of the gatekeepers identified in this section has an important role in ensuring that investors and consumers remain confident and informed in their decisions.

Financial advisers

Honesty

- 21 Financial advisers exert a significant degree of control over their clients' money. Clients place a high level of trust in financial advisers to exercise this control appropriately. Dishonest conduct involving clients is regarded by us as extremely serious and may result in suspension or banning, as well as a criminal conviction.
- 22 Misappropriations of client funds, fraud or theft are among the most serious of dishonesty offences, and will incur the most severe consequences. For example, in New South Wales, the offence of fraud carries a maximum penalty of 10 years jail.

Example 1: Falsifying documents

Sydney-based financial adviser Susan Heathwood pleaded guilty in June 2012 to two counts of dishonest conduct after she falsified more than 60 insurance policies in order to collect more than \$380,000 in commissions. In February 2012, ASIC permanently banned Ms Heathwood from providing financial services.

At the time of the conduct, Ms Heathwood was an authorised representative of GuardianFP and an employee of Jalee Consulting Group Pty Ltd. The information she falsified related to personal information about applicants who had never asked for insurance to be arranged on their behalf.

The criminal case has been adjourned for sentencing. The first offence carries a maximum penalty of five years imprisonment or a \$22,000 fine, or both. The second offence carries 10 years imprisonment or a \$450,000 fine, or both.

Example 2: Stealing from clients

James Patrick Hobson, a former senior financial adviser employed by Binma Pty Ltd, which operates the North Sydney firm Noall & Co, was convicted and sentenced in the Sydney District Court following an ASIC investigation.

The court found that between March 2008 and August 2008, Mr Hobson misappropriated \$307,000 and attempted to misappropriate \$120,000 of client funds while working for Noall & Co. In each instance, the funds were provided to him after the provision of advice to invest in international shares via a product called 'Skandia'. It was alleged that Mr Hobson did not invest these funds on behalf of his clients but instead used the money to fund a gambling addiction.

Mr Hobson was sentenced on four counts to two years imprisonment (suspended on the offender entering into a two-year good behaviour bond), and entered into a five-year good behaviour bond on a fifth count.

Mr Hobson has been banned permanently from providing financial services as a result of his conviction.

Diligence

- 23 Financial advisers must have a reasonable basis for advice given. This requires advisers to properly consider the particular circumstances of their clients. This is not only good practice, but is their legal duty under the Corporations Act. The Corporations Act also requires advisers to give their clients certain information and documentation as part of the advice-giving process.

Example 3: Inappropriate advice

In March 2012, the Administrative Appeals Tribunal (AAT) affirmed ASIC's decision to ban Don Nguyen from providing financial services for seven years, after an ASIC delegate earlier found he had failed to comply with financial services laws.

In March 2011, we banned Mr Nguyen after an investigation identified breaches including:

- failing to have a reasonable basis for advice given;
- failing to provide Statements of Advice (SOAs) or Product Disclosure Statements;
- failing to provide additional information when recommending the replacement of one financial product with another;
- making statements that were false or misleading in a material particular; and
- inducing clients to deal in financial products by making statements or forecasts that were misleading, false or deceptive.

The AAT found that a seven-year banning was appropriate for the protection of the public and for maintaining public confidence in the financial services profession.

- 24 The law requires that specific documentation must be completed and information given to financial consumers when advice is sought from or given by a financial adviser. Licensees must have systems in place and resources committed to their supervision to ensure these obligations are met, so that consumers can be confident when dealing with advisers.

Example 4: Failure to meet obligations

ASIC has accepted an enforceable undertaking from former Commonwealth Financial Planning Limited (CFPL) employee, Simon Langdon, after he failed to meet his obligations as a financial adviser.

Between 7 April 2008 and 23 June 2010, Mr Langdon was found to have:

- failed to complete Financial Needs Analysis documentation;
- allowed clients to sign blank Financial Needs Analysis documentation;
- failed to make reasonable inquiries in relation to the personal circumstances of clients before implementing advice;
- failed to provide clients with SOAs;
- failed to provide SOAs within a reasonable time period; and
- failed to disclose fees in an SOA provided to a client.

Under the enforceable undertaking, Mr Langdon has agreed not to provide financial services in any capacity for a minimum of two years. He has also undertaken to complete appropriate professional education requirements and must adhere to strict supervision requirements for 12 months should he decide to re-enter the financial services industry.

Competence

- 25 Individuals and businesses must not engage in financial services without holding an AFS licence, acting as an employee or representative of an AFS licensee or being exempt from the AFS licence requirement.
- 26 AFS licensees are responsible for ensuring that they continue to meet the obligations and standards required by their licence. Where necessary, additional conditions may be added to a licensee's existing obligations to address concerns about the licensee's conduct.

Example 5: Additional AFS licence conditions

Following an investigation, ASIC reached an agreement with Saxo Bank A/S, the former provider of the trading platform for collapsed broker Sonray Capital Markets Pty Ltd (in liq), that additional requirements be included on its AFS licence.

The additional conditions, which apply to Saxo Capital Markets (Australia) Pty Ltd (SCMA), require SCMA to:

- engage an expert to review and report on the adequacy of SCMA's risk management systems;
- implement any recommendations made by the expert over six months;
- engage the expert for further reviews and reporting over an 18-month period following the initial expert report; and
- provide ASIC with independent verification of client money being held by SCMA every six months.

- 27 The activities of unlicensed financial advisers can result in the loss of hundreds of thousands of dollars to investors through investment fraud. Perpetrators of this kind of scam operate without an AFS licence and may use false addresses and phone numbers. Victims are frequently lured with promises of high returns and low risk. Often, this money cannot be recovered. This kind of behaviour breaches the competence requirements of the Corporations Act and is also dishonest.

Example 6: Unlicensed activities

ASIC obtained court orders against the operators of a Gold Coast-based unlicensed financial services business, preventing it from carrying on its activities. Our investigation so far has found the investment scam has resulted in 37 investors losing approximately \$680,000.

The Supreme Court of Queensland made declarations against West Trade Group Pty Ltd, West Trade Cars Pty Ltd, West Two Pty Ltd and its directors Tiffany Lea O'Donnell, Russell John Lewis and John Steven Pitcher, finding the companies had carried on an unlicensed financial services business.

We alleged that these companies used cold calling and a website to induce investors to deposit funds into a number of bank accounts with the promise that funds would be used to buy shares on behalf of investors and generate profits well above market returns. We believe it is unlikely the investors' funds will be recovered.

Insurance brokers

- 28 Consumers look to insurance brokers, like other financial services businesses, for help in securing products with which they may be unfamiliar. In doing so, they place significant trust in these professionals. Consumers should have confidence that these gatekeepers are fully complying with their legal obligations when dealing with their money.

Honesty

- 29 It is important that insurance brokers act with honesty and integrity. Having no insurance cover or inadequate insurance cover can have a devastating impact on consumers or small businesses if something goes wrong.

Example 7: Dishonest and deceptive conduct by insurance broker

ASIC has permanently banned former insurance broker Alan Charstone of Croydon South, Victoria, from providing financial services. Between August 2009 and July 2010, Mr Charstone was an authorised representative of Insurance Advisernet Australia Pty Ltd.

Our investigation found that Mr Charstone engaged in dishonest and deceptive conduct between August 2009 and July 2010 in relation to business and personal insurance. Specifically, Mr Charstone failed to place adequate insurance cover for clients and misappropriated client funds.

We banned Mr Charstone after finding that he had not complied with financial services laws and that there was reason to believe he would not comply with financial services law in the future.

- 30 A careful approach should always be taken when advertising financial products and services to consumers. Comparisons of the benefits offered by different products on the market should be accurate and balanced and have a reasonable basis. Any qualifications should be given sufficient prominence to effectively convey key information.

Example 8: Misleading advertising involving product comparisons

Avant Insurance Limited (Avant) has changed the advertising for its Avant Practitioner Indemnity Insurance Policy, in response to ASIC concerns they were potentially misleading.

The ads, which were in the form of a letter sent to policy holders of competing products, included a table comparing the cover provided by Avant's policy against that of four other competitors. ASIC was concerned the table created the impression that Avant's policy provided more cover than its competitors in some areas and provided unqualified cover in some areas, when this was not necessarily the case.

Avant has agreed to:

- make clear to consumers that cover is subject to applicable terms, conditions and exclusions of the policy where key statements are made about policy features;
- place disclaimers in close proximity to any key statements about the features of the policy;
- stop the use of comparisons that may not accurately represent the scope of cover provided by Avant and its competitors; and
- update its internal marketing guidelines.

Competence

- 31 Licensees have a responsibility to properly monitor their compliance with their licence conditions and to notify ASIC if they are unable to meet or have breached these conditions. Licensees that fail to comply with these requirements may have their licence suspended.

Example 9: Breach of AFS licence conditions

ASIC has suspended the AFS licence of Menai-based insurance broker, Southpoint Insurance Brokers Pty Ltd, for seven months.

The company's licence was suspended after ASIC surveillance revealed that it breached its AFS licence conditions by failing to:

- maintain sufficient base level financial requirements to pay all debts as and when they become due;
- hold at least \$50,000 in surplus liquid funds when holding client money or property over \$100,000;
- operate the trust account in accordance with financial services laws; and
- lodge financial statements and auditors' reports by the due date.

Responsible entities and their officers

Honesty

- 32 People that operate managed investment schemes should frankly disclose the nature and prospects of the scheme to prospective clients. Scheme operators risk criminal prosecution and imprisonment if they make false statements to investors or fail to act honestly as gatekeepers.

Example 10: Fraudulent investment scheme

Brian Wood and Jimmy Truong pleaded guilty in the Downing Centre Local Court in Sydney to criminal offences relating to the operating of a Ponzi scheme called Integrity Plus Fund.

Mr Wood pleaded guilty to a total of 10 charges, including six counts of making false statements to investors and four counts of fraudulently misappropriating investors' funds. Mr Truong pleaded guilty to four charges of making false statements to investors.

Both men falsely stated to investors that their investments would earn returns of 4% per month and that the capital amounts of their investments were guaranteed.

Competence

- 33 The licensing system allows us to monitor providers of collective investments to ensure they act within the law. New managed investment schemes must be registered with ASIC before they can operate. To register a scheme, the proposed responsible entity must be a registered Australian public company and hold an AFS licence authorising it to operate a managed investment scheme.

Example 11: Unregistered managed investment scheme

ASIC obtained orders in the Supreme Court of New South Wales to wind up an unregistered managed investment scheme, known as Master Fund, operated by Secured Bond Ltd. In proceedings on 28 May 2012, the Supreme Court of New South Wales also made final orders appointing a liquidator of the scheme.

We believe that Master Fund operated from October 2004 until December 2008, when we obtained orders restraining the operation of Master Fund. Approximately 40 investors who invested around \$3.6 million were involved in Master Fund. We are also taking civil penalty action in the NSW Supreme Court against the operators of Master Fund and 13 other schemes.

We have been assisted in this matter by the US Commodities Futures Trading Commission, the NZ Financial Markets Authority and the Securities and Futures Commission of Hong Kong.

Diligence

- 34 Establishing and maintaining compliance plan measures that ensure the responsible entity meets financial services laws are a condition of its AFS licence. Inadequate compliance plans are commonly associated with poor risk management practices, deficient disclosure to investors and non-compliance with financial requirements.

Example 12: Failure to act diligently

ASIC banned Michael Grochowski of Hampton, Victoria, from providing financial services for four years as a result of his conduct as director and officer of Sovereign MF Limited (Sovereign).³

Mr Grochowski was banned after an ASIC investigation found he did not comply with financial services laws by failing to:

- ensure all assets of the Sovereign Aged Care Property Fund (SACPF) were properly identified and registered as assets of SACPF;

³ Sovereign holds an AFS licence that authorises it to operate registered managed investment schemes. Sovereign is addressing issues stemming from the conduct in question. We are not pursuing any action against Sovereign or its current directors in relation to these issues.

- remedy defective disclosure documents for the SACPF;
- provide members of SACPF with timely ongoing disclosure; and
- lodge annual financial reports for Sovereign and SACPF.

We found that Mr Grochowski failed to exercise the degree of care and diligence expected of a person in his position, responsible for operating a managed investment scheme. We also found that Mr Grochowski's conduct demonstrated a lack of understanding of the obligations imposed on AFS licensees.

Credit licensees

- 35 The national credit regime is intended to protect consumers and ensure ethical and professional standards in the finance industry. Credit providers must comply with the provisions of Sch 1 of the *National Consumer Credit Protection Act 2009* (National Credit Code) and their obligations as a credit licensee.

Honesty

- 36 Falsification of documents is a serious breach of a credit licensee's obligations. Creating false documents that are used or relied on by another person, forging a client's signature or providing false information in a credit licence application are all examples of serious misconduct.

Example 13: False and misleading statements

ASIC banned Ravind Prasad of Mill Park, Victoria, from engaging in credit activities for three years after he provided false and misleading statements in his credit licence application. Mr Prasad's company, Jazzrozz Pty Ltd, of which he is the sole director and responsible manager, also had its credit licence cancelled.

Mr Prasad failed to clearly identify that his broker accreditation had been terminated in October 2008 by both Choice Aggregation Services and the ANZ Bank. He also failed to clearly state that he had previously been disciplined by the Mortgage and Finance Association of Australia, of which he was a member, which required him to complete a mentoring program.

An ASIC investigation found that Mr Prasad's business failed to comply with general conduct requirements to be a member of an external dispute resolution (EDR) scheme and to lodge an annual compliance certificate by the due date. We found that Mr Prasad's lack of skill and knowledge in complying with legal and regulatory obligations highlighted his inability to carry out the responsibilities associated with the role of director of a credit licensee.

- 37 Advertisements should give balanced information to ensure the overall effect creates realistic expectations about a product or service. Importantly, awards

should be adequately explained to ensure that they do not mislead consumers.

- 38 ASIC intervened on a number of occasions to require credit providers to remedy advertisements which we considered were misleading or likely to mislead.

Example 14: Misleading advertising of a credit product

The Bank of Western Australia (Bankwest) agreed to make changes to advertising for their Bankwest Breeze MasterCard following concern raised by ASIC that the advertisements were misleading or likely to mislead.

Bankwest claimed in print advertisements that the Breeze Mastercard was 'Australia's cheapest credit card'. The advertisement prominently disclosed that this claim was based on a recent award the Breeze MasterCard received from *Money* magazine.

ASIC reviewed the award issued by *Money* magazine and discovered that the Breeze MasterCard was only the cheapest credit card when compared with credit cards offered by other banks. In fact, there were some other credit card issuers (such as credit unions) that offered cheaper credit cards.

Bankwest has been proactive in responding to ASIC and is taking a number of steps to address the concerns, including:

- amending the advertisements; and
- contacting consumers who have taken out the Breeze MasterCard since the advertisements were published to more accurately explain the nature of the claim.

Competence

- 39 Individuals and businesses must not engage in credit activities without either holding a credit licence, acting as the representative of a credit licensee or being exempted from the credit licensing requirement. Engaging or using the services of unlicensed credit operators puts the public at risk.

Example 15: Unlicensed credit provider

ASIC banned Victor Manatakis of Doncaster, Victoria, from engaging in credit activities for five years after an ASIC investigation found his payday lending business was an unlicensed credit provider.

Mr Manatakis was the former director of Billpal Pty Ltd, which was the operator of payday lending business, Cashpal. We found that between August and October 2011, Billpal engaged in credit activities relating to credit contracts without a credit licence.

- 40 Credit licensees and their officers, including a director, secretary or senior manager of a credit licensee who perform duties in relation to credit

activities, must ensure that they comply with their obligations under the credit licence.

- 41 Membership of an approved EDR scheme is an important requirement for credit licensees under the *National Consumer Credit Protection Act 2009* (National Credit Act). EDR gives consumers alternatives to legal proceedings for resolving complaints with their credit service providers. ASIC cancelled the licences of five credit licensees who failed to comply with this requirement.

Example 16: Failure to meet licence requirements

ASIC cancelled the credit licence of Sydney finance broking firm Nova Home Loans for failing to maintain its membership of an approved EDR scheme. Nova had been licensed to engage in credit activities related to credit contracts, consumer leases, related mortgages and guarantees and credit services.

Nova was expelled from membership of the Financial Ombudsman Service Limited (FOS), one of two EDR schemes approved by ASIC. Following Nova's expulsion from FOS, we became aware that Nova had failed to obtain membership of the other approved EDR scheme, the Credit Ombudsman Service Limited. We subsequently acted to cancel Nova's credit licence.

B Fair and efficient financial markets

Key points

This section reviews enforcement outcomes in relation to gatekeepers with a key role in ensuring our markets are fair and efficient.

Enforcement outcomes often relate to matters of corporate governance, including in the areas of directors' duties and external administration where there has been a failure to perform duties with sufficient honesty, diligence, competence or independence.

Insolvency practitioners

Diligence

- 42 Liquidators must faithfully perform their professional duties as a liquidator or receiver and adhere to relevant legal requirements. Our proactive program of compliance visits continues to identify insolvency practitioners who warrant further investigation in this respect.

Example 17: Failure to properly perform duties

In May this year, ASIC applied to the Federal Court to inquire into the conduct of Melbourne liquidator Andrew Leonard Dunner, concerning the performance of his duties as a registered and official liquidator and as a receiver or manager of 11 companies to which he has been appointed.

We sought orders that Mr Dunner be prohibited from holding the office of liquidator, provisional liquidator, voluntary administrator or administrator of a deed of company arrangement for such a period as the court saw fit, or alternatively, to declare there are grounds for the cancellation of Mr Dunner's registration as an official liquidator.

In July, the court ordered that:

- there be an inquiry into the conduct of Mr Dunner as a liquidator and receiver and manager in relation to the companies; and
- until the determination of the proceeding, or further court order, Mr Dunner report to ASIC each month with details of the remuneration he has received and the relevant approvals in relation to the companies to which he has been appointed, which are the subject of the application.

Auditors

- 43 We took action against a number of auditors in the relevant period as part of our program to lift standards in the financial services and professional services industry.

Diligence

- 44 Auditors must ensure each audit is planned and performed with an attitude of professional scepticism.

Example 18: Failure to perform duties as auditor

ASIC accepted an enforceable undertaking from the auditor of the failed Astarra Strategic Fund to not act as a registered company auditor for three years. Timothy Frazer of WHK Audit & Risk Assessment audited the 2008 financial report of Alpha Strategic Fund and the 2009 report of Astarra Strategic Fund.

We were concerned that during these audits Mr Frazer failed to adequately and properly perform the duties of an auditor, and failed to ensure each audit was planned and performed with an attitude of professional scepticism.

This action is one of many arising from ASIC's investigation of Trio Capital and its related entities.

Independence

- 45 It is essential that auditors are fully aware of their independence obligations and work independently to carry out their audit activities.
- 46 Under the Corporations Act, an auditor generally cannot audit a listed company for five successive years without a two-year break. Auditor rotation is a key aspect of the independence provisions of the Corporations Act, aimed at enhancing the reliability and credibility of audit reports.

Example 19: Failure to meet auditor rotation requirements

ASIC accepted an enforceable undertaking from Graham Bruce Abbott after he breached the auditor rotation requirements in the Corporations Act. Our surveillance found that Mr Abbott breached these requirements by playing a significant role in audits of listed companies Central West Gold NL and Morning Star Gold NL for a number of successive financial years.

We were concerned that Mr Abbott showed a lack of understanding of the importance of the independence of his role as an auditor by breaching these requirements.

Under the enforceable undertaking, Mr Abbott has agreed not to practise as an auditor for a company or a registered scheme under the Corporations Act.

Directors and officers

- 47 Directors are the focal point for the governance of corporations. All decision making is devolved from them. As such, they play a fundamental role in maintaining the integrity of capital markets and ensuring investor confidence.
- 48 Actions against directors during the period fell into two categories. There were proceedings against nine directors (five criminal, three civil and one enforceable undertaking/negotiated outcome) relating to more serious breaches of the law. There were 196 proceedings against company officers for less serious summary offences, such as failure to keep proper books and records.

Honesty

- 49 Directors must not dishonestly use their position to gain an advantage for themselves or someone else.
- 50 Possible imprisonment is a salient reminder of just how seriously crimes involving dishonesty are viewed by Parliament, the courts, ASIC and the Australian community.

Example 20: Dishonest breach of directors' duties

The former directors of Australian Capital Reserve Limited (ACR) were convicted of charges related to false or misleading statements in the company's accounts and a prospectus, following an ASIC investigation.

The three directors, Samuel Pogson, Murray Lapham and Steven Martin were sentenced at the NSW District Court after pleading guilty to one charge each under the *Crimes Act 1900* (NSW) of making a false or misleading statement to obtain a financial advantage for the company. Mr Pogson also pleaded guilty to one charge under the Corporations Act of making a false or misleading statement in a form lodged with ASIC.

Mr Pogson and Mr Lapham were each sentenced to two years imprisonment. Mr Pogson was also sentenced to one year imprisonment to be served concurrently with the other charge. Mr Martin was sentenced to one year and four months imprisonment. All three were directed to serve their terms of imprisonment by way of intensive correction orders.⁴

Diligence

- 51 We expect directors to discharge their duties diligently and in accordance with the Corporations Act. Some recent cases have brought into sharp focus the content of this obligation on both executive officers and non-executive directors when making important decisions.

⁴ The Crown has lodged an appeal against the sentencing decision. A decision on this appeal is pending.

Example 21: Breach of directors' duties

In February 2007, ASIC commenced civil penalty proceedings against seven former non-executive directors and three former company officers of James Hardie Industries Limited (JHIL). One issue before the trial judge in the Supreme Court of New South Wales was whether the former directors and officers failed to discharge their duties with due care and diligence by not taking steps to ensure that JHIL did not contravene its obligations regarding disclosures about, among other things, the adequacy of compensation arrangements for victims of asbestos-related diseases.

In 2009, the trial judge found that the defendants had breached the Corporations Act, and imposed pecuniary penalties and disqualification orders on the non-executive directors and officers. The decisions on liability and penalty were subsequently appealed to the NSW Court of Appeal, which upheld the officers' appeal (in part) and the non-executive directors' appeal.

In May 2012, the High Court upheld the finding of the trial judge, that the directors of JHIL did breach their duty to the company as alleged by ASIC. The High Court also decided that ASIC's decision not to call a witness caused no unfairness and that there was no basis for drawing any inference that the witness would have given evidence adverse to ASIC's case.

Example 22: Breach of directors' duties

ASIC achieved a significant milestone in its long-running case against Andrew Alexander Lindberg, former Managing Director of AWB Limited (AWB).

In the Supreme Court of Victoria, Mr Lindberg acknowledged a number of serious contraventions of the Corporations Act relating to his duties as a director, arising from AWB's supply of wheat to Iraq under the United Nations' Oil-For-Food Programme, and the subsequent inquiries conducted by AWB in relation to that supply.

Several of the contraventions relate to Mr Lindberg's failure to inform the AWB board of relevant information within his possession.

The matter was adjourned until August while the court considered the parties' joint submission on penalties.⁵

ASIC's proceedings against other former officers of AWB are ongoing.

Markets

- 52 Participants in Australia's financial markets have a responsibility to uphold the integrity and fairness of local markets. We will target misconduct which has the potential to damage the integrity and reputation of the market

⁵ In August the court approved the parties' joint submission on penalties. It imposed a pecuniary penalty of \$100,000 and disqualified Mr Lindberg from managing a corporation until 14 September 2014, after finding that he breached his duties as a director of AWB.

Diligence

- 53 Listed and unlisted disclosing entities must disclose material information on a timely basis and comply with any relevant listing rules. ASIC can issue infringement notices to address breaches of the continuous disclosure obligations.
- 54 Infringement notices can require the payment of a monetary penalty. Under the Corporations Act, compliance with the infringement notice is not an admission of guilt or liability and the disclosing entities are not taken to have contravened the provision(s) specified in the notice.

Example 23: Breach of continuous disclosure rules

Leighton Holdings Limited (Leighton) paid a total of \$300,000 after ASIC served three infringement notices alleging the company had not complied with its continuous disclosure obligations. In addition, we accepted an enforceable undertaking from Leighton that commits the company to reviewing its disclosure practices.

The infringement notices were issued following an ASIC investigation into an announcement Leighton made to the market on 11 April 2011 of a \$907 million write down to its profit forecast.

The alleged continuous disclosure breaches related to information concerning Leighton's Airport Link project, its Victorian desalination project and its investment in the Al Habtoor Leighton Group that were not immediately notified to the Australian Securities Exchange (ASX).

Example 24: Breach of continuous disclosure rules

BioProspect Limited paid a \$33,000 penalty after ASIC served an infringement notice alleging the company had not complied with the continuous disclosure provisions of the Corporations Act and relevant provisions of the ASX Listing Rules.

The alleged breach related to statements BioProspect made about the interests of Frontier Gasfields Pty Ltd, in which BioProspect was acquiring 25% equity. ASIC believes that when BioProspect made these statements it was aware of information which was not disclosed that qualified the nature of Frontier Gasfields' interest in an asset.

- 55 Market participants should review the entry of orders into the trading platform and prevent the entry of those that could result in a market that is not fair and orderly.

Example 25: Contravention of ASIC market integrity rules

Commonwealth Securities Ltd (CommSec) paid a penalty of \$35,000 to ASIC to comply with an infringement notice issued by the Markets Disciplinary Panel (MDP) for the entry of an erroneous Priority Crossing in the security OZ Minerals Limited, that allegedly resulted in the market for OZ Minerals not being both fair and orderly.

CommSec was an ASX trading participant at the relevant time and therefore required to comply with the market integrity rules.

C Efficient registration and licensing

Key points

This section reviews enforcement outcomes in the area of registration and licensing. Upon the registration of a company, various notification and record-keeping obligations apply.

Failure to meet these obligations may lead to prosecution by ASIC.

Officeholders of registered companies

Diligence

- 56 Conscientious and accurate record keeping is a fundamental responsibility of all companies registered with ASIC.
- 57 Financial reports, including directors' reports and auditors' reports, must be diligently prepared to ensure that consumers, investors and the public are properly informed.

Example 26: Failing to lodge reports

Eight Western Australian public companies have informed the Perth Magistrates' Court that they will plead guilty to a total of 15 charges for failing to comply with their obligations to lodge reports with ASIC.

The companies are all subsidiaries of the Barrick Gold Corporation of Canada.

The alleged failure of these companies to lodge the required reports was identified as part of a regular compliance program that aims to ensure that creditors, investors and the public have access to accurate and up-to-date information about companies.

The Barrick subsidiaries have since pleaded guilty to all charges laid.⁶

Competence

- 58 ASIC continues to focus on ensuring that directors who are involved in numerous company failures are removed from positions of authority within companies. This disqualification action seeks to protect future creditors, investors and employees who may suffer losses at the hands of these individuals.

⁶ On 27 August 2012, the Barrick subsidiaries were convicted and fined a total of \$127,000 for failing to lodge required documents with ASIC.

- 59 The number of directors disqualified by ASIC has increased over the past three years. We disqualified 25 directors from managing corporations following their involvement in two or more failed companies in the six-month period.

Appendix 1: Statistics

Table 1: Enforcement outcomes: 1 January 2012 to 30 June 2012*

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcomes	Public warning notice	Total
Market integrity			8	1		9
Market manipulation						
Continuous disclosure			6	1		7
Market integrity rules			2			2
Other market misconduct						
Corporate governance	5	3		4		12
Action against directors	5 [†]	2		1		8
Insolvency						
Action against liquidators		1		1		2
Action against auditors				2		2
Other corporate governance misconduct						
Financial services	4	7	26	19	1	57
Unlicensed conduct		1				1
Dishonest conduct, misleading statements, unconscionable conduct	3	4	6 [^]	3		16

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcomes	Public warning notice	Total
Misappropriation, theft, fraud	1	1	3**			5
Credit		1	12	3		16
Other financial services misconduct			5	13	1	19
Small business compliance and deterrence	200		25			225
Action against directors	196 [†]		25			221
Efficient registration and licensing	4					4
Total	209	10	59	24	1	303

* Outcomes are presented per defendant

† Includes four outcomes that are currently under appeal

^ Includes one outcome currently under appeal

** Includes one outcome currently under appeal

‡ This figure comprises technical offences such as failure to keep proper books and records

Table 2: Pending matters

Area of enforcement	Criminal	Civil	Administrative remedies	MDP
Market integrity	15	2		8
Insider trading	8	1		
Market manipulation	4			
Continuous disclosure				
Market integrity rules				8
Other market misconduct	3	1		
Corporate governance	16	6	4	
Action against directors	12	4	2	
Insolvency	1		2	
Action against liquidators		1		
Action against auditors	1	1		
Other corporate governance misconduct	2			
Financial services	23	14	12	
Unlicensed conduct	2	2		
Dishonest conduct, misleading statements, unconscionable conduct	16	8	4	
Misappropriation, theft, fraud	5		2	
Credit		2	3	
Other financial services misconduct		2	3	
Small business compliance and deterrence	156		23	
Action against directors	156		23	
Efficient registration and licensing				
Total	210	22	39	8

Explanation

- 60 Table 1 lists enforcement outcomes achieved during the period 1 January 2012 to 30 June 2012. 'Enforcement outcome' refers to any formal action taken to secure compliance, about which ASIC has made a public announcement (with the exception of 'Small business compliance and deterrence' actions). This includes court action (criminal and civil), administrative remedies and the acceptance of enforceable undertakings. It also includes outcomes where a defendant has pleaded guilty or agreed to plead guilty to the charges against them but has yet to be sentenced. However, it does not include the many less formal processes we undertake to secure compliance with the law once a breach has occurred. For example, it does not include negotiating a change in compliance processes after receiving a breach notification from a licensee.
- 61 'Pending matters' in Table 2 refers to matters which have yet to result in a formal outcome (such as the imposition of an administrative remedy, court ordered penalty or sentence). These include, in the case of criminal matters, matters where charges have been laid or, for any other pending matter, where a hearing date has been announced. All of the matters in this table are pending as at 30 June 2012, although they may have arisen at any time prior to this date. A public announcement may not have been made about each of the matters in this table. This table provides a good indication of the number of matters that are being pursued by ASIC at any one time.

Appendix 2: Schedule of media releases

Table 3: Media releases for enforcement outcomes: 1 January 2012 to 30 June 2012

Media release (by area of enforcement)	Date	Link
Market integrity		
BioProspect complies with ASIC infringement notice for alleged continuous disclosure breach	8/03/2012	12-42AD
BC Iron complies with ASIC infringement notice for alleged continuous disclosure breach	8/03/2012	12-43AD
Leighton Holdings complies with three ASIC infringement notices for alleged continuous disclosure breaches and ASIC accepts compliance enforceable undertaking	18/03/2012	12-53MR
Nomura Australia Limited pays \$30,000 infringement notice penalty	30/03/2012	12-59AD
Brisbane man charged with market manipulation	18/05/2012	12-98MR
Commonwealth Securities Limited pays \$35,000 infringement notice penalty	28/05/2012	12-107MR
Navigator Resources complies with ASIC Infringement notice for alleged continuous disclosure breach	15/06/2012	12-130MR
Former managing director of stock broking firm charged with insider trading	07/06/2012	12-119MR
Corporate governance		
Sydney liquidator prevented from practising	18/01/2012	12-04MR
Astarra Strategic Fund auditor prevented from auditing companies for three years	10/02/2012	12-22MR
ASIC acts against Melbourne liquidator	15/05/2012	12-93MR
Former ARP Growth Fund operator prevented from participating in financial services, managing companies	1/02/2012	12-15MR
Former Australian Capital Reserve directors sentenced	8/03/2012	12-44AD
ASIC brings criminal charges against former Kleenmaid directors	16/02/2012	12-27AD
Former WA director jailed for stealing \$230,000	13/04/2012	12-69MR
ASIC accepts enforceable undertaking from auditor for breaching the rotation requirements	20/04/2012	12-75AD
Decision in ASIC's appeals in James Hardie matter	3/05/2012	12-85MR
Former Bustan Chairman sentenced	4/05/2012	12-87MR
WA company director charged	29/05/2012	12-105MR

Media release (by area of enforcement)	Date	Link
Former AWB managing director acknowledges directors duty breaches	31/05/2012	12-109MR
Perth auditor charged by ASIC for failing to be independent	12/06/2012	12-124MR
Former AWB Chief Financial Officer acknowledges breaching legal duties	13/06/2012	12-126MR
Financial services		
ASIC accepts enforceable undertaking from former Commonwealth Financial Planning adviser	10/01/2012	12-02AD
CBA to change Wealth Package loan comparison rates	12/01/2012	12-03MR
ASIC permanently bans former SA director	30/01/2012	12-10AD
ASIC obtains Supreme Court orders against fraudulent Gold Coast financial services business	3/02/2012	12-16AD
Federal Court finds loan brokers engaged in unconscionable conduct	8/02/2012	12-19MR
Self-managed super adviser faces criminal charges following ASIC investigation	14/02/2012	12-24AD
ASIC suspends AFS licence of 'Aussie Rob's' Lifestyle Investor Services	15/02/2012	12-25AD
American Express agrees to change credit card interest rate policy for defaulting cardholders	24/02/2012	12-31MR
ASIC cancels credit licence of Sydney finance broker	28/02/2012	12-33AD
ASIC permanently bans former Victorian company director and financial adviser	2/03/2012	12-37MR
ASIC permanently bans Sydney financial adviser	7/03/2012	12-39AD
ASIC accepts enforceable undertaking from Commonwealth Bank	7/03/2012	12-40MR
Former Stonebridge broker banned for three years	12/03/2012	12-48AD
ASIC brings criminal charges against banned financial adviser	14/03/2012	12-50AD
ASIC accepts permanent undertaking from Adelaide adviser	2/04/2012	12-60AD
ASIC accepts enforceable undertaking from former Commonwealth Financial Planning adviser	4/04/2012	12-63AD
Former Bell Potter advisor charged with fraudulent conduct	10/04/2012	12-66AD
Elders Insurance repays customers \$5.3 million following underpayment error	11/04/2012	12-67AD
Provisional liquidators appointed to Your Trading Room Pty Ltd	12/04/2012	12-68AD
Lifestyle Trader Pty Ltd wound up on ASIC's application	16/04/2012	12-71AD

Media release (by area of enforcement)	Date	Link
ASIC suspends Australian Performance Financial Planning Pty Ltd licence	16/04/2012	12-70AD
ASIC permanently bans Victorian man from providing financial services	17/04/2012	12-72AD
HSBC to change home loan advertising	18/04/2012	12-73AD
ASIC permanently bans former Melbourne CFD dealer	20/04/2012	12-74MR
ASIC obtains Federal Court order banning derivatives trading director from providing financial services for six years	23/04/2012	12-78MR
ASIC permanently bans financial adviser following fraud conviction	23/04/2012	12-77AD
ASIC takes action on car finance advertising under credit legislation	23/04/2012	12-76AD
Westpac withdraws unsolicited credit card limit increase invitation in response to ASIC's concerns	24/04/2012	12-79MR
Former Commonwealth Financial Planning Limited adviser banned for three years	30/04/2012	12-80MR
ASIC permanently bans former Commonwealth Financial Planning adviser	30/04/2012	12-81MR
ASIC suspends financial services licence of New South Wales insurance broker	7/05/2012	12-88MR
Former directors of companies within Dollarforce Group to stand trial	07/05/2012	12-89MR
Investors warned about dealing with Dellingworth Pty Ltd	17/05/2012	12-95MR
Former Sydney financial adviser sentenced on fraud charges	21/05/2012	12-100MR
ASIC obtains court orders against Sydney financial adviser	21/05/2012	12-99MR
ASIC accepts enforceable undertaking from former Commonwealth Financial Planning adviser	4/06/2012	12-111MR
Bankwest amends credit card advertising following ASIC action	4/06/2012	12-110MR
ASIC bans former broker for three years	5/06/2012	12-115MR
Ponzi scheme operators plead guilty to ASIC charges	8/06/2012	12-120MR
ASIC issues warning about Connaught Investment Group	8/06/2012	12-121MR
ASIC bans Melbourne man from providing financial services	12/06/2012	12-125MR
ASIC bans Victorian pay day lender	14/06/2012	12-127MR
ASIC winds up \$3.6 million scheme	14/06/2012	12-129MR
More than \$630,000 refunded to Toyota customers following overcharged premiums	14/06/2012	12-128MR

Media release (by area of enforcement)	Date	Link
ASIC imposes licence conditions on insurance group	19/06/2012	12-132MR
ASIC takes action on RESI home loans advertising	19/06/2012	12-133MR
More than \$1 million to be refunded to BMW finance customers	20/06/2012	12-134MR
Avant to change insurance policy advertising	20/06/2012	12-135MR
ASIC acts to stop cold calling scam and obtain compensation for investors	25/06/2012	12-137MR
ASIC takes action on car finance advertising	25/06/2012	12-136MR
ASIC acts to wind up Australia AFT Finance Market	26/06/2012	12-138MR
Former financial adviser pleads guilty to dishonest conduct	26/06/2012	12-141MR
Former Director of SA insurance broker charged	29/06/2012	12-147MR

Note 1: Where ASIC has issued more than one media release in relation to a matter, the most recent or relevant release is listed. Media releases may list outcomes in relation to multiple defendants.

Note 2: Not all outcomes will be announced in a media release, particularly 'Small business compliance and deterrence' outcomes.

Key terms

Term	Meaning in this document
AAT	Administrative Appeals Tribunal
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services. Note: this is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purpose of that Act
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in RG 139
enforcement outcome	Any formal action to secure compliance, about which ASIC has made a public announcement.
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
INFO 151 (for example)	An ASIC information sheet (in this example numbered 151)
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
MDP (Markets Disciplinary Panel)	ASIC's Markets Disciplinary Panel, through which ASIC exercises its power to issue infringement notices and to accept enforceable undertakings in relation to breaches of the market integrity rules
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 of the National Credit Act

Term	Meaning in this document
relevant period	1 January to 30 June 2012
REP 281 (for example)	An ASIC report (in this example numbered 281)
RG 100 (for example)	An ASIC regulatory guide (in this example numbered 100)
s798G (for example)	A section of the Corporations Act (in this example numbered 798G), unless otherwise specified
SOA (Statement of Advice)	A document that must be given to a retail client for the provision of personal advice under Subdivs C and D of Div 3 of Pt 7.7 of the Corporations Act Note: See s761A for the exact definition.

Related information

Headnotes

ASIC's strategic priorities, banning, competence, credit activity, diligence, enforceable undertaking, enforcement outcome, financial service, gatekeepers, honesty, independence, infringement notice

Regulatory guides

RG 100 *Enforceable undertakings*

RG 139 *Approval of external complaints resolution schemes*

Legislation

Corporations Act, Div 4 of Pt 7.1, s180(a), 761A, 798G

Crimes Act 1900 (NSW)

National Credit Act, Sch 1 (National Credit Code), s6, 11(1)(a), 35

Reports

REP 281 *ASIC enforcement outcomes: July to December 2011*

Information sheets

INFO 151 *ASIC's approach to enforcement*

INFO 152 *Public comment*