



ASIC

Australian Securities & Investments Commission

REPORT 281

ASIC enforcement outcomes: July to December 2011

March 2012

About this report

This report outlines enforcement outcomes achieved by ASIC during the period 1 July 2011 to 31 December 2011. 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 (primarily the Corporations Act)
- 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 or giving practical examples of how regulated entities may decide to meet their obligations).

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.

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Overview

Our enforcement powers

- 1 ASIC's strategic priorities are to ensure:
 - (a) confident and informed investors and financial consumers;
 - (b) fair and efficient financial markets; and
 - (c) efficient registration and licensing (with a focus on small business).
- 2 Enforcement action is only one of several regulatory tools available to ASIC to pursue its strategic priorities. Where appropriate to achieve these priorities, ASIC uses enforcement action to deter misconduct. Other regulatory tools that ASIC uses include: engagement with industry and stakeholders, surveillance to detect unlawful or risky behaviour, guidance, education, and policy advice.
- 3 As part of ASIC's commitment to improving the transparency of its enforcement approach and increasing public understanding of how and why ASIC uses its enforcement powers, ASIC has published Information Sheet 151 *ASIC's approach to enforcement* (INFO 151),¹ Information Sheet 152 *Public comment* (INFO 152)² and Regulatory Guide 100 *Enforceable undertakings* (RG 100).³

The role of gatekeepers

- 4 Holding the 'gatekeepers' of the financial system to account is an important part of how ASIC achieves its priorities. Broadly, the term 'gatekeepers' includes advisers, auditors, directors, liquidators, custodians, product manufacturers and distributors, market operators, and brokers. This is not an exhaustive list.
- 5 Gatekeepers perform an important role in promoting sound investment practices, preventing or detecting market failures and promoting market integrity. Among other things, gatekeepers may:
 - (a) verify, certify or approve products and services that are offered to investors on the market, lowering the cost of market entry for product issuers;

¹ INFO 151 explains how ASIC's enforcement tools relate to its other regulatory powers and how ASIC selects matters for formal investigation and enforcement action. It also provides some information on how ASIC interacts with people during investigations and enforcement actions and discusses the benefits of cooperating with ASIC.

² INFO 152 outlines ASIC's public comment policy. It provides guidance on the circumstances where ASIC may comment on an investigation and factors that limit ASIC's ability to comment on investigations.

³ RG 100 outlines what an enforceable undertaking is and when ASIC will consider accepting an enforceable undertaking.

- (b) monitor compliance of entities and their management through better access to information than is available to the investing public; or
 - (c) perform a private regulatory role by detecting and deterring misconduct.
- 6 Where participants in financial markets play a gatekeeping role, the community expects they will do so with:
- (a) honesty (e.g. by respecting other people's property and not using a position of trust for self-advantage);
 - (b) diligence (e.g. by applying due care and skill to advice or decision making);
 - (c) competence (e.g. by meeting any applicable conduct, licensing, registration and training obligations); and
 - (d) independence (e.g. by managing conflicts of interest appropriately);

Purpose and scope

- 7 As announced in Media Release (12-29MR) *ASIC releases policy on enforcement and investigations* (20 February 2012), this enforcement report is intended to further increase the level of transparency regarding ASIC's enforcement activity. It is anticipated that similar reports will be published every six months.
- 8 This report summarises enforcement outcomes achieved by ASIC for the period 1 July 2011 to 31 December 2011 (the relevant period). The report identifies various categories of gatekeeper against whom ASIC has taken enforcement action. In the case of directors in particular, enforcement outcomes relate to a wide range of matters, from serious non-compliance with director's duties to record-keeping type offences.
- 9 Examples of individual enforcement outcomes are included in order to illustrate the types of unlawful activity that have been targeted by ASIC during the relevant period. These cases are representative of the behaviours of current concern to ASIC and therefore the public may expect they are presently the subject of surveillance and, if required, deterrence activity.
- 10 Each section of this report sets out examples of individual enforcement outcomes as they relate to ASIC's strategic priorities:
- (a) confident and informed investors and financial consumers (Section A);
 - (b) fair and efficient financial markets (Section B); and
 - (c) efficient registration and licensing (Section C).

Appendix 1 provides statistics about our enforcement activities and an explanation of the methodology for compiling this data. The outcomes relating to the efficient registration and licensing priority are described under the heading 'Compliance and deterrence'. Appendix 2 provides a schedule of media releases and advisories related to our enforcement outcomes for the relevant period.

- 11 This report does not address enforcement outcomes from ASIC's market supervisory functions. Key outcomes for that area during the relevant period are set out in Report 277 *ASIC supervision of markets and participants: July to December 2011* (REP 277). Most notably, that report covers enforcement actions relating to insider trading and market manipulation. To the extent that an enforcement outcome is relevant to both market supervision and gatekeepers, there may be some overlap between the subject matter in REP 277 and this report.
- 12 As this report shows, in the last six months of 2011, ASIC was engaged in a wide range of enforcement actions against both small and large entities. ASIC will continue to take on big and difficult cases, no matter where they are or who they involve, if that is needed to achieve our priorities.

A Confident and informed consumers and financial investors

Key points

This section reviews enforcement outcomes against providers of financial services or financial products, who have failed to perform their duties with sufficient honesty, diligence, competence or independence. Each of the gatekeepers identified in this section have an important role in ensuring that investors and financial consumers are confident and informed.

Financial advisers

Honesty

- 13 Financial advisers occupy a position of considerable trust by virtue of the control they are given over other people's money. The community expects that financial advisers will not use their position to advantage themselves at the expense of their clients.
- 14 It is a crime to misappropriate client funds or to deal with client assets without proper authorisation. Dishonest advisers will be removed from the industry in order to protect the public, deter similar conduct and maintain consumer confidence in the financial services industry.

Example 1: Stealing from clients

Former Sydney financial adviser, Alan Brown, was sentenced to three years imprisonment with 21 months non-parole after pleading guilty to one count of obtaining money by deception, one count of using a false instrument and four counts of dishonest conduct in relation to financial services. Between July 2002 and July 2008, Mr Brown fraudulently withdrew funds totalling approximately \$600,000 from five clients' accounts without their knowledge or authority. ASIC previously made the decision to permanently ban Mr Brown from providing financial services.

Example 2: Stealing from clients

Insurance agent Phillip John Kingston was permanently banned from providing financial services after being convicted of fraud offences between January 2007 and June 2008. In May 2010, Mr Kingston was sentenced in the Magistrates' Court of Tasmania after he pleaded guilty to two charges of stealing by agent, one charge of stealing and one charge of dishonestly acquiring a financial advantage. ASIC made the decision to permanently ban Mr Kingston as it had reason to believe he is not a person of good fame and character.

Diligence

- 15 For consumers to have confidence in the advice process it is essential that they receive good quality financial advice that properly considers their circumstances and meets their needs.
- 16 Advisers should be careful of adopting a ‘one size fits all’ model of financial advice, where the same advice is given to all clients regardless of their circumstances and needs. There is a high probability that some clients will receive inappropriate advice if this occurs.
- 17 The consequences of providing poor or inappropriate advice include licensing action against the licensee for failing to properly supervise and monitor advisers as well as the banning of individual advisers. ASIC enforcement outcomes are publically reported and so poor or inappropriate advice also risks reputational damage.

Example 3: Inappropriate advice

ASIC accepted enforceable undertakings from financial advisers formerly employed by Storm Financial Ltd. The enforceable undertakings were offered following ASIC’s concern and subsequent investigation that in advising clients to adopt the Storm model of investment, these advisers only advised clients to invest in accordance with the Storm model of investment and without considering whether any other strategy would meet their needs.

Competence

- 18 Unlicensed advisers put consumers at risk of financial losses and potentially damage confidence in the financial services industry. It is an offence to conduct a financial services business without an Australian financial services (AFS) licence.

Example 4: Unlicensed activities

John Vafiadis was sentenced to six months imprisonment after an ASIC investigation found he provided unlicensed financial advice to investors. The court also ordered Mr Vafiadis to pay compensation to the investors.

- 19 AFS licensees must comply with the conditions of their licence. To ensure licence conditions are met, licensees must have adequate internal compliance arrangements in place.
- 20 A licensee who can no longer meet or has breached their internal compliance obligations may have their licence suspended or revoked.

Example 5: Poor internal compliance arrangements

ASIC suspended the AFS licence of Seagrims Pty Ltd until 27 November 2011. ASIC's investigation established that Seagrims failed to:

- take reasonable steps to ensure its authorised representatives made reasonable inquiries about client's personal circumstances before recommending Astarra Asset Management Pty Ltd (Astarra) products to clients;
- establish and maintain measures that ensure it complied with financial services laws;
- comply with a condition of its AFS licence to have total assets exceeding total liabilities or adjusted assets exceeding adjusted liabilities; and
- notify ASIC of a significant breach relating to Statements of Advice and Statements of Additional Advice given to clients that recommended Astarra products.

Peter Seagrim and Anne-Marie Seagrim, both directors and responsible managers of Seagrims, were also banned from providing financial services for three years after ASIC found they had not, and would not, comply with financial services law. Both individuals have appealed to the Administrative Appeals Tribunal (AAT) against their banning.

21 Adequate supervision of financial advisers employed by a licensee is particularly important. If a licensee has a low ratio of compliance staff to advisers, this can increase the risk that:

- (a) advisers are not properly monitored and supervised; and
- (b) poor or inadequate internal compliance arrangements occur.

This is also the case where compliance staff are poorly trained or do not have the skills, mandate and experience demanded of the role.

Example 6: Supervision of financial advisers

ASIC accepted an enforceable undertaking from Commonwealth Financial Planning Limited following an investigation into the provision of advice by some of its financial advisers.

Commonwealth Financial Planning agreed to conduct a comprehensive review of its risk management framework and legal and regulatory obligations regarding the provision of financial services, financial advice and the monitoring and supervision of its representatives.

Independence

22 It is an obligation of advisers and other AFS licensees that provide services to retail clients to have adequate arrangements to manage their conflicts of interest. Failure to have these arrangements in place may lead to suspension or revocation of a licence.

Example 7: Inadequate arrangements to manage conflicts of interest

ASIC cancelled FP Investment Partners Pty Ltd's AFS licence after the company failed to meet its obligations. ASIC's investigation and subsequent hearing found that FP Investment Partners had failed to ensure that:

- adequate arrangements for the management of conflicts of interest were in place; and
- one of its previous authorised representatives, Mr Joshua David Fuoco, had complied with financial services laws. In particular, FP Investment Partners failed to take reasonable steps to ensure that Mr Fuoco, in the context of providing advice about investments in two unregistered managed investment schemes, had a reasonable basis for the advice given to his clients, and that statements of additional advice provided by Mr Fuoco contained all the relevant information.

- 23 Disclosure can, in some cases, be one tool used to manage conflicts of interest. In addition, disclosure of fees or other conflicts is sometimes specifically required to be given to clients. Failure to disclose conflicts may lead to licensing action.

Example 8: Failure to disclose conflicts

A further ground for ASIC suspending the licence of Seagrims (discussed in Example 5) was a failure to provide information in its Financial Services Guide about fees and revenue it received from Astarra for recommending Astarra's products to clients.

Responsible entities and their officers

Honesty

- 24 Responsible entities and others who operate managed investment schemes must act honestly, including honestly disclose the nature and prospects of the scheme.

Example 9: False disclosure about illegal managed investment schemes

David Kennedy was sentenced to six years imprisonment following an investigation into a managed investment scheme that raised approximately \$2.5 million from Australian investors. He will serve a minimum of two years with credit for time served.

ASIC alleged that First Foundation Developments Limited and Mr Kennedy offered securities in an unregistered managed investment scheme between October 2002 and April 2003. At the time, the scheme raised approximately \$2.5 million from members of the public to allegedly finance various Gold

Coast property developments supposedly owned by First Foundation. A subsequent ASIC investigation found First Foundation never owned such properties and that Mr Kennedy used the money to fund a lavish lifestyle and transferred the balance of funds to a personal account.

Diligence

- 25 A responsible entity must take responsibility for operating its managed investment schemes. The responsibilities of directors and officers of responsible entities are not diminished through outsourcing to third parties such as investment managers.

Example 10: Directors must monitor investments diligently

ASIC entered into enforceable undertakings with the former chief executive officer (CEO), director and secretary of Trio Capital Limited (Trio), Rex Phillipott, and four former non-executive directors of Trio. Trio was formerly the trustee of five superannuation entities and the responsible entity for 25 managed investment schemes, including the Astarra Strategic Fund. The Astarra Strategic Fund invested in several overseas hedge funds, mostly based in the Caribbean. ASIC commenced an investigation into Trio in October 2009 over concerns about the legitimacy of its investments.

Competence

- 26 Managed investment schemes are generally required to be registered under the *Corporations Act 2001* (Cth) (Corporations Act). It is an offence to raise funds through an unregistered managed investment scheme unless an exemption applies.
- 27 A responsible entity must be a public company and hold an AFS licence authorising it to operate the scheme. Unlicensed promoters or issuers risk serious criminal consequences.

Example 11: Unregistered/unlicensed managed investment schemes

Mark Ronald Letten, accountant and director of LGH Holdings Ltd, appeared before the Melbourne Magistrates' Court after his arrest on 37 criminal charges following an ASIC investigation. Mr Letten was charged with 21 counts of operating unregistered managed investment schemes, one count of carrying on a financial services business without an AFS licence, and 15 counts of obtaining a financial advantage by deception. Mr Letten faces a maximum of five years imprisonment on each of the unregistered scheme charges and a maximum two years imprisonment on the charge of carrying on an unlicensed financial services business. The obtaining financial advantage by deception charges carry a maximum term of ten years imprisonment.

- 28 Failure to comply with the licence conditions imposed on a responsible entity may result in the suspension of the licensee or, if warranted, cancellation of the licence.

Example 12: Failure to comply with licence conditions

ASIC suspended the AFS licence of Gold Coast-based Equititrust Limited for 12 months, for failing to comply with a number of key obligations as a financial services licensee. Equititrust is the responsible entity of the Equititrust Income Fund and the Equititrust Priority Class Income Fund. ASIC found that Equititrust breached its legal obligations and licence conditions when it failed to:

- comply with its obligation to maintain at least \$5 million net tangible assets;
- prepare and lodge annual audited financial statements and to provide annual financial reports to members of both funds for the financial year ended 30 June 2011; and
- lodge compliance plan audits for both funds for the financial year ended 30 June 2011.

Independence

- 29 Responsible entities or their agents that use other people's money for the benefit of themselves, related parties or associates instead of investors risk prosecution and jail.

Example 13: Misleading and deceptive conduct

Former Astarra investment manager, Shawn Richard, was sentenced to a total of three years and nine months imprisonment for dishonest conduct while providing financial services, following an investigation into the collapse of the Astarra Strategic Fund and its responsible entity, Trio.

Trio was the trustee of four superannuation funds and one pooled superannuation trust. Trio invested some assets of the funds into a managed investment scheme, Astarra Strategic Fund. Most of its assets were directed into 'hedge funds', located in the Caribbean. There is little, if any, credible evidence that the purported investments were actually made or, if they were, that they had any realisable value. Most of the assets invested were subsequently lost. ASIC alleged that Mr Richard and Astarra Asset Management received in excess of \$6.4 million in undisclosed payments for making these investments.

Mr Richard admitted to conduct that constituted making false statements in relation to a financial product.

Credit licensees

Honesty

- 30 ASIC expects holders of an Australian credit licence (credit licensees) to comply with the law and their obligations as a licensee. Only those who meet the requisite standards of honesty and integrity are permitted to participate in the consumer credit industry.
- 31 Enforcement outcomes were recorded against three credit licensees during the relevant period.

Example 14: Fit and proper person

ASIC cancelled the credit licence of Melbourne-based Star Alliance Financial Services Pty Ltd and banned its director, Prasanna Indrajith Wijesekara, from engaging in credit activities following an investigation. The orders were made on the grounds that statements in the company's credit licence application were false or materially misleading and Mr Wijesekara was not a fit and proper person to engage in credit activities.

Example 15: Fit and proper person

ASIC permanently banned Kristy Ann Lake, finance broker and former director and secretary of Clearwater Financial Systems Pty Ltd, from engaging in credit activities after being convicted of serious fraud offences. In March 2011, Ms Lake pleaded guilty in the Melbourne Magistrates Court to two charges of obtaining property by deception in breach of s81 of the *Crimes Act 1958* (Vic).

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

Honesty

- 32 Liquidators are entrusted with significant financial responsibility and discretionary power over corporate assets. The community expects that liquidators will execute their professional duties with honesty and integrity, and in accordance with the law.

Example 16: Dishonest conduct

Former liquidator, Stuart Ariff, was jailed for six years following his conviction on 19 criminal charges brought by ASIC. ASIC's charges related to Mr Ariff's conduct while he was the liquidator of HR Cook Investments Pty Ltd. Mr Ariff was found guilty on 13 charges under s176A of the *Crimes Act 1900 (NSW)*, concerning the transfer of \$1.18 million with intent to defraud HR Cook Investments. He was also found guilty on six charges of making false statements in documents lodged with ASIC that recorded receipts and payments relating to HR Cook Investments.

Diligence and competence

- 33 Registered liquidators must ensure they have the capacity to properly discharge their duties to creditors and to the court.

Example 17: Failure to properly perform or carry out duties

ASIC accepted an enforceable undertaking from Sydney liquidator Peter Ngan, preventing him from practising as a registered liquidator for two and a half years. An ASIC review of 24 external administrations that Mr Ngan managed found he failed to carry out or adequately and properly perform his duties.

Mr Ngan acknowledged and accepted ASIC's concerns that he:

- failed to identify, secure and deal appropriately with assets;
- carried out incomplete or inadequate investigations;
- did not adequately report to creditors;
- did not adequately report or did not report at all to ASIC;
- adopted inappropriate remuneration practices and time-recording procedures;
- had inadequately maintained books; and
- unnecessarily delayed finalising external administrations.

Mr Ngan also acknowledged and accepted ASIC's concerns that he failed to disclose prior relationships and indemnities.

Independence

- 34 The independence of liquidators underpins, and is the foundation of, an effective and efficient system of corporate insolvency. To be considered independent, a liquidator must not:
- (a) be biased towards any person or group;
 - (b) have, or have had, a close personal or business relationship with any person involved in the insolvency, where that relationship would lead someone to suspect that they would favour the interests of that person; and
 - (c) be in a position where their own personal or private interests conflict with their duties in the insolvency.
- 35 A person must not consent to be appointed as a liquidator if they have a pre-existing relationship with the company (unless court approval is given).
- 36 Disclosure must be made of any circumstances or relationships which might cast doubts on the liquidators' independence.

Example 18: Failure to disclose interests

John Frederick Lord, a former partner of accounting firm PKF Chartered Accountants and Business Advisers, had his official liquidator registration cancelled after failing to disclose that he had a commercial relationship with the petitioning creditor of 225 companies he was acting for as official liquidator.

Atle Crowe-Maxwell, a partner of PKF Chartered Accountants and Business Advisers, also failed to disclose his commercial relationship with the petitioning creditor for 105 administrations in which he was acting as official liquidator. As a result, Mr Crowe-Maxwell entered into an enforceable undertaking with ASIC.

Auditors

Diligence

- 37 Audited accounts provide confidence to users of financial reports about the accuracy and integrity of the information contained within those reports. There is an expectation that auditors will thoroughly and professionally carry out their responsibilities in preparing these reports.
- 38 Auditors who fail to perform their duties properly, with due care and skill, can have their ability to practice restricted or removed.

Example 19: Failure to exercise due care and skill

ASIC accepted an enforceable undertaking from Stuart Cameron of KS Black & Co in North Parramatta following concerns that he was not a fit and proper person to remain registered as an auditor. The enforceable undertaking followed an investigation by ASIC into Mr Cameron's audits of the financial reports of a number of companies. The investigation gave rise to concerns, including that:

- Mr Cameron had not performed sufficient audit work in order to properly form the audit opinion stated in the reports;
- the audit work in support of each audit opinion was undertaken during a period of suspension imposed by the Companies Auditors and Liquidators Disciplinary Board; and
- Mr Cameron failed to ensure that the audit was conducted in accordance with Australian Auditing Standards

Mr Cameron undertook that, within seven days of acceptance by ASIC of the enforceable undertaking, he would ask ASIC to cancel his registration as an auditor and would not re-apply for registration for five years from the day on which it was cancelled.

Directors and officers

- 39 Company directors are important gatekeepers within Australia's financial system, being the directing mind and will of a company. ASIC expects them to take their responsibilities seriously and discharge their duties carefully.
- 40 Actions against directors fall into two categories. There were proceedings against 28 directors (18 criminal and 10 civil) relating to more serious breaches of the law. There were 208 proceedings against company officers for less serious summary offences, often for failure to keep proper books and records (discussed in Section C).

Honesty

- 41 Company directors must not make false statements to gain an advantage for themselves, their company or someone else.

Example 20: False information in prospectus

Samuel Pogson, Murray Lapham and Steven Martin, former directors of Australian Capital Reserve Limited, pleaded guilty to crimes relating to false statements in the company's prospectus. ASIC alleged these statements were made to obtain a financial advantage for Australian Capital Reserve.

- 42 Directors must act honestly and in the best interests of shareholders. Making false statements or misleading statements is serious criminal conduct and may also give rise to civil liability.

Example 21: False or misleading statements

Former Westpoint chief financial officer (CFO), Graeme Rundle, has been sentenced to 18 months imprisonment, with the sentence to be suspended upon him entering into an 18-month good behaviour bond, after being found guilty of two criminal offences of making a false or misleading statement with intent to obtain a financial advantage for Scots Church Development Limited. Mr Rundle's offences involved contraventions of s178BB of the *Crimes Act 1900* (NSW). The charges related to statements made to a financial institution in relation to obtaining a \$71 million construction finance facility to complete a project at York Street, Sydney.

Mr Rundle has lodged a notice of intention to appeal.

Diligence

- 43 Companies must keep adequate financial records to correctly record and explain transactions and the company's financial position and performance. Directors are responsible for ensuring the accuracy of information contained in public announcements, company reports and fundraising documents.

Example 22: Accuracy of public announcements

The Federal Court handed down penalty decisions against the former CEO, CFO, chairman and non-executive directors of Centro Properties Group. The court found that the directors had breached their duties when they approved financial reports that failed to disclose significant matters. Penalties handed down to individual directors included disqualification orders and cost orders depending on the relevant party. The orders against former executives included fines.

- 44 Corporations and their officers (including directors) should make sure the market is accurately informed about their business. Failure to comply with

the continuous disclosure obligations in the Corporations Act is an offence and may also give rise to civil penalty proceedings or the issue of an infringement notice by ASIC.

Example 23: Breach of continuous disclosure rules

Nexbis Limited paid a \$33,000 penalty after ASIC issued an infringement notice for an alleged failure to inform the market. An ASIC investigation found that Nexbis knew on 26 August 2010 that its subsidiary had acquired, for US\$30 million, all the rights in an agreement to supply the Nexcode security suite to the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China for the China National Gas Tank Project. However, it did not make this information public until 9.07 am (AEST) on 7 September 2010.

- 45 Directors have a duty to prevent their company from incurring debts while insolvent. This means that before incurring a debt, a director must consider whether there are reasonable grounds to suspect that the company is insolvent or will become insolvent as a result of incurring the debt.

Example 24: Insolvent trading

In August 2011, the former director of International Consulting Group Pty Ltd, Anula Kumari Kauye, pleaded guilty to insolvent trading, theft, and providing false information following an investigation by ASIC. Ms Kauye has been sentenced to a total of three years and two months imprisonment.

Competence

- 46 A person who is disqualified from managing companies breaks the law if they continue to engage in company management.
- 47 A person who is disqualified commits an offence if, among other things:
- (a) they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation;
 - (b) they exercise the capacity to significantly affect the company's financial standing; or
 - (c) they communicate their instructions or wishes to the directors of the company knowing, or intending, that the directors will act in accordance with their instructions or wishes.
- 48 Activities such as operating company bank accounts, passing company cheques, negotiating with suppliers and customers on behalf of a company, or entering into a joint venture on behalf of a company despite being disqualified will breach the prohibition against managing while disqualified.

Example 25: Managing while disqualified

This example was withdrawn in accordance with ASIC policy - see INFO 152 *Public comment on ASIC's regulatory activities*.

Market participants

- 49 Market participants often provide financial advice to their clients. For that reason, paragraphs 13–23 dealing with the honesty, diligence, competence and independence of financial advisers are also relevant to market participants.
- 50 Market participants and other licensees also often provide trading or dealing services to clients and in doing so should take into account the principles in this report.

Honesty

- 51 Claims about trading software or schemes should not be misleading or deceptive.

Example 26: Misleading claims in marketing trading software

ASIC accepted an enforceable undertaking from options trader, Rob Wilson, and Gold Coast-based companies Lifestyle Investor Services Pty Ltd and Lifestyle Trader Pty Ltd following an investigation into misleading and deceptive conduct regarding the marketing of share trading software. The companies also agreed to write to the relevant clients and provide them with information to help them claim any refund to which they were entitled.

Diligence

- 52 Market participants should obtain their client's authorisation to trade where that is needed.

Example 27: Lack of client authorisation

ASIC permanently banned a former Citibank manager from providing financial services after an investigation found she conducted over 30 transactions without client authorisation.

Victoria Cai was employed as a relationship manager with Citibank between 2006 and 2010 and was responsible for facilitating investment instructions made by clients—particularly in relation to foreign exchange trading.

- 53 In some cases, market participants also need to comply with the ASIC market integrity rules. Market integrity rules are made by ASIC and apply to market operators, market participants and prescribed entities under the regulations. The rules are designed to promote market integrity and to help protect investors.
- 54 Participants who breach the rules may be required to:
- (a) pay a penalty;
 - (b) undertake remedial measures;
 - (c) accept other sanctions (including public censure or disgorgement of profits); or
 - (d) enter into an enforceable undertaking.
- 55 ASIC obtained penalties against two companies for breach of the market integrity rules during the relevant period.

Example 28: Breach of market integrity rules

Patersons Securities Ltd paid a penalty of \$25,000 and provided training to its designated trading representatives to comply with an infringement notice given to it by the Markets Disciplinary Panel (MDP). Patersons Securities was alleged by ASIC to have contravened s798H(1) by contravening Rule 6.6.1 of ASIC Market Integrity Rules (ASX Market) 2010, which states that:

A Trading Participant must not effect a Special Crossing of any Cash Market Products (excluding Warrants) of an Issuer, on behalf of that Issuer during the term of a buy-back offer conducted On-Market by that Issuer.

Example 29: Breach of market integrity rules

Austock Securities Ltd paid a penalty of \$30,000 in order to comply with an infringement notice given to it by the MDP. Austock Securities was alleged to have contravened s798H(1) by contravening Rule 5.9.1 (ASX), which states that:

A Market Participant must not do anything which results in a market for a product not being both fair and orderly, or fail to do anything where that failure has that effect.

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 ASIC maintains a corporate register, which contains information about companies, including the address of a company's registered office and its principal place of business and the names and addresses of company directors and secretaries. The register is an important source of information for consumers, investors and the public.
- 57 Corporate officeholders must ensure that the details held on ASIC's corporate register are accurate and up-to-date by informing us of any changes to these details. Under the Corporations Act, ASIC must generally be notified of the changes within 28 days of their occurrence.
- 58 Failure to lodge this information with ASIC is a strict liability offence. This means that an individual can be found guilty even if their breach was unintentional.

Example 30: Failure to update details

Terrence Foster Boyle was convicted of offences under s142, 146 and 205B on 8 December 2011. Mr Boyle was director of Pizza La Cona Group Pty Ltd, which failed to lodge with ASIC a notice of change of the registered office and principal place of business of the company and the residential address of a director and secretary of the company.

- 59 A director must provide assistance to an external administrator who has been appointed to the company with whom they are associated, including by providing books, records and information. Two hundred and eight individuals were successfully prosecuted for summary offences concerning a failure to assist external administrators, as part of ASIC's Liquidator Assistance Program.

Competence

- 60 Further, directors with a history of involvement in failed companies may be disqualified from managing companies in order to protect the interests of future creditors, investors and employees who may suffer losses at the hands of these individuals. On application by ASIC, 38 individuals were banned from managing corporations, after presiding over two or more companies that were wound up.

Appendix 1: Statistics

Table 1: Enforcement outcomes:* 1 July to 31 December 2011

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings / negotiated outcomes	Total	Pending matters**
Market integrity						
Insider trading	5	1			6	7
Market manipulation	1				1	5
Continuous disclosure			1		1	
Market integrity rules			2		2	6
Other market misconduct		1			1	
Corporate governance						
Action against directors	18 [†]	10			28	14
Insolvency	1		1		2	3
Action against liquidators	1		2		3	
Action against auditors				2	2	2
Other corporate governance misconduct				1	1	
Financial services						
Unlicensed conduct	2	3			5	1

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings / negotiated outcomes	Total	Pending matters**
Dishonest conduct, misleading statements, unconscionable conduct	8	2	3	5	18	16
Misappropriation, theft, fraud	6	1	3	5	15	4
Credit			3		3	
Other financial services misconduct		5	9 ^{††}	4	18	4
Compliance and deterrence						
Action against directors	208		38		246	83
Efficient registration and licensing	2				2	
Total	252	23	62	17	355	145

* Outcomes are presented per defendant

** Figures are presented per court case, hearing, etc. (many cases will have multiple defendants). We anticipate the litigation will be completed in coming months.

† Includes one outcome that is currently under appeal.

†† Includes two outcomes that are currently under appeal.

Note: Some of the data in this table was corrected on 5 August 2015.

Explanation

- 61 This table lists enforcement outcomes achieved during the period 1 July 2011 to 31 December 2011. ‘Enforcement outcome’ refers to any formal action taken to secure compliance, about which ASIC has made a public announcement (with the exception of compliance and deterrence actions). Public announcements by ASIC take a variety of forms, including: media releases and advisories, newsletters, speeches, information sheets, reports and publically available information on ASIC registers such as ASIC’s registers of banned and disqualified persons. ‘Formal action’ includes court action (criminal and civil), administrative

remedies and the acceptance of enforceable undertakings. It also includes negotiated outcomes, where this is the final stage in a more formal process (e.g. where ASIC has initiated civil or criminal proceedings in court, which are later withdrawn and a settlement negotiated). However, it does not include the many less formal processes ASIC undertakes to secure compliance with the law once a breach has occurred (e.g. it does not include negotiating a change of compliance processes after receiving a licensee breach notification). Figures in the pending matters column represent matters currently before the courts.

Appendix 2: Schedule of media releases and advisories

Media Release	Date	Link
Market integrity		
Former Gunns chairman charged with insider trading	13/12/2011	11-296AD
Former Sydney executive sentenced for insider trading	14/12/2011	11-299MR
NSW tax consultant pleads guilty to insider trading	15/12/2011	11-302AD
Sydney pair plead guilty to ASIC insider trading charges	20/12/2011	11-309AD
Former company director convicted of market manipulation	9/12/2011	11-286MR
ASIC obtains passport and freezing orders against Hanlong Mining executives and others	13/09/2011	11-201AD
ASIC obtains orders to freeze 15 million Northwest Resources Limited shares	16/12/2011	11-303AD
Nexbis Limited pays \$33,000 continuous disclosure penalty	12/08/2011	11-168AD
Patersons pays \$25,000 infringement notice penalty	30/09/2011	11-216AD
Austock pays \$30,000 infringement notice penalty	12/12/2011	11-291AD
Corporate governance		
ASIC brings criminal charges against Westpoints Norm Carey and Graeme Rundle	01/07/2011	11-132AD
Jan Li pleads guilty to breaching directors' duties	15/07/2011	11-142AD
Opes Prime directors jailed	27/07/2011	11-150MR
Former ABC director to stand trial	29/07/2011	11-153AD
Former Australian Capital Reserve directors plead guilty	29/08/2011	11-185AD
WA director sentenced in Perth District Court to three years jail	2/09/2011	11-195AD
Adelaide man convicted of managing a corporation while disqualified	07/09/2011	11-198MR

Media Release	Date	Link
Former OnQ Group Ltd CFO pleads guilty	8/09/2011	11-199AD
Sentencing decision in the Westpoint CFO criminal case	12/09/2011	11-200MR
Former Melbourne director convicted of managing a corporation while disqualified	21/09/2011	11-208AD
Gold Coast company director jailed for 7.5 years	18/11/2011	11-260MR
Former managing director of Wintech Group Limited committed to stand trial	07/12/2011	11-283AD
Solicitor sentenced after pleading guilty to aiding and abetting corporate offending	09/12/2011	11-288AD
Ocean Keys director charged with stealing	12/12/2011	11-290AD
Stuart Ariff jailed on ASIC charges	19/12/2011	11-308MR
Former Melbourne director sentenced on insolvent trading charges	30/11/2011	11-273MR
ASIC obtains orders to wind up York Capital Limited	06/07/2011	11-137AD
ASIC obtains orders to wind up SunEnergy companies	22/07/2011	11-149AD
Centro civil penalty proceedings	31/08/2011	11-188MR
ASIC acts against official liquidators	26/08/2011	11-184MR
Melbourne director banned for five years	17/11/2011	11-258AD
ASIC addresses unacceptable takeover circumstances	27/07/2011	11-151AD
ASIC accepts enforceable undertaking from Sydney auditor of financial services companies	27/10/2011	11-230AD
ASIC accepts enforceable undertaking from North Parramatta auditor	02/11/2011	11-239MR
Financial services		
Former Astarra investment manager sentenced to jail	12/08/2011	11-169MR
Gold Coast business man jailed for seven years for multiple fraud offences	01/09/2011	11-191AD
Former Hobart financial adviser jailed on ASIC charges	02/09/2011	11-196AD

Media Release	Date	Link
Former Port Pirie financial adviser charged	26/09/2011	11-210AD
Sonray Capital Markets director arrested and charged	27/09/2011	11-212AD
Former Sonray Capital Markets CEO jailed	14/10/2011	11-222MR
Gabriel Neil Pennicott sentenced to 4 years and 7 months jail	28/10/2011	11-234AD
Sydney financial adviser jailed for \$600,000 fraud	04/11/2011	11-241AD
Former currency trader pleads guilty	09/11/2011	11-245AD
Former Sydney financial adviser charged with fraud	09/11/2011	11-247AD
Former Gold Coast property developer jailed on ASIC fraud charges	11/11/2011	11-249AD
Former Perth stockbroker charged with fraud	14/11/2011	11-252AD
Melbourne man jailed on ASIC charges	24/11/2011	11-267AD
Fuelbanc promoter and director of investment scheme sentenced	30/11/2011	11-275AD
Accountant arrested and charged	14/12/2011	11-298AD
Sydney company director sentenced to jail	16/12/2011	11-304AD
Former Firepower Holdings Group chairman banned for 20 years	21/07/2011	11-148MR
ASIC successful in proceedings against company associated with Firepower Holdings Group	18/08/2011	11-179AD
ASIC achieves compliance for investors in property development	22/08/2011	11-180AD
ASIC renews Frontline Financial Planning warning	25/08/2011	11-183AD
ASIC takes urgent action to preserve investor funds promoted on cityindexmutual.com website	21/09/2011	11-207AD
ASIC obtains orders against Australia AFT Finance Market Pty Ltd	14/11/2011	11-253AD
ASIC obtains court orders against Gold Coast-based investment scam	25/11/2011	11-271AD
ASIC reaches eighth Westpoint settlement	02/12/2011	11-280AD
ASIC suspends AFS licence of Equititrust Limited	19/12/2012	11-306MR

Media Release	Date	Link
ASIC takes urgent action to preserve investor funds promoted on goldsmithandassociates.com website	21/12/2011	11-313AD
ASIC acts re Trio: Seagrims licence suspended and directors banned	05/07/2011	11-134AD
ASIC permanently bans Victorian finance broker	05/07/2011	11-135AD
ASIC permanently bans Sydney director	02/08/2011	11-157AD
ASIC suspends Kinetic Securities licence	17/08/2011	11-175AD
ASIC bans former Citibank manager	19/09/2011	11-204AD
ASIC bans Tasmanian insurance agent following fraud conviction	20/09/2011	11-206AD
ASIC bans Sydney financial and futures adviser	10/10/2011	11-218AD
ASIC suspends Far East licence for failing to lodge financial statements	24/10/2011	11-227AD
ASIC bans authorised representative of Romad Financial Services	07/11/2011	11-244AD
ASIC suspends Paritech licence for failing to lodge financial statements	16/11/2011	11-256AD
ASIC cancels licences of Mark Power Financial Pty Ltd and Mark Raymund Power	16/11/2011	11-257AD
ASIC bans Sydney man from providing financial services	22/11/2011	11-262AD
ASIC cancels licence of Ferguson No 2 Pty Ltd	24/11/2011	11-268MR
ASIC cancels FP Investment Partners' licence	24/11/2011	11-269AD
ASIC permanently bans Melbourne director from engaging in credit activities and cancels company's credit licence	19/12/2011	11-307MR
Former directors of Trio Capital prevented from working in financial services industry	4/07/2011	11-133MR
ASIC accepts 'Aussie Rob' enforceable undertaking	9/08/2011	11-161AD
Trio former chairman and director agrees to nine year exclusion from financial services industry	11/08/2011	11-166MR
Perth financial adviser removed from industry	18/08/2011	11-177MR
Remaining Trio former directors excluded from financial services industry for four years	24/08/2011	11-182MR

Media Release	Date	Link
ASIC accepts Opus Capital Limited enforceable undertaking	13/10/2011	11-220MR
ASIC accepts enforceable undertaking from Commonwealth Financial Planning	26/10/2011	11-229MR
ASIC accepts enforceable undertakings from financial advisers	22/12/2011	11-315AD
ASIC imposes licence conditions on JB Global	18/07/2011	11-144MR
Westpac reviews use of 'stress-free' in response to ASIC's concerns	1/12/2011	11-277MR

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

Note 2: Not all outcomes will be announced in a media release, particularly compliance and deterrence outcomes and pending matters. ASIC's policy on when it will make public comment on pending matters is contained in INFO 152.

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.
Astarra	Astarra Asset Management Pty Ltd
ASIC Market Integrity Rules (ASX Market) 2010	Rules made by ASIC under s798G of the Corporations Act for trading on ASX
CEO	Chief executive officer
CFO	Chief financial officer
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes 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
enforcement outcomes	Any formal action to secure compliance, about which ASIC has made a public announcement. For more information, see paragraph 61
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
Financial Services Guide	A document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Pt 7.7 of the Corporations Act Note: See s761A of the Corporations Act for the exact definition.
INFO 151 (for example)	An ASIC information sheet (in this example numbered 151)
relevant period	1 July 2011 to 31 December 2011
REP 277 (for example)	An ASIC report (in this example numbered 277)

Term	Meaning in this document
RG 100 (for example)	An ASIC regulatory guide (in this example numbered 100)
Rule 5.9.1 (ASX) (for example)	A rule of the ASIC Market Integrity Rules (ASX Market) 2010 (in this example, numbered 5.9.1)
s798H(1) (for example)	A section of the Corporations Act (in this example numbered 798H(1)), unless otherwise specified
Trio	Trio Capital Ltd

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*

Legislation

Corporations Act, s142, 146, 205B, 798H(1)

Crimes Act 1900 (NSW), s176A, 176BB

Crimes Act 1958 (Vic), s81

Market integrity rules

ASIC Market Integrity Rules (ASX Market) 2010

Reports

REP 277 *ASIC supervision of markets and participants: July to December 2011*

Information sheets

INFO 151 *ASIC's approach to enforcement*

INFO 152 *Public comment*

Media releases

12-29MR *ASIC releases policy on enforcement and investigations*