



ASIC

Australian Securities & Investments Commission

REPORT 383

ASIC enforcement outcomes: July to December 2013

January 2014

About this report

This report outlines enforcement outcomes achieved by ASIC during the period 1 July 2013 to 31 December 2013 (the relevant period). 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.

Previous reports on ASIC's enforcement outcomes

Report number	Report date
REP 360	July 2013
REP 336	April 2013
REP 299	September 2012
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 is Australia's corporate, markets and financial services regulator. We contribute to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, and underpinned by confident and informed investors and consumers and an efficient registration and licensing system.
- 2 The *Australian Securities and Investments Commission Act 2001* (ASIC Act) requires ASIC to enforce and give effect to the law.
- 3 Enforcement action is one of several regulatory tools ASIC uses to respond to potential breaches of the law. Other regulatory tools that we use include education, guidance and surveillance. In many cases, ASIC uses a combination of regulatory tools to achieve a number of objectives. This report only discusses enforcement action.
- 4 Enforcement action by ASIC may take the form of:
 - (a) criminal action;
 - (b) civil action, such as civil penalty proceedings (e.g. for breach of directors' duties), corrective action (e.g. to correct misleading disclosure) and compensatory action (e.g. to recover compensation on behalf of consumers); and
 - (c) administrative action (e.g. banning or disqualifying persons from the financial services industry).
- 5 ASIC also pursues negotiated outcomes (which may arise from surveillances or from investigations), including enforceable undertakings.¹ Negotiated outcomes, such as enforceable undertakings, can offer a faster, more flexible and effective regulatory outcome than could otherwise be achieved through administrative or civil action: see Examples 4 and 5.
- 6 Since 1 July 2011, ASIC has entered into 63 enforceable undertakings with entities and individuals. Many of these enforceable undertakings have required entities to pay compensation to consumers, improve internal compliance arrangements, appoint an independent expert to oversee elements of the entity's business and report back to ASIC on performance.

¹ Regulatory Guide 100 *Enforceable undertakings* (RG 100) provides more information on ASIC's approach to enforceable undertakings. See also *Senate inquiry into the performance of ASIC: Supplementary submission by ASIC on Commonwealth Financial Planning Limited*, available at www.asic.gov.au/asic/asic.nsf/byheadline/13-345MR+ASIC+lodges+fourth+submission+to+Senate+Inquiry?openDocument. This submission details changes to Commonwealth Financial Planning Limited's business practices as result of compliance with its enforceable undertaking with ASIC.

- 7 The regulatory tool or tools ASIC chooses to use in response to a potential breach of the law will depend on the objectives that ASIC is seeking to achieve. These include:
- (a) punishment;
 - (b) improved compliance;
 - (c) protection for the public;
 - (d) compensation for investors; and
 - (e) deterrence.

Note: For further information on ASIC's approach to enforcement, see Information Sheet 151 *ASIC's approach to enforcement* (INFO 151) and Information Sheet 152 *Public comment* (INFO 152).

Misleading or deceptive advertising or sales practices

- 8 In Report 360 *ASIC enforcement outcomes: January to June 2013* (REP 360), we stated that we were observing an increasingly vigorous search for yield by investors. Consequently, we said we would be targeting misleading or deceptive sales practices by product issuers to protect vulnerable consumers from the dangers associated with higher-risk products.
- 9 In the relevant period, we achieved 12 enforcement outcomes involving misleading or deceptive advertising or sales practices. Of these, seven involved consumer credit activity, five related to product issuers and one related to an insurance broker.

Product comparisons

- 10 When comparing products in an advertisement, the products should have sufficiently similar features to make the comparison relevant and not misleading. The more that a qualification is required to balance the information contained in the headline claim, the clearer and more prominently placed that qualification should be
- 11 Our enforcement action in this space is often aimed at preventing potentially harmful conduct from occurring: see Example 1.

Example 1: Potentially misleading advertising campaign

Woolworths Limited agreed to change an ad campaign for its car insurance product following ASIC concerns that it was potentially misleading.

The ads for Woolworths Car Insurance ran in the latter half of 2012 and early 2013, appearing online, in outdoor marketing and on buses. The ads claimed 'on average, our customers saved \$240'. This claim was based on a sample of 109 customers who purchased a comprehensive car insurance

policy from Woolworths between 6 August 2012 and 30 September 2012, and compared the cost of the new Woolworths premium with the premium they had paid for their previous policy.

ASIC was concerned that the comparison was made despite potential differences between Woolworths' insurance product and the product consumers switched from. Importantly for the purposes of a price-based comparison, ASIC identified that differences in the agreed value of vehicles that prospective customers could choose from had the potential to affect represented savings.

Product features

- 12 Advertisements must not be misleading about a product's nature or features, and must appropriately outline the risks to investors. The impact of fees and costs should not be hidden or difficult to understand.
- 13 Capital protection or capital guarantee products are complex. Complex products can be especially difficult for investors to understand. Licensees selling complex products need to ensure marketing and advice directed at retail investors is accurate: see Example 2.
- 14 ASIC will continue to monitor industry practice in the description and labelling of structured and other complex products, especially where there are claims of capital protection.

Example 2: Advertising of complex products

Commonwealth Bank of Australia (CBA) and HSBC Bank changed their advertising for certain retail structured products following ASIC concerns that the materials were potentially misleading.

CBA's flyer for its 'Protected Loan' compared investing \$100,000 directly in listed shares with using a \$100,000 Protected Loan to buy the same shares. However, the comparison and accompanying claims about the relative benefits of the gearing strategy failed to subtract the interest costs of the loan, and this may not have been clear to consumers.

Further, CBA's ads—stating that Protected Loan customers could 'walk away with no loss' at maturity if share prices fell—were potentially misleading as the costs of the loan and protection had not been considered. Warnings that outlined returns may be negative because of interest costs were not prominent enough, appearing at the end of the booklets.

HSBC's website materials for certain structured products were inappropriate; they created the impression the investments were low risk and comparable to relatively safe investments such as bank deposits, when for some products this was not the case.

HSBC claimed that its structured products were suitable for 'traditional deposit investors looking for a way to enhance their returns through

exposure to financial markets, but are unwilling to put their capital at risk should the market not perform as expected’.

ASIC viewed this statement as inappropriate and potentially misleading, due to the risk of capital loss with certain HSBC structured products being promoted.

Cost of credit

- 15 The cost of credit is a key factor for many consumers when shopping around for a loan. The law requires that representations about the cost of credit in advertising and loan contracts be accurate. ASIC will not accept overcharging and, where necessary, will take action to ensure consumers are not out of pocket: see Example 3.

Example 3: Overcharged interest

Fair Loans Foundation Pty Ltd entered into an enforceable undertaking with ASIC, under which it will refund approximately 864 consumers around \$157,000 in overcharged interest and appoint an independent consultant to ensure it complies with the credit laws in the future.

Fair Loans operates on a not-for-profit basis to provide credit to financially disadvantaged consumers as an alternative to high-cost payday lenders.

An ASIC investigation into Fair Loans identified concerns that the interest rate being disclosed to consumers in the advertising and loan contracts was less than the actual rate charged. Fair Loans disclosed an annual percentage rate of 15.95% or 19.95%, when the actual rate of interest charged was 28.25% or 35% respectively. This led to consumers being overcharged interest.

ASIC also issued two infringement notices to Fair Loans with a total penalty of \$22,000 for related breaches of the *National Consumer Credit Protection Act 2009* (National Credit Act). Infringement notices can be issued under the Corporations Act or the National Credit Act and can require the payment of a monetary penalty. Compliance with an infringement notice is not an admission of guilt or liability, and the recipient is not taken to have contravened the provision(s) specified in the notice.

Guidance and examples

- 16 We provided guidance in Regulatory Guide 234 *Advertising financial products and services (including credit): Good practice guidance* (RG 234) on the promotion and advertising of financial products. This guide is for promoters of financial products, financial advice services, credit products and credit services, and publishers of advertising for these products and services. It contains good practice guidance to help promoters comply with their legal obligations not to make false or misleading statements or engage in misleading or deceptive conduct.

- 17 Other examples of misleading or deceptive advertising or sales practices are included in the body of this report: see Examples 12, 13 and 21.

Market misconduct

- 18 Effective monitoring and control systems are essential for preventing market misconduct from occurring. Deficiencies in these systems have the potential to damage the efficient functioning of the Australian securities market and negatively affect its reputation. Enforceable undertakings are a timely and effective way in which ASIC can influence businesses to institute genuine organisational change to ensure this type of conduct does not occur: see Examples 4 and 5.

Example 4: Potential misconduct

ASIC accepted an enforceable undertaking from National Australia Bank (NAB) following an investigation into the 18 October 2012 share price spike of the ASX 200. The enforceable undertaking relates specifically to NAB's responsibility for potential market misconduct, undertaken by the trading personnel of a contractor, which led to the spike.

NAB agreed to adopt specific monitoring and control systems for its direct market access trading and ASIC will supervise the certification of those systems for the next three years. NAB will also make a voluntary contribution of \$2 million to fund independent financial literacy projects in Australia.

ASIC Commissioner Cathie Armour said: 'It is imperative that entities have adequate monitoring and control systems in place to ensure this type of activity does not occur.'

NAB's review under the enforceable undertaking will address ASIC's concerns about the inadequacy of its systems and controls in relation to its use of direct market access. ASIC's investigation of the contractor and its trading personnel continues.

Example 5: Potential misconduct

ASIC accepted an enforceable undertaking from UBS AG in relation to potential misconduct involving the Australian Bank Bill Swap Rate (BBSW). UBS will also make a voluntary contribution of \$1 million to fund independent financial literacy projects in Australia.

In July 2012, UBS reported to ASIC that it had found evidence of conduct seeking to influence its BBSW submissions, based on how the submissions may benefit UBS's derivatives positions. In February 2013, UBS withdrew from the BBSW submissions panel.

The enforceable undertaking requires UBS to ensure its participation in relation to the setting of Australian interest rate benchmarks upholds the

integrity and reliability of those benchmarks and is in accordance with its obligations under the Commodity Futures Trading Commission Orders.

At ASIC's request, UBS engaged an independent expert to conduct a review of BBSW submissions. The expert found that any market impact was insignificant.

The role of gatekeepers

- 19 ASIC regulates financial advisers, credit licensees, mortgage brokers, auditors, liquidators and company directors, among others. We regard the people who occupy these roles as 'gatekeepers' of the Australian financial system.
- 20 Gatekeepers perform an important role in promoting sound investment practices, preventing or detecting market failures, and promoting market integrity. We expect them to adhere to the highest standards in performing this role. Using enforcement action to hold gatekeepers to account for a failure to meet and adhere to these standards is an important way in which we fulfil our duties under the ASIC Act.
- 21 One example of our enforcement activities in this area during the relevant period involved Australian Property Custodian Holdings Ltd (APCHL). The Federal Court found five former directors of APCHL liable for breaching their duties as officers of APCHL. This is a significant outcome for investors. Directors are important gatekeepers who must discharge their duties with the appropriate care and diligence. The conduct of the APCHL board was unacceptable and this is reflected in the court's judgement: see Example 25.
- 22 In complex matters, ASIC enforcement action may involve a range of gatekeepers. We are committed to pursuing all individuals who are involved in corporate wrongdoing: see Example 6.

Example 6: Additional result in Trio Capital matter

A former investment manager with links to the failed firm Trio Capital pleaded guilty to 20 criminal charges, including making false or misleading statements resulting in his business receiving more than \$500,000 in payments. Tony Maher, who changed his name from Paul Gresham, admitted to making the statements when recommending investments for the Trio-run ARP Growth Fund.

Mr Maher (of Katoomba, New South Wales) faces a maximum penalty of five years in jail and/or a fine of \$110,000 for each offence. The matter will return to court for sentencing in February 2014. ASIC previously accepted an enforceable undertaking from Mr Maher, preventing him from working in the Australian financial services industry or managing a corporation.

The criminal charges against Mr Maher are ASIC's latest action since the collapse of the fund manager in December 2009. Since ASIC's investigation into Trio Capital started in October 2009, more than 11 people have either been jailed, banned from providing financial services, disqualified from managing companies or have agreed to remove themselves from the financial services industry for a total of more than 50 years.

ASIC Commissioner John Price said: 'ASIC enforcement action in relation to the Trio matter demonstrates that ASIC will hold gatekeepers to account where their conduct falls below the required standard. Directors, company officers, auditors, investment advisers, and financial planners play a key role in ensuring that Australia's markets are fair and efficient. ASIC will continue to take enforcement action against gatekeepers where they fail to perform their duties.'

On 29 October 2013, ASIC released an update into its Trio investigation: see Media Release (13-294MR) *Update on Trio investigation* (29 October 2013).

Significant enforcement outcomes for the relevant period

- 23 In the relevant period, we achieved a total of 340 enforcement outcomes. This figure comprises criminal, civil and administrative actions, as well as outcomes resulting in an enforceable undertaking, negotiated outcome or the issue of a public warning notice. One hundred and twelve outcomes were in the 'market integrity', 'corporate governance' and 'financial services' areas, and 228 were in the 'small business compliance and deterrence' area (between 1 January and 30 June 2013, the comparative figures were 78 and 293).
- 24 Four of the most notable enforcement outcomes for ASIC during the relevant period were:
- (a) Mr Rental Port Augusta released Indigenous consumers from their contracts following an ASIC surveillance for unconscionable conduct. ASIC took action in this case to protect financially vulnerable people from exploitation: see Example 14.
 - (b) The Full Court of the Federal Court of Australia upheld ASIC's appeal against the court-approved \$82.5 million settlement between former Storm Financial investors and Macquarie Bank. Our pursuit of this matter demonstrates our determination to secure fair and adequate compensation for affected investors: see Example 24.
 - (c) Clestus Weerappah, a former director of Dollarforce Financial Services Pty Ltd, was jailed for four years over his role in the collapse of the property development group. The custodial sentence handed to Mr Weerappah sends a clear message to corporate Australia that ASIC,

the community and the courts will not tolerate criminal behaviour against the interests of investors: see Example 27.

(d) [Withdrawn in accordance with ASIC policy - see [INFO 152](#) *Public comment on ASIC's regulatory activities*]

- 25 We achieved a large number of outcomes relating to consumer credit in the relevant period, including:
- (i) approximately \$157,000 in overcharged interest refunded to 864 consumers: see Example 3;
 - (ii) more than 30,000 car owners refunded over \$15 million in tyre and rim insurance premiums: see Example 17;
 - (iii) eight infringement notices paid totalling \$117,800;
 - (iv) five individuals permanently banned from undertaking credit activities;
 - (v) three individuals or companies banned from—or gave an undertaking to refrain from—providing credit for between three and five years; and
 - (vi) two Australian credit licences cancelled.

Enforcement report data

- 26 Appendix 1 provides statistics about our enforcement outcomes and an explanation of the methodology for compiling this data: see Table 1 and Table 2.
- 27 We have also included aggregate enforcement data for the past two years, as reported in our six-monthly enforcement reports: see Table 3. Comparisons between individual enforcement reports have some limitations. This is because no two enforcement actions are the same. For example, there may be differences in the complexity or seriousness of the allegations. However, over a two-year period, it is possible to identify the types of conduct or sectors that are the focus of ASIC's enforcement activity in the longer term.
- 28 Appendix 2 provides a schedule of media releases that corresponds to the enforcement outcomes in this report.

Current and future areas of focus

- 29 Organisational culture ASIC has a long history of taking action to remove 'bad apples' from the financial services industry. We do this to protect consumers and to ensure that confidence in Australian financial services remains strong. In the future, we will be placing increased attention on the

conduct of Australian financial services (AFS) licensees that fail to detect, prevent or deter poor compliance practices by employees or authorised representatives of their organisation, where this enables improper practices to occur: see Example 11.

Loan fraud

- 30 Since assuming responsibility for regulating consumer credit in 2010, ASIC has had a particular focus on raising standards of competence and diligence in the industry. In particular, ASIC is focusing on allegations of falsification of loan documentation or loan applications and will continue to do so: see Example 15.

Unfair and unconscionable conduct in lending

- 31 The responsible lending provisions are a key element of the National Credit Act. They are designed to protect consumers from being offered credit contracts or consumer leases that they cannot afford to repay or that are otherwise unsuitable for them. ASIC has been very active in monitoring compliance, investigating reports of breaches and in taking action against firms that have failed to comply with their obligations: see Example 14.
- 32 ASIC will continue to take action where necessary to reinforce the obligation to engage in responsible lending in the credit industry, particularly in the payday lending sector.

Advertising of financial products

- 33 Advertising plays an important role in the financial services and credit sectors. Many AFS licensees undertake advertising or sales activities to promote their financial products or services. These activities often have a broad reach and can affect large numbers of people. Investors and financial consumers are heavily influenced by advertisements for products and services when making financial decisions and seeking financial advice.
- 34 ASIC will continue to monitor industry practice, especially:
- (a) in relation to comparisons of products, where differences in the products may make comparisons misleading; and
 - (b) in the description and labelling of structured and other complex products, particularly where there are claims of capital protection.

Takeovers and shareholder disclosure

- 35 ASIC is focusing on breaches of takeovers laws and failure by shareholders to disclose their interests in shares. Examples of this conduct may include an entity acquiring a controlling stake in a listed company other than in an

authorised manner (such as a formal takeover bid) or a person holding a substantial interest in shares in a listed company through offshore entities and not disclosing these interests to the market. These are important obligations and are central to market integrity and the efficient operation of financial markets: see Example 34.

False accounting

- 36 In a market where investors are seeking high-yield investments, the temptation to exaggerate profits or disguise losses is substantial. During recent investigations, ASIC has uncovered several instances of false accounting that have resulted in the misstatement of company financials, in the process providing short term gains to company officers who have engaged in such conduct. ASIC is now increasingly focused on false accounting as an activity to be targeted for attention in the current economic climate.

Purpose and scope of this report

- 37 This report summarises enforcement outcomes achieved by ASIC in the period 1 July 2013 to 31 December 2013.
- 38 This report is organised according 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).

In each section, we identify different categories of gatekeeper against whom ASIC has taken enforcement action.

- 39 The examples in this report are representative of the behaviours of current concern to ASIC. They range from minor regulatory offences through to serious misconduct. This report does not include a range of less formal processes we use to enforce the law: see paragraph 99.
- 40 This is the fifth of ASIC's six-monthly enforcement reports. Previous reports are available at www.asic.gov.au/reports.

A Confident and informed consumers and financial investors

Key points

Providers of financial services and products have a significant role to play in ensuring that consumers and investors are confident and informed. This section highlights enforcement outcomes achieved in relation to these gatekeepers.

In the relevant period, ASIC achieved 10 criminal outcomes relating to financial services misconduct and two criminal outcomes relating to credit misconduct. We also achieved five civil outcomes relating to financial services misconduct. Twelve people were banned from the financial services industry, 10 of them permanently. Nine infringement notices were paid, totalling \$128,000.

Financial advisers

- 41 Financial advisers have a general obligation to do all things necessary to ensure they provide financial products and services efficiently, honestly and fairly.
- 42 ASIC is committed to ensuring that financial advisers meet their obligations and are held to account. Where they fail to meet this standard of behaviour, ASIC will take enforcement action.

Use of client funds and assets

- 43 It is a crime to misappropriate client funds or deal with client assets without proper authorisation.

Example 7:

[REDACTED]

[REDACTED]

[REDACTED]



Quality of financial advice

- 44 Consumers are entitled to receive good-quality financial advice that properly considers their circumstances and meets their needs. Providing inappropriate or poor advice places consumers at risk of financial loss.

Example 8: Inappropriate and unreasonable advice

ASIC permanently banned former financial adviser Bradley John Lofts (of Brisbane, Queensland) from providing financial services after an investigation found he provided inappropriate and unreasonable advice.

Mr Lofts was a director of McLofts Pty Ltd, which traded as Sterling Financial Strategies. Sterling Financial Strategies operated a financial services business from offices in Townsville, Ayr and Brisbane.

Mr Lofts was an authorised representative of Lionsgate Financial Group Pty Ltd between 15 October 2010 and 19 January 2012. Between 13 June 2012 and 22 June 2012, Mr Lofts was an authorised representative of Synchronised Business Services Pty Ltd.

ASIC's investigation found that, between October 2010 and August 2012, Mr Lofts provided inappropriate and unreasonable advice to 50 clients without determining the clients' personal circumstances. ASIC also found that between 25 January 2012 and 7 June 2012 Mr Lofts, on 33 separate occasions, sold ASX-listed shares on behalf of seven clients when he was not licensed or authorised to do so.

Self-managed superannuation funds

- 45 The decision to establish a self-managed superannuation fund (SMSF) is a significant step for investors, because it involves greater personal responsibility. Those providing financial advice on SMSFs must ensure that they take into consideration consumers' individual circumstances and make sure the advice adequately meets their needs.²

² In September 2013, ASIC released Consultation Paper 216 *Advice on self-managed superannuation funds: Specific disclosure requirements and SMSF costs* (CP 216). This consultation paper sets out ASIC's proposed guidance to improve the quality of advice given to investors on establishing or switching to an SMSF. The consultation paper is available at: www.asic.gov.au/cp/#cp216.

- 46 With the continuing growth of SMSFs, ASIC will closely monitor the industry to ensure businesses have the processes in place to provide consistently good financial advice.

Example 9: Advice regarding establishment of an SMSF

AFS licensee Anne Street Partners Financial Services Pty Ltd (ASP) has agreed to address ASIC concerns relating to the provision of its financial product advice to clients.

ASIC's surveillance of ASP identified concerns surrounding the appropriateness of advice provided to clients regarding the establishment of an SMSF. In particular, we were concerned by:

- the low balance with which SMSFs were established;
- advice not being sufficiently tailored to the needs of each client;
- inadequate comparison of clients' existing superannuation to the recommended SMSF;
- inadequate consideration of suitable alternative strategies that would have met clients' needs; and
- inadequate consideration of clients' long-term retirement planning objectives.

ASP cooperated fully with ASIC's inquiries and ASIC acknowledges the constructive action taken by ASP to address our concerns

Compensation arrangements

- 47 Under s912B of the *Corporations Act 2001* (Corporations Act), an AFS licensee that provides a financial service to retail clients must have arrangements in place for compensating them for loss or damage suffered because of breaches of the relevant obligations under the Corporations Act by the licensee or its representatives.
- 48 Section 915B(3)(b) of the Corporations Act provides that ASIC may suspend or cancel an AFS licence held by a body corporate, by giving written notice to the body, if the body becomes an externally administered body corporate.

Example 10: Failure to obtain professional indemnity insurance

ASIC cancelled the AFS licence of Chambers Investment Planners Pty Ltd after it failed to obtain professional indemnity insurance and entered voluntary administration. ASIC also cancelled the Australian credit licence of Chambers after it ceased to engage in credit activities.

Chambers was licensed to deal in, and provide advice on, a range of financial products, including life insurance, superannuation, managed funds, securities and margin lending, and to provide credit services in relation to credit contracts where it was not the credit provider.

Advice monitoring processes

- 49 All financial services licensees should undertake robust testing of their processes to ensure that consumers receive high-quality advice. This includes ensuring that the licensee has adequate monitoring processes in place to ensure appropriate advice standards are met.
- 50 ASIC is continuing to closely scrutinise licensees' arrangements for adequate monitoring and supervision and will not hesitate to take action where we find those practices deficient. We will require ongoing compliance reviews if we have concerns that advice standards are not consistently at appropriate levels.

Example 11: 'Light touch' approach to compliance

ASIC accepted an enforceable undertaking from Wealthsure Pty Ltd, Wealthsure Financial Services Pty Ltd (Wealthsure FS) and the former chief executive officer of both companies, Darren Pawski.

The enforceable undertaking follows an ASIC investigation that started in December 2011. The investigation reviewed Wealthsure's compliance systems and identified recurring compliance deficiencies, despite previous regulatory intervention in 2006.

ASIC was concerned that Wealthsure's 'light touch' approach to compliance had resulted in a failure to:

- regularly or consistently review its representatives' financial product advice;
- subject those of its representatives with a higher risk of compliance breaches—given their compliance history, associations or business model—to more regular random audits;
- carry out robust investigations into non-compliant representative conduct or give appropriate consideration to breaches;
- systematically ensure appropriate sanctions or other consequences for non-compliant representative conduct;
- provide its representatives with robust documented policies and procedures; and
- employ adequate processes for identifying and addressing the competence and training needs of its representatives.

The enforceable undertaking requires Wealthsure and Wealthsure FS to complete a program to address their failure to foster and maintain a proper commitment to its compliance obligations. The program will be reviewed by an independent expert, who will report to ASIC regularly until 2018.

Additionally, the enforceable undertaking requires Wealthsure and Wealthsure FS to restructure their board. Wealthsure must replace its managing director, Mr Pawski, and both Wealthsure and Wealthsure FS must maintain a majority of independent non-executive members on their boards.

Credit providers

- 51 The National Credit Act is intended to protect consumers and ensure ethical and professional standards in the finance industry. It establishes licensing requirements and obligations for credit providers.
- 52 Australian credit licensees must familiarise themselves with their obligations under the National Credit Act. ASIC has provided substantial guidance to assist credit licensees in this regard, and licensees should seek additional or external advice if they feel they need it.
- 53 Identifying misconduct by credit providers is an ongoing focus for ASIC as part of our commitment to protecting consumers and investors against inappropriate or unconscionable conduct affecting all products and services.
- 54 In the relevant period, we suspended or cancelled the credit licence of nine individuals or companies under s54 or 55 of the National Credit Act, and banned a further 11 individuals or companies from engaging in credit activity under s80 of the National Credit Act.

Advertising

- 55 ASIC expects credit licensees to provide clear and accurate information to consumers in their advertising. Where advertising promotes a particular product feature, such as a low interest rate for a loan, the credit provider needs to make sure that any qualifications about how that rate applies are clear and that the information is not misleading in any way.

Example 12: Advertising of interest rates

MyRate Pty Ltd made changes to its website and will contact affected customers following ASIC concerns that home loan interest rates advertised on the website were likely to mislead consumers.

ASIC was concerned the website gave the impression the advertised rate for a variable home loan applied to both existing and new loans when, in reality, it only applied to new home loans. This meant some customers with existing variable rate home loans were charged interest over the advertised rate.

In response to ASIC's concerns, MyRate has made changes to its website to prominently state on the home page that the advertised rate only applies to new loans.

Further, MyRate also agreed to write to all affected customers to confirm the advertised rate only applies to new loans. Under this agreement, MyRate will provide their internal dispute resolution contact details and customers are encouraged to contact MyRate if they had any concerns that they may have been misled about the interest rate on their loan, or other questions about their loan.

Household goods rental industry

- 56 ASIC has been monitoring the household goods rental industry over the past few years as this has been identified as a high-risk product for consumers, who are often not aware of the type of contract they are entering into. We have taken action to ensure that consumers are not misled when they are making a financial commitment.

Example 13: 'Rent to buy' agreements

Dale Cleves Music Pty Ltd, trading as Winston Music, stopped advertising its musical instrument rental agreements as 'rent to buy' following ASIC concerns it was misleading.

ASIC was concerned that:

- the terms of the rental contract did not give consumers the right or obligation to purchase the instrument. Instead they provided that the consumer may make an offer to purchase the instrument which Winston Music may or may not accept; and
- they incorrectly advertised these arrangements as 'rent to buy'. Unless a consumer has a right or obligation to purchase the goods under a goods rental contract, it is misleading to advertise the arrangement as being 'rent to buy'.

Winston Music responded to ASIC's concerns and stopped using the phrase 'rent to buy' and 'choose to purchase' in its advertising, including in signage on its delivery truck, website, and its telephone on-hold system.

Winston Music published a corrective notice regarding the advertising on their website, and has also sent a copy of the corrective notice to current customers.

- 57 ASIC is conscious that disadvantaged Australian consumers face particular problems when accessing and using financial services. Such consumers include Indigenous Australians, rural and remote residents, newly arrived migrants, people from lower socio-economic backgrounds and people living in the outer suburbs of large metropolitan areas.
- 58 The credit rules have been designed to protect consumers from exploitation. We will take enforcement action to protect consumers from credit providers who try to sidestep these rules, particularly when these dubious practices are employed against financially vulnerable people.

Example 14: Unconscionable conduct in rental agreements

A franchisee of a national household goods rental business has released Indigenous consumers from their contracts following an ASIC surveillance for unconscionable conduct. Mr Rental Port Augusta's conduct included compelling customers to declare they were not drunk at the time of leasing the goods.

Mr Rental Port Augusta targeted Indigenous consumers in the Anangu Pitjantjatjara Yankunytjatjara lands (APY lands) in remote South Australia. An ASIC surveillance found more than 40 consumers were asked to sign several documents together with a lease agreement, none of which were explained to them and included a 'customer declaration' indicating they understood all the paperwork and that they were not intoxicated.

Deputy Chairman Peter Kell said, 'It is completely unacceptable that these Indigenous consumers have been taken advantage of and subjected to such appalling practices. The majority of consumers in the APY lands are living on very low incomes, English is not their first language and they are not familiar with an indefinite lease agreement.'

Following ASIC action, the consumers' agreements have been terminated, they owe no further money and they now own their rented goods. Mr Rental Port Augusta provided an undertaking to notify ASIC and the governing body of the APY lands if they intend to enter a remote or very remote Indigenous community in the future to sign consumers up to agreements.

Loan fraud

- 59 You must be a fit and proper person to engage in credit activities. This requires the credit provider to demonstrate the attributes of good character, diligence, honesty, integrity and judgement. Providers who engage in dishonest, deceitful conduct will be removed from the industry.
- 60 Mortgage brokers provide a link between the credit provider and the consumer, often completing loan applications on behalf of the consumer. Mortgage brokers typically receive a commission from the credit provider, based on the size of the loan acquired by the consumer.
- 61 ASIC is actively targeting mortgage brokers and finance brokers who falsify loan documents. Any broker who engages in this sort of misconduct will be removed from of the industry.
- 62 ASIC has investigated cases of loan fraud involving falsified payslips, inflated income figures and fake references from employers. In the most extreme cases, the broker has created entirely fictitious clients in an attempt to get a loan approved.
- 63 ASIC's crackdown on brokers submitting fraudulent loan applications and similar behaviour has seen several individuals criminally charged or banned. We currently have more than 20 investigations underway involving falsification of loan documents and loan applications.



Credit representatives

- 64 The credit licensing regime is intended to regulate every person involved in the loan process between the consumer and the lender. Companies that engage in credit services on behalf of a credit licensee generally need to be authorised as credit representatives of the licensee.
- 65 It is important for all credit licensees to carefully consider how each party they deal with is authorised or licensed. This helps ensure that all the parties involved in the loan application process are identified, and also strengthens access to external dispute resolution. These are both important consumer protection aspects of the regime.

Example 16: Authorising credit representatives

ASIC concerns prompted Yellow Brick Road Finance Pty Ltd (YBR) to change the way it authorises companies and individuals to offer loan advice through branches operated under its Australian credit licence.

YBR directly authorised over 100 individuals working in YBR branches as credit representatives. ASIC considered that the national credit licensing framework also required YBR to authorise the companies that operate the branches. This was because the companies also act as intermediaries between the licensee and the consumer.

YBR is now in the process of authorising the corporate entities directly under its licence, and those entities can sub-authorise employees or they can be directly appointed under YBR's credit licence.

ASIC acknowledges YBR's cooperation in responding to this issue.

Car insurance premiums

- 66 The National Credit Act allows the financing of car insurance premiums for only one year. Financing of these premiums for more than a year can lead to customers paying undue interest on premiums and being unfairly locked into longer contracts with one insurer. ASIC took action to secure refunds for consumers who were improperly charged car insurance premiums.

Example 17: Financing of car insurance premiums

More than 30,000 car owners will be paid back over \$15 million, following an ASIC review of the financing of tyre and rim insurance premiums. Tyre and rim insurance provides cover to car owners for damage to tyres, including punctures or blowouts. It also provides cover if a vehicle's rims are damaged.

This type of damage is not commonly included in standard comprehensive motor vehicle policies. An industry-wide review by ASIC found improper financing of tyre and rim insurance premiums by some of Australia's largest car financiers.

The review was prompted after BMW Australia Finance Ltd notified ASIC of its breach of the National Credit Act for the same offence and subsequently refunded a total of \$1,392,667 to 2466 customers.

The car financiers reviewed have put in place steps to refund the money. ASIC acknowledges their help in responding to this issue.

Insurance brokers

- 67 Individuals that work for licensed insurance intermediaries hold a position of trust and are accountable for their actions. One of the basic principles of being a trusted financial services provider is that you must comply with financial services laws.

Tombstoning and other fraudulent practices

- 68 It is an offence to submit insurance applications in the names of dead or fictitious people. This practice is known as 'tombstoning'. After recently becoming aware of someone engaging in this conduct, ASIC took swift action to prevent its continuation and punish the perpetrator: see Example 17.



- 69 Individuals that work for licensed insurance intermediaries hold a position of trust and are accountable for their actions.

Example 19: Fabricating insurance documents

ASIC permanently banned John Andrew Barr (of Darlington, Western Australia) after an investigation found he engaged in misleading and deceptive conduct.

ASIC's investigation found that, from May 2011 to May 2012, Mr Barr fabricated three insurance certificates, an insurance policy schedule and an email purporting to be from an insurance provider. Further, Mr Barr falsified another email, and made misrepresentations as to cover level.

The potential exposure that Mr Barr's clients faced as a result of his conduct was in excess of \$40 million. He also put one client at risk of breaching the terms of their AFS licence.

ASIC's investigation into Mr Barr followed his then employer notifying ASIC and sharing its own internal investigation into his conduct. ASIC considers this to be a good example of a licensee reporting breaches in line with its obligations, and found that Barr acted independently of his employer.

Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78) provides guidance for financial services licensees on reporting breaches, or likely breaches, of their obligations under the financial services laws.

Product issuers

- 70 Licensees wanting to take on the responsibility of managing investors' money must be backed by responsible entities with appropriate financial substance. ASIC imposes financial conditions on licensees to help ensure that they have adequate financial resources to provide the services covered by their licence.

Financial reporting obligations

- 71 Companies also have obligations that are central to ensuring the transparency and accountability of the reporting process. These obligations must be complied with to ensure users of financial reports, like unit holders and creditors, have the information available to help them make informed decisions.

Example 20: Breach of licence conditions and reporting requirements

ASIC cancelled the AFS licence of Australian Public Trustees Limited (APT) after it was found they had breached a number of the financial, reporting and other obligations of a financial services licensee.

APT's licence authorised it to operate managed investment schemes and act as a responsible entity, among other things. It operated two such schemes, both of which invest in direct real property.

ASIC surveillance found that APT failed to:

- comply with the financial conditions of its licence; and
- lodge audited financial reports on time for APT and the schemes it operated.

The cancellation of APT's AFS licence was effective from 18 July 2013, subject to a condition that the licence continues in effect until 30 June 2014 for the purpose of providing financial services necessary to transfer the schemes to a new responsible entity, or for the winding up of the schemes.

Disclosure documents and advertisements

- 72 It is important that disclosure documents and advertisements are clear, accurate and balanced, and when comparing products in an advertisement, the products should be similar enough to make the comparison relevant and not misleading. This is especially the case when consumers are looking for lower risk products or higher yields in an uncertain global financial environment.

Example 21: Disclosure and advertising of schemes

ASIC placed interim stop orders on the product disclosure statements and associated advertising for Trilogy Monthly Income Fund and Trilogy Melbourne Office Syndicate – Cheltenham. Trilogy Funds Management Limited is the responsible entity of both schemes.

ASIC's concerns relate to the product disclosure statements and advertising's:

- use of headline rates of return;
- comparisons of the schemes with other financial products, without disclosing the differences between these products;
- failure to disclose against the benchmarks or apply the disclosure principles as outlined in relevant ASIC regulatory guides;
- use of ratings statements without providing adequate details about the meaning of the rating or where investors could obtain further details of the rating; and
- failure to provide clear, concise and effective disclosure of the structure and nature of the product being offered.

ASIC identified these concerns as part of our ongoing work in the area of mortgage and property schemes, and advertising more generally.

Fees

- 73 One of ASIC's priorities is ensuring that consumers can have confidence in their financial institutions. It is important financial services companies charge customers the fees they have advertised and disclosed. Where this hasn't occurred, we expect errors to be swiftly rectified.

Example 22: Refund of excess fees

BT Financial Group will refund customers after it discovered that some of its Wrap and SuperWrap customers were paying adviser fees in excess of disclosed percentage ranges. In some cases, there was confusion around whether the percentage ranges disclosed represented the maximum adviser fees that could have been charged.

BT discovered the problem, reported it to ASIC of their own accord and have kept ASIC informed. BT undertook a review to identify customers potentially affected, and to ensure that they were compensated where appropriate. BT also issued revised disclosure and put in place strengthened operational controls to prevent similar occurrences in the future.

ASIC acknowledges the cooperative approach taken by BT in this matter.

Licensee conduct

- 74 AFS licensees are responsible for ensuring that they 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. This reflects ASIC's commitment to taking strong action where licensees are not meeting expected standards.
- 75 Licensees have an obligation to have adequate risk systems in place. This is non-negotiable. These systems play a fundamental role in building investor confidence and ASIC expects nothing less than the highest standards.





Fair compensation

- 76 Financial loss can cause significant hardship for consumers and investors. ASIC's regulatory role does not involve preventing consumer losses or ensuring full compensation for consumers in all instances where losses arise. However, we are active in obtaining compensation for consumers and investors who suffer losses because of improper conduct, especially where this occurs on a large scale.

Example 24: Appeal against settlement upheld

The Full Court of the Federal Court of Australia upheld ASIC's appeal against court approval of the \$82.5 million settlement between former Storm Financial investors and Macquarie Bank. The settlement arose from a class action brought against the bank by Sydney law firm Levitt Robinson.

Under the settlement, around 315 investors who funded the class action were to be compensated for approximately 42% of their losses (as estimated by Levitt Robinson) while around 735 investors were only to get back about 18% of their losses (as estimated by Levitt Robinson). The difference between the rates of compensation arose from a funders' premium of \$28.875 million (35% of the settlement sum of \$82.5 million) to be paid to investors who funded the class action. The funders' premium was in addition to reimbursement of legal costs.

ASIC appealed the decision, challenging the court's approval of the settlement on the basis the differential distribution of the settlement funds resulted in a lack of fairness to the majority of the members of the class. This result is the latest in a series of enforcement outcomes ASIC has achieved in relation to Storm Financial. For example, in May 2013 ASIC secured \$1.1 million in compensation from Macquarie Bank and Bank of Queensland for two former Storm Financial investors, Barry and Deanna Doyle, for their financial loss arising from their Storm investments: see Media Release (13-122MR) *ASIC settles in Storm Financial proceedings* (29 May 2013).

ASIC is also awaiting judgment in the Federal Court action we brought against Macquarie Bank and the Bank of Queensland, in which we alleged that the banks were involved in the operation by Storm Financial of an

unregistered managed investment scheme. The declarations sought against the banks, if made by the court, will lay the foundation for compensation for Storm investors.

ASIC's dedicated Storm website details the actions we have undertaken in recent years: <https://storm.asic.gov.au/>.

B Fair and efficient financial markets

Key points

Directors, company officers, auditors, insolvency practitioners, sharebrokers, investment banks and other market participants play a key role in ensuring that Australia's financial markets are fair and efficient. This section highlights enforcement outcomes achieved in relation to these gatekeepers.

In the relevant period, ASIC achieved 15 criminal outcomes and three civil outcomes relating to fair and efficient markets. In addition, seven market integrity rules infringement notices and three continuous disclosure rules infringement notices were paid, totalling \$777,000.

Directors and officers

Directors' duties

- 77 Company directors are important gatekeepers in Australia's financial system. ASIC expects them to discharge their duties with the appropriate care and diligence. ASIC, the community and the courts will not tolerate criminal behaviour against the interests of investors.

Example 25: Breach of directors' duties

The Federal Court in Melbourne found five former directors of APCHL liable for breaching their duties as officers of APCHL. Findings were also made in relation to the conduct of APCHL.

APCHL was the responsible entity of the Prime Retirement and Aged Care Property Trust (Prime Trust), a managed investment scheme which owned retirement villages in Queensland, New South Wales and Victoria. APCHL collapsed in 2010 when administrators were appointed, owing investors approximately \$550 million.

ASIC sought a declaration that APCHL breached its duties in exercising its powers and carrying out its duties as the responsible entity of Prime Trust, and that APCHL and its directors failed to act in the best interests of the members.

Justice Murphy found that:

- each of the directors had breached various duties, including the responsibility to act in the best interests of scheme members;
- APCHL had breached similar duties under the Corporations Act;
- amendments made to the constitution of Prime Trust were not permitted to be made without approval of a special resolution of the unit holders; and

- the directors breached the law in paying a 'listing fee' to APCHL as a result of it becoming listed on the ASX.

ASIC is seeking pecuniary penalties from the court, as well as orders banning the directors from managing companies.

Theft of client money

- 78 The integrity of the market is one of ASIC's key priorities, and investors have a fundamental right to expect that their money will be handled honestly and appropriately.

Example 26: False accounting, theft, deception

Russell Andrew Johnson, the sole director of Sonray Capital Markets Pty Ltd, pleaded guilty in the Supreme Court of Victoria to seven criminal charges brought by ASIC.

Mr Johnson faces a maximum of ten years imprisonment for each of the state offences of false accounting, theft and deception, and a term of five years imprisonment for submitting a false document to ASIC.

The charges relate to the use of various Sonray clients' trading accounts to create numerous unfunded deposits for which no physical cash was involved. This was done to either obtain funds for use by himself or Sonray, or to hedge the trading book against margin calls. The effect of withdrawing funds from client accounts from unfunded deposit entries caused an actual deficiency in the segregated client account funds.

Additionally, Mr Johnson, in a solvency report required by ASIC, made a false statement about equity injections of \$5.2 million into Sonray.

Information lodged with ASIC

- 79 Individuals who lodge documents with ASIC have an obligation to ensure that the information they provide is accurate.

Example 27: Dishonestly using position as a director

Clestus Weerappah, a former director of Dollarforce Financial Services Pty Ltd, was jailed for four years over his role in the collapse of the property development group. Dollarforce collapsed in 2009 with a deficiency of \$24 million, with investors losing more than \$8 million.

Mr Weerappah (of Oakleigh, Victoria) pleaded guilty to five charges relating to the raising of more than \$4 million from investors. The charges included dishonestly using his position as a director and making false and misleading statements.

On 6 August 2013, the County Court of Victoria sentenced Mr Weerappah to four years jail with a non-parole period of two years. The court also ordered Mr Weerappah to repay a total of \$3.7 million to a number of investors.

Company deregistration

- 80 If a company is deregistered while it has outstanding liabilities, it unfairly prejudices another person's legal rights. ASIC will not hesitate to take action when someone fails to act honestly when they attempt to deregister a company.



Director disqualifications

- 81 Directors that have been involved in two or more failed companies may be disqualified by ASIC from managing corporations. We disqualified a total of 32 directors from managing corporations, following their involvement in two or more failed companies, in the relevant period.

Auditors

- 82 Auditors play an important role in maintaining and promoting confidence and integrity in Australia's capital markets. In conducting an audit or review of a financial report, an auditor must follow the auditing standards issued by the Auditing and Assurance Standards Board. Those who do not adhere to the professional standards will be removed from the industry.

Example 29: Cancellation of auditor registration

ASIC has accepted an enforceable undertaking from Wangarrata-based auditor Anthony Hyndman, which permanently prevents him from practising as an auditor.

On 10 October 2013, in accordance with the enforceable undertaking, Mr Hyndman requested that ASIC cancel his registration as an auditor. Mr Hyndman has agreed to never re-apply for registration or perform any duties or functions of an auditor.

ASIC's investigation focused on Mr Hyndman's audits for the 2011–12 financial year of three unlisted public companies operating in Victoria. The three companies were Hargraves Secured Investments Limited, Webster Dolilta Finance Limited and Win Securities Limited.

As a result of the investigation, ASIC formed the view that Mr Hyndman did not conduct the audits of the companies in accordance with the Australian auditing standards.

Insolvency practitioners

- 83 Liquidators play a key role in promoting a fair and efficient market and ensuring that investors, including creditors, are confident and informed.
- 84 A person's registration as a liquidator is a privilege, the continuation of which is conditional on diligent performance of their duties. We will withdraw a liquidator's registration to protect the public from unsatisfactory work or inappropriate conduct, and to deter other liquidators from acting similarly.

Example 30: Not fit and proper to remain a registered liquidator

ASIC cancelled the registration of liquidator Mark Darren Levi following a successful application to the disciplinary body, the Companies Auditors and Liquidators Disciplinary Board (CALDB).

CALDB found that Mr Levi was persistently and seriously dishonest and, therefore, not a fit and proper person to remain registered as a liquidator. CALDB found that in 2009 Mr Levi took \$92,000 from Biseja Pty Ltd while it was in receivership and under the control of registered liquidator Jamieson Louttit. At the time of his alleged misconduct, Mr Levi was a senior staff member at Jamieson Louttit & Associates.

CALDB found that Mr Levi engaged in serious dishonesty in misappropriating the funds, in falsifying records to disguise the misappropriation and in putting forward a false version of events after having admitted the misappropriation to Mr Louttit. Mr Levi's dishonesty was not an isolated lapse, but involved dishonesty on numerous occasions from April 2009 to at least 2011.

Example 31: Failure to properly perform duties

The Federal Court made final orders cancelling the registration of Melbourne liquidator Andrew Leonard Dunner until 11 February 2018, following ASIC action. In April 2012, ASIC applied to the Federal Court in

Melbourne to inquire into Mr Dunner's conduct while performing his duties as liquidator or receiver and manager of 11 companies.

In handing down the reasons for his judgment, Justice Middleton found that Mr Dunner had failed to adequately investigate the circumstances and affairs of companies to which he was appointed and had inaccurately reported to ASIC and creditors. The court also found that he had drawn remuneration in excess of \$600,000 without appropriate approval or adequate supporting documentation.

Justice Middleton stated that Mr Dunner's conduct indicated 'a systemic failure of administration and internal protocols, as well as (in a number of instances) extremely poor professional judgment. In this way, Mr Dunner has failed to satisfy the high standards of conduct required of his offices'.

Market participants

Insider trading

- 85 ASIC is committed to prosecuting insider trading. Our ability to see trading as it occurs, to watch for trading in stocks we know are in play, and to invoke our investigatory powers early means that ASIC is a credible insider trading enforcement agency.
- 86 Since 2009, ASIC has prosecuted 32 insider trading actions. Of those, 23 have been successfully prosecuted (20 matters finalised and three guilty pleas await sentencing). Three individuals are awaiting trial and are contesting their charges. Six matters have been unsuccessful, including one conviction that was quashed on appeal and one matter that was discontinued.
- 87 The maximum penalty for insider trading under s1043A(1) of the Corporations Act is 10 years imprisonment and/or a fine of \$495,000 or three times the amount of the benefit obtained, whichever is greater.
- 88 Directors should carefully consider the information they possess when making a trading decision. Company policies on trading windows are not a protection for trading when a director possesses inside information.

Example 32: Withdrawn

[Withdrawn in accordance with ASIC policy - see [INFO 152](#) *Public comment on ASIC's regulatory activities*]

Example 33:



Takeovers

- 89 Ensuring takeovers and other transactions involving the acquisition of control take place fairly and in an efficient, competitive and informed market is an important focus for ASIC.
- 90 It is important that people seeking to acquire control of companies ensure that all shareholders have the opportunity to have a say or participate in the benefits of a control transaction and are given sufficient information to make an informed decision.

Example 34: ASIC enforces standards in takeovers cases

ASIC intervened in transactions deciding the control of two companies, reinforcing our commitment to our takeovers policy and market integrity. As a result of ASIC's actions, the transactions for both mineral exploration company Laneway Resources Limited and PR Finance Group Limited have been altered.

Laneway was looking to raise \$22.2 million to advance its gold and coal projects and eliminate debt. ASIC raised concerns the proposal was an abuse of the rights issue and underwriting exceptions under the law. Under the arrangements, the Bizzell-related entities could potentially control up to 86.45% of the voting shares in Laneway largely by, in effect, converting a debt owed to the entities to equity.

A scheme of arrangement to effect the acquisition by Keybridge Capital Limited of PR Finance highlighted several noteworthy issues. ASIC was concerned that audited accounts had not been lodged ahead of the shareholder meeting as promised in the scheme booklet and shareholders did not have all information they needed to decide the future of the company.

Client money handling practices

- 91 Businesses that hold client money must ensure that they have the proper management, oversight and controls in this area. Under the law, licensees

must keep client money separate from their own. This is an important safeguard to protect the interests of retail investors. For example, if there are failings in the handling of client money, the client's money may be at risk if a firm becomes insolvent, and clients may suffer losses.

92 ASIC will take action to ensure client money is adequately protected.

Example 35: Failings in the handling of client money

ASIC has accepted an enforceable undertaking from Australia's largest retail broker, Commonwealth Securities Ltd (CommSec), and Australian Investment Exchange Ltd (Ausix), both of which are members of the Commonwealth Bank of Australia group.

Under the enforceable undertaking, CommSec and Ausix must appoint an independent expert to review their handling of client money and develop a plan to rectify any deficiencies found in their client money processes. The independent expert will report to CommSec and Ausix by mid-2014, following which CommSec and Ausix must provide and implement a remediation plan if the independent expert report makes recommendations to do so.

ASIC acknowledges that CommSec and Ausix completed a remediation program in late 2012 to address weaknesses in their client money handling arrangements. Those weaknesses related to withdrawing client money from trust accounts without the required written authorisations and failing to separate client money from CommSec's and Ausix's money. ASIC considers it appropriate to seek the view of an independent expert to evaluate the controls and processes of CommSec and Ausix in relation to the handling of client money.

C Efficient registration and licensing

Key points

There are ongoing responsibilities and obligations associated with registration and licensing. Failure to meet these obligations may lead to enforcement action by ASIC.

This section highlights enforcement outcomes that relate to efficient licensing and registration.

Officeholders of registered companies

Entitlement to manage a company

- 93 It is important that individuals managing companies are lawfully entitled to do so. ASIC wants to ensure that consumers and businesses can be confident they are dealing with legitimate directors. Individuals who have been disqualified from managing a corporation must not act in this capacity during the period of their disqualification.

Example 36:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Reporting obligations

- 94 Officers of registered companies have ongoing reporting obligations. Compliance with these obligations is central to the confident and informed participation of consumers in the financial services market.

- 95 ASIC views reporting deficiencies seriously and will take enforcement action to send a message to the market about the consequences of non-lodgement.
- 96 Under the Corporations Act, public companies must hold annual general meetings at least once in each calendar year and, within five months of the end of its financial year, provide members with annual reports and lodge annual reports with ASIC.

Example 37: Failure to comply with reporting obligations

A Western Australian mining company was convicted in the Perth Magistrates Court on 20 September 2013 of failing to lodge statutory reports, following an ASIC investigation. The company was fined \$18,000.

Black Earth Resources Ltd, a public company based in Malaga that mines landfill for organic resources, pleaded guilty to 12 charges of failing to:

- hold annual general meetings for the 2007–08, 2008–09, 2009–10 and 2010–11 financial years;
- provide annual reports to members for the 2007–08, 2008–09, 2009–10 and 2010–11 financial years; and
- lodge annual reports with ASIC for the 2007–08, 2008–09, 2009–10 and 2010–11 financial years.

ASIC Commissioner Greg Tanzer said, 'This prosecution shows ASIC's determination to ensure investors and the public have accurate and timely information so they can make informed financial decisions.'

Obligations relating to company registration

- 97 Officeholders of registered companies are required to fulfil a number of 'housekeeping' obligations in connection with company registration. Some of these obligations continue even when a company is in external administration.
- 98 For example, a director must provide assistance to an external administrator who has been appointed to a company with which they were associated. As part of our liquidator assistance program, 176 directors were successfully prosecuted for summary offences concerning a failure to assist an external administrator.

Appendix 1: Statistics

Table 1: Enforcement outcomes—1 July 2013 to 31 December 2013*

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcomes	Public warning notice	Total
Market integrity	8	–	10	3	–	21
Insider trading	7					7
Market manipulation	1			1		2
Continuous disclosure			3			3
Market integrity rules			7			7
Other market misconduct				2		2
Corporate governance	7	3	2	1	–	13
Action against directors	7					7
Insolvency		1				1
Action against liquidators		2	2			4
Action against auditors				1		1
Other corporate governance misconduct						

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcomes	Public warning notice	Total
Financial services	12	5	34	23	4	78
Unlicensed conduct						
Dishonest conduct, misleading statements, unconscionable conduct	4		6	5	1	16
Misappropriation, theft, fraud	5 [^]		5			10
Credit	2		14 [#]	9	3	28
Other financial services misconduct	1	5	9	9		24
Subtotal	27	8	46	27	4	112
Small business compliance and deterrence	186	–	42	–	–	228
Action against directors	181		42 ^{**}			223
Efficient registration and licensing	5					5
Total	213	8	88	27	4	340

* Outcomes are presented per defendant

[^] Includes one outcome currently under appeal

[#] Includes two outcomes currently under appeal

^{**} Includes 10 credit related outcomes

Table 2: Pending matters

Area of enforcement	Criminal	Civil
Market integrity	15	2
Insider trading	11	1
Market manipulation	3	
Continuous disclosure		
Market integrity rules		
Other market misconduct	1	1
Corporate governance	7	5
Action against directors	5	5
Insolvency	1	
Action against liquidators		
Action against auditors		
Other corporate governance misconduct	1	
Financial services	15	16
Unlicensed conduct	1	2
Dishonest conduct, misleading statements, unconscionable conduct	8	4
Misappropriation, theft, fraud	5	
Credit	1	4
Other financial services misconduct		6
Small business compliance and deterrence	74	–
Action against directors	74	
Efficient registration and licensing		
Total	111	23

Explanation

- 99 Table 1 lists enforcement outcomes achieved during the relevant period. ‘Enforcement outcome’ refers to any formal action taken to secure compliance, about which we have made a public announcement, and also ‘small business compliance and deterrence’ formal findings, which we do not generally announce. This includes court determinations (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 been identified. For example, it does not include negotiating a change in compliance processes after receiving a breach notification from a licensee.
- 100 ‘Pending matters’ in Table 2 refers to publicly announced enforcement matters that 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 but are yet to be heard and, in the case of civil matters, where the filing of an action has been announced but remains undetermined. All of the matters in this table were pending as at 30 June 2013, although they may have been announced or filed before 1 January 2013. Where a matter falls within the ‘small business compliance and deterrence’ area, a public announcement may not have been made about the matter in this table. This table provides a good indication of the number of matters that we are pursuing at any one time.

Table 3: Aggregate enforcement outcomes—1 January 2012 to 31 December 2013

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcomes	Public warning notice	Total
Market integrity	23	1	29	4	–	57
Insider trading	21					21
Market manipulation	2		1	1		4
Continuous disclosure		1	10	1		12
Market integrity rules			18			18
Other market misconduct				2		2
Corporate governance	16	8	7	12	1	44
Action against directors	16	4	2	2	1	25
Insolvency		1	1			2
Action against liquidators		3	4	4		11
Action against auditors				6		6
Other corporate governance misconduct						

Area of enforcement	Criminal	Civil	Administrative remedies	Enforceable undertakings/ negotiated outcomes	Public warning notice	Total
Financial services	35	39	114	62	5	255
Unlicensed conduct		4				4
Dishonest conduct, misleading statements, unconscionable conduct	20	26	24	14	1	85
Misappropriation, theft, fraud	9	1	14			24
Credit	5	3	48	19	3	78
Other financial services misconduct	1	5	28	29	1	64
Subtotal	74	48	150	78	6	356
Small business compliance and deterrence	962	2	129	–	–	1093
Action against directors	936		126			1062
Efficient registration and licensing	26	2	3			31
Total	1036	50	279	78	6	1449

Appendix 2: Schedule of media releases

Media Release (by area of enforcement)	Date	Link
Market integrity		
Credit Suisse Equities (Australia) Limited pays \$95,000 infringement notice penalty	12/07/2013	13-173MR
UBS Securities Australia Ltd pays \$30,000 infringement notice penalty	17/07/2013	13-180MR
Euroz Securities Limited pays \$35,000 infringement notice penalty	19/07/2013	13-186MR
Instinet Australia Pty Limited pays \$130,000 infringement notice penalty	8/08/2013	13-208MR
Former Royal Bank of Canada employee jailed for insider trading	8/08/2013	13-209MR
Former analyst convicted of insider trading	16/08/2013	13-217MR
Former Gunns chairman convicted of insider trading	23/08/2013	13-226MR
ZYL Ltd fined for continuous disclosure breaches	20/09/2013	13-262MR
Central Asia Resources Limited fined for continuous disclosure breach	14/10/2013	13-274MR
UBS Securities Australia Ltd pays \$50,000 infringement notice penalty	22/10/2013	13-287MR
Two men plead guilty to insider trading	29/10/2013	13-295MR
Queensland man jailed for market manipulation	13/11/2013	13-309MR
Former CEO pleads guilty to insider trading	26/11/2013	13-317MR
Stone Resources Australia Limited fined for continuous disclosure breach	3/12/2013	13-323MR
Third man convicted in insider trading investigation	10/12/2013	13-333MR
Macquarie Bank Limited pays \$175,000 infringement notice penalty	17/12/2013	13-343MR
CommSec and Ausiex enter into enforceable undertaking with ASIC	17/12/2013	13-344MR
ASIC accepts enforceable undertaking from National Australia Bank	23/12/2013	13-365MR
ASIC accepts enforceable undertaking from UBS	23/12/2013	13-366M

Media Release (by area of enforcement)	Date	Link
Corporate governance		
ASIC winds up Apex Derivatives Pty Ltd	9/07/2013	13-168MR
Former Alice Springs builder sentenced to jail	11/07/2013	13-172MR
ASIC to remove liquidator from industry	23/08/2013	13-227MR
Federal Court indicates Melbourne liquidator should be banned for 5 years	30/08/2013	13-239MR
Hotel entrepreneur convicted	18/09/2013	13-260MR
Former Wintech Group MD pleads guilty	14/10/2013	13-275MR
ASIC accepts enforceable undertaking from Wangarrata auditor	15/10/2013	13-278MR
Former investment manager pleads guilty to making false statements	29/10/2013	13-293MR
ASIC to remove liquidator from industry	12/11/2013	13-308MR
Former financial controller sentenced for falsifying company books	22/11/2013	13-315MR
ASIC enforces liquidator's fiduciary duties	9/12/2013	13-332MR
Former Gold Coast businessman pleads guilty to charges of creating a phantom company director and obstructing ASIC	20/12/2013	13-356MR
Former director sentenced to jail for \$820,000 theft	23/12/2013	13-364MR
Financial services		
BT to refund customers after review of fees disclosed and charged	1/07/2013	13-159MR
False identities used in ASIC insurance 'tombstoning' case	4/07/2013	13-163MR
Permanent ban for insurance broker	8/07/2013	13-166MR
ASIC permanently bans Sydney financial adviser convicted of fraud	8/07/2013	13-167MR
ASIC permanently bans Victorian insurance claims manager	10/07/2013	13-169MR
ASIC bans Perth finance broker for falsifying documents	11/07/2013	13-170MR
ASIC concerns see CBA and HSBC change advertising	16/07/2013	13-176MR
ASIC permanently bans former Bell Potter adviser after dishonest conduct conviction	16/07/2013	13-175MR
Professional Investment Services enters into monitoring program	17/07/2013	13-178MR

Media Release (by area of enforcement)	Date	Link
ASIC concerns prompt Woolworths to change insurance ads	17/07/2013	13-177MR
Lender to refund consumers and pay financial penalty following interest rate errors	24/07/2013	13-190MR
ASIC acts on rent to buy advertisements	26/07/2013	13-193MR
Credit licensee updates its licensing structure	26/07/2013	13-192MR
ASIC cancels licence of Australian Public Trustees Limited	30/07/2013	13-194MR
ASIC cancels securities dealer's licence	31/07/2013	13-198MR
ASIC permanently bans insurance broker	5/08/2013	13-202MR
[REDACTED]	[REDACTED]	[REDACTED]
ASIC successful in appeal against Storm settlement deal	12/08/2013	13-214MR
ASIC permanently bans Queensland financial adviser	16/08/2013	13-216MR
CUA honours discounts on home loans after misleading ad campaign	19/08/2013	13-218MR
ASIC removes mortgage broker from industry	21/08/2013	13-225MR
[REDACTED]	[REDACTED]	[REDACTED]
ASIC imposes additional licence conditions on Roco Forex	26/08/2013	13-229MR
ASIC surveillance prompts brokerage to stop new margin loans	27/08/2013	13-232MR
Former financial adviser pleads guilty to dishonest conduct	27/08/2013	13-234MR
ASIC review prompts car financiers to refund more than \$15 million	28/08/2013	13-231MR
ASIC takes action against rental company's franchisees	28/08/2013	13-235MR
ASIC accepts enforceable undertaking from Wealthsure Pty Ltd, Wealthsure Financial Services Pty Ltd and their former CEO	2/09/2013	13-240MR
ASIC issues interim stop orders on Trilogy Funds Management Limited schemes	02/09/2013	13-242MR
ASIC removes Mobile Rentals' franchisees from industry	3/09/2013	13-245MR
ASIC concerns prompt banks to change promotional materials	4/09/2013	13-246MR
ASIC bans Wickham Securities chairman Brad Sherwin	4/09/2013	13-247MR

Media Release (by area of enforcement)	Date	Link
ASIC concerns prompt Anne Street Partners to change their financial advice practices	5/09/2013	13-248MR
Former Dollarforce director jailed and accountant convicted	6/09/2013	13-252MR
ASIC imposes licence condition on Moneywise Securities	17/09/2013	13-259MR
ASIC accepts enforceable undertaking from Melbourne adviser	24/09/2013	13-264MR
ASIC review prompts Spring Financial Group into enforceable undertaking	24/09/2013	13-263MR
Court orders surrender of LM founder's passport, freezes assets	27/09/2013	13-266MR
Sonray director pleads guilty to seven charges after \$46 million collapse	2/10/2013	13-267MR
ASIC cancels the licences of Chambers Investment Planners Pty Ltd	3/10/2013	13-269MR
ASIC accepts enforceable undertaking from Queensland credit provider	9/10/2013	13-270MR
Accountant involved in Dollarforce collapse sentenced	11/10/2013	13-271MR
ASIC bans businessman 'Aussie Rob'	17/10/2013	13-282MR
Small amount lender pays infringement notice penalty for 'Free' loan offer	21/10/2013	13-284MR
ASIC action sees Indigenous consumers released from contracts	24/10/2013	13-288MR
Former Bell Potter adviser jailed for dishonest conduct after Crown appeal	25/10/2013	13-290MR
ASIC concerns result in changes to online advertising by Insure 247	28/10/2013	13-291MR
Rental goods provider pays \$27,500 penalty, enters into enforceable undertaking	29/10/2013	13-301MR
ASIC bans Melbourne mortgage broker	7/11/2013	13-305MR
Former Woodville North mortgage broker convicted	8/11/2013	13-306MR
ASIC permanently bans former mortgage broker	11/11/2013	13-337MR
ASIC permanently bans jailed financial services director	12/11/2013	13-307MR
Prime Trust directors found to have breached duties	12/11/2013	13-339MR
Former WA mortgage broker removed from the industry	18/11/2013	13-312MR

Media Release (by area of enforcement)	Date	Link
Sydney adviser removed from financial services	18/11/2013	13-313MR
Former financial adviser convicted and ordered to pay back money	28/11/2013	13-321MR
ASIC removes bankrupt financial adviser from industry	2/12/2013	13-322MR
ASIC imposes condition on Award Mortgage Solutions' credit licence	5/12/2013	13-326MR
ASIC concerns prompt MyRate to change website	9/12/2013	13-329MR
Former mortgage broker convicted of falsifying home loan applications	11/12/2013	13-335MR
ASIC permanently bans Sydney credit brokers	11/12/2013	13-336MR
Former financial adviser pleads guilty to \$5.9 million fraud	17/12/2013	13-346MR
Dollarforce director permanently banned	18/12/2013	13-348MR
SMSF Property Capital pays penalty for ads promoting 'ASIC approved' financial products	18/12/2013	13-351MR
Court winds up Tasmanian debenture firm	18/12/2013	13-352MR
Solar panel company pays \$27,500 penalty, enters into enforceable undertaking	19/12/2013	13-353MR
ASIC obtains court orders against Queensland financial adviser	19/12/2013	13-354MR
Former currency trader jailed	23/12/2013	13-360MR

Key terms

Term	Meaning in this document
13-173MR (for example)	An ASIC media release (in this example numbered 13-173)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
APCHL	Australian Property Custodian Holdings Ltd
APT	Australian Public Trustees Limited
APY lands	Anangu Pitjantjatjara Yankunytjatjara lands
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASP	Anne Street Partners Financial Services Pty Ltd
ASX	ASX Limited or the exchange market operated by ASX Limited
Ausix	Australian Investment Exchange Ltd
Australian auditing standards	Standards issued by the Auditing and Assurance Board under s336 of the Corporations Act
BBSW	Australian Bank Bill Swap Rate
CALDB	Companies Auditors and Liquidators Disciplinary Board
CBA	Commonwealth Bank of Australia
CommSec	Commonwealth Securities Ltd
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 licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds a credit licence under s35 of the National Credit Act

Term	Meaning in this document
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
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
Prime Trust	Prime Retirement and Aged Care Property Trust
relevant period	1 July 2013 to 31 December 2013
REP 360 (for example)	An ASIC report (in this example numbered 281)
RBC	Royal Bank of Canada
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
SMSF	Self-managed superannuation fund
tombstoning	The practice of submitting insurance applications in the names of dead or fictitious people
Wealthsure FS	Wealthsure Financial Services Pty Ltd
YBR	Yellow Brick Road Finance Pty Ltd

Related information

Headnotes

ASIC's strategic priorities, banning, credit activity, enforceable undertaking, enforcement outcome, financial service, gatekeepers, infringement notice, misleading or deceptive advertising

Regulatory guides

RG 78 *Breach reporting by AFS licensees*

RG 100 *Enforceable undertakings*

RG 234 *Advertising financial products and services (including credit): Good practice guidance*

Legislation

ASIC Act

Corporations Act, s912B, 915B(3)(b), 1043A(1), 1308(2)

National Credit Act, s54, 55, 80

Consultation papers and reports

CP 216 *Advice on self-managed superannuation funds: Specific disclosure requirements and SMSF costs*

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

REP 299 *ASIC enforcement outcomes: January to June 2012*

REP 336 *ASIC enforcement outcomes: July to December 2012*

REP 360 *ASIC enforcement outcomes: January to June 2013*

Media releases

13-122MR *ASIC settles in Storm Financial proceedings*

13-294MR *Update on Trio investigation*

13-345MR *ASIC lodges fourth submission to Senate Inquiry*

Information sheets

INFO 151 *ASIC's approach to enforcement*

INFO 152 *Public comment*

Forms

Form 6010 *Application for voluntary deregistration of a company*