

# **ASIC DETERRENCE AND ITS APPROACH TO SECURITIES LITIGATION**

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## **INTRODUCTION**

1. This paper accompanies a presentation given by Justin Brereton of the Victorian Bar on 23 July 2009. Both the presentation and the paper consider some current and common issues that arise in the context of Australian Securities and Investments Commission (“ASIC”) investigations and litigation. In dealing with such a large subject area, it is not intended to be an exhaustive consideration of all matters which may arise.<sup>1</sup>
2. Justin Brereton is a Victorian Barrister who specialises in both commercial and regulatory matters. He regularly appears for ASIC and has done so in some of the largest investigations and litigation of recent times. This has included appearing as counsel for ASIC in its investigation into the directors and officers of the Australian Wheat Board; the committal of property spruiker Henry Kaye and numerous other pieces of civil, administrative and criminal litigation.
3. Justin also appears regularly against ASIC. Examples include investigations and litigation arising from the Westpoint collapse; litigation relating to the giving of allegedly unlicensed financial product advice and investigations into alleged stock market manipulation.
4. Prior to joining the Bar, Justin was a senior lawyer in the enforcement directorate of ASIC. In that role, he was responsible for numerous high profile matters including ASIC’s action against the NAB following the rogue traders scandal. Whilst at ASIC, Justin also worked in the United States during joint investigations with the Securities and Exchange Commission.

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<sup>1</sup> An excellent source of further information in this area is Middleton T, “ASIC Corporate Investigations and Hearings” Lawbook Co, Sydney 1999 (ISBN 0 455 21686 X).

## **PART 1 – BEFORE THE CASE BEGINS**

5. ASIC enquiries can be overwhelming. The numerous of possibilities created by ASIC's vast array of evidence gathering powers often leaves those on the receiving end of such enquiries dazzled by the possibilities. Indeed, for this reason, people often assume the worst about what it is that ASIC is trying to achieve.
  
6. The purpose of the first part of this paper is to consider some of the evidence gathering tools commonly used by ASIC. In considering these tools, the paper will demonstrate how it is possible to avoid being overwhelmed by the possibilities and gain an insight into ASIC's litigation objectives. It will also demonstrate how it is possible, in certain circumstances, to influence the use ASIC can make of the evidence it collects, through the use of some of its compulsory powers.

## **INVESTIGATION PROCESS AND ASIC'S LITIGATION OBJECTIVES**

### **Notices to produce books<sup>2</sup>**

7. The most common evidence gathering tool used by ASIC is the notice to produce books.<sup>3</sup> Such notices are used in the course of both informal enquiries and once a formal investigation has been commenced.<sup>4</sup> Furthermore, documents obtained under such notices can be used in all forms of ASIC based litigation.
  
8. For those reasons, notices to produce books are a valuable means of collecting evidence for ASIC. Importantly however, once served, notices to produce books

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<sup>2</sup> "Books" is defined by section 5 of the ASIC Act as being, inter alia, a register, financial reports, a document, a bankers book and any other record or information.

<sup>3</sup> ASIC Act sections 30, 31, 32A and 33.

<sup>4</sup> ASIC Act section 28

are also a valuable source of information about ASIC's litigation objectives. In that regard, by thoroughly analysing a notice to produce books, it is often possible to answer a number of questions relevant to any future litigation. That will include answers to questions such as:

- a. Has a formal investigation commenced? and
- b. If so:
  - i. is subsequent litigation likely to be criminal, civil or administrative?
  - ii. who is the likely defendant in that litigation?
  - iii. what is the likely subject matter of any litigation?

***Has a formal investigation commenced?***

9. In analysing a notice to determine whether a formal investigation has commenced, it is firstly necessary to appreciate that notices to produce books are used by ASIC during both formal investigations and as a means of conducting less formal preliminary enquiries.<sup>5</sup> ASIC is able to do this because of section 28 of the *Australian Securities and Investments Commission Act 2001* (“ASIC Act”). The effect of section 28 is that it is not necessary for ASIC to commence a formal investigation in order to use most of its powers to compel the production of books under part 3, division 3 of the ASIC Act.

10. Identifying whether a formal investigation has commenced is critical in allowing you to make an assessment of how advanced ASIC is in its enquiries. It will also allow you to make an assessment of whether your client is likely to be subjected to ASIC's other evidence gathering tools. That is the evidence gathering tools that are only available to ASIC after a formal investigation has been commenced.

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<sup>5</sup> See generally ASIC Act, part 3, division 3.

11. In order to determine whether a notice to produce books has been served as part of an investigation or less formal preliminary enquiry it is necessary to pay close attention to the words used in the notice. In that regard:

a. notices served in the context of a preliminary enquiry will always use the words which appear in either subsections (a), (b) or (c) of section 28 of the ASIC Act as being the basis upon the notice is served. That is to say, that the notice will state that it is:

- i. for the purpose of “ASIC exercising its functions;”<sup>6</sup>
- ii. “to ensure compliance;”<sup>7</sup> or
- iii. “in relation to an alleged or suspected contravention”;<sup>8</sup>

b. investigation notices for the production of books on the other hand will use the words which appear in subsection (d) of section 28 as the being the basis upon which ASIC is exercising the power to compel production. That is to say the notice will state that it is served in relation to, or “for the purpose of an investigation under Division 1” of Part 3 of the ASIC Act.

12. Having analysed a notice to produce books in this way, you will have now determined whether a formal investigation has commenced. Having done that, you will then be in a position to further analyse the notice for the purpose of identifying whether the matters under investigation and therefore any subsequent litigation is likely to be criminal, civil or administrative.

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<sup>6</sup> ASIC Act subsection 28(a).

<sup>7</sup> ASIC Act subsection 28(b).

<sup>8</sup> ASIC Act subsection 28(c).

*Is any litigation likely to be criminal, civil or administrative?*

13. Determining whether any litigation flowing from an investigation is likely to be criminal, civil or administrative requires consideration of the specific provisions under investigation. In that regard, notices to produce books that are served in the course of an investigation will always identify the specific provisions that ASIC are investigating.<sup>9</sup>
14. The provisions identified will usually be provisions from either the *Corporations Act* 2001 (“**Corporations Act**”) or the ASIC Act and those provisions (or the part in which they appear in each Act) will usually identify whether a contravention gives rise to criminal or civil liability or whether the provision is one which ASIC can litigate through an internal administrative procedure.
15. It should be noted however that the specific provision (or part) which gives rise to liability does not always specify whether the provision is criminal, civil or administrative. For that reason, when analysing the provisions identified in a notice to produce books, attention should also be paid to:
  - a. schedule 3 of the Corporations Act which sets out the penalties for the various criminal offence provisions under that Act;
  - b. chapter 2 of the Commonwealth Criminal Code which sets out the general principles of criminal responsibility; and
  - c. section 1317E of the Corporations Act which sets out the various civil penalty provisions.

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<sup>9</sup> From time to time notices to produce documents will identify a mixture of criminal, civil and administrative provisions. If this occurs, it is obviously prudent to adopt the most conservative approach to such a notice.

16. It should also be noted that from time to time a notice to produce books will identify provisions from Acts other than the ASIC Act or the Corporations Act. The reason for this is that ASIC has the power to investigate a contravention of any law of the Commonwealth, State or a Territory that:

- a. concerns the management of the affairs of a body corporate or a managed investment scheme;<sup>10</sup> or
- b. involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.<sup>11</sup>

17. The most common example of this in Victoria is a notice which identifies the offence of obtaining financial advantage by deception contrary to section 82 of the Victorian *Crimes Act* 1958. As a matter of practice, it is common for ASIC to identify this state-based offence when conducting criminal investigations, primarily due to the absence of any like offence in either the Corporations Act or the ASIC Act.

18. The fact that ASIC is investigating an alleged contravention of an Act other than the Corporations Act or the ASIC Act will have no practical effect on the manner in which any investigation and any subsequent litigation is conducted.

***Who is the likely defendant?***

19. Using a notice to produce books to identify the likely defendant to any litigation can be achieved by identifying the target of the investigation. This information can again be obtained by analysing the specific words used in the notice.

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<sup>10</sup> ASIC Act sub-paragraph 13(1)(b)(i).

<sup>11</sup> ASIC Act sub-paragraph 13(1)(b)(ii).

20. In that regard, a notice to produce books will, as a matter of practice, state that the investigation either arises out of the conduct of the affairs of:

- a. a company or other corporate entity and its officers, employees, agents, representatives, associates and / or related entities; or
- b. a particular individual.

21. As a result of this, you will be in a position to determine whether it is the person or entity that you are representing that is the likely defendant in any litigation. Alternatively, it will assist you in determining whether your client is on the periphery of the investigation and merely being used by ASIC to provide information relevant to its investigation into another person or entity. Common examples of this latter type of notice are notices that are served on banks to obtain the banking records of the investigation targets.

***What is the likely subject matter of the litigation?***

22. The final clue about ASIC's litigation objectives that can be obtained from a notice to produce documents is the likely subject matter of any litigation. In that regard, there are four separate provisions within the ASIC Act which allow ASIC to serve notices to produce books. Those provisions are in two categories. The first category is the general power to compel the production of books that are in a person's possession.<sup>12</sup> Obviously, a notice of this nature will provide few clues about the likely subject matter of future litigation.

23. The second category however is the provisions which allow ASIC to compel the production of books of a specific type. That is, books about:

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<sup>12</sup> ASIC Act section 33.

- a. the affairs of a body corporate or a registered scheme;<sup>13</sup>
- b. financial products;<sup>14</sup> and
- c. financial services.<sup>15</sup>

24. By specifying these matters, a notice served under one of the provisions provides a strong indication of the subject matter of ASIC's investigation by telling you whether it is the affairs of a body corporate or particular financial products or services that are under consideration. By doing this, it also provides you with a strong indication as to the likely subject matter of any litigation which may flow from an ASIC investigation.

### **Compulsory Examinations**

25. As has already been noted, the majority of ASIC's investigative and information gathering powers are contained in Part 3 of the ASIC Act.<sup>16</sup> Division 1 of part 3 sets out the circumstances in which ASIC can commence a formal investigation.<sup>17</sup> As a matter of practice, this usually occurs by a staff member of ASIC recording their decision to commence a formal investigation in a written file note.<sup>18</sup>

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<sup>13</sup> ASIC Act section 30.

<sup>14</sup> ASIC Act section 31.

<sup>15</sup> ASIC Act section 32A.

<sup>16</sup> Note, there are some investigative and information gathering powers which do not appear in Part 3 of the *ASIC Act 2001*. For example, see section 912C and 912E of the *Corporations Act 2001* which allows ASIC to give a direction Financial Services Licensee to give to ASIC a written statement containing specified information about the financial services provided by the licensee, its representatives or the business being carried on and Division 4 of Part 3 of the *ASIC Act* relating to requirements to disclose certain information about financial products. These provisions, relevant to specific areas of ASIC's jurisdiction, are beyond the general scope of this paper.

<sup>17</sup> See in particular ASIC Act sections 13, 14 and 15.

<sup>18</sup> That file note will usually be signed by a staff member of ASIC who has a delegation from the Commission to conduct investigations. Such file notes are usually exhibited to an affidavit in support of any civil application or disclosed pursuant to the various disclosure obligations which exist in criminal cases.

Importantly, it is not until this has happened that ASIC has its full suite of investigative tools at its disposal.

26. One of the most common and effective investigative tools used by ASIC is its power to conduct compulsory examinations pursuant to section 19 of the ASIC Act. At a basic level, this power allows ASIC to compel a person to appear before ASIC investigators to answer questions on oath or affirmation and to also give ASIC all reasonable assistance.<sup>19</sup>
27. When advising clients who are the subject of a section 19 notice, there two important matters to consider. The first is that a section 19 notice will contain many of the same clues about litigious intent as a notice to produce books. The reason being that the format of a section 19 notice is very similar to a notice to produce books. As a result, a section 19 notice can give a strong indication of the likely defendant in any subsequent litigation and whether that litigation is likely to be criminal, civil or administrative.<sup>20</sup>
28. Secondly, to a certain extent the way in which a person responds to a section 19 notice can provide a small opportunity to shape the future conduct of any litigation ASIC may bring.

***Compulsory examinations and section 68 of the ASIC Act***

29. Whilst not always the case, there are times when ASIC uses its powers under section 19 of the ASIC Act to examine people who are the targets of their investigations. Alternatively, it is common that the recipient of a section 19 notice is concerned that they are sufficiently implicated in the matters under

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<sup>19</sup> ASIC Act subsection 19(2).

<sup>20</sup> The process for analysing notices to determine these matters are set out in detail at paragraphs 13 to 21 above, in relation to notices to produce books.

investigation that they may incriminate themselves by answering questions at a compulsory examination.

30. In either of these circumstances, section 68 of the ASIC Act is of critical importance.

31. Essentially, the effect of section 68 is that a person who is compulsorily examined can limit the extent to which ASIC can use the evidence obtained from a compulsory examination in any subsequent litigation. To invoke section 68, the examinee needs to make a claim of “privilege” before giving any evidence that might incriminate them. By doing this, any self – incriminating answer, following the claim of privilege, will be inadmissible in two types of litigation. That is:

- a. criminal proceedings; and
- b. proceedings to impose a penalty.<sup>21</sup>

32. Whilst the concept of what constitutes criminal proceedings is relatively simple, over recent times there has been a shift in the law relating to what constitutes “proceedings to impose a penalty.” In that regard, for many years, ASIC had relied on various authorities<sup>22</sup> to assert that a claim of privilege pursuant to section 68 of the ASIC Act was not relevant to the various forms of administrative hearings that ASIC is empowered to conduct.<sup>23</sup> The reason for that position was said to be that such administrative hearings are conducted for the purpose of protecting the public, rather than for the purpose of imposing a penalty.

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<sup>21</sup> ASIC Act paragraphs 68(3)(a) and (b).

<sup>22</sup> The relevant authorities are helpfully summarised by Santow J in the case of *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 at 97 – 9.

<sup>23</sup> See for example ASIC Act sections 206F, 915C and 920A.

33. ASIC persisted with that position until 2004 when the High Court delivered its decision in the case of *Rich & Anr v ASIC*.<sup>24</sup> In that case, the Court said that the various administrative disqualification; licensing and banning orders that ASIC is empowered to make are in fact proceedings to impose a penalty.<sup>25</sup> The effect of this decision was that a claim of privilege under section 68 became even more effective in limiting the extent to which ASIC could use self – incriminating evidence given in a compulsory examination.
34. Not surprisingly, ASIC were aggrieved by the consequences of the High Court’s decision and as a result set about securing legislative amendments to restore the position to that which existed prior to *Rich*.<sup>26</sup>
35. In response, parliament made an amendment to the Corporations Act. That amendment was to introduce section 1349, which came into force 2008. The effect of the amendment is to restore the position to that which existed before the High Court’s decision in *Rich*.<sup>27</sup> As a result, ASIC are again able to use self – incriminating evidence given by a witness during a compulsory examination as probative evidence in the various administrative proceedings ASIC is empowered to conduct.
36. Notwithstanding that, section 68 remains an effective way of influencing the extent to which ASIC can rely upon evidence given at a compulsory examination, particularly in criminal and civil penalty proceedings. For that reason, it is critical that those who are compulsorily examined by ASIC are both aware of and exercise their rights pursuant to section 68 of the ASIC Act.

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<sup>24</sup> (2004) 78 ALJR 1354; 209 ALR 271; [2004] HCA 42

<sup>25</sup> See for example Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at paragraphs 29 – 32 and McHugh J at paragraphs 41 and 42.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

## The types of search warrant available to ASIC

37. The final matter to be considered in the context of using ASIC's investigation processes to obtain an insight into ASIC's litigation objectives is to consider an important difference which exists in ASIC's search warrant powers. This difference is important because it identifies whether ASIC is conducting a criminal investigation or not.
38. In that regard, the right to obtain a search warrant is conferred upon ASIC<sup>28</sup> by either the Commonwealth *Crimes Act* 1914 ("**Crimes Act**") or under Part 3, Division 3 of the ASIC Act.

### *Crimes Act warrants*

39. In relation to warrants obtained under the Crimes Act, such warrants are issued pursuant to section 3E of the Crimes Act. As a matter of practice this occurs by an application being made to a magistrate and, if that application is successful, a warrant being issued to the Australian Federal Police ("**AFP**"). An ASIC officer or officers are then appointed "constables assisting" for the purpose of executing the warrant.
40. As a result of this process, Crimes Act warrants are not specifically issued to ASIC or any of its officers. Moreover, if ASIC uses the assistance of the AFP to make use of this particular power, a significant limitation exists in the extent to

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<sup>28</sup> In the interests of completeness, it is noted that there are also other provisions in the Corporations Act which deal with Search Warrants. An example is section 530C which confers a search warrant power in the context of a company that is being wound up. Provisions such as this are not generally used by ASIC deterrence and therefore are beyond the scope of this paper.

which ASIC can use evidence obtained in this way.<sup>29</sup> That limitation arises in two contexts:

- a. first, by the nature of the evidence that can be seized under a section 3E Crimes Act warrant. In that regard, the Crimes Act only allows a warrant issued under section 3E to be used for the purpose of obtaining “evidential material.”<sup>30</sup> Evidential material is defined<sup>31</sup> as being “*a thing relevant to an indictable offence or a thing relevant to a summary offence...*” [emphasis added];
- b. secondly, by the manner in which evidence seized under a section 3E Crimes Act warrant is provided by the AFP to ASIC. In that regard, evidence seized under a section 3E Crimes Act warrant is provided by the AFP, as the warrant holder, to ASIC pursuant to subsection 3F(5) of the Crimes Act. That provision limits the basis upon which the AFP is entitled to do this as being “*for the purpose of investigating or prosecuting an offence to which the things [i.e., the evidence seized] relate.*” [emphasis added]

41. In short therefore, the statutory authorisation for both the execution of a Crimes Act warrant and then the provision of any items seized pursuant to such a warrant to ASIC defines the purpose for which ASIC can use the documents – that is, for the purpose of investigating or prosecuting a criminal offence. The AFP has no authority under the Crimes Act to make evidence seized during the execution of a Crimes Act warrant available to ASIC for any other purpose.<sup>32</sup>

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<sup>29</sup> As to the general concept of statutes defining the purpose for which information that has been compulsorily obtained can be used see *Johns v ASC* (1993) 178 CLR 408 at 423 per Brennan J and 435 – 6 per Dawson J.

<sup>30</sup> Crimes Act section 3E(1).

<sup>31</sup> Crimes Act section 3F(5).

<sup>32</sup> This conclusion is also supported by the relevant authorities. See in particular *Williams v Keelty* (2001) 184 ALR 411 [at paragraph 233] per Hely J.

42. As a result of this, by executing a Crimes Act warrant, ASIC's litigation objective will be the bringing of criminal proceedings.

***Part 3 Division 3 ASIC Act warrants***

43. The second type of search warrant which is readily available to ASIC is under Part 3 Division 3 of the ASIC Act. As has already been noted above, this part of the ASIC Act contains provisions which allow ASIC to compel the production of documents in certain circumstances.

44. The search warrant powers in Part 3 Division 3 of the ASIC Act appear at sections 35 and 36. In order to enliven these provisions, ASIC must first have served a notice to produce documents and the recipient of that notice must have either refused or failed to comply with it.<sup>33</sup> If and when that occurs, ASIC can then apply to a magistrate for a warrant under Part 3 Division 3 of the ASIC Act. Unlike a Crimes Act warrant, these warrants are issued to ASIC and its officers, rather than the AFP.

45. In relation to this type of warrant, there are three important considerations to keep in mind:

- a. the first is the limited circumstances in which they can be used. In that regard ASIC's power to seek a warrant of this nature is only enlivened once there has been non-compliance with a notice to produce documents;
- b. the second is the type of evidence which can be obtained pursuant to a Part 3 Division 3 warrant. That is to say, rather than allowing ASIC to obtain "evidential material" as with a Crimes Act warrant, a Part 3 Division 3

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<sup>33</sup> ASIC Act paragraphs 35(1)(a) and (b).

warrant, only allows ASIC to seize documentary evidence, or as it is described in the ASIC Act “books”;<sup>34</sup>

- c. the third is the manner in which ASIC can use documents seized pursuant to a Part 3 Division 3 warrant. In that regard, such a warrant is not limited in the same way as Crimes Act warrant. That is to say that any documents seized pursuant to a warrant of this nature can be used in criminal, civil or administrative proceedings and, at least theoretically, this type of warrant could be used just as readily in the course of surveillance as it could in the course of a formal investigation.

46. As a result of these factors Part 3 Division 3 warrants are often of limited assistance when it comes to determining ASIC’s litigation objectives. For that reason, analysis of the original notice to produce books<sup>35</sup> (i.e., the notice that was not complied with and gave rise to the warrant) will be the most useful resource in obtaining an insight into ASIC’s litigation objectives.

## **COMPETING CONSIDERATIONS WHEN COMMENCING LITIGATION**

47. In determining whether or not to commence litigation, ASIC must weigh up a number of competing considerations. One of the reasons for this is the obstacle that the commencement of proceedings creates in relation to the use of ASIC’s compulsory powers.

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<sup>34</sup> The relevant provision only allows ASIC to seize “books” pursuant to such a warrant. “Books” is defined by section 5 of the ASIC Act as being, inter alia, a register, financial reports, a document, a bankers book and any other record or information.

<sup>35</sup> See paragraphs 7 to 24 for the process of analysing such notices in relation to ASIC’s litigation objectives.

### **The commencement of proceedings and the use of compulsory powers**

48. An excellent example of this issue arises in the context of the urgent injunctive relief often sought by ASIC. In that regard, it is common for ASIC to seek urgent injunctions to protect investor funds.<sup>36</sup> These proceedings use statutory injunction provisions<sup>37</sup> to seek orders similar to *Mareva*<sup>38</sup> injunctions to freeze assets and prevent the transfer of funds. Because of their urgency, these applications invariably occur before ASIC has completed its investigation into a particular matter.

49. Whilst it is not the case that ASIC is forbidden from using its compulsory powers, once litigation has commenced, the extent to which they are able to use those powers is significantly reduced. In that regard, a limited authority exists:

- a. first through some of the statutory injunction provisions which are predicated on there being a continuing investigation;<sup>39</sup> and
- b. secondly through the common law, where the High Court has stated, in a related regulatory jurisdiction, that of itself the use of a compulsory power is not unlawful, even if the sole purpose of the use of that power is to collect evidence for use in current litigation.<sup>40</sup>

50. Although this limited authority exists, it is important to appreciate that the permission ASIC has to use its compulsory powers, once litigation has commenced, is not absolute. In that regard, authorities relating to the use of

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<sup>36</sup> See for example *ASIC v Wynhoven* [2004] FCA 1418.

<sup>37</sup> See for example Corporations Act sections 1323 and 1324 and ASIC Act section 12GD.

<sup>38</sup> *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509

<sup>39</sup> (or prosecution or civil proceeding) per ASIC Act subsection 1323(1)

<sup>40</sup> *Environmental Protection Authority v Caltex* (1993) 178 CLR 477 at 517 – 8 and 558 – 9. See also *Hammond v The Commonwealth* (1982) 152 CLR 188 at 206 per Deane J

compulsory powers by other Commonwealth regulators<sup>41</sup> indicate that compulsory powers cannot be used to obtain an advantage in litigation that it would not otherwise have available.

51. An analysis of the authorities in this area indicates that:

- a. the law of contempt prevents regulators (including ASIC) from using coercive investigative powers in connection with current court proceedings to which that regulator is a party, if by exercising that power, the statutory authority will gain a procedural advantage that it would not have had under the rules of procedure governing the particular proceeding.<sup>42</sup> In the context of ASIC investigations and litigation, examples of this might be:
  - i. serving a notice to produce books to obtain access to documents that it would not be entitled to through the usual discovery process; or
  - ii. serving a notice to produce books to avoid the implied undertaking not to use discovered documents for another purpose; or
  - iii. compulsorily examining a witness who can not be compelled to give evidence before the Court.
- b. in order to make out the contempt any interference with the administration of justice must be “serious, real or substantial;”<sup>43</sup>

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<sup>41</sup> See *Federal Commissioner of Taxation v De Vonk* (1995) 61 FCR 564; *Watson v Federal Commissioner of Taxation* (1999) 169 ALR 213 and *Brambles Holdings Limited v Trade Practices Commission* (1980) 32 ALR 328 at 340, citing *Attorney General v Butterworth* [1963] 1 QB 696 at 725.

<sup>42</sup> *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467 – 468. See also *Brambles Holdings v Trade Practices Commission* (1980) 32 ALR 328 at 340 and 341 per Franki J.; *Sentry Corporation v Peat Marwick Mitchell & Co* (1990) 24 FCR 463 at 492 – 4.

<sup>43</sup> *Attorney General v Times Newspapers* [1974] AC 274 at 303.

- c. the test for determining whether the exercise of a compulsory power after court proceedings have been commenced constitutes a contempt is an objective one.<sup>44</sup> As such, the subjective intention of the particular investigator when exercising the compulsory power is irrelevant.

52. In summary then, the limited authority that ASIC has to use its compulsory powers in the course of litigation is an important consideration in ensuring that ASIC does not over-step the extent to which it is entitled to use its coercive powers, once litigation has been commenced.

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<sup>44</sup> Ibid.

## **PART 2 – ONCE THE CASE HAS STARTED**

### **ASIC’S APPROACH TO LITIGATION GENERALLY**

#### **The obligation to act as a model litigant**

53. Along with the majority of other federal regulators, ASIC has an obligation to act as a model litigant.<sup>45</sup> In that regard, ASIC is what is known as an “FMA Agency”<sup>46</sup> and subject to the Attorney General’s *Legal Services Direction 2005*.<sup>47</sup> In practical terms,<sup>48</sup> the direction and therefore the obligation to act as a model litigant applies to all forms of ASIC litigation.<sup>49</sup>

54. The essence of the direction is that ASIC, as a party to litigation, must act with complete propriety, fairly and in accordance with the highest professional standards.<sup>50</sup> More specifically, the obligation means, inter alia, that:

- a. ASIC must not start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution;<sup>51</sup>

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<sup>45</sup> Details of the obligation are set out at Appendix B to the *Legal Services Direction 2005*. ASIC’s obligation in that regard was also confirmed on 7 November 2008 in a speech by the Chairman of ASIC to the Australian Corporate Lawyers Association. A copy of that speech is available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/new-asic-7-11-2008-ACLA.pdf/\\$file/new-asic-7-11-2008-ACLA.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/new-asic-7-11-2008-ACLA.pdf/$file/new-asic-7-11-2008-ACLA.pdf) at page 12.

<sup>46</sup> FMA Agency is defined in Part 4 of the *Legal Services Direction 2005* as an agency that it subject to the *Financial Management and Accountability Act 1997*.

<sup>47</sup> See section 55ZF of the *Judiciary Act 1903*.

<sup>48</sup> Paragraph 15.

<sup>49</sup> Specific provision is made in relation to merits review proceedings such as those conducted by the Administrative Appeals Tribunal – see *Legal Services Direction 2005*, Appendix B, paragraphs 3 and 4 and the note thereto.

<sup>50</sup> The expectation that Commonwealth Agencies generally must act as a model litigant has also been recognised by the Courts. See for example *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

<sup>51</sup> *Legal Services Direction 2005*, Paragraph 4.2.

- b. ASIC should endeavour to limit the scope of legal proceedings, including by considering and participating in alternative dispute resolution, where appropriate;<sup>52</sup>
- c. ASIC must keep litigation costs to a minimum by:
  - i. not requiring a party to prove a matter ASIC knows is true;
  - ii. not contesting liability if they know a dispute is really about quantum;
  - iii. ensuring that arrangements are made so that the persons participating in settlement negotiations have the authority to settle matters;<sup>53</sup> and
- d. ASIC must not undertake appeals unless ASIC has a reasonable prospect of success, or it is otherwise in the public interest;<sup>54</sup>

55. Whilst this might give the impression that, by complying with its model litigant obligations, ASIC will go soft in its approach to litigation, this is not the case. In that regard, it is important to appreciate that in real terms, the directions main function is to impose an additional obligation on ASIC not to act inappropriately in relation to litigation. Specifically, it should be noted that under the direction ASIC:

- a. is still entitled to act in accordance with accepted legal principle and practice;<sup>55</sup>

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<sup>52</sup> *Legal Services Direction 2005*, Appendix B, subparagraph 2(d).

<sup>53</sup> *Ibid* subparagraph 2(e).

<sup>54</sup> *Ibid* subparagraph 2(h).

<sup>55</sup> *Legal Services Direction 2005*, paragraph 4.3.

- b. will not have commenced proceedings unless it has received written advice that there are reasonable grounds for doing so.<sup>56</sup> The effect of this is that ASIC will be confident about its prospects of success;
- c. is expressly not prevented from:
  - i. acting firmly to protect its interests;
  - ii. pursuing litigation in order to clarify a significant point of law (even if the opposing party wishes to settle the dispute);
  - iii. appealing on the basis that it is considered to be in the public interest;
  - iv. enforcing costs orders or seeking to recover its costs.<sup>57</sup>

56. For those reasons, whilst it is important to be aware of ASIC's model litigant obligations when advising clients involved in litigation against ASIC, you should not expect, in the usual course of events, that ASIC's model litigant obligations will have an impact on the way in which ASIC litigation is conducted.

## **CONSIDERATIONS RELEVANT TO SPECIFIC JURISDICTIONS**

57. In addition to the overarching obligation to act as a model litigant, there are a number of specific considerations that are relevant to specific types of ASIC litigation. An excellent example of this is the recent authorities dealing with the issue of whether civil proceedings should be stayed, pending the outcome of criminal investigations or litigation. These authorities bring into sharp focus the importance of the matters discussed in part 1 of this paper. That is to say, the importance of using the investigation process as a means of identifying ASIC's litigation objectives.

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<sup>56</sup> *Legal Services Direction 2005*, paragraph 4.7.

<sup>57</sup> *Legal Services Direction 2005*, Appendix B, notes 4 and 5.

### **Civil, criminal and civil penalty proceedings – when jurisdictions collide**

58. As has already been noted, ASIC regularly brings proceedings in civil courts. At a most basic level, these proceedings take one of two forms.

- a. the first are cases in which ASIC seeks a declaration that a particular provision has been contravened and, on the basis of that contravention, also seeks orders in the style of injunctions. Those injunctions are usually designed to either compel or prevent someone from engaging in particular conduct. An example of this type of proceeding is the misleading and deceptive conduct action ASIC took in relation to unsolicited offers to purchase securities off – market<sup>58</sup> (“**general civil proceedings**”).
- b. the second are civil penalty proceedings. The sections of the Corporations Act which give rise to civil penalty proceedings are set out in section 1317E of the Act. At a basic level, once ASIC has obtained a declaration that one of these provisions has been contravened, ASIC is entitled to seek an order pursuant to section 1317G that the defendant pay the Commonwealth a sum of money. This sum of money is in many ways akin to a fine in the criminal jurisdiction<sup>59</sup> (“**civil penalty proceedings**”).

59. In certain instances, the conduct which gives rise to either the general civil or civil penalty proceeding may also be relied upon by ASIC to bring either a criminal investigation, or a criminal prosecution.<sup>60</sup>

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<sup>58</sup> See for example *National Exchange Pty Ltd v ASIC* (2004) 22 ACLC 609.

<sup>59</sup> The leading decision concerning the imposition of a pecuniary penalty after civil penalty proceedings is *Australian Securities and Investments Commission v Adler (No 5)* (2002) 42 ACSR 80, where Santow J summarised the principles relevant to the imposition of such penalties.

<sup>60</sup> As a matter of completeness, it should be noted that criminal prosecutions are not brought by ASIC per se. Rather, criminal prosecutions which follow an ASIC investigation are brought by the Commonwealth Director of Public Prosecutions.

60. In a legal sense, ASIC's approach in the bringing of civil proceedings based on conduct that might be considered criminal has led to a clash of two lines of legal authority. Those lines of authority are:

- a. first, the various cases which relate to a plaintiff's right to have civil proceedings heard and determined in the ordinary course of the Court's business.<sup>61</sup> This line of authority includes the concept that a plaintiff (i.e., ASIC) is not debarred from pursuing a civil action in accordance with the normal rules *merely* because it would require the defendant in the civil proceeding to disclose his defence in any criminal proceeding which might occur.
- b. secondly, the cases which relate to the fundamental importance of the privilege against self incrimination. These cases include the notion that the right to silence and privilege against self incrimination can only be abrogated by an express statutory provision.<sup>62</sup>

61. In recent times, the conflict between these two lines of authority has led to a shift in the law, which practitioners in this area seem increasingly fond of trying to exploit.<sup>63</sup> The extent of that shift differs depending on whether the matter under consideration is a general civil proceeding or a civil penalty proceeding.

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<sup>61</sup> See for example *McMahon v Gould* (1982) 7 ACLR 202; *Australian Securities and Investments Commission v Kavanagh* (1993) 12 ACSR 69 at 72.

<sup>62</sup> *Reid v Howard* (1995) 184 CLR 1 at 5 and *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309.

<sup>63</sup> The most recent example occurred in the context of the Ope Prime collapse where an application to stay civil proceedings which did not involve ASIC. Whilst the Court did not need to decide the stay application for other reasons, this is nevertheless an example of the growing relevance of this area of securities litigation - see <http://business.theage.com.au/business/some-breathing-space-for-exopes-prime-boss-20090619-crai.html>

*Criminal v general civil proceedings*

62. Considering first the competing considerations which arise in relation to criminal and general civil proceedings, it should be noted that in most areas of the law general civil proceedings are not allowed to interfere with criminal matters.<sup>64</sup> Notwithstanding that, in company law and more specifically, proceedings brought by ASIC, it had become common practice for relief to be granted in general civil proceedings, on the basis of conduct which might also be considered criminal.<sup>65</sup>
63. This situation persisted until 2007 when Finkelstein J in the Federal Court of Australia delivered his decision in the case of *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd*.<sup>66</sup>
64. In that case, Finkelstein J provided a summary of the law in relation to the granting of relief by civil courts for conduct that may be considered criminal. In doing so, he concluded that the approach of using the civil and criminal jurisdictions in tandem is not always appropriate and said:

*“the English and Australian authorities that warn of the dangers of a civil court becoming involved in criminal conduct continue to apply in an appropriate company case... the court should be wary of granting relief, including the granting of a declaration or injunction, if the case is likely to end up before a criminal court. Ordinarily, a civil court should not intervene in those circumstances unless its failure to do so will result in*

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<sup>64</sup> See generally *Sankey v Whitlam* (1978) 142 CLR 1 at 25 per Gibbs ACJ; *Inglis v Moore* (1979) 24 ALR 411 at 421 per Brennan and Davies JJ.

<sup>65</sup> See for example *Australian Securities and Investments Commission v Fuelbanc Australia Ltd* (2007) 25 ACLC 1230 where Heerey J refers to the “consistent practice” in company cases of courts making declarations of criminal conduct.

<sup>66</sup> [2007] FCA 1868.

*irreparable injury...[or] the case involves undisputed facts and the issue raised gives rise to a question of pure law...’’<sup>67</sup>*

65. By reaching this conclusion, the court has forced ASIC to reconsider its approach to seeking declarations and injunctions on the basis of conduct that could also give rise to an allegation of a criminal offence. The effect of this is that it offers defendants in ASIC litigation an important opportunity to protect their right to silence and the privilege against self incrimination. Moreover, for ASIC, it is now more important than ever that ASIC carefully consider its overall objectives before deciding to commence general civil proceedings, based upon conduct which may also amount to a criminal offence.

***Criminal v civil penalty proceedings***

66. Just over a year after Finkelstein J’s decision in *HLP Financial Planning*, Robson J<sup>68</sup> of the Supreme Court of Victoria was also asked to consider this issue. That occurred in the case of *Australian Securities and Investments Commission v Flugge & Ors*<sup>69</sup> (“ASIC’s AWB Case”).

67. In that case, Robson J considered many of the issues relevant to the clash of jurisdictions. He concluded<sup>70</sup> that he would have been bound to follow the line of authority<sup>71</sup> as to the right of a plaintiff to have a proceeding heard and determined in the ordinary course of the Court’s business, but noted that a superior court may look to refine the principles set out in that case in light of the High Court’s statements about the primacy of the right to silence.<sup>72</sup>

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<sup>67</sup> [2007] FCA 1868 at paragraph 58.

<sup>68</sup> In November 2008.

<sup>69</sup> [2008] VSC 473.

<sup>70</sup> Paragraph 93 – 106.

<sup>71</sup> Starting with *McMahon v Gould* (1982) 7 ACLR 202

<sup>72</sup> See *Reid v Howard* (1995) 184 CLR 1.

68. More importantly however, his Honour also drew an important distinction between general civil proceedings on the one hand and civil penalty proceedings on the other. In that regard, he said:

*“The critical difference between these civil penalty proceedings and the typical civil action...is that the statutory scheme in Part 9.4B [i.e., the statutory scheme relating to civil penalty proceedings] overrides the principles in McMahan v Gould where criminal proceedings are started. The legislation prevents a civil penalty being imposed where a criminal conviction is obtained and provides that a civil penalty proceeding may not be continued once the criminal proceedings have started. Although Part 9.4B is silent on the position where criminal proceedings are threatened as opposed to started, the granting of a stay where criminal proceedings are threatened is not inconsistent with the purpose and object of s 1317N.”*<sup>73</sup>

69. On this basis, Robson J granted a stay to all but one of the defendant’s in the ASIC AWB case.<sup>74</sup>

70. Whilst it remains to be seen what, if anything ASIC does about this situation, it seems likely that these two cases will lead to either consideration of this matter by the High Court or legislative amendments. Nevertheless, until that occurs, the importance of these two decisions to those involved in ASIC based litigation can not be understated. They represent a significant shift in the law and present an opportunity for practitioners to ensure that their clients can fully exercise their rights in relation to investigations and litigation which involve a mix of criminal and either general civil or civil penalty proceedings.

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<sup>73</sup> [2008] VSC 473 at paragraph 97.

<sup>74</sup> The defendant for whom a stay was not granted did not have criminal charges recommended against him following the Cole Royal Commission and therefore criminal proceedings were not considered to have been “threatened”.

## Civil proceedings

71. In addition to the interplay between civil and criminal jurisdictions and the considerations arising from ASIC's obligation to act as a model litigant generally, there are also a number of matters, specifically relating to the area of civil proceedings involving ASIC that are worth noting. Those considerations also arise from ASIC's obligation to act as a model litigant and apply to issues of alternative dispute resolution and attempts to settle civil proceedings which involve ASIC.

### *ASIC and alternative dispute resolution*

72. In relation to the issue of alternative dispute resolution, ASIC is obliged to consider alternative dispute resolution before it commences court proceedings.<sup>75</sup> Whilst that will often be a hollow requirement due to the regulatory nature of most of ASIC's work, it is nevertheless important to appreciate that the requirement exists.

73. Furthermore, this obligation is becoming increasingly relevant due to the increasing number of cases that are being referred to mediation, by the Courts, regardless of whether those matters are regulatory in nature.<sup>76</sup> If that occurs, the model litigant policy contains requirements that ASIC participate fully and effectively in such alternative dispute resolution procedures and that those who attend such alternative dispute resolution must also have the authority to settle the proceeding, should a resolution be reached.<sup>77</sup>

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<sup>75</sup> *Legal Services Direction 2005* Appendix B, paragraph 5.1.

<sup>76</sup> A recent example is the various proceedings brought by ASIC in response to the Westpoint collapse. All of those proceedings were mediated from 15 – 19 June 2009 by former High Court Justice, the Honourable Ian Callinan AC QC. An example of a case that was commenced by ASIC and then settled at mediation is *ASIC v Marshall Bell Hawkins* [2002] FCA 1511

<sup>77</sup> *Legal Services Direction 2005* Appendix B, paragraph 5.1.

*ASIC and settlement negotiations*

74. Whilst again, the regulatory nature of ASIC's work means that matters are not always conducive to settlement through negotiation, this nevertheless does occur from time to time. In addition to this, ASIC has recently begun commencing proceedings on behalf of investors specifically for the purpose seeking damages or a return on investments.<sup>78</sup> For this reason, dealing with ASIC in relation to settlement negotiations is likely to become an issue of increasing relevance to this area of the law.
75. In that regard, there are two matters that are of particular importance. The first is the fact that ASIC's model litigant obligations will generally not allow it to agree to terms of settlement that are confidential.<sup>79</sup> That is unless confidential terms would be in the interests of the Commonwealth.
76. The second consideration is that the model litigant obligation also contains specific provisions relating to the handling of monetary claims.<sup>80</sup> Those provisions mandate that generally speaking monetary claims are to be settled in accordance with legal principle and practice. It also states however that settlement amounts exceeding \$25,000 must only be agreed to if written advice has been received from the Australian Government Solicitor or other legal adviser external to ASIC and a specific authorised officer of ASIC has agreed to the settlement. The Attorney General is the only person who may authorise a departure from the usual procedure.

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<sup>78</sup> A relevant example of this are the numerous proceedings ASIC has commenced in response to the Westpoint collapse.

<sup>79</sup> *Legal Services Direction 2005* paragraph 4.5.

<sup>80</sup> *Legal Services Direction 2005*, Appendix C. Note, this appendix does not apply to any action to enforce a penalty under commonwealth legislation, such as civil penalty proceedings under the *Corporations Act 2001*.

77. Both of these requirements may have an impact on any settlement negotiations and should be considered prior to the making of any offer of settlement to ASIC.

### **Administrative Hearings**

78. As has been mentioned earlier in this paper, ASIC often exercises its powers to make decision about whether certain people should be banned as company directors, financial advisers or cease to hold a financial services licence. Often, before ASIC is entitled to make a decision such as this, it is obliged to conduct an administrative hearing.<sup>81</sup>

79. The procedure at these hearings is governed by a document available from the ASIC website known as the “Hearings Practice Manual”.<sup>82</sup> This document sets out ASIC’s approach to most of the issues which might arise at such a hearings. It includes ASIC’s position on issues such as the burden of proof,<sup>83</sup> when adjournments will be granted<sup>84</sup> and a person’s right to a review of ASIC’s decision.<sup>85</sup>

80. Whilst most of what is contained in ASIC’s Hearings Practice Manual is consistent with the various obligations which arise under administrative law, there are two important matters that are not set out in the Manual. Those matters are:

- a. the interaction between ASIC administrative hearings and Enforceable Undertakings under the ASIC Act; and
- b. the interaction between the right to review of an ASIC administrative decision and ASIC’s obligation to act as a model litigant.

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<sup>81</sup> See for example Corporations Act section 920A.

<sup>82</sup> See [www.asic.gov.au/hearingsmanual](http://www.asic.gov.au/hearingsmanual)

<sup>83</sup> Page 19.

<sup>84</sup> Page 20.

<sup>85</sup> Page 21.

*Administrative Hearings and Enforceable Undertakings*

81. In relation to the manner in which enforceable undertakings under section 93AA and 93A of the ASIC Act intersect with administrative hearings, it is firstly necessary to say something about the nature of an enforceable undertaking.

82. At a most basic level, an enforceable undertaking is an undertaking which the target of an ASIC investigation or litigation can offer to ASIC as a means of dealing with the conduct that ASIC is concerned about. Often, an enforceable undertaking is similar to the type of undertaking given to a Court in place of a prohibitive or mandatory injunction.

83. If the person who gives the undertaking fails to comply with it, ASIC can apply to the Court to obtain orders to enforce the undertaking.<sup>86</sup>

84. Whilst there a number of factors which ASIC will consider when an enforceable undertaking is offered,<sup>87</sup> such undertakings often arise in the context of ASIC administrative hearings. The reason for this is simple. On a practical level, ASIC administrative hearings usually deal with the least serious transgressions of the Corporations Act or ASIC Act. For that reason, enforceable undertakings are more likely to be both offered and accepted in the context of ASIC administrative hearings.

85. No doubt as a result of this, the Hearing's Practice manual specifically refers to ASIC's power to accept enforceable undertakings in certain circumstances.<sup>88</sup>

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<sup>86</sup> ASIC Act subsection 93AA(4) allows the Court to make an order directing the person to: comply with the terms of the undertaking; pay the Commonwealth any amount obtained as a result of the breach of the undertaking; compensate any person who has suffered loss as a result of the breach or grant any other order that the Court thinks appropriate.

<sup>87</sup> These are set out in ASIC Practice Note 69.

<sup>88</sup> Page 21.

Indeed, the manual gives the impression that an enforceable undertaking is the sort of thing that could or should be offered in the course of an administrative hearing. This is not the case.

86. As a general rule, the ASIC delegate who conducts administrative hearing and makes a decision following that hearing does not have the appropriate delegation from the ASIC Commission to accept an enforceable undertaking. As a result, any submission at an administrative hearing that an enforceable undertaking would be an appropriate disposition for a matter will be met with a statement that any such offer should have been made before the matter proceeded to an administrative hearing and as such the submission will be rejected.

87. As a result of this, it is vital that any offer of an enforceable undertaking be made well before any administrative hearing is conducted.

***The right to review and ASIC's model litigant obligation***

88. Most of the provisions by which ASIC conducts administrative hearings have a statutory right of review<sup>89</sup> by the Administrative Appeals Tribunal (“AAT”). ASIC's obligation to act as a model litigant extend to these proceedings<sup>90</sup> and specifically imposes upon ASIC an obligation that ASIC pay “close attention” to its obligation<sup>91</sup> to assist the AAT in making its decision in relation to the merits review.

89. From a practical point of view, and from experience, it can often be of great assistance to remind ASIC of this obligation in the context of appeals to the AAT. This is particularly so as any assistance given by ASIC to the AAT will almost

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<sup>89</sup> Corporations Act sections 1317B, 1317C and 1317D.

<sup>90</sup> *Legal Services Direction 2005* page 23.

<sup>91</sup> *Administrative Appeals Tribunal Act 1975* section 33(1AA).

always provide an equal amount of assistance to any applicant for review and those who advise them.

### **PART 3 – RECENT DEVELOPMENTS AND FUTURE DIRECTIONS**

90. Whilst ASIC has been the subject of a number of changes recently, mostly as a result of changes at Commission level, there are two specific matters that are of particular note. The first of these is the recent action that ASIC has taken in the role of advocate for investors and the second relates to ASIC's growing sphere of influence.

#### **ASIC AS ADVOCATE FOR THE INVESTOR**

91. In relation to ASIC adopting the role of advocate for investors, it seems there has been a recent shift in ASIC's approach to such matters. An analysis of the type of litigation that ASIC has brought in the past shows that ASIC has traditionally been reluctant to commence proceedings which effectively placed it in the position of advocate for investors or creditors of failed investment schemes.

92. It would appear that recently, there has been a shift away from this traditional reluctance. Indeed, the most high profile example is the litigation that ASIC has commenced following the Westpoint collapse.<sup>92</sup> In that regard, ASIC has been proudly publicising that it has taken a total of 17 civil actions and aims to recover investor funds of approximately \$273 million.<sup>93</sup>

93. The relevance of this shift in ASIC's approach to those who advise clients in this area is two fold:

- a. Firstly, on a practical level, it is likely that, just as the directors, financial advisors and auditors have found in Westpoint, this change in approach is

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<sup>92</sup> See generally [www.westpoint.asic.gov.au](http://www.westpoint.asic.gov.au)

<sup>93</sup> Ibid.

likely to lead to defendants simultaneously defending both regulatory and commercial proceedings, with ASIC as the plaintiff in both matters;

- b. Secondly, it is likely to mean that the specific matters discussed at paragraphs 71 – 77 above, relating to ASIC and its specific approach to the commercial settlement of civil proceedings will become even more relevant to practitioners than it has been in the past.

### **ASIC’S GROWING SPHERE OF INFLUENCE**

94. The second issue that should be noted in this area is ASIC’s growing sphere of influence. In that regard, in 2008, the Council of Australian Governments agreed that the Commonwealth Government would take over responsibility for the regulation of consumer credit.<sup>94</sup> As a result, ASIC will now become the national regulator for consumer credit and finance broking, taking over from the states and territories.

95. As a result of this, personal loans, credit cards, consumer leases, overdrafts and line of credit accounts, among other products and services, will be regulated under Commonwealth legislation and administered by ASIC.

96. Whilst not yet passed into law, the program to bring the regulation of consumer credit under the jurisdiction of ASIC will be introduced in two phases. The first is by the Commonwealth Government assuming responsibility for the Uniform Consumer Credit Code by enacting it as Commonwealth law. As part of this phase:

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<sup>94</sup> <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Credit%20homepage>

- a. a national licensing regime will be established to require providers of consumer credit and credit-related brokering services and advice to obtain a licence from ASIC;
  - b. ASIC's powers will be extended to make it the national regulator of a new credit framework. This is said to include enhanced enforcement powers, although the precise nature of those powers have not yet been identified;
  - c. extending the operation of the Corporations Act to regulate margin lending.
97. In addition to phase one, there are also plans for a second phase which will mean that ASIC will become responsible for the regulation of:
- a. credit for small businesses;
  - b. investment loans other than margin loans and mortgages for residential investment properties.
98. Legislation to give effect to phase one was introduced into Parliament on Thursday, 25 June 2009 and it is planned to introduce legislation to give effect to phase two in or about mid 2010.
99. Whilst it is not yet clear what specific changes will result from this expanding area of influence, it is certain that ASIC will become bigger and busier through its regulation of credit. Similarly this is likely to lead to an increase in the amount of work undertaken by legal practitioners who advise clients in relation to their dealings with ASIC.