ASIC headed for a health check at Senate Inquiry

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A senate inquiry into Australia’s corporate regulator will question how well it does its job. Image sourced from www.shutterstock.com

On the face of it, the banning of seven financial planning advisers and $50 million worth of compensation paid to burnt investors would be considered a good outcome for our corporate regulator.

But the handling of the case of Commonwealth Financial Planning Limited (CFP), a wholly-owned subsidiary of the Commonwealth Bank of Australia, has led to a senate committee inquiry into the ability of the Australian Securities and Investment Commission (ASIC) to deal with corporate wrongdoing.

Pursuant to s 1(2)(b) of the ASIC Act ASIC, in performing its functions and exercising its powers must strive to promote the confident and informed participation of investors and consumers in the financial system.

These exact words form part of the preliminary wording of the enforceable undertaking against CFP’s Simon Langton, who with colleague Don Nguyen and five others employed by CFP have been found by ASIC to have given inappropriate advice to clients, particularly during 2008.
ASIC’s investigations resulted in the seven advisers being banned, 1,127 customers being compensated approximately $50 million, with several cases yet to be resolved, and enforceable undertakings by some of the company’s advisers.

But despite the outcome, the case - notably the 16 month delay by ASIC to respond to whistleblowers’ warnings - has led to it being investigated by a Senate Economics References Committee. Submissions close in October.

Terms of reference

Under wide-ranging terms of reference, committee members will investigate ASIC’s enabling legislation, and any barriers preventing the corporate regulator from fulfilling its legislative responsibilities and obligations.

Senators will also look at how ASIC collaborates with other regulators and law enforcement bodies, how it manages complaints and importantly, the protections it offers to corporate and private whistleblowers.

Regulators will always face contradictory demands: being responsive to those they regulate but not overly familiar; act quickly but be cautious; stay within the parameters of your mission but be creative; be effective and detailed, but don’t overstep.

ASIC completes toward 200 investigations a year and claims a 90% rate of success in litigated matters. However its losses on some high-profile cases have attracted more media attention than its gains. For instance, it was found to have misjudged the seriousness of Steve Vizard’s conduct by being prepared to accept a settlement considered too lenient by the Federal Court.

It was also found to have misjudged the weight of evidence needed to find former One Tel founder Jodee Rich had breached his directors duties and again in the case of Fortescue Metals, when its case alleging misleading conduct by the company was criticised by the High Court.

However, overall, and as its statistics show, ASIC is a winner, and if not strictly a winner on each occasion, then at least a constant reminder to corporate Australia that there is an active framework of accountability.

The two main issues to arise from the CFP matter are the delay between ASIC’s initial knowledge of the circumstances and the commencement of action; and whether enforceable undertakings issued by ASIC were considered appropriate punishments for certain of the advisers.

Enforceable undertakings

The issue of enforceable undertakings has broader significance. In 2012, ASIC entered 18 such arrangements and so far this year, 11 appear on the Enforceable Undertakings Register. While not a particularly large number, there is concern the procedure allows companies and individuals to escape themselves out of non-compliance rather than face the litigation that would expose conduct and send a more tangible message to the business community.
The dichotomy faced by ASIC in relation to enforceable undertakings is between a certain, if moderated, negotiated outcome, and an uncertain but higher profile litigated outcome. The balance between cost and outcome is crucial with well-resourced defendants who can tie up proceedings. However, the terms of the senate inquiry around ASIC’s enabling legislation and potential barriers seems broad enough to cover this value-for-money issue.

Advocacy role

A further factor in weighing ASIC’s role is the multiple impact of its investigations. In large corporate collapses, ASIC can be an advocate for thousands of individuals. In the CFP matter, the actions of a few advisers affected more than 1,000 investors. So ASIC’s responsibility in acting was not simply to a single stakeholder, but a collective, and accordingly the fall-out of its delay is more severe. However when ASIC successfully prosecutes an errant director for instance, the order applies to that director only.

So, with the community increasingly sensitive to corporate failure and market volatility, ASIC’s losses, impacting on a large and often diverse group of investors - “ordinary people” is a broad but probably accurate way to describe them - are given more attention than its’ wins. This becomes both a perception and a funding problem for ASIC.

A further criticism levied at ASIC in the lead-up to the senate inquiry is that it is a “kangaroo court”; a description suggesting elements of an unfair, biased, hasty, irregular, or particularly, an unauthorised judicial proceeding.

A timely check-up

ASIC may have been criticised for litigating unwisely at times, and the CFP matter cannot be ignored as a failure to respond promptly. But its autonomy in certain areas is a positive factor in a fast-moving, heavily litigation-focused corporate environment where court delays, defendant tactics, and rising costs limit the ability of all regulators to achieve consistent results.

ASIC may not be as unwell as some of the criticism suggests; nonetheless the senate inquiry will provide a timely check-up where ASIC can proffer information of its activities, achievements and plans, and possibly receive criticism of all of these. A positive outcome from the inquiry, and a good prognosis for ASIC, will be essential in the successful management of the corporate marketplace into the future.

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