

Subject: FW: ASIC comes into question during Senate Estimates

Date: Wednesday, 16 June 2010 7:39 AM

From: Stephen Knight <advisor@iinet.net.au>

To: Oliver Moon <ocm@starwon.com.au>

Regards

Stephen Knight

From: Stephen Knight [mailto:advisor@iinet.net.au]

Sent: Tuesday, 15 June 2010 8:56 PM

To: 'Oliver Moon'

Cc: Les Marshall (hairinfo@bigpond.net.au); 'Rod Henderson'

Subject: ASIC comes into question during Senate Estimates

Oliver,

Can you insert into the Broadcast please

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[An amazing admission by ASIC in Senate Estimates:](#)

ASIC has immense coercive powers, but has no clear guidelines established in relation to their use.

Subject: ASIC & SENATOR BUSHBY

June 2010

Importance: High

Senator BUSHBY—I want to ask some questions initially about the use of coercive powers. Which of the coercive powers available to you do you make most frequent use of?

Ms Gibson—There are three that spring to mind, Senator. One would be the power to require

people to acquire documents. The second is the power to attend investigation hearings. The third one would be a power we have to require financial services licensees to give reasonable assistance, which would be to prepare documents rather than just respond to directions.

Senator BUSHBY—What legislative powers give you the right to use those particular three? For the record, which sections?

Mr D'Aloisio—Section 19 and section 33.

Ms Gibson—I am not sure of the other ones either. There is 944DA or something.

Mr D'Aloisio—Asking commissioners that question is a bit tricky. We will take that on notice and give you

the answer. It will not take us long to get.

Senator BUSHBY—I will ask you some questions about section 19 and section 33. In respect of section

19, how frequently would you use that power to compel a person to provide assistance or answer questions?

Mr D'Aloisio—That power would be used quite extensively in almost, I would have thought, all investigations.

Ms Gibson—We would commence most investigations or inquiries, actually. The section 19 power is

engaged to produce notices where you are still in a pre 'capital I' investigation phase.

Senator BUSHBY—Do you keep any record of when you use the coercive powers? Is that something you would keep a—

Mr D'Aloisio—For every matter, there would be a record of what—

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Senator BUSHBY—Within that file?

Mr D'Aloisio—Within that file.

Senator BUSHBY—You do not keep a separate record of [the use of coercive powers](#)?

Mr D'Aloisio—Not that I am aware of. You would not have an aggregated list of how many of those. We

could do some spot testing and do some extrapolation, **but really** each case takes its own course and you use a range of powers.

Senator BUSHBY—And given that you do not have the record, you would not be able to provide a state-by-state basis of where you have used it.

Mr D'Aloisio—It is an interesting question. I have not thought of that.

Senator BUSHBY—Of keeping the record generally?

Mr D'Aloisio—Yes.

Senator BUSHBY—Since we are on it, I will ask you now: do you think it would be important to keep

such a record? The ACCC does keep such a record of its use of its coercive records. The ABCC even has a

separate report for disclosing the use of coercive powers. They are acknowledged as significant powers that

are open to being abused, so it is important that the transparency is there so that people have a comfort that

they are not being abused. Is that something that ASIC would consider?

Mr D'Aloisio—First of all, I will take it on board. Secondly, I think there may well be reports we do produce, because I know with the model litigant provisions and the way we work with the Attorney-General's

Department we provide a lot of statistics and a lot of information. Why don't I take it on board and have a look

at that and answer both what we do have and then, secondly, come back to you on the issue of whether we

should extend that? In principle, what you are saying in terms of a broader record, it might be useful in some

respects.

Senator BUSHBY—I think it is useful for transparency, if nothing else, and giving people the confidence

that their regulators are using the powers available to them in appropriate manners. I will come back to the

specifics, though. With section 19, are persons entitled to have a lawyer present when it is employed?

Specifically looking at section 19 again, are people entitled to have a lawyer present when you are using your

coercive powers?

Mr D'Aloisio—They would have the option to have a lawyer present and they would be able to claim

privilege on answers to certain questions. It is up to them and their advisers. You may have situations where

they choose not to have lawyers. It is a matter for them.

Senator BUSHBY—You sort of answered this earlier when you said that most investigations you undertake probably commence with the use of section 19. Are you able to tell me what percentage of the use

of section 19 powers actually results in an investigation going forward?

Ms Gibson—Senator, I am slightly confused whether section 19 is the power to attend inquiry or section 19

is a requirement to—

Senator BUSHBY—Provide assistance and answer questions.

Ms Gibson—It is to come in and answer questions. So that would be when we would have commenced an

investigation.

Senator BUSHBY—You would not use that unless you had already commenced an investigation?

Ms Gibson—That is correct. Sorry, I was wrong earlier.

Senator BUSHBY—I suppose it depends on your definition of commencing an investigation. If somebody

raises an issue with you that raises issues of concern but without a lot of evidence, would you use section 19 to

go off and see if there is actually substance to the allegation, or would you not use that until you had actually

got to the point where you thought there was something you needed to investigate?

Ms Gibson—To commence an investigation, the investigator or the person in the deterrence team

has to be satisfied that there is a certain threshold. I think they have to prepare a file note or a certificate that attests to the view that they had formed the view at that stage. You cannot engage a section 19—**Senator BUSHBY**—That answers the question. So they have to reach a certain threshold because it will be considered an investigation is underway and, therefore, section 19 powers would be used?

Ms Gibson—Yes.

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Senator BUSHBY—What about section 33—the power to compel a person to produce books or documents? How often would that be used? As often as section 19, or only once you are further through an investigation? What sort of threshold would be required before that would be employed?

Mr D'Aloisio—Again, it would depend on the investigator. We can take that on notice as well.

Senator BUSHBY—Do you have any internal policy for when the use of coercive powers should be employed?

Mr D'Aloisio—No. Not in the sense of trying to have generalisations about cases. But with the experience that our investigators and lawyers have, they would, I guess, intuitively work out how they are going to approach a particular inquiry into an investigation and so on. Through discussion and so on, they would work it out. Generally they would take a similar procedure in each case. I do not think we have it written down as such.

Senator BUSHBY—Once again, without casting any aspersions on your investigators—I am quite sure that the confidence you have in them is justified—for transparency purposes it would seem to me that there is some advantage in people knowing the terms and the circumstances that would actually lead to the use of coercive powers. Is that something that you would agree with?

Mr D'Aloisio—We will take that on and come back to you and, again, outline what we do and assess the point you are making.

Senator BUSHBY—I will move on from there. Have you heard of a fund regulated under the Australian Managed Investments Act known as the Basis Yield Alpha Fund?

Mr D'Aloisio—Yes, I have.

Senator BUSHBY—Is this fund currently operating?

Mr D'Aloisio—There are two Basis funds. I think one was frozen and I think the other one is operating.

There are two of them. One is operating and one, I think, is frozen.

Senator BUSHBY—Are you aware of whether there have been any losses in this fund or the other Basis

funds following the collapse of the CDO market in 2007? If so, what is the extent of those losses?

Mr D'Aloisio—Clearly there are issues around specific cases. I think in relation to this in terms of

the public record, the Basis capital, from memory, the investments related to CDO, or collateralised debt obligations and they were pursuant to a registered managed investment scheme. There were product disclosure statements. The product disclosure statements were quite extensive in outlining the risk and the leverage and the nature of these models. My understanding is that in turn those funds invested in offshore funds and ultimately invested in funds in the United States and in more sophisticated synthetic CDOs, which they have.

As a consequence of those investments, when assets declined when we had the crisis, those funds then either, from memory, closed or were at least frozen for a period of time just to look at the investor returns. Beyond that, I would have to take it on notice, because I am trying to recollect here.

Senator BUSHBY—There were reports that there were losses of \$700 million, which is the largest loss under the MI Act since its inception in 1998.

Mr D'Aloisio—I cannot confirm that.

Senator BUSHBY—Are you aware of whether the fund is being wound up? I am talking about the Basis fund that is not operating. What will be its final distribution?

Mr D'Aloisio—When I looked at it, one of them was, as I said, frozen. The other one was still operating.

Again, this is a matter that we can take up. Indeed, I suspect our people are in touch with the fund managers.

We can get that information. I do not want to guess at it.

Senator BUSHBY—Are you aware that a former director of Basis, Mr David Mapley, approached the USA's SEC to complain about misleading statements by Timberwolf investments and fund sponsor Goldman

Sachs, who ultimately made collateral calls on Basis and forced it to close?

Mr D'Aloisio—I am aware from newspaper reports that there was a complaint and there had been allegations about the Timberwolf transaction, which is the synthetic CDO that I referred to earlier.

But that is not on my direct evidence. That is what I have also read.

Senator BUSHBY—Likewise. Have the complaints that Mr Mapley made to the USA's SEC also been made to ASIC?

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Mr D'Aloisio—I am not aware of it, but if the gentleman has, we will certainly act on it. As I recollect from

what I read, he was alleging fraud, I think. Clearly if there are allegations of fraud, as a matter of course, ASIC

would look into those, if it is not already doing so. I am not aware of it. But certainly if he has complained to

us or complains to us and gives us information that is credible, we will act on it.

Senator BUSHBY—It appeared on the basis of what I read as well that it would be associated with

the

Goldman Sachs issues that led to a focus coming on Goldman Sachs in the States a couple of months ago.

Mr D'Aloisio—They are two different things, Senator. The Timberwolf transaction, which Basis has been

referred to, is one CDO. The action in the United States against Goldman Sachs is the Abacus synthetic CDO

case. It is a separate transaction.

Senator BUSHBY—You are aware of the facts to be able to give that sort of—

Mr D'Aloisio—We are aware of the second of those, yes.

Senator BUSHBY—Has ASIC ever met with the officials and directors of Basis to inquire into the reasons

for the failure of their funds?

Mr D'Aloisio—You could assume that in a case where we have complaints we would clearly look into that

and our people would be in touch with those funds and clearly would examine the conduct and would examine

the PDS, the disclosure documents, and so on to ensure that the law had been complied with.

Senator BUSHBY—Are they being investigated as a result? Are you satisfied that—

Mr D'Aloisio—I am aware that we are in touch with them and clearly have been following this now since

2007, indeed, when the issues first arose. But we do not, as you know, indicate what we are doing.

Senator BUSHBY—Has ASIC been in contact with the SEC at all in respect of this matter?

Mr D'Aloisio—ASIC, again, has extensive arrangements with overseas regulators, including the SEC

Regards

Stephen Knight