23 September 2019

37 Darian Road

Torquay, 3228

Attn: Tim Wilson MP

Chair

House of Representatives Standing Committee on Economics

Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Chair

Re: Questions on Notice

Review of the Australian Securities and Investments Commission Annual Report 2018

Canberra 16 October 2019

Following the revelations of the Hayne Royal Commission, most Australians have been shocked at the widespread and entrenched culture of greed in many of our largest financial institutions and the extent and severity of the misconduct that this greed has engendered.

I, therefore, draw the Chair and the Committee's attention to **Section 5.5** of the 2017-2018 ASIC Annual Report {**Appendix A**}.

The so-called ***Office of the Whistleblower*** was established following the **Senate Inquiry into the Performance of ASIC** after revelations of Whistleblower, Jeff Morris, and the associated media reports of the award-winning reporter Adele Ferguson from ***The Age.***

The ***Office of the Whistleblower*** is led by Warren Day.

It would appear that there is an expectation in ASIC that Whistleblowers have to be able to "***serve up on a plate***" a completely documented disclosure that requires no further investigation by ASIC.

Because of this self-imposed '*policy*', **95% of the 228 disclosures** received by ASIC were essentially filed into the waste-paper bin!

It would appear that there is no structured approach for assessing Whistleblower disclosures and cross-referencing with other sources of data or intelligence or with other agencies.

A common feature of serious white-collar is its complexity and the ease of concealment from regulatory agencies unless the misconduct is exposed by a Whistleblower.

It can often take several years to put all the "*pieces of the puzzle*" together even when regulator agencies invoke their evidence-gathering powers in cases of serious fraud.

The Bernie Madoff Whistleblower, Harry Markopolos, spend eight years lodging submissions with the US Securities and Exchange Commission before his efforts as a Whistleblower were finally vindicated.

ASIC makes no mention in its Annual Report as to whether it engaged its investigative powers pursuant to **Part 3** of the *ASIC Act 2001* and if so, how many manhours were devoted to obtaining evidence that might support the allegations made in some 228 disclosures?

I would hope that the Committee would agree that in a Post-Royal Commission world, a refusal to investigate **95% of Whistleblower disclosures** is completely unacceptable.

On behalf of Australian's who have been the victims of white-collar crime, I would ask the Committee to seek more information from ASIC as to the policy and procedures involved in engaging ASIC's investigative powers pursuant to **Part 3** of the *ASIC Act 2001*, following the receipt of a Whistleblower disclosure.

ASIC's Undertakings to the Federal Court

Attached to a letter dated 21 September 2019 I proved the Members of the Committee with general oversight over ASIC, a copy of the undertaking giving by ASIC to the Federal Court in relation to investigating the administration of one of Australia's oldest occupational pension schemes.

This superannuation scheme has been administered by **National Australia Bank**'s superannuation Trustee, NULIS Nominees (Australia) Ltd since 1 July 2016.

Committee Members will no doubt recall the '***train wreck***" testimony of the former Chair of NULIS, Nicole Smith before Royal Commissioner Hayne.

I have included a copy of this undertaking in **Appendix B.**

I am sure that this would be the first time that the Chair and the members of the **Joint Parliamentary Committee on Corporations and Financial Services** had ever heard of this undertaking (*and possibly of others as well*).

It is important to note that ASIC has not sought to have this undertaking discharged by the Federal Court.

A breach of, or a failure to fulfil, the undertaking constitutes contempt of court.

> *Law Institue of Victoria Ltd v Nagle* [2005] VSC 35 at [13] per Gillard J.
>
> *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 531 per Murphy J.
>
> Udall v Capri Lighting Ltd (in Liq) [1988] QB 907 at 915 per Balcombe LJ

This undertaking is, therefore, a very live undertaking at a time when ASIC has commenced proceedings against ***NULIS*** in the Federal Court {NSD1654/2018}.

ASIC has also commenced proceedings against **National Australia Bank** in the Federal Court {NSD1355/2019}.

Can these Proceeding be Impugned as an "*Abuse of Process*?

In *Rogers v R* (1994) 181 CLR 252 at 286 McHugh J stated that although the categories of abuse of process are not closed, there are three established categories, namely where:

(1) The court's processes are invoked for an illegitimate purpose;
(2) The use of the court's procedures is unjustifiably oppressive to one of the parties; or
(3) The use of the court's procedures would bring the administration of justice into disrepute.

This formulation was applied in *Julian Ronald Moti v R* (2011) 283 ALR 393 [2011] HCA 50 at [10] per French CJ, Hayne, Crennan, Kiefel and Bell.

ASIC has sought to invoke the ***judicial power*** of the Federal Court at the very same time that ASIC is in contempt of the Federal Court for failing to honour the undertaking given before the Honourable Justice Kenny in VID 323 of 2011.

ASIC has given no indication that is it now prepared to honour this undertaking. In fact the very opposite.

Would not this be an example us using the court's procedures to bring the administration of justice into disrepute?

The questions for this Committee are:

(i) Why does ASIC not disclose the undertakings that ASIC has given to the Federal Court (or other Courts) in its Annual Report?
(ii) Why does ASIC not disclose when such undertakings have been discharged?
(iii) If the undertakings are still alive from one year to the next, then why doesn't ASIC make a disclosure in the Annual Report such as "*Investigations are ongoing*"?

ASIC Royal Commission Implementation Update

The following is an extract from this update published in September 2019

> The FSRC also examined a number of case studies. From these case studies, ASIC has 29 investigations underway (some with external counsel involvement). Four matters are before the court (Select AFSL, Dover and two matters relating to NAB), another two matters are being considered by the Commonwealth Director of Public Prosecutions (CDPP) for potential criminal action.

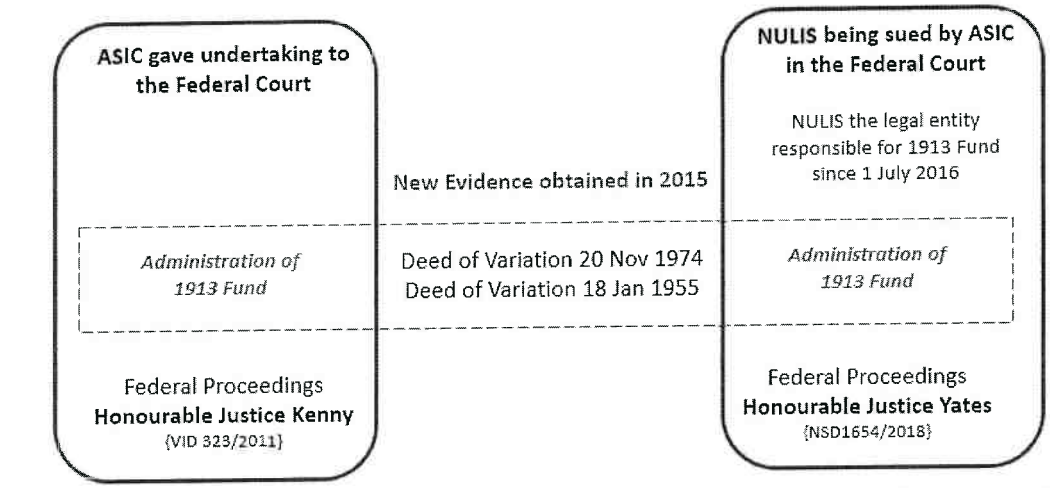
Two of the four matters before the court relate to the **National Australia Bank**, with one involving NAB's superannuation trustee, NULIS Nominees (Australia) Ltd {'***NULIS***'}.

No mention is made of the undertaking given to the Federal Court by ASIC in VID 323 of 2011.

This undertaking has direct relevance to one of the proceedings now afoot in the Federal Court {NDS1654/2018} with indirect relevance to the second NAB proceeding {NSD1355/2019}.

The connection between these proceedings in the Federal Court is illustrated in the following diagram.

Federal Court Proceedings



Lead Counsel for ASIC: Mr Christopher Horan QC

Lead Counsel for ASIC: Mr Tim Faulkner SC

It is also important for the committee to note that ASIC has failed to join an *'Intervenor'* in the proceedings with ***NULIS*** to represent the interests of superannuation fund members who have been the victims of misconduct by ***NULIS***. This defect will be the subject of future correspondence.

These proceeding are not simply proceedings between two private companies. The proceedings are between a conduct regulator and a trustee holding $70 billion on trust for fund members and beneficiaries in a COMPULSORY superannuation system. Therefore there needs to be representation for the beneficiaries of this superannuation trust, as occurs with other legal proceedings involving large regulated superannuation trusts and their trustees.

The Committee's attention is also drawn to the comments of Royal Commissioner Hayne concerning the need for financial service providers to obey the law and for those laws to be enforced by the conduct regulator in a transparent manner **{Appendix 3}.**

Does ASIC have a Problem with the Truth?

An event that received no media coverage occurred on 1 July 2019 when ASIC was able to extract itself and its staff from the **Australia Public Service** so as to be able to join the culture of "***greed***" of the financial institutions that ASIC purportedly regulates.

ASIC is now free to set its own remuneration levels, unfettered by the constraints that apply to other **Australian Public Servants**. ASIC staff are also no longer subject to the **APS Code of Conduct** {**Section 13** of the ***Public Service Act 1999***}.

This then raises another question for the Committee.

Can the Chair and the Committee have any confidence in the responses they receive when questioning ASIC Commissioners and staff?

The **APS Code of Conduct** has an important provision at **subsection 13(9):**

(9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.

This important provision has been excluded from ASIC's new Code of Conduct.

Instead, the following obligation **#9** is now imposed on ASIC staff.

9. Act in ASIC's best interests

I trust the Chairman of ASIC will be able to honestly answer these questions on 16 October 2019.

These are questions of public interest.

Yours Sincerely

Phillip Sweeney

Postscript: I shall again be writing to the Committee with evidence of how ASIC's Warren Day provided false and misleading information to the former Chair of this Committee, now Senator the Hon Sarah Henderson.

As to the discharge of undertakings by the Court see *COMMONWEALTH BANK OF AUSTRALIA -v- THE LAW DEBENTURE TRUST CORPORATION PLC [No 4]* [2018] WASC 165

Cc James Shipton – ASIC Chairman

Daniel Creenan QC – ASIC Deputy Chair

Karen Chester – ASIC Deputy Chair

Hon Dr Andrew Leigh MP – Deputy Chair

Dr Anne Aly MP

Mrs Bridget Archer MP

Mr Adam Bandt MP

Mr Jason Falinski MP

Mr Craig Kelly MP

Mr Andrew Laming MP

Dr Daniel Mulino MP

Mr Ted O'Brian MP

Committee Secretary

Adele Ferguson – ***The Age***

Chair and Committee Members of the J. P. Committee for Corporations and Financial Services

Tim Faulkner SC – Lead Counsel for ASIC: NSD1654/2018} {timfaulkner@12thfloor.com.au}

Christopher Horan QC – Lead Counsel for ASIC: VID 323/2011 {chris.horan@vicbar.com.au}

Appendix A

Extract from ASIC's 2017-2018 Annual Report

5.5 Office of the Whistleblower

We value the information we receive from **whistleblowers**. ASIC's Office of the Whistleblower is a central point within ASIC for ensuring that we record and action whistleblower matters appropriately.

We assess all information we receive; however, not every matter brought to our attention requires regulatory action. We will consider any breaches that have been disclosed and provide **information** on statutory protections that may be available to the whistleblower.

In 2017–18, we dealt with 228 disclosures by whistleblowers. Around 63% of these related to corporations and corporate governance (**including** internal company disputes). We also dealt with matters related to credit and financial services and the conduct of licensees (26%), markets (8%) and other issues (3%).

Following preliminary inquiries, approximately 5% of matters were referred for compliance, surveillance or investigation, including to assist ongoing activities.

Around 95% of disclosures were assessed as requiring no further action by ASIC, often due to insufficient evidence. In some cases, another agency, law enforcement body or third party (e.g. a liquidator) was better placed to appropriately deal with the underlying issues or was already taking action.

In 2017–18, we also continued to support the Government's work to reform Australia's **corporate** whistleblowing regime. *For more information on **whistleblower** reforms, see Section 1.5.*

Appendix B

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TRANSCRIPT OF PROCEEDINGS

O/N 166118

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

KENNY J

No. VID 323 of 2011

PHILLIP CHARLES SWEENEY

and

TONY D'ALOISIO and ANOR

MELBOURNE

2.14 PM, FRIDAY, 27 MAY 2011

MR P.C. SWEENEY appears in person
MR C. HORAN appears for the respondent

(7) on or before 5 August 2011, the respondent file and serve any submissions and any material on which it relies in reply;

(8) the notice of motion filed on 21 May 2011 by the applicant be adjourned to 10.15 on 9 August 2011;

(9) the hearing of the applicant's and the respondent's notice of motion be fixed for 10.15 on 9 August 2011;

(10) and the matter be referred to a case management conference to be held at 4 o'clock today before Registrar Hetyey.

(11) I will simply make an order reserving costs.

MR HORAN: Yes, your Honour.

And I think that covers the position. All right. So if the parties will go down to level nine, Registrar Hetyey will meet them, but you should be aware, it's a case management conference. It's therefore an open conference. What you say can be relied upon subsequently. All right.

MR HORAN: Thank you, your Honour.

HER HONOUR: All right. Thank you both.

ADJOURNED **[3.51 pm]**

RESUMED **[4.45 pm]**

MR HORAN: Your Honour, I'm pleased to say that the parties have signed proposed consent orders. They're a little bit messy in the way they're recorded, perhaps, but the parties have agreed on orders that the matter be dismissed without any orders as to costs, and that is on the basis of the common ground between the parties that the Commission is not functus officio in relation to any further request concerning the exercise of its investigatory powers. I should just note, although it's not really strictly relevant, but the – there were other proceedings preceding this commenced reviewing the same decision in the Administrative Appeals Tribunal, and it's also, for the record, the parties' understanding that, for similar reasons, those proceedings need not continue.

There had been a jurisdictional point raised in those proceedings also, but the understanding is that, on the same basis, those proceedings need not proceed. But that, of course, doesn't have any effect on the orders in this matter. But I thought it was worth mentioning.

HER HONOUR: That's helpful. What will the next step be?

MR HORAN: Well, I understand that Mr Sweeney proposes to gather what material he has, and write to the Commission sending out his concerns, and then the Commission will consider any correspondence, and if there are serious matters raised that lead to the Commission thinking it is expedient to exercise investigatory powers, then that will be considered. But there's - - -

HER HONOUR: Should I note on these orders that Mr Sweeney will prepare and submit material to the respondent for its further consideration, and the respondent will consider that material?

MR HORAN: Well, I would prefer that the orders aren't complicated by that matter, that it is an has always been the case that the Commission would consider any material submitted to it. I know that the applicant has had concerns about whether that in fact was the position, but I don't think it's necessary for the orders to reflect what I've just outlined. It's certainly on the record.

HER HONOUR: I note that. It has now been said in court.

MR HORAN: And I think that's sufficient comfort for the applicant.

HER HONOUR: I think it is. Mr Sweeney, you might note what Mr Horan has properly stated, and that is the understanding between the two of you, as I understand it, that you will prepare your material, you will submit it to the respondent, and the respondent would consider it. And there's – so far as the respondent is concerned, it's not a matter of functus officio, it will consider the material appropriately.

MR SWEENEY: Yes, your Honour. I'm quite happy with that as a resolution.

HER HONOUR: All right. Well, I think the first step is to vacate the orders that were made earlier today, which I shall do. And the second step is to order by consent that the application filed on 27 April 2011 be dismissed, and that there be no order as to costs. It's not often that sweetness and light rains on both sides.

MR SWEENEY: No.

HER HONOUR: I'm pleased to see that you've both been able to reach that conclusion.

MR SWEENEY: I think I achieved what I came to court to achieve, your Honour, so thank you.

HER HONOUR: Good. Very well. We will adjourn. Adjourn, please.

MATTER ADJOURNED at 4.50 pm INDEFINITELY

Appendix C

Extracts from *A speech by ASIC Commissioner Sean Hughes at 'Banking in the Spotlight': the 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, Queensland, 30 August 2019*

In the Royal Commission Interim Report delivered in September 2018, Commissioner Hayne was critical of ASIC's approach to enforcement. He highlighted that ASIC had, in his view, the wrong starting point:

> *'when deciding what to do in response to misconduct, ASIC's starting point appears to have been: How can this be resolved by agreement?*[1]

Commissioner Hayne's view was as follows:

> *'This cannot be the starting point for a conduct regulator. When contravening conduct comes to its attention, the regulator must always ask whether it can make a case that there has been a breach and, if it can, then ask why it would not be in the public interest to bring proceedings to penalise the breach. Laws are to be obeyed. Penalties are prescribed for failure to obey the law because society expects and requires obedience to the law.* [2]

Commissioner Hayne's view is clear. He said:

> *'The starting point for consideration is, and must always be, that the law is to be obeyed and enforced.* [4]

And that:

> *'...breaches of the offence and civil penalty provisions of the financial services laws are not to be dismissed as* 'just *a breach of* those *laws' as if the laws governing the conduct of financial services entities are some less important form of law. The financial services laws regulate the conduct of central actors in the Australian economy.* [5]

The recommendation for ASIC's approach to enforcement, as articulated by Commissioner Hayne in the Final Report, was:

> *'ASIC should adopt an approach to enforcement that:*

- *takes, as its starting point, the question of whether a court should determine the consequences of a contravention;*
- *recognises that infringement notices should principally be used in respect of administrative failings by entities, will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation;*

- *recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking and the utility in obtaining admissions in enforceable undertakings; and*
- *separates, as much as possible, enforcement staff from non-enforcement related contact with regulated entities.*'[6]

Commissioner Hayne emphasised that compliance with the law is not a matter of choice:

> *'All financial services entities must obey the law, not just those who are willing to do so. And all financial services entities must comply with all the laws that apply to them, not just with those bits of the law that they find to be commercially acceptable.*'[8]

he articulated in the Final Report.

[1] Interim Report, p 277.

[2] Interim Report, p 277.

[3] Final Report, p 431.

[4] Final Report, p 432.

[5] Final Report, p 433.

[6] Final Report, p 446.

[8] Final Report, p 425.