

2016 ASIC ANNUAL FORUM AT A GLANCE

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Legal Briefings - By **Luke Hastings, Andrew Eastwood, ...**, **Steven Rice** and **Vaishali Davé**

In case you were not able to attend the 2016 ASIC annual forum held in Sydney last week (the theme of which was 'Culture Shock'), we thought it may be useful to briefly summarise our key takeaways from comments made over the course of various sessions.

1. Responsibility for culture

ASIC noted the importance of individual accountability in creating the right institutional culture. However, it also observed that instead of blaming a few 'bad apples' for poor conduct and compliance issues, firms should consider whether there is an issue with the 'entire tree'. It also emphasised boards' responsibility in developing institutional culture. This 'tone from the top' is set via both formal structures and informal lines of influence (or 'shadow culture').

2. Regulating culture

ASIC acknowledged that it is not 'the culture police'. Instead, it described its function as alerting boards to pockets of bad culture within their organisation. However, the Honourable Kelly O'Dwyer expressed the Government's support of ASIC taking enforcement action where it sees culture and conduct failings. Similarly, ASIC noted that it will consider firm culture very closely in the coming months, continue to discuss any issues with board and senior management, and take enforcement action.

3. ASIC's culture 'focus areas'

ASIC expressed particular interest in remuneration / incentive structures, breach reporting, whistleblowing policies and complaints handling processes as indicators of culture. It also noted its concerns about culture in relation to vertically integrated fund management companies (as reflected in its recent report), and remediation and accountability for problematic financial advice.

4. ASIC investigations

ASIC addressed criticism of the number and scope of its notices to produce by noting the controls it has established around their issue. However, it also emphasised its need for confidence that it has requested and received all relevant evidence, and its difficulty sometimes in anticipating the breadth of responsive documents. ASIC suggested that notice recipients should engage with ASIC early if there are any concerns that the scope of the notice is too broad. Following ASIC's suggestion that a 'staged' production of documents would reduce the burden of production, a number of comments were made by the audience that staged production often involves more time and cost.

ASIC maintained that the decision to release privileged material remained very much up to the notice recipient. It also suggested up front consideration of how investigation reports should be structured (e.g. whether the background, factual findings and advice sections should be separated). The paper by Andrew Eastwood about the implications of waiver of privilege was discussed.

An ASIC officer said that she did not regard compliance with statutory obligations (such as producing documents under notice) as 'cooperation'. For ASIC, examples of cooperation include self-reporting misconduct, honest and complete disclosure of all information relevant to the misconduct and early guilty pleas or admissions of facts.

5. Regulatory enforcement

Deputy Director of the Commonwealth Director of Public Prosecutions (CDPP), Shane Kirne, observed that there is no bright line between the completion of an ASIC investigation and the commencement of CDPP involvement. In fact, in complex cases, the CDPP may provide assistance at an earlier stage on the proposed scope and likely outcome of ASIC's investigation, which may allow ASIC to narrow its focus.

Additionally, ASIC distinguished its enforcement role from the compensatory function of class actions, although it noted that it now more regularly seeks compensation for wrongdoing on the basis that those who have gained from misconduct should not be allowed to reap the benefits.

6. Financial innovation

ASIC welcomed – and dismissed concerns that its focus on culture would stifle – digital innovation, and encouraged firms to shift away from the 'fear of failure'. It nevertheless

acknowledged the need for balance between innovation and maintaining market confidence.

Blythe Masters, CEO of Digital Asset Holdings LLC, described how aspects of blockchain or distributed ledger technology make it uniquely suited to financial markets, including its ability to protect against the risk of 'single point of failure', as complete copies of data are stored on every node in the distributed ledger. ASIC appeared to welcome the potential for distributed ledger technology to provide increased transparency to regulators by giving them a 'window into the data', including potentially, visibility of beneficial owners. A panel discussion also considered the potential for distributed ledger technology to allow for 'cheaper, better and faster' clearing and settlement. The panel also considered the need for financial institutions to embrace innovation and technology more generally, but did note that while technology enables companies to be less vulnerable to 'bad actors' in fraudulent situations, it cannot solve for problems of culture.

7. The role of central counterparties

RBA Assistant Governor (Financial System), Malcolm Edey, noted the importance of central counterparties in both reducing risk (by shifting it away from a wide range of participants) and concentrating risk (as they act as counterparties to all trades). Rather than viewing central counterparties as 'too big to fail', the RBA's view is that they are critical infrastructure and therefore must be operationally resilient, financially robust, and have appropriate recovery plans and a way to allocate defaults to other participants.

8. Financial sector competition

ACCC Chairman, Rod Sims, expressed concerns about the concentration of market share in the banking sector, indicating a general lack of vibrant competition. Mr Sims and Professor Ian Harper (Chair of the 2015 Competition Policy Review) also observed the fine line between market manipulation and cartel conduct and the close, 'seamless' working relationship between ASIC and the ACCC.

Please let us know if you would like to discuss any of the above. We note the conference also included panel discussions on robo-advice, payment systems, the Asia Region Funds Passport and structural change and digital disruption in financial markets. Let us know if you would like our observations on these sessions.

More information

For information regarding possible implications for your business, contact Luke Hastings, Andrew Eastwood or Fiona Smedley.

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