



Australian Securities and Investments Commission

OWN MOTION INVESTIGATION INTO
THE MANAGEMENT OF A CONFLICT
OF INTEREST MATTER IN 2005

November 2015

Report by the Commonwealth Ombudsman,
Colin Neave, under the *Ombudsman Act 1976*

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CONTENTS

EXECUTIVE SUMMARY	4
PART 1—BACKGROUND	6
Commonwealth Ombudsman	6
ASIC	6
The SERC’s inquiry into the performance of ASIC	7
Ombudsman’s decision to conduct own motion investigation	8
PART 2—ASIC’S DECISION TO GRANT REGULATORY RELIEF FOR SUPERANNUATION CALCULATORS IN 2005	9
ASIC’s discretionary power to grant regulatory relief	9
Superannuation calculators	10
IFSA’s submission to ASIC.....	11
ASIC’s decision to grant class order relief for superannuation calculators	12
<i>ASIC’s authority to issue the class order</i>	<i>13</i>
<i>Requirement to submit a formal application.....</i>	<i>13</i>
<i>Consultation</i>	<i>14</i>
<i>Allegations of political influence.....</i>	<i>15</i>
<i>Divergent views within ASIC.....</i>	<i>16</i>
Ombudsman’s conclusions regarding the decision to grant regulatory relief for online calculators.....	17
PART 3—ASIC’S MANAGEMENT OF THE DISCLOSURE OF A POSSIBLE CONFLICT OF INTEREST.....	19
Definition of conflict of interest.....	19
Mr B’s secondment from a financial services firm to ASIC.....	19
<i>ASIC’s secondment program</i>	<i>19</i>
<i>Mr B’s secondment from a financial services firm to ASIC</i>	<i>20</i>
<i>Placement of Mr B on the generic calculator project team</i>	<i>20</i>
The management of Mr B’s disclosure of a possible conflict of interest	21
<i>Mr B’s disclosure of the possible conflict of interest.....</i>	<i>21</i>
<i>Mr C’s response to the disclosure of the possible conflict of interest.....</i>	<i>22</i>
<i>Contractual obligations regarding the disclosure of a conflict of interest</i>	<i>22</i>

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

<i>Legislative obligations regarding the disclosure of a conflict of interest</i>	23
<i>ASIC’s policies regarding the disclosure and management of a conflict of interest</i>	25
<i>Ombudsman’s conclusions regarding the management of Mr B’s disclosure of the possible conflict of interest</i>	35
Mr B’s continued involvement in the generic calculator project.....	36
<i>Junior nature of Mr B’s role</i>	36
<i>Amendments to the Project’s Issues Paper</i>	37
<i>Mr B’s supervision of another ASIC officer</i>	38
<i>Mr B’s interactions with MLC and IFSA during the secondment period</i>	38
<i>Ombudsman’s conclusions regarding Mr B’s continued involvement in the generic calculator project</i>	39

**PART 4—ASIC’S MANAGEMENT OF ALLEGATIONS MADE BY
MR A IN RELATION TO ASIC’S GENERIC CALCULATOR**

PROJECT 40

Mr A’s allegations.....	40
Mr C’s management of Mr A’s concerns.....	42
The Executive Director’s management of Mr A’s concerns.....	43
The OGC’s management of Mr A’s concerns	44
<i>Communication regarding the OGC’s investigation process</i>	44
<i>Outcome of the OGC’s investigation</i>	46
<i>The OGC’s assessment of Mr A’s allegations</i>	46
<i>The OGC’s compliance with ASIC’s Whistleblowing Policy</i>	47
Ombudsman’s conclusions regarding ASIC’s management of Mr A’s allegations....	48

PART 5—RECOMMENDATIONS 49

<i>RECOMMENDATION 1</i>	49
<i>RECOMMENDATION 2</i>	50
<i>RECOMMENDATION 3</i>	50

GLOSSARY 52

EXECUTIVE SUMMARY

In mid-2013, the Senate referred an inquiry into the performance of the Australian Securities and Investments Commission (ASIC) to the Senate Economics References Committee (SERC). During the course of this inquiry, a former employee of ASIC, Mr A, made allegations regarding the process that resulted in ASIC granting regulatory relief for superannuation calculators in 2005.

Mr A alleged that ASIC was unduly influenced by a key industry organisation, the Investment and Financial Services Association (IFSA), in coming to its decision about providing regulatory relief. Mr A's key allegations were that ASIC accepted IFSA's submissions without ensuring that IFSA complied with the formal relief application process, and also that ASIC did not appropriately respond to the disclosure of a possible conflict of interest made by a secondee involved in ASIC's decision-making process (Mr B, on secondment from a financial services firm, which was a member of IFSA at that time).

In its final report, the SERC recommended that the Commonwealth Ombudsman consider undertaking an own motion investigation into Mr A's allegations, and the Ombudsman accepted this recommendation.

In the Ombudsman's view:

- it was open to ASIC to grant regulatory relief in the form granted
- IFSA was not required to lodge a formal relief application as ASIC made the decision to grant relief on its own initiative, which it is empowered to do
- Mr B rightly brought to ASIC's attention a possible conflict of interest
- there is no evidence to suggest that Mr B acted improperly during the course of his secondment to ASIC, and
- there is no evidence to suggest that ASIC's decision to grant relief was contaminated by conflict of interest or other undue influence.

While not adversely affecting ASIC's decision-making in this instance, the Ombudsman considers that ASIC's management of Mr B's disclosure of a possible conflict of interest, and its efforts to address issues raised by Mr A about the decision-making process could have been better handled. In particular:

- ASIC did not comply with its own internal policies for dealing with conflicts of interest, and
- the final report of ASIC's internal investigation into Mr A's claims could not be produced, making it difficult to assess whether the investigation was appropriate in all the circumstances.

The Ombudsman acknowledges that secondment arrangements can be highly beneficial. Secondments involving private sector organisations have the potential to improve a regulator's knowledge and understanding of the operating environment of the entities it regulates.

However, it is critical that public sector agencies, and regulators in particular, appropriately identify and manage the possible conflicts of interest that are inherent in secondment arrangements. The processes for doing so should be robust and transparent in order to maintain public confidence in the integrity of agencies' internal processes and decision making.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

The events at the centre of this investigation took place approximately 10 years ago. Since that time, ASIC has updated many of its policies and procedures. The Ombudsman considers that ASIC could further refine its procedures for dealing with conflicts of interest and recommends that ASIC:

1. Review its policy regarding conflicts of interest, particularly its policy relating to documenting all disclosures (and enquiries about possible disclosures) and the management of allegations of conflicts of interest made by persons other than the conflicted person.
2. Review its policy regarding secondments with a view to improving information about the disclosure, assessment and recording of conflicts of interest involving secondees.
3. Consider reviewing the clauses regarding conflicts of interest in its template secondment agreement.

ASIC has indicated to the Ombudsman that it will adopt the recommendations.

PART 1—BACKGROUND

Commonwealth Ombudsman

1.1 The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- Correcting administrative deficiencies through independent review of complaints about Australian Government administrative action;
- Fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- Assisting people to resolve complaints about government administrative action;
- Developing policies and principles for accountability; and
- Reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

1.2 Under the *Ombudsman Act 1976*, the Commonwealth Ombudsman may investigate the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

1.3 The Ombudsman can culminate an investigation by preparing a report that contains his opinions and recommendations.

ASIC

1.4 ASIC is Australia's corporate, markets and financial services regulator.

1.5 The *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) provides for the establishment of ASIC and also directs ASIC, in the performance of its functions and exercise of power, to strive to:

- Maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs and the efficiency and development of the economy; and
- Promote the confident and informed participation of investors and consumers in the financial system; and
- Administer the laws the confer functions and powers on it effectively and with a minimum of procedural requirements; and
- Receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
- Ensure that information is available as soon as practicable for access by the public; and

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

- Take whatever action it can, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.¹

1.6 The laws ASIC administers give it wide-ranging powers, including the power to grant relief from various legislative requirements.

The SERC's inquiry into the performance of ASIC

1.7 On 20 June 2013, the Australian Senate referred an inquiry into the performance of ASIC to the SERC for inquiry and report.

1.8 The SERC received submissions in relation to its inquiry and also held public hearings. At a public hearing on 2 April 2014, allegations were made by a former ASIC employee, Mr A. Mr A's concerns related to the process that resulted in ASIC granting regulatory relief for superannuation calculators in 2005. In the SERC's final report, it summarised that:

Mr [A] alleged that ASIC was unduly influenced by the wishes of a key industry organisation and that the process for providing the relief was outside ASIC's stated procedures and had a pre-determined outcome. According to Mr [A], the relief granted as a result allowed online calculators to be offered that did not comply with the reasonable basis for advice obligation that was in place in the *Corporations Act* at the time. In his view, the calculators could simply be used by firms 'as a marketing tool to get people into their financial advisor network', by gathering information and not reflecting the impact of fees.

Mr [A] also advised that the individual he was required to report to was a secondee from a firm that was a member of the industry organisation. Although the individual disclosed a potential conflict of interest, Mr [A] advised that ASIC kept the secondee on the calculator relief project.²

1.9 ASIC rejected the allegations made by Mr A, telling the SERC that:

...ASIC made a relief decision that was completely proper, in response to unintended consequences arising from changes to the law. These are the sorts of decisions we make on a regular basis.

Our decision showed no favouritism, and it was very clearly in the public interest.

ASIC did have a person involved in the relief team that was on secondment from a financial services firm, but that person was not a decision-maker. They were only involved in assisting policy work that concerned the industry as a whole, rather than considering matters involving individual firms. ASIC has robust procedures for managing conflicts and these procedures were applied in the case of this secondee.³

¹ *Australian Securities and Investments Commission Act 2001* (Cth), s1.

² Senate Economic References Committee (SERC), "Performance of the Australian Securities and Investments Commission" Report, June 2014 (SERC Report)

³ Greg Medcraft (Chairman of the Australian Securities and Investments Commission), "Senate inquiry into the performance of the Australian Securities and Investments Commission - Opening statement", 10 April 2014.

Commonwealth Ombudsman—Australian Securities and Investments Commission: Own motion investigation into the management of a conflict of interest matter in 2005

1.10 On 26 June 2014, the SERC's report into the performance of ASIC was tabled in Parliament. Recommendation 33 stated that:

The committee requests that the Commonwealth Ombudsman consider undertaking an own motion investigation into the allegation related to the process that resulted in ASIC granting regulatory relief for generic online calculators in 2005. An investigation undertaken by the Ombudsman should, in particular, consider whether the process was undermined because ASIC did not adequately manage a conflict of interest identified by a person on secondment from a financial services firm.⁴

Ombudsman's decision to conduct own motion investigation

1.11 On 25 September 2014, the Ombudsman informed the SERC and ASIC that he had accepted the SERC's request and would be conducting an own motion investigation into ASIC's decision to grant regulatory relief for superannuation calculators in 2005.

1.12 The main objective of the Ombudsman's investigation has been to consider whether the process that resulted in the grant of regulatory relief was undermined because ASIC did not adequately manage a conflict of interest identified by a person on secondment from a financial services firm (Mr B). This consideration has involved reviewing and assessing ASIC's actions in relation to Mr B's disclosure that he had identified a potential conflict of interest, as well as reviewing ASIC's stated policies and practices in relation to conflicts of interest generally.

1.13 Further to this, the Ombudsman's investigation has touched on allegations concerning whether the key industry body referred to by Mr A, a body then known as IFSA, complied with ASIC's requirements for making a formal relief application in relation to the superannuation calculator issue, whether ASIC undertook sufficient public consultation in relation to the relief, and other associated issues regarding ASIC's decision-making process.

⁴ SERC Report

PART 2—ASIC’S DECISION TO GRANT REGULATORY RELIEF FOR SUPERANNUATION CALCULATORS IN 2005

2.1 The key aspects of Mr A’s allegations concerning the process that resulted in ASIC granting regulatory relief for superannuation calculators in 2005 included that:

- ASIC did not have the authority to grant the regulatory relief IFSA was requesting;
- ASIC did not require IFSA to submit a formal relief application or pay the mandatory application fee;
- ASIC did not undertake public consultation;
- IFSA’s application was judged by reference to the “clout and political influence” of IFSA; and
- Divergent views within ASIC were minimised.⁵

ASIC’s discretionary power to grant regulatory relief

2.2 ASIC has discretionary powers to grant relief from some provisions of the *Corporations Act 2001* (Cth) (*Corporations Act*) and other selected Acts.⁶ This relief can include exemptions from, and modification to, the provisions of these Acts.

2.3 Individuals seeking regulatory relief can make an application to ASIC pursuant to the application process described in ASIC’s Regulation Guide 51, *Applications for relief* (RG 51). RG51 states that applications must (among other things) be made in writing, contain all relevant information, and be accompanied by the prescribed fee.⁷ It is noted that up until 2007, RG 51 was known as Policy Statement 51, *Applications for relief* (PS 51), which was largely the same in substance as RG 51. ASIC also has the ability provide relief of its own motion.⁸ RG 51 states that, where ASIC is empowered to do so and if appropriate, it will execute class orders, which avoids the need for applicants to apply for relief on an individual basis.⁹ ASIC advises that it will “only execute class orders on policy that is well settled or after undertaking public consultation. However, we may make exceptions for class orders given on an interim basis”.¹⁰

2.4 ASIC has advised the Ombudsman that in 2004 and 2005 the consideration of class order relief involved policy development work (including possible industry consultation) by ASIC’s Regulatory Policy Branch (RPB). However, the decision-making power rested with ASIC’s Regulatory Policy Group (RPG), comprising of members of ASIC’s Commission and some senior ASIC staff.

⁵ Hansard, SERC’s Inquiry into the Performance of ASIC and evidence given to the Commonwealth Ombudsman by Mr A.

⁶ ASIC Regulatory Guide 51, *Applications for relief* (RG 51), para RG 51.1, and ASIC Regulatory Guide 167, *Licensing: Discretionary powers* (RG 167), para RG 167.3.

⁷ RG 51

⁸ RG 167

⁹ RG 51

¹⁰RG 51

Superannuation calculators

2.5 Superannuation calculators are mathematical tools commonly used to estimate the amount of superannuation available to fund members on retirement (based on information such as future contributions and retirement age).

2.6 These calculators are usually provided by superannuation funds at no cost to consumers and are generally accessed online via the website of the superannuation fund.

2.7 ASIC claims that changes brought about by the *Financial Services Reform Act 2001* (Cth) (implemented from 2002 to 2004) inadvertently created legal uncertainty regarding the use of superannuation calculators.¹¹ In general, the concern was that it was unclear whether superannuation calculators involved the provision of financial product advice, which would trigger the licensing, conduct and disclosure provisions of the Corporations Act.¹²

2.8 On 4 May 2004, ASIC published Information Release [IR 04-17] *ASIC provides guidance on superannuation calculators* (IR 04-17), which publicised ASIC's view that "the mere provision of a superannuation calculator does not mean the provider will always need an [Australian financial services (AFS)] licence or authorisation under the Corporations Act":

ASIC is aware that concerns have been expressed that an AFS licence or authorisation is always required for the provision of a superannuation calculator. This concern is based on the view that the provision of a calculator involves the giving of financial product advice. We are issuing this guidance to clarify that we do not think a licence or authorisation will always be required... The need for a licence will depend on a consideration of all the circumstances (including whether an entity can rely on an exemption under the Corporations Act).¹³

2.9 Despite releasing this guidance, ASIC believed that there remained ongoing uncertainty within industry about the legal position of superannuation calculators during 2004 and 2005. ASIC reasoned that there were a number of environmental factors which contributed to this uncertainty, including:

- The growing prevalence of calculators as a marketing and educational tool by retail and fund providers;
- Reforms to the financial services law, particularly the licensing regime and obligations applying to providers of personal advice; and
- Proposed reforms to laws applying to superannuation (i.e. the Superchoice reform).¹⁴

¹¹"Supplementary submission on ASIC's relief for generic financial calculators", Submission to the Senate Economics References Committee's Inquiry into the Performance of the Australian Securities and Investments Commission, May 2014.

¹² ASIC, Consultation Paper 70, *Online calculators* (CP 70), 23 August 2005.

¹³ ASIC, Information Release [IR 04-17], *ASIC provides guidance on superannuation calculators* (IR 04-17), 4 May 2004.

¹⁴ Letter from ASIC to Commonwealth Ombudsman, "Senate Economics References Committee's report: ASIC's relief for generic calculators", 8 July 2014.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

2.10 In August 2004, IFSA provided ASIC with a written submission requesting that ASIC consider granting regulatory relief in relation to online calculators.¹⁵

2.11 The following year, in May 2005, the Government released its “Refinements to Financial Services Regulation Proposals Paper” which outlined anticipated refinements to aspects of financial services regulation (FSR) introduced by the *Financial Services Reform Act 2001* (Cth). This paper identified concerns regarding whether online calculators constituted personal advice, and proposed that ASIC provide further guidance on, and/or relief for, the provision of basic online calculators to promote their use.¹⁶

2.12 In response, ASIC issued Information Release [IR 05-22] *ASIC provides details on financial services refinement projects* (IR 05-22), which stated that ASIC planned, by June 2005, to issue class order relief that would reflect the substance of ASIC’s administrative position in its earlier Information Release, IR 04-17. Further, ASIC stated that it planned, if necessary, to issue a consultation paper on any other compliance issues surrounding the provision of online calculators.¹⁷

2.13 ASIC granted Class Order 05/611 (CO 05/611) on 15 June 2005, which gave “providers of superannuation calculators relief from the requirement to hold an Australian financial services licence with an advice authorisation or (where they currently hold a licence) relief from the advice conduct and disclosure requirements”, subject to certain conditions.¹⁸

2.14 On 23 August 2005, ASIC released Consultation Paper 70, *Online calculators* (CP 70), which outlined proposals to extend the relief for superannuation calculators to financial calculators in general.

2.15 Following this, on 20 December 2005, ASIC released its final policy and class order relief for all generic financial calculators, Class Order 05/1122 (CO 05/1122). This second class order extended and superseded the class order released in June 2005 by granting relief to providers of generic financial calculators (including superannuation calculators) from the requirement to hold an AFS licence with an advice authorisation or (where they currently held a licence) relief from the conduct and disclosure requirements of Part 7.7 of the Corporations Act, subject to certain conditions.¹⁹

IFSA’s submission to ASIC

2.16 On 4 August 2004, IFSA provided a submission to ASIC requesting that it consider taking action to facilitate the maintenance of online calculators. IFSA’s specific request was that ASIC consider providing relief from certain requirements of the Corporations Act to licensed financial services providers who provided calculators

¹⁵ Letter from IFSA to ASIC, “Facilitating cost effective advice to consumers /provision of calculators/possible relief”, 4 August 2004.

¹⁶ Treasury, “Refinements to Financial Services Regulation: Proposals Paper”, May 2005.

¹⁷ ASIC, Information Release [IR 05-22], *ASIC provides details on financial services refinement project* (IR 05-22), 12 May 2005.

¹⁸ Explanatory Statement, ASIC Class Order [CO 05/611] “Exemptions for providers of superannuation calculators”.

¹⁹ Explanatory Statement, ASIC Class Order [CO 05/1122] “Exemptions for providers of calculators”.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

to consumers (specifically in relation to s945A – Requirement to have a reasonable basis for advice, and s946A – Obligation to give client a Statement of Advice).²⁰

2.17 IFSA’s submission outlined a number of reasons in support of relief, including:

- Calculators have a significant value to consumers, as they educate consumers about superannuation, provide information to people who are unwilling or unable to access advice in the form of face-to-face contact with professional advisers, and are usually provided free of cost;
- Consumers like calculators and complained when previously publicly available calculators were removed from the websites of some of IFSA’s members;
- IFSA members would be unable to provide calculators to consumers in a manner which complied with s945A and 946A of the Corporations Act, and would have to remove calculators unless relief was provided.²¹

2.19 On 5 November 2004, ASIC officers (Mr A, Mr B (on secondment from a financial services firm), and Mr C (Director of the RPB at that time)) met with representatives of IFSA to discuss the issues raised in IFSA’s submission.²²

2.20 Following this meeting, ASIC requested that IFSA consider drafting a supplementary submission containing further information of interest to ASIC, including an explanation as to why ASIC’s administrative position on superannuation calculators was not considered sufficient guidance for IFSA members, and why IFSA members believed it was necessary for ASIC to consider class order relief. In addition to this, ASIC asked IFSA to address concerns regarding how to define “calculator” for the purpose of the relief and to consider what conditions would be appropriate for the class order relief.²³

2.21 On 21 February 2005, IFSA provided a supplementary submission to ASIC in support of its letter of 4 August 2004. This submission responded to ASIC’s enquiries and also reiterated IFSA’s view that the:

withdrawal of many of the website calculators previously maintained by IFSA members is a direct result of the impact of some of the advice requirements which, while designed to protect customers, may have the reverse effect by cutting them off from a basic, but useful, form of education and assistance.²⁴

ASIC’s decision to grant class order relief for superannuation calculators

2.22 After considering the information provided by IFSA and other information deemed relevant, ASIC granted CO 05/611 on 15 June 2005, which gave “providers of superannuation calculators relief from the requirement to hold an Australian financial services licence with an advice authorisation or (where they currently hold a licence) relief from the advice conduct and disclosure requirements”.²⁵

²⁰ Letter from IFSA to ASIC, 4 August 2004.

²¹ Ibid.

²² Interview with Mr A, 30 October 2014.

²³ Email, ASIC to IFSA, “Calculators/risk profilers – Follow up from Friday”, 8 November 2004

²⁴ Letter from IFSA to ASIC, “Submission for relief for calculators”, 21 February 2005.

²⁵ Explanatory Statement for ASIC Class Order [05/611].

2.23 The relief was subject to certain conditions, including that the calculator could not generate advice about a specific financial product, that the default assumptions of the calculator were reasonable and could be changed by the user, and also that the calculator displayed clear statements about the purpose and any limitations of the calculator.²⁶

2.24 The Explanatory Memorandum stated that the purpose of the class order was “to deliver legal certainty for providers of superannuation calculators and to facilitate the provision of information about superannuation to consumers”.²⁷

2.25 Mr A has raised concerns about a number of aspects of ASIC’s decision-making process that resulted in this class order relief, and these will be addressed individually below.

ASIC’s authority to issue the class order

2.26 Mr A complained that he believed ASIC did not have the authority to issue the class order relief, as it overturned an intended effect of an act of Parliament (specifically the requirement to have a reasonable basis for advice found in s945A of the Corporations Act, as it then was).²⁸

2.27 In response to this allegation, ASIC has taken the view that it was not “explicitly clear” whether Parliament intended the providers of superannuation calculators would be required to hold an AFS licence and comply with the requirements of the personal advice regime under the Corporations Act. Further:

As a strict matter of law, whether the Parliament intends to regulate a particular activity does not limit the powers that Parliament has conferred on ASIC to exempt from or modify certain provisions of the legislation. The existence of those powers presupposes that there are things in the legislation in respect of which exemptions should be granted or modifications should be made from time to time.²⁹

2.28 At the point in time that ASIC made the relevant class order, the effect of s951B of the Corporations Act was that ASIC could exempt a class of persons from all or specified provisions of Part 7.7 of the Corporations Act, including s945A (Requirement to have a reasonable basis for advice) and s946A (Obligation to give a client a Statement of Advice). Further, s926A of the Corporations Act provided that ASIC could exempt a class of persons from all or specified provisions of Part 7.6 of the Corporations Act (Licensing of providers of financial services).

2.29 Based on this, it would appear that ASIC had the requisite power to issue a class order granting relief from specified provisions of Part 7.6 and Part 7.7 of the Corporations Act.

Requirement to submit a formal application

2.30 One of the key aspects of Mr A’s complaint is that ASIC did not require IFSA to submit a formal relief application, and IFSA did not pay the mandatory application fee; instead, IFSA was allowed to submit its application for regulatory relief in the form of letter personally addressed to senior ASIC staff.³⁰

²⁶ Ibid.

²⁷ Ibid.

²⁸ Hansard, SERC’s Inquiry into the Performance of ASIC.

²⁹ ASIC, “Questions on notice for ASIC”, SERC’s Inquiry into the Performance of ASIC.

³⁰ Hansard, SERC’s Inquiry into the Performance of ASIC.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

2.31 ASIC's response to this allegation is that formal relief applications are only required (and application fees are only payable) where relief applications are made by individuals in relation to a law that applies specifically to them, not in cases where the relief being sought is class order relief.³¹ In this context, the correspondence from IFSA appears to have been viewed as a "submission" rather than as an "application" for relief.

2.32 ASIC's view is consistent with RG 51 which states that ASIC is empowered to execute class orders, and where ASIC chooses to exercise this power, there is no need for applicants to apply for relief on an individual basis.³²

2.33 More specifically, the class order in this case was made under s926A and 951B of the Corporations Act, which provide that ASIC may exempt a class of persons from all or specified provisions of Part 7.6 (Licensing of providers of financial services) and Part 7.7 (Financial services disclosure) of the Corporations Act. These exemption powers confer an unconstrained discretion on ASIC and accordingly, ASIC can exercise this power at its own initiative or as a result of receiving a formal relief application.

2.34 ASIC has emphasised that the project to consider granting regulatory relief in relation to superannuation calculators was not specifically triggered by IFSA's submission, but was initiated by ASIC in response to a number of relevant factors at that time.³³ These factors were said to include the announcement of the Government's program of refinements to the newly introduced FSR, concerns expressed (and submissions received) from the industry about the legal uncertainty surrounding the provision of superannuation calculators, and the potential for detriment to consumers if superannuation calculators were no longer available or only available through personal advice from a financial planner.³⁴

2.35 It is reasonable to conclude that the reason IFSA was not required to lodge a formal application and pay the application fee was because ASIC had made the decision to consider granting class order relief on its own initiative, which it is empowered to do. The Ombudsman cannot be critical of this.

Consultation

2.36 Mr A has also claimed that ASIC failed to undertake public consultation before making its decision to grant regulatory relief for superannuation calculators.³⁵

2.37 RG 51 advises that ASIC will "only execute class orders on policy that is well settled or after undertaking public consultation".³⁶ This policy is based on the requirements of the *Legislative Instruments Act 2003*, which states that rule-makers should be satisfied that any consultation that is considered by the rule-maker to be appropriate and is reasonably practicable to undertake, has been undertaken before making a legislative instrument,³⁷ but that consultation may be "unnecessary or inappropriate" if the instrument is "of a minor or machinery nature" and it "does not substantially alter existing arrangements".³⁸ As a general rule, public consultation

³¹ Letter from ASIC to Commonwealth Ombudsman, 8 July 2014.

³² ASIC RG 51.

³³ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

³⁴ Letter from ASIC to Commonwealth Ombudsman, 8 July 2014.

³⁵ Hansard, SERC's Inquiry into the Performance of ASIC.

³⁶ ASIC RG 51.

³⁷ *Legislative Instruments Act 2003* (Cth), s17(1).

³⁸ *Ibid*, s18(2).

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

should be the default form of consultation,³⁹ however, there is no legislative requirement for rule-makers to undertake full public consultation in all cases when making legislative instruments.

2.38 The Explanatory Memorandum relating to CO 05/611 states that consultation in this case involved taking into account industry views expressed at industry liaison meetings and meetings with representatives of the superannuation industry (IFSA and the Association of Superannuation Funds of Australia (ASFA))⁴⁰ to discuss the proposals for relief. ASIC states that it did not undertake further consultation because, in its view, the class order was of a minor and machinery nature and it did not substantially alter ASIC's previously announced administrative position in IR 04-17.⁴¹

2.39 ASIC released IR 04-17 in May 2004, some 13 months before the class order was executed by ASIC. This sequence of events supports ASIC's view that public consultation was not required because the class order did not change its previously announced position. While it would appear that there are some variations in the terms of the relief and also in the conditions of the relief outlined in CO 05/611 when compared to IR 04-17, the Ombudsman accepts ASIC's position that CO 05/611 did not substantially alter ASIC's previous position in IR 04-17.

2.40 RG 51 also states that ASIC may make exceptions to its policy to undertake public consultation in cases where the class order is given on an interim basis.⁴² Although it was not formally announced as such, there is evidence to suggest that ASIC intended that the class order relating only to superannuation calculators would be an interim measure. In the submission to the RPG, it was flagged that broader work concerning generic calculators was planned, and that this work would "be the subject of a broader policy proposal and stakeholder consultation process".⁴³ Two months following the execution of the first class order, ASIC released CP 70, which outlined proposals to extend the relief for superannuation calculators to financial calculators in general. ASIC received 16 submissions from industry in response to this Consultation Paper, and these submissions were considered by ASIC in the RPB's submission to the RPG.⁴⁴ On 20 December 2005, ASIC released its final policy and class order relief for all generic financial calculators, CO 05/1122, which extended and superseded the class order released in June 2005. The result was that the first class order was in force for six months only, suggesting it was an interim measure.

2.41 On this basis, the Ombudsman's view is that the nature of consultation in relation to CO 05/611 was open to ASIC in all the circumstances.

Allegations of political influence

2.42 Mr A has also explained that he believes ASIC's decision-making in relation to superannuation calculators was unduly affected by concerns about the political influence of IFSA and the possibility of ministerial interference. A key part of Mr A's allegation is his recollection of being told by Mr C words to the effect of "not giving

³⁹ Australian Government, "The Australian Government Guide to Regulation", March 2014.

⁴⁰ Letter from ASIC to Commonwealth Ombudsman, 8 July 2014.

⁴¹ Explanatory Statement for ASIC Class Order [05/611].

⁴² ASIC RG 51.

⁴³ ASIC internal email with draft submission to the Regulatory Policy Group, 18 May 2005.

⁴⁴ ASIC, Regulatory Policy Group submission: "FSR Refinement Proposal 10.3: Calculators and Risk Profilers", 16 November 2005.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

relief is not an option because IFSA will go to the Minister, who will go to the Commission, who will then ask me [Mr C] why relief had not been granted”.⁴⁵

2.43 In response to this allegation, ASIC does not deny that a conversation took place between Mr A and Mr C where a reference to the “Minister” was made, however, it has disputed what the substance of the conversation was. In ASIC’s view, the conversation was focussed on Mr C’s expectations relating to the timely completion of tasks.

2.44 A particular difficulty in reconstructing events that occurred approximately 10 years ago is that people may have different recollections of conversations and the context in which they occurred. In this case, there are insufficient file notes and contemporaneous records to come to a conclusion about the specific nature of the exchange between Mr A and Mr C.

2.45 The Ombudsman has not identified evidence to indicate that IFSA did “go to the Minister” or that “the Minister” went to the Commission in order to request an explanation as to why regulatory relief had not been granted during ASIC’s assessment of the issue.

2.46 ASIC has acknowledged that it considers possible sensitivities when making policy decisions; in this context, ASIC’s then Executive Director of Policy and Markets Regulation expressed the view that ASIC’s policy is influenced by its thinking about the world, by submissions from industry, by submissions from consumer groups and by its understanding of government policy and direction as it ought to be. In the Ombudsman’s view, it was open to ASIC, and indeed appropriate, to give consideration to all these stakeholders when assessing the merits of class order relief.

2.47 The Ombudsman has formed the opinion that ASIC’s generic calculator project was not unduly affected by the political influence of IFSA and/or a concern about possible ministerial interference.

Divergent views within ASIC

2.48 Mr A has also suggested that the regulatory relief which IFSA sought was “controversial” within ASIC. His view is that others, particularly lawyers in ASIC’s Consumer Protection directorate, expressed serious misgivings about the adverse effects of any proposed relaxation or amendment of existing legal requirements, but that these concerns were minimised by Mr C.⁴⁶

2.49 Mr C’s recollection is that there was no major dissent in ASIC in relation to the underlying policy decision that superannuation calculators should not be subject to the personal advice and licencing regimes, but that there were differences in opinion about what conditions should be attached to the relief and how these would be monitored. In Mr C’s view, the generic calculator project was completely open to all at ASIC for contribution and comment. In particular, Mr C stated that the views of the Consumer Protection directorate informed ASIC’s decision-making, with the result that the class order was narrow in its scope.⁴⁷

2.50 These differing recollections present another example where it is difficult to reconcile two points of view to form a conclusion about events that occurred

⁴⁵ Interview with Mr A, 30 October 2014.

⁴⁶ Interview with Mr A, 30 October 2014.

⁴⁷ Interview with Mr C, 21 November 2014.

approximately 10 years ago. A further difficulty is that Mr A had ceased working at ASIC when the submission on superannuation calculator relief was presented to the RPG, with the result that he was not personally involved in the project to completion.

2.51 However, ASIC internal documents from that time indicate that three cross-directorate meetings were held in relation to the generic calculator project prior to the issue of the first class order.⁴⁸ This suggests that other directorates in ASIC were provided with multiple opportunities to contribute to the project. Further, in an ASIC internal memo dated March 2005, it was reported that a “divergence of views were expressed on the appropriateness of any relief” during the cross-directorate meeting held in February 2005,⁴⁹ which suggests that these views – including Mr A’s view – were not “minimised” but were openly acknowledged.

2.52 It is also noteworthy that the draft submission to the RPG regarding superannuation calculators was shared with other directorates, including the Consumer Protection directorate, to allow for comments before it was submitted to the RPG.⁵⁰

2.53 Based on this, the Ombudsman is satisfied that the evidence suggests any divergent views within ASIC were given consideration in the decision-making process.

Ombudsman’s conclusions regarding the decision to grant regulatory relief for online calculators

2.54 In the Ombudsman’s opinion:

- There is a legislative basis for ASIC’s view that it had the power to issue a class order granting regulatory relief from the relevant sections of the Corporations Act;
- It is reasonable to conclude that IFSA was not required to lodge a formal application for regulatory relief and pay the application fee in this case because ASIC made the decision to consider granting class order relief on its own initiative, which it is empowered to do;
- The nature of consultation in relation to the superannuation calculator class order was open to ASIC in the circumstances, particularly as the Ombudsman accepts ASIC’s view that CO 05/611 did not substantially alter ASIC’s previously announced administrative position in relation to superannuation calculators;
- It was open to ASIC, and indeed appropriate, to give consideration to stakeholder groups and government policy when assessing the merits of granting class order relief;
- ASIC’s decision to grant relief was not unduly affected by the political influence of IFSA and/or a concern about possible ministerial interference;
- Available records indicate that other directorates in ASIC (particularly the Consumer Protection directorate) were given reasonable opportunities to communicate their views about the generic calculator project and any

⁴⁸ ASIC, draft internal submission to the Regulatory Policy Group, attached to an email, 18 May 2005.

⁴⁹ ASIC internal email “Generic advice – calculator relief - Brief”, 3 March 2005, with Memo “Generic Advice – Calculator Relief”.

⁵⁰ ASIC internal email “Superannuation calculators – comments by 19 May”, 16 May 2005.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

divergent views within ASIC were given consideration in the decision-making process.

PART 3—ASIC’S MANAGEMENT OF THE DISCLOSURE OF A POSSIBLE CONFLICT OF INTEREST

3.1 The second substantive part of the allegations made by Mr A is that ASIC did not appropriately respond to the disclosure of a possible conflict of interest made by a secondee from a financial services firm in 2004, and subsequently, that ASIC failed to identify and take action to manage the resulting conflict of interest. This allegation relates to Mr B, who was on secondment from a firm, which was a member of IFSA, for a six month period across 2004 and 2005.

Definition of conflict of interest

3.2 In general, a “conflict of interest” arises when a person has an interest – real or perceived – that conflicts with a duty they hold, and could influence the performance of that duty. ASIC’s “Statement on disclosure of interests and conflicts of interests” (which was current at the time of Mr B’s secondment to ASIC) defines a conflict of interest as when:

...you are required to consider a matter in which you have a direct or indirect interest. The existence of that interest may mean that you are unable, or you may be perceived as being unable, to properly perform or exercise your functions, services or powers. The interest may be a pecuniary interest, an indirect interest or other interest. “Other interest” may include current or former personal relationships, such as friendships, familial ties, business or other professional or social associations or where you have had prior dealings of a negative kind.⁵¹

3.3 In regards to how this concept applied to ASIC and its employees, ASIC’s overarching policy at this time was that:

ASIC and members of its staff must avoid situations where external or personal interests may conflict, or appear to conflict, with our administration or enforcement of the ASIC Act, the Corporations Act 2001 (Corporations Act) or other legislation.⁵²

Mr B’s secondment from a financial services firm to ASIC

ASIC’s secondment program

3.4 Documents provided by ASIC indicate that it has had regular secondment activity over the past decade, with secondees coming from both private firms and public service organisations within Australia, as well as from international public service organisations at various points in time.⁵³ However, ASIC has declined to describe this activity as a formal “program”, instead explaining that secondments in to, and out of, ASIC are based on business need.⁵⁴

3.5 Internal ASIC documents relevant to the period from 2004 to 2014 indicate that a large proportion of secondees into ASIC came from private organisations which were then members of IFSA (and/or its successor, the Financial Services

⁵¹ ASIC, “Statement on disclosure of interests and conflicts of interests: Disclosing interests and conflicts of interests”, May 2004.

⁵² *Ibid.*

⁵³ ASIC, “List of National Secondees to ASIC”, undated; and ASIC, “List of International Secondees to ASIC”, undated.

⁵⁴ Letter from ASIC to the Commonwealth Ombudsman, 9 February 2015.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

Council). Mr A has communicated to the Ombudsman his suspicion that there has been a permanent representative from IFSA at ASIC during the past decade. However, based on the documents provided to the office of the Ombudsman, it does not appear that this has been the case.

3.6 Further, it is noted that secondees who came from private organisations were placed in a number of different teams within ASIC, and relatively few secondees were placed in regulatory policy roles at ASIC.

Mr B's secondment from a financial services firm to ASIC

3.7 In 2004, ASIC, a financial services firm and Mr B entered into an agreement which provided that Mr B, an employee of the firm, would provide consultancy services to ASIC for a period of 6 months, commencing on 27 September 2004.⁵⁵

3.8 Prior to beginning the secondment, Mr B's role was Senior Legal Counsel in the Distribution Business Division of the firm. Mr B also had some involvement in IFSA working groups on post-FSR implementation issues, as the firm was a member of IFSA at that point in time.⁵⁶

3.9 The Consultancy Agreement was made under s121 of the ASIC Act, which allows ASIC to engage consultants to perform services for it. Interestingly, the ASIC Act uses the term secondee only in the context where the person assisting ASIC is an employee of an agency within the meaning of the *Public Service Act 1999* (Cth) (PS Act), and not in cases of agreements where the person is from private industry. However, the provision of the consultancy services to ASIC by Mr B was viewed by the parties as a secondment arrangement.⁵⁷

3.10 ASIC has explained that the key reason for Mr B's secondment to ASIC was that there existed a business need for the skills that Mr B possessed; specifically, ASIC had a heavy workload at that time and it was considered that getting practical insights from industry would be helpful for ASIC's efficient consideration of matters.⁵⁸ According to ASIC, close engagement with industry, including appropriate secondments, was considered "an efficient and desirable tool" in achieving ASIC's objectives.⁵⁹ It was against this background that senior leadership decided that taking on secondees would be beneficial at that point in time,⁶⁰ and from Mr B perspective, the secondment to ASIC was seen as a growth opportunity.⁶¹

Placement of Mr B on the generic calculator project team

3.11 Mr C was the decision-maker regarding whether Mr B was a suitable secondee for ASIC. Mr C explained to the Ombudsman's staff that there was a common understanding at this time that secondees from industry would be placed in the RPB because it was a team that dealt with industry-wide issues, rather than looking at individual firm-by-firm applications for regulatory relief.⁶²

⁵⁵ Consultancy Agreement, undated.

⁵⁶ Interview with Mr B, 21 November 2014.

⁵⁷ ASIC internal email, 23 August 2004.

⁵⁸ Interview with Mr C, 21 November 2014.

⁵⁹ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

⁶⁰ Interview with Mr C, 21 November 2014.

⁶¹ ASIC internal email, 23 August 2004.

⁶² Interview with Mr C, 21 November 2014.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

3.12 According to Mr C, the concept of bringing secondees with industry expertise into the RPB was “acceptable” for a number of reasons, including:

- The RPB had no decision-making authority, as decisions were made by the delegate body of the Commission, the RPG; and
- Part of the RPB’s role was to consult with other directorates in ASIC, so the work of the RPB was open to wide review.⁶³

3.13 After commencing with ASIC, Mr B was assigned to a number of projects in the RPB, one of which was the generic calculator project. The decision to allocate Mr B to the generic calculator project was also made by Mr C in dialogue with the Assistant Director of the RPB and other senior managers.⁶⁴

3.14 Mr C stated that his direction was that Mr B would work with Mr A to draft an issues paper regarding generic calculator relief that would then be considered by senior management in the RPB and the other directorates, before being submitted to the RPG for approval. According to Mr C, Mr B’s knowledge of the industry and his practical understanding would assist in the efficient delivery of the project.⁶⁵

The management of Mr B’s disclosure of a possible conflict of interest

Mr B’s disclosure of the possible conflict of interest

3.15 The induction process at ASIC involved the completion of a Disclosure of Interests Declaration, where Mr B took the opportunity to declare his employment with the financial services firm.⁶⁶

3.16 Following this initial disclosure, it is agreed by all involved parties that Mr B expressed to Mr C, in the presence of Mr A, that he believed his involvement in ASIC’s generic calculator project may give rise to a possible conflict of interest. His concern was due to the fact that he had some involvement in IFSA’s submission to ASIC regarding online calculators before his secondment to ASIC commenced.⁶⁷ As the financial services firm in question was a member of IFSA at this time, its employees sometimes became involved in IFSA discussions and working groups about particular issues relevant to commercial providers of financial services, and in this case, Mr B had involvement in IFSA’s work in relation to superannuation calculators.

3.17 Although there is some uncertainty about the date on which this disclosure was made, it would appear that it occurred on either 7 October 2004 or 5 November 2004. In either case, it would seem that the disclosure was made around the time that Mr B first became involved in ASIC’s generic calculator project (noting that a weekly report of the RPB dated 15 October 2004 provides the first indication that Mr B had been assigned to the project).⁶⁸

3.18 Another area of uncertainty involves what was disclosed in terms of the nature of Mr B’s involvement in IFSA’s submission. Mr B has recollected that he

⁶³ Interview with Mr C, 21 November 2014.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ “ASIC’s Disclosure of Interests Declaration Form”, signed by Mr B, 22 September 2004.

⁶⁷ Interviews with Mr A on 30 October 2014, and with Mr B and Mr C on 21 November 2014.

⁶⁸ ASIC, “Current Regulatory Policy Project as at 15 October 2004”, 15 October 2004.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

disclosed he was involved in discussions with the IFSA working group on the superannuation calculator issue,⁶⁹ while Mr A's understanding was that Mr B's involvement included assisting with the drafting of IFSA's submission to ASIC and also providing advice to IFSA about the process for requesting that ASIC consider granting regulatory relief.⁷⁰ In a slightly different version of events, documents provided to the office of the Ombudsman indicate that Mr B explained to Mr C that he had attended IFSA Committee Meetings and was part of the working group which drafted the IFSA submission to ASIC.⁷¹ In the Ombudsman's opinion, these variations in recollections are understandable in light of the fact that 10 years have passed since the event was said to have occurred. At a minimum, it can be concluded that Mr B disclosed that he was involved in discussions with the IFSA working group regarding superannuation calculators.

Mr C's response to the disclosure of the possible conflict of interest

3.19 There are also some variations regarding the specific nature of Mr C's response to Mr B (which, again, is understandable given the passage of time). Mr A has suggested that Mr C responded with words to the effect of "Don't worry about it" and immediately gave Mr B a new task to complete in relation to the project. Mr B could not recall Mr C's specific response to his disclosure, however, his impression was that Mr C "wasn't troubled or was unperturbed" about his prior involvement with IFSA. Mr C also cannot remember his exact words in response to Mr B, however, he commented that at that time he did not see any immediate reason to cause him to question having Mr B involved in the work, as the disclosure:

really provided no additional information to what ASIC already knew about Mr B. It was plain knowledge when he joined the team that Mr B was a [financial services firm] employee who had assisted IFSA on a number of matters.⁷²

3.20 Whatever the exact nature of Mr C's response to Mr B, the recollections of the conversation suggest that Mr C decided to allow Mr B to continue to work on ASIC's generic calculator project. Mr C did not seek internal legal advice, nor did he record the details of the disclosure.⁷³

3.21 Mr B's actions in disclosing the possible conflict of interest and Mr C's subsequent management of the disclosure can be examined in a number of ways, including whether their actions complied with the contractual obligations of the Consultancy Agreement, the legislative obligations found in the PS Act and the ASIC Act, as well as the principles found in ASIC's various policies regarding conflicts of interest.

Contractual obligations regarding the disclosure of a conflict of interest

3.22 The Consultancy Agreement between the financial services firm, ASIC and Mr B made a small reference to the issue of potential conflicts of interest, stating:

In order to avoid any potential conflicts of interest that may arise during the consultancy work, the Consultant [Mr B] will not work on any matter for ASIC which directly involves [the financial services firm] or the broader [Groups of Companies].⁷⁴

⁶⁹ Interview with Mr B, 21 November 2014.

⁷⁰ Interview with Mr A, 30 October 2014.

⁷¹ ASIC, "Draft outline of evidence of [Mr C]", undated.

⁷² Interviews with Mr A on 30 October 2014, and with Mr B and Mr C on 21 November 2014.

⁷³ Interview with Mr C, 21 November 2014.

⁷⁴ Consultancy Agreement, undated.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

3.23 The Agreement does not set out the process for disclosing a conflict of interest, nor what the possible outcomes could be if a conflict was found to exist. There is also a lack of clarity about how ASIC would assess whether any matter directly involved the financial services firm or the broader groups of companies. It can perhaps be assumed that in the event that potential conflicts arose, ASIC would rely on its own internal policies to manage the situation, including its “Statement on disclosure of interests and conflicts of interests” and “A guide for managers in dealing with conflicts of interests”. The application of these policies is discussed below.

3.24 Further, the Consultancy Agreement also provided that Mr B would be bound by ASIC’s general requirements of its own employees concerning their conduct, specifically the Australian Public Service Code of Conduct (APS Code of Conduct).⁷⁵ This Code obliges APS employees to disclose or take reasonable steps to avoid any conflict of interest (real or apparent).⁷⁶ Mr B’s compliance with the APS Code of Conduct is also discussed below.

3.25 It is noted that ASIC no longer appears to use Consultancy Agreements in the general form that constituted the basis of the agreement with Mr B. ASIC has provided to the office of the Ombudsman its current template Secondment Agreement for use in situations where a secondee comes from a private organisation.⁷⁷ On the whole, the current iteration of this Agreement provides far more detailed information regarding steps that need to be taken to ensure a conflict of interest does not arise, as well as the consequences of finding that a conflict does exist. However, it is noted that there are aspects of the current Agreement that ASIC may wish to review, including:

- The role that ASIC has during a secondment to ensure that a secondee does not work on any matter that involves a conflict or perceived conflict of interest, as well as the process that ASIC will follow upon becoming aware of conflict; and
- The secondee’s obligations in regards to conflicts or potential conflicts, including information such as who a disclosure should be made to, when a disclosure should be made, and in what form a disclosure should take.

Legislative obligations regarding the disclosure of a conflict of interest

APS Code of Conduct

3.26 The terms of the Consultancy Agreement between ASIC, the financial services firm and Mr B provide that Mr B would be bound by ASIC’s general requirements of its own employees concerning their conduct, specifically the APS Code of Conduct.⁷⁸

3.27 The APS Code of Conduct is set out in s13 of the PS Act, which refers specifically to the obligations of an “APS employee”. In the case of Mr B, the Consultancy Agreement made it clear that nothing in the Agreement should have the effect of construing a relationship of employer and employee between ASIC and Mr B.⁷⁹ On this basis, it would appear that Mr B was not specifically bound by the requirements of the PS Act.

⁷⁵ Ibid.

⁷⁶ *Public Service Act 1999* (Cth), s 13(7), as at 31 December 2004.

⁷⁷ “ASIC Secondment Agreement (Firm to ASIC)” template, updated April 2013.

⁷⁸ Consultancy Agreement, undated.

⁷⁹ Ibid.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

3.28 However, as the principles found in the APS Code of Conduct formed general requirements that Mr B agreed to be bound by, it is pertinent to ask whether Mr B disclosed, or took reasonable steps to avoid, any conflict of interest (real or apparent) pursuant to the obligations of the Code.⁸⁰ It is agreed by all involved parties that Mr B verbally disclosed the possible conflict of interest regarding the superannuation calculators matter to Mr C, which therefore suggests that Mr B's actions were generally compliant with the Code.

3.29 Looking at the matter from a different perspective, it is also relevant to consider whether Mr C's management of the disclosure of the conflict of interest – or his management of the generic calculator project more generally – gave rise to any apparent breach of the APS Code of Conduct. To put this into context, one aspect of Mr A's allegations was that Mr C failed to act apolitically, which constituted a breach of the APS Code of Conduct principle of behaving in a way that upholds the Australian Public Service Values (APS Values). At this time, the PS Act outlined the APS Values including that "the APS is apolitical, performing its functions in an impartial and professional manner".⁸¹

3.30 As explored above, the Ombudsman's analysis of Mr C's actions in relation to IFSA's submission regarding online calculators did not uncover reason to conclude that Mr C was unduly influenced by IFSA's alleged political influence. On this basis, the Ombudsman cannot conclude that Mr C acted inconsistently with the APS Values in this regard. Further, the Ombudsman has found no evidence to support the contention that Mr C breached other APS Values or the APS Code of Conduct outlined in the PS Act.

ASIC Act

3.31 Section 125 of the ASIC Act obliges a person who is engaged as a consultant to ASIC to provide written notice to ASIC stating that he/she is required to consider a matter and that he/she has an interest that could involve a conflict, if the person believes that a conflict exists.⁸² It would appear that this obligation applied to Mr B during the secondment period.

3.32 Although Mr B did not provide written notice to ASIC regarding the possible conflict he had identified, it is agreed by all parties that Mr B took action to make the disclosure to Mr C. In this case, the Ombudsman considers it was reasonable for Mr B to believe that he was not required to provide written notice of the possible conflict following his discussion with Mr C, particularly as Mr C did not advise him to take any further action. It is also difficult to see how Mr B would have known to put the disclosure in writing if he had not been advised to do so by ASIC. In this regard, it is relevant to note that Mr B explained to the Ombudsman's staff that he felt comfortable about his involvement in ASIC's generic calculator project because he believed he had been transparent with Mr C, and Mr C communicated to him that he was untroubled by the situation.⁸³

3.33 Although it would have been optimal for Mr B to formalise the disclosure in writing as was required by s125 of the ASIC Act, there is no evidence to suggest that Mr B sought to conceal from ASIC his contribution to IFSA's online calculators working group; on the contrary, he brought it to the attention of his supervisor at an early stage, and the Ombudsman cannot be critical of the actions of Mr B in raising

⁸⁰ *Public Service Act.*

⁸¹ *Ibid.*

⁸² *ASIC Act*, s125.

⁸³ Interview with Mr B, 21 November 2014.

the issue with Mr C. In the Ombudsman's view, Mr B acted entirely appropriately in raising the issue with Mr C.

ASIC's policies regarding the disclosure and management of a conflict of interest

3.34 In addition to the legislative requirements explored above, the terms of the Consultancy Agreement provided that Mr B would be "bound by ASIC's general requirements of its own employees concerning their conduct".⁸⁴ At the time of Mr B's secondment, ASIC had in place formal policies regarding conflicts of interests, including ASIC's "Statement on disclosure of interests and conflicts of interests" (the Statement)⁸⁵ and "A guide for managers in dealing with conflicts of interests" (the Guide)⁸⁶. It would appear that Mr B agreed to comply with the principles outlined in these policies upon signing the Consultancy Agreement.

ASIC's statement on the disclosure of interests and conflicts of interests

3.35 At the time in question, ASIC's Statement provided that, even where the relevant person believed that an interest would not actually impair the performance of their functions or duties as an ASIC staff member:

...you must disclose any conflict or perceived conflict of interest that arises in writing, to your supervisor or disclosure officer in the same office as you...as soon as you become aware of the conflict.⁸⁷

3.36 As explained above, although Mr B did not make the disclosure in writing, the Ombudsman considers that Mr B's actions were reasonable in all the circumstances. Mr B made a disclosure of what he believed to be a possible conflict of interest to an appropriate person (that being his supervisor, who was also considered a "disclosure officer" for the purposes of ASIC's policy) at a point in time which appears to have been around the beginning of his involvement in the project.

3.37 ASIC's Statement also provided information regarding the role of supervisors and disclosure officers once a disclosure had been made. The Statement provided that supervisors were obliged to contact a disclosure officer, and could make a recommendation about how to handle the conflict. The responsibility for considering whether there was, or could be, a conflict of interest was given to the disclosure officer, who could authorise the person making the disclosure to continue their duties without any further action, or could take other action such as rearranging duties or transferring the discloser to another equivalent position.⁸⁸ As Mr C was both Mr B's supervisor and a disclosure officer in this case, Mr C had responsibility for considering whether a conflict of interest existed and what action should be taken. Based on this, it was reasonable for Mr C to make the initial assessment about what action should be taken in response to Mr B's disclosure.

3.38 The issue of whether Mr C took relevant factors into account in his decision-making process, and whether his decision to retain Mr B on the generic calculator project was reasonable, are other questions which are more appropriately dealt with in the context of whether Mr C complied with ASIC's Guide.

⁸⁴ Consultancy Agreement, undated.

⁸⁵ ASIC's Statement on disclosure of interests and conflicts of interests.

⁸⁶ ASIC, "A guide for managers in dealing with conflicts of interest", 6 October 2002.

⁸⁷ ASIC's Statement on disclosure of interests and conflicts of interests.

⁸⁸ Ibid.

ASIC’s guide for managers in dealing with conflicts of interest

3.39 At the time of Mr B’s secondment to ASIC, the purpose of ASIC’s Guide was said to be to:

...provide guidance to managers of staff to whom a conflict of interest disclosure has been made and who then need to determine what measures should be implemented to deal with the staff member’s conflict.⁸⁹

3.40 The Guide specifically states that a person is considered to be a “staff member” for the purposes of the Guide if they are a consultant engaged under s121 of the ASIC Act, as was the case with Mr B.

3.41 The first step identified by the Guide when dealing with the disclosure of a conflict of interest is “to establish that one actually exists”, keeping in mind the “starting premise” that “if a staff member considers that they are affected by a conflict of interests, then it will usually be appropriate to assume that they are”.⁹⁰

3.42 Factors relevant to this consideration were said to include the nature of the interest giving rise to the conflict, the status of the conflicted officer and their role in the decision-making process, the nature of the decision, whether the conflicted person is required to take the action alone or as part of a committee, the time at which the conflict arises, and whether there is another non-conflicted officer available.⁹¹

3.43 Mr C explained to the Ombudsman’s staff that he gave consideration to a number of factors relevant to Mr B’s placement in the RPB when determining what action to take in response to the disclosure, including what he described as measures that had already been put in place by ASIC to manage the conflict, being:

- Mr B would not work on any matter that involved a specific application for relief from his normal employer; he would only work on industry-wide matters;
- Mr B would not approve any papers; papers were approved by senior management after wide consultation within the organisation;
- Mr B did not have decision-making authority; the ultimate decision about the grant of regulatory relief was made by the RPG;
- The generic calculator project was a simpler matter, as the task involved putting in place a policy to reflect ASIC’s existing administrative position.⁹²

3.44 In Mr C’s opinion, Mr B’s disclosure “provided no additional information to what ASIC already knew about Mr B”, and the measures put in place to manage the conflict “remained strong”, so there was no “immediate inconsistency” or any reason to cause him to question having Mr B continue working on the generic calculator project.⁹³ Based on Mr C’s explanation, it would appear that ASIC had already identified a conflict of interest at the commencement of Mr B’s secondment with ASIC, but it believed that it had put in place sufficient measures to manage that conflict.

⁸⁹ ASIC’s Guide for managers in dealing with conflicts of interest.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Interview with Mr C, 21 November 2014.

⁹³ Ibid.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

3.45 This decision can be differentiated from a decision that a conflict did not exist (which is described by the Guide to apply to cases where “[t]he staff member might have conceivably have misconstrued ASIC’s conflicts policy and might have made disclosure of some matter which could not give rise to a conflict on any view”). The Guide makes is clear that the conclusion that a disclosure of a conflict is misconceived should only be formed by the relevant Executive Director, will generally require receipt of specific legal advice, the reasons for the decision should be documented, and further, written notification should be forwarded to ASIC’s Risk Management Unit (RMU) to be retained in the staff member’s Personal Security File.⁹⁴ In this case, it does not appear that Mr C came to the conclusion that the conflict did not exist (particularly as he stated that ASIC had put in place measures to “manage” the conflict), and hence, it does not seem that this aspect of the Guide applied to this situation.

3.46 Mr C’s actions therefore need to be examined in the context of other principles found in the Guide, particularly principles relating to situations where a conflict of interest is found to exist but that the circumstances justify maintaining the conflicted officer on the relevant project.

3.47 In general, the Guide indicates that the starting point for Mr C’s decision-making should have been to exclude Mr B from the generic calculator project:

...an officer who has a conflict of interests, real or apparent, that is more than merely inconsequential, should be excluded from making the relevant decision or taking the relevant action.⁹⁵

3.48 However, this general principle can be departed from if the circumstances warrant such a departure. The Guide clearly sets out two relevant scenarios:

1. Conflicts that are determined to be “merely inconsequential” are handled differently under the Guide:

There will be some cases where a conflict can properly be held to be merely inconsequential...in which case no particular action by the manager may be necessary, other than recording the staff member’s disclosure and the manager’s view of it.⁹⁶

2. Alternatively, the Executive Director may make a decision not to exclude an officer from making the relevant decision or taking the relevant action.

3.50 As Mr C decided not to exclude Mr B from the generic calculator project but he did not refer the matter to the relevant Executive Director, it is likely that he regarded the conflict as being “merely inconsequential” for the purposes of the Guide. In this case, the Guide states that Mr C should have recorded Mr B’s disclosure and his own view of the situation. This did not occur.

3.51 The Ombudsman has given consideration to how the Guide could reasonably have been applied in the circumstances of Mr B’s disclosure.

⁹⁴ ASIC’s Guide for managers in dealing with conflicts of interest.

⁹⁵ Ibid.

⁹⁶ Ibid.

Was the conflict “merely inconsequential”?

3.51 While acknowledging that “[e]ach case will turn on its facts”, the Guide suggests that the test for determining whether a conflict is merely inconsequential is simply whether “any reasonable person would regard it as merely inconsequential”. In order to assist with this assessment, the Guide provides examples of merely inconsequential conflicts, including:

- A staff member holds a bank account with an authorised deposit-taking institution (ADI) and the ADI has made an application to ASIC that the staff member is asked to deal with, but that application has no direct or indirect bearing on the rights of person holding such bank accounts.
- A staff member is asked to investigate a company and they hold a general insurance policy of the common variety issued by a company related to the company which is the subject of the investigation, in circumstances where the outcome of the investigation does not relate to general insurance policies and could have no impact on the efficacy of the policy.⁹⁷

3.52 The examples outlined in the Guide do not provide specific guidance which is relevant to the situation involving Mr B, however, it appears that the general principle to take from these examples is that the action taken or decision made by the person in their capacity as an ASIC staff member does not relate to, or has no impact on, their interest in the company/ADI, and the conflict is therefore “merely inconsequential”.

3.53 In the case of Mr B, however, it is possible to suggest that his involvement in ASIC’s decision to grant regulatory relief in relation to superannuation calculators could be seen to relate to his interest as an employee of the financial services firm. This is on the basis that:

- Mr B was an ongoing employee of the firm, which was part of the [...] group of companies, which provided various services including services involving superannuation;
- The firm was a member of IFSA, the peak industry body representing the interests of financial services providers;
- Mr B had involvement in the IFSA working group regarding online calculators before he commenced a secondment at ASIC;
- IFSA provided a submission to ASIC requesting that ASIC consider granting regulatory relief in relation to online calculators (which Mr B may have assisted drafting, or otherwise provided comments and advice in relation to);
- The firm would benefit from the grant of class order relief to providers of superannuation calculators (albeit equally with other providers of superannuation calculators); and
- Mr B was asked to work on ASIC’s generic calculator project during his secondment to ASIC, which involved putting a recommendation to RPG about whether or not to grant class order relief to all providers of superannuation calculators.

3.54 ASIC contended in response to a draft of this report that its view that there was no real, sensible possibility of conflict was reasonable. In particular, ASIC points

⁹⁷ Ibid.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

to the fact that as early as May 2004 ASIC had publicly expressed a policy view in favour of generic calculators. ASIC argues that, as a result, the generic calculator project was directed at whether ASIC needed to make a Class Order to remove any uncertainty about the whether ASIC's view of the law was correct.⁹⁸

3.55 As noted above, the Ombudsman acknowledges that ASIC had publicly expressed its view about generic calculators prior to Mr B commencing work on the project. However, the existence of the project indicates that there was still a live issue to be considered by ASIC senior management and a decision to be made. The Ombudsman does not accept that ASIC's earlier public statements meant that the work of the project was so constrained and mundane as to eliminate the possibility of conflict of interest.

3.56 In the Ombudsman's view, Mr B's interest as an employee of the financial services firm had the potential to conflict with a duty he had been asked to perform while on secondment at ASIC, and on this basis, the Ombudsman is of the opinion that it was not reasonable to conclude that the possible conflict disclosed by Mr B was "merely inconsequential".

Was it considered necessary to depart from the general rule to exclude a conflicted officer?

3.57 The other scenario in which the Guide provides that a decision may be made to not exclude a conflicted officer from the relevant project is where the Executive Director considers it necessary to depart from the general rule that "an officer who has a conflict of interests, real or apparent, that is more than merely inconsequential, should be excluded from making the relevant decision or taking the relevant action".⁹⁹

3.58 In this case, Mr C's actions indicate that he decided that the circumstances warranted a departure from general principle outlined in the Guide. However, the Guide clearly states that "[a] decision to depart from that rule should be uncommon and should be taken by the relevant Executive Director".¹⁰⁰

3.59 It is unclear why Mr C chose not to refer the matter to the relevant Executive Director. ASIC's explanation is that, as Mr B did not disagree with Mr C's assessment of the conflict issue at the time of the disclosure, the matter did not require referral to the Executive Director.¹⁰¹ In the Ombudsman's view, ASIC's reasoning in this regard is inconsistent with the general principles of ASIC's Statement and Guide,¹⁰² and is a generally inappropriate approach to managing disclosures of conflicts of interest made to managers. Once Mr B had made the disclosure to Mr C, it was for Mr C, as his manager and as a disclosure officer, to assess what actions needed to be taken in pursuant to ASIC's policies, irrespective of whether Mr B agreed with that assessment or not. Most importantly, in deciding what action to take, Mr C should have been guided by the general rule set out in the Guide that a decision to not exclude a conflicted officer from making the relevant decision should be made by the relevant Executive Director.¹⁰³

⁹⁸ Letter from ASIC to Commonwealth Ombudsman 'Management of a conflict of interest at ASIC in 2005 – draft investigation report', 28 October 2015.

⁹⁹ ASIC's Guide for managers in dealing with conflicts of interest.

¹⁰⁰ Ibid.

¹⁰¹ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

¹⁰² ASIC's Guide for managers in dealing with conflicts of interest.

¹⁰³ Ibid.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

3.60 On this basis, the Ombudsman is of the opinion that Mr C failed to comply with the Guide by personally making the decision not to exclude Mr B from the generic calculator project.

3.61 Putting this issue to one side, consideration should also be given to the underlying issue of whether Mr C had a reasonable basis for his decision to not exclude Mr B from the project.

3.62 For this purpose, the Guide states that all of the relevant facts and circumstances need to be taken into account when deciding what steps are required to deal with a conflict of interest.¹⁰⁴

3.63 Importantly, the Guide highlights that the novelty or significance of the relevant decision or action that the conflict relates to is a relevant factor, keeping in mind that the more significant a decision is, the greater the need for the conflicted officer to be quarantined from the decision-making process. The Guide provides an example that:

steps will generally be necessary to remove a conflicted officer from a matter if the relevant recommendation and/or decision relates to...an application for relief under the Corporations Act or other legislation which we administer.¹⁰⁵

3.64 In the case of Mr B's disclosure, the possible conflict related to an ASIC project considering a grant of relief under the Corporations Act. ASIC has taken the view that this project was not considering an "application" for relief as such but that ASIC initiated the project on its own motion. In the Ombudsman's opinion, the pertinent aspect is that the project involved making a decision about granting regulatory relief (and therefore providing a benefit), irrespective of whether the genesis of the project was an application or ASIC's own initiative. The Guide suggests that steps should have been taken to quarantine Mr B from the generic calculator project in this case.

3.65 ASIC has also argued that "[i]t is difficult to have a conflict of interest when the decision applies universally to every entity in the industry",¹⁰⁶ for "[t]he interests of [the financial services firm] in obtaining the relief was shared by other commercial retail funds, industry funds and others, including many which were in competition with [the firm]".¹⁰⁷ In the Ombudsman's opinion, the reasoning that a conflict of interest is insignificant because the action or decision that the conflict relates to affects other entities in the same industry, is problematic. ASIC's point of view explicitly acknowledges that the financial services firm had an interest in the decision, and the fact that the interest was shared by others in the industry does not eliminate that interest.

3.66 The Guide provides that where the decision to be made by the conflicted officer is merely preliminary, or is non-determinative of a substantive fact or issue, or does not involve the exercise of any discretion, rearrangement of duties may not be necessary.¹⁰⁸ This point appears to be relevant to Mr C's analysis that Mr B would not approve any papers (as papers were approved by senior management after wide consultation within the organisation), and Mr B did not have decision-making

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Peter Kell (ASIC), Hansard, SERC's Inquiry into the Performance of ASIC, 10 April 2014.

¹⁰⁷ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

¹⁰⁸ ASIC's Guide for managers in dealing with conflicts of interest.

authority (as the ultimate decision about the grant of regulatory relief was made by the RPG).

3.67 However, the Guide also goes on to say that:

An officer's role is not merely peripheral or preliminary because they only produce a recommendation which is then approved or "signed off" by a more senior officer. In such circumstances allowing the conflicted officer to make the recommendation might be held to contaminate the ultimate decision made by the more senior, non-conflicted officer.¹⁰⁹

3.68 This principle is relevant to the situation involving Mr B, as ASIC has explained that "[t]he task of the team working on the Relief Project was to put a recommendation to RPG about whether or not to grant class order relief to all providers of superannuation calculators including operators of retail and industry super funds and, if so, how that relief would be crafted".¹¹⁰ Hence, it could be said that part of Mr B's role was to develop a recommendation about the grant of regulatory relief that may then be approved or signed off by the RPG, and as the Guide suggests, such a circumstance may have provided an opportunity for contamination of the ultimate decision. It does not appear that Mr C turned his mind to this issue.

3.69 Further, the Guide provides that: "If the conflicted staff member is a junior officer, it will usually be possible to arrange for another non-conflicted officer to make the decision or take the action in their place".¹¹¹ Given that ASIC has highlighted that it believed Mr B's role was junior in its nature, Mr C should have given consideration to whether it was possible to arrange for another non-conflicted officer to take Mr B's place in the generic calculator project team.

3.70 The Ombudsman has concluded that Mr C did not give full consideration to how the principles found in the Guide applied in this case, particularly whether these principles provided a reasonable basis to conclude that Mr B should not be excluded from the generic calculator project.

Assessment of Mr C's compliance with ASIC's Guide

3.71 ASIC's then General Counsel, Mr D, became aware of Mr B's disclosure, and Mr C's response to this disclosure, sometime after the fact (it is unclear exactly when this occurred). Upon learning of the situation, Mr D recalled asking Mr C why he left Mr B on the generic calculator project and further enquired why Mr B was not given something else to do.¹¹²

3.72 Mr C's response to Mr D appears to be consistent with the factors he told the Ombudsman's staff he took into account when initially assessing Mr B's disclosure, being that he did not think Mr B's participation in the project was a problem as Mr B was a junior member of the team, Mr B would not be making any critical decisions, and he did not think it was possible for Mr B to inappropriately steer the matter off course.¹¹³

3.73 Mr D's assessment of Mr C's overall response to the disclosure was that it was "in the range of available decisions given the whole range of circumstances

¹⁰⁹ Ibid.

¹¹⁰ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

¹¹¹ ASIC's Guide for managers in dealing with conflicts of interest.

¹¹² Interview with Mr D, 21 November 2014.

¹¹³ Ibid.

surrounding the matter”, but “it may not have been the most conservative decision or the decision that I might have made”.¹¹⁴ Mr D indicated that it was not the decision he would have advised Mr C to take, had Mr C discussed it with him before he took it, as conflicts are better avoided than managed wherever possible. However, Mr D added that he has no doubt Mr C took the decision in good faith and in the belief that it would not unduly influence the policy process in any substantive way¹¹⁵.

3.74 The Ombudsman acknowledges Mr D’s assessment, but observes that the Guide states that the decision not to exclude Mr B from the generic calculator project should have been made by the relevant Executive Director in this case.

3.75 It is also important to note that when Mr A raised his concerns about Mr C’s compliance with the Guide to Mr D, Mr D’s response was that “unsurprisingly, a guide is a guide”, indicating that it was not binding on ASIC staff members and that no further action would be taken in relation to Mr C’s non-compliance.¹¹⁶ This response may have reinforced Mr A’s perception that ASIC was inappropriately responding to a situation involving what he believed to be a clear conflict of interest. Arguably, action should have been taken by ASIC in order to make an assessment about whether there was non-compliance with the Guide and whether any corrective action needed to be taken.

ASIC’s policies regarding the disclosure and management of a conflict of interest involving a secondee

3.76 The fact that Mr B was on secondment to ASIC at the time he made the disclosure of the possible conflict of interest is an important aspect to consider in the context of ASIC’s management of the matter.

3.77 At the time of Mr B’s secondment, ASIC did not have a formal policy on secondments. ASIC internal emails indicate that there was a lack of clarity about how to deal with specific situations involving secondees and conflicts of interest, and members of the RPB saw a need to draft general principles regarding the topic of their own accord.¹¹⁷ This would suggest a need for further guidance on the issue and, in the Ombudsman’s opinion, it would have been beneficial for ASIC to have developed a formal agency-wide policy regarding the management of secondments at this time.

3.78 By December 2004, draft principles had been developed internally in the RPB for the specific use of the RPB, including that:

We think it is unlikely that any identified actual or potential conflict of interest will prevent a secondee working on a policy project. The number of people involved in a policy project is such that a secondee’s work will always be appropriately reviewed.

However, an actual or potential conflict of interest may mean that a secondee should not be involved in certain aspects of a policy project. For example, in some circumstances

- secondees should not sign letters or emails to external parties
- it may not be appropriate for a secondee to attend a liaison or consultation meeting with external parties.

¹¹⁴ Ibid.

¹¹⁵ Comments by Mr D in response to the Ombudsman’s draft report, 2 September 2015.

¹¹⁶ ASIC internal email “Re: Our meeting this morning”, 30 March 2005.

¹¹⁷ ASIC, various internal emails “Re: Conflicts of interest for secondees”, 4 November 2004.

The secondee should discuss these matters with the senior member of the project team.¹¹⁸

As these guidelines were developed at a point in time after Mr B made the disclosure of the possible conflict of interest, they were not applied in this case.

3.79 The difficulty with this ad hoc approach to the development of guidelines is that it created inconsistencies with ASIC's Statement and Guide (particularly regarding to whom the disclosure of the conflict of interest should be made, and the factors to consider when assessing whether a secondee should work on a project). This emphasises the importance of ASIC developing a formal secondment policy.

3.80 The risk of conflicts of interest arising during secondments, particularly in the case of secondees from private sector organisations, is readily apparent and it is therefore important that ASIC appropriately identifies and deals with this risk. As identified by Mr D, the difficulty with private industry secondments is that if ASIC is to get the benefit of the knowledge exchange that secondments can provide, the secondee needs to work on a subject matter that they have gained experience in during their pre-secondment employment. The result, in Mr D's view, is that:

There is an inherent conflict in the whole notion of industry secondments that needs to be managed, rather than necessarily avoided, because the avoidance would defeat the purpose.¹¹⁹

3.81 In the Ombudsman's opinion, secondment arrangements involving private sector organisations can provide many benefits. Secondments may assist ASIC to strengthen relationships with the private sector in order to facilitate efficient and co-operative regulation, as well as provide opportunities for ASIC to increase its knowledge and better understand the perspective of the private sector. However, these benefits must not come at the expense of accountability and transparency. As a regulator, ASIC must be scrupulous in appropriately identifying and managing conflicts of interest that inevitably arise in the context of secondments. This will assist ASIC in maintaining a workplace culture that encourages public confidence in the integrity of its internal processes and decision-making.

3.82 It is important to note that public confidence in the integrity of any government agency is vital to its operation and this confidence may be jeopardised if the community perceives that the agency's decision-making has been affected by a conflict of interest. In this context, the perception of a conflict of interest can be just as damaging to the reputation of an agency as the actual conflict. ASIC therefore needs to ensure that its management of conflicts of interest can withstand public scrutiny.

ASIC's current policies regarding the management of conflicts of interest and secondments

3.83 It is important to note that the events at the centre of this investigation took place approximately 10 years ago. Since that time, ASIC has updated and changed many of its policies and procedures, and these are summarised briefly below.

¹¹⁸ ASIC, internal email to RPB management, "Guidelines for dealing with secondees' conflicts of interest", 14 December 2004.

¹¹⁹ Interview with Mr D, 21 November 2014.

Conflicts of interest policy

3.84 ASIC's current policy on conflicts of interest, "Guide to avoiding conflicts of interest and improper use of information", published in March 2014 (the current Guide), is far more comprehensive than the policies in existence at the time of Mr B's secondment to ASIC in 2004-2005.

3.85 The current Guide provides that an ASIC staff member must immediately notify their Senior Executive (with a copy to their manager) of any personal interest that conflicts, or may conflict, with their work at ASIC. This effectively provides that a conflict is reported to two people – a manager and a Senior Executive – which is an improvement in the oversight of disclosures, both in terms of the number of people notified and the level of seniority of the people notified.

3.86 The current Guide also provides greater detail regarding the process that will occur after the disclosure has been made, including the responsibilities of the manager, Senior Executive and ASIC's Risk & Security Services team in maintaining a register of all notifications of conflicts of interest.

3.87 In the Ombudsman's view, the current Guide is an improvement on the policy in place at the time of Mr B's secondment to ASIC, however, the Ombudsman has identified a number of specific areas which could be strengthened, including:

- Clarifying the policy relating to seeking advice from a manager or Senior Executive if a person is in doubt about a possible conflict of interest,¹²⁰ particularly whether such enquiries should be formally documented and recorded by ASIC's Risk & Security Services team;
- Explaining how the policy relates to conflicts of interest that arise in the context of secondments;
- Incorporating advice regarding the notification and investigation process that will be put into motion if a person contacts their manager or Senior Executive in relation to what they believe is a conflict of interest involving *another* ASIC staff member; and
- Explaining what actions ASIC will take in cases of non-compliance with the current Guide by its staff.

Secondment policy

3.88 ASIC recently published its Secondment Policy (in July 2014), following the recommendation made by the SERC that "ASIC publish on its website information about its secondment programs and the policies and safeguards in place that relate to these programs". The origins of this recommendation are found in the SERC's observation that:

ASIC needs to be more transparent about the secondment processes it has and the policies in place for managing possible conflicts of interest.¹²¹

3.89 The Ombudsman acknowledges the progress ASIC has made in relation to this recommendation. However, in the Ombudsman's opinion, it would be beneficial

¹²⁰ ASIC, "Guide to avoiding conflicts of interest and improper use of information", March 2014.

¹²¹ SERC Report.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

for ASIC to publish further information about its secondment activities, particularly in relation to secondments from private sector organisations and its management of possible conflicts of interests.

Ombudsman’s conclusions regarding the management of Mr B’s disclosure of the possible conflict of interest

3.90 The Ombudsman is of the opinion that:

- The Consultancy Agreement involving Mr B did not set out the process for disclosing a conflict of interest, or what the possible outcomes could be if a conflict was found to exist. There is also a lack of clarity about how ASIC would assess whether any matter “directly involved” the financial services firm in question or its broader group of companies for the purpose of determining whether a conflict of interest existed;
- Mr B was transparent about his previous involvement in IFSA’s discussions regarding superannuation calculators;
- Mr B generally complied with s 125 of the ASIC Act (the obligation to provide written notice to ASIC regarding interests that could involve a conflict) and ASIC’s Statement regarding the disclosure of conflicts of interest. Although it would have been optimal for Mr B to formalise the disclosure in writing, it was reasonable for Mr B to believe that he was not required to do so following his discussion with Mr C;
- Mr C failed to record Mr B’s disclosure and his subsequent assessment of the disclosure (as was required by ASIC’s Guide);
- Mr C did not appear to give full consideration to how the principles found in the Guide applied in this case, specifically:
 - Mr B’s interest as an employee of the financial services firm had the potential to conflict with a duty he had been asked to perform while on secondment at ASIC, and on this basis, it was not reasonable to conclude that the conflict disclosed by Mr B was “merely inconsequential”; and
 - The nature of the decision being made (particularly the fact that it related to the grant of relief under the Corporations Act), and the potential for contamination in the decision-making process;
- Mr C’s decision to not exclude Mr B from the generic calculator project did not comply with the Guide, as the Guide states that in these circumstances such a decision should be made by the Executive Director;
- Secondment agreements involving private sector organisations may inform regulation activities and improve the regulator’s knowledge and understanding of the operating environment for private sector entities. However, these benefits must not come at the expense of accountability and transparency. As a regulator, ASIC must be scrupulous in appropriately identifying and managing conflicts of interest that will inevitably arise in the context of secondments. This will assist ASIC in maintaining a workplace culture that encourages public confidence in the integrity of its internal processes and decision-making;
- The events at the centre of this investigation took place approximately 10 years ago, and since that time, ASIC has updated and changed many of its policies and procedures. ASIC’s current Guide is far more comprehensive

than the policies in existence at the time of Mr B's secondment to ASIC in 2004-2005. However, some aspects of the policy could be improved;

- ASIC has made progress in relation to the SERC's recommendation to publish information about its secondment activities. However, it would be beneficial for ASIC to publish further information about its secondment activities, particularly in relation to secondments from private sector organisations and its management of possible conflicts of interests.

Mr B's continued involvement in the generic calculator project

3.91 As ASIC's response to the disclosure of the possible conflict of interest by Mr B resulted in his continued involvement in the generic calculator project, it is necessary to examine whether this gave rise to a situation where Mr B exercised undue influence on the project to benefit his employer (and/or IFSA), or himself.

3.92 The evidence gathered in the course of the investigation leads the Ombudsman to conclude that Mr B was transparent with ASIC about his previous involvement with IFSA, and he appropriately disclosed what he believed to be a potential conflict of interest. It is important to note that, while Mr B had a responsibility to disclose any potential conflicts of interest to ASIC, it was not Mr B's responsibility to ensure that ASIC's response to any disclosure was consistent with its policies.

3.93 It should also be noted that Mr B explained to the Ombudsman's staff that at the commencement of his secondment to ASIC his manager from the financial services firm made it very clear to him that he was going to ASIC to perform a role with an "ASIC hat on", not to prosecute the firm's interests. Mr B's view is that he had a useful perspective to contribute and he felt he appropriately acknowledged other people's perspectives and considered all views in a balanced way during the secondment at ASIC.¹²²

Junior nature of Mr B's role

3.94 The key theme in ASIC's reasoning for allowing Mr B to continue to work on the generic calculator project was that Mr B's role was considered to be of a junior nature, and that Mr B had no decision-making authority on the project.¹²³

3.95 The Duty Statement provided to Mr B before he commenced the secondment states that his position was at the Executive Level 1 (EL1), and his duties included "Contribution to the leadership and management of both issues and people to maximise the regulatory outcomes of the branch".¹²⁴ The Ombudsman recognises that the nature of decision-making responsibilities and the degree of influence held by EL1 staff members may vary among different agencies across the Australian public service. In the Ombudsman's opinion, it is reasonable to consider that a person at this classification level, with the duties described in Mr B's Duty Statement, may have the ability to influence the outcome of a project.

3.96 In this context, it was insufficient for ASIC to rely on its characterisation of Mr B as a "junior" officer without giving careful consideration to the tasks he would be

¹²² Interview with Mr B, 21 November 2014.

¹²³ Letter from ASIC to Commonwealth Ombudsman, 8 July 2014.

¹²⁴ ASIC, "Duty Statement and Selection Criteria" attached to an email from ASIC to Mr B, "Re: your secondment to ASIC", 9 September 2004.

involved in, and whether these gave rise to possibilities for contamination – or the appearance of contamination – in the decision-making process.

3.97 Mr C has explained that he made a commitment to monitor Mr B's engagement in the work, with the reasoning that if anything caused him disquiet about improper influence, he would have intervened at that point. When questioned about what kind of behaviour would have led to intervention, Mr C explained that if Mr B became irrational in the way that he argued his position, or did not accept Mr C's guidance on the matter, or went behind the scenes with other teams in order to promote an aspect of the matter which had initially been considered inappropriate, then Mr C would have seen reason to intervene. While it must be acknowledged that Mr C cannot recall witnessing any behaviour that caused him concern in relation to Mr B,¹²⁵ Mr C's approach to the management of Mr B's work was not recorded at the time and it is unclear how closely Mr C monitored Mr B.

3.98 With this in mind, it is relevant to examine Mr A's allegations relating to Mr B's contribution to the project, particularly whether there is evidence to support the allegation that Mr B acted as an "enthusiastic advocate within ASIC for the relief his employer sought".¹²⁶

Amendments to the Project's Issues Paper

3.99 One of the key allegations made by Mr A is that Mr B amended the generic calculator project's Issues Paper with the effect of removing many of the arguments against granting regulatory relief.¹²⁷

3.100 Mr C and Mr B agree that part of Mr B's role was to contribute to the Issues Paper,¹²⁸ and it is clear from the documents provided to the office of the Ombudsman that Mr B made amendments to, and provided comments in relation to, the Issues Paper.¹²⁹

3.101 Mr B has emphasised to the Ombudsman's staff that he feels that allegations relating to his work on the Issues Paper unfairly imply that he was attempting to circumvent a process, or was surreptitiously making amendments that went on to become ASIC's public position on the matter. He stated that this view is "far from reality". In his opinion, he provided comments on the Issues Paper – just as a number of other people at ASIC did – on the understanding that the comments would be reviewed, which meant that it was likely that some comments would be accepted and some would be rejected.¹³⁰

3.102 Based on the internal documents made available to the Ombudsman, it appears that the drafting process was collaborative and transparent. For example, where (in the documents provided to the Ombudsman) Mr B made amendments to the Issues Paper, these amendments were openly acknowledged by Mr B and were accompanied with notes such as "Happy to discuss and all comments appreciated",

¹²⁵ Interview with Mr C, 21 November 2014.

¹²⁶ Hansard, SERC's Inquiry into the performance of ASIC, 2 April 2014.

¹²⁷ Interview with Mr A, 30 October 2014.

¹²⁸ Interview with Mr C, and Interview with Mr B, 21 November 2014.

¹²⁹ ASIC internal emails of 14 October 2004 and 11 January 2005.

¹³⁰ Interview with Mr B, 21 November 2014.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

or in one instance, that the amendments were made “along the lines discussed in our last meeting”.¹³¹

3.103 Further, Mr C has explained that the final version of the Issues Paper presented to the RPG was completed by other ASIC officers at a point in time after Mr B’s secondment to ASIC was complete (Mr B’s secondment period ended on 24 March 2005 and it appears that the Issues Paper was submitted to RPG on 25 May 2005). Mr C’s view was that the final submitted paper “reflected very little of Mr B”.¹³²

3.104 On the basis of these factors, it cannot be concluded that Mr B improperly altered the Issues Paper to benefit of IFSA, the financial services firm or himself, or that the final version of the Issues Paper was contaminated by the conflict of interest. In the Ombudsman’s view there is no basis to be critical of Mr B for tending to a task assigned to him after he had, quite appropriately, disclosed the potential conflict of interest to Mr C.

Mr B’s supervision of another ASIC officer

3.105 Mr A also raised the concern that he believed he was required to report to Mr B in relation to the generic calculator project.¹³³

3.106 Mr C has rejected this version of events, stating that Mr A must have misconstrued the instructions he provided to Mr A to work together with Mr B on the project.¹³⁴

3.107 According to Mr B, it was never expressed to him that he was to supervise Mr A, and he went on to state that, even if such a request was made, he did not believe he would have accepted a supervisory role at ASIC given he was on secondment.¹³⁵

3.108 In the absence of anything to suggest otherwise, it does not appear that Mr B was given a supervisory role in relation to Mr A’s work on ASIC’s generic calculator project. Given this conclusion it is not necessary for the Ombudsman to consider whether it would have been appropriate for Mr B to have supervised Mr A.

Mr B’s interactions with MLC and IFSA during the secondment period

3.109 A further element of the allegations made by Mr A is that Mr B inappropriately drafted emails to be sent to IFSA on behalf of ASIC.

3.110 ASIC has acknowledged that Mr B was involved in drafting emails to be sent by Mr C to IFSA in relation to the superannuation calculator issue.¹³⁶ In particular, a copy of an email drafted by Mr B in November 2004 was provided to the office of the Ombudsman and it was found to contain requests for further information from IFSA regarding certain issues identified in IFSA’s original submission to ASIC (for example, “please provide an analysis of the practical burden of complying with the personal advice obligations identified in the original submission”).¹³⁷ It does not

¹³¹ ASIC, internal email from Mr B to Mr A (and others), “Next draft – generic advice paper”, 11 January 2005.

¹³² Interview with Mr C, 21 November 2014.

¹³³ Hansard, SERC’s Inquiry into the performance of ASIC, 2 April 2014.

¹³⁴ Interview with Mr C, 21 November 2014.

¹³⁵ Interview with Mr B, 21 November 2014.

¹³⁶ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

¹³⁷ ASIC, internal email from Mr B to Mr C, “Draft e-mail to IFSA – calculators”, 5 November 2005; and email from Mr C to IFSA, “Calculators/risk profilers – Follow up from Friday”, 8 November 2011.

appear that the content of the email was inappropriate, or that it demonstrated undue influence by IFSA or Mr B, and the Ombudsman has therefore found no reason to be critical of Mr B in this regard.

3.111 It would also appear that Mr B attended an IFSA liaison meeting with other ASIC officers in November 2004, during which time the superannuation calculator issue was discussed. It is noted that given the uncertainty regarding the precise date on which Mr B disclosed the possible conflict of interest to Mr C, the Ombudsman has not come to a conclusion as to whether this liaison meeting occurred before or after the disclosure was made. It is also not clear if consideration was given to whether attending a liaison meeting with IFSA was a suitable activity for Mr B in this case.

3.112 As a general principle, regulatory agencies should give careful consideration to what duties are appropriate for secondees in the unique circumstances of each secondment. This is particularly important when the substance of the work assigned to a secondee is connected (or could be perceived to be connected) to their permanent employer or may benefit that employer. It is not clear whether ASIC gave consideration to the appropriateness of the tasks allocated to Mr B.

Ombudsman’s conclusions regarding Mr B’s continued involvement in the generic calculator project

3.113 The Ombudsman’s view is that:

- There is no evidence to suggest that Mr B acted as an “enthusiastic advocate” for the financial services firm or IFSA during the period of his secondment at ASIC or in any other improper manner;
- It was insufficient for ASIC to rely on its characterisation of Mr B as a “junior” officer without giving careful consideration to the tasks he would be involved in, and whether these gave rise to possibilities for contamination – or the appearance of contamination – in the decision-making process;
- There is no evidence to suggest that Mr B substantially altered the generic calculator project’s Issues Paper for the benefit of IFSA, his employer or himself, and it appears that the drafting process was collaborative and transparent;
- There is no evidence to support the allegation that Mr B was given a supervisory role in relation to Mr A’s work on ASIC’s generic calculator project;
- During his secondment at ASIC, Mr B attended a liaison meeting with IFSA and also drafted an email to send to IFSA regarding the superannuation calculator issue. The Ombudsman does not suggest that there was anything improper in relation to these points of contact between Mr B and IFSA, but it does not appear that consideration was given to the question of whether these tasks were appropriate activities for Mr B in all the circumstances.

PART 4—ASIC’S MANAGEMENT OF ALLEGATIONS MADE BY MR A IN RELATION TO ASIC’S GENERIC CALCULATOR PROJECT

4.1 The Ombudsman has considered ASIC’s management of the allegations made by Mr A, and makes the following general observations.

Mr A’s allegations

4.2 Mr A commenced non-ongoing employment with ASIC on 16 August 2004, approximately 6 weeks before Mr B began his secondment to ASIC. Mr A was also assigned to ASIC’s generic calculator project,¹³⁸ and like Mr B, his supervisor was Mr C.¹³⁹

4.3 Mr A began raising concerns about ASIC’s approach to the generic calculator project in approximately February 2005, and he soon escalated the matter to Mr C:

Please correct me if I am wrong, but it looks to me like we are proceeding on the assumption that we will grant relief for calculators, subject to certain conditions: don’t we need to do a cost/benefit analysis first?...

I would sincerely appreciate it if someone could explain to me what I am missing here. Don’t the principles set forth in PS 51 and PS 167 apply to IFSA’s application for relief?¹⁴⁰

4.4 On 18 March 2005, Mr A spoke with the Executive Director of Policy and Markets Regulation (the ED of PMR). During that conversation, Mr A stated that he believed a conflict of interest existed due to Mr B’s involvement in the generic calculator project, and also that he believed Mr C had managed the conflict inappropriately.

4.5 On 21 March 2005, Mr D explained to Mr A that the OGC would “examine your queries and respond to them in due course”.¹⁴¹ The relevant “queries” related to both Mr C’s general management of the generic calculator project, and the conflict of interest issue involving Mr B.

4.6 On 24 March 2005, Mr A provided a detailed memo to the ED of PMR and the OGC, which included:

[T]he conflict of interest matter is not the fundamental issue here: rather, because the conflict of interest violations are so clear, so flagrant and so egregious, I felt that I had to act promptly when I became aware last week of the specific content of our policy on conflicts... The real issue here is that ASIC’s consideration of IFSA’s application for relief has from the outset been guided by political considerations about all else, and the substantive requirements of the law and our policy have been disregarded in an effort to achieve a result that [Mr C] thinks the Minister will find politically expedient...

4.7 Mr D met with Mr A on 30 March 2005, following which Mr A sent an email to Mr D setting out what he believed to be the “outstanding issues” from the meeting:

¹³⁸ ASIC, “Current Regulatory Policy Project as at 24 September 2004”, 24 September 2004.

¹³⁹ Interview with Mr C, 21 November 2014.

¹⁴⁰ ASIC, internal email from Mr A, 15 March 2005.

¹⁴¹ ASIC, internal email from Mr D to Mr A, 21 March 2005.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

You [Mr D] opened the meeting by asserting with some vigour that I had defamed a person by informing the... [ED of PMR] as well as OGC of the existence of what appeared to me to be a potential criminal violation of s125 of the ASIC Act, and you advised me that it was possible to defame persons without mentioning names, and you advised me to be more careful in the future, and you reminded me of the fact that I am not yet admitted as a legal practitioner in NSW and you stated that my behaviour to date could raise difficulties for me when I do seek admission...¹⁴²

4.8 Mr D responded:

...for the record I don't think the carelessness which has affected some of your recent e-mails to have anything to do with your proposed admission as a solicitor. I said nothing of the kind. I was merely trying to make the point to you in the meeting that an admitted solicitor needs to be very careful about making allegations of criminality without very good cause, as that may be regarded by the relevant professional association as a serious breach of professional ethics.

...you cannot go around accusing your work colleagues, or anyone else, of criminal actions without running the risk of defaming them ...

Having administered the general admonition to you to be more careful about such matters, I have done everything about that matter that I intend to do.¹⁴³

4.9 Following this, Mr A sent an email to the ED of PMR and Mr D enquiring whether Mr D's "general admonition" was intended to serve as a written warning under his Australian Workplace Agreement (AWA).¹⁴⁴ It does not appear that either the ED of PMR or Mr D responded to this email.

4.10 On 4 April 2005, Mr A approached the ED of PMR in person to ask about the progress of ASIC's response to his allegations.¹⁴⁵ The ED of PMR proposed meeting with Mr A in several days' time (a Friday) to discuss the issues in more detail. Mr A's response was that he believed Friday would be too late, and that if he was not provided with a retraction of the admonition by Thursday morning, he would cease working at ASIC. It would appear that the ED of PMR explained to Mr A at this point that he did not believe Mr D had issued Mr A with a formal warning under his AWA, and he later recalled that he went on to state that:

You need to remember that it is not your job to conduct your own investigation into these matters (the purported conflict of interest). That is the OGC's role, and their investigations are ongoing. You should await the outcome of those investigations. You have raised your concerns with me, and I am dealing with them...In the meantime you should continue to perform your work in RPB.

4.11 On the same day, Mr A sent an email to the ED of PMR and Mr D, which stated:

...I hereby advise that I am unwilling to discuss further any of the matters I have heretofore raised so long as the written admonition that [Mr D] issued to me last Wednesday, and repeated on Thursday, hangs over my head. At no time since I raised these matters with you some weeks ago have I received any guidance whatsoever from management with respect to the established procedures for handling the present situation, or how in fact ASIC management

¹⁴² ASIC, internal email from Mr A, 30 March 2005.

¹⁴³ ASIC internal emails from Mr D, 30 March 2005 and 31 March 2005.

¹⁴⁴ ASIC internal email from Mr A, 1 April 2005.

¹⁴⁵ ASIC internal Memo, 4 April 2005.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

is handling the present situation, but rather I have been ostracised, belittled and insulted by senior management and subject to the crudest and most maladroit forms of intimidation...

Accordingly, I shall consider any further negotiation or discussion of the various matters I have raised to be contingent upon your providing me, before 10:00am on the morning of Thursday 7 April 2005, an effective and comprehensive written retraction of the warning that [Mr D] issued to me last week...¹⁴⁶

4.12 The ED of PMR replied on that day:

For clarity, you have not been provided with a warning under the terms of your AWA. I look forward to our discussion on Friday.¹⁴⁷

4.13 Mr A has stated that this response “did nothing to resolve any of my concerns”, as he took it to mean not that he hadn’t been warned, but merely that he had not received a warning in accordance with the terms of his contract.

4.14 Mr A did not attend ASIC’s offices on 5 April and 6 April 2005. It would appear that on 6 and 7 April 2005 the ED of PMR attempted to organise a meeting with Mr A for Friday 8 April 2005.

4.15 On Thursday 7 April, Mr A attended ASIC’s offices, where he found there was no further communication from ASIC’s senior management regarding his email of 4 April 2005. Mr A then sent an email entitled “My departure” to various ASIC staff stating:

I regret to inform you that, due to certain actions of senior management of ASIC, I am unable to work here any longer.¹⁴⁸

4.16 Following this, a number of emails and letters were exchanged between Mr A and ASIC regarding whether Mr A intended to resign his employment with ASIC. As Mr A did not resume performing his duties with ASIC, ASIC wrote to him on 11 May 2005 stating that by his conduct he had repudiated his contract of employment and ASIC had accepted such repudiation.

Mr C’s management of Mr A’s concerns

4.17 Mr A raised concerns about what he perceived to be deficiencies in ASIC’s approach to IFSA’s request for regulatory relief to his supervisor, Mr C, in late February 2005. In general, Mr A alleges that Mr C failed to respond to most of his emails on the matter,¹⁴⁹ and, in the documents provided to the office of the Ombudsman, the Ombudsman was unable to identify specific responses from Mr C in relation to a number of emails sent by Mr A.

4.18 It may be that Mr C chose to respond to Mr A’s emails verbally. Mr C’s recollection is that he “tried valiantly” to explain his position on the project to Mr A, “but it was falling on deaf ears”. In his opinion, Mr A “did not take on board ASIC’s previous administrative position or the variety of thoughts from others within the organisation”, and his overall assessment of the situation was that:

¹⁴⁶ ASIC internal email from Mr A, 4 April 2005.

¹⁴⁷ ASIC internal email from ED of PMR, 4 April 2005.

¹⁴⁸ ASIC internal email from Mr A to various ASIC staff, 7 April 2005.

¹⁴⁹ Interview with Mr A, 30 October 2014.

Commonwealth Ombudsman—Australian Securities and Investments Commission: Own motion investigation into the management of a conflict of interest matter in 2005

Mr A had passion and robust views – and there is nothing wrong with that – but he was working in a unit where he had to take reasonable instruction to put together a paper and that means, for all officers, that sometimes they have to stand back from the passion and strength of views that they have...I did not see that in Mr A.¹⁵⁰

4.19 From Mr A's perspective, the explanations provided by Mr C did not satisfy him, and his overall impression was that Mr C didn't understand his objections.¹⁵¹

4.20 In the Ombudsman's opinion, this situation highlights the reality that different people can form different opinions or have different perspectives in relation to the same subject matter, particularly in cases involving policy decisions where a number of different outcomes may be possible.

4.21 It is relevant to note here that one of the contributing factors to the difference in opinion may have included Mr A's work experience; he had not worked for a regulator before and also did not have local experience (as he had practiced as a lawyer in another country previous to commencing employment at ASIC).

4.22 The Ombudsman acknowledges that situations involving ongoing differences of opinion can be difficult to resolve to the satisfaction of all parties. Indeed, Mr C has acknowledged that he found the situation concerning Mr A difficult to manage: "the most challenging work environment experience I have had in all my years at ASIC".¹⁵² In light of this, it perhaps would have been beneficial for Mr C to seek the assistance or involvement of another manager.

4.23 It would perhaps also have been beneficial for Mr C to have responded more comprehensively to Mr A's concerns (particularly Mr A's numerous emails on the matter). Such action may have reassured Mr A that his point of view had been acknowledged by Mr C, even if Mr C's ultimate response demonstrated that he did not agree with Mr A's view. In the Ombudsman's view, better management of Mr A's concerns at an earlier point may have diffused his overall feelings of dissatisfaction, which would have allowed for a more considered and productive discussion about his substantive concerns.

The Executive Director's management of Mr A's concerns

4.24 The Ombudsman's staff did not interview the then ED of PMR in relation to his involvement in the management of Mr A's concerns. The office of the Ombudsman has therefore relied on file notes and other documents provided by ASIC in order to form general conclusions about the actions of the ED of PMR in relation to this matter.

4.25 The ED of PMR appears to have become involved in the management of Mr A's concerns when Mr A verbally disclosed that he believed a conflict of interest existed due to Mr B's involvement in the generic calculator project, and further, that he believed Mr C had violated ASIC's policies in relation to the management of the conflict.

4.26 Although the Ombudsman has not been provided with sufficient evidence to come to a conclusion about whether it was the ED of PMR or Mr A who ultimately referred the allegations to the OGC, it is clear that by 21 March 2005 there was a

¹⁵⁰ Interview with Mr C, 21 November 2014.

¹⁵¹ Interview with Mr A, 30 October 2014.

¹⁵² Interview with Mr C, 21 November 2014.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

general understanding between the ED of PMR, the OGC and Mr C that the OGC had taken carriage of Mr A's concerns.¹⁵³

4.27 ASIC's Guide does not provide direction in regards to the management of allegations of potential conflicts of interest made by persons other than the alleged conflicted person. However, ASIC has explained to the Ombudsman that:

There are no differences in the process if an existing ASIC officer believes there is a possible conflict of interest involving a secondee. That is, they have an obligation to report that actual or potential conflict of interest to their people manager as soon as they are aware of it.¹⁵⁴

4.28 Hence, the Ombudsman assumes that ASIC would seek to apply the same process for dealing with a disclosure by a third party as a disclosure made by the potentially conflicted person themselves. Based on this, it can be assumed that the Guide would have application in these cases.

4.29 The Guide suggests that it was open to the ED of PMR to make a decision about what action to take in relation to the conflict of interest,¹⁵⁵ including consulting the OGC for any necessary legal advice.

4.30 However, the Ombudsman notes that, in principle, the ED of PMR should have maintained a clear record of the disclosure and his subsequent decisions relating to the disclosure (which did not occur in this case).

4.31 A further issue to note is that ASIC's Public Interest Whistleblowing Policy (Whistleblowing Policy), dated 24 March 2004, outlines principles for handling reports made by ASIC employees about breaches or alleged breaches of the APS Code of Conduct by another ASIC employee (including consultants or persons seconded to ASIC).¹⁵⁶ In the case of the allegations made by Mr A to the ED of PMR, if Mr A suggested that he believed there had been a breach of the Code of Conduct, Mr A's allegations would generally have triggered the application of ASIC's Whistleblowing Policy. However, documents provided to the office of the Ombudsman indicate that Mr A did not explicitly communicate that he believed there had been specific breaches of the Code of Conduct, and the Ombudsman therefore concludes that it was reasonable to not apply ASIC's Whistleblower Policy in relation to Mr A's allegations at this point.

The OGC's management of Mr A's concerns

4.32 By 21 March 2005, the OGC had taken carriage of Mr A's concerns. In the Ombudsman's opinion, it was open to ASIC to decide that Mr A's allegations be handled by the OGC. The basis for this conclusion is found in ASIC's Guide, which states that the relevant Executive Director may consult the OGC for any necessary legal advice where a disclosure of a conflict has been made.¹⁵⁷

Communication regarding the OGC's investigation process

4.33 A point of concern for the Ombudsman is the lack of communication between the OGC and Mr A regarding the investigation process. In the days after Mr A

¹⁵³ ASIC internal email, "Re: Conflict of Interest/ Security clearance forms", 21 March 2005.

¹⁵⁴ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

¹⁵⁵ ASIC's Guide for managers in dealing with conflicts of interest.

¹⁵⁶ ASIC, "Public Interest Whistleblowing Policy", 24 March 2004.

¹⁵⁷ ASIC's Guide for managers in dealing with conflicts of interest.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

disclosed his concerns to the ED of PMR and the OGC, one of Mr A's key complaints was that he perceived there had been a lack of guidance and support from the OGC.

4.34 Apart from general statements (such as that the OGC's inquiry into the allegations would be "afforded its due priority"),¹⁵⁸ it does not appear that Mr A was provided with information regarding how long it was anticipated that the investigation would take, what the investigation process involved, or what was expected of Mr A while the investigation was underway. In the Ombudsman's opinion, better communication with Mr A may have diffused Mr A's feelings of discontent by reassuring him that actions had been taken in response to his allegations.

4.35 The Ombudsman acknowledges that the management of Mr A's allegations perhaps became difficult due to the development of a point of contention between Mr A and Mr D. In particular, Mr A seemed to be concerned about the "general admonition" administered by Mr D. According to Mr D, he believed Mr A had been distributing emails "rather generally" that made "very serious allegations" of "very serious wrongdoing", and as the General Counsel of ASIC he believed he had a duty to communicate to Mr A that this involved a risk for the agency and for Mr A himself.¹⁵⁹ In the Ombudsman's opinion, it was open to Mr D to inform Mr A of legal risks associated with his behaviour, and the Ombudsman is satisfied that it was explained to Mr A that Mr D's statements did not amount to a warning under his AWA. This issue did, however, appear to distract Mr A from the substance of his original allegations, which led to a breakdown in communication between Mr A and Mr D. The situation may have been alleviated if the OGC maintained open lines of communication with Mr A at this time.

4.36 Mr D has expressed the view that the events in question took place in a very short amount of time and that the "OGC gave the matter as much consideration and engaged in as much communication as the peculiar circumstances merited and the very limited time allowed"¹⁶⁰ In Mr D's view, it is unreasonable to conclude that any particular management step would have had a beneficial effect at the time and in those particular circumstances.

4.37 A further issue considered by the Ombudsman is that it is unclear what the OGC communicated to Mr B about the allegations which had been made concerning him, or the subsequent investigation that was being conducted by the OGC. In general, procedural fairness requires a decision-maker to inform people of allegations made against them and to provide them with the opportunity to respond. However, it does not appear that the OGC promptly informed Mr B of the claims Mr A had made, and Mr A then took it upon himself to inform Mr B of his allegations as he believed that Mr B had "the right to know that I have raised this issue".¹⁶¹ In the Ombudsman's opinion, apart from the fact that this exacerbated Mr A's feelings that his allegations were not being handled appropriately, this was also an unsatisfactory outcome for Mr B. An ASIC internal email indicates that the situation left Mr B feeling concerned:

To be perfectly frank, [Mr B] is clearly totally stunned by this turn of events and quite spooked. He appears genuinely worried that there is going to be an allegation that he was behaved

¹⁵⁸ ASIC internal email from Mr D, 23 March 2005.

¹⁵⁹ Interview with Mr D, 21 November 2014.

¹⁶⁰ Comments by Mr D in response to the Ombudsman's draft report, 2 September 2015.

¹⁶¹ ASIC internal email from Mr A, 23 March 2005.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

improperly... I have tried to reassure him that this not the case but I think he would really like someone to speak to him. He does not know what he should do.¹⁶²

4.38 Although Mr D later had a conversation with Mr B about the allegations, it is the Ombudsman's opinion that ASIC should have ensured that Mr B was made aware of the allegations concerning him at an earlier point in time, and should also have ensured that the OGC's investigation process was adequately explained to Mr B to avoid causing undue concern to him.

Outcome of the OGC's investigation

4.39 It is clear that the OGC began its inquiry into Mr A's allegations, however, at the time that Mr A ceased his employment with ASIC, the OGC's investigation was yet to be completed.

4.40 ASIC has explained to the Ombudsman that Mr A's allegations were fully considered by the OGC and it was ultimately determined that his "concerns were not made out".¹⁶³

4.41 While the Ombudsman has been provided with an incomplete draft of the OGC's report relating to its investigation (dated 13 April 2005), ASIC has been unable to locate the OGC's completed report. In the Ombudsman's opinion, it is unusual that the draft report was found, but the completed report could not be located. This situation perhaps suggests that the investigation was not completed. This is supported by Mr D's evidence who has indicated that, to the best of his knowledge and belief, there was no final memo but consideration of the matter was concluded in substance, with the conclusion that the allegations had no basis¹⁶⁴.

4.42 It is essential that allegations of conflicts of interest are recorded and that the subsequent investigation and decision are also recorded. In particular, ASIC's Guide makes it clear that a decision and the reasons for a decision in relation to not disqualifying a conflicted officer from a relevant project should be documented, with a copy retained by the RMU and the OGC.¹⁶⁵

The OGC's assessment of Mr A's allegations

4.43 As ASIC has been unable to locate the OGC's report on the investigation of Mr A's allegations, there is a lack of clarity regarding what factors the OGC considered when coming to its conclusion that Mr A's concerns were unfounded.

4.44 The draft report gives an indication of what the investigation entailed. Although it must be acknowledged that the draft report is incomplete, it is the only information the Ombudsman has been provided with in regards to the outcome of the OGC's investigation, and hence, the Ombudsman will rely on this document in order to examine whether the OGC gave appropriate consideration to Mr A's concerns.

4.45 Importantly, the draft report states that its purpose was to report to the Commission the OGC's consideration and assessment of what it perceived to be Mr A's complaints – that being:

¹⁶² ASIC internal email 23 March 2005.

¹⁶³ Letter from ASIC to Commonwealth Ombudsman, 9 February 2015.

¹⁶⁴ Comments by Mr D in response to the Ombudsman's draft report, 2 September 2015.

¹⁶⁵ ASIC's Guide for managers in dealing with conflicts of interest.

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

- Mr B may have breached s125 of the ASIC Act in failing to provide written notice of a conflict of interest; and
- Mr C, failed to comply with ASIC's Guide and failed to meet the standards imposed under s10 of the PS Act.¹⁶⁶

4.46 However, the draft report only gives specific consideration to whether Mr C's conduct amounted to a violation of the APS Values or the APS Code of Conduct. The draft report does not examine whether a conflict of interest existed in relation to Mr B's involvement in the generic calculator project, or whether the disclosure and management of the conflict violated the ASIC Act or ASIC's policies. It is unclear then, how the OGC came to the conclusion that Mr A's claims were not made out.

4.47 It does not appear that the OGC's investigation gave careful consideration to all aspects of Mr A's allegations – particularly the allegations relating to the presence and management of the conflict of interest – or at the very least, the OGC did not comprehensively document the factors that it gave consideration to.

4.48 Further, documents provided to the Ombudsman seem to indicate that the OGC was dismissive of Mr A's concerns about possible breaches of ASIC's Guide by Mr C. In particular, following the meeting between Mr A and Mr D, Mr A requested clarification regarding his recollection of Mr D's statement that ASIC's Guide was merely a 'guide' and therefore not binding on any way on ASIC personnel", to which Mr D responded that: "Yes, unsurprisingly, a guide is a guide". In the Ombudsman's opinion, this was an inadequate response to Mr A, and action should have been taken by the OGC in order to make an assessment about whether there was non-compliance with the Guide and whether any corrective action needed to be taken.

The OGC's compliance with ASIC's Whistleblowing Policy

4.49 An allegation made by an ASIC staff member of a breach of the Code of Conduct by another ASIC staff member should generally have triggered the application of ASIC's Whistleblowing Policy. Pursuant to this policy, allegations should have been reported in writing to the Human Resources Director or the appropriate Executive Director.¹⁶⁷

4.50 All parties appear to agree that Mr A reported to the OGC allegations that Mr C had breached the APS Code of Conduct, and therefore, the Ombudsman concludes that Mr A did not report these allegations to the appropriate person as outlined in the Whistleblowing Policy. In these circumstances, Mr A had not made a formal whistleblowing report.

4.51 However, the draft report of the OGC indicates that it was understood that Mr A's allegations included claims that Mr C failed to meet the standards imposed under s10 of the PS Act (the APS Values), which could result in a finding that Mr C breached the APS Code of Conduct.¹⁶⁸ In light of this, it arguably would have been prudent for Mr D to inform Mr A of ASIC's Whistleblowing Policy, and explain that it was open to him to report his concerns to the Human Resources Director or the ED of PMR pursuant to the Whistleblowing Policy.

¹⁶⁶ ASIC internal Memo, (Draft), 13 April 2005.

¹⁶⁷ ASIC's "Public Interest Whistleblowing Policy".

¹⁶⁸ ASIC internal Memo, (Draft) 13 April 2005.

Ombudsman's conclusions regarding ASIC's management of Mr A's allegations

4.52 The Ombudsman has concluded that:

- Although it would likely have been beneficial for Mr C to respond more comprehensively to Mr A's concerns or to have sought the assistance or involvement of another manager, the Ombudsman has not identified any breaches of ASIC policies by Mr C in managing the specific concerns that Mr A raised with him;
- It was open to the ED of PMR to make a decision about what action to take in relation to the possible conflict of interest reported to him by Mr A, including referring the matter to the OGC;
- It was appropriate for Mr A's allegations to be ultimately handled by the OGC.
- Better communication between Mr A and the OGC regarding the investigation process was warranted in this case, particularly as it may have diffused Mr A's feelings of discontent by reassuring him that action had been taken in response to his allegations, as well as setting clearer expectations about when and how the matter was being dealt with. The OGC should also have informed Mr B of the allegations made about him at any earlier point in time;
- ASIC's inability to locate the OGC's report on its investigation into Mr A's allegations suggests that no final report was completed or that ASIC's record-keeping in relation to this matter was deficient. This makes it difficult to assess whether the investigation was appropriate in all the circumstances.

PART 5—RECOMMENDATIONS

5.1 We would like to acknowledge the cooperation and assistance provided by ASIC in the course of this investigation.

5.2 The Ombudsman has taken a forward-looking approach to the formulation of recommendations arising from this investigation. In particular, consideration has been given to changes ASIC has made to its policies relating to conflicts of interest and secondments since the time of Mr B's secondment to ASIC in 2004-2005.

5.3 The Ombudsman's recommendations and ASIC's responses are set out below.

RECOMMENDATION 1

The Ombudsman recommends that ASIC review its policies regarding the disclosure and management of conflicts of interest, particularly its policy relating to documenting all disclosures (and enquiries about possible disclosures).

5.4 ASIC may wish to consider improving some aspects of its current "Guide to avoiding conflicts of interest and improper use of information". In particular, the current Guide suggests that staff may seek advice from a manager or Senior Executive if they are in doubt about a possible conflict of interest¹⁶⁹. In the Ombudsman's opinion, it should be made clear that such enquiries must be formally documented and recorded by ASIC's Risk & Security Services team in order to ensure that ASIC's register of conflicts of interest is a comprehensive record of all discussions on the matter.

5.5 A further area where ASIC could incorporate more detailed guidance in its policy relates to conflicts of interest that arise in the context of secondments. This would be particularly useful as ASIC's current "Secondment Policy" (which is discussed further in Recommendation 2) appears to deal with conflicts of interest in a slightly different manner.¹⁷⁰ A clear statement on secondments in the current Guide would therefore provide greater clarity for secondees and their managers.

5.6 In addition to this, ASIC could consider incorporating into the current Guide advice regarding the notification and investigation process that will be put into motion if a person contacts their manager or Senior Executive in relation to what they believe is a conflict of interest involving *another* ASIC staff member.

ASIC's response to Recommendation 1

In its response to the Ombudsman ASIC noted the report acknowledges that matters considered in the report occurred 10 years ago and ASIC has updated and changed many of its policies and procedures since that time. ASIC advised that it is willing to adopt Recommendation 1 and review its current policies concerning disclosure and management of conflicts of interest. ASIC also advised that it is already developing procedures to provide for the reporting to Risk and Security Services of enquiries by staff to a manager about a possible conflict of interest.

¹⁶⁹ ASIC, "Guide to avoiding conflicts of interest and improper use of information", March 2014.

¹⁷⁰ ASIC, "Secondment Policy", 25 November 2014.

RECOMMENDATION 2

The Ombudsman recommends that ASIC review its policy regarding secondments with a view to improving information regarding the disclosure, assessment and recording of conflicts of interest involving secondees.

5.7 In the Ombudsman's opinion, ASIC's current secondment policy could be improved by providing more detailed information about the management of conflicts of interest. Further information relating to how secondees should disclose and record possible conflicts of interest, how a disclosure will be assessed, and possible outcomes resulting from a disclosure, would be useful in this context.

5.8 An additional area where further information may be useful relates to what factors ASIC will take into account when coming to a decision about the allocation of work to secondees into ASIC. For example, ASIC may wish to provide guidance regarding particular work that it considers appropriate or inappropriate for secondees due to the risk of conflicts of interest arising, as well guidance about how it will assess whether a secondee has any direct or indirect associations with work being completed by ASIC due to the secondee's pre-secondment employment.

ASIC's response to Recommendation 2

ASIC advised that it is willing to adopt Recommendation 2 and review its policy regarding secondments.

RECOMMENDATION 3

The Ombudsman recommends that ASIC consider reviewing the clauses regarding conflicts of interest in its template Secondment Agreement to provide greater clarity regarding the roles of ASIC, the secondee's employer and the secondee when a conflict, or potential conflict, of interest arises during the course of a secondment.

5.9 There are aspects of the current template Secondment Agreement (relating to situations where a secondee comes from a private organisation, "a firm") that ASIC may wish to review. In particular, the Agreement states that the firm will take reasonable steps to ensure that the secondee does not work on any matter for ASIC which involves a conflict or perceived conflict of interest with the secondee's role in the firm, and that the firm will take reasonable steps to resolve or deal with a conflict if it arises.¹⁷¹ Although the Ombudsman acknowledges that the secondee remains an employee of the firm (and not an employee of ASIC) during the secondment period, the Agreement provides that the secondee is under the day-to-day control of, and will take instructions from, the ASIC officer managing the secondee. It is therefore difficult to envisage how the firm could take reasonable steps to ensure that the secondee does not work on any matter for ASIC which involves a conflict of interest, or how a firm would be in a position to take reasonable steps to resolve a conflict if it arises. Indeed, it is likely that the firm would have little knowledge of the day-to-day activities of the secondee during the secondment period. In light of this, ASIC may wish to consider reviewing these clauses in the template Agreement to better reflect the role that ASIC has during a secondment to ensure that a secondee does not work

¹⁷¹ ASIC, "ASIC Secondment Agreement (Firm to ASIC)".

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

on any matter that involves a conflict or perceived conflict of interest, as well as the process that ASIC will follow upon becoming aware of a possible conflict.¹⁷²

5.10 Further to this, ASIC may also wish to consider setting out the secondee's obligations in regards to conflicts or potential conflicts, including information such as who a disclosure should be made to, when a disclosure should be made, and in what form a disclosure should take. The Ombudsman notes that the template Deed of Acknowledgement attached to the current form of the Secondment Agreement includes an undertaking by the secondee "if, during the term of the secondment to ASIC, a conflict or risk of conflict of interest arises, to notify ASIC immediately in writing of that conflict or risk and take such steps as ASIC may reasonably require to resolve or otherwise deal with the conflict of interest".¹⁷³ The Ombudsman's suggested amendments would provide greater clarity regarding how this disclosure should occur.

ASIC's response to recommendation 3

ASIC advised that it is willing to adopt Recommendation 3 and review the clauses regarding conflicts of interest in its template secondment agreement. ASIC stated that the template agreement is currently being updated and ASIC will complete that task once it has received and considered the Ombudsman's final report. ASIC expressed the view that there may be circumstances which make it beneficial for the secondment agreement to impose an obligation on the employer of the secondee to take steps to deal with a conflict if it arises. However, ASIC said that it will review the way in which this obligation is expressed. ASIC noted that, at this stage, it is not inclined to think that setting out in detail in the secondment agreement the secondee's obligations regarding a conflict of interest is the best course to follow. Rather, ASIC is currently inclined to the view that an obligation in the secondment agreement for the secondee to read and observe the guide on avoiding conflicts of interests would be a preferable course.

¹⁷² ASIC, "Secondment Policy".

¹⁷³ ASIC, "ASIC Secondment Agreement (Firm to ASIC)".

GLOSSARY

ADI	Authorised deposit-taking institution
AFS licence	Australian Financial Services licence (required to conduct a financial services business)
AFSA	Association of Superannuation Funds of Australia
APS Code of Conduct	Australian Public Service Code of Conduct, found in s13 of the <i>Public Service Act 1999</i> (Cth)
APS Values	Australian Public Service Values, found in s10 of the <i>Public Service Act 1999</i> (Cth)
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
AWA	Australian Workplace Agreement
CO 05/611	Class Order 05/611 (Exemptions for providers of superannuation calculators), dated 15 June 2005
CO 05/1122	Class Order 05/1122 (Exemptions for providers of calculators), dated 20 December 2005
Corporations Act	<i>Corporations Act 2001</i> (Cth)
CP 70	Consultation Paper 70, <i>Online calculators</i> , dated 23 August 2005
(the) Current Guide	ASIC's "Guide to avoiding conflicts of interest and improper use of information", dated March 2014
ED of PMR	Executive Director of Policy and Markets Regulation
EL1	Australian Public Service Executive Level 1
FSR	Financial Services Regulation
(the) Guide	ASIC's "A guide for managers in dealing with conflicts of interest", dated 6 October 2002
IFSA	Investment and Financial Services Association, now known as the Financial Services Council
IR 04-17	ASIC Information Release [IR 04-17], <i>ASIC provides guidance on superannuation calculators</i> , dated 4 May 2004
IR 05-22	ASIC Information Release [IR 05-22], <i>ASIC provides details on financial services refinement projects</i> , dated 12 May 2005
OGC	ASIC's Office of the General Counsel
PID Act	<i>Public Interest Disclosure Act 2013</i> (Cth)
PS Act	<i>Public Service Act 1999</i> (Cth)
PS 51	ASIC's Policy Statement 51, <i>Applications for relief</i> (superseded by ASIC's Regulation Guide 51, <i>Applications for relief</i>)

**Commonwealth Ombudsman—Australian Securities and Investments Commission:
Own motion investigation into the management of a conflict of interest matter in 2005**

PS 167	ASIC's Policy Statement 167, <i>Licensing: Discretionary powers</i> (superseded by ASIC's Regulatory Guide 167, <i>Licensing: Discretionary powers</i>)
RG 167	ASIC'S Regulatory Guide 167 <i>Licensing: Discretionary powers</i>
RG 51	ASIC's Regulation Guide 51, <i>Applications for relief</i>
RMU	ASIC's Risk Management Unit
RPB	ASIC's Regulatory Policy Branch (which was tasked with making recommendations to ASIC's Regulatory Policy Group)
RPG	ASIC's Regulatory Policy Group (which had decision-making power in relation to the grant of regulatory relief; and was comprised of members of ASIC's Commission and some senior ASIC staff)
SERC	Senate Economics References Committee
(the) Statement	ASIC's "Statement on disclosure of interests and conflicts of interests, dated May 2004