Revealing look at ASIC's practices

Business Banking and Finance
Date
April 2, 2014

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Illustration: John Shakespeare

James Wheeldon joined the Australian Securities and Investments Commission in mid-2004. It was his first legal job in Australia after graduating from Harvard Law School in 2000. He had just spent four years doing merger and acquisition deals with top-tier New York City law firm Skadden Arps.

"I joined ASIC because I thought I would be working in the public service," says Wheeldon. "Silly me".

Assigned to the regulatory policy branch, he was soon to review an application for relief submitted under RG51 by the Investment and Financial Services Association, the body representing Australia's banks and big retail superannuation funds.

"This was not the first time I witnessed ASIC favouritism for the big banks but it was the most egregious thing I saw during my time with the regulator."

IFSA, since renamed the Financial Services Council, applied to have ASIC amend the Corporations Act so that online superannuation calculators offered by its members would not need to reflect fees.

"It was clear IFSA was concerned that, without relief, retail super fund calculators would show poorer returns, if fees were shown, than industry funds. IFSA wanted to "level the playing field" with the lower-fee industry funds by removing the obligation to show fees."

Two things immediately became clear, he says. Firstly, IFSA's application completely failed to comply with RG51 in that it (among other things) did not state all relevant information. Secondly, the intent of the law as passed by Parliament was clear and unambiguous. As soon as an online calculator provider started to take account of personal information (if you input your age or salary or super balance into the calculator), the Corporations Act required the provider to show all relevant information, including fees.

"There was no doubt in my mind after studying the act and the explanatory statements for the law and the relevant guidance that Parliament clearly intended for online calculators to show fees. In other words, my

considered view was that there was absolutely no basis in the law for granting IFSA's relief. ASIC simply did not have the authority to do it."

But things were not that simple. Shortly after IFSA submitted its application, the young lawyer had a meeting to discuss ASIC's response with Mark Adams, the head of regulatory policy at the time, and another lawyer on secondment from MLC, the retail super fund provider.

On November 8, 2004, according to Wheeldon's testimony before the Senate on Wednesday, Adams sent an email to several senior ASIC staff, including John Price, who is now a Commissioner of ASIC.

"In that email, Mr Adams stated that his intention was to 'pre-empt' IFSA's request for calculator relief. Mr Adams said that, based on IFSA's lobbying to date, he thought IFSA was 'likely to seek' class order relief exempting online super calculators from the reasonable basis standard, and thus Mr Adams had set up a team of five lawyers to progress IFSA's anticipated request," said Wheeldon.

"Mr Adams tasked me with preparing a class order that would exempt online calculators from the Corporations Act. He instructed me to start drafting this relief instrument, despite the fact that no formal relief application had been submitted."

Wheeldon said that, in his opinion as a lawyer, the intent of Parliament was clear and that, as a matter of law, ASIC did not have the authority to grant IFSA's request for relief – and certainly not without first undertaking public consultation. Further, it was crystal clear that the relief would cause significant regulatory detriment in the form of poorer fee disclosure to superannuation investors.

"On more than one occasion, however, Mr Adams explicitly told me that ASIC had to produce a result for IFSA, and that if we didn't, IFSA would bring pressure to bear on the commissioners of ASIC, and that he didn't want anyone to be able to say that the RPB was responsible for any delay in giving IFSA what it had asked for."

Complicating matters further, Wheeldon said, was the fact Adams required him to report to Grant Jones, a more senior lawyer who had also been assigned by Adams to the 'calculator relief' project.

"But Grant Jones was not an ASIC employee. He was employed by MLC, the wealth management division of National Australia Bank. MLC was an IFSA member."

Jones was at ASIC on a secondment from MLC. On November 5, 2004, Jones told Adams, in the presence of Wheeldon, that Jones had, as an MLC employee, helped draft IFSA's letters to ASIC lobbying for calculator relief.

"Mr Jones specifically told Mr Adams that he thought he had a conflict of interest. Despite this disclosure, Mr Adams kept Mr Jones on the "calculator relief" team," said Wheeldon.

ASIC then granted IFSA the relief it sought in even more generous terms than IFSA had sought.

James Wheeldon later become a partner at Atanaskovic Hartnell and now has his own commercial law practice in Sydney.

Meanwhile, the regime of relief orders proceeds apace at ASIC. They have the effect of changing the law and the regulator says it has no public duty to disclose if they are granted. Often, as detailed here, they are granted to insolvency practitioners who are thereby excused from filing financial statements for public perusal.

It is both timely and courageous that James Wheeldon has told his story to the Senate.

Adams and Jones have not yet been asked by the Senate to give their side of the story. ASIC says it rejects Wheeldon's version of events and will put forward its version on April 10.

Read more: http://www.smh.com.au/business/revealing-look-at-asics-practices-20140402-35z1s.html#ixzz2xrEOGpOG