

Monday, 10 June 2019

Law Council questions the appropriateness of comments by the Deputy Chair of ASIC

The statements attributed in the Australian Financial Review to the Deputy Chair of ASIC regarding client legal privilege and the conduct of litigation are extremely concerning, particularly in the light of ASIC's status as a model litigant.

The potential consequences for a person faced with criminal or civil proceedings brought by ASIC are extremely serious, including loss of their liberty or their livelihood. There is a presumption of innocence. It is entirely appropriate for any defendant to rely on the rights and protections developed over centuries to ensure the proceedings ASIC is bringing against them are conducted fairly.

It is concerning that ASIC as the regulator would make such statements as there is a real risk these may put undue pressure on parties not to contest proceedings or raise legitimate issues for determination by a Court.

Our Courts have led the way in case management and are well equipped to deal with time-wasting tactics and unreasonable rejections of settlements. They have, and use, mechanisms to ensure that matters are resolved as justly, quickly and cheaply as possible consistent with respecting the parties' legal rights.

If ASIC believes there are concerns in a particular case about the conduct of the litigation, the appropriate person for ASIC to raise these concerns with is the judicial officer conducting the matter, not by making broad statements to the media which may be read as veiled threats to litigants and business.

Such conduct may have a tendency to influence parties not to contest legitimate claims and undermine confidence in the judicial system and litigation process.

I am also concerned that implicit in the comments that have been attributed to the Deputy Chair of ASIC are what appears to be a criticism of our courts in the management of these cases. Whether those comments were made by the Deputy Chair, and if so, whether that was his intention, is not clear. However, what is clear is that these types of comments should not be made because unfair and incorrect inferences can be drawn from such comments. That is why there is the need for careful language by the regulator when making statements. Our courts are leaders when it comes to the efficient case management of proceedings.

Commercial litigation often involves complex and intricate legal and factual issues and transactions. In some cases there may be legitimate reasons for extended discovery, interlocutory proceedings or trial preparation. These processes are critical to ensure the time and resources of the court are not subsequently wasted.

Further, the Law Council is troubled as to why ASIC has indicated it would not accept a last-minute settlement.

Media Release



There may be cases where settlements arise at a late hour, with all parties engaging in good faith, due to the complex nature of some commercial litigation. The suggestion that these would be rejected by ASIC could be seen as demonstrative of the very bullish conduct ASIC is suggesting is objectionable.

Importantly, as a party to proceedings, the concerns and obligations that ASIC has raised are just as applicable to the regulator.

The regulator, legal profession and courts have common duties to promote the administration of justice.

This will become even more pertinent in light of the Banking Royal Commission's recommendation that ASIC should adopt an approach to enforcement that takes, as its starting point, the question of whether a court should determine the consequences of a contravention.

Threats to parties for exercising their legal rights have no place in our justice system, especially from a regulator entrusted with the important role of promoting the rule of law. These statements are unhelpful at best, and at worst, risk undermining business and public confidence in Australia's justice system and regulator.

Anne-Louise Brown

P 0406 987 050

E Anne-Louise.Brown@lawcouncil.asn.au

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.