



**Institute of
Chartered Accountants
Australia**

28 October 2013

Senator David Bushby
Chair
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee,

Inquiry into the performance of the Australian Securities and Investments Commission

The Institute of Chartered Accountants in Australia (the Institute) welcomes the opportunity to provide a submission to the Senate Inquiry on the performance of the Australian Securities and Investments Commission (ASIC).

The Institute is the professional body for Chartered Accountants in Australia and members operating throughout the world.

Representing more than 73,000 current and future professionals and business leaders, the Institute has a pivotal role in upholding financial integrity in society. Members strive to uphold the profession's commitment to ethics and quality in everything they do, alongside an unwavering dedication to act in the public interest.

Chartered Accountants hold diverse positions across the business community, as well as in professional services, government, not-for-profit, education and academia. The leadership and business acumen of members underpins the Institute's deep knowledge base in a broad range of policy areas impacting the Australian economy and domestic and international capital markets.

The Institute was established by Royal Charter in 1928 and today has more than 61,000 members and 12,000 talented graduates working and undertaking the Chartered Accountants Program. The Institute is a founding member of both the Global Accounting Alliance (GAA), which is an international coalition of accounting bodies and an 800,000-strong network of professionals and leaders worldwide; and Chartered Accountants Worldwide, which brings together leading Institutes of Chartered Accountants in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support, develop and promote over 320,000 Chartered Accountants in more than 180 countries around the world.

General comments

There is no question that over recent years, the expectations of the role played by the ASIC have evolved. For many reasons, ASIC plays a vitally important role in promoting confidence and stability in our capital markets, which in turn impacts on the activities of corporations and businesses broadly, as well as almost every Australian household.

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The introduction of compulsory superannuation for all workers from the mid-1990s means that almost every Australian now has a stake in the ongoing stability and transparency of our capital markets.

For these reasons, ASIC must continue to evaluate its accountability framework for all stakeholders. Measures that have the demonstrable effect of boosting transparency and confidence in the role played by the corporate regulator should be implemented wherever, and whenever, they are identified by either internal or external stakeholders. Consistency of regulatory approach is an important component of delivering the right messages to the marketplace in a timely manner.

While there will always be a need to maintain a clearly delineated separation of function and accountability between ASIC and external stakeholders, we believe there is a pressing need for ASIC to engage in greater regular collaboration with industry and professional bodies in order to achieve the most effective and efficient regulatory outcomes possible. To date, ASIC has not maximized the opportunity that is presented by a strong working relationship with co-regulatory stakeholders. There has been an apparent lack of willingness on ASIC's part to work in an open and shared manner in order to secure the right outcomes in the marketplace.

Over recent years the Institute has invested heavily in helping ASIC to recognise the contribution that independently-set professional and ethical frameworks play in the regulated marketplace. One clear example relates to the work undertaken by the Institute and CPA Australia in the formulation and design of policies and regulations relating to the introduction of new the conditional AFSL (which formed part of the *Future of Financial Advice* reforms) enacted by the previous government in early 2013. During the course of those discussions, it was not readily apparent to ASIC how they could, and should, differentiate between members of a profession and members of an industry.

Another area where ASIC should re-evaluate its current approach relates to market communication. Effective communication can often play a critical role in ensuring that the right messages are relayed to those who must change behaviours or actions in order to deliver the right regulatory outcomes in the marketplace. Implementing effective communication strategies must involve a strong 'two-way' relationship with those in the marketplace who can play an important part in supporting and reinforcing the objectives that sit behind the communication messages.

ASIC should consider how new frameworks can be implemented to deliver a more constructive relationship with external stakeholders on a regular basis. The manner in which other organisations, such as the Australian Taxation Office (ATO), conduct their stakeholder collaboration and engagement dialogue strategies may provide a useful reference point for ASIC in considering the most appropriate approach in the future.

Putting in place a robust consultative framework will also help to ensure that issues relevant to the role of the regulator – as opposed to the role played by policy-makers and law-makers – is identified and communicated to the appropriate stakeholders within government. There have been a number of occasions over recent years where ASIC has appeared to take on the role of both regulator and policy-maker on behalf of the government. For that reason, it may be relevant to involve officials from key agencies such as the Department of the Treasury, in the regular dialogue forums between ASIC and external stakeholders. Again, such an approach would mirror the practices currently used by the ATO in collaborating with stakeholders on the administration of Australia's tax and superannuation systems.

The Institute is very supportive of recent moves by ASIC to improve the transparency of its enforcement actions. Over recent years many criticisms have been levelled at the use of enforceable undertakings (EUs) that appear to allow for the defendant not to take any responsibility for their actions. In more recent EUs, it is apparent that ASIC has taken steps to ensure that there is a clearer admission of fault by the relevant parties. In our view, greater transparency around ASIC's enforcement actions will have the effect of boosting confidence and stability in the marketplace.

Resourcing

ASIC's role has continued to evolve and expand over recent years. The layering of more and more responsibilities on to ASIC naturally brings with it a potential risk of being seen to be 'spread too thin' by external stakeholders.

It is our understanding that notwithstanding an overall increase in staffing numbers across the organisation, that those increases have not necessarily matched the additions to responsibilities and functions over the same period of time. Much like any public or private sector organisation, it simply isn't feasible to continue to increase staffing numbers on an infinite basis. All organisations are under pressure in today's operating environment to 'do more with less', and to tightly manage budgets and resourcing in order to deliver the outcomes expected within pre-determined constraints.

This ongoing challenge must be managed by ASIC through constant review of the effectiveness and efficiency of its existing regulatory programs, and an ongoing re-assessment of where the most significant resource allocations are required from time to time. It is not always apparent to us that ASIC engages in this type of ongoing analysis right across the organisation.

Keeping a close watch on the deployment of existing resources can reveal that certain resource allocations could be redeployed to other functions which draw on their analytical and investigative skills in discharging other regulatory functions that may be a better alignment of assessed risk and resource allocation. In our experience, there are many examples where ASIC initiates a specific regulatory program that targets particular areas of focus in the marketplace, but then continues to allocate resources to the same program even when many would argue that the impact (or relevance) in the marketplace of the work that continues to be done has significantly diminished. One such example could be found in the work done by ASIC as part of the accounts surveillance program. This program was initially very effective in lifting the standard of financial reporting in Australia. However, many stakeholders in the capital markets would question whether ASIC's work continues to have a major impact on the quality of financial information in the marketplace, given that many of ASIC's initial objectives have now been met.

Another way of meeting the resource challenge is through a more efficient approach to working within Australia's co-regulatory environment. Australia's co-regulatory framework is an important pillar in our regulatory framework. Currently ASIC makes use of the existing co-regulatory framework in an ad-hoc manner, with no consistency in how matters are referred to its co-regulatory partners. A consistent approach in the types of matters referred could assist ASIC in freeing up resources.

It is also vital that the resources engaged by ASIC meet the highest standards of expertise and experience; the caliber of resources will have a significant bearing on the organisation's capacity to deliver the right regulatory outcomes in the marketplace. Ensuring that secondment programs, staff training and education frameworks, as well as the hiring of resources with specific expertise all contribute to raising the effectiveness with which ASIC performs its functions. It should also lead to consistency in decision making by ASIC's staff. Inconsistencies in decision-making can often be a source of frustration for investors and consumers, who constantly seek a degree of certainty in relation to their regulatory and compliance obligations.

It has also been noted that in the current environment, where ASIC's resources are being stretched, it has reduced its fieldwork considerably with more work being conducted at ASIC's offices. This creates challenges for ASIC's investigators to perform their work efficiently while at the same time making sure that they are able to conduct a full and thorough investigation of the relevant issues.

One other area of responsibility that can be impacted by resourcing allocation against strategic priorities is found in the role played by ASIC in providing guidance to external stakeholders via regulatory guides, information sheets, reports, consultation papers and other information. These types of information sources serve several roles in the marketplace, and in many cases they are relied upon by investors, consumers and other participants in the capital markets. In our view, ASIC should ensure that an appropriate allocation of resourcing is directed towards ensuring that such information is regularly monitored and maintained so that users are able to rely on the currency and accuracy of the information contained in those materials.

The role of whistleblowers

An area of regulatory focus in recent times relates to the role played by so-called 'whistleblowers' in the marketplace. Often, whistleblowers make courageous decisions to come forward and provide specific information about instances of misconduct by other individuals or organisations. They provide a valuable source of information and are sometimes the first 'warning bell' about potential issues that may exist within a particular organisation. For this reason, as a community, we must ensure that whistleblowers are protected from the sometimes adverse consequences that can arise as a consequence of their speaking out, and we must continue to provide encouragement to other potential whistleblowers to come forward where circumstances permit.

Amongst many challenges in this area of regulation, one specific concern that has been pointed to by many relates to the amount of time that it takes ASIC to act and respond to the complaint or information revealed in such circumstances. While there is no question that ASIC must be thorough in its investigations, questions have been raised about why it can sometimes take a number of years to respond to allegations made in the public arena.

In certain cases, a quick and timely response can have the effect of limiting the adverse consequences of any actual market misconduct that relates to the allegations. A timely and effective process of working through such allegations can also send the right signal to others who may have access to information that would be helpful to ASIC achieving the right regulatory outcomes.

Legal protection of whistleblowers is also very important. The ASIC Act contains provisions for the protection of corporate whistleblowers. However, in our view there appears to be some potential shortcomings in how the regulatory framework applies to the protection of private whistleblowers as compared to corporate whistleblowers.

ASIC's enabling legislation

ASIC is responsible for administering a broad range of legislation and regulations, including:

- Australian Securities and Investments Commission Act 2001
- Corporations Act 2001
- Business Names Registration Act 2011
- Business Names Registration (Transitional and Consequential Provisions) Act 2011
- Insurance Contracts Act 1984
- Superannuation (Resolution of Complaints) Act 1993
- Superannuation Industry (Supervision) Act 1993
- Retirement Savings Accounts Act 1997
- Life Insurance Act 1995
- National Consumer Credit Protection Act 2009, and
- Medical Indemnity (Prudential Supervision and Product Standards) Act 2003.

The Institute believes ASIC's existing powers to investigate and gather information to administer this legislation are sufficient. Given the significant amount of legislation ASIC is already charged with administering on behalf of the government, we do not believe it is necessary or appropriate to further broaden ASIC's responsibilities. An ongoing process of ensuring that ASIC's resource allocation is appropriately calibrated to the greatest risk factors in the marketplace will help to maximize the likelihood of ASIC discharging their obligations as effectively and efficiently as possible.

Performance and focus of regulatory work

In today's global business environment it is vital for all of Australia's regulator bodies, including ASIC, to be able to respond in a timely manner to changes in the business and economic landscape. The scope and nature of regulatory issues is constantly changing which means that the regulatory bodies need to be fit for purpose and ready to adapt to, and respond to, emerging issues before they become more significant with widespread implications. By necessity, the dynamic nature of business activities in today's economy will require regulators in Australia and around the world to move away from reliance on the more traditional 'one size fits all' approach, and instead rely on a risk assessed basis for allocation of resources and regulatory focus.

Although ASIC, along with Australia's other law enforcement agencies and regulators, would appear to have a clearly defined mandate, the interaction and working relationship between key regulatory agencies does not always present itself as cohesive (to external stakeholders). In recent years there have been a number of cases where regulatory agencies are seen to lay responsibility for poor regulatory outcomes at the feet of other agencies, rather than being seen to operate as one cohesive group of law enforcement agencies. Effective regulation in today's modern cross-border business environment will require a much greater degree of engagement and collaboration between regulators than has perhaps been the case in the past.

If you would like to discuss any aspect of this submission or require further information, please contact either me on (02) 9290 5598 or Geraldine Magarey on (02) 9290 5597. We would be pleased to elaborate on our views expressed in this submission in a hearing before the Committee.

Yours sincerely

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