



ASIC
Australian Securities &
Investments Commission

**Australian Securities
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8 August 2023

Senator Andrew Bragg
Chair
Senate Economics References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

**JOSEPH LONGO
CHAIR**

By email to: Economics.Sen@aph.gov.au

ORDER FOR THE PRODUCTION OF DOCUMENTS – Senate Economics References Committee – Australian Securities and Investments Commission investigation and enforcement – Interim report: Public interest immunity claims

Dear Chair

We write to you and all members of the Senate Economics References Committee (**Committee**) in relation to the Senate's Order for the Production of Documents of 20 June 2023 adopting the recommendations of the Committee's report *Australian Securities and Investments Commission investigation and enforcement – Interim Report: Public interest immunity claims (the Report) (Order)*.

We also refer to:

- the Assistant Treasurer's letter to the Minister for Finance which was tabled in the Senate on 20 July 2023, and;
- the statements by the Minister representing the Treasurer and other Senators in the Senate on 2 August 2023 in relation to the Order.

The purpose of this letter is to address the comments of the Senators who rose to speak on the matter on 2 August 2023, to reiterate our proposal to the Committee, and to make clear ASIC's acceptance of the powers of the Senate to require the production of documents and to take evidence.

Summary of ASIC's position

In writing to the Committee, we have carefully listened to and reflected on the comments of the Senators, and wish to further explain why ASIC has made its public interest immunity claims. ASIC has been and will continue to be as open and transparent as possible with the Committee's Inquiry.

To be clear, ASIC is not attempting to engage in a 'cover up'. ASIC has made its public interest immunity claims because it is concerned that the current approach of the Committee establishes a precedent which could have a lasting negative impact on our work going forward and the way in which people interact with and cooperate with our investigations.

The documents which the Order seeks production of are confidential and sensitive material held by ASIC. They include material provided to ASIC in confidence for the purpose of law enforcement and material produced under compulsion through the exercise of ASIC's investigation powers.

ASIC has always understood and acknowledged the important oversight role of the Parliament and its committees over the affairs of ASIC, and its powers to conduct inquiries into matters of concern and to require the production of documents and to take evidence. We wish to assist the Senate and the Committee with its work and have sought to do so in a way which minimises the harm to:

- those that interact and cooperate with ASIC's investigations by providing information to ASIC on the expectation that such information is private and confidential (including reporters of misconduct and whistle-blowers). We note a third party has already raised strong concerns with ASIC about the production of material which they prepared and which they claim is subject to their legal professional privilege; and
- ASIC's investigation and law enforcement processes.

It is in the above circumstances that ASIC, at its appearance before the Committee on 23 June 2023 and in its letter to the Chair of the Committee on 10 July 2023, sought the Committee's agreement for ASIC to:

1. provide to the Committee written submissions about the particular matters the Committee is interested in examining; and
2. provide to members of the Committee in a private and in-camera briefing more detail in relation to those matters.

ASIC remains open to proceeding in this manner, or otherwise discussing alternative options with the Committee. We acknowledge and understand the Committee's intention to conduct the Inquiry differently. Our experience with other senate committee inquiries which have examined ASIC's work (in respect of the collapse of Trio Capital in 2011, the inquiry into the performance of ASIC in 2013, and recently, the inquiry into Sterling Income Trust in 2021-22), is that those committees have been able to closely examine the work that ASIC has done, by

way of ASIC providing public submissions, which can be supplemented by private briefings and in-camera hearings which allowed ASIC to more frankly disclose confidential information (which if revealed publicly, would cause significant harm to third parties and ASIC).

ASIC envisages that our proposed public written submissions will contain details about the investigative steps, analysis and decision-making process which informed our decision to take no further action in each of these matters. In a confidential setting, we would also be able to take the Committee through certain documents and provide additional information which, if revealed to the Committee on a confidential basis, will not result in a substantial adverse effect on ASIC's operations. Of course, it would remain open to the Committee, after considering the information provided by ASIC, to seek further information from ASIC on either a public or confidential basis.

ASIC maintains its claims for public interest immunity and continues to hold significant concerns about the production of the documents to the Committee. I wish to be clear, however, that while we prefer to proceed as proposed above, should the Senate decide nevertheless to compel ASIC to produce the documents to the Committee through an order of the Senate, ASIC will use its best endeavours to comply with that order.

We note that to date, no order has been made by the Senate which requires ASIC to produce these documents to the Committee.

Concerns about public disclosure of highly sensitive information

We wish to address some of the comments of the Senators by further explaining ASIC's views as to the strong public interest in maintaining confidentiality in relation to investigations, including finalised investigations, particularly in the following circumstances:

- (a) the information would reveal confidential sources of information (including self-reporters and whistle-blowers) which is likely to discourage these persons from reporting matters to regulatory and law enforcement agencies in the future, due to a fear of losing their privacy and being subject to reprisal actions. This may inhibit our ability to enforce the law, as ASIC would be unable to provide any guarantee that such material will not be published and that ASIC's redactions will wholly mitigate the possible harms that could be inflicted onto third parties. In some cases it may be possible, for example, for reporters to be identified by the person of interest or those with knowledge of the matter from information contained in ASIC material, even where personal or identifying information is redacted;
- (b) the information would expose third parties including the aforementioned confidential informants, to unfair prejudice and damage to their personal reputation, privacy and other legitimate interests (including their right to seek to resist production on the basis of their legal professional privilege), and the risk of action. Our files contain highly sensitive personal information about the subjects of our investigations, witnesses and other third parties, acquired by ASIC through the exercise of compulsory information

gathering powers including search warrants. Our files also contain transcripts of private examinations under section 19 of the ASIC Act, where persons are required to answer questions without any right to silence. In respect of finalised investigations which have not resulted in enforcement action, our files necessarily contain untested allegations;

(c) the information would reveal confidential internal documents on specific matters, which, if revealed, carry a risk of enabling future potential perpetrators to evade the law. Our files necessarily involve analysis of the availability, sufficiency and any weaknesses of applicable law and evidence gathered from a variety of confidential sources of information. We note that ASIC's submission to the Committee inquiry dated February 2023 sets out the factors we consider in deciding to undertake investigation or enforcement action; and

(d) in some limited instances the information may prejudice related ongoing regulatory and enforcement matters, by revealing information which may, for example, affect the fair trial or impartial adjudication of proceedings by influencing jurors or witnesses in their evidence or decision-making. Some files relating to the finalised ALS investigation contain information relating to Terracom which is the subject of current civil penalty proceedings brought by ASIC against Terracom. Further, some files relating to the finalised NUIX Black Hat investigation contain information relating to our investigation into continuous disclosure breaches which is the subject of current civil penalty proceedings brought by ASIC against NUIX.

Should you have any questions in relation to this letter, please contact ASIC's General Counsel, Chris Savundra at [REDACTED]. We are also open to further discussing this matter directly with the Committee members.

Yours sincerely,

[REDACTED]

JOSEPH LONGO

CHAIR