

Question No: 018
Reference: 63
Committee Member: Mr Gorman

Questions:

Mr GORMAN: Ms Chester, I want to clarify what you said earlier about declaring of interests to the minister. You said that every commissioner and the chair and others declare their interests to the minister. I've looked at the information around the ASIC Act and what's required there, which says that the chair must but that the commissioners only declare through the commission's secretary to the chair. So I just want to clarify: does the minister actually have the cooperation of all commissioners?

Ms Chester: I'll take that question on notice, unless Mr Savundra has a better insight than me. I'm aware that the practice is that we do send up to the chief of staff in the Treasurer's office, for the purposes of the Treasurer, any updates to our standing declarations. We make standing declarations at the point prior to appointment, and that's quite an extensive one, and then we update that as we go. That's a regular document that I look at and update and make sure goes through to the Treasurer's Chief of Staff on a regular basis. But we'll take that question on notice and come back to you more fulsomely.

Mr GORMAN: Does the commission secretariat send it, or do you send it yourself?

Ms Chester: No, my wonderful executive assistant sends it, Mr Gorman.

Mr GORMAN: I have no doubt that your executive assistant is wonderful.

Mr Hughes: Just to clarify, the obligation to disclose those interests exists under section 123 of the ASIC Act. We do send them off [inaudible].

Mr GORMAN: I've got that in front of me. I'm just trying to clarify this question about—the chair is obliged to provide to the minister, and the commissioners are obliged to disclose to the chair—

Mr Hughes: Mr Gorman, it will be taken on notice, as we said, but a practice has arisen whereby individual commissioners and commission members make their own disclosures to the minister.

Answers:

We consider these questions relate to two separate but related statutory obligations of ASIC members:

1. Section 123 of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) – *Members to disclose certain interests to the Minister* - requires all members of ASIC to disclose to the Minister their interests in Australian businesses, products regulated by ASIC, as well as in respect of business relationships the member may resume or commence following the end of his or her term. In practice, members send their disclosure under section 123 of the ASIC Act to the Treasurer's office on a 6 monthly basis.

We note that this provision does not concern the disclosure of conflicts of interests per se, but rather is a broader provision requiring the disclosure to the Minister of a range of pecuniary and business interests. Clearly, however, this provision is directed to ensuring that the Minister is aware of issues which may impact a member's ability to properly and impartially carry out his or her duties.

2. Section 29 of the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**) and sections 13, 16 and 16A of the *Public Governance, Performance and Accountability Rule 2014* (**PGPA Rule**):

Disclosure to other members of ASIC

- a. Section 29 of the PGPA Act sets out the obligation of all officials, including ASIC members, to disclose details of any material personal interests that relate to the affairs of ASIC.
- b. Section 16 of the PGPA Rule provides that officials who are not the accountable authority of ASIC must disclose a material personal interest relating to the affairs of ASIC in accordance with any instructions given by the Chairperson as ASIC's accountable authority. In accordance with this provision, the Chairperson has issued instructions to the members regarding how such interests must be disclosed. A copy of these instructions, dated 12 April 2019, is **attached**.

We note that these instructions require a member who has a material personal interest relating to the affairs of ASIC to disclose that interest in writing to the Chairperson, in addition to meeting the requirements of section 16A of the PGPA Rule.

- c. Section 16A of the PGPA Rule requires each of the members of ASIC, including the Chairperson, to disclose a material personal interest relating to the affairs of ASIC to the other members. The disclosure must be made at a meeting of the members, and the relevant member must ensure that the disclosure is recorded in the minutes of the meeting.

Disclosure to the Minister

- d. Section 13 of the PGPA Rule requires the Chairperson to disclose material personal interests relating to the affairs of ASIC to the Minister (including details of the nature and extent of the interest and how it relates to the affairs of ASIC). We note that this obligation only applies to the Chairperson and not other ASIC members.

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Appendix 3: Chairperson's instructions for the purpose of Rule 16 of the *Public Governance, Performance and Accountability Rule 2014*

1. Where an ASIC member has a material personal interest that relates to the affairs of ASIC, that member must, as soon as practicable after becoming aware of the interest/change of interest:
 - a. disclose the interest in writing to the Chairperson;
 - b. provide a copy of the written disclosure to the Commission Secretary for record keeping purposes;
 - c. disclose the interest, orally or in writing, at the next Commission meeting (whether or not the matter to which the interest relates is to be discussed at that meeting);
 - d. ensure the minutes of the meeting record the disclosure; and
 - e. provide written notification of the interest to such other persons as the Chairperson directs, and provide copies of these notifications to the Commission Secretary for record keeping purposes.
2. Where a member is unsure of whether a matter constitutes a material personal interest that relates to the affairs of ASIC (and therefore has the capacity to give rise to a real or apparent conflict of interest), the member should provide written notification of the interest to the Chairperson. The Chairperson will consider the interest and make a determination as to whether the matter constitutes a material personal interest that relates to the affairs of ASIC.
3. A written record must be made of the Chairperson's conclusion, given to the relevant member and copied to the Commission Secretary for confidential record keeping purposes. The Chairperson should record the reasons for the determination if considered appropriate.
4. Where the Chairperson concludes that the interest is material, the member must follow the process outlined in paragraph 1.
5. Where a member has a material personal interest they must not take part in determining the matter at a Commission meeting, in accordance with Rule 16B.
6. In these cases, the Commission Secretary will, where the Chairperson so directs, ensure that the member does not receive the papers in relation to the matter for meetings of the Commission, as well as meetings of any ASIC Committee or Senior Leaders Forum, and will, in all cases, note in the relevant minutes the absence of that member from any determination (including discussions) in relation to that matter.

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7. These instructions also apply to the Chairperson, who is to notify a Deputy Chairperson of an actual or possible material personal interest. That Deputy Chairperson is to consider the actual or possible material personal interest in accordance with paragraphs 1 to 6 above as if he or she is the Chairperson.

Approved by the ASIC Chair, James Shipton, 12 April 2019