



**ASIC**

Australian Securities & Investments Commission

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## **Australian Securities and Investments Commission**

# **Submission to the Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity**

**May 2014**

## **Introduction**

1. The Australian Securities and Investments Commission ('**ASIC**') welcomes the opportunity to make submissions in relation to the jurisdiction of the Australian Commission for Law Enforcement Integrity ('**ACLEI**').
2. This submission addresses the term of reference dealing with the desirability and feasibility of extending ACLEI's jurisdiction to include ASIC.
3. To assist the Committee's consideration of this issue, our submission:
  - (a) describes what ASIC does;
  - (b) sets out ASIC's existing accountability framework;
  - (c) characterises ASIC's corruption risks;
  - (d) compares ASIC's risks with the corruption risks for which ACLEI is established; and
  - (e) overviews two additional internal ASIC mechanisms designed to guard against corrupt or improper conduct by ASIC staff.

## ASIC's role in the financial system

4. ASIC regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.
5. The ASIC Act requires ASIC to:
  - (a) maintain, facilitate and improve the performance of the financial system and entities in it;
  - (b) promote confident and informed participation by investors and financial consumers in the financial system;
  - (c) administer the law effectively and with minimal procedural requirements;
  - (d) enforce and give effect to the law;
  - (e) receive, process and store, efficiently and quickly, information that is given to us; and
  - (f) make information about companies and other bodies available to the public as soon as practicable.
6. As the *financial services regulator*, we have responsibility for investor and consumer protection in financial services. We administer the Australian financial services licensing regime and monitor financial services businesses to ensure that they operate efficiently, honestly and fairly. These businesses typically deal in superannuation, managed funds, deposit and payment products, shares and company securities, derivatives and insurance.
7. As the *consumer credit regulator*, we license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers). We ensure that licensees meet the standards—including their responsibilities to consumers—that are set out in the *National Consumer Credit Protection Act 2009*.
8. As the *markets regulator*, we assess how effectively financial markets are complying with their legal obligations to operate fair, orderly and transparent markets. We also advise the Minister about authorising new markets. On 1 August 2010, we assumed responsibility for the supervision of trading on Australia's domestic licensed equity, derivatives and futures markets.
9. As the *corporate regulator*, we ensure that companies, schemes and related entities meet their obligations under the Corporations Act. We register and regulate companies at every point from their incorporation through to their winding up, and ensure that company officers comply with their responsibilities. This 'cradle to grave' approach enhances regulatory oversight. We also register and, where necessary, take disciplinary

actions against company auditors and liquidators. We monitor public companies' financial reporting and disclosure and fundraising activities.

10. ASIC also promotes *financial literacy*, to ensure investors and financial consumers can have greater confidence when buying financial services, and are able to make sensible and informed financial decisions.

## **ASIC's accountability framework**

11. As an agent of the Australian Government and the public, ASIC is accountable for all aspects of our work, including our financial management, and our regulatory and law enforcement decisions.
12. ASIC is ultimately accountable to the Australian Parliament for our operations and performance. We are also accountable through administrative and judicial review and through the broader scrutiny of the general community.
13. Being accountable is a component of ASIC's responsibilities in its own right, and demands time and other resources as much as any other task we perform.

## **ASIC's governance arrangements**

14. The ASIC Act establishes ASIC's Commission and sets out its functions and powers as well as the statutory governance requirements for ASIC, including:
  - (a) the terms and conditions of the appointment of members of the Commission;
  - (b) provisions governing meetings of the Commission;
  - (c) delegation by the Commission and its members; and
  - (d) arrangements for preventing conflicts of interest and misuse of information.
15. The Commission has also established a number of external committees to provide guidance to ASIC on various issues. These include:
  - (a) the External Advisory Panel, which assists ASIC in meeting our objectives, including to better understand the market that ASIC regulates and to be more forward-looking in examining issues and assessing systemic risks;
  - (b) the Consumer Advisory Panel, which provides advice to ASIC on current consumer protection issues and gives feedback on ASIC policies and activities;
  - (c) ASIC's Audit Committee, which provides independent oversight of, and reporting to, ASIC's Chairman and the Commission regarding ASIC's risk management and internal control frameworks. The Audit Committee Chairman, Deputy Chairman and one other member of the Committee are

- appointed from outside ASIC. An ASIC Commissioner and senior executive from ASIC are also members;
- (d) the Market Supervision Advisory Panel, which advises ASIC on our approach to our responsibilities in day-to-day supervision of the Australian market and on broader market developments. Members are from the financial services industry with experience in the legal, compliance, retail and institutional aspects of broking; and
  - (e) the Registry and Licensing Business Advisory Committee, which advises ASIC on the impact of current and proposed services with an emphasis on small business and registry services.
16. ASIC's Commissioners have a statutory obligation to disclose to the Minister certain interests, such as direct or indirect pecuniary interests and any previous, existing or possible new business relationships. All of ASIC's staff are also required to disclose and take reasonable steps to avoid any real or apparent conflict of interest in relation to their employment.

## **Oversight of ASIC**

### *Accountability to government*

17. The Minister responsible for ASIC is the Treasurer, assisted by the Assistant Treasurer and the Parliamentary Secretary to the Treasurer. Particular responsibility for the administration of ASIC has been allocated to the Assistant Treasurer. The Commission reports to government through ASIC's annual report and through briefings, submissions and meetings with both the Treasurer and the relevant Minister. ASIC also meets with, and provides briefings to, officers of Treasury.
18. The Minister may direct ASIC to investigate a matter and prepare a report about our findings. Under s12 of the ASIC Act, the Minister may also direct ASIC about policies and priorities in using our powers or performing our functions, but may not direct ASIC about a particular case.

### *Accountability to the Parliament*

19. ASIC is accountable to the Parliament in a number of ways, including through:
- (a) ASIC's annual report, which is tabled in Parliament;
  - (b) parliamentary scrutiny of any legislative instruments ASIC makes under the *Legislative Instruments Act 2003*; and
  - (c) ASIC's obligation to appear before and respond to questions of certain parliamentary committees, including the Parliamentary Joint Committee on

Corporations and Financial Services ('PJC') and the Senate Standing Committee on Economics as part of the budget estimates process.

20. In addition to appearing before the PJC and the Senate Standing Committee on Economics, ASIC also regularly appears before, and participates in, other Government inquiries, including the recent Senate Economics References Committee inquiry into the performance of ASIC.

*Administrative and judicial review of ASIC's decisions*

21. The ASIC Act, the Corporations Act and other Commonwealth regulatory legislation confer various powers and discretions on ASIC. The exercise by ASIC of most of our powers is subject to judicial review (review of the legality of the exercise of the power) and/or merits review (review of whether a decision was the correct decision) by the Federal Court and the Administrative Appeals Tribunal, respectively.
22. ASIC's actions can also be the subject of complaints to the Commonwealth Ombudsman. The Ombudsman can investigate complaints about actions and decisions of Australian Government agencies to see if they are wrong, unjust, unlawful, discriminatory or unfair.

*Other sources of oversight and accountability*

23. There are a number of other bodies that oversee regulators such as ASIC. These include Auditors-General and Ombudsmen.
24. There are a number of laws and agreements that affect ASIC, including:
  - (a) the *Financial Management and Accountability Act 1997*, which sets out the financial management, accountability and audit obligations of agencies such as ASIC that are financially part of the Australian Government; and
  - (b) the *Freedom of Information Act 1982*, which, broadly speaking, gives Australians a right of access to documents held by government agencies.
25. ASIC is also accountable to the public, beyond our formal legislative obligations, through our:
  - (a) regular surveys of our stakeholders, which have to date been conducted in 2008, 2010 and 2013;
  - (b) Service Charter, covering the most common interactions between ASIC and our stakeholders, and setting performance targets for each type of interaction;
  - (c) publication of our policies and procedures; and
  - (d) interaction with the media.

## ASIC's corruption risks

26. ASIC is a law enforcement agency responsible for the investigation and prosecution of a range of criminal offences and civil penalty provisions. ASIC, however, has not had any reported instances of serious and systemic law enforcement-related corruption issues.
27. The corruption risks present within ASIC arise from our role as a regulator. Potential corruptors may stand to make a financial profit, or otherwise enhance their commercial interests, by obtaining access to the information and intelligence that ASIC collects as a result of ASIC's regulatory functions. Alternatively, potential corruptors may seek to benefit from favourable treatment such as the imposition of lower penalties, improper determinations of relief applications, or other biased decisions.
28. Given these possible motives for corruption, there is a risk that ASIC staff may seek to gain a profit or benefit for themselves or others (in particular through the misuse of information)<sup>1</sup>, may use ASIC powers and discretions for an improper purpose, and may protect unlawful activity by diverting attention or otherwise manipulating surveillance and investigations.

## ASIC's risks compared to the corruption risks for which ACLEI is established

29. We understand that ACLEI's role is to investigate law enforcement-related corruption. In the exercise of this role, we understand that ACLEI focuses on serious and systemic law enforcement-related corruption issues, particularly those that involve a suspected link between law enforcement and organised crime. The ACLEI submission of 17 April 2014 to this Inquiry notes that *'the LEIC Act should apply to law enforcement agencies that have a high inherent risk of corruption due to:*
  - (a) *information held or operational activities undertaken that have a strong nexus with combating serious and organised crime;*
  - (b) *close interaction with other law enforcement agencies that have high inherent corruption risks; and*
  - (c) *whose operational staff may operate with a high degree of autonomy or discretion, away from central control'.<sup>2</sup>*

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<sup>1</sup> For example, ASIC staff may engage in insider-trading or provide information to others to enable them to engage in insider-trading.

<sup>2</sup> ACLEI submission to the Parliamentary Joint Committee on ACLEI, *Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity*, 17 April 2014, p. 6.

30. Below we discuss these factors in more detail.

### **Nexus with combating serious and organised crime**

31. The information held by ASIC and the operational activities undertaken by ASIC do not on many occasions have a strong nexus with combating serious and organised crime. This is the case despite the fact that people connected to serious and organised crime may well be involved in corporations, or operate within the financial services sector, so as to be caught within our regulatory and law enforcement remit.
32. ASIC's purpose is to regulate, to promote compliance, and to pursue enforcement action where necessary in respect of participants in the corporations, markets, financial services, and consumer credit spheres. Given ASIC's broad regulatory remit, the nexus between ASIC and serious and organised crime is likely to be less strong than the nexus that Commonwealth law enforcement agencies such as the Australian Federal Police ('**AFP**'), the Australian Customs and Border Protection Service ('**ACBPS**'), and the Australian Crime Commission ('**ACC**') have with combating serious and organised crime.

### **Interaction with other agencies**

33. ASIC has close interaction with a number of other Commonwealth agencies. These include chiefly the Commonwealth Director of Public Prosecutions ('**CDPP**'), the Australian Prudential Regulation Authority, the Australian Taxation Office, the AFP, and the Reserve Bank of Australia. In addition, ASIC's chairman is a member of the board of the ACC, and ASIC is a member of the Heads of Commonwealth Operational Law Enforcement Agencies ('**HOCOLEA**'). It will be apparent that a number of these agencies come within the jurisdiction of ACLEI.
34. The recommendation that the Parliamentary Joint Committee now inquire into, and report on, the feasibility of extending ACLEI's jurisdiction to include ASIC arose in the *Inquiry into the gathering and use of criminal intelligence* Final Report of May 2013, from the fact that ASIC has endorsed the Australian Criminal Intelligence Model ('**ACIM**').<sup>3</sup> The May 2013 report stated that, having endorsed the ACIM, ASIC will 'gain access to sensitive information and intelligence through the national repository'. While this is the case, it should also be noted that ASIC's endorsement of the ACIM has not, in an appreciable way, enhanced ASIC's access to sensitive information and intelligence.
35. As ASIC has had, and continues to have, access to sources of sensitive information and intelligence primarily disseminated by the ACC, a number of measures are in place to

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<sup>3</sup> PJC-ACLEI, *Inquiry into the gathering and use of criminal intelligence*, Final Report, May 2013, p. 62.



manage the security of such information including the restriction of access to it according to security clearance level, maintaining low numbers of personnel who have access, and making access to these sources auditable.

### **Degree of autonomy, discretion and independence**

36. There are a number of checks and balances which permeate decision-making within ASIC that may be considered to counter the risk of corruption. Decisions are generally made with the involvement of more than one ASIC officer, and are then often subject to review by more senior ASIC officers or the Commission itself. It is also the case that ASIC officers infrequently operate away from central control minimising the risks that may otherwise arise from this.
37. In the case of all significant enforcement activity, monitoring and oversight is undertaken by ASIC's Enforcement Committee. The Enforcement Committee meets monthly and is chaired by a member of the Commission. It is usually attended by Commission members, all enforcement Executives, and the Chief Legal Officer of ASIC. The Chief Legal Officer leads a legal capability that works with, but remains independent from, the enforcement teams.
38. Special Counsel or Litigation Counsel within the Chief Legal Office are involved in all ASIC significant enforcement matters which go before a Court. While all criminal prosecutions arising out of ASIC investigations are commenced by ASIC and are based on briefs of evidence prepared by ASIC, prosecutions for indictable offences are generally continued by the CDPP. There are a number of summary or minor criminal prosecutions brought by ASIC itself.
39. Additionally, ASIC's staff profile is diverse and includes lawyers, accountants, financial analysts, investigators, ex-police, financial counsellors, educators and others who work together in multi-disciplinary teams. The interaction of such a diverse range of professionals makes for a strong, multi-skilled culture that is committed to integrity.

### **Existing mechanisms to guard against improper or corrupt conduct**

40. As has been above discussed under the heading of ASIC's accountability framework, ASIC has in place measures relating to risk management, agency governance, public interest disclosure, and the APS code of conduct as is required of all Commonwealth agencies. Given our regulatory and law enforcement functions, ASIC has also implemented additional measures to prevent and detect any improper, fraudulent or corrupt behaviour within ASIC.



41. In particular, the Risk and Security Services team and the Professional Standards Unit, and the measures implemented by those divisions, are designed to heighten ASIC's protection against corrupt behaviour.

#### **ASIC Risk and Security Services team**

42. The Risk and Security Services team is responsible for ongoing fraud and incident monitoring and reporting, and for ensuring compliance with ASIC's Fraud Control program. It also undertakes, in respect of all potential ASIC staff, a thorough 'suitability for employment assessment' prior to engagement, which amongst other things determines an individual's appetite for risk-taking or illicit behaviours which could translate into a susceptibility to other risks, including engaging in corrupt conduct. Risk and Security Services also manages an ongoing program of risk training and awareness for both new and existing staff, which includes a strong focus on corruption, the APS code of conduct, and disclosures of conflicts of interest.

#### **ASIC Professional Standards Unit**

43. The Professional Standards Unit, which works closely with Risk and Security Services, is an independent unit housed within ASIC's Chief Legal Office with responsibility for investigating allegations of misconduct by ASIC officers. Where appropriate, the Professional Standards Unit will refer investigations to the AFP or the relevant State Police. Reports of misconduct or corruption can be made by existing and ex-staff as well as by members of the public via the whistleblower arrangements or as a complaint. The commencement of the *Public Interest Disclosure Act 2013* in January of this year, and ASIC's implementation of related procedures, has further enhanced the mechanisms available to staff to report suspected wrongdoing within ASIC.

## **Conclusion**

44. To date, the foregoing measures, which are designed to mitigate any potential corruption risks, have constituted a cohesive (and apparently robust) system whereby high professional standards and integrity have been maintained.
45. As the ACLEI submission notes, the 'independent scrutiny of corruption issues by the Integrity Commissioner is intended to provide an additional layer of assurance that the most significant instances of suspected corrupt conduct are being handled appropriately and that an agency's capabilities and business outcomes are being protected appropriately and proportionately from corrupt compromise'.<sup>4</sup>

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<sup>4</sup> ACLEI submission to the Parliamentary Joint Committee on ACLEI, *Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity*, 17 April 2014, p. 6.

46. Whether ASIC should have the benefit of this additional layer of assurance is a decision to be guided by the recommendation of this Committee.