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17 June 2024

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

JOSEPH LONGO
CHAIR

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

ASIC SUPPLEMENTARY SUBMISSION TO THE INQUIRY INTO ASIC INVESTIGATION AND ENFORCEMENT

Dear Chair and Committee members

This supplementary submission is provided before conclusion of the Inquiry to assist the Committee with preparation of its final report. The purpose of the submission is to clearly demonstrate that ASIC has, to the best of its ability, attempted at all times to assist the Inquiry without any intent to obfuscate or undermine the Committee's work.

The Committee has generally requested the production of material from ASIC from two broad categories – ASIC's confidential investigation files (including information provided to ASIC by third parties on a confidential basis), and material relating to ASIC's governance.

ASIC's investigation materials

In respect of the first category, ASIC has produced extensive material to the Committee including multiple submissions, responses to over 400 questions on notice, and has offered to appear in-camera to provide the Committee with confidential information about its investigations. To date, the Committee has requested ASIC officials to appear for a private briefing on only two occasions.

ASIC has made a claim of public interest immunity or otherwise raised objections about providing evidence to the Committee about its confidential investigations because we are concerned about minimising harm to individuals who interact and cooperate with ASIC's investigations by providing information to us on the expectation that their information is private and confidential. This includes reporters

of misconduct and whistle-blowers. We are also concerned that such disclosure may in turn harm and lessen the future effectiveness of ASIC's investigation and law enforcement processes.

This is a common position for law enforcement agencies and consistent with the approach taken by regulators in other oversight Committees. ASIC has not made these claims or raised objections with the intent to obfuscate or undermine the Inquiry. In that regard, this submission also seeks to set out ASIC's response to issues raised by the Committee in its Interim Report about ASIC's claims of public interest immunity.

Information concerning ASIC (including its governance)

In respect of the second category, ASIC has produced material and provided evidence to the Committee where it is possible and appropriate to do so. In some instances, it has been necessary for ASIC to raise concerns about the production of such material in light of the Government's claims of public interest immunity. We refer in particular to the Government's claims made on 9 March 2023 in response to Order for Production of Documents No. 160, and on 4 September 2023 in response to Order for Production of Documents No. 290 and 291. Where ASIC has not produced materials to the Committee or redacted information, it has done so with proper regard to the Government's claims and to ensure that it has not acted inconsistently with, or undermined, those claims. In those circumstances, there is no basis, nor evidence before the Committee, to support a finding that ASIC has dealt with requests by the Committee for such information with the intent to obfuscate or undermine the Inquiry.

Summary of assistance provided to the Committee

ASIC has always understood and acknowledged the important oversight role of Parliament and its committees over the affairs of ASIC, and its powers to conduct inquiries into matters of concern, to require the production of documents and to take evidence. We have been as open and transparent with the Inquiry as possible, given the sensitive nature of our work.

ASIC rejects any suggestion that it has "*obfuscated*" or "*undermined*" the Committee's inquiry.

In that regard, I note the submissions we provided on 16 April 2024 which demonstrate that ASIC has provided extensive information to the Inquiry and continues to offer to assist the Inquiry through:

- (a) Our initial and five supplementary submissions of February 2023, 23 June 2023, 22 August 2023, 29 September 2023, 22 December 2023 and 16 April 2024;
- (b) Responses to over 400 questions on notice;
- (c) ASIC's appearance at one public hearing on 23 June 2023;
- (d) ASIC's appearance at two private briefings on 3 May 2023 and 20 May 2024;

- (e) ASIC's letters to the Committee of 5 December 2022, 2 March 2023, 14 March 2023, 23 March 2023, 24 April 2023, 10 July 2023, 8 August 2023 and 22 December 2023 providing explanation for why it is concerned about the production of highly confidential and sensitive material which affects ASIC's future effectiveness as a law enforcement agency.

I note that the Committee held public hearings over five days, and that a large part of those hearings was dedicated to examining particular case studies of interest to the Committee. ASIC was invited to appear at only one public hearing on 23 June 2023 which occurred prior to the Committee's public hearings that examined the specific case studies. We were not otherwise asked to provide submissions in response to any of the matters raised during the course of the hearings.

From at least 10 July 2023, in response to requests from the Committee for ASIC to produce its investigation files, ASIC offered to attend further hearings and to appear before the Committee in-camera to address confidential and sensitive matters. We also offered to provide public submissions about case studies of interest to the Committee. On 13 July 2023, the Committee Chair declined our proposal and insisted on the production of materials.

In our letter of 29 September 2023 to the Committee, we re-iterated our offer to make public submissions relating to matters of interest to the Committee ahead of public hearings, in order to assist the Committee and witnesses to understand ASIC's approach.

Of our own volition we prepared and submitted supplementary submissions to assist the Committee, once we became aware of the Committee's intent to examine particular case studies during the hearings.

Response to the Interim Report

For the avoidance of any doubt and prior to the conclusion of the Inquiry, we consider it important to put on the record ASIC's response to a number of issues raised by the Committee in its Interim Report. We acknowledge that the Committee has not accepted many of ASIC's claims of public interest immunity and other objections raised. We have carefully considered the views of the Committee expressed in the Interim Report. While we are respectful of the Committee's views, we consider it necessary to clarify matters raised by the Committee in the Interim Report where ASIC believes that determinations made by the Committee to reject claims of public interest immunity are not supported by the evidence.

We consider we have provided sufficient particularisation of our claims of public interest immunity. Further, as noted above, we have been open to providing such information in-camera noting that it is difficult to articulate claims of public interest immunity in public without revealing the information over which the immunity is claimed. However, we were not invited to provide further submissions in-camera to articulate our claims prior to the tabling of the Interim Report.

For the reasons set out in our previous correspondence, we maintain our claims of public interest immunity and other objections that we have raised with the Committee. These claims were made not only to minimise the harm caused to ASIC's investigation and law enforcement processes, but also to prevent the revelation of confidential sources of information and information exposing third parties to unfair prejudice and damage to their reputation, privacy and other legitimate interests and the risk of action. ASIC is not aware of any evidence which supports the suggestion that in raising such objections that ASIC has done so with the intent of undermining or obfuscating the Inquiry.

We note that the Committee has accepted our concern that there may be a case for a claim of public interest immunity in cases where investigation and enforcement activity is ongoing, and the release of information could potentially jeopardise regulatory action, and also in situations where releasing the information could reveal a confidential source of information.¹

Questions about Nuix

We refer to the Committee's request in Question 12 of Set 2 to provide copies of affidavits and internal ASIC reports on key management personnel in respect of the Nuix matter. We note the Committee's view that:

- ASIC did not fully articulate the harm which would result from providing such information to the Committee and that ASIC's statements about the harms are "vague";²
- ASIC did not clarify the nature of the legal proceedings that might be prejudiced by the release of such information and that it is "*unclear from ASIC's letters whether these matters are even current legal proceedings or are at the investigation stage.*"³

It is on these bases that the Committee rejected ASIC's claim of public interest immunity.⁴

We do not agree with the Committee's view that we did not properly particularise the relevant harm that would be caused by production and disclosure of material relating to Nuix. Our letter of 5 December 2022 (no. 1) referred to and enclosed a copy of ASIC's media release about its ongoing legal proceedings concerning Nuix relating to directors' duties breaches. That media release noted that the proceedings had been set down for a liability trial in November 2023. The 5 December letter also referred to ASIC conducting a separate set of ongoing inquiries in respect of trading in Nuix shares.

The letters of 5 December 2022 and 23 March 2023 explain that the disclosure of the material the subject of the Committee's request may prejudice the fair trial or impartial adjudication of the ongoing legal proceedings.⁵

¹ We refer to the Committee Chair's letter to the ASIC Chair of 17 November 2023, and paragraphs 1.9-1.10 of the Interim Report.

² See paragraphs 1.58 and 1.63 of the Interim Report.

³ See paragraphs 1.61-1.62 of the Interim Report.

⁴ See paragraph 1.64 of the Interim Report.

⁵ See page 3 of the 5 December 2023 letter.

Questions about ALS Limited

We refer to the Committee's request in Questions 1, 3 and 4 of Set 5 to provide internal investigation files in relation to ASIC's investigation of ALS Limited. We again note the Committee's view that it is unclear whether ASIC's letter is referring to ongoing investigations or ongoing legal proceedings⁶, or what those specific legal proceedings might be.⁷ The Committee's view was that ASIC had not fully articulated the harm which would result from providing such information, and it is on this basis that ASIC's claim of public interest immunity was rejected.⁸

We do not agree with the Committee's view that we did not properly particularise the relevant harm that would be caused by production and disclosure of the material related to ALS Limited. ASIC's letter of 5 December 2022 (no. 3) explained that at the time of that letter, ASIC's investigation into TerraCom Limited was ongoing. ASIC's letter of 23 March 2023 then advised the Committee that ASIC had recently commenced legal proceedings against TerraCom Limited and officers of TerraCom Limited. Those legal proceedings were commenced on 28 February 2023 following the conclusion of ASIC's investigation.

Furthermore, we note that ASIC's letter of 5 December 2022 about these questions referred to a number of other harms (such as harms arising from or relating to the reputation and privacy of former persons of interest, the disclosure of ASIC's legal advice, and the disclosure of legal advice provided to a third party). Those concerns do not appear to have been considered by the Committee.

Question about parties investigated in respect of superannuation investment switching matter

We refer to the Committee's request in Question 4 of Set 3 for ASIC to provide a list of parties that were investigated in respect of this matter, including the companies and the names of individuals. We note the Committee's view that ASIC has not advised of the particular harm which would arise should such information be provided and disclosed.⁹ It is on this basis that the Committee rejected ASIC's claim of public interest immunity.¹⁰

We do not agree with the Committee's view that ASIC did not particularise the relevant harm caused by production and disclosure of the material. As set out in ASIC's letters dated 5 December 2022 (no. 2) and 23 March 2023, ASIC considers that the disclosure of personal information about persons of interest may unfairly and adversely prejudice and damage the personal reputation and privacy of those persons in circumstances where those persons are no longer the subject of ASIC's inquiries.

Questions about communications between ASIC and the Minister's Office and members of Parliament

For the avoidance of doubt, we would like to make clear that we have made a claim of public interest immunity in respect of our answer to Question 2 in Set 6

⁶ See paragraph 1.53 of the Interim Report.

⁷ See paragraphs 1.61-1.62 of the Interim Report.

⁸ See paragraphs 1.63-1.64 of the Interim Report.

⁹ See paragraphs 1.65-1.66 and 1.68 of the Interim Report.

¹⁰ See paragraph 1.70 of the Interim Report.

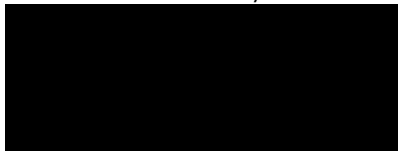
concerning communications between ASIC and the Minister's Office about the superannuation investment switching matters). However, we have never made a claim of public interest immunity in respect of Question 1 in Set 4 concerning communications between ASIC and members of Parliament about the inquiry. The Committee's Interim Report suggests that ASIC has made such a claim.¹¹

As set out in our letter dated 14 March 2023 relating to Question 1 in Set 4, following consultation with relevant members of Parliament, ASIC was concerned with providing such information, and noted that in practical terms, the provision of evidence by members of Parliament would be contrary to those members' objections and Senate Standing Orders relating to the provision of evidence by members. ASIC did not raise this objection as a claim of public interest immunity.¹²

We note that ultimately the Committee made no recommendation to pursue this request further.

Should you have any questions about this letter, please let me know.

Yours sincerely,



¹¹ See paragraphs 1.22, 1.26-1.28 and 1.32 of the Interim Report.

¹² See Odgers' Australian Senate Practice (2016), 14th edition at p 551 which states that "*Witnesses may object to answering any questions on any grounds, and committees must consider and determine any objections by a witness.*"