

21 October 2013

The Secretary
Senate Economics References Committee
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Dear Committee Members

Inquiry into the Performance of the Australian Securities and Investments Commission

The Governance Institute of Australia is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Our Members are all involved in governance, corporate administration, legal practice, company secretariat and compliance within their organisations, with their primary responsibility being the development and implementation of governance frameworks in a variety of organisations, including public listed and public unlisted companies, private companies, public sector agencies and not-for-profit organisations. Company secretaries are usually entrusted with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC) on a regular basis.

Governance Institute of Australia welcomes, therefore, the opportunity to comment on the *Inquiry into the Performance of the Australian Securities and Investments Commission* (the inquiry) and draws upon the experience of our Members in providing our response.

General comments

ASIC is the key corporate, market, credit and financial services regulator in the private sector and its functions and powers are legislated by the *Australian Securities and Investments Commission Act 2001* (the ASIC Act). The ASIC Act provides the context within which ASIC exercises its legislative responsibilities and obligations that extends to ASIC being responsible for the administration of the *Corporations Act 2001* (the Corporations Act).

Governance Institute of Australia notes that ASIC is also an Australian Government body accountable to the relevant Minister and Parliament and subject to parliamentary scrutiny, such as through the current review process being undertaken by the Senate Economics References Committee.

As noted above, our Members work in a diverse range of governance-related roles, including as company secretaries, and are often in communication with ASIC when ensuring that their respective organisations are operating within the wider regulatory and compliance framework. The Governance Institute of Australia, itself, retains an ongoing professional relationship with

ASIC on behalf of our Members to ensure that the governance-related aspects of the overarching framework are properly considered and attended to.

Governance Institute of Australia strongly supports the roles and responsibilities of ASIC in overseeing the market and the protection of investors. ASIC makes a fundamental contribution to the integrity of Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, and that investors and consumers have confidence in the market. We also support the manner in which ASIC has engaged with stakeholders as it seeks to strengthen the regulatory framework in place.

ASIC has undertaken significant work in improving its administrative and information management systems in the exercise its functions and powers. For example, ASIC is well underway with both a major information technology roll-out and registry transformation project aimed at improving the interaction with those who have registering and licencing obligations with ASIC. Governance Institute of Australia is also a member of ASIC's Business Advisory Committee that provides feedback to ASIC on such projects and we commend ASIC for the manner in which it has kept stakeholders informed and engaged through all stages of these major projects.

It has become evident questions have been raised about the efficiency and efficacy of the corporate regulator in recent months which has resulted in the current inquiry and investigation into the performance of ASIC, including examining:

- ASIC's enabling legislation to assess if any barriers exist preventing ASIC from fulfilling its legislative responsibilities and obligations
- ASIC's accountability framework
- the workings of ASIC's relationships with other regulators and law enforcement bodies
- ASIC's complaints management policies and practices, and
- the protections afforded by ASIC to corporate and private whistleblowers.

Our comments on ASIC in this submission are intended to assist the Committee in its consideration of ASIC's performance. We remain strong supporters of the corporate regulator, while recognising that there are areas where ASIC can improve its performance.

Governance Institute of Australia notes that the terms of reference also allow respondents to the inquiry to canvas any other related matters which they believe to be relevant.

We are of the view that many of the terms of reference of the inquiry are interrelated, for example, understanding ASIC's collaborative workings requires knowledge of ASIC's enabling legislation to understand its legislative functions and powers. Our response, therefore, ranges across all the terms of the inquiry, rather than addressing each term individually.

Whistleblowing, white collar crime and public perception

Governance Institute of Australia is aware that the inquiry into the performance of ASIC has partly resulted from unfavourable media scrutiny concerning the handling of incidents involving corporate and private whistleblowers in relation to corporate misconduct.

However, we believe that issues concerning the overarching framework for reporting, managing, and investigating corporate and private whistleblowing incidents is broader than simply ASIC's role in providing protections for whistleblowing.

Governance Institute of Australia notes that ASIC is granted specific powers under the ASIC Act and the Corporations Act which allow it to regulate and oversee actions in the corporate sphere.

Broadly these powers may be categorised as:

- administrative — including registering companies, auditors and liquidators; granting of Financial Services and Australian Credit Licences; banning and disqualification of licensees and directors; issuing infringement notices in connection with continuous disclosure obligations; and maintaining publicly accessible registers
- civil — seeking declarations for civil penalty contraventions of the legislation and issuing infringement notices for suspected breaches of the legislation
- legal — issuing Regulatory Guides aimed at ensuring the integrity and due process or performance of financial markets, and
- investigative — forensic gathering of evidence with respect to suspected breaches of the law and commencing civil or administrative proceedings or referring the matter to the Office of the Commonwealth Director of Public Prosecutions (CDPP) for criminal proceedings.

It is important to highlight, however, that ASIC's key role in this process does not extend to the complete prosecution of corporate and private whistleblowing actions. Instead ASIC must liaise with the CDPP in the conduct of criminal prosecutions that, ultimately, the CDPP determines in accordance with (and not limited to) the *Director of Public Prosecutions Act 1983* and Attorney-General Model Litigant policy. The investigation of any allegations of corruption may be undertaken by the Australian Federal Police (AFP) and not by ASIC.

In this regard, Governance Institute of Australia notes that ASIC's powers in relation to prosecutions for these types of actions is appropriate. For example, ASIC's involvement in whistleblowing matters is currently limited to the protection of officers who make protected disclosures on the grounds that they reasonably suspect that the information they are reporting indicates that the company, or an officer or employee of the company has breached the Corporations Act or ASIC Act.

It is important, therefore, when considering ASIC's performance in this regard to recognise that when other regulatory bodies hold responsibility to investigate and prosecute criminal activity, ASIC cannot be enjoined to take responsibility. That is, ASIC does not and cannot usurp the powers of other regulators. However, as noted later in this submission, where possible breaches of directors' duties are involved in such criminal investigations, Governance Institute of Australia is of the view that concurrent investigations could take place that could improve outcomes for those affected by criminal misconduct.

The recent media coverage has highlighted, however, that there are practical issues in the way in which complaints made about corporate conduct are processed. There are also issues in the way in which prosecutions are conducted, and in particular ensuring that the protections for whistleblowers continue to be observed.

While the operation of s 127 of the ASIC Act (with its exceptions) ensures that confidentiality for corporate whistleblowers who make protected disclosures is maintained, it appears that there is a disconnect between the regulatory framework in place for protecting corporate and private whistleblowers and the way in which it operates in practice.

Governance Institute of Australia strongly recommends, therefore, that there be a separate targeted review of the regulatory framework for corporate and private whistleblowing which recognises the involvement of multiple regulators in the process of investigating and prosecuting corporate and private whistleblowing.

We note that the Federal Government in 2009 released a discussion paper *Improving protections for corporate whistleblowers*, to which the Governance Institute of Australia and others responded. Treasury then held a Roundtable in 2010 to discuss various issues raised in submissions — Governance Institute of Australia participated in this. We attach our submission

(under our previous name, Chartered Secretaries Australia) to the discussion paper, as it sets out some of the issues involved that we believe need to be considered in any targeted review of the framework for corporate and private whistleblowing.

Governance Institute of Australia also notes that, in the public sector, the *Public Interest Disclosure Act 2013* (the Public Interest Disclosure Act) which received Royal Assent on 15 July 2013 and comes into force from January 2014, provides a set of rules for agencies to respond to allegations of wrongdoing and strengthens the protections against victimisation and discrimination for those who speak out. The Public Interest Disclosure Act is also the result of the implementation of the previous government's response to the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs report, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*. A closer examination of the manner in which each of the agencies is involved in investigating and prosecuting white collar crime is warranted.

Governance Institute of Australia does not, however, support broadening ASIC's powers which might include widening the definition of protected disclosures, or incorporating directors' duties, discrimination, or other related areas within the scope of ASIC's remit. If this was to happen, Governance Institute of Australia notes that ASIC would effectively be granted the leniency to step into boardrooms and regulate the manner in which decisions are made, thereby interfering with the internal governance of companies. Our Members do not believe that this would be appropriate. Such an approach would also usurp the powers of other regulators who are charged under a legislative framework with handling these related matters, such as the Australian Competition and Consumer Commission or Worksafe authorities.

Notwithstanding this, at present the process is that this first instance line of investigation is usually exhausted before ASIC commences any prospective derivative action and this has been the subject of some concern.

Another matter that requires consideration is that ASIC's role is prefaced on an ability to react to market, or corporate misconduct, investigate matters and provide appropriate punishment to deter future actions from occurring. That is, the corporate regulator is largely reactive. Yet there is a strong public perception that the regulator should be proactive in stopping such corporate misconduct from occurring in the first instance. Governance Institute of Australia is of the view that the primary responsibility for corporate misconduct remains with the individuals and companies that carry out these actions, and the regulator's role is to provide guidance as to duties and responsibilities, and undertake enforcement where breaches of those duties and responsibilities occur. It is important to assess the degree to which ASIC can be proactive without 'stepping into the boardroom', which would not be a desirable outcome.

Another issue that needs consideration is the degree to which the confidentiality of investigations precludes public understanding of actions ASIC could be undertaking in relation to possible breaches by individuals and companies of duties and responsibilities. Governance Institute of Australia notes that ASIC is often viewed as acting tentatively in investigating and enforcing matters, yet under its legislative framework, ASIC will neither confirm nor deny that an investigation is underway unless it is in the public interest to do so. Confidentiality of surveillance and investigation is central to preserving the integrity of the market, but it results in external public parties being unable to objectively evaluate ASIC's actions. Governance Institute of Australia also notes that a great deal of remedial action also occurs outside the public view.

Nonetheless, it appears that the surveillance function at ASIC is under-resourced. ASIC's resources could be deployed more efficiently and ASIC could communicate more effectively what actions it is undertaking, taking into account that confidentiality is required when investigations are underway.

Further options could also be explored to increase the efficacy of white collar crime investigations and prosecutions in Australia. Governance Institute of Australia is of the view that the Committee could consider the following suggestions:

- forming a separate prosecutorial body with specific and targeted powers to prosecute white collar crime
- providing additional resources to ASIC to allow it to have more inspectors to conduct surveillance and issue notices
- a separate targeted review of the regulatory framework for corporate and private whistleblowing which recognises the involvement of multiple regulators in the process of investigating and prosecuting corporate and private whistleblowing
- using an outsourced model of prosecutions and/or advice on prosecutions whereby members of the Australian Barristers Association are called upon to provide assistance in the conduct of white collar crime prosecutions.

Governance Institute of Australia reiterates that these are suggestions put forward for further consideration and not recommendations, apart from the recommendation that a separate, targeted review be undertaken of the regulatory framework for corporate and private whistleblowing.

ASIC's legislative responsibilities

The question of the resourcing of ASIC is, undoubtedly, one of the key issues for the exercise of ASIC's legislative, surveillance and investigative functions, and we are of the view consideration needs to be given to whether an injection of further funding or the efficient reallocation of existing resources could improve ASIC's performance. Governance Institute of Australia notes that the new Federal Government has not clearly identified whether further funding for ASIC will be considered.

In the past few years, ASIC's responsibilities have expanded significantly. It is no longer just a corporate regulator as it was when first formed. At the behest of the government, ASIC has in recent years become a regulatory conglomerate that covers not only companies, markets and finance industry supervision, but also insurance, superannuation, credit markets, margin lending, business names and securities market disclosures.

In recent years ASIC has taken responsibility for the:

- new credit registration and licensing scheme (approximately 26,000 new registrations)
- new margin lending licensing scheme
- new National Business Names Service (estimated 250,000 to 270,000 new registrations per annum)
- new financial product authorisation for Carbon Credits (registering and licensing industry participants to provide financial services in relation to Emission Units)
- new Self-Managed Superannuation Funds (SMSF) auditor registration
- new Tax Agent Registration Service for financial planners (approximately 18,000 registrations)
- new ABN/business names registration service (estimated 300 applications per day)
- migration of the register of company charges to the new National Personal Property Securities Register, as well as maintenance of historical charge information on the ASIC register.

This burgeoning sphere of regulation has not necessarily seen an increase in funding. Staff numbers rose by eight per cent from 1610 to 1738 between 2006-2007 and 2011-2012 – and annual expenses rose by 50 per cent from \$255.7 million to \$384 million, but government funding rose by only 24 per cent to \$304 million, much of it tied to specific projects, such as the

Registry Transformation Project. Fee income, from company registrations and searches, rose by 28 per cent, from \$519 million to \$664 million, but this is returned to consolidated revenue.¹

We note that at times there is discussion that ASIC revenue not be returned to consolidated revenue, but be retained by ASIC (as is the case with the Securities Exchange Commission in the United States). However, it is not a simple matter of comparing two vastly different legal structures in two different jurisdictions. In Australia, it is not the practice for government agencies to retain their own earnings, s 1351 of the Corporations Act specifically notes that the fees imposed on companies are payable directly to the Commonwealth. Such a model, therefore, would be a significant departure from the current one and raises significant issues.

Governance Institute of Australia is clear, however, that the constant accrual of functions and services by ASIC has played some part in reducing the ability of ASIC to devote resources to its legislative, surveillance and investigative responsibilities.

Different possibilities can be canvassed in relation to this. One is a complete devolution of the registry business to create the equivalent of the Companies Office in the United Kingdom. The revenue-generating corporate registries could be set up as a separately managed business, leaving ASIC itself more tightly focused on corporate, market and finance industry supervision and enforcement. Another possibility is that a number of smaller regulators could be established to manage the wide range of regulatory functions currently allocated to ASIC, leaving ASIC focused solely on its original regulatory functions or more limited regulatory functions than it is currently tasked to manage.

Notwithstanding these suggestions, which relate to the policy objectives that ASIC is tasked to fulfil, Governance Institute of Australia also suggests that the question of the efficient reallocation of resources under the current regulatory structure might be addressed in other ways than is currently the case.

We note that ASIC's administrative function is currently run by the ASIC Information Processing Centre (IPC) at Traralgon in Victoria which utilises a range of ASIC personnel to input, process and record administrative data about organisations regulated by ASIC. Governance Institute of Australia Members note that the call centre does not utilise senior-level ASIC staff, or lawyers, and call centre staff appear to be trained only to the extent of referring callers to the ASIC website in situations where there is uncertainty about the interpretation of specific provisions.

It may well be that it is a matter of policy that ASIC not provide legal guidance, but as part of ASIC's role to educate stakeholders, Governance Institute of Australia suggests that there may be service efficiencies to be gained by ASIC outsourcing its administrative function in a bid to broaden its educative function. That is, it might be cost-effective for ASIC to use a commercial operator to run its administrative function rather than maintaining these responsibilities in-house.

Governance Institute of Australia reiterates that this option should be explored independently and properly before being pursued. The suggestion is based on the need to consider if removing the administrative plank from ASIC's key functions could allow ASIC to refocus its responsibilities and obligations on the provision of legal and investigative services. Governance Institute of Australia notes, for example, that this could allow ASIC to better handle the process of corporate or private whistleblowing as it arises.

Governance Institute of Australia also suggests that ASIC's legal education services could be improved through better resource allocation. For example, ASIC Regulatory Guide 92 on *Procedural fairness to third parties* was last updated in 1996, and while the information contained therein might continue to remain useful and correct, Governance Institute of Australia

¹ ASIC Annual Reports 2006—07 to 2001—12

notes that regulatory guides are often relied upon as the way in which ASIC interprets and applies the law. While Governance Institute of Australia notes that ASIC is undertaking a program of updating much of the regulatory guidance it issues, the pace of updating can be slow given the sheer volume of material requiring review and ASIC's aim of consulting publicly with stakeholders on any updates.

Company secretaries and other governance practitioners seeking to understand how particular matters might be dealt with by ASIC rely on the regulatory guides for assistance. It is essential, therefore, that these materials are continually reviewed for currency and accuracy. Governance Institute of Australia, itself, as an organisation dedicated to demonstrating leadership in the promotion and application of good governance practice, has implemented an ongoing review program of all of the intellectual property materials on the our website to ensure currency and accuracy.

Governance Institute of Australia strongly recommends therefore that more regular updates to all the intellectual property information contained on the ASIC website be undertaken, and that resources in ASIC be allocated to provide for more regularity on this front.

The legal education information put forward in regulatory guides must also be supplemented by knowledgeable and experienced staff. Governance Institute of Australia notes that ASIC's role in managing compliance with corporate law and embedding corporate governance in organisations relies on its understanding of how governance operates in practice. This means ensuring that the people drafting and writing materials and guides are properly equipped to deal with all the issues relevant to companies.

In this regard, Governance Institute of Australia believes that the provision of up-to-date legal education material should be accompanied by providing appropriate training to ASIC staff and ensuring they have appropriate experience. Our Members have noted that there is a lack of consistency in how ASIC staff may deal with matters, with sometimes variable approaches adopted in interpreting even the most basic processes. For example, when applying for an Australian Financial Services Licence (AFSL), Governance Institute of Australia Members have experienced situations where different licensing conditions have been imposed for applications which are in all respects identical.

Governance Institute of Australia notes that these problems can arise because the staff tasked with attending to these processes may often be inexperienced and without immediate access to senior, more knowledgeable ASIC staff to assist them with carrying out their duties. There may also be internal inefficiencies which restrict the flow of information between directorates within ASIC which adds further complexity to administrative processes. Our Members note, for example, that in some instances changes to details such as 'change of address' require different forms to be lodged with different sections for different entities or licensees, when potentially only one notification of change should be required that is consistent with Standardised Business Reporting protocols — 'lodge once – lodge all'. Our Members have also noticed that there are inconsistencies in how processes are undertaken in different state offices.

Governance Institute of Australia believes that further training and education for junior and senior staff can assist with ensuring that there is more consistency in the way in which ASIC manages compliance processes and queries. However, it is also important to ensure that junior staff are provided with access to more senior staff to clarify and provide advice on more complicated issues.

For senior staff, Governance Institute of Australia is of the view that the secondment program that enables senior or ASIC staff to work in the private or other sectors should be increased to assist with providing staff with appropriate education and experience to fulfil their duties. For example, Governance Institute of Australia Members note that company secretaries often rely

on the advice or information proffered by ASIC staff as guidance on how to handle matters; however, there can be gaps between the advice being put forward and the reality of corporate governance practice. The advice must be able to be practically implemented to ensure good governance outcomes.

Governance Institute of Australia is also strongly of the view that ASIC should embark on a marketing and advertising strategy to educate the wider community. Governance Institute of Australia notes that there is a wealth of useful information on the ASIC and MoneySmart websites, yet the messages are usually only understood by those who operate in corporate circles.

While many average wholesale investors, retail investors or consumers would be likely to be able to describe the basic functions of the Australian Taxation Office (ATO), the same can not be said for ASIC, which is generally perceived to be the corporate regulator for the big-end of town. The expansion in the number of incorporated entities over the past 20-30 years, with which retail investors and consumers are involved through superannuation, securities trading, and employment, for example, means that ASIC is now just as relevant to them as the ATO is.

Governance Institute of Australia notes, for example, that an accountant might recommend to a 'mum and dad' investor couple that they set up a company to manage their affairs. The investor couple, seeing that there is a tax advantage, considers the company structure, and engages the accountant to set up the company on their behalf. As a result, the husband and wife investors are now directors of a company and caught by the ASIC regulatory framework, yet it is unlikely that they would be aware of their statutory, fiduciary and common law duties, even though this information is available on the ASIC website. Governance Institute of Australia notes that many in the broader community do not know what ASIC does because it does not widely advertise its functions.

Governance Institute of Australia recommends, therefore, that ASIC should consider engaging in a broader and more prominent marketing and advertising campaign to promote the regulatory framework which it oversees, the intellectual property which it creates to guide those who are regulated, retail investors, and consumers, and the other various services it provides in administering the regulatory framework.

ASIC's role as an educator for the private and corporate sector is pivotal to its ongoing functions and the effective regulation of the sector. Governance Institute of Australia believes that ASIC should invest more in ensuring that retail investors, consumers and the wider public are aware of the functions and services available (subject, of course, to consideration of our comments on funding above).

This would include, for example, also disseminating information about the role and responsibilities of directors which, for many in the wider public domain, remains an area of uncertainty. Governance Institute of Australia notes that there is currently a gap between what the community expects from directors, and the legal and ethical responsibilities of a person who is charged with acting as a director. We believe that an educational campaign, therefore, which highlights the duties and responsibilities of directors would be beneficial in making the public more aware of those duties, while also informing those who have 'fallen' into the director's role, such as those in 'mum and dad' companies, about their statutory obligations. It is not without note, that directors could be subject to up to 700 laws in Australia.

Improving ASIC's collaboration with other regulators and law enforcement bodies

Governance Institute of Australia notes that there are various instances where inter-agency collaboration could be improved in order to streamline services for users. For example, there

can be significant time delays between ASIC and the ATO when changes to details about a company, such as the company name, address, or principle place of business are made and processed. It can take months for the changes made in ASIC to be reflected by the ATO with respect to the Australian Business Number (ABN) of companies, and this can introduce complexities into reporting and taxation which should otherwise not exist. We note that the new ABN/business names registration service, due to come on line soon, will hopefully address this concern.

Governance Institute of Australia is also aware that a major project that commenced in or about 2007 is not fully implemented or understood — Standardised Business Reporting (SBR) — which will ensure that information can be shared quickly and efficiently between different regulators. However, there is still considerable lack of knowledge of this program in the corporate world and ongoing reservations about its implications for companies. Governance Institute of Australia notes that there has not been a clear articulation of the benefits to business of implementing SBR, or a communication program implemented that assists business to understand SBR, how it interacts with existing reporting frameworks and processes, and how business as well as government agencies will benefit from its implementation.

The potential cost of implementing SBR for organisations is also a concern as Governance Institute of Australia notes that costs will not be borne evenly across all industries and sectors. Governance Institute of Australia is particularly concerned that the benefits for small and medium-sized organisations are likely to be limited, given that financial reporting tends to be a smaller component of their operations than it is for larger organisations with a greater complexity of reporting obligations. It is not 'one size fits all'.

Governance Institute of Australia believes that this is particularly true in the not-for-profit (NFP) sector, and Governance Institute of Australia has already noted in a submission to Treasury on the reform of the NFP regulatory framework that, while we support SBR in principle, we want to ensure that the process of incorporating the SBR taxonomy into the systems of NFPs does not impose additional costs or the require the expansion of resources.

While the focus of the SBR program is on companies and their ability to adopt this reporting process, Governance Institute of Australia believes that the onus is also on ASIC to ensure that inter-agency processes are properly set up to reap the benefits of programs such as SBR.

In this regard, Governance Institute of Australia commends ASIC for having promulgated, from the outset, a good working relationship with the Australian Charities and Not-for-profits Commission (ACNC), which has already resulted in some red tape reduction and streamlining of shared information for regulated NFP bodies under both ASIC and the ACNC.

Governance Institute of Australia is of the view that ASIC could consider re-visiting the agreements which it has in place with other agencies to see where efficiencies in service can be sought and implemented.

Ensuring ASIC's ongoing accountability to the public

As a public sector body, Governance Institute of Australia notes that ASIC must remain accountable to the public. As the corporate regulator, ASIC must also be accountable to the companies which it regulates.

There are various instances where accountability mechanisms are not entirely transparent and free from bureaucratic operation. For example, Governance Institute of Australia notes that there are bureaucratic restrictions placed on access to the historical records of companies. Governance Institute of Australia notes that the charging of a fee for access, even for officers of companies, is both undesirable and impractical. Governance Institute of Australia is of the view that charging a fee for access to such information for the purposes of raising revenue is

inappropriate and unfairly restricts company officers, particularly officers new to the company, from legitimately reviewing their own company historical records. While companies will often keep their own records, Governance Institute of Australia believes that companies and other stakeholders should also be able to see their corporate history stored by ASIC without restriction or cost.

The other major area in which Governance Institute of Australia is of the view that ASIC could improve its accountability is in the disclosure of public actions taken, particularly in respect of the infringement notice regime. Governance Institute of Australia notes that as part of ASIC's enforcement regime, it is able to utilise several tools to deter contraventions, including administering infringement notices for corporate misconduct.

Infringement notices by their nature, however, reflect the views of the regulator. The payment of an infringement notice is not an admission of liability, but it avoids litigation in court. Infringement notices are also extremely influential in providing guidance to companies about corporate compliance and good corporate governance. Governance Institute of Australia notes, for example, that ASIC has previously issued infringement notices in situations where companies have withheld market-sensitive information from the market for periods as short as 60 and 90 minutes, and a trading halt has not been requested to cater for the delay. The infringement notices alleged a breach of the companies' obligations under the continuous disclosure regime and Australian Securities Exchange (ASX) Listing Rule 3.1.

There is no publicly available information on the full context of the particular circumstances of the alleged breaches in these two instances (the full context has not been made public and is known only to ASIC, ASX and the listed entities involved), yet these infringement notices were read by companies as:

- setting 60 and 90 minutes as the default timing for market announcements, imposing an unrealistic expectation on how fast a company can and should turn around price-sensitive announcements to the market
- establishing these two infringement notices as de facto law, even though there is no relevant case law on those aspects of continuous disclosure.

A breach of an entity's continuous disclosure obligations can in some instances be considered significant misconduct. In these two instances, neither listed entity admitted liability. Both listed entities took a pragmatic decision to pay the fine without admitting liability, and yet these two infringement notices formed the policy settings for the interpretation of 'immediate disclosure'. This was only ameliorated to some degree by the issue of *Revised Guidance Note 8: Continuous Disclosure* by ASX in 2012.

The workings of the infringement notice system gives companies involved in an alleged breach the choice not to admit liability, but instead pay the fine as a pragmatic response. This means that the terms of the settling of the matter remain confidential to enable without prejudice discussions between the parties. That is, information about the alleged breach remains restricted and the reasons for particular actions taken by ASIC are not fully disclosed.

Be that as it may, this substantially weakens the knowledge base that ASIC promotes to the corporate sector in regard to continuous disclosure obligations. Governance Institute of Australia is of the view that companies looking to ensure that they are compliant with their obligations are provided with insufficient information to make an informed assessment.

While Governance Institute of Australia recognises that restrictions on the information which can be published is due, in part, to the legislative framework within which the regulator operates. We are of the view that ASIC should consider releasing further information, where appropriate, about the context in which infringement notices are issued. Providing the context of such decisions is important as it allows companies to understand their obligations more fully and influences how they approach such issues as they arise. Better disclosure will lead to more informed decision-making by companies and can lead to a reduction in alleged misconduct as companies.

Conclusion

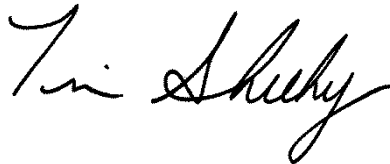
It is evident that ASIC operates in a difficult environment, playing both friend and foe of companies while administering and regulating their operations. It is also clear that the expansion of ASIC's regulatory jurisdiction is a major factor that needs to be taken into account when considering ASIC's performance, and that any such consideration should be undertaken in conjunction both with a review of funding and consideration of whether the breadth of regulatory responsibility assigned to ASIC is best suited to the needs of Australia at this point in time.

Nonetheless, Governance Institute of Australia is of the view that there are significant benefits to resolving some of the current complexities in ASIC's working relationships with stakeholders, including clearing some of the frustrations with ASIC's bureaucratic processes. We stress the point that a review of the regulatory framework for the prosecution of white collar crime would be beneficial.

Governance Institute of Australia remains a strong supporter of the corporate regulator in its current role and does not believe that the review being undertaken by the Committee should contemplate a significant change in the powers of the market regulator. ASIC has considerable powers that it can utilise, but it appears to not necessarily be able to apply those powers as required in all instances. Nonetheless, we reiterate the importance of ensuring that ASIC's resources are appropriately utilised for ASIC to regulate the market while providing education and guidance to companies and investors to maintain market integrity and investor confidence.

Governance Institute of Australia looks forward to seeing the recommendations and advice of the Committee in due course and would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Sheehy', written in a cursive style.

Tim Sheehy
CHIEF EXECUTIVE