



**ASIC**  
Australian Securities &  
Investments Commission

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and Investments Commission**

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Mr George Christensen MP  
Chair, Joint Standing Committee on Trade and  
Investment Growth  
C/O  
The Committee Secretariat  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

By email to: [jsctig@aph.gov.au](mailto:jsctig@aph.gov.au)

30 April 2021

Dear Mr Christensen

**Inquiry into the prudential regulation of investment in Australia's export  
industries**

We refer to the inquiry into the prudential regulation of investment in Australia's export industries (**the Inquiry**) announced by the Joint Standing Committee on Trade and Investment Growth (**the Committee**) on 17 February 2021. We further refer to the general invitation for interested parties to make submissions addressing the terms of reference for the Inquiry and your letter dated 26 February 2021 specifically inviting a submission from ASIC.

We thank the Committee for that invitation and welcome the opportunity to make a submission to assist the Committee in its consideration of the matters under inquiry. ASIC's submission is attached to this letter at Annexure 1.

Kind regards



Claire LaBouchardiere  
Senior Executive Leader, Corporations  
Australian Securities & Investments Commission

## Annexure 1: Submission

### ASIC's role

1. ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator. ASIC is established under and administers the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and carries out most of its work under the *Corporations Act 2001* (Corporations Act).
2. Under the ASIC Act, ASIC is required to, among other things:
  - maintain, facilitate and improve the performance of the financial system and entities in it;
  - promote confident and informed participation by investors and consumers in the financial system; and
  - take whatever action it can, and which is necessary, to enforce and give effect to the law.
3. ASIC's vision is for a fair, strong and efficient financial system for all Australians.<sup>1</sup>

### About this submission

4. This submission addresses item 2 of the terms of reference, which refers to the 'investment guidance and advice provided by Australia's financial regulators, including the Australian Prudential Regulation Authority (APRA), the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission (ASIC), to banking, insurance and superannuation institutions, and also to publicly listed companies, in relation to investment in Australia's export industries'.
5. ASIC is not a prudential regulator or provider of investment advice. ASIC's regulatory remit extends, in varying capacities, to entities that may fall within the scope of those identified as potentially being of interest to the Committee in the conduct of its Inquiry. While in no way exhaustive, this is most relevantly likely to include:
  - issuers (for example, listed public companies) which may operate businesses in, or materially connected to, an Australian export industry; and
  - debt and equity investors in such issuers (for example, banks, regulated superannuation funds, managed investment schemes and domestic and foreign investors including retail investors).
6. This submission largely focuses on disclosure requirements for listed public companies and retail managed investment schemes (schemes), which ASIC considers will be of primary interest to the Committee in its consideration of matters relating to 'investment in Australia's export industries'.

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<sup>1</sup> For further information, see [ASIC Annual Report 2019–20](#).

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### Law and ASIC regulatory guidance

7. Neither the Corporations Act nor the ASIC Act generally demonstrate, or confer on ASIC any discretion to exercise, a preference for one particular business, investment or economic activity over another.<sup>2</sup>
8. Rather, the Corporations Act and the ASIC Act are framed on principles that seek to support and promote fair and efficient financial markets and confident and informed participation by investors and consumers in those markets. In many cases, these ends are sought by means of *disclosure*.
9. Relevantly, many disclosure requirements apply to listed public companies and schemes (including those operating a business in, or materially connected to, Australia's export industries). Key disclosure requirements include:
  - where a listed public company seeks to raise capital by offering securities for issue or sale—ensuring that the offer is accompanied by a disclosure document (usually a prospectus) containing clear, concise and effective disclosure on the financial position, financial performance and future prospects of the issuer.<sup>3</sup> Similarly, where a scheme offers interests in the scheme, the offer must be accompanied by a product disclosure statement, containing clear, concise and effective disclosure, among other prescribed disclosures;<sup>4</sup>
  - preparing and lodging full-year and half-year financial reports<sup>5</sup> on the company's financial condition and results in accordance with the accounting standards.<sup>6</sup> Annual financial reports must include a directors' operating and financial review containing disclosure on the company's prospects and strategies for future financial years;<sup>7</sup>
  - continuous disclosure—listed companies and certain schemes must notify the market operator of information about specified events or matters if that information is not generally available but, if it were to be, it would have a material effect on the price or value of securities;<sup>8</sup> and

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<sup>2</sup> This approach has its foundation in the *Financial system inquiry final report* (1997), Chapter 5: Philosophy of financial regulation, pp 177–178 which provides '[t]he first purpose [of financial regulation], which applies in all sectors of the economy, is to ensure that markets work efficiently and competitively. Regulation for this purpose includes rules designed to promote adequate disclosure, prevent fraud or other unfair practices and prohibit anti-competitive behaviour such as collusion or monopolisation. This type of regulation does not materially alter or prescribe the nature of products or services, but simply aims to ensure that they are traded in fair and efficient markets.'

<sup>3</sup> Section 710(1), Corporations Act.

<sup>4</sup> Part 7.9, Corporations Act.

<sup>5</sup> Section 292(1) and section 302, Corporations Act.

<sup>6</sup> Section 296(1) and section 304, Corporations Act.

<sup>7</sup> Section 299A(1), Corporations Act.

<sup>8</sup> Section 674(1), Corporations Act.

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- those set out in the ASX Listing Rules, supplemented by the ASX Corporate Governance Principles which require disclosure on an 'if not, why not' basis.
10. The provision of such disclosure by listed public companies and retail schemes under the law is for the purpose of allowing investors in those entities, and the market generally, to price securities and allocate capital efficiently.
11. ASIC considers these disclosure requirements to be of paramount importance in ensuring that Australia's markets are and remain fair and efficient and that investors and consumers can participate confidently and on a fully informed basis. Accordingly, ASIC has issued a range of regulatory guidance to assist its regulated population to comply with these legislative disclosure obligations, including [Regulatory Guide 228](#) *Prospectuses: Effective disclosure for retail investors* and [Regulatory Guide 247](#) *Effective disclosure in an operating and financial review*.
12. ASIC may also produce guidance or recommendations on a particular matter that is new or novel, or of heightened importance or relevance, to encourage and facilitate better disclosure to the market so that investors are and remain fully informed. Examples of areas that ASIC has focused on over recent periods include the COVID-19 pandemic<sup>9</sup>, cyber risk<sup>10</sup> and climate change.<sup>11</sup>
13. ASIC's regulation of the disclosure-related requirements of the Corporations Act can include, where necessary and appropriate, taking action on misleading and deceptive disclosure or enlivening administrative stop order powers to prevent fundraising activities being undertaken where disclosure documents are defective.
14. Furthermore, disclosure standards are maintained through our surveillance and enforcement of statutory directors' duties and promotion of strong and effective standards of corporate governance in listed companies. ASIC's regulatory activities are key drivers in ensuring that listed companies make useful and meaningful disclosures.
15. Similarly, ASIC administers and enforces disclosure and other requirements in relation to retail schemes through a number of measures. These include:
- ensuring that responsible entities which operate the scheme, as well as their directors and officers, comply with their duty to operate in the best interest of members; and

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<sup>9</sup> See, for example, ASIC's webpage [COVID-19 implications for financial reporting and audit: Frequently asked questions \(FAQs\)](#).

<sup>10</sup> See, for example, [Report 429](#) *Cyber resilience: Health check*.

<sup>11</sup> See, for example, [Report 593](#) *Climate risk disclosure by Australia's listed companies*.

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- promoting appropriate risk and conflict management and compliance by responsible entities and fund managers through our regulatory guides.<sup>12</sup>

16. However, in its administration of the law, ASIC adopts a position of neutrality with respect to the appropriateness of any particular industry or business model or the desirability of any particular investment.<sup>13</sup>

### Importance of disclosure for Australia's financial markets

17. The practical importance of Australia's disclosure regime can be demonstrated by reference to its application to over 2,100 listed entities with a combined market capitalisation of over A\$2.3trillion<sup>14</sup>, informing a mix of Australian institutional (42%), Australian retail (28%) and foreign (30%) investors<sup>15</sup> across trades averaging in excess of 1.9 million by volume and in excess of A\$7 billion by value per day.<sup>16</sup>

18. From the perspective of international capital markets, Australia's regulatory settings on disclosure broadly reflect those in other developed economies and play an important role in ensuring Australia is and remains an attractive market for international capital to invest in.

### Superannuation

19. ASIC's position of investment neutrality also applies to superannuation. We do not impose regulatory requirements on superannuation trustees in relation to any particular investments. Nor does ASIC provide any investment guidance or advice to superannuation trustees, including in relation to investments in Australian export industries.

20. ASIC is the conduct regulator for superannuation, a role reflected in legislative reforms that took effect on 1 January 2021. ASIC now has powers to enforce provisions of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) imposed on APRA-regulated superannuation trustees (not self-managed superannuation funds) that concern consumer protection and market integrity. ASIC also has powers concerning a

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<sup>12</sup> See, for example, [Regulatory Guide 259](#) *Risk management systems of responsible entities* and [Regulatory Guide 133](#) *Funds management and custodial services: Holding assets*.

<sup>13</sup> See, for example, [Regulatory Guide 254](#) *Offering securities under a disclosure document* at RG 254.315 which states, as to our review of disclosure documents, that '[t]he primary objectives of the post-lodgement review program are to ensure adequate protection for investors and maintain investor confidence. In reviewing, we are only concerned with disclosure deficiencies and contraventions of the Corporations Act. Our review of the document does not consider whether the securities offered are desirable investments.'

<sup>14</sup> As at the end of March 2021: see [ASX's end-of-month values](#) for domestic equity market capitalisation.

<sup>15</sup> Refers to ownership of ASX 200, as at 2019: see Orient Capital, [Ownership trends in Australia, 2019 update](#) (PDF 742 KB).

<sup>16</sup> Based on equity market data for December quarter 2020: see [ASIC equity market data](#).

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broader scope of conduct of these superannuation trustees under the Corporations Act and ASIC Act. APRA's role as prudential regulator remains unchanged.

21. The laws ASIC administers are concerned with the investment activities of superannuation funds, only to the extent that these activities relate to funds' conduct towards, and disclosure to, fund members. Listed below are elements of the regulatory framework administered by ASIC that are relevant to the Committee's inquiry.

### *Investment decision-making and governance*

22. There are explicit SIS Act provisions that need to be considered as part of any decision-making by a superannuation trustee about the fund's investments. Importantly, section 52(2) of the SIS Act provides that a trustee must exercise the care, skill and diligence of a prudent trustee in making investments, performing the trustee's duties, and exercising the trustee's powers in the best interests of superannuation fund beneficiaries.
23. As a consequence of ASIC's expanded powers as superannuation conduct regulator, we have joint regulatory responsibility with APRA for the trustee covenants set out in section 52(2) of the SIS Act. Case law has confirmed that the best interests of beneficiaries are normally their best financial interests: *Cowan v Scargill* [1985] Ch 270 at [287].<sup>17</sup> The duty to act in the best interests of beneficiaries is a duty to present and future beneficiaries, and between different classes of beneficiaries.<sup>18</sup>
24. Trustees must therefore consider the best interests—ordinarily the best financial interests—of members when they are making investment decisions. They should be able to point to evidence of the decision-making process supporting investments that are in members' best interests.
25. Investment governance for superannuation trustees is a matter for which APRA, rather than ASIC, has issued prudential standards and guidance.<sup>19</sup>
26. We note that law reform is proposed to make superannuation fund trustees subject to an underperformance test and the new 'best financial interests duty' (see the Treasury Laws Amendment (Your Future, Your Super) Bill 2021).

### *Disclosure of investments*

27. ASIC regulates trustees' portfolio holdings disclosure (**PHD**), a requirement under section 1017BB of the Corporations Act. Trustees must make publicly available information that identifies each investment item allocated to an investment option as at 31 December and 30 June each financial year, and information about the value of the investment items. ASIC supports

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<sup>17</sup> Subsequently confirmed in *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* [2006] VSC 112 at [107].

<sup>18</sup> *Cowan v Scargill* [1985] Ch 270 at [287].

<sup>19</sup> See APRA's [Prudential Practice Guide SPG 530 Investment Governance](#) (PDF 346 KB).

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greater transparency in the superannuation system. To date, these obligations have been deferred by ASIC instrument because regulations about the form of PHD disclosure have not been made by parliament. Presently, 31 December 2021 is the first reporting date for these obligations.

28. Trustees must also ensure that representations about superannuation investments are not misleading or deceptive.<sup>20</sup> Broad disclosure about the investments undertaken is common in a number of consumer-facing documents, for which ASIC has regulatory oversight, such as product disclosure statements and periodic reporting.

### **Additional disclosure requirements for certain product disclosure statements**

29. As noted above and similar to the requirements for listed companies, the Corporations Act sets out a number of disclosure requirements that apply to product disclosure statements offering financial products for issue or sale.<sup>21</sup> These requirements are not prescriptive with respect to any particular investments made by the relevant managed investment scheme.
30. Where the financial product has an investment component, the extent to which labour standards, or environmental, social, or ethical considerations are taken into account in the selection, retention or realisation of the investment must be disclosed.<sup>22</sup> The Corporations Act confers on ASIC the ability to develop guidelines in this regard<sup>23</sup> and ASIC has done so by way of [Regulatory Guide 65](#) *Section 1013DA disclosure guidelines*. However, this guidance focuses solely on disclosure and is not prescriptive as to investment strategy.

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<sup>20</sup> Section 1041H, Corporations Act

<sup>21</sup> Section 1013D(1), Corporations Act

<sup>22</sup> Section 1013D(1)(l), Corporations Act

<sup>23</sup> Section 1013DA, Corporations Act