Committee Secretary, Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100 Parliament House
Canberra ACT 2600

My submission will refer to 2 sections of the terms of reference being:

The Terms of reference

- **the general regulatory environment for these products and services;**

- **the need for any legislative or regulatory change**

I have enclosed the attached article from the SMH as I believe that it encapsulates very well a number of aspects that are clearly wrong with the regulatory environment and the lack of knowledge of legislation by the regulators that are allegedly administrating the legislation.

Effectively a serious systemic problem exists, in which the ASX (as regulator) is failing to address, namely Opening accounts in a **"false name"**.

The ASX guidelines and ASTC procedures guidelines 5.2.4.12 state and they have stated in correspondence that a Formal Trust and SMSF can not open an account in its legal name as registered on the Australian Business Register.

Of course this view is in direct conflict with other legislation, namely:

- The Australian Tax legislation as 'A New Tax System (Goods & Services Tax) Section 184 entities confirms that a Trust is a legal entity
- ML&CTF Act 2006 - states that you cant open an account in a false name
- Financial Transactions Report Act 1988 - states you cant open an account in a false name
- Corporation Act 2001 - False statements as per the 17th April 2009
- Industry Body - The SRRA has stated that you are allowed to open an account on CHESS- Sub-register in your legal name as registered on the Australian Business Register

Risk Manage changes in legislation

It is also apparent that they do not manage the risk of legislation changes, have had on their procedures. as an ASX spokesman is quoted in the article as saying,

"said that ASX's rules (more specifically ASTC settlement rules) on the naming of accounts were consistent with the provisions of the Securities Registrars Association of Australian (SRAA), which set the industry standard"

Yet the ASX is using this website www.sraa.com.au as the Industry Standard guidelines and placing the comments contained in this website above the law and in effect the legislation governing the securities industry and ignoring the legal disclaimer section of this website regarding its non-compliance with the law and the legislation.

So we now are in a position, in that the industry standard SRAA is saying the opposite to

the ASX. The SRAA Website www.sraa.com.au states the following in its legal disclaimer.

"The materials on this Site have been prepared for general information purposes only. The materials on Site, or on any other website on the Internet accessed via the Site or otherwise, may not necessarily be accurate, reliable, complete or current, In particular such materials should not be taken as a complete statement of relevant law or practice."

Mr Ken Dyer who is noted down on the SRAA website as a committee member of the SRAA, has stated in writing that a Formal Trust can open an account in its legal name as registered in the Australian Business Register. Opposite to the stated position of the ASX

A request to the Committee

As such I ask the Committee to ask the ASX to supply the section of the following legislation that states that a Formal Trust or SMSF are not allowed to open an account in its legal name. As the following legislation states the opposite position to the ASX

- Corporation Act 2001
- Tax Legislation
- Financial Transaction Report Act 1988
- ML & CTF Act 2006

Third Party Mortgages

This is very important to establish, as this matter has a number of knock on effect, in that any margin lender who followed the ASX directive would in effect, would be entering into a Third Party Mortgage - which is illegal in all of the states of Australia and may have an impact on the Opes Prime and Storm financial transactions

CONSUMER CREDIT CODE - SECT 44

44 Third party mortgages prohibited *(1) A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.*
(2) A credit provider must not enter into a mortgage to secure obligations under a guarantee unless each mortgagor is a guarantor under the guarantee or a debtor under the related credit contract.
(3) A mortgage which does not comply with this section is unenforceable.
(4) The Court may, on the application of a party to a mortgage that is unenforceable because of this section, order that the credit provider takes such steps as are necessary to discharge the mortgage.
(5) In this section, a reference to a credit contract or guarantee includes a reference to a proposed credit contract or proposed guarantee

Patriot Act - overseas legislation

Additional it effects the compliance with the Patriot Act, so effecting the Banks in Australia compliance with this overseas legislation and Australia's standing with the various Money Laundering Legislation around the world

Potential Amount at Risk

It would appear that the ASX is putting at risk $60 billion of assets (as stated in the article) by their failure to address their systemic problem and to keep the public informed.

In Summary

financial transactions are governed by various legislation namely;

- the Corporation Act 2001
- The Financial Transactions Report Act 1988
- Tax Legislation
- ML & CTF Act 2006

The ASX's stance in this article, is that it only needs to comply with the Corporation Act, is a naive at best and needs to be addressed, by this committee so that action can be put in place to address this.

In addressing the **terms of reference -The Legislation**, is very good, its just, that the regulators are not up to the standard of the legislation and appear to have little understanding of the legislation or its effect on their operation.

The ASX is a good example. As they had a duty to ensure that they are compliant with all the regulation that affects the securities business. As pointed out in this article the ASX spokesmen has stated that they are noncompliant with Tax legislation. Yet the Tax legislation is very important part of the securities industry in that the Tax office is able to perform its functions of collecting income tax by the correct use of ABN and TFN identifiers which are sent over the CHESS Message system between the participants and the share registry (and this is governed by the Tax legislation).

The ASX have not nor have they managed their Tax compliance risks steaming from the compliance with this and other legislation affecting the securities industry. This action has greatly compromised the ability of the Tax office to track assets and income and has quite possibly opened the door for possible tax evasion. Let's hope that this is not the case.

The second point in the **term of reference - the need for regulatory change**

The ASX needs to be compliant with all of the legislation governing their operation and therefore should be audited by the individual regulators to confirm that they are compliant. (Which they currently appear not to be). As such we recommend that this occurs.

My Dealings with the ASX

In all my dealings with the ASX they have refused to look at the key point in my case. If I was allowed to open my account in my legal name as registered on the Australian Business Register then my problem would not have occurred.

I therefore again request that you ask the ASX to supply the legislation that states that a Formal Trust and SMSF can not open an account in its legal name as registered in the Australian Business Register. If they can't supply the section of the legislation that states their position, then they need to make a public statement that their guidelines are not compliant with all of the legislation that affects the securities industry and has not been from the inception of that legislation and then fix it.

No such legislation exists

My current position

Because at this point in time I have the Tax office saying that my formal Trust owns the

shares, as the Tax office records (income tax returns and BAS reports) together with the share registry records confirm that the Trusts ABN and TFN were used to identify the owner (being the trust) and were used for the withholding tax exemption by the share register

The ASX and the Participants are all saying that the Trust identified by its ABN and TFN is not their client and does not own the shares and that their client is identified by its ACN. Yet none of them can explain why my ABN and TFN identifies were used by them in their documentation any why their clients details are different to the records of the share registry

Its a simple request simply supply the section of the legislation that states that a formal trust of SMSF is not allowed to use its legal name when setting up an account. Other wise FIX the SYSTEMIC PROBLEM

Best regards

Andrew Barrell

- **Michael West**
- July 14, 2008 - 9:25AM

Distressed clients of Opes Prime will be heartened to hear that they may never have legally transferred their shares to ANZ or Merrill Lynch, due to a glitch in the wording of their registrations.

We are talking about a technical, legal glitch but the outcome of many a court case has swung on no less. This particular glitch though carries far deeper ramifications for Australian financial markets than Opes Prime, potentially rendering even $60 billion of trust assets illegal.

What is this annoying glitch? The Australian Tax Office requires you to employ the full legal name when using an ABN number of a trust on a public document.

The full legal name, to use a hypothetical example, would be ''the Trustee for the XYZ Trust''. Guidance from the Australian Stock Exchange however _ and consequently the widespread practice in the finance industry - is simply to register the Trustee's name, say, ''Bill Smith Pty Ltd''.

The industry and the ASX appear to be at odds with the ATO. Responding to questions from Business Day, the Stock Exchange and the corporate regulator ASIC naturally played down the issue.

If, however, a court were to rule in favour of complying with the Tax Office ruling, the bulk of Australian trusts _ and all their transactions _ could be in a legal no-man's-land.

Looking to the industry background then, the superannuation system in Australia contains some $1.2 trillion the assets. Of this, around $60 billion lies in the hands of private-sector financial institutions governed by trustee entities.

In a speech to the Australian Superfund's Summit 2008 in March this year, Nick Sherry, the Minister for Superannuation and Corporate Law said his Government had a strong 'duty of care' regarding superannuation assets.

On 14 February 2008, Sherry had announced a consultation process with a range of industry players about certain practices in the Self Managed Superannuation Funds

[SMSF's] sector. The Government was concerned some SMSF trustees are not as aware of their legal obligations as they could be.

More specifically, the Government was aiming for Trustees to ensure that the superannuation fund they acted for operated strictly in accordance with the trust deed and statutory requirements. Trustees should possess relevant investment skills and expertise and be aware of the SISA (Superannuation Industry (Supervision) Act 1993) prudential requirements relating to investments.

A recent ATO survey found 21% of participating SMSF (Self-Managed Super Fund) trustees had 'low' or 'low to medium' knowledge of their obligations. Moving up the food chain, it appears the level of awareness was also less than perfect.

On August 30, 2006, Tax Commissioner Michael D'Ascenzo had launched the Large Business and Tax Compliance 2006 booklet at the Large Business and Tax Administration Symposium in Sydney.

The booklet was designed to highlight both business tax obligations and corporate governance obligations to company directors.

One of the key governance questions posed: ''Is your group making necessary changes to its processes and giving proper consideration to major transaction and strategies to take account of changes in the tax laws?''

Twelve months later at an Institute of Company Directors meeting D'Ascenzo discussed Tax Risk Governance and advised that he had written to the top ASX 200 companies enclosing a summary of the publication Large Business and Tax Compliance. One could assume that this would have included the ASX by virtue of its position.

The Commissioner's intention was to provide company directors with some common sense suggestions which they could use for governance. Among these:

* A sound framework in place to manage its tax risks and comply with its tax obligations.

* A well resourced in-house tax governance capability.

* Reporting requirements to ensure that significant tax risks could be elevated to the board level.

* Appropriate review and sign off procedures for material transactions.

* An effective tax mitigation capability including the company's relationship with the Tax Office.

By all accounts the Tax Commissioner did a thorough job in highlighting to boards and directors of Australian publicly listed companies the risks associated with changing tax legislation.

Whether the ASX and others thoroughly heeded this advice however is doubtful. The ASX is no mere company but is itself empowered as a regulator and, until its reputation took a few hits for oversight amid the severe market downturn this year, enjoyed an authority which was rarely questioned.

Despite its special powers it appears the Exchange itself is not up to scratch when it comes to the minutiae of Self- Managed Superannuation Funds and formal Trusts.

In what could only be put down to further evidence of its focus on profit over regulation, it seems ASX has been, perhaps inadvertently, advising its participating brokers to break the law via its guidance notes and procedure guidelines; notably in not advising for the use of the Legal Name, as listed on the Australian Business Register (an Australian Tax Office Register) for either a Superannuation or formal trust in completing the application paperwork to open an account on its CHESS sub-register. The opening of the account enables the SMSF or Formal Trust to trade in publicly-listed shares on the ASX.

An examination of the guidelines from its member brokers shows ASX clients have followed suit. Since 2001, stockbrokers and trading platforms such as Commsec, ETrade and Ord Minnett have also failed to allow for the opening of the accounts for SMSF's and Formal Trust's in their proper legal names.

The effect has been a transfer of the ownership of the shares and subsequent dividends from the SMSF and Formal Trusts' owners, to non-related third parties - which would appear to contravene the tax laws by the misuse of the ABN and TFN numbers of the SMSF and Formal Trusts in the process.

Ironically, one of the directors of the ASX, Russell Aboud, also a senior officer at one of the brokers which carries the inadvertent advice, seems to have established his own formal trust according to the tax laws and Corporation Act - countervailing ASX's own guidelines.

As more than $60 billion of assets are managed by trustee entities, it is not unreasonable to assume that at least $20 billion would be invested in the share market and by following the ASX's guidance notes and procedure guidelines, these assets would not be in the name of the legal owner as listed on the Australian Business Register.

The implications for corporate Australia, should the discrepancy between the ATO and the ASX and others be tested in a court could be far reaching. For instance, in the event of a merger or takeover, have the actual legal owners of the shares had the opportunity to vote for the deal?

Moving further afield, share registries act as the agents for listed companies, managing their share registries. In this capacity, they are responsible for ensuring that the companies carry out their fiduciary duty to their shareholders and comply with the law. Among their functions they:

Record the holders' correct names and details of the shares in the company. (Are these records accurate?).

Manage the withholding tax process on dividends. They are required to withhold at the top marginal rate a percentage of the dividends if the holder does not provide an ABN or TFN number.

If there is were systemic problem and ABN and TFN numbers did not match the legal owners of the shares, the withholding tax may not been applied correctly.

Among other questions to consider, could the banks with their margin lending facilities encounter problems? What would the compliance issues be for overseas legislation?

Business Day asked ASIC if one entity could use the ABN or ACN number of a different entity on Public Documents. The response was ``the legislation is silent on this issue. However, provided it is made clear that the ABN/ACN being quoted is that of a different legal entity there is no specific prohibition against quoting the ABN/ACN of a different entity on public documents. However the entities correct ACN/ABN must also be included

in the document.''

Does this mean that, for example, Fred can use Johns ABN/ACN if Fred first denotes his ABN/ACN on the document, in the instance of purchasing shares Fred ABN/ACN is purchasing shares for John ABN/CAN?

On this point, the legislators connect both the Corporations and Tax Acts by requiring Fred to report in what capacity he is carrying out the transaction.

In relation to SMSF's and Trust's Fred ABN/ACN is acting as a Trustee for John ABN/ACN or it could be shown as Fred as Trustee of John Trust.

What the ASX rules state is that it can be written as Fred using John's ABN or TFN which ends up as the shares actually being in Fred's name. So, Fred could, if he chose, sell or leverage the shares in his own name without John being the wiser as to what had happened.

The Tax legislation deals with this under ''New Tax System (Australian Business Number) Act 1999 _ Section 23 - Misuse of ABN''.

According to the Act:

Misuse of ABN

(1) * You must not purport to identify yourself by using: (a) a number that is not an * ABN as if it were an ABN; or (b) an ABN that is not your own.

Penalty: Imprisonment for 2 years.

(2) * You must not purport to identify an * entity that is an * associate of yours by using: (a) a number that is not an * ABN as if it were an ABN; or (b) an ABN that is not the entity's own ABN.

Penalty: Imprisonment for 2 years

A number of questions arise in the Opes Prime disputes. If the directors of Opes followed the guidance notes and procedure guidelines issued by the ASX (the website shows they have) then it would appear that they have entered into a contract with ANZ and others offering collateral over shares for which they have no valid contacts with the legal owners. Such would bring smiles to the class action lawyers.

Meanwhile, The CHESS sub-register is recognised as forming part of the legal register of holders for a financial product, upon which each individual holders holding and registration details are maintained.

An investor and a participant/broker enter into a sponsorship agreement in order for the investor to hold shares on the CHESS sub-register.

In layman's terms the Chess Sponsorship Agreement is a document that sets out who the client is their ABN and or TFN numbers where they live and so forth. It is signed by both the client and the broker as being correct keeping in mind that the broker will not execute the document unless it is in order from his point of view.

This document is then used to raise a Holders Identification Number or HIN to identify the client meaning if client HIN Number 123 wishes to buy or sell shares then when the transaction is carried out electronically his HIN number is used to identify him not his name.

The ASTC (ASX Settlement and Transfer Corporation) settlement Rules provide thorough information concerning the mandatory content of Sponsorship agreements as does the Corporation Act 2001, Tax Legislation, Financial Transaction Reports Act 1988 and the Money laundering and Counter-Terrorism Financing Act 2006. This legislation confirms that you must use the legal name when opening an account on the CHESS sub-register.

Responding to questions from Business Day, a spokesman for ASX said that ASX's rules (more specifically ASTC settlement rules) on the naming of accounts were consistent with the provisions of the Securities Registrars Association of Australian (SRAA), which set the industry standard.

The SRAA however has not been empowered by legislation to adjudicate and issue binding rulings for the securities industry.

According to the SRAA: ''They [the provisions of the SRAA] should be read in conjunction with other regulations and procedures governing the securities industry.''

The SRAA is a forum is for discussion only: ''The Securities Registrars Association of Australia Inc (SRA) provides a forum where members comprising registrars, stockbrokers and other securities industry participants discuss issues related to the industry.''

When the ASX introduced the CHESS Settlement System it did not get a ruling from the ATO to ascertain if the system was tax compliant.

''ASX does not have a tax ruling on matters in this area. We have no need to seek one. Taxation concerns are a matter for individual investors and perhaps their brokers, not the exchange,'' said a statement from ASX.

Although displaying regulatory solidary in the public eye there have been private rifts between ASX and ASIC. In February 2006 the ASIC wrote in its annual assessment (s794C): ''During this assessment, we noted some deficiencies in ASX's response to particular complaints dealt with by various ASX business units. While some responses were potentially confusing, others said that certain investigatory action would be taken which was then not undertaken.''

The former CEO of the ASX, Tony D'Aloisio was appointed chairman of ASIC two years ago.

ASX response to questions:

ASX's rules (more specifically ASX Settlement and Transfer Corporation [ASTC] settlement rules) on the naming of accounts are consistent with the provisions of the Securities Registrars Association of Australian (SRAA), which sets the industry standard. They should be in the name of the registered legal owner (which could be the trustee). We enforce our rules.

We are not aware of the alleged illegality or why .... our guidelines are ''wrong''.

ASTC's association is with the registered legal owner - not, necessarily, the beneficial owner which an account designation may depict.

ASIC response to questions:

Can one entity use the ABN or ACN number of a different entity on Public Documents?

The legislation is silent on this issue. However, provided it is made clear that the ABN/ACN being quoted is that of a different legal entity there is no specific prohibition against quoting the ABN/ACN of a different entity on public documents. However the entities correct ACN/ABN must also be included in the document.

Can an entity quote its ABN number on Public Documents if its nine digit ACN is embedded into that ABN number?

Yes, as per section 153(2)(b) of the Corporations Act 2001 (the Act).

Can an entity quote an ABN number on a Public Document if its nine digit ACN is not embedded into that ABN number?

Yes, although under section 153(2) the company will also be required to quote its ACN where the ACN is not embedded in the ABN. It is worth noting that, where a company has an ABN, the ACN will generally be embedded in the ABN although there are some companies (generally from the early days of issuing ACN's) that have an ABN that does not include their ACN.

Does an entity have to quote its ACN or ABN number on Public Documents?

Yes, other than exempt documents. Under section 153 of the Act a company must set out with its name its ACN or ABN (where the ACN is embedded in the ABN) (or just its name if the name includes its ACN) on all public documents and negotiable instruments. The only exceptions are receipts (s154 of the Act) and the exceptions set out in schedule 7 of the Corporations Regulations 2001.

Is a public document valid under the corporation act 2001 if an abn/acn number is not listed on the document?

The Act is silent on this issue. As such, presumably public documents that don't include the ABN/ACN number are not thereby invalidated, although the company concerned will have breached section 153 of the Act, which is an offence of strict liability.

What is a public document?

A public document is defined in section 88A of the Act and includes signed documents required to be lodged under legislation or issued for the purpose of a particular transaction/dealing or a business letter, statement of account, invoice, receipt, order for goods/services or an official notice. It does not include a document applied or intended to be applied to goods or a package/label for a purpose connected with the supply of goods.

What documents require you to quote your ABN or ACN numbers?

Public documents and negotiable instruments. See above.

Is it against the Corporations Act 2001 to misquote an acn number and or an ABN number?

It is a breach of section 153 of the Act to produce a public document that does not include a company's correct ACN/ABN. It is also a breach of section 1308(2) of the Act to knowingly make a false or misleading statement in a document lodged with ASIC.

Is it against the corporation act 2001 to quote an abn number as if it was yours when it does not have your nine digit acn number embedded into it?

I am not sure what this question means. As stated above, if you have an ABN number that does not have your ACN embedded in it you will also have to quote your ACN on public documents and negotiable instruments in order to comply with section 153 of the Act.