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### **Council of Financial Regulators: Review of Financial Market Infrastructure Regulation**

The Australian Council of Superannuation Investors (ACSI) is pleased to make the following submission to the Council of Financial Regulators and respond to the Consultation Paper on the Review of Financial Market Infrastructure Regulation. ACSI represents the interests of 40 superannuation funds who collectively manage over \$350 billion of Australia's retirement savings; ACSI's membership also includes several large overseas pension funds with substantial investments in Australia.

As representatives of long term investors in listed Australian companies, ACSI is focussed on promoting high standards of corporate governance in the Australian market. ACSI research and advisory work over the past decade includes participation on the ASX Corporate Governance Council and extensive knowledge of the ASX Listing Rules. ACSI and its member funds therefore have a strong interest in the maintenance of a robust framework for financial market infrastructure. This submission is made in response to item 6.3 of the Consultation Paper which has raised a number of issues in relation to the making, monitoring and enforcement of the ASX Listing Rules.

#### **ASIC and the ASX Listing Rules**

ACSI strongly supports the Council's reform proposal to give ASIC an explicit power to direct a licensed market operator to make listing rules with specified content, with the consent of the Minister. It is our submission that the Council consider broadening its recommendation to consider transferring to ASIC the responsibility for setting, monitoring and enforcing the Listing Rules.

We recognise and support the rationale behind the Council's recommendation on giving ASIC power to direct a licensed market operator to make Listing Rules. As discussed in the consultation paper, this proposal reduces risks related to having a licensed market operator acquired by a foreign entity and an 'informal dialogue' being an insufficient mechanism to protect listing standards. We note that this concern is equally applicable to a domestic licensed market operator, or operators. Drawing on the Council's concern regarding the adequacy of 'informal dialogue', the same concerns arise over a market operator's ability to monitor and enforce Listing Rules – even where they are set by ASIC as an independent external body.

The ASX has publicly supported moving certain Listing Rules on related party transactions and executive remuneration into the *Corporations Act*. In a submission to the Productivity Commission's *Inquiry Report – Executive Remuneration in Australia* the ASX made the following comment:

ASX is of the view that since the majority of the regulation concerning related party issues and director and executive remuneration is already contained in the Corporations Act, there is a case for consolidating the subject matter of the Listing Rules discussed above in the Corporations Act.<sup>1</sup>

These comments were made in relation to Listing Rules 10.11, 10.14, 10.17 and 10.18. In the same submission, the ASX also noted that this change would provide benefits including to 'increase the ease of access to provisions dealing with similar issues', 'Provide a wider range of enforcement option in the event of a breach of a rule by a company' and 'provide the ability to introduce enforcement options targeted at individuals, which is not possible under the listing rules because they are underpinned by a contract between a company and the ASX.'<sup>2</sup> In ACSI's view the transfer of these functions is consistent with recent changes to transfer the market supervision role to ASIC from the ASX. This submission from the ASX lends weight to proposals to move certain Listing Rules, with associated monitoring and enforcement functions, to ASIC. The benefits identified by the ASX would have a significant impact on market integrity.

### **Monitoring and Enforcement of the ASX Listing Rules**

It is ACSI's submission that Council consider the transfer of monitoring and enforcement of the Listing Rules to ASIC. This change is consistent with the ASX's own policy position noted above, and these functions appear to be consistent with ASIC's role in relation to market supervision.

Continuous disclosure and the enforcement of ASX Listing Rule 3.1 is critical to market integrity. Presently, it is for the ASX to refer matters to ASIC for investigation were the ASX believes there has been a serious or possible contravention of the Listing Rules or Corporations Act.<sup>3</sup> It is concerning that recent reports from ASIC indicate that the ASX's records of discussions with market participants are not sufficient in this regard. ASIC has specifically noted that:

Based on our review, however, the file notes taken are invariably not verbatim accounts of the discussions held. As a result, the risk needs to be managed that these records may not be sufficiently detailed or adequate for evidential purposes in subsequent proceedings, particularly in providing evidence of the criminal standard required to support alleged breaches of s1309(1). It is also important that lines of inquiry undertaken by ASX Group's listings officers, when engaging with listed entities, are informed by the requirements that may be needed to establish a breach of the relevant law.<sup>4</sup>

This report is concerning from a market integrity perspective, and raises a broader issue of whether having the ASX and ASIC sharing responsibility for oversight of continuous disclosure provisions is an efficient framework.

Research into the application of the Listing Rules also indicates that there are issues with current processes for monitoring and enforcement that have potentially significant negative consequences for investors. In 2007, research commissioned by ACSI in relation to ASX Listing Rule Waivers indicated that there was little transparency regarding the use of waivers which included a significant proportion granted in relation to transactions with related parties, voting rights for external managers of listed infrastructure vehicles and executive remuneration<sup>5</sup>.

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<sup>1</sup>Australian Securities Exchange, Submission No 64 to Productivity Commission, *Executive Remuneration Inquiry*, 29 May 2009, p4.

<sup>2</sup> Ibid.

<sup>3</sup>Australian Securities Exchange, *Guidance Note 8 – Listing Rule 3.1 Continuous Disclosure*, p2.

<sup>4</sup>Australian Securities & Investment Commission, *Market Assessment Report: ASX Group*, November 2011, pp17-18.

<sup>5</sup>ACSI, *The ASX Listing Rule waiver regime*, April 2007. Available at:

<[http://www.acsi.org.au/images/stories/ACSI/Documents/detailed\\_research\\_papers/asx\\_listing\\_rule\\_waiver\\_regime.april\\_07.pdf](http://www.acsi.org.au/images/stories/ACSI/Documents/detailed_research_papers/asx_listing_rule_waiver_regime.april_07.pdf)>

ACSI also notes that despite recent progress, research conducted by BT Governance Advisory Services in 2005 provided an insight into the oversight of director and executive share trading by ASX and ASIC<sup>6</sup>. BT's research found that '15% of all trades by S&P/ASX200 directors — 432 out of 2936 trades in total in 2004 — were not notified to the market within the five business days required by the ASX Listing Rules.<sup>7</sup> This is despite these Rules creating a contractual obligation for ASX-listed companies.<sup>8</sup>' This research by ACSI and others highlights specific issues regarding the enforcement and monitoring of the Listing Rules. The results support the need to review the current system where the ASX, and other market operators, are responsible for monitoring and enforcing compliance with the listing rules they develop.

### **In summary**

ACSI supports the Council's reform proposal to give ASIC an explicit power to direct a licensed market operator to make listing rules with specified content, with the consent of the Minister. It is our submission that the Council broaden its recommendation to consider having ASIC responsible for setting, monitoring and enforcing the Listing Rules. Such a change is consistent with the ASX's policy submission noted above and ASIC's current role in relation to market supervision.

If you have any further queries please do not hesitate to contact us.

Yours Sincerely,

Ann Byrne  
CEO

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<sup>6</sup>BT Governance Advisory Services, *Position Paper Position paper — Director and executive share trading*, available at: <[http://www.aria.gov.au/about/governance/Copy\\_of\\_i\\_RE\\_Position\\_Paper\\_DST.pdf](http://www.aria.gov.au/about/governance/Copy_of_i_RE_Position_Paper_DST.pdf)>

See also, Regnan, *Position Paper – Director and Executive Security Trading*, April 2008. Available at:

< <http://www.regnan.com.au/documents/Position%20Paper%20-%20Share%20Trade%20Governance.pdf>>

<sup>7</sup> The research also found a number of trades were not notified within the period required under the *Corporations Act* indicating problems with ASIC oversight of the Act's provisions.

<sup>8</sup> BT Governance Advisory Services, *Position Paper Position paper — Director and executive share trading*, p2.