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ASIC Capability Review Panel
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Dear Capability Review Panel members

Capability review of the Australian Securities and Investments Commission

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are second to none.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies. They frequently are those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC), and in listed companies have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our members have a thorough working knowledge of the operations of the markets and the needs of investors, as well as compliance with the *Corporations Act 2001* (the Act). We have drawn on their experience in our submission.

Governance Institute welcomes the opportunity to comment on the capability review of ASIC (the capability review) and notes that the scope and purpose of the review is to examine, and make recommendations on how efficiently and effectively ASIC operates to achieve its strategic objectives, including:

- identification and analysis of immediate and future priorities and risks including financial system conduct risks
- resource prioritisation and responsiveness to emerging issues
- the skills, capabilities and culture of the Commission and its staff, including in respect of internal review and improvement mechanisms, and
- organisational governance and accountability arrangements.

General comments

Governance Institute's members strongly support the function and powers vested in ASIC to maintain and facilitate the performance of the financial system and the entities within that system to promote market and investor confidence and reduce business costs. We have participated in the Senate inquiry into the performance of ASIC and the Financial System Inquiry with a view to improving understanding the vital role that ASIC plays in the Australian economy in its regulatory role.

While the Financial System Inquiry report has recommended changes to the funding model for ASIC, as well as the capacity for ASIC to be exempt from the public sector bargaining framework and the *Public Service Act 1999* so that it can pay staff at market rates, the report did not recommend changes to any of ASIC's responsibilities.

However, while the question of the resourcing of ASIC is, undoubtedly, one of the key issues for ASIC to adequately perform its functions, the fact that in the past few years ASIC's responsibilities have expanded significantly is also a key matter.

Governance Institute remains a strong supporter of the corporate regulator in its current role and does not contemplate that a significant change in the functions and powers of the market regulator is necessary or judicious. Our members have taken a high-level approach in responding to the capability review and to that end have focused on the issues that pertain to governance.

Generally, Governance Institute is of the view that ASIC should focus on understanding the market and the range of financial products available, and also concentrate on the linkages between the market and products at different levels within corporations and product providers. ASIC needs to understand the risks in the financial system, and resource allocation is key to this. Currently, resources are focused on compliance. This is important, but has a concentration on the entity, rather than the system.

While we are of the view that the existing functions and administrative powers of ASIC are adequate, we are also of the view that, due to the significant expansion of ASIC responsibilities over recent years, there is an opportunity to improve the way these functions are performed, with greater resources provided to fulfil a wider and more active surveillance capacity. ASIC needs to be able to look across the market at the types of product being offered and take a mass market approach, rather than concentrating solely on individual entities within that system.

Accordingly, Governance Institute highlights the importance of ensuring that ASIC's resources and capital are allocated at an appropriate level and are utilised to allow ASIC to regulate the market effectively, while it continues to provide education and guidance to companies. We are of the view that ASIC's key role is ensuring there is trust and confidence in the market through effective surveillance, and an understanding of the market and financial products is central to this. Funding and enabling core infrastructure are key to ASIC's effectiveness. Both will assist ASIC to be more efficient in response to data mining, cyber crime and other emerging challenges. As with the businesses it regulates, ASIC needs to be digitally-enabled. In turn, this will allow ASIC to focus more on the customer, including the mass market, rather than on the entity, and to respond more quickly to misconduct or highlight more quickly potential detriment to the customer.

We support ASIC's dialogue with the marketplace — there are multiple levels of consultation, and we are of the view that this should be maintained. Secondments are beneficial, both for ASIC and for market participants. We are of the view that a strong relationship between the regulator and the market does not lead to regulatory capture. ASIC cannot be detached from the market but must have a deep understanding of it. It is critical that ASIC staff have market and business experience, in order for them to be able to make judgment calls on issues.

For these reasons, our members support the three-year funding model recommended by the Financial System Inquiry, on the basis that it will provide greater stability to ASIC during changes in economic cycles and expansion or contraction of government funding that result from those changes in cycles. Such a model will ensure that ASIC has funding even when government funding contracts during economic downturns, which is the period when ASIC's resources are more likely to be called upon. Stability of funding over three years will ameliorate the asymmetry currently in place between government funding capacity and ASIC requirements.

Capability review

Governance

Governance Institute is usually of the view that the roles of CEO and chair in a corporation should be held by different individuals, as from a governance perspective such separation provides for more effective accountability (the CEO is accountable to the board and the board is accountable to shareholders). However, in relation to ASIC, we are of the view that the governance structure currently in place suits the functions of the regulator.

The Chair and Commissioners of ASIC are, of course, accountable to Parliament and the Australian taxpayers. ASIC is an Australian government body accountable to the relevant Minister and Parliament and subject to parliamentary scrutiny. We also note that key decisions are taken by the Commission, not by individuals. Australia is a small market, and there are questions as to whether independence in the formal sense could be achieved, given that any potential board members separate from the Commission would come with industry and market experience and associations. Having the executive chair as a spokesperson for ASIC is an efficient and effective communication model that is transparent and accountable to all stakeholders, and accountability mechanisms are already in place. Moreover, the governance structure of ASIC is similar to that of the Australian Competition & Consumer Commission (ACCC) and the Australian Prudential Regulation Authority (APRA) and is a model that has served Australia well.

We also note that concern has not been expressed in the market as to the independence of the Chair or Commissioners of ASIC. Indeed, their independence of judgment is widely acknowledged by market participants and consumers. In the absence of evidence of problems with the current model, and a clear case for an alternative, Governance Institute is of the view that the current model should not be altered. If any suggestion of an alternative model arises from the capability review we believe that wide consultation on that issue would be essential.

Skills, capability and culture

In regard to staff skills, capability and culture, Governance Institute is of the view that the excellent work completed in the preparation of regulatory guides and information sheets issued by ASIC should be accompanied by specialist staff to respond to enquiries about these documents. Call Centre staff do not necessarily have the knowledge, training or experience to respond to queries with appropriate advice or responses. While industry meetings and similar allow for limited discussion on the intent and purpose of the documents, having a specialist contact point to provide support to businesses working to implement processes and procedures in line with the regulatory guides and similar would be of wider benefit. This would also provide feedback to ASIC on the impact of the guides and information and provide a consistent response across industries.

Call Centre staff tasked with providing support on the processes dealing with such requirements as the application for various licenses and submission of required documents could also potentially provide a higher level of service, if their knowledge and skills were focused on a couple of main areas, rather than attempting to respond to any and all enquiries. Again, the provision of more robust responses would potentially overcome issues experienced by our members such as 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 members have experienced situations where different licensing conditions have been imposed for applications which are in all respects identical. Governance Institute 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'. Further training and education for junior staff can assist with ensuring that there is consistency in the way in which ASIC manages compliance processes and queries. It is also important to ensure that junior staff are provided with access to more senior staff to clarify and engage on more complicated issues.

Governance Institute is of the view that, in order for ASIC to undertake larger-scale investigations more quickly, it would be a constructive outcome for the staff to be able to concentrate on fewer industry areas at a greater depth, thereby ensuring that they build the requisite understanding of the areas they are engaged with. It would develop in ASIC staff the knowledge to 'sit beside the market'. This would in turn heighten ASIC's capacity to identify areas of concern or the need for further education or to implement increased surveillance.

Such an allocation of staff resources in turn requires significant investment, as in order for ASIC to employ staff with the relevant skills, it must have the ability to pay individuals at market rates and also reward high performers appropriately. As noted in the Financial System Inquiry report, it hinders ASIC's capability when it is subject to the *Public Service Act 1999* in relation to the remuneration of its staff. ASIC should be able to position its reward structure in relation to the market and recruit, reward and retain the human resources it requires.

Governance Institute notes that ASIC's permanent Office of Whistleblower is designed to provide engagement with complainants through regular 'one-on-one' consultations. This function delegates to the relevant staff member the authority to manage and report to the complainant and facilitates a discussion in a far more collaborative style than merely written communication. Governance Institute submits that this framework could be applied to other areas that ASIC regulates, providing greater and more structured information-sharing between ASIC and the entities that it regulates without jeopardising the regulator's investigative methodology. This would contribute toward managing stakeholder expectations and arguably reduce adverse commentary in the media.

Conclusion

Governance Institute remains a strong supporter of the corporate regulator in its current role and functions and does not support a significant change in its functions and powers. Nonetheless, Governance Institute reiterates the importance of ensuring that ASIC's resources are appropriately utilised to allow ASIC to regulate the market effectively, while also providing education and guidance to the entities it regulates and to consumers.

Governance Institute looks forward to seeing the recommendations and advice of the Capability Review Panel in due course.

Yours sincerely

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

Tim Sheehy FGIA
Chief Executive