



ASIC

Australian Securities & Investments Commission

Use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries: Submission by ASIC to the Victorian Law Reform Commission

August 2015

ASIC's submission

- 1 ASIC welcomes the opportunity to contribute to the Victorian Law Reform Commission's review of the use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries.
- 2 Our submission provides information on ASIC's:
 - (a) roles and responsibilities, including the occupations and industries ASIC regulates; and
 - (b) use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries it regulated, including:
 - (i) licensing;
 - (ii) registration schemes;
 - (iii) surveillance;
 - (iv) reports of misconduct;
 - (v) investigative powers;
 - (vi) banning and disqualifications; and
 - (vii) co-operation with other Commonwealth agencies.
- 3 We would be happy to provide further, more specific, information where the Commission considers it would assist its review.

ASIC's roles and responsibilities

- 4 ASIC regulates Australian companies, financial markets, financial services organisations, and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.
- 5 As Australia's *corporate regulator*, ASIC is required to ensure that companies, managed investment schemes and associated individuals and entities fulfil their obligations under the *Corporations Act 2001* (Cth) (**Corporations Act**). ASIC's responsibilities in this field include:
 - (a) registering companies, managed investment schemes, auditors and liquidators; and
 - (b) ensuring that company directors, officers and employees comply with their legal duties, including acting in the best interests of the company.

- 6 As Australia's *markets regulator*, ASIC is required to supervise Australia's domestic licensed equity, derivatives and futures markets and those who participate in them.
- 7 As Australia's *financial services regulator*, ASIC is required to protect investors and consumers in the financial system. ASIC's responsibilities in this field include:
- (a) regulating corporations, managed investment schemes and participants in the financial services industry;
 - (b) assessing applications for, and granting or revoking, Australian financial services (**AFS**) licenses to individuals and corporations seeking to provide financial services, which typically involve dealing in superannuation, managed funds, deposit and payment products, shares and company securities, derivatives and insurance; and
 - (c) assessing AFS licensees' compliance with their obligations.
- 8 As Australia's *consumer credit regulator*, ASIC is required to ensure that individuals and entities engaging in credit activities fulfil their obligations under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**). ASIC's responsibilities in this field include:
- (a) assessing applications for, and granting or revoking, Australian credit licenses (**credit licence**) to individuals and corporations seeking to engage in credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers); and
 - (b) ensuring that Australian credit licensees and their representatives comply with their obligations.
- 9 In order to enforce and give effect to the laws it is responsible for administering ASIC engages in the following types of activities:
- undertaking investigations into suspected contraventions of relevant laws;
 - taking various forms of administrative action against regulated individuals and entities, such as disqualifying or banning persons from engaging in regulated activities or cancelling or suspending licences;
 - commencing and conducting various types of civil proceedings;
 - conducting criminal prosecutions for regulatory offences and
 - commencing, and assisting the Commonwealth Director of Public Prosecutions to conduct, criminal prosecutions for more serious criminal offences.

Licensing

- 10 A business providing financial services will generally need to obtain an AFS licence from ASIC. An AFS licence authorises the business and its representatives to provide financial services to clients. A similar regime exists for engaging in credit activities, in which a credit licence is required.
- 11 When assessing these applications, ASIC seeks detailed information from the applicant and conducts a range of checks. Particularly relevant to the VLRC's review are the mandatory preconditions, requiring ASIC to conduct checks on the key persons of the licence, known as 'fit and proper people' and responsible managers.

Australian credit licences

- 12 In each application for a credit licence, the applicant must identify each of the people who are involved in the management of their credit business, known as 'fit and proper people'.
- 13 Under a credit licence, the fit and proper people are:
- (a) if the applicant is a company or other body corporate— the directors and secretaries, and any senior managers who will perform duties in relation to credit;
 - (b) if the applicant is a partnership or a trustee:
 - (i) the partners or trustees who will perform duties in relation to credit; and
 - (ii) if a partner or trustee is a body corporate - the directors and company secretaries of the partner or trustee; or
 - (c) if the applicant is a natural person - that person.
- 14 To be a fit and proper person to engage in credit activities means that the person, among other things:
- (a) is competent to operate a credit business (as demonstrated by the person's knowledge, skills and experience);
 - (b) has the attributes of good character, diligence, honesty, integrity and judgement; and
 - (c) is not disqualified by law from performing their role in the business.
- 15 For each of the fit and proper people, a national criminal history check that is no more than 12 months old and a bankruptcy check that is no more than 12 months old is required.

- 16 Applicants are asked to certify whether their fit and proper people have been subject to certain events within the last 10 years, whether in Australia or overseas, and include:
- (a) administrative, civil or criminal proceedings or enforcement action, which were determined adversely to the person;
 - (b) declaration of bankruptcy or insolvency;
 - (c) involvement in the management of any companies or businesses that have had an external administrator appointed, or entered a compromise or scheme of arrangement with creditors, or been declared insolvent;
 - (d) refusal or restriction of authorisations required by law for a trade, business or profession; disciplinary action or investigations that may result in disciplinary action; licence cancellations;
 - (e) reprimand or disqualification or removal by a professional or regulatory body or external dispute resolution scheme in matters relating to the person's honesty, integrity or business conduct;
 - (f) claims against professional indemnity (PI) insurance in relation to advice given by the person;
 - (g) refusal of PI insurance; and
 - (h) denial, cancellation or suspension of accreditation by a lender, mortgage manager or mortgage insurer.
- 17 Credit licensees must provide ASIC with an annual compliance certificate confirming that the licensee has conducted background checks on each of the fit and proper people named on their licence. Credit licensees may be asked to provide a copy of national criminal history checks and credit history reports for each fit and proper person.

Australian financial services licence

- 18 In an application for an AFS licence, the applicant must identify each person responsible for significant day-to-day decisions about the financial services business, known as responsible managers, and provide a number of documents allowing ASIC to assess that each responsible manager is, among other things, of good fame and character.
- 19 The applicant must provide the following documents to ASIC for each responsible manager:
- (a) Statement of Personal Information providing the following information:
 - (i) whether the applicant has been the subject of any findings, judgment or current proceeding, including findings, in relation

- to fraud, misrepresentation or dishonesty, in any administrative, civil or criminal proceedings in any country;
- (ii) whether the applicant has been declared bankrupt;
 - (iii) relevant qualifications;
 - (iv) relevant experience;
- (b) copies of qualification certificates;
 - (c) copy of a bankruptcy check no more than 12 months old;
 - (d) copy of a national criminal history check no more than 12 months old; and
 - (e) copies of two business references (at least one of these should be from someone external to the responsible manager's current organisation).

Negative assurance and mandatory licensing

- 20 The granting of an AFS licence and credit licence is mandatory. That is, ASIC must grant an AFS licence or credit licence if, for an AFS licence, we have no reason to believe that the responsible managers are not of good fame and character or, for a credit licence, if we have no reason to believe that the fit and proper people are not fit and proper persons to engage in credit activities (among other criteria).
- 21 This represents a negative assurance test, with the presumption that ASIC will grant a licence unless there is material before us that would form the basis for ASIC having the necessary belief about the responsible managers and fit and proper people.
- 22 Section 913B(3) of the Corporations Act sets out some of the matters that are relevant to considering whether an applicant is of good fame or character. While a non-exhaustive list, it nominates convictions, suspensions or cancellations of a licence or banning or disqualification order against the person as being relevant to consider.

Registration schemes

- 23 ASIC is responsible for registering companies, directors, officeholders, auditors and liquidators.
- 24 Generally, there are no legislative conditions that ASIC must be satisfied of before ASIC registers an individual as director or officeholder or, for bodies corporate, to register as a company. This includes an absence of any requirement for individuals becoming directors or officeholders to provide proof of identity.

- 25 However, prior to registering an individual as a liquidator or auditor, the applicant must provide sufficient information to allow ASIC to be satisfied that the person:
- (a) is a fit and proper person;
 - (b) has prescribed qualifications or experience; and
 - (c) is capable of performing the duties of a registered liquidator or registered auditor.

Public registers

- 26 ASIC provides the public with access to a range of its registers, which includes information on:
- companies;
 - financial advisers;
 - directors and officeholders;
 - registered auditors;
 - registered audit companies;
 - registered and official liquidators;
 - managed investment schemes;
 - AFS licensees;
 - authorised representatives;
 - credit licensees;
 - credit representatives; and
 - credit registered persons.
- 27 Generally, each of these individuals and organisations must provide various information to ASIC, to be placed on the relevant, publicly-accessible registers, if they wish to participate in their respective occupations or industries.
- 28 The information in the registers will depend on the occupation or industry of the individual or company and can include:
- (a) address of an organisation;
 - (b) shareholders of an organisation;
 - (c) personal details of individuals, including their name, address and date of birth;
 - (d) for financial advisers, their qualifications, training, disciplinary action (including banning orders or disqualifications made against the financial adviser and any enforceable undertakings accepted by

ASIC from the financial advisor), professional memberships and employment history; and

- (e) details of any conditions or restrictions about an individual's registration.

29 Registers enable the public to find out information about professionals they deal with, gives employers greater ability to assess prospective employees and improves ASIC's ability to monitor our regulated population.

Proactive and reactive regime

30 ASIC takes a complementary proactive and reactive approach to monitor our regulated population.

Surveillance

31 ASIC undertakes extensive surveillances to monitor the activities of individuals and entities within our large regulated population, which can be proactive or reactive.

32 Proactive surveillances are the result of ASIC scanning the regulatory environment for possible problems. These may relate to particular industries, conduct or entities.

33 Reactive surveillances are prompted by a specific complaint, breach report or 'tip off' concerning the subject of the surveillance.

34 This monitoring regime discourages organised crime groups from entering or remaining in our regulatory spheres.

35 Through surveillances we engage with our regulated population (often on a face-to-face basis) and actively monitor activity. This is achieved by requiring licensees and individuals to:

- (a) provide ASIC with documents related to the licensee's business; and
- (b) answer questions related to the licensee's business.

36 ASIC has a range of compulsory information-gathering powers to facilitate its surveillance activities.

37 ASIC devotes significant resources to surveillance: during the 2013 to 14 financial year, ASIC completed 860 high-intensity surveillances. A high-intensity surveillance lasts for more than two days and includes both on-site visits and desk-based reviews.

Reports of misconduct

- 38 Each year, ASIC receives thousands of complaints from the public. ASIC refers to these complaints as ‘reports of misconduct’. Reports of misconduct allow persons affected by the conduct of an individual (or individuals) or company to bring potential breaches of the law to our attention.
- 39 ASIC receives reports of misconduct from a number of sources, including:
- (a) the public (including whistleblowers);
 - (b) industry participants;
 - (c) Members of Parliament on behalf of their constituents;
 - (d) external dispute resolution schemes;
 - (e) consumer groups and organisations such as community legal centres;
 - (f) other government and law enforcement agencies at the Australian and state and territory government levels; and
 - (g) ASIC employees.
- 40 ASIC reviews and assesses every report of misconduct we receive, making a range of preliminary inquiries to consider if the alleged misconduct suggests a breach of a law that we administer. This assessment may result in the commencement of a formal investigation or surveillance.
- 41 In 2013-14, ASIC received 10,507 reports of misconduct.
- Note: detailed information on the assessment of reports of misconduct and other reports by ASIC can be found in ASIC’s Annual Reports.
- 42 ASIC ensures there is a high level of public visibility on reporting misconduct. In 2013–14, we published 12 additional information sheets to explain our role in response to concerns frequently reported to us. These information sheets – now 16 in total – have been viewed more than 20,000 times in 2013–14.

Investigative powers

- 43 As a law enforcement agency, ASIC is empowered to conduct investigations within our regulated population to give effect to our strategic priorities of:
- (a) promoting investor and financial consumer trust and confidence;
 - (b) ensuring fair, orderly and transparent markets; and

- (c) providing efficient and accessible registration.
- 44 ASIC has a range of powers to facilitate its investigations, including:
- (a) our compulsory information-gathering powers, including those that enable us to require a person to:
 - (i) attend an examination to answer questions under oath;
 - (ii) provide us with such assistance as is reasonably requested in relation to the performance of our functions; or
 - (iii) provide us with documents and information;
 - (b) our power to make an application for a search warrant;
 - (c) our power to access telecommunications records; and
 - (d) our power to make an application for a stored communications warrant.
- 45 Investigations may lead to enforcement action such as:
- (a) criminal action;
 - (b) civil action, such as civil penalty proceedings (e.g. for breach of directors' duties), corrective action (e.g. to correct misleading disclosure) and compensatory action (to recover compensation on behalf of consumers); and
 - (c) administrative action (e.g. banning or disqualifying persons from the financial services industry). This is discussed in more detail at paragraphs 46 and 47 below.

Banning and disqualification

- 46 ASIC has a range of administrative actions available to us, including powers to issue a banning order where:
- (a) a person is convicted of fraud: s920A(1)(c) of the Corporations Act and s 80(1)(c) of the NCCP Act;
 - (b) a person in the financial services industry is suspected to not be of good fame or character: s920A(1)(d) of the Corporations Act; or
 - (c) ASIC has reason to believe a person engaging in credit activities is not a fit and proper person: s 80(1)(f) of the NCCP Act;
- 47 A person may be banned from providing financial services or engaging in credit activities permanently or for a specified period of time.
- 48 In addition, a person becomes automatically disqualified from managing a corporation if that person:
- (a) is convicted on indictment of an offence that:

- (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or
 - (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or
 - (b) is convicted of an offence that:
 - (i) is a contravention of the Corporations Act and is punishable by imprisonment for a period greater than 12 months; or
 - (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
 - (c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months: s206B(1) of the Corporations Act.
- 49 The period of disqualification commences on the day the person is convicted and lasts for five years after they are convicted (if the person does not serve a term of imprisonment) or five years after they are released from prison (if the person serves a term of imprisonment).

Co-operation with other Commonwealth agencies

- 50 ASIC is committed to building strong relationships with partner Commonwealth agencies, and supports a coordinated and strategic approach to the use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries. As identified in the VLRC Consultation Paper, effective information sharing across the relevant Commonwealth agencies is critical to the success of the regulatory tools described above.
- 51 Information on the relationships between ASIC and the Australian Taxation Office, Australian Crime Commission, Australian Transaction Reports and Analysis Centre and Australian Federal Police is outlined below. While ASIC works with other Commonwealth agencies, the agencies listed are most relevant to the VLRC's review.

Australian Taxation Office

- 52 ASIC has a close strategic relationship with the ATO. ASIC and the ATO signed a Memorandum of Understanding (MOU) on 24 December 2012, which sets out the high-level parameters by which the agencies work together on areas of common risk.
- 53 ASIC and the ATO have established information-sharing guidelines to clarify how and when information should be shared. Information is

released through one formal channel with a single point of contact at each agency. This approach ensures appropriate record keeping, minimises the risk of a request being missed and allows the liaison staff to develop an enhanced understanding of the needs of the other agency.

54 ASIC and ATO staff often attend regular and risk-specific working groups to discuss strategic matters and operational risks, and exchange ideas and information to mitigate those risks.

55 ASIC and the ATO hold a National Liaison Committee meeting every six months where senior staff of both agencies discuss issues of strategic importance, the effectiveness of information exchange, the utility of ongoing working groups and specific operational matters.

Australian Crime Commission

56 ASIC has a strong relationship with the ACC. The Chairman of ASIC is an ex-officio board member of the ACC and attends ACC board meetings every three months.

57 In September 2014, ASIC and the ACC signed an MOU on cooperation and information sharing. The ACC routinely provides valuable information to ASIC, which assists ASIC in using our regulatory tools effectively.

58 ASIC also participates in cross-agency standing forums coordinated by the ACC, which meet regularly to discuss ongoing matters relating to financial crime. Among these, the Australian Criminal Intelligence Forum (ACIF) is Australia's premier meeting of heads of intelligence in law enforcement. ASIC is a founding member of the ACIF.

59 ASIC and the ACC have seconded officers between them as required by various operations and taskforces. The ACC has also provided a part-time secondee to ASIC to work on the intelligence nexus between criminal law enforcement and corporate regulation.

Australian Transaction Reports and Analysis Centre

60 AUSTRAC is Australia's anti-money laundering regulator and specialist financial intelligence unit. It oversees compliance with the reporting requirements of the *Financial Transaction Reports Act 1988* and compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* by a wide range of financial services providers, the gambling industry and other entities.

61 The information and reports that AUSTRAC obtains can be extremely useful to ASIC in administering the Corporations Act and identifying high-risk entities. ASIC has entered into an MOU with AUSTRAC. This

MOU sets out the basis for collaboration, cooperation and mutual assistance between the agencies.

- 62 ASIC and AUSTRAC have both nominated liaison staff responsible for managing the relationship and monitoring referrals of information between the agencies. Regular meetings are held between the agencies to facilitate close cooperation.

Australian Federal Police

- 63 ASIC liaises with the AFP at strategic and operational levels.
- 64 ASIC officers' work with their AFP counterparts at a number of regular interagency forums, including the Heads of Commonwealth Operational Law Enforcement Agency (**HOCOLEA**) sponsored working groups, ACIF and the AFP-chaired OPAL group on identity fraud. ASIC also maintains regular contact with the AFP's Criminal Assets Confiscation Task Force, High Tech Crime Operations and Intelligence units.
- 65 ASIC and the AFP routinely refer matters, such as complaints, to one another when the matter falls more appropriately within the other's jurisdiction, and share intelligence and information on a regular basis. ASIC provides the AFP with access to our companies register and the AFP provides intelligence reporting to ASIC when a matter involves company activity.
- 66 ASIC recently executed a new MOU with the AFP, which covers our general relationship, information sharing and operational interaction, and clarifies our respective responsibilities in relation to overseas bribery matters.

Heads of Commonwealth Operational Law Enforcement Agencies

- 67 ASIC is a member of the HOCOLEA. Currently hosted by the Attorney-General's Department, the HOCOLEA forum is attended by ASIC's Chairman/Commissioners and Chief Legal Officer and meets two to three times per year.
- 68 Through HOCOLEA, ASIC is involved in policy-level discussions and initiatives with a wide range of Australian Government agencies. The membership of HOCOLEA is made up of representatives from:
- (a) the Attorney-General's Department;
 - (b) the Australian Competition and Consumer Commission;
 - (c) the ACC;
 - (d) the Australian Border Protection and Customs Service;

- (e) the AFP;
 - (f) the Australian Prudential Regulation Authority;
 - (g) the ATO;
 - (h) AUSTRAC;
 - (i) the Department of Immigration and Border Protection;
 - (j) CrimTrac; and
 - (k) the Commonwealth Director of Public Prosecutions.
- 69 ASIC has been involved in the recent development of several HOCOLEA initiatives, including:
- (a) the Organised Crime Compendium;
 - (b) the Organised Crime Strategic Framework Taskforce;
 - (c) the HOCOLEA Research Steering Committee and Research Plan; and
 - (d) the HOCOLEA Working Group on Carbon Pricing.
- 70 The Australian Government launched the Organised Crime Strategic Framework. The Framework:
- (a) drives an integrated and collaborative Australian Government approach to addressing organised crime, and
 - (b) sets the strategic priorities for Australian Government efforts against organised crime.
- 71 Its key components are the Organised Crime Threat Assessment (a detailed regular assessment to identify the most significant organised crime threats), the Commonwealth Organised Crime Response Plan (which identifies how Government will respond to those threats), and multi-agency responses.¹

Conclusion

- 72 ASIC employs a proactive and reactive strategic approach to prevent the infiltration of organised crime into our large regulated population by using a combination of regulatory tools. This approach allows ASIC to achieve a number of objectives in a resource-effective manner.

¹ More detailed information on the Organised Crime Compendium and Organised Crime Strategic Framework Taskforce can be found at: <https://www.ag.gov.au/CrimeAndCorruption/OrganisedCrime/Documents/Fact%20Sheet%20-%20Organised%20Crime%20Strategic%20Framework.pdf>.