

11 September 2015

Expert Panel
The Treasury
GPO Box 89
SYDNEY NSW 2000

email: capabilitypanel@treasury.gov.au

Dear Sir/ Madam

Capability Review of the Australian Securities and Investments Commission

Further to our meeting with the Expert Panel on 21 August 2015, the Australian Institute of Company Directors (AICD) welcomes the opportunity to make further, more detailed comments on the capability review of the Australian Securities and Investments Commission (ASIC) being undertaken by the Expert Panel.

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. We have a significant and diverse membership of more than 36,000 from across a wide range of industries, commerce, government, the professions, private and not-for-profit sectors.

Introduction of a board of directors

The AICD recommends ASIC's governance structure should be changed to improve its accountability and culture with the introduction of a board of directors. Having a board with a majority of non-executive directors will provide greater oversight for ASIC and set the cultural tone for the organisation "from the top".

Under its current structure, ASIC is headed by a Chairman who is supported by a Deputy Chairman and three Commissioners.¹ All are full-time executives of ASIC and together form the Commission. While the Commission is responsible for the exercise of ASIC's functions and powers, ASIC's strategic direction and its priorities, it does not formerly operate as a board of directors. External perspectives are provided through external panels, including the External Advisory Panel, Consumer Advisory Panel and Director Advisory Panel. However, we are advised by some of our members (a number of whom have sat on various ASIC panels) that these panels are not currently used to their full advantage and as a result are not overly effective.

While ASIC's Chairman, Deputy Chairman and Commissioners are able to provide significant knowledge and a deep understanding of the organization, the introduction of a board comprising a majority of non-executive directors would bring an additional layer of oversight, objectivity, independent thinking and external perspectives to ASIC. The responsibilities of such a board would include setting ASIC's culture, strategic priorities and a framework for ASIC's decision makers to work within as well as having oversight of ASIC's governance, internal control framework, financial reporting and compliance with relevant

¹ See <http://www.asic.gov.au/about-asic/what-we-do/our-structure/>

legislation. It would also provide a mechanism through which ASIC could receive greater practical insight from practicing directors.

There is precedent for government agencies within Australia to have a board structure in place as the governing body of the agency. The Reserve Bank of Australia (RBA) has a board that comprises nine members: three ex officio members – the Governor (who is Chair), the Deputy Governor (who is Deputy Chair) and the Secretary to the Treasury – and six non-executive members, who are appointed by the Treasurer.

Internationally, there are a number of examples of regulators with board structures in place, including authorities that regulate capital markets and corporate conduct. For example, in the United Kingdom, both the Financial Conduct Authority (FCA) and the Financial Reporting Council (FRC) have boards of directors (with a majority non-executives) as their governing body.² Similarly, the Financial Markets Authority (FMA) in New Zealand has a board with a majority of non-executive directors as its governing body.³

Composition and governance

Consistent with the principles that apply to boards of ASX listed companies, a board of ASIC should be of an “effective composition, size and commitment to adequately discharge its responsibilities and duties”.⁴ We propose that the Chairman of ASIC be appointed to the board of ASIC as Chairman, similar to the structure of the RBA. This would also be consistent with the boards of the FRC and the FCA in the UK where the most senior executives hold board positions.

Non-executive appointed to the ASIC Board for a set term, for example three years, with an option to re appointment for further terms by mutual agreement. Care will also need to be taken to help ensure that individual board terms are appropriately staggered, so that there is a continuity of appropriate knowledge, skills and experience on the board, as well as continuity on organisation and board-specific issues. This reduces the likelihood that multiple concurrent new appointments will impact adversely on the effectiveness of the board

With respect to the size of the board, as a general guide, we note that larger listed companies tend to have between seven and 10 directors. The board will need to be large enough to ensure there is a majority of non-executive directors and to also allow for an appropriate mix of skills, experiences and backgrounds but not so large that it becomes unworkable.

In order to achieve an appropriate mix of skills, experience and diversity of backgrounds (including gender diversity) is present on the board, we recommend the use of a “skills matrix” to map out the skills, experiences and backgrounds of the directors and to assist with identifying any gaps. To get directors with the relevant skills and experience on the board, it will be necessary to recognise that the non-executive directors appointed to the board are likely to have business interests outside of their role on the ASIC board. Indeed, most of the non-executive directors on the boards of the FRC, FCA and FMA also have directorships with other companies and organisations. Conflicts of interests are dealt with by these boards in the usual manner, with existing potential conflicts being declared at the commencement of their appointment and any that arise during their appointment being immediately declared to

² For the FSC see: <http://www.fca.org.uk/about/structure/board> and for the FRC see <https://www.frc.org.uk/About-the-FRC/FRC-structure/FRC-Board.aspx>

³ See <http://fma.govt.nz/fmas-role/our-people/board-of-directors/>

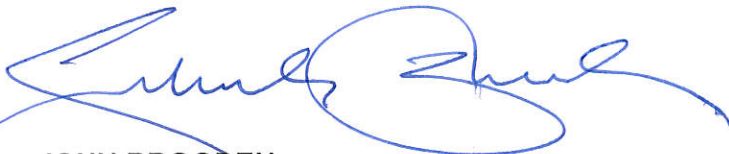
⁴ Principle 2 of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations, 3rd ed.

the Chairman or company secretary. Where any actual conflict arises with respect to a matter being considered by the board, appropriate steps would then be taken to ensure that the conflicted director is not involved in the decision making process. A similar process would need to be put into place and strictly adhered to by any non-executive directors appointed to a board of ASIC.

In addition to adopting processes to deal with conflicts of interest, other general principles of good governance that apply to the board of any organisation should also be applied to a board of ASIC. This would include undertaking regular assessments of board performance (including the performance of the individual directors and any board committees), maintaining a board succession plan, having in place transparent processes for director recruitment and appointments and having an appropriate director induction and continuing professional development program in place. The relevant principles set out in the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations (3rd ed)* will be a useful starting point for the development of appropriate governance practices for the board of ASIC, but with appropriate adaptations being made to take into account the fact that ASIC is a government body and not an ASX listed company with shareholders.

We hope that our comments will be of assistance to the Expert Panel. Please contact Senior Policy Advisor, Gemma Morgan on (02) 8248 2724 if you would like to discuss any of the matters raised in this letter further.

Yours sincerely



JOHN BROGDEN
Managing Director & Chief Executive Officer