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# Australia: Financial Sector Assessment Program—Technical Note—Investor Protection, Disclosure, and Financial Literacy

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# FINANCIAL SECTOR ASSESSMENT PROGRAM

# AUSTRALIA

## TECHNICAL NOTE: INVESTOR PROTECTION, DISCLOSURE, AND FINANCIAL LITERACY IN AUSTRALIA

DECEMBER 2005

INTERNATIONAL MONETARY FUND
MONETARY AND FINANCIAL SYSTEMS DEPARTMENT

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## GLOSSARY

| | |
|---|---|
| AICD | Australian Institute of Company Directors |
| APRA | Australian Prudential Regulatory Authority |
| ASIC | Australian Securities and Investment Commission |
| ASX | Australian Stock Exchange |
| ASXSR | Australian Stock Exchange Supervisory Review Pty Ltd. |
| CLERP | Corporate Law Economic Reform Program |
| FSRA | Financial Services Reform Act |
| HIH | HIH Insurance Group |
| IFRS | International Financing Reporting Standards |
| IOSCO | International Organization of Securities Commissions Objectives |
| NAB | National Australia Bank |
| OECD | Organization of Economic Cooperation and Development |
| FRC | Financial Reporting Council |
| PDS | Product Disclosure Statements |

## EXECUTIVE SUMMARY

1. **This Note reviews selected issues on investor protection and corporate governance in Australia.** It examines whether, from an investor protection perspective, there are vulnerabilities in the corporate governance framework in Australia and, if so, whether there are measures that the Australian authorities could take to strengthen the system. The Note focuses in particular on issues relating to disclosure and transparency and the corporate reporting framework, how those requirements are implemented and enforced in practice, and what the government is doing to maximize the likelihood that investors will make informed choices based on the disclosure that is provided.

2. **The Note concludes that the corporate governance framework for Australian listed companies is largely healthy and dynamic.** While there is no guarantee against corporate fraud or failure, and the governance framework can always be improved, it is notable that in Australia disclosure and corporate governance are part of the fabric of doing business. The authorities have built disclosure and corporate governance practices into their supervisory model, and listed companies, particularly the larger ones, deal with these issues on a regular basis and have created compliance systems to enable them to do so. While there is some concern about compliance costs, listed companies also recognize the benefits of and take advantage of a system where frequent market announcements are routine to manage their disclosure obligations and keep the market informed of key developments.

3. **An equally important part of the picture is the activist shareholder environment in which the listed companies in Australia operate.** Shareholder activism—and an active financial press—is an important element of corporate governance because it promotes compliance and implementation of disclosure and corporate governance obligations. Legal obligations of accountability, while necessary, may not, in the absence of an activist shareholder community, be sufficient to cause company boards and management to act accountably to shareholders in practice. In the past few years in Australia, shareholders, including institutional shareholders and shareholder groups, have become significantly more active and thus have increased leverage in dealing with management and making management more accountable.

4. **This dynamic corporate governance environment is built on a solid legal and regulatory foundation.** The legislative and regulatory framework in Australia includes disclosure requirements that meet or exceed the requirements that exist in many other countries. The periodic disclosure requirements to which listed companies in Australia are subject are consistent with international best practice. While listed companies are not required to issue quarterly reports as they are in some countries, more frequent periodic

reporting does not appear to be either necessary or warranted in view of the statutory requirement for continuous disclosure. The continuous disclosure requirements provide a framework through which market discipline is effectively exercised.

5. **The ASX has adopted a flexible approach to corporate governance disclosure, the "if not, why not?" regime, which is well suited to a market with a wide range of listed companies and for which uniform corporate governance requirements would not be easily adaptable.** The "if not, why not?" approach is consistent with international best practice. Many exchanges around the world take a similar approach of "comply or explain," and the OECD Corporate Governance Principles endorse this type of approach.

6. **As a general matter, implementation and enforcement of disclosure and corporate governance requirements seems quite strong, particularly among the top tier of listed companies.** While disclosure is not perfect, especially among the smaller companies, the combination of ASX monitoring backed by ASIC enforcement is largely effective. ASX seems to have struck a good balance in working with listed companies to assist them in complying with their disclosure obligations while at the same time aggressively monitoring continuous disclosure reporting. Cooperation between ASX and ASIC on potential disclosure breaches has improved in recent years.

7. **For both deterrence and enforcement purposes, ASX needs to continue to work with ASIC to highlight the importance of good corporate governance and the benefits to the company as well as the market of candid and timely disclosure.** Smaller companies, in particular, may need some extra attention in this regard. In addition, while there is no evidence that ASX's supervisory role has been compromised by its demutualized status, ASX needs to remain sensitive to the potential for conflict or the appearance of conflict between its regulatory and commercial roles.

8. **ASIC's enforcement reputation, which is critical to the credibility of the financial reporting framework, appears to have grown considerably stronger in the past five years.** It is possible that the new infringement notice and penalty authority that ASIC has recently attained will further increase ASIC's enforcement presence, although ASIC will need to bring more infringement notice cases and to follow through in those instances where cooperation is not forthcoming in order for the new authority to serve as an effective market deterrent.

9. **The Australian government has continued to focus on strengthening corporate governance reforms, including in the area of auditor independence and oversight.** The CLERP 9 reforms, which were adopted just last year, have strengthened auditor independence, enhanced financial reporting, and improved disclosure. While many of these reforms are consistent with those taking place in other developed markets, the Australian authorities have been highly sensitive to the risks and costs of over-regulation, and have made an effort to adopt a principles-based approach. The new reforms have reinforced and

increased ASIC's role in monitoring the audit firms, and ASIC will need to intensify its inspection and oversight activities. Giving ASIC enhanced inspection and information gathering powers with respect to the audit firms, as is currently proposed, could increase its effectiveness and ability to oversee the corporate reporting framework. These changes may well require additional resources, however.

10. **The strong emphasis which the Australian government places on a principles-based approach to legislation and regulation and the benefits of a flexible approach to corporate governance has in some ways led, paradoxically, to a surfeit of disclosure and excessive detail in the corporate governance arena.** While industry members profess to want a light hand from government, they also seek certainty in practice, not the least because of liability concerns. This of course has led to product disclosure statements, which, despite the legal requirement, are anything but "clear, concise and effective." It also has led the ASX Corporate Governance Council to balance its very broad principles of corporate governance with quite specific and detailed recommendations of best practice, perhaps causing some of the confusion among smaller companies who perceive the code as more prescriptive than advisory.

11. **The tension between a principles-based and flexible approach on the one hand, and a more prescriptive and detailed approach on the other, is also evident in the controversy which has surrounded APRA's corporate governance proposals.** The proposed standards, which are more specific than the ASX Corporate Governance Principles, would impose quite detailed requirements on APRA-regulated entities, relating for example, to board composition, the audit committee, and director independence. The highly charged atmosphere around the issue of principles-based regulation may have caused some to lose sight of the fact that APRA's proposals, while indeed prescriptive, are being made by a prudential supervisor seeking to apply fundamentally prudential standards to financial institutions. International best practice recognizes that prudential supervisors of financial institutions have an important role in corporate governance oversight, and supports a more prescriptive governance framework than that which applies more generally to listed companies. APRA's proposals are consistent with this approach.

12. **ASIC and the Australian government more generally should continue their multi-prong efforts to increase investor education and financial literacy.** ASIC takes both a supply and demand side approach to the issue, working with advisers and fund managers to make sure they understand their obligations, monitoring their compliance, and, at the same time, developing and providing a wide variety of information and assistance to investors. The Australian government, with its Financial Literacy Foundation, has taken a longer-term approach, putting significant resources into efforts to raise the financial literacy of the population at large. Additional resources, beyond those tied to the superannuation campaign, would help ASIC to expand its role in investor and consumer education and protection, which is important in filling an immediate need for improved consumer education that is likely to extend well beyond the transition to superannuation choice.

## I. INTRODUCTION

13. **In recent years, both national and international authorities have recognized the importance of corporate governance as one element in the quality of a country's financial supervision and the strength of its financial performance.** Corporate governance has been defined in different ways, but as a general matter relates to the mechanisms, by which corporations are directed and controlled and by which those in control are held accountable. Reforms in corporate governance in many countries have been motivated by high profile failures of significant companies and financial institutions.

14. **Like many other countries, Australia has seen its share of large-scale corporate collapses and, in response, has introduced numerous reforms affecting the entire spectrum of corporate activity and its oversight**. Many of these reforms represented efforts to improve disclosure and transparency and thus the accountability of corporate directors and managers. As noted more generally in a 2003 survey of corporate governance developments in OECD countries, in recent years "[t]he whole process [of financial reporting] has been placed under examination, from internal preparation of financial reports and internal controls through to the role of the board in approving the disclosure, the accounting standards being used and the integrity of the external audit process."[1]

15. **Indeed, in many respects, Australia has been ahead of the curve in introducing corporate governance reforms in the area of disclosure and transparency.** The corporate collapses in Australia in the 1980s precipitated a whole series of legislative and regulatory reforms that have continued largely unabated to this day. Notably, a national corporations act and a national securities act were introduced in 1989, which together assigned responsibility for company and securities law matters to a newly created national securities regulator, the Australian Securities Commission. In 1990, the Chairman of the newly formed Commission formed an advisory group to "discuss growing public concern about standards of corporate behavior revealed in recent high profile corporate collapses and to recommend action to promote higher standards of corporate conduct."[2]

16. **Throughout the 1990s, across different governments and via numerous reform initiatives continuing through today with the adoption of CLERP 9, the Australian disclosure requirements were elaborated, and the supervisory structure through which these provisions were to be implemented and enforced, was built.** The structure is a multifaceted one, with a mix of statutory requirements, common law precedents, listing rules,

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[1] OECD, *Survey of Corporate Governance Developments in OECD Countries,* December 2003. The OECD went on to note, "The responsibility of boards and their audit committees (or similar bodies) have been tightened and a number of countries have now introduced public oversight of the setting of accounting and auditing standards."

[2] P. Collett, S. Hrasky, *Voluntary Disclosure of Corporate Governance Practices by Listed Australian Companies,"* Vol. 13, No. 2, Blackwell Publishing Ltd., March 2005.

voluntary compliance recommendations, enforcement guidance practices, and private sector best practice guidelines all playing a part.

17. **This Note will look at selective issues in the Australian corporate governance framework, focusing on disclosure, implementation and enforcement, and financial literacy.** The Note first discusses the legislative, regulatory and institutional framework in which the corporate reporting regime is anchored. It then discusses the corporate governance, financial reporting, and continuous disclosure requirements that apply to listed companies in Australia, including the costs of such requirements and their comparability with international best practice.[3] Because implementation is critical to compliance, the Note then explores how the disclosure and corporate governance requirements are implemented and enforced in practice. Directors' duties and shareholder rights and the role of external auditors, including their independence obligations and auditor oversight, are also discussed in this context. Finally, the Note discusses investor education and financial literacy initiatives that are intended to maximize the likelihood that investors will make informed choices based on the information that is disclosed.

18. **This Note does not purport to be a formal or comprehensive assessment of corporate governance in Australia.** While it draws on the Corporate Governance Principles of the OECD where relevant, it does not attempt to apply these Principles in any kind of systematic manner. Moreover, it does not draw conclusions or propose an action plan based on those Principles. Rather, the Note looks at corporate governance from an investor protection perspective, with a particular focus on disclosure and transparency, and considers the effectiveness of that system and how it might be further strengthened.

19. **The information on which this Note is based was derived from a wide variety of sources, including relevant Australian laws, regulations, listing rules, and guidance notes, a range of academic literature, both from within and outside Australia, as well as other relevant materials on investor protection and corporate governance such as, for example, the OECD Corporate Governance Principles.** In addition, a great deal of information was obtained through interviews conducted in person with Australian authorities and members of the private sector. This Note was prepared[4] as part of the assessment conducted in Australia by the International Monetary Fund, pursuant to the Financial Sector Assessment Program. The author is extremely grateful to the Australian authorities for the generous time and cooperation that they provided.

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[3] "If the financial reporting and audit process is flawed, the whole external accountability framework is at risk. In other words, our system of corporate governance is at risk." B. Collier, Commissioner, *The Role of ASIC in Corporate Governance,* Corporate Governance Summit 2002, November 27, 2002.

[4] The Note was prepared by Felice Friedman, a consultant with the World Bank on securities markets and regulation.

## II. Background—Legislative and Supervisory Structure

20. **The legislative and supervisory structure for financial supervision in Australia took its present shape in July 1998, when the Australian Securities Commission became the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulatory Authority (APRA) was created.**[5] ASIC and APRA were formed in response to the 1997 report of the Wallis Committee, a committee chaired by Stan Wallis and charged by the Australian Government with undertaking a comprehensive review of the Australian financial services industry and its regulation. The Wallis Committee recommended that Australia adopt a "twin peaks" system of regulation, under which one institution (ASIC) would assume responsibility for market integrity and investor protection across all types of financial products, and a second institution (APRA) would be responsible for prudential regulation of banking, insurance and superannuation.[6]

21. **The Australian Government initiated the Corporate Law Economic Reform Program (CLERP) in 1997 which has produced a series of initiatives that continue to the present.** In undertaking reforms under the CLERP program, the government sought to balance the interests of protecting investors and maintaining confidence in the market while facilitating investment and employment. "The principles guiding CLERP are market freedom, investor protection and quality disclosure of relevant information to the market. The reforms have been aimed at ensuring that regulation keeps pace with a rapidly changing business environment and with international best practice."[7] The most recent set of reforms under CLERP 9, which were implemented in July 2004, focused on strengthening Australia's financial reporting framework and improving transparency, including audit reform and corporate disclosure.

22. **As part of the CLERP program, the Wallis Committee recommendations were further elaborated and extended with the enactment of the Financial Services Reform Act 2001 (FSRA).** Under the FSRA, functionally similar products are to be regulated in a consistent manner. Thus, virtually all financial products, including securities and derivatives

[5] The Australian Commonwealth government is responsible for corporations legislation, which it has enacted by virtue of its own constitutional power and power referred to it by the states. This is underpinned by a political agreement (the Corporations Agreement 2002). Under the Agreement, the Commonwealth government must consult the Ministerial Council, comprising Commonwealth, State and Territorial representatives, about proposed amendments to the Corporations Act and about appointments to certain key bodies including ASIC.

[6] The Reserve Bank of Australia remains responsible for monetary policy, overall financial system stability, and the payments system.

[7] R. Grant, *Australia's Corporate Regulators – the ACCC, ASIC and APRA,* Parliament of Australia, Department of Parliamentary Services, June 2005.

and certain insurance and superannuation products, are now regulated under a single scheme for licensing, disclosure, and market conduct.[8]

23. **As a result of this complex legislative foundation, ASIC is the government agency that is primarily responsible for disclosure and transparency and its implementation and enforcement in Australia.** While APRA also has a mandate to protect consumers (in their capacity as "depositors and policy holders"), its focus is different from that of ASIC and is primarily on preventing institutional failure. Nonetheless, ASIC and APRA's responsibilities, while different, often affect the same institutions. For example, ASIC is responsible for licensing all financial services providers, including those who offer products, such as superannuation funds, that are regulated from a prudential perspective by APRA. And, of course, with respect to financial institutions whose securities are publicly listed, both agencies have key responsibilities.

24. **Because of their complementary responsibilities, ongoing cooperation is critical to the ability of ASIC and APRA to carry out their responsibilities.** If, for example, a financial institution which is regulated by APRA and listed as a public company, experiences material difficulties, APRA is likely to have prudential concerns and ASIC is likely to have concerns about whether the firm is meeting its disclosure obligations to the market. The prudential concerns of APRA and the investor protection concerns of ASIC may well be in conflict. Thus, it is necessary for APRA and ASIC to consult at an early stage and on an ongoing basis to determine how such a situation should be handled. Since the failure of HIH Insurance Ltd. in 2001, APRA and ASIC have entered into an MOU as well as a number of protocols to enhance their cooperation and the level of information sharing seems to have increased. These are important steps, but will only be effective if the two agencies are committed at all levels to a culture of cooperation in practice.

25. **ASIC is responsible for enforcing the provisions of the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001.** The ASIC Act establishes ASIC as an independent statutory authority, with a Commission consisting of between three and eight members and a full-time chair. Its responsibilities are wide-ranging, and go beyond many of its counterpart securities regulators in other countries to include companies and auditor registration and regulation in addition to market regulation and the regulation of financial services providers. ASIC has a number of different regulatory tools at its disposal to enforce its responsibilities, including civil, administrative and criminal powers.

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[8] See, e.g., R. Simmonds, R. Da Silva Rosa, *The Impact of Federalising Securities Regulation in Australia: A View from the Periphery,* Report for the Wider Person Committee of the Department of Finance Canada, October 2003. The government currently is in the process of adopting the Financial Services Reform Refinements Act, which aims to clarify and streamline some of the financial disclosure required under the FSRA.

26. **Despite its wide-ranging responsibilities, however, ASIC does not possess actual rule-making powers.** Under the Australia Constitution, the Governor-General is responsible for making regulations, on the advice of the relevant Minister. ASIC is likely to be consulted by Treasury with respect to the development and issuance of regulations within the scope of ASIC's responsibilities. Nevertheless, unlike securities regulators in many other developed markets, ASIC does not have the power to issue legally binding rules, and the Treasury plays a more significant role in the development of securities regulatory policy. ASIC does, however, possess both a specific and a general exemptive power, which permits it to exempt specific persons or a class of persons from compliance with the regulations. ASIC also is active in issuing policy statements, which, while not legally binding, provide important guidance as to how ASIC will exercise its powers.

27. **Along with ASIC, the Australian Stock Exchange (ASX) plays an important role in ensuring that information is disseminated to the market.** While ASIC is responsible for enforcing the disclosure requirements of the Corporations Act, ASX is the front-line regulator for disclosure to the market. ASX imposes a wide range of requirements on listed companies, both through its listing rules and its corporate governance standards. Even though it performs important regulatory functions, ASX is in fact a private entity.[9] With respect to its disclosure responsibilities, ASX does not possess any disciplinary or enforcement mechanisms, other than the "nuclear" option of suspending a listed company's securities from trading and even delisting. It must refer matters to ASIC for further investigation and possible prosecution. Thus, ASIC and ASX must work together to ensure that listed companies are complying with their disclosure obligations. ASIC and ASX have entered into a memorandum of understanding which sets forth the parameters for cooperation, which seems to have increased and become smoother in recent years. As can be seen below, both the Listing Rules and the Corporations Act impose disclosure obligations on listed companies that are quite extensive.

## III. DISCLOSURE AND TRANSPARENCY

28. **Disclosure and transparency are key components of the OECD Principles of Corporate Governance.** The OECD Principles provide that, "[the] corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company."[10] In the annotations, the Principles note that, "[a] strong disclosure regime that promotes real transparency is a pivotal feature of market-based

[9] In 1998, ASX became the first stock exchange to demutualize and to self-list its securities. This of course raises some sensitive supervisory issues (discussed in more detail below).

[10]Section V, Principles of Corporate Governance, OECD, 2004. It is noteworthy that the OECD Steering Group that prepared the corporate governance principles was chaired by Veronique Ingram, a representative of the Australian Treasury.

monitoring of companies and is central to shareholders' ability to exercise their ownership rights on an informed basis." An ASIC Commissioner has observed similarly that, "[a]ccess to adequate, accurate and timely information on the activities of those in control of the corporation, whether it be through financial reports, continuous disclosure or analysts reports, is essential to the proper monitoring of those in control of the corporation and is, therefore, in ASIC's view, part of corporate governance."[11]

29. **As noted above, disclosure and transparency in Australia rest on a multifaceted foundation of legislative requirements, common law precedents, listing rules, policy statements and voluntary good practice guidelines.** However, despite the complexity of these legal, quasi-legal, and non-legal elements, the fundamental requirement that material information must be disclosed to the market has been in place in Australia since the early 1990s. According to the Australian government, "accountable management and transparent financial information are fundamental tenets of the Australian corporate governance framework."[12] In Australia, disclosure requirements include requirements for a company to disclose financial and non-financial information on both a periodic and continuous basis, as well as information that specifically relates to the company's corporate governance practices on an annual basis.

## A. Information disclosure requirements

### Periodic disclosure requirements

30. **The periodic disclosure requirements to which listed companies in Australia[13] are subject are consistent with international best practice.**[14] Under Sections 292 and 302 of the Corporations Act, listed companies must prepare both annual reports and half-year reports, each of which must be filed with ASIC and audited by a registered company auditor who is independent of the company.[15] The annual reports must include an annual financial statement, consisting of a balance sheet, an income statement, a statement of changes in equity, a cash flow statement and notes comprising a summary of significant accounting policies and other explanatory notes, and must be circulated to all shareholders. The semi-

[11] B. Collier, *supra.*

[12] Australian Treasury, *An Overview of Australia's Corporate Governance Framework,* Prepared in connection with assessment conducted under the IMF-World Bank Financial Sector Assessment Program, November 2005.

[13] The requirement actually applies to "disclosing entities," a somewhat broader category than "listed companies."

[14] The OECD Principles do not specify the frequency with which disclosure should be made, but "support timely disclosure of all material developments that arise between regular reports." Australia's periodic (and continuous) disclosure requirements are also consistent with IOSCO's Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities, October 2002.

[15] The audit of the half-year report may be limited to a "review."

annual statements are generally an abridged version of the annual report, and they do not need to be circulated to the shareholders. Both the annual and semi-annual reports also must include a directors' report about the operations of the company, and a directors' declaration that the financial statements comply with the requirements of the accounting standards requirements and give a "true and fair view" of the company's financial position.

31. **While listed companies are not required to issue quarterly reports as they are in some countries including, for example, the United States, more frequent periodic reporting does not appear to be either necessary or warranted in Australia.** Indeed, Australia's periodic disclosure requirements are consistent with international best practice. The recently adopted European Union Directive on Transparency, for example, does not require that listed companies issue quarterly reports. It does, however, recognize that more frequent reporting to shareholders is in fact desirable, and requires those companies that do not publish quarterly reports to issue "interim management statements" to their shareholders.[16] While in Australia there has been some debate about the advantages and disadvantages of mandating quarterly reporting for listed companies, the decision to date has been that, on balance, the costs to listed companies of complying with such a requirement outweigh the likely benefits of additional meaningful information being disclosed to the market. This is because Australia already has in place a system for updating the market about significant developments, which effectively compensates for less frequent reporting requirements. That system is the continuous disclosure regime.[17]

**Continuous disclosure regime**

32. **The continuous disclosure regime is a central part of Australia's corporate reporting framework.** Continuous disclosure is the "timely advising of information to keep the market informed of events and developments as they occur."[18] ASX regards Listing Rule 3.1, which sets forth the continuous disclosure requirements, as "particularly important" and "central to the orderly conduct and integrity of the ASX market."[19] Listing Rule 3.1 requires that, "once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities,

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[16] Such statements would include a description in narrative form of the company's financial position and of the impact of material events.

[17] It is also possible that more frequent periodic reporting could act as a disincentive to companies to comply with their continuous disclosure obligations, as there is some evidence that, toward the end of the reporting period, companies tend to delay announcements of material developments until the periodic report is issued. See C. McNamara, G. Gallery, N. Fargher, *Management Reluctance to Disclose Earnings Information in a Continuous Disclosure Environment: Evidence from the Association between Unexplained Stock Returns and Subsequent Disclosure,* February 2004.

[18] ASX Listing Rule 3.1

[19] ASX Guidance Note 8.

the entity must immediately tell ASX that information."[20] The Listing Rules define the concept of awareness broadly, such that an entity is considered "aware" of information if a director or executive officer of that entity has, or ought reasonably to have, come into possession of the information in the course of their duties. ASX is then responsible for disseminating that information to investors. In order to ensure that all investors will receive the information simultaneously, the ASX listing rules require listed entities to maintain the confidentiality of the information until after ASX has acknowledged that it has released the information to the market.[21]

33. **The continuous disclosure listing rule is reinforced by a statutory requirement.** As early as 1991, the Australian Companies and Securities Advisory Committee recommended statutorily mandated continuous disclosure. The Committee believed that a statutory requirement would "promote confidence in the integrity of the Australian capital markets and provide benefits to market participants and management in various interrelated ways."[22] Under Section 674 of the Corporations Act, listed entities are obligated to comply with the listing rules of the market on which their securities are listed. A contravention of ASX Listing Rule 3.1 is thus also a contravention of the Corporations Act,[23] which may give rise to civil or criminal liability.

34. **There are limited exceptions from the disclosure requirements of Listing Rule 3.1.** Information does not have to be disclosed if: (i) a reasonable person would not expect the information to be disclosed; (ii) the information is confidential and ASX has not formed the view that the information has ceased to be confidential; AND (*emphasis added*) (iii) one or more of the five factors listed in ASX Listing Rule 3.1 is present."[24] When first introduced, these exceptions apparently created some confusion and were regarded by the industry, at least to some extent, as a permissible loophole to the continuous disclosure requirements. In

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[20] Listing Rule 3.1 also is consistent with the OECD Corporate Governance Principles, which state, "A number of countries have introduced provisions for ongoing disclosure (often prescribed by law or by listing rules) which includes periodic disclosure and continuous or current disclosure which must be provided on an *ad hoc* basis. With respect to continuous/ current disclosure, good practices is to call for "immediate" disclosure of material developments. . .," as does Listing Rule 3.1

[21] Private sector representatives noted that ASX works creatively with listed entities to address difficult timing issues that may arise when the entity has shares that are cross-listed in other markets in a different time zone.

[22] ASX, *Continuous Disclosure: The Australian Experience,* February 2002.

[23] Corporations Act, Subsection 674(2). The statutory requirement for continuous disclosure was introduced in 1994.

[24] The five factors are as follows: (i) it would be a breach of law to disclose the information; (ii) the information concerns an incomplete proposal or negotiation; (iii) the information comprises matters of supposition or is insufficiently definite to warrant disclosure; (iv) the information is generated for the internal management purposes of the entity; or (v) the information is a trade secret. ASX Listing Rule 3.1.

response, ASX made an effort to limit the use of these exceptions.[25] ASX has stressed that the listing rules are not to be read in a narrow or legalistic way, and that Listing Rule 3.1 in particular is to be complied with "in the spirit of continuous disclosure." ASX also has emphasized that all of the conditions of the exception must be present for the exception to apply, and provided guidance elaborating on each of those conditions in detail. In addition, ASX has introduced the concept of a "false market," whereby, even if all of the conditions of the exception seem to apply, ASX may require a listed entity to make a disclosure in order to rectify or prevent the creation of a "false market" in the entity's securities. While the false market provisions were hotly debated at the time they were introduced and are still at times the focus of disclosure discussions between ASX and listed companies, as a general matter, ASX's efforts seem to have reduced the frequency with which entities abuse the disclosure exception.

35. **Continuous disclosure requirements are thus central to the effectiveness of corporate governance in Australia**. Indeed, it has been argued that, "continuous disclosure plays a vital role in the mechanism for information provision to Australian securities markets and in ensuring that the markets are fair and efficient."[26] Listed entities do not appear to view the continuous disclosure requirement as a burden, and, indeed, take advantage of a system where frequent market announcements are routine to manage their disclosure obligations and to keep the market informed of key developments.[27]

### B. Corporate governance disclosure requirements

36. **In addition to the periodic and continuous disclosure requirements, listed companies must also disclose information about their corporate governance practices.** In 2002, in response to the corporate collapses in Australia, the United States, and elsewhere, ASX formed the Corporate Governance Council. The Council includes 21 representatives of different stakeholders including investors, business interests and market participants. The Council has published a corporate governance code, which identifies 10 core principles for effective corporate governance along with 28 best practice guidelines.[28] The ASX Listing Rules require listed companies to include a statement in their annual report "disclosing the extent to which the entity has followed the best practice recommendations set by the ASX

[25] ASX, Guidance Note 8 to Listing Rule 3.1.

[26] Neagle/ Tsykin 2001.

[27] For example, listed companies see to be using the disclosure requirements to give the market early notice of the impact of the switchover to IFRS on their financial statements. ASX noted that it works to prevent companies using the continuous disclosure platform for advertising or other inappropriate purposes.

[28] ASX Corporate Governance Council, Principles of Good Corporate Governance and Best Practice Recommendations, March 2003. Some market participants noted that the corporate governance code was an attempt to ward off more prescriptive corporate governance requirements such as those adopted through the Sarbanes-Oxley Act in the United States.

Corporate Governance Council during the reporting period."[29] If a company has not complied with the principles or recommendations in the corporate governance code, it must explain why.

37. **The Australian approach to corporate governance recommendations is thus flexible and disclosure-based.** The ASX takes an "if not, why not?" approach to corporate governance rather than mandating that all listed companies follow certain prescribed practices. It is purposely intended to be sufficiently adaptable to apply to diverse companies, and relies on market discipline mechanisms to promote good governance. In an address given in Singapore in 2004, the Chair of the ASX Corporate Governance Council explained, "the disclosure requirement is the only thing that is prescriptive about our work. . . . ASX doesn't consider its role is to prescribe how companies should manage their affairs, any more than we see it as our role to tell investors what to value and where to invest. Our role is about facilitating informed and free choice."[30]

38. **The "if not, why not?" approach to corporate governance is consistent with international best practice.** Many exchanges around the world take a similar approach of "comply or explain," and the European Commission has endorsed this approach for European exchanges. Proposed amendments to the 4th and 7th Company Law Directives would impose on EU issuers the obligation to publish a yearly corporate governance statement.[31] The OECD Corporate Governance Principles reinforce the benefits of this type of approach, emphasizing that, "[p]olicy makers have a responsibility to put in place a framework that is flexible enough to meet the needs of corporations operating in widely different circumstances. . ."[32]

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[29] ASX Listing Rule 4.10.3

[30] K. Hamilton, *The Challenge of Change: Driving Governance and Accountability,* Address given at the CPA Forum, Singapore, August 2004.

[31] "Under our proposal to amend the Accounting Directives we have suggested that listed companies should disclose their corporate governance practices in an annual corporate governance statement. And where they depart from a chosen corporate governance code they must explain why. This is to set, as a minimum, the so-called "comply-or-explain" principle leaving it for the market to fill in the details. Through this mechanism we hope that shareholders will be in a position to make better informed decisions. C. McCreevy, European Commissioner for Internal Market and Services, *Future of the Company Law Action Plan,* Address to Listed Companies and Legislators in Dialogue Conference, Copenhagen, November 2005.

[32] OECD Corporate Governance Principle IA, 2004. OECD Corporate Governance Principle VA8 states that, "[c]ompanies should report their corporate governance practices, and in a number of countries such disclosure is now mandated as part of the regular reporting. In several countries, companies must implement corporate governance principles set, or endorsed, by the listing authority with mandatory reporting on a "comply or explain" basis.

39. **While the ASX Principles are indeed broad-based, the Recommendations that accompany them are considerably more detailed.**[33] The Council purposely adopted a principles based approach, believing that excessively detailed rules can encourage avoidance, and that broad guidelines "designed to produce an efficiency, quality or integrity outcome" are preferable. ASX views a principles based approach as "less of a risk to the cost of capital" than a more rules-based approach such as that in the United States.[34] Nonetheless, the 28 best practice recommendations are in fact quite specific. They thus narrow the scope for company compliance, which is assessed against the recommendations. The ASX Council's approach thus reflected the inevitable tension between a principles-based philosophy of regulation, and industry's need or desire for detailed guidance for compliance purposes.

### C. APRA's corporate governance requirements

40. **APRA has chosen to take a more prescriptive approach to corporate governance than the one adopted by ASX.** In May of this year, APRA issued a discussion paper and draft prudential standards on "Governance for APRA-regulated Institutions, followed by its issuance of draft standards on Fit and Proper Requirements in June. These standards would impose quite detailed requirements on APRA-regulated entities, relating, for example, to board composition, the audit committee and independence of directors. These proposals created quite an uproar among the regulated industry as well as a broad range of private sector participants, who viewed them as excessively prescriptive, inflexible, potentially duplicative and perhaps inconsistent with the ASX guidelines. Some even went so far as to suggest that APRA was venturing outside its territory, i.e., that corporate governance is the province of ASIC and ASX and not of a prudential supervisor.[35] More generally, objections were raised that the proposed principles represented over-regulation and lack of concern about the burdens and costs of compliance, particularly with regard to smaller institutions.

41. **APRA's initiative on corporate governance may be in part a reaction to industry practices that were perceived as lax**. A report prepared for the Australian Parliament observes that APRA's "short tenure as the national regulator has been defined by the major corporate collapses of HIH, FAI, One.Tel and Ansett in 2001, and the subsequent reforms to the regulator's structure."[36] APRA was subject to strong criticism following the HIH debacle, and the Royal Commission Report found that APRA faced staffing shortfalls, outdated

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[33]For example, Principle 1 is "Lay solid foundations for management and oversight." Principle 2 is "structure the board to add value."[33] The remaining eight principles are similarly broad.

[34] T. D'Aloisio, *Corporate Governance in APEC's Financial Institutions,* Comments at the ABAC Symposium, October 2005.

[35] See, for example, Release of Australian Institute of Company Directors, 18 August 2005, and *Submission to APRA,* 12 August 2005. See, also, Securities Institute, *Submission to APRA,* 4 June 2004.

[36] R. Grant, *ibid*.

legislation and an inadequate supervisory methodology. While APRA was subsequently given increased authority and a reformed governing structure, its reputation again was put to the test in 2004 when the National Australia Bank (NAB) suffered significant foreign exchange trading losses. In response to the NAB scandal, APRA imposed higher minimum capital requirements, ordered temporary closure of the currency trading business to big corporate clients, and revoked NAB's authorization to use its own internal model for capital adequacy purposes.[37] While APRA has suggested that its proposals are largely an effort to harmonize corporate governance standards across its regulated entities, and to modernize its standards so that they match actual marketplace practices, APRA's perception of the corporate governance culture and practices that existed at NAB and some of the other APRA regulated institutions may underlie its determination to introduce enhanced corporate governance requirements.

42. **The controversy over the proposed APRA standards highlights the extent to which Australian stakeholders have embraced the "flexible" approach to corporate governance, as well as their general antipathy to additional regulation that may not be expressed in the same terms as corresponding requirements in the Corporations Act.** In Australia, corporate governance has been seen as the province of ASX and ASIC, and industry has embraced the flexible, non-prescriptive approach that ASX has taken. Nevertheless, corporate governance principles of the sort that APRA has proposed are in fact consistent with the Basel Committee's view that governance requirements for financial institutions are a necessary part of a broader prudential framework imposed because of the special role played by financial institutions in the functioning of the economy. Indeed, enhanced governance standards for banks has been an international issue for several years, in part due to the governance failures of banks and other non-financial institutions and in part to the increasing size and complexity of banks' activities which makes daily supervisory monitoring impossible.[38] Unlike the OECD Corporate Governance Principles which apply broadly to listed companies, and which support an "if not, why not?" reporting framework, prudential supervision of financial institutions requires a minimum standard across regulated financial institutions.[39]

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[37] See, R.Grant, *ibid*.

[38] For example, the Basel II capital framework explicitly stresses strong corporate governance as a necessary prerequisite for a bank being allowed to use the advanced risk measurement and management approaches.

[39] See, J. Laker, APRA Chairman, *Corporate Governance in Financial Institution – Some Remarks,* ABAC/ABA/PECC Symposium on Promoting Good Corporate Governance, October 2005. In principle, even under APRA's proposed approach, an institution could convince APRA that it could achieve compliance with the corporate governance standard in a manner other than that prescribed.

## IV. IMPLEMENTATION, COMPLIANCE AND ENFORCEMENT

43. **The information and corporate governance disclosure requirements must be implemented in practice for the corporate governance framework to be effective.** Implementation in practice is shaped by the structures that companies have in place to promote compliance. The external auditor also plays an important role in helping a company meet its obligations, and, therefore, auditor independence and oversight is essential. The enforcement activities of supervisory agencies also play a significant role in promoting compliance—and penalizing non-compliance. Finally, official enforcement action may be effectively supplemented and reinforced by private enforcement.

### A. Internal controls/company governance

44. **Under Australian law, directors owe a duty of due care and diligence to the shareholders of the company and must act in good faith in the best interests of the company as a whole.**[40] Directors are prohibited from using their position or any information obtained through their position to gain an advantage for themselves or someone else or to cause harm to the company.[41] However, directors are legally protected from personal liability in relation to honest, informed and rational decisions taken in good faith for the best interests of the company.[42] The business judgment rule does not, however, give directors' carte blanche to act in disregard of shareholders interests. In *ASIC v. Adler,* for example, the court held that an HIH director could not rely on the business judgment rule as a safe harbor to protect rather blatant breaches of basic director duties in the absence of a "business judgment" made in good faith for a proper purpose and in absence of personal interest.[43]

45. **Australian listed companies have organized themselves to facilitate their ability to carry out their disclosure and corporate governance obligations, assisted by the large amount of guidance that has been issued by various agencies and stakeholder groups.** The ASX Corporate Governance Council Best Practice Recommendations suggest specific practices intended to assist companies' implementation efforts, such as, for example, how boards of directors might be constituted so as to maximize good governance. Recommendation 5.1, for example, recommends that companies "establish written policies and procedures designed to ensure compliance with ASX Listing Rule Disclosure requirements and to ensure accountability at a senior management level for compliance." In addition to specific Recommendations, ASX has issued best practice guidance. For example,

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[40] Corporations Act, Sections 180 and 181.

[41] Corporations Act, Sections 182 and 183.

[42] Corporations Act, Sections 180(2) and 180(3). The common law business judgment rule was reinforced by statute in 1999.

[43] A. Dalton, T. Greenwood, *A Raising of the Bar for Non-Executive Directors?,* issues@bdw.com,2003.

ASX suggests that the Board adopt formal job descriptions for key management positions, review responsibilities on a regular basis, and assess the independence of each director, and provides specific suggestions for the structure and composition of the audit committee.[44] Many listed companies seem to have adopted a number of these recommendations. For example, the largest listed companies almost all split the position of CEO and Chairman of the Board, and many feature a board in which the majority of directors are independent. There also has been significant reduction in the number of directors who sit on a large number of multiple boards.

46. **Individual stakeholder groups also have issued guidance for their members to help them enhance their corporate governance.** The Australian Institute of Company Directors (AICD), for example, has issued a protocol for company directors, which outlines their principal legal obligations. This Protocol underscores that, under Australian law, directors' owe an obligation to the company as a whole, and not to any individual shareholder or group of shareholders. The AICD also sponsors classes for directors to assist them in carrying out their obligations.[45] Other stakeholder groups have issued similar types of guidance to assist companies in determining the approach to corporate governance best suited for their own particular circumstances.

47. **ASIC also is very active in highlighting areas where there may be compliance concerns.** ASIC Commissioners speak frequently on compliance issues, advising on new developments and seeking to raise awareness. ASIC also has conducted targeted reviews of listed company disclosure, to determine the level of compliance among certain industry groups, or with certain requirements. For example, in September 2000, following a targeted review, ASIC determined that a number of high tech companies were in potential breach of their disclosure obligations. ASIC attributed the level of non-compliance to lack of awareness on the part of company directors, noting that, "many directors of dot coms have never been directors of public companies, let alone listed public companies, before."[46]

### B. Role of external auditor

48. **The external auditor also plays an essential role in a company's compliance with its disclosure obligations.** The importance of the external auditor and how it relates to the

[44] ASX Listing Rule 12.7 requires the top 500 listed companies to have an audit committee, and ASX Best Practice Recommendation 4.2 more generally recommends that each board should have an audit committee.

[45] In December 2004, for example, the AICD announced an "International Company Directors Course," developed in response to "increasingly complex governance considerations for directors operating across Asia Pacific, and heightened investor expectations surrounding governance and compliance."

[46] ASIC Media Release, *High Tech Disclosure Not What It Should Be,* September 2000. More recently, as of 17 February 2005, approximately half of all listed entity full year financial reports had been reviewed for compliance with accounting standards. ASIC Media Release No. 05-31, *ASIC Releases Preliminary Results of 2004-05 Financial Reporting Surveillance Project,* 17 February 2005.

companies that it audits has been underscored in the corporate collapses of recent years. In the United States, an enhanced emphasis on the role of the external auditor and its critical importance for corporate governance was reflected in the Sarbanes-Oxley Act of 2002, which included new provisions for auditor independence and auditor oversight. In Australia, CLERP 9 proposed a range of measures to strengthen audit oversight and the general disclosure framework.

49. **Many of the CLERP 9 reforms relating to auditor independence were the result of recommendations made by Ian Ramsay in October 2001 in his Report on the Independence of Australian Company Auditors.** The Australian government commissioned the Ramsay Report in response to developments relating to auditor independence in the United States and Europe, as well as to the collapse of HIH Insurance Ltd. and the failure of a number of other listed Australian companies during 2001. The CLERP 9 reforms enacted in July 2004 are largely consistent with the recommendations of the Ramsay Report and of the Report of the HIH Royal Commission, which was established to conduct a comprehensive review of the HIH collapse.

50. **Similar to the Sarbanes-Oxley Act, the CLERP 9 legislation aims to improve financial reporting and disclosure.** For example, at the company level, CLERP 9 requires CEOs and CFOs of listed entities to certify that the annual financial statements are in accordance with applicable laws, including accounting standards, and that they present a "true and fair" view. The annual directors' report must now include an operating and financial review—similar to the "management discussion and analysis" included in the annual reports of US listed companies. In addition, the auditor must attend the annual general meeting of a listed client to enable shareholders to ask questions relevant to the audit. Shareholders are entitled to submit questions in writing before the annual general meeting.

51. **Also like Sarbanes-Oxley, CLERP 9 introduced reforms whose objective was to enhance auditor independence.** CLERP 9 introduced a general standard of auditor independence, together with a requirement that auditors must make an annual declaration that they have maintained their independence. In addition, CLERP 9 mandates five year rotation for the lead audit partner and review partner, and requires listed companies to disclose in their annual report the fees paid to the auditor for each non-audit service. The directors also must state that they are satisfied the provision of non-audit services does not compromise the independence of the auditor.

52. **CLERP 9 also contained measures designed to enhance auditor oversight.** While CLERP 9 did not establish a new oversight board as did Sarbanes-Oxley, it did expand the role of the Financial Reporting Council (FRC) to act as a policy adviser to government on the auditing standard setting arrangements and auditor independence. Because ASIC remains responsible for surveillance, investigation and enforcement of the responsibilities of companies and auditors in relation to financial reporting, the FRC and ASIC entered into a Memorandum of Understanding to ensure good communication and cooperation in carrying

out their responsibilities in administering the new auditor independence provisions. Thus, ASIC will share with the FRC information it gains from its inspections of audit firms as a basis for the development by the FRC of policy advice.

53. **While the CLERP 9 reforms significantly enhance the corporate reporting environment, they must be strictly enforced in order to be effective.** Following the enactment of CLERP 9, ASIC issued a number of policy statements and practice notes to provide guidance on the new requirements, and initiated a first round of surveillance of the "Big 4" audit firms to assess compliance with the new independence requirements.[47] ASIC found that, "all firms had documented policies in place and these were generally adequate." ASIC explicitly stated that it did not "seek to comprehensively test for breaches of the audit independence requirements," and that "no breaches of the Corporations Act were identified in the course of the inspections."[48] Given the circumscribed nature of ASIC's inquiry, the significance of its findings is somewhat limited. ASIC is, however, intending to undertake more in depth inspections in the coming years, and has been given additional resources to do so. This will be quite important in ensuring effective auditor oversight.

54. **In September 2005, the Treasury issued a Consultation Paper proposing enhanced audit inspection powers for ASIC.** These proposals are aimed primarily at reducing the regulatory burden on global audit firms who are subject to both Australian and overseas audit regulatory regimes, including, in particular, in the United States. Under the proposals, the ASIC Act would be amended to authorize ASIC to enter into arrangements with foreign audit regulators to carry out inspection functions to ascertain compliance with the relevant foreign audit requirements. Notably, in proposing to expand ASIC's powers to gather information from audit firms on behalf of overseas audit regulators, it is also proposed to expand ASIC's powers to gather information from audit firms for its own purposes so as to avoid creating a "two-tier" audit inspection framework. Thus, it is proposed, for example, to give ASIC "discrete audit inspection and information gathering powers" which would permit it to conduct a general examination of the processes and systems an audit firm has in place to meet its audit obligations generally, and not just in relation to the business of an audit client. If adopted, these proposals would better equip ASIC's abilities to conduct audit oversight and enforce the new CLERP 9 audit requirements.

[47] Together the Big 4 firms audit approximately 54 percent of companies listed on ASX and 91 percent by market capitalization of the 300 largest entities.

[48] ASIC Media Release 05-343, *ASIC Reports on the First Year of Its Auditor Inspection Program,* November 2005.

## C. Implementation/enforcement

### ASX monitoring and enforcement

55. **The existence of official monitoring and enforcement is an important incentive in promoting compliance by listed companies with their financial disclosure requirements.** ASX monitors company compliance with both the continuous disclosure requirements and the corporate governance disclosure requirements. ASX's supervision of listed companies is itself supervised by a quasi-independent entity within ASX, called ASX Supervisory Review. In turn, the quality and effectiveness of ASX monitoring, and the activities of ASX Supervisory Review, are assessed by ASIC.

56. **ASX is active in monitoring the release of price sensitive information by listed companies.** Once a company has given information to ASX for release, ASX examines it to decide whether the disclosure is sufficient and whether trading in the company's shares needs to be halted pending dissemination of the announcement. ASX then releases the information to the market and the media and advises the company that the information has been released. If ASX is alerted, for example by press reports or by unusual stock price movements, that information about a listed company may need to be disclosed, it may contact the company by initiating a "Share Price Query," either informally or by letter. If after communicating with the company, ASX still is convinced that disclosure is necessary, the company will often disclose the information immediately, or, alternatively, it may seek a trading halt. ASX also may enter into written correspondence with the company, and has the right to release that correspondence to the market.

57. **Compliance with the continuous disclosure requirements, particularly among the largest listed companies is reportedly strong.** "The general consensus is that the continuous disclosure regime for listed companies administered by ASX is operating efficiently and effectively."[49] As of spring 2002, the average number of announcements made per company had grown 65 percent since the statutory requirement for continuous disclosure was introduced in 1994.[50]

58. **There nonetheless remains some reluctance to disclose information to the market.** In its Strategic Plan for 2005-10, ASIC notes that, "among Australian corporations, larger listed companies have generally observed reasonably high standards, although some directors still drag their feet in disclosing bad news and view compliance as a burden rather than as a strength."[51] A 2001 independent study identified what it termed a "potential lack in

[49] A. Lumsden, *Making Continuous Disclosure Work – Outcomes v. Enforcement,* JASSA, Spring 2002.

[50] Id.

[51] ASIC Strategic Plan, 2005-10, April 2005.

candor in disclosure activity."[52] The study noted in particular, that, "[t]he quality of some company responses to ASX Queries appears to be poor [and that] many companies appear to behave in a reactive rather than proactive fashion in their approach to the continuous disclosure obligations."[53] Poor disclosure practices seemed to be particularly prevalent in smaller companies in the technology, biotechnology, telecommunications and exploration industries.[54] In its 2004 annual review of ASX, ASIC found inconsistencies in ASX's monitoring and enforcement of compliance with the disclosure provisions of the listing rules, including in the area of continuous disclosure and recommended that measures be put in place.[55] ASX has in fact restructured its monitoring and supervision of listed companies and there appears to be significant improvements in consistency.

59. **While ASX monitors information disclosure by listed companies through its surveillance department, it does not undertake a comprehensive review of listed company periodic reports.** ASX's supervisory focus centers primarily on ensuring that companies are meeting their continuous disclosure obligations, and, other than its systematic review of corporate governance disclosure (discussed below), ASX does not engage in cyclical or risk-based reviews of annual and semi-annual reports. This may weaken the deterrent impact of what are in fact robust disclosure requirements.

60. **The level of compliance by listed companies with their corporate governance, "if not, why not?" disclosure requirements also appears strong, but it is difficult to assess the quality of their corporate governance in practice.** ASX undertook an analysis of corporate governance disclosure practices by listed companies in the 2004 reporting period.[56]

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[52] A. Neagle, N. Tsykin, *'Please Explain': ASX Share Price Queries and the Australian Continuous Disclosure Regime,* Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2001. The Query inquires whether there are any matters of importance that the Company should announce to the market and if so, whether the company can make the announcement immediately, and whether the company is aware of any information which, if had been available to the market, might reasonably explain the recent price movements or news. The Query also asks the Company to confirm that it is in compliance with the listing rules and, in particular, with Listing Rule 3.1 on continuous disclosure.

[53] A more recent study found a similar reluctance on the part of Australian listed companies to disclosure information to the market, and a tendency to defer releasing such information until the issuance of periodic reports. See C. McNamara, G. Gallery, N. Fargher, *Management Reluctance to Disclose Earnings Information in a Continuous Disclosure Environment: Evidence from the Association between Unexplained Stock Returns and Subsequent Disclosure.*

[54] ASX purportedly was critical of the 2001 study, claiming it did not approach the share price query process comprehensively, omitting ASX's management of the entire continuous disclosure regime as a whole. See, A. Lumsden, *supra.*

[55] ASIC, *Annual Assessment Report,* August 2004.

[56] Under Listing Rule 4.10.3, listed companies must disclose in the corporate governance section of their annual reports the extent to which they have adopted the ASX Corporate Governance Principles and Recommendations. ASX's analysis was based on 1222 annual reports released for that period.

During its review, ASX "contacted 392 companies to discuss their disclosure, clarified disclosure requirements on 186 occasions, identified 16 companies requiring additional educational support, and obtained announcements of additional disclosure from 39, with another 6 announcements pending" at the time its report was issued. Despite these problems, ASX determined that, "the large majority of listed companies have fulfilled their reporting requirements satisfactorily, either confirming adoption of the Recommendations or providing 'if not, why not?' reporting." ASX followed up with individual companies where it believed the corporate governance disclosure to be inadequate.

61. **As with continuous disclosure compliance, there appears to be a significant gap in corporate governance disclosure compliance between the larger listed companies on the one hand, and the smaller companies on the other.** For the past three years, researchers at the University of Newcastle have undertaken an independent annual review of corporate governance of the top 250 Australian companies by market capitalization. In each of the three years reviewed, the researchers found that "the corporate governance gap between the top companies and the lesser ranked companies remains huge. The apparent indifference to corporate governance reforms for some (usually smaller) companies remains a concern." The most recent report, which is based on 2003 annual report information, concluded that the corporate governance structures of approximately half the companies could be described as good or better with approximately one-third of the companies lacking in key areas.[57]

62. **The difficulties in determining how well companies are complying with their continuous disclosure requirements, and how robust their corporate governance is in practice, underscores the importance of ASX's supervisory role**. Under the Corporations Act, ASX must, as a condition of its license, seek to maintain a fair, orderly and transparent market. ASX must therefore establish and maintain adequate market supervision arrangements, including monitoring compliance with its market and listing rules. ASX's status as a demutualized, for-profit, self-listed, exchange raises questions about whether it has sufficient incentives to carry out its supervisory role.[58] The Australian Financial Review, for example, "has consistently argued that the ASX's Surveillance and regulatory functions should be given to an independent body. It would be better to hand the entire market

[57] Horwath NSW, a chartered accountancy firm based in Sydney, commissioned the reports. J. Psaros, M. Seamer, 2004 *Horwath Corporate Governance Research Report,* www.newcastle.edu.au. The Implementation Review Group, an independent panel of senior industry figures, also has reported that while the "if not, why not" structure works well in accommodating "the diverse needs of listed companies in Australia, we found that this flexibility is not well understood, particularly by smaller companies, and needs to be communicated more effectively." I. Pollard, *Work in Progress,"* www.riskmanagementmagazine.com.au, November 18, 2005.

[58] At the time that ASX was demutualized, the decision was made for it to remain the front-line regulator for listed companies in Australia. By way of contrast, when the London Stock Exchange demutualized, its listing responsibilities were transferred to the UK regulator, the Financial Services Authority.

surveillance and listing rules supervision roles to ASIC."[59] The Australian Treasury itself noted in its review of the continuous disclosure regime that, "there has recently been discussion over whether ASIC should assume responsibility from market operators for the administration of their listing rules. This discussion has been motivated in part by the demutualization of ASX and its transformation from a mutual body into a commercial entity. This has raised the issue of the potential for conflicts of interest between the commercial and regulatory responsibilities of market operators."[60]

63. **ASX has responded to questions about ASX's supervisory role by developing structures to minimize internal conflicts and promote effective supervision in the context of a for-profit exchange.** The Corporations Act requires ASX to have "adequate arrangements" for handling conflicts between its commercial interests and its supervisory responsibilities.[61] ASX Supervisory Review Pty Ltd. (ASXSR) is a subsidiary of ASX, established in 2000, to monitor the adequacy of ASX supervisory arrangements and assess compliance with ASX license obligations. ASXSR is responsible for reviewing ASX decisions in relation to those entities that have a direct commercial or competitive relationship with ASX. A majority of the members of the board of directors of ASXSR are independent. They are appointed by ASX from a list approved by ASIC, and their appointment requires the agreement of the Treasury. Their removal would also require ASIC and Treasury's agreement. ASXSR reports directly to ASIC.

64. **In its 2004 review of ASX, ASIC recommended that ASX review its arrangements for managing conflicts between its commercial interests and its supervisory obligations.** ASIC has responsibility for overseeing ASX and for auditing its supervisory activities, including the ASXSR. ASIC prepares an annual assessment report, which it submits to Treasury and issues publicly. In its 2004 review, ASIC found that, despite some inconsistencies in ASXSR processes, "ASX supervisory arrangements are adequate and the Australian equity market is fair and transparent."[62] Nevertheless, ASIC recommended that

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[59] Australian Financial Review, *The Best Way to Restore Faith,* July 2002, quoted in J.Ridge, C.Comerton-Forde, *The Importance of Market Integrity: An Analysis of ASX Self-Regulation,* SIRCA, September 2004.

[60] Department of the Treasury, *Part 8: Continuous Disclosure,* www.treasury.gov.au. In its 2004 assessment of ASX, ASIC, referring to the IOSCO Technical Committee's 2001 report on demutualization, stated that, "all for-profit exchanges with public supervisory responsibilities face the potential for actual or perceived conflict, and may be less willing to commit resources to enforcement or to take action against market users and listed companies, who are a source of income for the exchange."

[61] [Get cite.] Thus, under Corporations Regulation 7.2.16, ASIC may intervene, at the request of a listed entity that is a commercial competitor of ASX, to take a supervisory role if there is a specific conflict or potential conflict between ASX's commercial interests and its supervisory obligations in dealing with that listed entity. Special procedures have also been established for supervising trading or clearing participants, which have or may have a commercial conflict with ASX.

[62] J. Rydge, C. Comerton-Forde, supra. ASIC did recommend, however, that ASX restructure its supervisory areas to ensure a more coordinated approach to supervision and to provide clearer lines of accountability for its

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ASX's arrangements for handling conflicts of interest be strengthened. In particular, ASIC found that ASX tended to apply too narrow a definition to the term "conflict of interest" and that the full range of potential conflicts of interest were not adequately recognized. Thus, while ASIC commented that ASXSR operated effectively and with genuine independence, it recommended that its mandate in managing conflicts of interest be broadened.

### D. ASIC enforcement

65. **ASX works closely with ASIC to enforce the disclosure obligations of listed companies.** As noted above, while ASX is the front-line regulator, its powers to act against listed companies that do not meet their obligations are limited either to suspending their shares from trading or delisting them altogether. These are drastic sanctions that may well result in penalizing the very shareholders the disclosure rules are intended to protect. Thus, when ASX discovers a potential breach of the Corporations Act or the Listing Rules, it refers the matter to ASIC.[63]

66. **ASIC, however, does not have systematic procedures for comprehensively reviewing listed company disclosure**. ASIC does conduct a cyclical review of listed companies' compliance with their financial reporting obligations, in which it reviews approximately a quarter of the listed companies each year.[64] ASIC may target specific issues for focus. For example, ASIC has announced that it will focus on the adoption of the Australian equivalents of international financial reporting standards in its financial reporting surveillance program for 2005-06.[65] ASIC also undertakes occasional reviews of non-financial statement disclosure, targeting specific topics relevant for investor protection. Apart from financial statement reviews and the targeted reviews, ASIC must rely either on referrals from ASX or on other information that may come to its attention signifying a potential disclosure problem. Going forward, ASIC intends to move towards incorporating a more

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supervisory obligations. ASX in fact undertook the recommended restructuring even before the ASIC report was issued. ASIC, *Annual Assessment Report,* August 2004.

[63] In its 2004 Annual Assessment of ASX, ASIC recommended that ASX review its enforcement of listing rules, "to satisfy itself that it has sufficient mechanisms to achieve practical enforcement outcomes." In particular, ASIC questioned whether there might be additional sanctions for a breach of the listing rules in situations where enforcement action by ASIC would not be justified.

[64] In 2003-2004, ASIC conducted a review of the financial reports of 400 listed companies and stated that, "overall compliance with accounting standards appeared to be high." Nevertheless, 35 companies had received a qualified audit report and another 27 were still being investigated. The survey also found that 73 companies had failed to file their annual reports on time and that eight companies had been late in filing their semi-annual reports. ASIC noted that improved disclosure was needed. ASIC Media Release No. 03-404, *ASIC Releases Results of the Financial Reporting Surveillance Project, 17 December 2003.* See, also, G. Costa, *Accuracy a Qualified Success,* Theage.com.au, December 2003.

[65] ASIC Media Release No. 05-304, *ASIC's 2005-06 Financial Reporting Surveillance Program Focuses on International Accounting Standards,* October 6, 2005.

systematic risk-based approach into its financial statement reviews, which should increase the effectiveness of its oversight.

67. **ASIC has broad investigative and enforcement powers to act when it does learn of a breach or potential breach**. Under the ASIC Act, ASIC has a general power to begin an investigation if it suspects there has been a contravention of the Corporations Act or of any law that concerns the management or affairs of a company or managed investment scheme; or involves fraud or dishonesty relating to a company, managed investment scheme or financial product. ASIC can compel the production of books and records from individuals, including financial services license holders, and can issue an order requiring any person to "give all reasonable assistance" to ASIC in connection with an investigation, including appearing before ASIC to answer questions on oath. Upon completing an investigation, if ASIC concludes that a contravention of the relevant provisions has occurred, ASIC has a range of options available, including imposing administrative sanctions, commencing civil proceedings, and initiating or referring (to the Commonwealth Director of Public Prosecutions) matters for criminal prosecution. ASIC also can seek suspension of trading in the securities.

68. **Despite its broad enforcement powers, ASIC has not historically been viewed as an aggressive enforcer, although its reputation for aggressive and creative enforcement has improved.** A Parliamentary study noted that, "historically, the perception of ASIC was as a fairly passive regulator, burdened with a huge administrative responsibility." The study went on to quote an observer who noted in 2002 that, "on the whole, ASIC has not yet managed to create the image of invincibility in tough enforcement action that can motivate preventative self-regulation."[66] In recent years, however, ASIC's reputation for effective enforcement has improved. ASIC developed the "enforceable undertaking" as an administrative tool to expand its ability to impose a range of different orders to rectify wrongdoing and to take action more quickly than court processes would normally permit.[67] The prosecution and conviction of HIH officers and directors also have redounded to ASIC's credit, with the media noting that ASIC has appeared to be more aggressive in its pursuit of corporate crime.[68] Private sector representatives also noted that ASIC had an improved presence in the market, and had become more effective in prosecuting and obtaining convictions in important cases.

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[66] R. Grant, *supra*.

[67] ASIC may accept enforceable undertakings given by a person regarding any matter in which ASIC has a function or power. If a person breaches an enforceable undertaking, ASIC can apply to the court for an order to compel compliance, without having to establish a contravention of the underlying legislation originally the subject of the enforceable undertaking.

[68] R. Grant, *supra*.

69. **ASIC also lobbied aggressively for and was successful in obtaining a new power to issue infringement notices and assess administrative penalties directly on companies that breach their continuous disclosure obligations.** Prior to being granted this power under CLERP 9, ASIC either had to initiate civil proceedings (or civil penalty proceedings) or initiate or, more typically, refer the matter to the Department of Public Prosecutions for criminal proceedings. ASIC argued that, "a power by ASIC to impose fines of substance would add discipline to the market's processes—not just because of their financial impact but more importantly perhaps through their public nature" and the ability to respond quickly.[69] Under CLERP 9, ASIC can issue an infringement notice imposing a financial penalty on a disclosing entity where ASIC has reasonable grounds to believe that the entity has breached its continuous disclosure obligations. If the company complies with the notice, it is not an admission of liability. ASIC will publish details of the notice but cannot commence further proceedings against the entity in relation to the breach described in the notice. If the company does not comply with the notice, ASIC may commence either civil or criminal proceedings.

70. **The extension of ASIC's powers to issue infringement notices and impose administrative penalties for breach of the continuous disclosure obligations has been quite controversial.** Some have argued that the new infringement notice powers permit ASIC to act as both prosecutor and judge in the same matter, thus raising constitutional implications. In response, ASIC has issued a guide as to how it will use infringement notices, which sets out the key features of the infringement notice process, including significant built-in procedural protections.[70] ASIC also notes in the Guide that it intends to use the remedy to address "less serious beaches."

71. **CLERP 9 also more generally increased and expanded the penalties for breach of the continuous disclosure requirements**. For example, prior to CLERP 9, a court could fine a company up to $A 200,000 for breach of the requirements, and also could order the company to pay compensation for damage suffered. Under CLERP 9, a company can be fined up to $A 1,000,000 for the breach. In addition, a court can assess a civil penalty of up to $A 200,000 for breach of the continuous disclosure requirements against an individual "involved" in the contravention.

72. **The perception of ASIC as an aggressive but not overzealous enforcer, including its use of the new infringement notice process, will continue to be an important factor in creating a culture of compliance on the part of listed companies**. In this regard, it is worth noting that ASIC did not issue its first infringement notice until over a year after it had been

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[69] J. Segal, Deputy Chair, ASIC, *Current areas of concern to ASIC Regarding Corporate Disclosure,* Address to the Australian Investor Relations Association, Sydney, March 2002.

[70] For example, only an ASIC officer who has not been involved in the investigation will decide whether or not to issue a notice, and the company that is the subject of the notice will have the opportunity to present information to the ASIC officer before he makes a decision.

granted the power to do so. On August 1, 2005, ASIC announced that it had issued an infringement notice to Solbec Pharmaceuticals Limited for breach of the continuous disclosure provisions of the Corporations Act.[71] Interestingly, the breach which was the subject of the infringement notice occurred in November 2004, approximately 10 months prior to the issuance of the infringement notice—hardly the "on the spot" fine that the public might have expected from ASIC's advocacy for the introduction of the new powers. Nonetheless, the possibility of individual liability, and a substantially increased fine for corporate liability, are likely to signal to company executives and directors that they need to be diligent about ensuring that their companies have internal controls and procedures in place for meeting their continuous disclosure requirements.[72]

### E. Private enforcement

73. **Private actions by individual investors to enforce their rights, including ensuring that companies comply with their disclosure obligations, are an important complement to official enforcement by ASX and ASIC.** One of the principal vehicles for shareholders to force companies to observe their legal obligations is the shareholder class action lawsuit, which permits shareholders to group together to enforce their legal rights without having to commence individual proceedings. In recent years, Australia has seen an increase in the number of shareholder class actions for corporate malfeasance, including for breach of a company's disclosure obligations.[73] The recent removal of a number of legal obstacles to such actions is one cause of this increase. For example, as a result of recent court cases, it may now be easier for shareholders in Australia to form a litigant class without having to be sure that each class member has a viable action against each of the respondents. In addition, while attorneys may not accept contingency fees, speculative fees (no-win, no-pay) are permitted.[74]

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[71] ASIC Press Releases, *ASIC Issues First Infringement Notice for Continuous Disclosure Breach,* 1 August 2005. Solbec had made an announcement on 23 November 2004 about the positive results of animal trials of its cancer drug, in which it had, according to ASIC, failed to notify the ASX "about the structure, size and limited nature of the results." Following the 23 November announcement, Solbec's shares experienced a dramatic (nearly doubling) price increase. However, over the next two days, when a number of articles were published questioning Solbec's announcement and providing more details of the study, the price of Solbec's shares declined. In a subsequent announcement on 26 November, Solbec clarified the results of the study that it had announced so positively on 23 November.

[72] Indeed, in response to ASIC's gaining the new infringement notice power, the Institute of Company Directors offered training on continuous disclosure requirements.

[73] M.Mills, *The Rise of Shareholder Class Actions in Australia,* www.freehills.com.au, 14 April 2005.

[74] Litigations funders also are permitted to accept contingency fees.

74. **Another legal vehicle that shareholders can use to force directors to comply with their obligations is the statutory derivative action.**[75] Australia introduced the statutory derivative action in 1999, as a companion to the statutory business judgment rule. Thus, while at the same time making it easier for shareholders to bring an action against a company's directors, the legislation gave directors a safe harbor from liability, provided that they had acted appropriately and in the best interests of the company.[76] The statutory derivative action does not appear, however, to be a significant source of shareholder enforcement actions, although it may have given shareholders additional leverage when dealing with management.

75. **Shareholder activism short of legal action also can be important in forcing companies' to comply with their disclosure and other obligations, and Australia appears to have quite an activist shareholder community.** Under CLERP 9 shareholders can for the first time name a corporate entity as their proxy for shareholder meetings. This has given organizations such as the Australian Shareholders Association, which represents retail investors, new leverage in dealing with management, and the ability in some instances to influence the outcome of shareholder votes. The Australian government has recently proposing tightening the conditions under which shareholders can demand an emergency meeting.[77] This proposal was somewhat controversial, with some believing that the proposal would unfairly disenfranchise small shareholders, and others arguing that it would reduce frivolous shareholder actions and that the 5 percent provision is consistent with the requirements in many developed markets where only an issued share capital test is used.[78]

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[75] In a derivative action, the shareholders sue on behalf of the company and in its name to enforce rights that are being contravened.

[76] The derivative action existed in common law before 1999; however, according to Treasury, "significant practical and legal difficulties meant that few such actions proceeded." Treasury, *An Overview of Australia's Corporate Governance Framework,* prepared for IMF Financial Sector Assessment, November 2005.

[77] Currently, Section 249D(1) of the Corporations Act requires the directors of a company to call a special meeting at the request of either: (i) members with at least 5 percent of the votes that may be cast at a general meeting; or (ii) at least 100 members who are entitled to vote at a general meeting. The government has proposed to eliminate the 100 member option, on the basis that this will help reduce the number of frivolous claims (which does not seem to be large in any case). In exchange, the government has proposed to make it easier for resolutions to be put to a meeting by reducing (from 100 to 20) the number of shareholders required to put a resolution to the annual general meeting.

[78] The European Commission Internal Market Directorate has proposed a consultation document on "Fostering an Appropriate Regime for Shareholders' Rights." The document includes for consultation a proposed minimum standard, which would require shareholders of listed companies to be able to table resolutions for discussion at the annual meeting, provided that they hold a minimum stake of no more than 5 percent of the share capital of the issuer or a value of 10 million euros, whichever is lower. Responses from the consultation were split over the 5 percent threshold. EC Internal Market Directorate, *Fostering an Appropriate Regime for Shareholders' Rights*, Synthesis of the Comments on the Second Consultation Document, September 2005.

## V. INVESTOR EDUCATION AND FINANCIAL LITERACY

76. **A corporate governance framework that relies centrally on the role of disclosure places a premium on investor education and financial literacy.** The theory underlying a disclosure based system is that investors should be given sufficient information to enable them to make an informed investment decision. However, disclosure that is excessively complex or arcane, or investors who lack sufficient expertise to understand financial disclosure, present serious obstacles to the effectiveness of a corporate governance framework centered on disclosure and reporting. Along with measures aimed at helping companies make their disclosure more comprehensible, investor education and financial literacy initiatives are intended to maximize the likelihood that investors will be able to make informed choices based on the information that is disclosed. They must of course be supported by supervisory standards that are implemented and enforced, as well as legal protections and other pre-conditions necessary to effective supervision.

77. **Investor education and financial literacy initiatives are of heightened importance at present in Australia due to mandatory superannuation and the recent introduction of "Choice."** In 1992, the Australian government introduced a universal compulsory contribution system, which requires employers to pay 9 percent of an employee's earnings to a superannuation fund or a retirement savings account. This compulsory system has generated "immense growth in superannuation savings: from $A 229 billion at 30 June 1995 to $A 740 billion at 31 October 2005.[79] As of the end of September 2005, coverage was estimated at over 98 percent of permanent employees and 72 percent of casual employees."[80] On top of this large amount of superannuation, the Australian government recently introduced a system of "Choice," whereby, as of 1 July 2005, employees have had the right to choose the superannuation fund into which their employer pays the compulsory contribution.[81]

78. **Superannuation has created a growth industry in superannuation funds.** It is estimated that, as of the end of October 2005, there were approximately 291,000 individual

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[79] APRA Media Release No. 05.53, *APRA Statistics Reveal Superannuation Assets Exceed $A 740 billion.* 13 October 2005. See, also, R. Jones, Deputy Chairman, APRA, *Developments in the Reform of the Australian Pensions System,* International Seminar for China Pension Development, Dalian, China, September 2005.

[80] See, R. Jones, supra. Deputy Chairman, APRA,

[81] Superannuation funds are not regulated by ASIC as managed (collective) investment schemes. However, ASIC is responsible for licensing the investment managers and investment products in which the superannuation funds invest. Prudential regulation of superannuation is the responsibility of APRA, with the exception of small self-managed funds, which are deemed not to require prudential regulation and are the responsibility of the Australian Taxation Office. It is estimated that 99 percent of funds, accounting of 23 percent of total superannuation assets, have fewer than five members.

super funds.[82] With the introduction of Choice, a large number of super funds are being marketed to the public, inevitably creating a consumer protection challenge for ASIC. In addition, investors—many of whom have little if any knowledge about finance and financial markets—are being asked to choose how best to invest their retirement savings. As the Chairman of ASIC has stated, "Without the levels of disclosure and protection provided to consumers under the FSR [financial services reform] regime, super choice wouldn't work."[83]

79. **The Australian authorities have recognized that the introduction of Choice along with compulsory superannuation has caused an exponential increase in the investor education challenge that they face.** In response, the authorities are undertaking a range of initiatives. Some of these are on the supply side and are aimed at improving disclosure; others focus more on the demand side and are aimed at educating investors about making investment decisions. In addition, the Australian government has commenced a broader and longer-term project aimed at increasing the financial literacy of all Australians.

80. **As the agency charged expressly with investor protection, ASIC developed a "consumer education strategy" for 2001-2004, which focused, among other things, on educating consumers about retirement planning and superannuation**. The purpose of the strategy was to improve the ability of consumers to make financial decisions and to increase their financial literacy. As part of the strategy, ASIC undertook a joint project with industry on superannuation, and engaged in a range of other education initiatives.

81. **ASIC is continuing to work to educate investors about superannuation and Choice, and to prevent the industry from taking advantage of those who are unwary.** ASIC has a special consumer website (www.asic.gov.au/fido), whose focus is on educating consumers. The website contains fact sheets and questions and answers on a range of investor education topics, including information specifically on superannuation.[84] ASIC also has issued a range of documents to help investors understand their options in choosing a superannuation fund. ASIC's focus is on a broad range of consumers, including indigenous populations in rural and remote locations.

82. **Along with investor education, ASIC has continued its industry-focused initiatives to help advisers and fund managers comply with their obligations**. For example ASIC has issued a policy statement on product disclosure statements (PDS), which provides broad policy guidance on preparing a PDS in compliance with the Corporations

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[82] APRA Media Release No. 05.53, supra. The number of funds is expected to decline dramatically through consolidation.

[83] J. Lucy, Chairman, ASIC, *Significant Regulatory Issues Facing ASIC and Australian Business,* Presentation to Australia-Israel Chamber of Commerce, August 2004.

[84] See, for example, *Essential facts about Superannuation,* www.asic.gov.au/fido. See, also, *Self-Managed Super,* www.asic.gov.au/fido.

Act.[85] ASIC initiated a "superannuation switching" campaign in which it reviewed whether advisers were complying with their conduct and disclosure obligations when advising clients to switch superannuation funds. As a result of this review, ASIC identified patterns of conduct where advisers were "recommending a switch despite having undertaken little or no investigation into the client's current superannuation fund."[86] Similarly, ASIC is engaged in a "shadow shopping" exercise in which it is testing the advice being given to consumers about superannuation. ASIC has also warned that a financial services license is a prerequisite to providing advice to a client about investment strategy or about the decision to switch superannuation to a self-managed superannuation fund,[87] and has issued materials, such as its Fee Disclosure Model, to promote full and transparent disclosure about fees.[88]

83. **ASIC also is assisting industry to comply with their obligations by issuing a "model statement of advice."** A financial services adviser must provide a statement of advice to a client to whom they are providing personal advice, including switching superannuation funds. A Statement of Advice must explain the basis on which the advice is given and must include information about all remuneration including commissions, and other benefits that the adviser (or others) are to receive. ASIC intended the model statement to give advisers a starting point in producing clear, easily understandable communications.

84. **In addition to investor education, the Australian authorities are engaged in an effort to improve financial literacy on a more widespread basis**. As early as 2003, the then-Chairman of ASIC called "for a national partnership of stakeholders to improve financial literacy levels across Australia.[89] In February 2004, the Treasury announced the formation of a high-level Consumer and Financial Literacy Taskforce, whose objective was to develop a national strategy for improving levels of consumer and financial literacy. The Taskforce, which included representatives of government and industry, released a

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[85] Any investment product in which a superannuation fund invests must be accompanied by a "product disclosure statement" or PDS, which is a point-of-sale document that must be given to retail clients before they invest in a financial product. The PDS Policy Statement includes "Good Disclosure Principles" to encourage product issuers to ensure that disclosure is timely, relevant, complete and that it promotes product understanding and comparisons.

[86] B. Collier, Commissioner, ASIC, *Wealth management and Advice – the Way Ahead,* Remarks to IFSA Member Luncheon, October 2005.

[87] See, e.g., ASIC Media Release No. 05-127, *ASIC to Keep a Close Eye on Accountants' Advice about Self-Managed Superannuation Funds,* May 16, 2005.

[88] In March 2005, Treasury announced the development of regulations to standardize the description and calculation methods for fees and costs to allow for easier comparability and understanding of this information in product disclosure statements. Fee disclosure has historically been an area of obfuscation by fund managers and a number of ASIC's counterpart regulators in other developed markets have issued guidance in an effort to enhance and simplify information about fees.

[89] ASIC Media Release 03-142, *ASIC Chairman calls for action on Financial Literacy Problems,* May 2003.

consultation paper in June 2004, and in August recommended the establishment of a national financial literacy body. A year later the Financial Literacy Foundation was created.

85. **The Financial Literacy Foundation aims to give Australians the opportunity to better manage their money.** The Foundation was established within the Department of Treasury but has a ten-member independent advisory board, chaired by Paul Clitheroe, the executive director of ipac securities, a financial planning firm. The Foundation has funding of $A 5 million per year (indexed) until 2008-09 and an additional $A 13 million for an information program in 2006. Its goals are: (i) to raise and measure awareness of financial literacy and its benefits; (ii) to provide consumers and stakeholders with well organized and accessible information to enable them to link to financial literacy information and resources; and (iii) to raise financial literacy levels in the Australian community.[90] As part of its strategy, the Foundation is beginning a nation-wide information campaign to raise awareness of financial literacy, and its benefits, developing a website for financial literacy information and education resources, assisting in developing financial literacy programs in schools and workplaces,[91] and engaging in original research on these issues.

86. **The Australian authorities have taken a multi-prong approach to the challenging issues of investor education and financial literacy.** ASIC works with advisers and fund managers to make sure that they understand their obligations, monitors their compliance and, at the same time, provides a wide variety of information and assistance to enable investors to be as informed as possible. Both its supply side and demand side activities are very much built around the practices it observes in the markets. ASIC's activities are highly resource intensive, however, and ASIC has only limited budget available to devote to consumer education. Additional resources, beyond the funds that have been earmarked for the superannuation education campaign, would enable ASIC to respond to the growing numbers of people who are looking for an alternative to industry as their preferred source of financial sector information. On a more general level, the Australia government is cognizant of the tremendous risks that exist in introducing the discretionary investment of retirement savings on a massive scale to a population largely unfamiliar with financial products and financial markets. While this is an extremely challenging problem, the Australian authorities should be commended for the pro-active and long-term approach that they have taken.

[90] See, *About Us,* www.understandingmoney.gov.au.

[91] From 2008, all Australia children will receive financial literacy education from Kindergarten to Year 10.