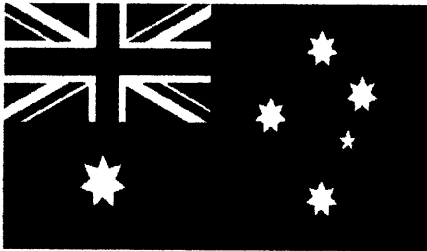


# MEMORANDUM OF UNDERSTANDING

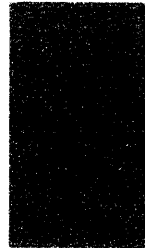
**AUSTRALIA**

**AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION**



**ITALY**

**COMMISSIONE NAZIONALE PER LE  
SOCIETÀ E LA BORSA**



**NAIROBI**

**SEPTEMBER 1998**

# MEMORANDUM OF UNDERSTANDING

The AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION and the *COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA*

RECOGNISING, in light of the increasing international activity in securities markets, the need for mutual co-operation and consultation in order to enhance investor protection, promote the integrity of financial markets, and facilitate the performance of their respective functions and powers;

CONSIDERING the importance of ensuring compliance with and enforcement of the laws and regulations governing securities, which are applicable in Australia and in Italy; and

WILLING therefore to establish the fullest mutual assistance by providing a framework for co-operation, including channels for communication, increased mutual understanding, the exchange of information and investigative assistance permitted by the laws and practices of Australia and Italy;

RESOLVE:

To enter into the following understanding.

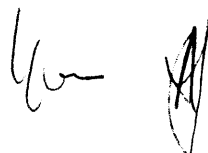
## 1 Definitions

1 For the purpose of this Memorandum of Understanding:

“**Authority**” means:

- (a) the Australian Securities and Investments Commission of Australia; or
- (b) the *Commissione Nazionale per le Società e la Borsa* of Italy.

The Australian Securities and Investments Commission (“ASIC”) is the national corporate and securities regulator established under section 7 of the *Australian Securities Commission Act 1989*. ASIC is responsible for the administration and enforcement of the *Corporations Law* and the *Australian Securities Commission Act 1989*, which provide for the regulation of corporations and the securities industry. ASIC's ability to exercise coercive powers on behalf of foreign regulators is governed by the *Mutual Assistance in Business Regulation Act 1992*.



The *Commissione Nazionale per le Società e la Borsa* (“**CONSOB**”) was established by Law 216 of 7 June 1974 and is responsible for the supervision and regulation of investment businesses, securities exchanges, companies whose securities are traded on regulated or organised markets, and auditing firms. It has statutory powers of investigation and the ability to exercise its powers for the purpose of co-operation with overseas regulators.

“**investor**” means a person who has, holds or places an order to obtain an interest in securities, or who intends to invest or is solicited to invest in securities.

“**laws and regulations**” means provisions of the laws, regulations or rules applicable in Australia or in Italy with respect to securities.

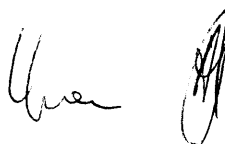
“**person**” means a natural person, legal entity, partnership or unincorporated association.

“**requested Authority**” means the Authority to whom a request under this Memorandum of Understanding is made.

“**requesting Authority**” means the Authority making a request under this Memorandum of Understanding.

“**securities**” means:

- (a) any share, stock, bond, note, debenture, interest in collective investments scheme or any instrument similar to shares, stocks, bonds, notes, debentures and interests in collective investment schemes;
- (b) any contract or right giving the right to subscribe, buy or sell any instrument mentioned in (a);
- (c) any exchange contract, futures contract, options contract, or any financial instrument based on instruments mentioned in (a);
- (d) any index contract based on instruments mentioned in (a); or
- (e) any exchange contract, commodity futures contract or any commodity futures option contract.



**“securities professionals”** means:

- (a) any person who engages in the business of:
  - (i) purchasing, selling, distributing, transferring, clearing or settling securities;
  - (ii) collecting, executing or transmitting orders given by investors concerning the purchase or sale of securities; or
  - (iii) engaging for his or her own account, or for the accounts of investors, in the management of individual or collective securities portfolios or accounts; and
- (b) any person who is associated with another person who performs any function listed in subparagraph (a) including, without limitation, an employee or authorised representative.

## **2 General Principles**

- 2.1 The purpose of this Memorandum of Understanding is to establish within the limits provided by the law a framework for mutual assistance between the Authorities in order to protect investors, promote the integrity of financial markets, facilitate the performance of the Authorities’ functions, and enforce and secure compliance with the laws and regulations.
- 2.2 The Authorities will use their best endeavours to fulfil the terms of Memorandum of Understanding.
- 2.3 This Memorandum of Understanding does not:
  - (a) modify or supersede any laws or regulatory requirements applicable in Australia or Italy;
  - (b) affect the ability of the Authorities to exchange non-confidential information;
  - (c) create an binding obligation under international law; create any rights enforceable by third parties; or
  - (d) affect any other Memoranda of Understanding entered into by the Authorities.



### 3 Scope of Assistance

3.1 The Authorities will provide each other with the fullest mutual assistance under this Memorandum of Understanding, in accordance with the laws and practices of their respective States. This assistance will be provided:

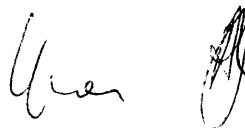
- (a) in connection with investigations to determine whether any person has violated the laws and regulations of the requesting Authority applicable in the State of the requesting Authority; or
- (b) to conduct any enforcement proceedings arising out of such violations.

3.2 Mutual assistance will be provided in the following areas:

- (a) insider trading, market manipulation and other fraudulent and manipulative practices in relation to companies, securities, futures and option contracts, and collective investment schemes;
- (b) enforcement of the laws and regulations relating to dealing in, arranging deals in, managing securities, futures and options contracts and collective investments;
- (c) enforcement of the law rules or regulations relating to fitness and propriety of persons authorised or registered as securities professionals and to fairness in dealing and integrity in the conduct of their business;
- (d) enforcement of laws, rules and regulations relating to the rights of investors to obtain timely and accurate information regarding securities, and the disclosure of interests in the securities of companies;
- (e) the duties of issuers and offerors of securities to make disclosure of information relevant to investors; and
- (f) any other matters falling within the jurisdiction of the authorities.

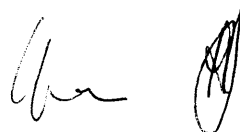
3.3 Assistance available under this Memorandum of Understanding includes:

- (a) providing information from files of the requested Authority;
- (b) obtaining evidence and documents from persons; and
- (c) taking statements from persons.

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## **4 Requests for Assistance**

- 4.1 Requests for assistance must be made in writing and addressed to the requested Authority's contact officer listed in Appendix A.
- 4.2 In order to facilitate the giving of assistance, the requesting Authority should specify:
- (a) a description in general terms of the subject matter of the request and of the facts of the matter including:
    - (i) the conduct under investigation;
    - (ii) any periods of time to which the request relates; and
    - (iii) the names, and last known addresses, of individuals or companies referred to in the request;
  - (b) a description in general terms of the assistance sought;
  - (c) the purpose for which the information is sought;
  - (d) a copy of the laws or regulations which may have been violated, and a statement of the way in which the facts give rise to a belief or suspicion that the laws or regulation may have been violated;
  - (e) a statement as to whether the requesting Authority has sought, or could conveniently seek, from another source the information, evidence or documents to which the request relates;
  - (f) the purpose for which the information, evidence or documents is to be used or may at any future time be used;
  - (g) the desired time period and means for the reply and, where appropriate, the urgency of the request.
- 4.3 In urgent cases, requests for assistance and replies to such requests may be transmitted by summary or emergency procedures mutually agreed upon by the Authorities, provided that these requests are confirmed in the manner required by subparagraphs 4.1 and 4.2.
- 4.4 Any document or other material provided in response to a request under the Memorandum of Understanding and any copies thereof must be returned on request, to the extent permitted by law.

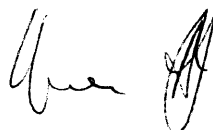


## **5 Execution of Requests**

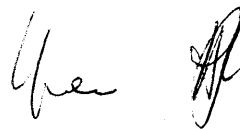
- 5.1 Each request will be assessed by the requested Authority to determine whether assistance can be provided under the terms of the Memorandum of Understanding. If the request cannot be accepted completely, the requested Authority will consider whether other assistance may be provided.
- 5.2 Assistance under this Memorandum of Understanding may be denied:
- (a) where the execution of the request would prejudice the sovereignty, security, fundamental economic interests, or public policy of the State of the requested Authority;
  - (b) where the request involves an assertion of jurisdiction not recognised by the requested Authority;
  - (c) where the execution of the request would lead to a violation of the laws and regulations of the State of the requested Authority;
  - (d) where a criminal proceeding has already been initiated in the State of the requested Authority, based upon the same facts and against the same person(s), or the same person(s) has already been finally sanctioned on the same charges by the competent authorities of the State of the requested Authority, unless the requesting Authority can demonstrate that the relief or sanctions sought in any such proceeding would not be duplicative of any relief or sanctions obtained in the State of the Requested Authority; or
  - (e) where the information or assistance would more readily be obtained through other channels.
- 5.3 The denial of assistance does not undermine the ability of the Authorities to consult with each other.

## **6 Permissible Use of Information**

- 6.1 The requesting Authority will use the information furnished solely for the purposes stated in the request, with a view to ensuring compliance with or enforcement of the provisions of the laws and regulations specified in the request.



- 6.2 The requesting Authority will inform the requested Authority at the time of making a request as to whether the requesting Authority believes that transmission to the Public Prosecutor of information obtained pursuant to the request is likely.
- 6.3 If the requesting Authority wishes to use the information provided for any purpose other than that stated in the request, it must first ask permission of the requested Authority. The requested Authority may:
- (a) consent to such use of the information, and may impose conditions on this consent; or
  - (b) refuse such use of the information, in which case the Authorities will consult each other pursuant to clause 9 concerning the reasons for the refusal and the circumstances under which the use of the information might otherwise be allowed.
- 6.4 Where the requesting Authority is required by the law of its State to transmit to the Public Prosecutor information obtained from the requested Authority which gives rise to a suspicion or belief that a criminal offence has been committed:
- (a) the requesting Authority will inform the requested Authority of such transmission;
  - (b) where the CONSOB transmits information obtained by ASIC pursuant to the *Mutual Assistance in Business Regulation Act 1992* to the Public Prosecutor, the CONSOB will inform the Public Prosecutor of the origin of the information transmitted and of its legal status under Australian law and will inform ASIC of such transmission; and
  - (c) where ASIC transmits information obtained by the CONSOB to the Australian Director of Public Prosecutions, ASIC will inform the Director of Public Prosecutions of the origin of the information and will inform the CONSOB of such transmission.
  - (d) the Authorities will inform each other of the use made of information transmitted by them to their respective Public Prosecutors, when this becomes available.



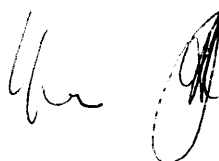


## **7 Unsolicited assistance**

- 7.1 To the extent permitted by the laws and practices of its jurisdiction, each Authority will use reasonable efforts to provide the other Authority with any information it discovers which gives rise to a suspicion of a breach, or anticipated breach, of the laws and regulations administered by of the other Authority.
- 7.2 Any information provided on an unsolicited basis will not be used for any purpose other than that stated in the transmission letter, except that:
- (a) the information may be used in civil, administrative or disciplinary proceedings if the Authority which provided the information consents, and this consent may be subject to certain conditions; and
  - (b) any transmission of the information to the Public Prosecutor will be made pursuant to subparagraph 6.4.
- 7.3 If the requested Authority refuses to consent under subparagraph 7.2(a), the Authorities will consult each other pursuant to paragraph 9 concerning the reasons for the refusal and the circumstances under which the use of the information might otherwise be allowed.

## **8 Confidentiality of Requests**

- 8.1 Each Authority will keep confidential, to the extent permitted by law:
- (a) any request for information made under this Memorandum of Understanding;
  - (b) any information provided under this Memorandum of Understanding; and
  - (c) any matters arising during the implementation of this Memorandum of Understanding, including consultations between the Authorities.
- 8.2 The confidentiality obligations in subparagraph 8.1 will not apply if:
- (a) disclosure of the information is necessary to carry out the request; or
  - (b) the Authority from which the request or information originates waives the obligations.

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## **9 Consultations and Disputes**

- 9.1 The Authorities may inform each other of substantial changes in the laws and regulations, and may consult whenever necessary.
- 9.2 The Authorities may consult and review this Memorandum of Understanding with a view to improving its operation and resolving any matters which may arise.
- 9.3 The Authorities may agree on such practical measures as may be necessary to facilitate the implementation of this Memorandum of Understanding.
- 9.4 The Authorities will consult in the event of any dispute over the meaning of any term used in this Memorandum of Understanding.

## **10 Amendments to the Memorandum of Understanding**

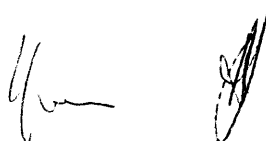
- 10 Further to consultations held pursuant to paragraph 9, the Authorities may determine amendments to be made to this Memorandum of Understanding, as may be necessary.

## **11 Entry into Effect**

- 11 This Memorandum of Understanding will be effective from the date of its signature by the Authorities.

## **12 Termination**

- 12.1 This Memorandum of Understanding will remain in effect unless terminated by any Authority upon 30 days' written notice.
- 12.2 If an Authority gives notice that this Memorandum of Understanding is to be terminated, it will continue to have effect with respect to all requests for assistance which are made before the effective date of notification.



### 13 Contact Points

- 13.1 All communications between the Authorities should be between the contact officers listed in Appendix A, unless otherwise agreed.
- 13.2 An Authority may change its contact officers by giving notice in writing to the other Authority, without the need to re-sign this Memorandum of Understanding.

IN WITNESS WHEREOF the Undersigned have signed this Memorandum of Understanding.

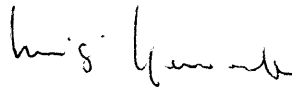
DONE in Nairobi, in quadruplicate, this 11<sup>th</sup> day of September, 1998, two in English, two in Italian, each text being equally authoritative.

FOR THE AUSTRALIAN SECURITIES  
AND INVESTMENTS COMMISSION

FOR THE *COMMISSIONE NAZIONALE  
PER LE SOCIETÀ E LA BORSA*



Alan Cameron AM  
Chairman



Luigi Spaventa  
Chairman

## APPENDIX A

The requested Authority's contact officer pursuant to paragraphs 4 and 13 of the Memorandum of Understanding is:

**Australian Securities and Investments Commission:**

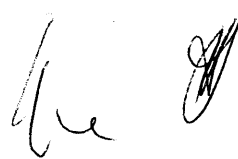
Director of International Relations  
National Office, Sydney  
Australian Securities and Investments Commission  
Level 18  
135 King Street  
Sydney NSW 2000  
AUSTRALIA

Telephone: 61.2.9911 2075  
Fax: 61.2.9911 2634

**Commissione Nazionale per le Società e la Borsa:**

Director of International Relations Office  
*Commissione Nazionale per le Società e la Borsa*  
Via Isonzo 19d/e  
00198 Roma  
ITALY

Telephone: 39.6.847 7381  
Fax: 39.6.847 7763

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MEMORANDUM

**ASIC**

Australian Securities & Investments Commission

**Operation of the Memorandum of Understanding between  
the Commissione Nazionale per le Società e la Borsa and  
the Australian Securities and Investments Commission**

The purpose of this Memorandum is to discuss the operation of the MOU signed on (17<sup>th</sup> September, 1998) (the "MOU") between the Commissione Nazionale per le Società e la Borsa ("CONSOB") and the Australian Securities and Investments Commission ("ASIC"), and to explain how requests for information from the CONSOB will be handled by ASIC.

**A. Requests not requiring the use of ASIC's compulsory powers:**

**Public information requests:**

ASIC is able to assist the CONSOB by providing information contained in the ASCOT public information database. The ASCOT database provides function search facilities including: organisation details; professional register enquiries; person enquiries; and address enquiries. The attached annexure marked "A" provides a visual summary and explanatory information sheets regarding the available public information. Company extracts can also be requested off the system providing either historical or current company information.

Linked searches of the corporate database can also be conducted using the ASCERTAIN module. This means that information relating to companies and individuals can be accessed more readily and cross-referenced more easily.

ASIC can also request computer-generated images of documents filed with ASIC through the DOCIMAGE system. General subject categories of documents kept filed with ASIC include the following:

- Names
- Registration
- Transfer of Incorporation
- Post registration
- Annual Returns and accounts
- Resolutions and minutes of holding companies
- Registrable charges
- Foreign companies or registered Australian bodies
- Deregistration
- Defunct companies

**Non-public file information requests:**

Types of information available pursuant to a request under the MOU include trading data such as prices, volumes and broker activity concerning futures traded on the futures exchange. ASIC may also informally advise the CONSOB as to whether it has instituted civil or administrative proceedings against a particular individual or entity, and may provide copies of public documents relating to such proceedings.

ASIC may also obtain certain information without commencing a formal investigation, and this information can be provided to the CONSOB under the MOU. ASIC officers may inspect books pursuant to its inspection powers under the Australian Securities and Investments Commission Act 1989 ("ASC Law"). Books which are included for inspection fall within four categories:

- (a) registers required under the Corporations Law of company members, options granted to persons to take up unissued shares in the company, directors' share holdings, principal executive officers and secretaries, charges, substantial shareholdings, beneficial shareholdings, interests in securities and debenture holders and proper authority holders;
- (b) shareholders' and directors' minute books; and
- (c) such accounting records as correctly record and explain the transactions of the broker and its financial position. These records must be kept so that true and fair accounts of the broker can be prepared from time to time, and to enable accounts to be conveniently and properly audited in accordance with the Law.

Accounting records include invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry. They also include working papers and other documents necessary to explain the methods and calculations by which accounts are made up.

- (d) such records as are required to be, or would normally be, kept by futures brokers, including dealing chits and other records which show separate particulars of all purchases and sales transactions in futures contracts made by the broker, the charges and credits arising from them, and the names of the buyer and seller of each of those contracts.

ASIC will also provide information extracted from its investigative non-public files pursuant to a formal request made under the MOU. ASIC will request that persons located in Australia provide statements, produce or prepare documents on a voluntary basis for the CONSOB.

**B. Compelling the Production of Information Pursuant to the MOU:**

ASIC can compel the production of information on behalf of the CONSOB pursuant to the MOU. The Mutual Assistance in Business Regulation Act 1992 ("MABR Act") allows ASIC to compel the giving of evidence, the provision of information and the production of documents to assist foreign regulators. The MABR Act provides for Ministerial approval for such assistance in each case.

Requests from the CONSOB for assistance will be made at first instance to ASIC. Should ASIC not oppose the request, it will so advise the Attorney-General, subject to any conditions or undertakings ASIC may require. The Attorney-General must then authorise the request before ASIC can provide the assistance to the CONSOB. The Attorney-General has the power to vary any conditions or undertakings imposed by ASIC or impose further conditions or undertakings at his or her discretion.

**1. Information sought by ASIC when considering a request for compulsory assistance by the CONSOB:**

(A) When considering what action to take in relation to a request, ASIC will take into account various factors including:

- the availability to the CONSOB of the information sought in the request from other sources;
- the resource cost to ASIC in meeting the request;
- the likelihood of ASIC successfully obtaining the information sought by the CONSOB;
- the extent to which the CONSOB has functions corresponding to those of ASIC; and
- whether the CONSOB is likely to respond to a similar request made by ASIC.

(B) In order to prepare an appropriate submission to the Commission of ASIC and ultimately to the Attorney-General, ASIC requires the following information from the CONSOB for requests which require the use of compulsory process:

- (a) a description in general terms of the subject matter of the request and the facts of the matter including in particular:
  - (i) the conduct under investigation
  - (ii) any periods of time to which the request relates; and
  - (iii) the names, last known addresses of individuals to whom, or bodies corporate to which, the request relates and refers; and

- (b) a description in general terms of the assistance sought; and
  - (c) the purpose for which the assistance is sought; and
  - (d) a copy of the relevant foreign business law and a statement of the way in which the facts give rise to a belief or suspicion that the law has been, or may have been, contravened; and
  - (e) a description of the functions of the foreign regulator making the request that is sufficient to enable ASIC to consider the extent to which the functions of the foreign regulator correspond with the functions of ASIC; and
  - (f) a statement as to whether the foreign regulator has sought, or could conveniently seek from another source the information, evidence or document to which the request relates; and
  - (g) a statement of the grounds on which the CONSOB considers ASIC will be likely to be able to obtain the information, evidence or documents; and
  - (h) the purpose for which the information, evidence or documents is to be used or may at any future time be used; and
  - (j) details of the confidentiality that the CONSOB will accord any information provided in compliance with the request; and
  - (k) the time within which the CONSOB desires to receive the information: and
  - (l) whether the CONSOB desires to receive the information in a single transmission or as and when each item of information becomes available; and
  - (m) the name and telephone number of an officer of the CONSOB who is familiar with the subject matter of the request and who will be available by telephone to answer queries or clarify matters relating to the request if asked to do so by an officer of ASIC.
- (C) In considering whether to authorise the provision of assistance, the Attorney-General will, in turn, have regard to the following matters:
- whether it is in Australia's national interest to comply with the request;
  - whether complying with the request is consistent with international law and comity;
  - whether the material provided to the foreign agency is likely to be used for the purpose of punishing a person for an offence of a political nature or punishing



or prejudicing a person on account of the person's race, sex, sexual preference, religion, nationality or political opinions; and

- whether the request would be more suitably dealt with under the Mutual Assistance in Criminal Matters Act 1987.

## 2. **Gathering Information Pursuant to a request made under the Mutual Assistance in Business Regulation Act**

All administrative and procedural arrangements as to the granting and execution of requests, other than the authorisation, will be carried out by ASIC. Once the Attorney-General authorises the obtaining of the information, documents or evidence, ASIC will gather the requested information pursuant to the provisions of the MABR Act.

ASIC staff member may serve a written notice on the person (or body corporate as the case may be) to whom the Attorney-General's authorisation relates requiring that person:

- (i) to give to ASIC by instrument signed by the person or competent officer of the body corporate, within the time and manner specified in the notice; or
- (ii) to produce documents to ASIC, in accordance with the notice to which the CONSOB request relates; or
- (iii) to appear before a specified ASIC staff member at a time and place specified in the notice to give evidence to which the foreign request relates, either orally or in writing, and to produce any such documents.

Where required, ASIC staff member may request the evidence to be given on oath or affirmation. If the person providing the evidence does not comply with the provisions of the notice, and fails to show reasonable excuse, or gives evidence or information knowing it to be false or misleading in a material particular, then that person is guilty of an offence and will be liable to a maximum penalty of 2 years' imprisonment.

The evidence taken under the MABR Act is to be put in writing and ASIC will certify a written version of the evidence. Where documents have been produced to ASIC, certified copies will be sent to the CONSOB.

A person who appears to give evidence will be able to be represented by an admitted Australian legal practitioner or by any other person (including a foreigner) who by virtue of their expertise could be expected to be of assistance to the person giving the evidence. Other persons who may be present during the taking of evidence include:

- the person taking or giving the evidence;
- a staff member of ASIC;

- a representative of the CONSOB;
- a person who is present at the request of the person giving the evidence.
- a person who is entitled to be present under a direction given by the person taking the evidence.

Protection and immunity is given to lawyers and other representatives and persons giving evidence as if they were appearing in a proceeding in the Australian High Court. Therefore persons taking or providing evidence cannot be liable for damages in defamation as a result of the evidence.

A person providing evidence under compulsion will be able to claim the statutory privilege against self incrimination if the information or evidence might tend to incriminate him or her or make him or her liable to the imposition of a penalty. However, the fact that providing the evidence may tend to incriminate the person, is not considered a "reasonable excuse" for failing to provide the evidence. A legal representative is entitled to claim legal professional privilege. Where a privileged communication is withheld, the lawyer is required to provide details of the identity of the document or the person to whom or by whom the communication was made.

### **C. Participation of the Requesting Authority**

ASIC will, through its International Relations Unit, be in close contact with the CONSOB in the course of processing requests for information and in conducting investigations to obtain information to provide to the CONSOB. In the context of Clause 3.3 of the MOU the CONSOB may participate in the investigation by:

- being present during the taking of testimony and prescribing specific questions to be asked by ASIC of the witness;
- being present at the inspection or examination of books and records and participating in such inspection or examination subject to the approval of the ASIC; and
- consulting about strategy and information to be gathered

### **D. Conditions Concerning use and Confidentiality of Information Provided Pursuant to the MOU**

The MABR Act contemplates conditions which may attach to a request made by the CONSOB which may be imposed by ASIC and supported, varied or deleted by the

Attorney-General. ASIC will specify undertakings to be given to the CONSOB to ensure that the conditions are met.

The MOU also contemplates that the Authorities will use their best efforts to maintain confidentiality of requests and protect information exchanged under the MOU from unnecessary public disclosure.

### **ASIC duty of confidentiality:**

Section 127 of the ASC Law imposes a positive duty on ASIC to take all reasonable steps to protect from unauthorised use or disclosure confidential information it has been given in connection with the performance of its functions or the exercise of its powers. However, disclosure of particular information is permitted:

- where disclosure is required or permitted by a law of the Commonwealth;
- to allow a person to perform his or her functions as a member, staff member or delegate of the Commission or to assist a Commission delegate
- where the Chairman is satisfied that the information will enable or assist a government or agency (including a government or agency of a foreign country: paragraph 127(4)(c)) to perform its functions or exercise its powers.<sup>1</sup>

### **Maintenance of confidentiality:**

Non-public information received from the CONSOB under the MOU, including non-public information contained in requests for assistance from the CONSOB to ASIC, would be "confidential" information and thus protected by the positive duty of confidentiality in section 127 of the ASC Law. ASIC will undertake to maintain the confidentiality of such information to the extent permitted by Australian law. In practice, this will mean that ASIC will not offer information obtained from the

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<sup>1</sup> Subsection 127(4) states:

"127(4) [Chairperson may authorise disclosure] Where the Chairperson is satisfied that particular information:

- (a) will enable or assist an agency, being the Advisory Committee, the Panel, the Disciplinary Board, the Review Board or any other agency within the meaning of the Freedom of Information Act 1982, to perform or exercise any of the agency's functions or powers;
- (b) will enable or assist the government, or an agency, of a State or Territory to perform a function or exercise a power; or
- (c) will enable or assist a government, or an agency, of a foreign country to perform a function, or exercise a power, conferred by a law in force in that foreign country;

the disclosure of the information to the agency or government by a person whom the Chairperson authorises for the purpose shall be taken to be authorised use and disclosure of the information."

CONSOB to third parties, and will not disclose such information if required by Australian law to do so, without prior reference to the CONSOB.

In cases in which ASIC is required by law to disclose information in its possession, ASIC will use its best endeavours to maintain the confidentiality of the information by reference to available privileges and exemptions from production. For example where the production of documents might be required by service of subpoena to produce, ASIC would seek to have such a subpoena put aside on the grounds of public interest immunity. In such cases, ASIC will undertake to inform the CONSOB as soon as a demand for disclosure is made.

The following government agencies are permitted by law to obtain from ASIC information provided by the CONSOB:

- the Australian Taxation Office
- the National Crime Authority
- the Australian Competition and Consumer Commission
- the Commonwealth and Defence Force Ombudsman
- the Privacy Commissioner
- the Inspector-General of Intelligence and Security
- the Parliamentary Joint Committee on the Australian Security Intelligence Organisation

Of these organisations, the most frequent recipients of ASIC information are the Australian Taxation Office and the Australian Competition and Consumer Commission. In both cases, ASIC has negotiated an MOU with the agency and the parties have agreed not to exercise coercive powers against each other. In these instances, the CONSOB would be consulted before any of its information was released. In the event of a demand being made by the other agencies ASIC may be able to protect the confidentiality of CONSOB information on the basis of statutory provisions which enable persons served to claim that they have a "reasonable excuse" for resisting production. ASIC would argue that the fact the information had been obtained from the CONSOB on a confidential basis was a "reasonable excuse" for refusing access. In those circumstances ASIC will ensure that these agencies are advised of the confidential nature of the information and the basis upon which the information was given to ASIC by the CONSOB. In any event ASIC will endeavour in every case to ensure the confidentiality of CONSOB information to the extent permitted by the law.

ASIC will not be required to produce a document to the Ombudsman if the Attorney-General gives a certificate to the Ombudsman certifying that disclosure of the information would prejudice the international relations of the Commonwealth (paragraph 9(3)(a) of the Ombudsman Act).

ASIC will not be required to produce a document to the Privacy Commissioner if the Attorney-General gives a certificate to the Privacy Commissioner certifying that disclosure of the information would

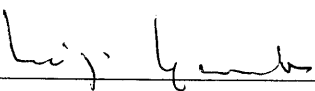
- prejudice the international relations of the Commonwealth;
- prejudice the conduct of a criminal investigation;
- disclose the existence or identify of a confidential source of information in relation to enforcement of criminal law;
- prejudice the effectiveness of the operational methods or investigative practices or techniques of ASIC (paragraphs 70(1)(a), (e), (f) and (g) of the Privacy Act).

### ***Freedom of Information Act***

Persons can seek access to information held by ASIC pursuant to the Commonwealth Freedom of Information Act (the FOI Act). Documents received by ASIC from the CONSOB would not, in themselves, be exempt from disclosure under the Act.

It is important to note that the FOI Act has several provisions which safeguard against the production of information supplied by an agency such as the CONSOB. Documents should be exempt from disclosure under the FOI Act for one or more of the following reasons:

- the disclosure would, or could reasonably be expected to, damage the international relations of the Commonwealth (paragraph 33(1)(a));
- the disclosure would divulge information communicated in confidence by or on behalf of an authority of a foreign government to an authority of the Commonwealth (paragraph 33(1)(b));
- the disclosure would, or could reasonably be expected to, prejudice the conduct of an investigation or disclose the existence or identity of a confidential source of information in relation to the enforcement or administration of the law (paragraphs 37(1)(a) and (b));
- the disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (paragraph 40(1)(d));
- the disclosure would divulge information communicated in confidence by the CONSOB (section 45)

  
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