CS 50 Proposed updates to RG 172, RG 249 and RG 268

ASIC

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Introduction

I make this submission in response to ASIC's proposed updates to Regulatory Guide 172, Regulatory Guide 249 and Regulatory Guide 268.

I do not oppose the need to update regulatory guidance to reflect the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024. If Parliament has altered the financial market infrastructure framework, ASIC's guidance should be brought up to date.

My concern is different. The proposed updates sit within a reform package that gives ASIC heavier licensing, supervisory and enforcement responsibility over financial market infrastructure. That is not a minor administrative matter. Financial market infrastructure is critical economic infrastructure. It supports trading, market integrity, benchmark reliability, derivative reporting, capital formation and public confidence in the financial system. Guidance in this area should therefore do more than describe ASIC's powers and the obligations of licensees. It should also explain how those powers will be exercised transparently, consistently and accountably.

The consultation asks whether the guidance is sufficiently clear. My submission is that the draft guidance is not yet sufficiently clear in the sense that matters most. It may explain some of the mechanics of the new framework, but it does not do enough to explain how ASIC will avoid broad discretion becoming opaque discretion.

Good public purpose filter

This submission applies the filter of good public purpose. In this context, good public purpose means a financial market infrastructure regime that strengthens market integrity, public confidence, transparency, accountability, operational resilience, genuine independence and fair treatment of affected parties.

That test is stricter than asking whether the draft guides accurately track legislative amendments. A regulatory guide should not merely restate that ASIC now has more power. It should explain the discipline that will apply to the use of that power.

That is especially important where powers previously held by the Minister are transferred to ASIC, where ASIC is given greater supervisory power, where ASIC may require reports or expert reviews, where foreign entities with an Australian nexus may be brought within oversight, and where control approvals may affect ownership and influence over important market bodies.

A simple consultation should not become a simple assumption of public trust. Trust must be built into the guidance.

ASIC's expanded responsibility requires stronger safeguards

The draft guidance proceeds in a context that cannot be ignored. Recent parliamentary scrutiny has raised serious concerns about ASIC's performance, enforcement culture, transparency and breadth of remit. I do not rely on those concerns to make a general attack on ASIC. I rely on them because they are directly relevant to whether expanded ASIC responsibility should be accompanied by clearer public safeguards.

The issue is not whether ASIC should administer the law that Parliament has enacted. The issue is whether ASIC's guidance should be written as if the public can simply assume that broad powers will be used well.

That assumption is not good enough.

Where ASIC is receiving stronger licensing, supervisory and enforcement powers over financial market infrastructure, the guidance should be correspondingly stronger on reasons, decision criteria, conflicts, review pathways, reporting and public accountability. Expanded discretion without expanded transparency risks entrenching the very weaknesses that have already damaged confidence in ASIC.

Guidance should explain decision making, not merely power

The proposed updates refer to important areas of ASIC decision making, including licensing, exemptions, operating rules, suspension and cancellation, control approvals, foreign entity oversight, required reports and expert reports. These are not minor procedural powers. They can affect market access, ownership, governance, continuity of service, public confidence and the practical operation of Australian financial markets.

The guides should therefore include clearer statements about the criteria ASIC will apply when exercising these powers. It is not enough to say that ASIC may act where the legislation permits it. The guidance should explain what factors ASIC will consider, how competing factors will be weighed, what procedural fairness will be given, what reasons will be provided, and what avenues exist for review or reconsideration.

This is especially important where ASIC proposes to approve or refuse control changes involving more than twenty percent voting power in relevant licensees or holding companies. The draft guidance refers to a legitimate control test, but ASIC should provide a clearer account of how that test will operate in practice. It should explain how it will assess influence, conflicts, financial capacity, strategic direction, market integrity risk, governance capability and public interest consequences. It should also explain when conditions will be imposed, varied or revoked, and whether reasons for those decisions will be published in a form that protects genuinely confidential material while still allowing public scrutiny.

Expert reports require explicit independence protections

ASIC's power to appoint an expert, or require a licensee to appoint an expert, is potentially useful. It is also a power that requires careful safeguards.

The guides should make clear that expert reports must not become a private supervisory process between ASIC, the expert and the regulated entity. If expert reports are used to assess compliance, governance, operational resilience, market integrity or licence obligations, the guidance should address independence, conflicts, scope, methodology, access to information, treatment of affected parties, and the extent to which findings or summaries will be published.

Where a licensee is required to pay for an expert report, ASIC should also explain how it will prevent cost shifting from weakening independence. A report paid for by a regulated entity, required by a regulator, and used for public supervisory purposes must be governed by clear integrity rules. Otherwise, the process risks looking like outsourced supervision without adequate accountability.

The guides should state that expert appointment processes will include conflict checks, written terms of reference, reasons for the appointment, a clear explanation of the matters to be examined, and a process for responding to adverse findings before final regulatory action is taken.

Core officer obligations should not rely too heavily on licensee discretion

The proposed guidance concerning core officers' fitness, propriety and capability is important. Financial market infrastructure licensees should not be able to satisfy these obligations through superficial internal assurance.

The guidance appears to leave substantial discretion to licensees in determining how they satisfy themselves that core officers are fit and proper, capable and not disqualified or banned. Some discretion is unavoidable, but the guidance should set stronger minimum expectations.

ASIC should require licensees to maintain documented evidence of checks, periodic reassessments, role specific competence, conflict management, disciplinary history, insolvency checks, criminal history checks where relevant, and escalation processes where concerns arise. The guidance should also state how often ASIC expects reassessment to occur and what events should trigger immediate reassessment.

A critical infrastructure style regulator should not rely on a trust-based model of officer suitability. The public interest requires evidence, records and regulatory visibility.

Foreign entities and Australian nexus

ASIC's expanded oversight of foreign entities operating financial market infrastructure with a significant Australian nexus is a necessary area of reform. However, the draft guidance should be clearer about how ASIC will determine whether an overseas entity has a sufficient Australian connection, how it will treat entities targeting Australian investors, and how it will coordinate with overseas regulators.

This matters because foreign entities may have real influence over Australian market integrity even when key systems, personnel or legal structures sit offshore. The guidance should avoid creating uncertainty for legitimate overseas operators, but it should also avoid leaving ASIC with overly private discretion to decide when Australian public interest is engaged.

ASIC should publish clearer criteria, examples and reasons when making material connection decisions, subject only to genuinely necessary confidentiality.

Suspension and cancellation powers require procedural discipline

The proposed guidance addresses suspension and cancellation of licences in circumstances such as inactivity, deregistration or cessation of relevant activity. Those powers are understandable, but the guidance should also explain how ASIC will consider market continuity, affected participants, investors, reporting users, benchmark users and systemic consequences.

Suspension or cancellation may be appropriate where a licensee is inactive or no longer operating. But financial market infrastructure can have broader dependencies. The guidance should therefore make clear that ASIC will consider transition arrangements, notice, market disruption risk, affected users and public communication before exercising suspension or cancellation powers.

A purely administrative view of suspension and cancellation is too narrow for financial market infrastructure.

Transparency and reporting should be built into the guides

The strongest weakness in the proposed guidance is that it does not sufficiently embed transparency as a governing principle.

ASIC should commit to public reporting on the use of the new and transferred powers. That reporting should include how often key powers are used, the broad categories of reasons, the types of entities affected, the use of expert reports, the use of conditions, the use of suspension or cancellation powers, and the handling of control approvals.

This does not require publication of commercially sensitive information. It requires public accountability for the exercise of public power.

The guidance should also state that ASIC will provide meaningful reasons to affected parties wherever it makes a significant decision under the updated regime. Reasons should not be treated as a courtesy. They are a basic discipline of lawful and accountable administration.

Regulatory capture and institutional closeness

Financial market infrastructure regulation involves powerful, sophisticated and repeat players. ASIC will necessarily have regular contact with those entities. That creates a standing risk of institutional closeness.

The guides should acknowledge that risk and explain how ASIC will manage it. This should include internal separation between supervisory engagement and enforcement decisions where appropriate, record keeping of material engagements, conflict controls, escalation processes and transparency around significant regulatory decisions.

The public should not be asked to trust that closeness will not become comfort. The guidance should show how that risk is managed.

Conclusion

The proposed updates should not be rejected merely because ASIC is the agency responsible for administering the regime. However, the guides should not be finalised in their current form unless they more clearly address the accountability problem created by expanded ASIC responsibility.

Financial market infrastructure is too important to be governed by broad regulatory discretion supported only by general statements of power. If ASIC is to exercise stronger licensing, supervisory and enforcement powers, the guidance must be stronger on transparency, reasons, expert independence, control approvals, foreign entity oversight, procedural fairness, public reporting and conflict management.

The central test should be simple. The updated guides should not only tell licensees what ASIC can do. They should tell the public how ASIC will be held to a disciplined, transparent and accountable use of the powers Parliament has given it.

My submission is therefore that ASIC should revise RG 172, RG 249 and RG 268 before finalisation to include clearer safeguards around decision making, expert reports, control approvals, foreign entity declarations, suspension and cancellation powers, core officer obligations and public reporting. Without those changes, the guidance risks entrenching a wider trust me model at precisely the time when ASIC's remit, performance and accountability remain under serious public scrutiny.