

## MEMORANDUM OF UNDERSTANDING

between the

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

and the

**AUSTRALIAN FINANCIAL SECURITY AUTHORITY**

### 1. PARTIES, CONTEXT AND PURPOSES

1.1 The parties to Memorandum of Understanding (**MOU**) are:

- (a) the Australian Securities and Investments Commission (**ASIC**); and
- (b) the Australian Financial Security Authority (**AFSA**).

1.2 Under this MOU, agencies mean both ASIC and AFSA, and agency means either ASIC or AFSA (as the case requires). References to "government objectives" in this MOU refer to Commonwealth legitimate purposes, or Whole of Australian Government policies or initiatives being applicable to both agencies.

1.3 This MOU does not create any legally binding obligations between the agencies.

1.4 ASIC is a body corporate established by the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). ASIC is a regulatory and law enforcement agency with statutory powers and functions (among other things) in relation to:

- monitoring and promoting market integrity and consumer protection in relation to the Australian financial system
- promoting the confident and informed participation of investors and consumers in the financial system
- registration and oversight of corporate insolvency practitioners and administration of the corporate insolvency provisions of the *Corporations Act 2001* (Corporations Act) and
- administration of the *National Consumer Credit Protection Act 2009*.

1.5 AFSA is an Executive Agency (under the *Public Service Act 1999* (Cth)) of the Commonwealth Government. As a modern, visible and contemporary regulator, our vision is to ensure a strong credit system for Australia through:

- ensuring confidence in Australia's personal insolvency system through the administration of the Bankruptcy Act 1966 (Bankruptcy Act) and by performing the functional responsibilities of the Inspector-General in Bankruptcy, the Official Receiver, and the Official Trustee in Bankruptcy
- administering the Personal Property Securities Register (**PPSR**), through the Registrar of Personal Property Securities (the Registrar), established under the *Personal Property Securities Act 2009*

- preserve and manage assets under the custody and control of the Official Trustee in Bankruptcy under the Proceeds of Crime Act 2002
- support people in our society to interact positively with the credit system
- demonstrate a strong and balanced regulatory posture through a collaborative, whole-of-system and intelligence-based approach to regulation.

1.6 Each agency plays important roles in contributing to the stability of the Australian financial system through effective and efficient regulation and administration of Australia's personal and corporate insolvency regimes. Both agencies have collective responsibility for insolvency options available to all types of Australian businesses.

1.7 ASIC and AFSA recognise their complementary roles in ensuring a strong credit system; ASIC for licensing and regulation of credit providers, financial service providers, registered liquidators, and debt management firms (among others); and AFSA for regulation of registered trustees, debt agreement administrators, and the administration of bankrupt estates as the Official Trustee. The agencies have a strong history of cooperation and working together to support outcomes for Australia and have a large number of stakeholders in common.

1.8 The agencies recognise the need for cooperation and mutual assistance at all levels between them and is desirable to assist in the discharge of their respective statutory powers and functions to maximise the effectiveness of their regulatory and enforcement oversight functions, as well as to deliver on agreed strategic priorities and the objectives of the government of the day.

1.9 The scope and purpose of this MOU are to work together with an outcomes focus:

- (a) express the understanding between the agencies of the working relationship between them and the complementary responsibilities in the Australian credit system to promote the stability of the Australian financial system
- (b) set out a framework for mutual cooperation and assistance between ASIC and AFSA with respect to exchange of relevant information, appropriate referral of matters, and co-operation in compliance with education, regulatory, and enforcement activities within the framework provided by this MOU and consistent and compliant with all relevant applicable laws (i.e. legislative provisions)
- (c) set out the process for entering into Subsidiary Arrangements, which will provide guidance in relation to each specific mutual collaboration, cooperation, and assistance in respect of statutory functions of each agency and
- (d) sets out a framework for how the agencies will work together to identify and deliver on strategic priorities and government objectives.



1.10 The agencies will work together to pursue common interests and demonstrate their commitment to a Whole of Australian Government approach to protecting and promoting public confidence in the financial system.

1.11 There are no funding arrangements or costs involved with this MOU.

## **2. SUBSIDIARY ARRANGEMENTS**

2.1 Either agency may give the other agency a written proposal for a Subsidiary Arrangement that falls within the subject matter of this MOU (see paragraphs 4, 5, 6, 7, and 9 of this MOU). The proposal must set out:

- (a) the information sharing and/or other activities (e.g. project scope, details, and risk management) to be carried out under that Subsidiary Arrangement
- (b) each agency's arrangement manager for that Subsidiary Arrangement
- (c) the duration of that Subsidiary Arrangement
- (d) monitoring, evaluation, and reporting requirements for that Subsidiary Arrangement
- (e) all other provisions proposed for that Subsidiary Arrangement (other than common provisions set out in this MOU).

2.2 An initial proposal may take the form of an email between each agency's relationship manager. Each proposal for a Subsidiary Arrangement is to be cooperatively developed and negotiated by the agencies in good faith and has no statutes until both agencies agree and signed in writing.

## **3. LIAISON BETWEEN AGENCIES**

3.1 To promote co-operation between the agencies, regular national liaison meetings will be held between ASIC and AFSA regarding operational and policy matters.

3.2 The agencies will use best endeavours at these liaison meetings to identify and agree on any strategic priorities that are common to both agencies, which are then the subject of mutual assistance, collaboration and cooperation between the agencies.

3.3 These liaison meetings should occur at least every six months and will include consideration and agreement of shared strategic priorities.

3.4 The agencies agree that liaison in respect of routine operational matters will occur on an 'as needed' basis between appropriate staff of the agencies.

3.5 In order to ensure effective liaison, the agencies have exchanged, and will continue to update, lists of contact officers at the national level.

## **4. REGULATION, POLICY DEVELOPMENT AND STAKEHOLDER ENGAGEMENT**

4.1 Each agency will use its best endeavours to:

- (a) work together to achieve agreed strategic priorities and regulatory responsibilities, including in relation to informing policy and delivering meaningful outcomes for common stakeholders.
- (b) notify the other agency of proposed changes in regulatory policy and guidance, including through environment/operating scan or identification of emerging risks or issues for or in the insolvency sector, which are likely to impact on the regulatory responsibilities of the other agency. Where possible, each agency will provide the opportunity to consult the other agency about those changes.
- (c) provide advance notice of proposed publication of regulatory guidance or media releases that may be of interest to, or have an impact on the regulatory responsibilities of the other agency.

4.2 Where appropriate, the agencies may consider whether to issue a regulatory or policy document, or media release jointly having regard to the subject matter, policy objectives, and statutory powers and functions of each agency.

## **5. MUTUAL ASSISTANCE AND COOPERATION**

5.1 The agencies recognise the need for cooperation and mutual assistance at all levels to effectively discharge their respective responsibilities and achieve strategic priorities. These may include but are not limited to issues relating to regulatory stewardship and digital innovation.

5.2 The agencies agree to provide each other with mutual assistance, exchange of relevant information and appropriate referrals of matters in areas of mutual interest to assist them to effectively discharge their respective responsibilities.

5.3 Subject to each agency's obligations at law, the agencies will, where appropriate, provide assistance and cooperation, in accordance with paragraph 2 of this MOU, and in a timely manner and with a particular focus on:

- (a) the exchange of information
- (b) appropriate referrals of matters
- (c) exchange of technical information and expertise
- (d) best practice regulation of the insolvency industry
- (e) best practice enforcement procedures within the insolvency industry
- (f) co-operative liaison with industry bodies
- (g) participation in joint training programs
- (h) other general matters relating to regulation and enforcement; and
- (i) design and delivery of initiatives against strategic priorities and government objectives.

5.4 The agencies agree to provide assistance and to cooperate when mutually beneficial, in accordance with paragraph 2 of this MOU, in matters including:



- (a) ensuring, as far as possible that the agencies take advantage of opportunities to harmonise the administration of personal and corporate insolvency legislation
- (b) the planning and implementation of surveillance programs
- (c) evaluation of surveillance techniques
- (d) industry education and consultation
- (e) formation of a joint taskforce as contemplated in paragraphs 5.4 and 5.5 below
- (f) investigation and enforcement of, and monitoring compliance with, applicable laws and
- (g) matters relating to small business insolvencies including consumer, financial service provider and creditor behaviours.

5.5 From time to time, the agencies may agree that their investigations, strategic priorities and government objectives may be conducted or delivered more effectively by the establishment of a joint taskforce (or working group) consisting of staff members from both agencies.

5.6 If both agencies agree to take part in the joint taskforce, an agreed operational plan in accordance with paragraph 2 of this MOU, will be prepared between the agencies setting out the objectives, expected duration, funding arrangements, publicity arrangements, accountability, and management of the joint taskforce.

## **6. PPSR COOPERATION**

6.1 The agencies agree to novate the existing signed Memorandum of Understanding, between the Registrar of the Personal Property Securities Register and ASIC dated 30 June 2014 with respect to ASIC's access to and use of the PPSR, to become a Subsidiary Arrangement under this MOU, in accordance with paragraph 2 of this MOU, to facilitate the transition to, and operation of, the PPSR, including ongoing liaison in relation to the PPSR.

## **7. ACCESS TO INFORMATION**

7.1 Each agency holds information relevant to the other agency's statutory responsibilities. Subject to each agency's obligations at law, the agencies agree to negotiate and enter into appropriate Subsidiary Arrangements in accordance with paragraph 2 of this MOU, to facilitate access by one agency to information held by the other agency and that is relevant to the first agency's statutory responsibilities, to assist each agency to effectively and efficiently perform their statutory functions.

## **8. UNSOLICITED ASSISTANCE**

8.1 Each agency acknowledges that in the course of carrying out its functions and exercising its powers, it will periodically come into possession of information which would, if provided to the other agency, be likely to assist that other agency in administering or enforcing the particular laws for which that agency is responsible.

8.2 Each agency agrees, subject to any applicable law, to use reasonable endeavours to notify the other agency on a timely basis of the existence of information which the agency holding that information considers may assist the other agency to perform its statutory regulatory and enforcement functions, notwithstanding that it may not have received a request from the other agency for such information.

## 9. REQUESTS FOR CONFIDENTIAL INFORMATION

9.1 The agencies will use their best endeavours to provide relevant information in a timely manner in response to requests for confidential information, subject to any relevant legal and operational considerations and any conditions that the provider of the information may impose when disclosing information.

9.2 The agencies agree that where one agency seeks confidential information from the other agency, both agencies will confer without delay to determine the most appropriate basis for the release of the information in accordance with paragraph 2 of this MOU.

## 10. CONFIDENTIALITY

10.1 An agency that receives information from the other agency under this MOU, will take all reasonable steps to ensure that such information is only used or disclosed for the purpose for which it was obtained, or, as otherwise authorised by the other agency, subject to applicable laws (i.e. each and all legislative secrecy provisions).

10.2 Where a legally enforceable demand would require the production of confidential information obtained by one agency from the other under this MOU, the agency subject to the demand will, prior to production, notify the other agency in writing of the fact of receipt of the demand to enable the other agency to determine what action, if any, it should take.

## 11. PRIVACY

11.1 Personal information and eligible data breach have the same meaning as they have in section 6 of the *Privacy Act 1988* (Cth) (**Privacy Act**).

11.2 Each agency must comply with their obligations under the Privacy Act, and will ensure that its officers, employees, agents, and subcontractors do so when processing applicable personal information.

11.3 If an agency becomes aware that there are reasonable grounds to suspect that there may have been an eligible data breach in relation to any personal information held by that agency connected with this MOU or any Subsidiary Agreements under this MOU, then that agency must notify the other agency in writing as soon as possible and in any event no later than 3 days, and carry out any assessment in accordance with the requirements of the Privacy Act.



11.4 Where either agency is aware or notifies the other agency that there are reasonable grounds to believe there has been an eligible data breach in relation to any personal information held by the agency connected with this MOU or any Subsidiary Arrangements under this MOU, the other agency must take all reasonable action to mitigate the risk of eligible data breach causing serious harm to any of the individuals to whom it relates, take all other action necessary to comply with the requirements of the Privacy Act, and any other action as reasonably directed by both agencies.

## **12. DATA SECURITY**

12.1 If a Subsidiary Arrangement, established by the agencies in accordance with paragraph 2 of this MOU, involves or is otherwise connected to any data-exchanges or sharing between the agencies, that Subsidiary Arrangement will need to set out general security, data security and integrity protective measures, and applicable security processes to be taken, adopted, or followed by the agencies to prevent any cyber-incident, protect the relevant data from unauthorised access, use, disclosure or modification, or loss or damage of the relevant data.

## **13. INTELLECTUAL PROPERTY**

13.1 As between the agencies, the Intellectual Property in material brought into assistance by or on behalf of the agencies with this MOU will be owned by (and held by the agency primarily responsible for bringing it into existence as custodian for the Commonwealth, and managed (as to licensing, registration and other matters associated with its protection) in accordance with Commonwealth policy and otherwise as agreed between the agencies.

13.2 Intellectual Property means all rights and interests arising from intellectual activity in the scientific, literary, artistic, and industrial fields, including those in the nature of copyright, patents, designs, trade and service marks, trade, and business names, whatever they are called and wherever and however they arise.

## **14. CONFLICT OF INTEREST**

14.1 Each agency agrees to promptly notify the other agency if a conflict of interest arises or becomes likely to arise that would affect that agency's performance of its roles or responsibilities under this MOU or any Subsidiary Arrangements.

14.2 Where an agency notifies the other agency of any actual, potential, or perceived conflict of interest, the agencies will discuss and agree the necessary actions that they are to take to ensure that the conflict of interest is avoided, mitigated, or is otherwise dealt with in an appropriate manner to ensure compliance with the respective avoiding conflict of interest policy of each agency and the *Public Governance, Performance and Accountability Act 2013* (Cth).

## **15. INTERNATIONAL REPRESENTATION**

15.1 The agencies will cooperate to ensure that Australia has appropriate regional and international representation in areas of mutual interest.

## **16. TERMINATION**

16.1 Either agency may give written notice to the other of its intention to terminate this MOU. The MOU will terminate 30 days after the date the notice was received. Cooperation will continue for all requests made before the effective date of the termination. In the event of termination, information obtained under this MOU will continue to be treated in accordance with the terms of this MOU.

## **17. MISCELLANEOUS**

17.1 The agencies will maintain a current list of senior representatives and areas contacts.

17.2 The role of the relationship managers under the MOU is to be responsible for overseeing the strategic operation of the relationship between the agencies and its general adherence to the MOU, monitoring and evaluating the operation and progress of this MOU and any Subsidiary Arrangements, and provide brief annual reports on the operation and progress of this MOU and Subsidiary Arrangements (including their achievements and any outstanding issues) to their respective agency.

17.3 Relationship managers may also receive any notices given by an agency to the other agency under this MOU.

17.4 ASIC's relationship manager for this MOU is the Senior Executive Specialist, Companies and Small Business.

17.5 AFSA's relationship manager for this MOU is the National Manager Strategy & Government.

17.6 Either agency may propose a variation to this MOU by giving the other agency a notice setting out details of the variation proposal. This MOU can only be varied by an agreement of both agencies in writing.

## **18. COMMENCEMENT**

18.1 This MOU comes into effect when signed by both ASIC and AFSA and replaces and supersedes the previous signed MOU between the agencies dated October 2014.

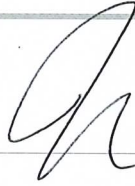


**Accepted and agreed**

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Signed for and on  
behalf of the  
Australian Securities  
and Investments  
Commission by  
Joseph Longo, Chair

} Signature

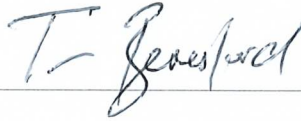


Date

16 / 11 / 2023

Signed for and on  
behalf of the  
Australian Financial  
Security Authority by  
Tim Beresford, Chief  
Executive

} Signature



Date

16/4/2023