

## OFFSHORING AND OUTSOURCING

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To provide guidance to participants on some of the issues they need to address when offshoring or outsourcing their activities as a participant</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The obligation of a participant to have adequate resources and processes to ensure that offshored or outsourced activities comply with the participant's obligations under the ASX Clear Operating Rules</li> <li>What is an offshoring arrangement?</li> <li>What is an outsourcing arrangement?</li> <li>When is an offshoring or outsourcing arrangement "material"?</li> <li>The due diligence a participant should undertake before entering into an offshoring or outsourcing arrangement</li> <li>Matters that the documentation for an offshoring or outsourcing arrangement should address</li> <li>The requirement to notify ASX of proposed overseas activities, the termination of a material offshoring arrangement and the entry or termination of a material outsourcing arrangement</li> <li>The supervisory processes a participant should have in place in relation to an offshoring or outsourcing arrangement</li> <li>ASX's investigatory powers in relation to offshored or outsourced activities</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>ASX Clear Operating Rules Guidance Note 1 <i>Admission as a Participant</i></li> <li>ASX Clear Operating Rules Guidance Note 8 <i>Notification Obligations</i></li> <li>ASX Clear Operating Rules Guidance Note 10 <i>Business Continuity and Disaster Recovery</i></li> </ul>

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**Important notice:** ASX has published this Guidance Note to assist participants to understand and comply with their obligations under the ASX Clear Operating Rules. It sets out ASX's interpretation of the ASX Clear Operating Rules and how ASX is likely to enforce those rules. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX Clear Operating Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and participants should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

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## 1. Introduction

This Guidance Note has been published by ASX Clear Pty Limited (“ASX”) to provide guidance to participants on some of the issues they need to address when offshoring or outsourcing their activities as a participant.

ASX recognises that globalisation and advances in technology are changing the way in which many participants conduct their business. More and more participants are offshoring and outsourcing their activities in search of economies of scale and savings in staff and infrastructure costs.

The ASX Clear Operating Rules do not seek to proscribe the way in which participants conduct their business, provided they do so in a manner that conforms to those rules.

Under the ASX Clear Operating Rules, a participant is responsible for all actions and omissions of persons involved in its business as a participant.<sup>1</sup> This applies regardless of where the business activities are conducted and by whom.

A participant is also required to have adequate resources and processes, including management supervision processes, to comply with its obligations as a participant under the ASX Clear Operating Rules.<sup>2</sup> This applies to all of a participant’s activities, including any that it may have offshored or outsourced. Hence a participant must have appropriate processes to supervise any offshored or outsourced activities so that they comply with all applicable obligations under the ASX Clear Operating Rules.

## 2. What is an offshoring or outsourcing arrangement?

“Offshoring” occurs when a participant (or another group entity acting on behalf of the participant) enters into an arrangement to conduct, on a continuing basis, a business activity outside Australia that currently is, or could be, undertaken by the participant itself in Australia. The activity may be conducted outside Australia by the participant, a related body corporate or an unrelated third party.

“Outsourcing” occurs when a participant (or another group entity acting on behalf of the participant) enters into an arrangement with another party to perform, on a continuing basis, a business activity that currently is, or could be,

<sup>1</sup> ASX Clear Operating Rule 4.17.1. This specifically includes, without limitation, its officers and employees and the officers and employees of any related bodies corporate who are involved in its activities as a participant (see the reference to “Employee” in ASX Clear Operating Rule 4.17.1 and the definition of “Employee” in ASX Clear Operating Rule 2.10.1, discussed in note 30 below and the accompanying text). It also extends to the actions and omissions of a third party to whom a participant has outsourced any of its activities as a participant.

<sup>2</sup> ASX Clear Operating Rule 3.5.1. For these purposes, “resources” include financial, technological and human resources and “processes” include management supervision, training, compliance, risk management, business continuity and disaster recovery processes.

undertaken by the participant itself. That other party could be a related body corporate<sup>3</sup> or an unrelated third party.

An arrangement can be both an offshoring and an outsourcing if and to the extent that the service provider to whom business activities are outsourced performs them outside Australia.

Central to the notion of offshoring and outsourcing are that they involve continuing arrangements between a participant (or another group entity acting on behalf of the participant) and another party to do something that is, or could be, part of the normal business activities of the participant. A one-off or short term arrangement is therefore not an offshoring or outsourcing, nor is an arrangement for the provision of specialist products or services that do not form part of the normal business activities of a participant.

Hence, the supply of computer hardware or software by another party to a participant to be used at the participant's premises would not constitute an offshoring or outsourcing since supplying computer hardware or software is not part of the normal business activities of a participant. The same applies to the supply of telecommunication services and utilities to the participant's premises. However, the provision of a service where another party hosts and operates computer infrastructure on behalf of a participant at an external data centre or in a cloud<sup>4</sup> environment would be an outsourcing, and if done outside Australia an offshoring, since a participant could, and often would, locate and operate its computer infrastructure on its own premises as part of its normal business activities.

### 3. The risks associated with offshoring and outsourcing arrangements

Offshoring and outsourcing arrangements are a potential source of added risk for a participant, as well as for the market, clearing and settlement facilities of ASX.

These added risks arise because offshored or outsourced activities are often performed:

- at scale, meaning that if something does go wrong, it has the potential to do so on a large scale;
- on behalf of multiple parties,<sup>5</sup> giving rise to divided attention and loyalties by the person performing those activities on behalf of the participant; and
- at a remote location vis-à-vis the participant's operations in Australia, exposing them to disruption if communications between the participant and the place where the activities are being performed fail.

Where activities are offshored,<sup>6</sup> these risks may be compounded by time zone differences, language barriers and the fact that the staff performing the activities may not have the same level of familiarity with the ASX Clear Operating Rules and Australian market customs and business practices as Australian-based staff.

Outsourcing arrangements have added risk because the service provider has a commercial interest in providing the outsourced services at the lowest possible cost, which may not necessarily align with the commercial interests of the participant. For example, if not otherwise precluded by the contractual arrangements between the parties, the service provider might apply fewer or lesser quality resources to performing the outsourced activity, compared to what the participant would do if it were performing the activity itself.

Outsourcing arrangements entered into at a group level rather than by a participant directly also have added risk because the participant's individual requirements may get lost amongst the group's broader requirements and the

<sup>3</sup> Although note that ASX does not regard arrangements between wholly-owned group entities to be outsourcings for the purposes of this Guidance Note: see '4. Inhouse arrangements between wholly-owned group entities' below.

<sup>4</sup> Some helpful guidance on cloud computing arrangements and the security considerations they raise can be found in the publication *Cloud Computing Security Considerations* published by the Australian Signals Directorate, available online at: [http://www.asd.gov.au/publications/csocprotect/Cloud\\_Computing\\_Security\\_Considerations.pdf?&version=1408](http://www.asd.gov.au/publications/csocprotect/Cloud_Computing_Security_Considerations.pdf?&version=1408).

<sup>5</sup> In the case of an offshoring arrangement with a wholly-owned group entity, on behalf of multiple group entities, and in the case of an outsourcing arrangement, on behalf of multiple clients.

<sup>6</sup> Including to an overseas office of the participant, to an overseas-based wholly-owned group entity under an offshoring arrangement or to an overseas-based service provider under an outsourcing arrangement.

participant may not be able to exercise the same level of oversight in respect of the arrangement or escalate incidents as effectively as it could if it were a direct party to the arrangement.

In light of these added risks, ASX would generally expect a participant to implement a policy that the entry, variation or termination of a material offshoring or outsourcing arrangement must be approved at a senior level (eg, by the board of directors or by a senior manager with delegated authority to enter into such arrangements). If the entity is likely to enter into more than one offshoring or outsourcing arrangement,<sup>7</sup> that policy should go further and also cover the matters dealt with in sections 6-12 of this Guidance Note, including establishing clear guidelines for identifying what is a material outsourcing for the purposes of that policy.

#### 4. Inhouse arrangements between wholly-owned group entities

ASX acknowledges that many participants form part of a larger wholly-owned corporate group and that those groups often conduct their business activities as if the entities in the group were part of a single enterprise. It is not uncommon, for example, for various activities relating to the business of a participant to be performed by functions that sit within, or staff who are employed by, another entity within the group, without the arrangements between the entities being formally documented in legally binding agreements. These arrangements can extend to the provision of premises, equipment, technology, finance, accounting, legal, compliance, risk, administration and other support services.

So long as these activities remain wholly inhouse – that is, between wholly-owned group entities<sup>8</sup> – ASX does not consider them to be “outsourcings” for the purposes of this Guidance Note. They may, however, constitute an “offshoring” if and to the extent that the wholly-owned group entity performing the activities does so outside Australia.

An offshoring arrangement between a participant and a wholly owned group entity stills need to be appropriately documented, managed and supervised by the participant but ASX would not expect the documentation relating to the arrangement to be as formal or as detailed as the documentation for an outsourcing arrangement with a third party.<sup>9</sup>

#### 5. Arrangements between group entities that are not wholly-owned

Sometimes, a participant (or another group entity acting on its behalf) will enter into an arrangement with a related body corporate that is not a wholly-owned group entity to perform, on a continuing basis, a business activity that currently is, or could be, undertaken by the participant itself. The chain of 100% ownership may be broken because the participant or a holding company of the participant has outside shareholders (for example, management shareholders). It could also be broken because the service provider or a holding company of the service provider has outside shareholders.

In such a case, the fact that the ownership interests in the participant and the service provider are not wholly aligned will give rise to a potential for their business interests also not to be aligned.

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<sup>7</sup> ASX does not consider it necessary for a participant to have a formal offshoring and outsourcing policy if it is only likely to enter into a single offshoring or outsourcing arrangement. In that case, the board of directors or senior manager of the participant approving the entry of the offshoring or outsourcing arrangement should satisfy themselves that the matters dealt with in sections 6-12 of this Guidance Note have been appropriately addressed in the arrangement.

<sup>8</sup> For the purposes of this Guidance Note, the term “wholly-owned group entity” has the same meaning as in ASX Clear Operating Rule 2.10.1.

ASX Clear Operating Rule 2.10.1 defines “wholly-owned group entity”, in relation to a participant, to mean: (a) an entity of which the participant is a wholly-owned subsidiary; or (b) a wholly-owned subsidiary of an entity referred to in (a).

For these purposes, an entity (the **subsidiary entity**) is a **wholly-owned subsidiary** of another entity (the **holding entity**) if all the membership interests in the subsidiary entity are beneficially owned by: (d) the holding entity; or (e) one or more wholly-owned subsidiaries of the holding entity; or (f) the holding entity and one or more wholly-owned subsidiaries of the holding entity.

An entity (other than the subsidiary entity) is a **wholly-owned subsidiary** of the holding entity if, and only if: (g) it is a wholly-owned subsidiary of the holding entity; or (h) it is a wholly-owned subsidiary of a wholly-owned subsidiary of the holding entity, including because of any other application or applications of this provision.

<sup>9</sup> See ‘8 Service level agreements’ on page 6.

ASX considers these sorts of arrangements between group entities that are not part of a wholly-owned group to be outsourcings for the purposes of this Guidance Note. ASX expects them to be documented, managed and supervised in the same manner as any third party outsourcing.

### 6. When is an offshoring or outsourcing arrangement “material”?

ASX has higher expectations around the documentation and supervision of “material” offshoring and outsourcing arrangements, relative to those that are not material.

An offshoring or outsourcing arrangement is considered by ASX to be “material” if it involves the offshoring or outsourcing of a material business activity.

For these purposes, a “material business activity” is one that has the potential, if disrupted, to have a material impact on the ability of a participant to comply with its obligations under the ASX Clear Operating Rules.

Examples of arrangements that ASX would regard as material offshoring or outsourcing arrangements (as the case may be) include:

- the offshoring or outsourcing of the operation of core IT systems used in a participant’s clearing activities;
- the offshoring or outsourcing of core clearing functions and processes; and
- the offshoring or outsourcing of a participant’s business continuity and disaster recovery arrangements.

Examples of offshoring or outsourcing arrangements that ASX generally would not regard as material include:

- the engagement of an external identity verification service or credit service to verify the identity or creditworthiness of new clients on an ongoing basis;<sup>10</sup>
- the provision of accounting, legal or compliance services on an ongoing basis by staff located offshore and employed by an overseas related body corporate;
- the engagement of a professional adviser (such as an accountant, lawyer or management consultant) to provide professional advice on an ongoing basis; and
- the engagement of a specialist compliance consulting firm to provide compliance services on an ongoing basis.<sup>11</sup>

### 7. Due diligence enquiries

A participant should undertake appropriate due diligence enquiries before entering into an offshoring arrangement with a wholly-owned group entity or an outsourcing arrangement with another party. These enquiries should be directed to:

- establishing that the service provider<sup>12</sup> has:
  - the human, financial and technological resources;
  - the knowledge<sup>13</sup> and expertise;

<sup>10</sup> The disruption of this service might prevent the participant providing clearing services to new clients whose identity had not been properly verified in accordance with section 32 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) but it would not affect its ability to provide clearing services to existing clients.

<sup>11</sup> The disruption of this service might prevent the participant from detecting and rectifying potential compliance breaches but it would not necessarily have a significant impact on its ability to comply with its obligations under the ASX Clear Operating Rules.

<sup>12</sup> The term “service provider” is used to refer both to a wholly-owned group entity performing business activities for or on behalf of a participant under an offshoring arrangement and to a party performing business activities for or on behalf of a participant under an outsourcing arrangement.

<sup>13</sup> Including knowledge of the ASX Clear Operating Rules, where relevant.

- the internal processes and procedures; and
  - any authorisations,
- needed to perform the activities being offshored or outsourced competently, reliably and in a manner that will comply with all applicable ASX Clear Operating Rules;
- verifying that the service provider's business continuity and disaster recovery arrangements are adequate and align with the recovery time objective in the participant's business continuity and disaster recovery arrangements;
  - identifying the potential business, operational and other risks involved with the offshoring or outsourcing arrangement with a view to ensuring that those risks are appropriately addressed:
    - in the case of an offshoring to a wholly-owned group entity, in the internal processes and procedures of the participant and the service provider; and
    - in the case of an outsourcing, in the contractual arrangements between the participant and the service provider; and
  - in the case of an outsourcing:
    - if possible, ascertaining the service provider's insurance arrangements and determining the extent to which they may help to mitigate the risks mentioned above; and
    - validating, through appropriate reference checks, the competence and reliability of the service provider.

Where the offshoring or outsourcing arrangement is a material one, ASX would expect the participant to be able to provide documentary evidence of its due diligence enquiries and their outcome.

## 8. Service level agreements

Again, ASX acknowledges that wholly-owned corporate groups often conduct their business activities as if the entities in the group were part of a single enterprise, without the arrangements between them being formally documented in legally binding agreements. ASX therefore would not generally expect an offshoring arrangement between a participant and a wholly-owned group entity to be governed by a legally binding written agreement between the participant and the service provider. However, where the offshoring arrangement is a material one,<sup>14</sup> ASX would expect there to be documented processes and procedures agreed between the participant and the service provider that, at a minimum, address:

- the scope of the arrangement and services to be supplied;
- service levels and performance requirements;
- record keeping and reporting requirements;
- business continuity management;<sup>15</sup>
- access to, and security of, information;
- confidentiality and privacy; and

<sup>14</sup> The fact that this Guidance Note only addresses the contents ASX expects to be included in the agreed processes and procedures for a material offshoring arrangement should not be taken as inferring that a participant need not have appropriately documented processes and procedures for a non-material offshoring arrangement.

<sup>15</sup> Further guidance on business continuity arrangements can be found in ASX Clear Operating Rules Guidance Note 10 *Business Continuity and Disaster Recovery*.

- the obligation of the service provider to consult with the participant if it proposes to outsource any of the services being supplied.

An outsourcing arrangement, on the other hand, should be governed by a legally-binding written agreement (a “service level agreement” or “SLA”) between the participant and the service provider.<sup>16</sup> This applies whether the outsourcing arrangement is a material one or not.

Where the outsourcing arrangement is a material one,<sup>17</sup> ASX would expect the SLA, at a minimum, to address:

- the scope of the arrangement and services to be supplied;
- start and end dates;
- service levels and performance requirements;
- record keeping and reporting requirements, including the timely reporting of any incidents that may affect the service provider’s ability to meet its obligations under the SLA;
- audit rights and procedures;
- business continuity management, including:
  - the alignment of the service provider’s recovery time objective in its business continuity and disaster recovery arrangements with the recovery time objective in the participant’s business continuity and disaster recovery arrangements;
  - the obligation of the parties to consult with each other before making any material changes to their business continuity and disaster recovery arrangements;
  - the frequency with which the service provider is expected to test its business continuity and disaster recovery arrangements, including connectivity with the participant’s infrastructure; and
  - the co-operation of the service provider in any testing by the participant of the participant’s business continuity and disaster recovery arrangements, including connectivity with the service provider’s infrastructure;<sup>18</sup>
- access to, and security of, information;<sup>19</sup>
- confidentiality and privacy;
- co-operation with ASX investigations;<sup>20</sup>
- events of, and rights upon, a default;
- termination provisions;
- dispute resolution arrangements;
- liability and indemnity;

<sup>16</sup> For the avoidance of doubt, this includes a service provider which is a related body corporate of the participant but which is not a wholly-owned group entity.

<sup>17</sup> Again, the fact that this Guidance Note only addresses the contents ASX expects to be included in the SLA for a material outsourcing arrangement should not be taken as inferring that a participant need not have appropriate SLA for a non-material offshoring arrangement.

<sup>18</sup> Again, further guidance on business continuity arrangements can be found in ASX Clear Operating Rules Guidance Note 10 *Business Continuity and Disaster Recovery*.

<sup>19</sup> For further guidance on the information security issues associated with cloud computing arrangements, see the Australian Signals Directorate publication referred to in note 4 above.

<sup>20</sup> See the text accompanying note 21 below and also ‘12. ASX’s investigatory powers’ on page 10.

- sub-contracting; and
- insurance.

In specifying the services to be supplied and setting service levels and performance requirements in an SLA for a material outsourcing, the participant needs to factor in its obligations under the ASX Clear Operating Rules and ensure that the service provider is obliged to provide the outsourced services in a manner that meets those obligations. This could be done by spelling out specific service and performance requirements in the SLA that, if met, will ensure compliance with the ASX Clear Operating Rules. Alternatively, it could be done by including a general requirement in the SLA that the outsourced activities must be performed to a standard that complies with the ASX Clear Operating Rules.

The SLA for a material outsourcing should address what is to happen if changes are made to the ASX Clear Operating Rules during the course of the outsourcing arrangement that affect the services being supplied.

In negotiating end dates and termination provisions in an SLA for a material outsourcing, the participant needs to be mindful of the steps and time frames involved in securing a suitable alternative service provider or bringing the outsourced activity inhouse.

To ensure that the participant is able to comply with its obligations under the ASX Clear Operating Rules,<sup>21</sup> the SLA for a material outsourcing should include:

- an acknowledgement by the service provider that ASX may, as part of any investigation of the participant's activities, require:
  - information about the outsourced activities; and
  - the production of records relating to the outsourced activities at any place, including at the offices of the service provider; and
- an agreement by the service provider to provide such information and produce such records to ASX upon request.

Prudently, the SLA for a material outsourcing should provide that the participant's consent is required before the service provider can sub-contract any of the outsourced services.

## 9. Notification of offshoring and material outsourcing arrangements to ASX

A participant that proposes to locate or relocate any part of its business as a participant (including, without limitation, any gateway or other means of communicating clearing messages to ASX or any employees<sup>22</sup>), outside Australia<sup>23</sup> must:

- provide prior written notification to ASX;

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<sup>21</sup> Including, but not limited to, ASX Clear Operating Rules 19.1.1 and 19.1.2.

ASX Clear Operating Rule 19.1.1 provides that ASX may at any time investigate the activities of a participant. As part of any investigation, ASX may require the participant: (a) to provide any information known to the participant; and (b) by notice in writing, to provide or permit inspection at the offices of the participant or any other place notified by ASX of any records in the custody, control or possession of the participant, in connection with the performance by the participant of its obligations under the Rules or the Procedures. ASX may also require, by notice in writing, that a participant provide specified information relating to the terms and circumstances of, and the parties to, any dealings in relevant financial products by clients and former clients of the participant.

ASX Clear Operating Rule 19.1.2 provides that a participant that is required to provide information or receives a notice under rule 19.1.1 must: (a) provide the information, or provide or permit inspection of the records in accordance with the notice; (b) provide assistance to ASX as ASX may reasonably require in relation to the information required or the notice; and (c) bear any costs incurred by the participant in connection with providing the information or complying with the notice or providing assistance to ASX.

<sup>22</sup> "Employee" for these purposes has an extended meaning: see note 30 below.

<sup>23</sup> Referred to in the ASX Clear Operating Rules as "overseas activity".



- obtain and maintain all necessary regulatory approvals from any relevant governmental agency or regulatory authority in Australia or elsewhere in respect of the overseas activity and provide a copy of those regulatory approvals to ASX upon request; and
- comply with the directions of ASX and any relevant governmental agency or regulatory authority in Australia or elsewhere concerning the conduct or supervision of the overseas activity.<sup>24</sup>

This applies whether the overseas activity is being conducted by the participant itself, a related body corporate or a third party service provider under an outsourcing arrangement. It also applies whether or not the overseas activities are material business activities, as defined in section 6 above, and whether the activities are currently being carried out in Australia or at another location overseas.

The notification should include:

- details of the proposed overseas activity, including the anticipated start date;
- if the activity is currently being performed in Australia or at a different overseas location, a brief description of the participant's plans for transitioning it to the new location overseas;
- details of any necessary regulatory approvals from any relevant governmental agency or regulatory authority in Australia or elsewhere required in connection with the proposed overseas activity and confirmation that they have been obtained;
- in the case of a material offshoring to a wholly owned group entity, confirmation that there are documented processes and procedures agreed between the participant and the service provider covering ASX's minimum expectations for material offshoring arrangements set out in section 8 above; and
- in the case of a material offshoring to someone other than a wholly owned group entity, confirmation that there is a written SLA agreed between the participant and the service provider covering ASX's minimum expectations for material outsourcing arrangements set out in section 8 above and section 10 below.

In assessing whether it should give any directions about the supervision of overseas activity, ASX will have regard to the quality and comprehensiveness of the documents provided to it with the notification and also to the obligation of the participant to have sufficient personnel and other resources located in Australia, or to have made other arrangements satisfactory to ASX, so that the participant and ASX can communicate with each other promptly and receive each other's responses quickly on a day-to-day operational basis and so that the participant can comply promptly with the ASX Clear Operating Rules or a request of ASX.<sup>25</sup>

ASX considers the termination of a material offshoring arrangement and the entry or termination of a material outsourcing arrangement by a participant to be a material change in information concerning its business. A participant must therefore immediately notify ASX if it terminates a material offshoring arrangement or it enters into or terminates a material outsourcing arrangement.<sup>26</sup>

## 10. Management supervision processes

As mentioned previously, a participant is required to have appropriate management supervision processes to ensure that any offshored or outsourced activities comply with all applicable obligations under the ASX Clear Operating Rules.<sup>27</sup> These processes need to be robust and fit for purpose, since the participant will be liable for any action or omission of that other party in breach of the ASX Clear Operating Rules.<sup>28</sup>

<sup>24</sup> ASX Clear Operating Rule and Procedure 4.19.1. The participant also must not engage in overseas activity of a type which would result in ASX becoming subject to the jurisdiction of any relevant government agency or regulatory authority outside Australia without the prior written consent of ASX.

<sup>25</sup> ASX Clear Operating Rule 4.19.4.

<sup>26</sup> ASX Clear Operating Rule 4.7.1(d)(iii).

<sup>27</sup> See note 2 above and the accompanying text.

<sup>28</sup> See note 1 above and the accompanying text.

In the case of an offshoring arrangement with a wholly-owned group entity, the participant's processes need to dovetail with the processes and procedures it has agreed with the entity, as referred to in section 8 above.

In the case of an outsourcing arrangement, the participant's processes need to dovetail with the contractual rights and obligations of the parties under the SLA governing the outsourcing arrangement.<sup>29</sup> For this reason, ASX would generally expect the SLA for a material outsourcing arrangement to include:

- a requirement for the service provider to give to the participant regular reports about the performance of the outsourced services, including reports as to whether it is meeting the contracted service levels and performance requirements;
- provision for the participant and the service provider to have review meetings at a senior manager level, either upon request or at regular intervals;
- a requirement for the service provider to notify the participant in a timely manner of any incidents that may affect the service provider's ability to meet its obligations under the SLA;
- a right for the participant to call for copies of records relevant to the provision of the outsourced services;
- a right for the participant to attend the service provider's premises to inspect its operations and records; and
- a right for the participant to audit the performance of the services by the service provider.

The frequency of the reports and meetings referred to in the first two bullet points above should be appropriate for the nature and materiality of the outsourced activity. The more material the outsourced activity, the more frequent those reports and meetings should be.

## 11. Consequential changes to other policies, procedures and processes

If a participant enters into or terminates an offshoring or outsourcing arrangement, it should consider the impact that might have on its various policies, procedures and processes. For example, this may require changes to its internal operating procedures, compliance procedures or business continuity and disaster recovery arrangements.

## 12. ASX's investigatory powers

The powers of ASX to conduct an investigation into the performance of the participant's obligations under the ASX Clear Operating Rules are not diminished by any offshoring or outsourcing arrangement that the participant may have entered into.

Where the offshoring or outsourcing arrangement involves another related body corporate, any staff involved in the activities of the participant can be required to appear for an interview before ASX in connection with such an investigation, even if the staff technically are employed by that (or another) related body corporate, rather than the participant.<sup>30</sup>

Having regard to the practical realities of how group entities conduct their business activities, ASX takes the position that:

<sup>29</sup> An outsourcing agreement is essentially grounded in contract. The participant will only be able to enforce its management supervisory processes if the SLA makes appropriate provision for it to do so.

<sup>30</sup> ASX Clear Operating Rule 19.1.3. For these purposes, the ASX Clear Operating Rules define the term "employee", in relation to a participant, to mean a director, employee, officer, agent, representative, consultant or adviser of that participant or any related body corporate who is involved in its activities as a participant (ASX Clear Operating Rule 2.10.1). ASX would note that this includes all related bodies corporate and not just wholly-owned group entities.

- any information known to any staff involved in the activities of the participant is information known to the participant, even if the staff technically are employed by another entity within the group;<sup>31</sup>
- any records relating to the activities of the participant are records in the custody, control or possession of the participant, even if those records technically are maintained by another entity within the group;<sup>32</sup> and
- any premises at which the participant's business activities are conducted are "offices" of the participant, even if those premises technically are owned, leased or otherwise occupied by another entity within the group.<sup>33</sup>

ASX also considers any records of an unrelated service provider under an outsourcing arrangement that a participant has a right to access under an SLA to be records in the control of the participant. Accordingly, as part of any investigation it is conducting into the performance of the participant's obligations under the ASX Clear Operating Rules, ASX can give a notice in writing to a participant requiring the participant to provide a copy of those records or to permit the inspection of those records at any place ASX may specify.<sup>34</sup> The place of inspection may include the offices of the service provider, if ASX so determines.

If ASX gives such a notice to a participant, the participant must provide any assistance that ASX reasonably requires in relation to the notice and bear any costs it incurs in complying with the notice or providing that assistance.<sup>35</sup>

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<sup>31</sup> Meaning that ASX can require the participant to provide that information to ASX pursuant to ASX Clear Operating Rule 19.1.1(a) (set out in note 21 above).

<sup>32</sup> Meaning that ASX can require the participant to provide those records to ASX pursuant to ASX Clear Operating Rule 19.1.1(b) (set out in note 21 above).

<sup>33</sup> Meaning that ASX can require the participant to permit the inspection of its records at those premises pursuant to ASX Clear Operating Rule 19.1.1(b) (set out in note 21 above).

<sup>34</sup> ASX Clear Operating Rule 19.1.1 (set out in note 21 above).

<sup>35</sup> ASX Clear Operating Rule 19.1.2 (set out in note 21 above).