

The Senate

Economics References Committee

Australian Securities and Investments
Commission investigation and
enforcement

3rd July 2024

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Terms of reference

The capacity and capability of the Australian Securities and Investments Commission to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct, with particular reference to:

- (a) the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action;
- (b) the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;
- (c) whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement;
- (d) the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes;
- (e) the offences from which penalties can be considered and the nature of liability in these offences;
- (f) the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner;
- (g) opportunities to reduce duplicative regulation; and
- (h) any other related matters.

Abbreviations

ABA	Australian Banking Association
ACCC	Australian Competition and Consumer Commission
AFA	Association of Financial Advisers
AFCA	Australian Financial Complaints Authority
AFSL	Australian financial service license
AICD	Australian Institute of Company Directors
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ARITA	Australian Restructuring and Insolvency Turnaround Association
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASC	Australian Securities Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	Australian Securities Exchange
Banking Act	<i>Banking Act 1959</i>
CAANZ committee	Chartered Accountants Australia and New Zealand Senate Economics References Committee
COO	Chief Operating Officer
Corporations Act corporations law	<i>Corporations Act 2001</i> <i>The Australian Securities and Investments Commission Act 2001 and the Corporations Act 2001</i>
CCDA Scheme	Compensation for Detriment due to Defective Administration Scheme
CDPP	Commonwealth Director of Public Prosecutions
CRIS	Cost Recovery Implementation Statement
CSLR	Compensation scheme of last resort
EDR	External dispute resolution
EU	Enforceable undertaking
ESA	Enforcement Special Account
FAR	Financial Accountability Regime
FOI	Freedom of information
FRAA	Financial Regulator Assessment Authority
FSC	Financial Services Council
FSI	Financial System Inquiry
Greywolf	Greywolf Resources NL
ICA	<i>Insurance Contracts Act 1984</i>
IFM	Industry Funding Model

IPA	Institute of Public Accountants
IPA	Institute of Public Affairs
IPO	Initial public offering
Law Council	Law Council of Australia
LIA	<i>Life Insurance Act 1995</i>
Medical Indemnity Act	<i>Medical Indemnity (Prudential Supervision and Product Standards) Act 2003</i>
NCCP Act	<i>National Consumer Credit Protections Act 2009</i>
PJCCFS	Parliamentary Joint Committee on Corporations and Financial Services
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PTAG	Prime Trust Action Group
Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services
RSA Act	<i>Retirement Savings Account Act 1997</i>
SBDC	Small Business Development Corporation
SFAG	Sterling First Action Group
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIT	Stirling Income Trust
SIAA	Stockbrokers and Investment Advisors Association
SNLL	Sterling New Life Lease

Executive summary

The Australian Securities and Investments Commission (ASIC) is the centrepiece of Australia's system of corporate and financial regulation. ASIC's responsibility for enforcing corporations law supports the health of the economy, promotes market integrity and protects consumers and investors.

When corporate misconduct occurs, Australians expect that ASIC will investigate promptly, take appropriate enforcement action and deter future breaches of the law.

However, ASIC's approach to investigation and enforcement has been continually criticised over many years. In 2014, this committee inquired into ASIC and made over 60 recommendations to help improve ASIC's performance. The 2017–19 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services* (the Royal Commission) was scathing of ASIC's enforcement approach, finding that financial service providers were not being held to account for unlawful conduct. Concerns regarding ASIC's effectiveness in protecting consumers and investors have been raised in many other parliamentary inquiries, government reports, academic works and in public discourse. At various times, ASIC been labelled a 'toothless tiger' for failing to hold those who break Australia's corporate laws to account.

While ASIC tries to deflect criticism that it is a weak corporate regulator by promoting its recent enforcement actions, the reality remains that corporate law is underenforced in Australia. ASIC's response to most reports of alleged misconduct is to take no further action and only a fraction of reports are investigated. For the matters where ASIC proceeds to take enforcement action, the civil penalties imposed are often at odds with the scale of the offending, and few criminal sanctions are achieved. Further, ASIC's investigation and enforcement decisions are opaque and difficult to scrutinise.

Evidence to this inquiry has made clear the deep flaws in ASIC's approach to investigation and enforcement. Too often, ASIC fails to respond to early warnings of corporate misconduct and does not routinely use the full extent of its powers to achieve strong enforcement outcomes. This approach fails to deliver justice to the victims of corporate crimes, undermines economic productivity and does not deter future poor behaviour.

ASIC's success rests on it having the right remit and powers, the right people and resources and the right governance and oversight arrangements. These factors have fallen out of balance. As a result, ASIC's capacity to respond to corporate misconduct is now compromised by significant structural, resourcing and cultural issues.

Stumbling at the first hurdle—ASIC's insurmountable remit

Since ASIC's establishment in 1991, successive governments have expanded ASIC's remit in response to emerging needs in corporate and financial regulation. At the same

time, the size of the Australian economy has grown along with the increased sophistication of Australia's financial markets and product offerings.

Today, ASIC's remit spans companies, markets, financial services, consumer credit and professionals who deal with financial products. In 2021–22, ASIC regulated over 95 000 entities of varying size and complexity, including 1841 public companies, 6288 financial services licensees and 1183 securities dealers.¹ ASIC's remit also incorporates globally significant capital markets. For example, Australia has the world's fifth-largest pool of managed funds, totalling \$4.75 trillion, and the fifth largest pool of retirement savings, totalling \$3.9 trillion.²

ASIC regulates Australia's corporate and financial markets with a staff of less 2000.

Further, ASIC's remit is one of the widest of any corporate regulator in the world. Indeed, ASIC's remit has become so large that it now uses significant resources just to strategically prioritise its regulatory efforts. When ASIC's performance is inevitably criticised, ASIC commits even more resources to managing its reputation.

The concerns regarding ASIC's resourcing are not new. In 2018, the Royal Commission heard from the then Chair of ASIC that the regulator was 'constrained in probably every aspect of [its] regulatory work', including in investigations, enforcement, surveillance and supervision activities, and its work on financial capability.³ ASIC's evidence to this committee shows that resource constraints continue to limit the matters ASIC determines to pursue, leading ASIC to focus only on what it considers the highest risk cases.

Following the Royal Commission, the Australian Government increased ASIC's budget and further expanded ASIC's enforcement powers. ASIC's total resources increased from \$607 million in 2016–17 to \$861 million in 2021–22.⁴ Over the same period, the number of ASIC staff increased 19 per cent from 1640 to 1947.⁵ Additionally, ASIC has undergone a number of organisational restructures.

¹ See, Australian Securities and Investments Commission (ASIC), *Submission 1*, p. 11.

² See, Australian Trade and Investment Commission, *Why Australia: Benchmark Report 2023*, August 2023, p. 12. Note, the figure given for the value of Australia's managed funds was as at the December 2023 quarter and sourced from Australian Bureau of Statistics, 'Managed Funds, Australia', 7 March 2024; the figure given for the value of Australia's retirement savings was at March 2024 and sourced from Australian Prudential Regulation Authority, 'APRA releases superannuation statistics for March 2024', *Media release*, 28 May 2024.

³ See, James Shipton, Chair, ASIC, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry hearing transcript*, 22 November 2018, p. 6907.

⁴ See, ASIC, *Annual report 2016–2017*, October 2017, p. 181; ASIC, *Annual report 2021–22*, October 2022, p. 236, as referenced by Financial Services Council, *Submission 7*, p. 19.

⁵ See, ASIC, *Annual report 2016–17*, October 2017, p. 183; ASIC, *Annual report, 2021–22*, October 2022, p. 218.

However, evidence to the inquiry suggests that the increases to ASIC's resourcing have not resulted in a marked uplift in ASIC's performance. As such, it is difficult to accept ASIC's contention that some of its functions would not be better administered by other entities.⁶ Rather, it appears that the scope and complexity of ASIC's remit has outgrown its abilities and it is time to consider other models, or even new entities, to administer these parts of Australia's law. The committee has made strong recommendations in this regard.

No further action—ASIC's approach to investigation

Australia's system of corporate and financial regulation places ASIC in a leading position to investigate alleged breaches of corporate law. Each year, ASIC receives thousands of reports of alleged misconduct, including voluntary reports from the public and mandatory reports from industry.

In the decade to 2021–22, ASIC received some 236 000 reports of alleged misconduct.⁷ Despite misconduct reports often containing serious allegations of unlawful conduct, ASIC took no further action in 66 per cent of the reports received from the public in 2021–22.⁸ Further, most statutory reports that insolvency practitioners submit to ASIC also go without investigation. ASIC generally responds to these statutory reports with an automated, 'no further action' email within 40 seconds of the report being made.⁹ This is particularly concerning given that the number of companies entering administration in Australia are at record high levels. Australians lose billions of dollars each year when insolvent companies fail to pay their creditors.

On the basis of evidence received in this inquiry, ASIC appears reluctant or unwilling to commence investigations. By not taking a proactive approach to investigation, ASIC lets many reports of misconduct go without substantive review. In some cases, ASIC's lack of early regulatory intervention prolonged the harm of misconduct to consumers and investors. This harm is compounded by the information asymmetry that is created when ASIC receives information on potential misconduct but consumers and investors remain unaware of the potential risks. Unfortunately, this was seen in submissions received from victims of the Ponzi scheme operated by Courtenay House, who collectively lost \$180 million.

Only a fraction of the matters reported to ASIC proceed to formal investigation. For example, in the last three financial years, ASIC commenced an average of 117 investigations per year.¹⁰ Evidence to the inquiry suggests that ASIC investigates around one per cent of misconduct reports. However, ASIC describes the focus on its

⁶ ASIC, *Supplementary submission 1.5*, p. 29.

⁷ See, ASIC, *Submission 1*, p. 49.

⁸ ASIC, *Annual report 2022–23*, October 2023, pp. 207–208.

⁹ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 2.

¹⁰ See, ASIC, *Supplementary Submission 1.5*, p. 51.

low rate of misconduct reports it investigates as ‘oversimplified and superficial’ and, further, states it is ‘not a complaint handling body’.¹¹

When ASIC does investigate, evidence provided to the inquiry suggests that the process can be marred by delay and inefficiency. The committee heard instances where investigations took inordinately long to finalise, sometimes even years. In other cases, ASIC failed to follow up information from key individuals, lacked mechanisms to share information between internal teams and even appears to have lost information.

ASIC’s approach to enforcement

ASIC has substantial powers to enforce corporate law. Nonetheless, only a small proportion of alleged misconduct reported to ASIC results in enforcement action.

Many submitters and witnesses during the inquiry raised concerns regarding ASIC’s lack of action to enforce the law. Such underenforcement of Australian corporations law can be seen in ASIC’s low rates of enforcement action, a reliance on relatively few civil and criminal prosecution mechanisms, penalties that appear weak compared to the severity of the offending and delayed prosecution of offences.

ASIC litigates relatively few matters through the courts, having initiated just 75 new civil actions and 52 new criminal actions in 2021–22.¹² ASIC refers most serious cases for prosecution to the Commonwealth Department of Prosecutions (CDPP), however ASIC’s referrals to the CDPP are in decline too. In 2022–23, ASIC made 41 referrals to the CDPP, down from 86 referrals made in 2018–19.¹³

ASIC’s enforcement actions in response to the now-defunct Dixon Advisory and Superannuation Services Limited (Dixon) are illustrative of ASIC’s enforcement woes. In September 2020, ASIC commenced civil proceedings against Dixon for, among other things, significant failures to act in its clients’ best interests. It took ASIC two years to settle its case against Dixon, and the company was penalised \$7.2 million. However, ASIC has said this fine is unlikely to ever be paid. Moreover, no criminal charges have been brought in relation to Dixon, despite total claims in the case exceeding \$386 million. In September 2023, three years after its initial enforcement action, ASIC brought civil proceedings against a former director of Dixon for alleged breaches of directors’ duties. This trial had its first hearing on 17 June 2024 and is ongoing.

As a comparison, the enforcement action taken in the United States against Samuel Bankman-Fried—for securities fraud that led to the collapse of his USD \$32 billion crypto trading firm, FTX—took a year-and-a-half and resulted in a 25-year prison sentence.

¹¹ See, ASIC, answers to written questions on notice set 29, 28 June 2023 (received 7 August 2023); ASIC, *Supplementary submission 1.5*, p. 5.

¹² ASIC, *Submission 1*, pp. 57–58.

¹³ Commonwealth Director of Public Prosecutions, answers to written questions on notice set 2, 6 September 2023 (received 6 October 2023), p. [2].

Following the Royal Commission, ASIC sought to improve its enforcement outcomes by adopting the so-called ‘why not litigate?’ approach.¹⁴ Two years later during the COVID-19 pandemic, ASIC set aside the ‘why not litigate?’ approach in favour of a new approach called ‘Express Investigation’. This ‘lighter’ approach focused on ASIC’s early engagement with entities and prioritised ‘cooperation’.¹⁵ ASIC dismissed concerns about the lighter approach, stating the ‘critical question’ for ASIC was whether it litigates the ‘right matters’ and takes ‘full advantage of the full range of enforcement and regulatory tools’ available to it.¹⁶

However, evidence suggests that ASIC is not pursuing enough of the ‘right matters’, nor is it using its full suite of enforcement tools. For example, in May 2024, ASIC announced it was protecting ‘small business by disqualifying four directors for failures relating to the management of small proprietary companies’.¹⁷ Each of the disqualifications applied by ASIC appears to be manifestly inadequate. One director was involved in the failure of eight small companies—which owed over \$33 million to unsecured creditors, including nearly \$14 million to the Australian Taxation Office—and was disqualified from managing corporations for just four years. Another director was disqualified for two years, despite being involved in the failure of four companies that owed \$4.9 million to over 50 creditors.¹⁸ ASIC has the power to disqualify directors for a maximum period of five years, but ASIC appears reluctant to use these powers to their full effect despite the extensive harm that poor conduct has on consumers and creditors.

Furthermore, ASIC’s approach to strategic regulation is undermined by its inconsistent approach to enforcement actions. For instance, on the same day that ASIC announced that Australians need better hardship support from their lenders,¹⁹ reports emerged that ASIC failed to take basic action to help protect Australians from a major international cryptocurrency scam. Reports allege that ASIC received information from German law enforcement on over 34 000 Australians who had lost over

¹⁴ See, Sean Hughes, Commissioner, ASIC, ‘ASIC’s approach to enforcement after the Royal Commission’, *Speech*, 2 September 2019.

¹⁵ Karen Chester, Deputy Chair, ‘Regulation for recovery: when pilots become enduring practice’, *Speech*, 10 March 2021.

¹⁶ Mr Joseph Longo, Chair, ASIC, *House of Representatives Standing Committee on Economics Hansard*, 10 September 2021, p. 29.

¹⁷ See, ASIC, ‘ASIC protects small business by disqualifying four directors for failures relating to the management of small proprietary companies’, *Media release*, 1 May 2024.

¹⁸ See, ASIC, ‘ASIC protects small business by disqualifying four directors for failures relating to the management of small proprietary companies’, *Media release*, 1 May 2024.

¹⁹ See, ASIC, ‘ASIC report: Australians need better hardship support from their lenders’, *Media release*, 20 May 2024.

\$200 million to the scam, including the victims' contact details.²⁰ However, ASIC did not contact the victims despite there being a 'serious risk' that they could lose more money, nor did ASIC update an investor alert list to warn Australians about the scam.²¹ ASIC has refuted elements of the reporting but confirmed it did not seek to contact the Australian victims.²²

Redressing the underenforcement of corporate law in Australia should be a national priority. If those who seek to break the law do not fear that they will be held to account for their actions, then there is a high risk that offending will occur. Without significant improvements to ASIC's enforcement approach, the harm to Australians from corporate misconduct can be expected to continue.

Culture starts from the top—the need for better governance

ASIC's governance is vital to ensuring that it is an effective and respected regulator.

ASIC's leadership, and the systems used to support executive decision-making, need to demonstrate integrity and focus. This is particularly true of the ASIC commissioner structure, comprised of commissioners and led by the Chair, which exercises executive and non-executive functions that guide ASIC's strategic direction, operations and culture.

Yet, in recent years ASIC has been inwardly focused and distracted from its core regulatory functions by well-publicised shortcomings in its governance arrangements. These issues have affected ASIC's leadership and undoubtedly damaged ASIC's standing in the community. While there have been some efforts to reform ASIC's leadership structure, these changes do not appear to have altered ASIC's governance arrangements in a way that would substantively enhance ASIC's culture to ensure that similar distractions are not repeated in future.

At present, ASIC commissioners are appointed by the Governor-General, on the nomination of the government, as independent statutory officers under section 9 of the *Australian Securities and Investments Commission Act 2001*. While ASIC states that commissioners are subject to the ASIC Code of Conduct, there are no sanctions that can be imposed on a commissioner if they breach the code. Indeed, the only sanction that applies to commissioners is termination of their appointment by the Governor-General.²³

This high threshold for sanctioning commissioners means that any underperformance is unlikely to be dealt with internally. In serious cases, this has been shown to affect the administration of ASIC. It also contributes to a culture whereby ASIC believes it is

²⁰ See, David Murray, '[Scams Australia: Aussies 'not alerted' to massive fraud network](#)', *The Australian*, 20 May 2024.

²¹ See, David Murray, '[ASIC's scam alert list silent after 34,000 ripped off](#)', *The Australian*, 21 May 2024.

²² Ms Sarah Court, Deputy Chair, ASIC, *Senate Economics Legislation Committee Hansard*, 4 June 2024.

²³ See, ASIC, answer to written question on notice [Set 65], asked on 22 October 2023 (received 22 December 2023).

immune from accountability. This was evidenced during the inquiry when ASIC repeatedly declined to provide requested documentation, and failed to provide upfront explanations as to why it would not provide this information.

While ASIC may be independent of government, it is still accountable to the Australian Parliament. Given the significant functions and powers exercised by ASIC, it is essential that strong accountability mechanisms apply to ASIC. However, parliamentary accountability is severely curtailed when ASIC withholds certain information from parliamentary oversight. Indeed, ASIC's engagement with the inquiry was characterised by its repudiation of concerns regarding its investigation and enforcement activities. ASIC's lack of accountability does not instil confidence that ASIC will be an effective agent of self-improvement and suggests that the Australian Government will need to take a greater role in leading reforms of the legislative settings which define ASIC's work.

Fit for the future—the need for regulatory reform

When ASIC underperforms, consumers and investors are too often left to deal with the harms of corporate misconduct. Persistent concerns raised about ASIC's approach to investigation and enforcement underscore the need for the change.

Thirty years on from ASIC's establishment, it is necessary to consider how corporate and financial regulation could be better served by refocusing ASIC's remit. Indeed, Australia's twin peaks model of financial regulation was never intended to operate with ASIC administering such an extensive set of responsibilities. To improve investigation and enforcement outcomes, a new framework is needed to recognise that it is impossible for ASIC to administer its exceedingly broad remit to the high standard expected by Australians.

There are several options to focus ASIC's remit, including civil enforcement functions and prosecutions being administered by entities separate to ASIC. Additionally, dedicated responsibility for consumer protection in financial services could be administered by an agency focussed on the retail market.

These options to focus ASIC's remit are a substantial opportunity to step away from the failed regulatory experiment of ASIC as a 'do everything' corporate regulator. Australia's system of corporate and financial regulation could be much improved by assigning key regulatory functions, which are otherwise well designed, to special purpose bodies with the capacity to exercise those functions for maximum public benefit. Such outcomes are not being achieved under Australia's current system with ASIC as a lone, capacity constrained, corporate regulator.

Further, ASIC's approach to investigation and enforcement needs a wholesale reimagining. ASIC needs a structural shift from relying on its underwhelming enforcement response (for which it is most criticised) to more effective detection methods and prevention activities. Indeed, ASIC needs to take its role as a corporate gatekeeper more seriously. This should involve ASIC prioritising resources for front-end functions, such as company registration, market monitoring (including

intelligence gathering), compliance requirements (such as product design) and improving director requirements.

Further, ASIC's handling of misconduct reports needs a radical cultural shift. When ASIC seemingly views these reports as complaints to be managed, it completely overlooks the strategic opportunity to use these reports to identify misconduct at an early stage and take appropriate enforcement action. ASIC should commit significantly more resources to efficiently harvest the information in misconduct reports and routinely use information gathering powers to allow it to form a preliminary view of whether misconduct has likely occurred. Further, ASIC's decision-making criteria for progressing reports to formal investigation needs to be reviewed with a view to limiting the wide range of circumstances which, at present, lead ASIC to assess the majority of misconduct reports as requiring no further action. Reforms in ASIC's approach to investigation must also extend to better utilising information on alleged misconduct contained within statutory reports from registered liquidators.

No one expects ASIC to investigate all the reports it receives, or to get it right 100 per cent of the time. However, at present, ASIC does not appear to even be trying to improve its handling of misconduct reports.

When misconduct does occur, ASIC's enforcement response needs to be unquestionably robust. ASIC has extensive powers to enforce corporate law, but ASIC routinely underutilises those powers. As a result, enforcement outcomes are frequently mild compared to the severity of corporate offending and the harm that poor behaviour results in. While litigation is resource intensive, it is the most powerful tool in ASIC's arsenal to hold offenders to account and acts as a strong deterrent to other potential offenders. To that end, the Australian Government needs to appropriately resource ASIC, or an external enforcement body, to undertake a greater amount of litigation which utilises a wider range of civil and criminal penalty provisions. To reduce length and complexity of corporate litigation, the Australian Government should prioritise implementing the recommendations of the Australian Law Reform Commission's Final Report, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*. Additionally, ASIC's enforcement outcomes need ongoing oversight, which could be undertaken by the Financial Regulator Assessment Authority as part of its assessment and reports on ASIC's effectiveness.

Clearly, exercising ASIC's responsibilities needs to be done better and it needs to be done differently. Continually assigning ASIC more duties and powers will simply deliver more of the same result: an overburdened and monolithic regulator that fails to meet expectations. Addressing the challenges faced by ASIC, and the broader challenges in Australia's financial system, requires strong action from the Australian Government. It also requires ASIC's leadership to critically reflect on the evidence of ASIC's underperformance and to use that as opportunity for improvement.

List of recommendations

Recommendation 1

8.7 The committee recommends that the Australian Government should recognise that the Australian Securities and Investments Commission has comprehensively failed to fulfil its regulatory remit.

Recommendation 2

8.8 The committee recommends that the Australian Government should recognise, based on the finding of recommendation one, that the Australian Securities and Investments Commission's regulatory failures call into question whether its remit is too broad for it to be an effective and efficient agency, and the government should strongly consider separating its functions between a companies regulator and a separate financial conduct authority.

Recommendation 3

8.13 The committee recommends that the Australian Government urgently address the shortcomings in Australia's system for handling reports of alleged corporate misconduct. In doing so, the committee recommends that the Australian Government make it a legislative requirement of the Australian Securities and Investments Commission or future regulatory authorities to investigate reports of alleged misconduct at an appropriate rate. Further, the committee recommends that:

- the regulator develop consistent standards to transparently report data to the public on the handling of reports of alleged misconduct; and
- the regulator establish service standards to require that people who submit reports of alleged misconduct are provided with clear, detailed and timely information on the tangible actions taken in response to their report.

Recommendation 4

8.17 The committee recommends that the statement of expectations which is currently issued for the Australian Securities and Investments Commission:

- contain, among other things, expectations and priorities relating to transparency; and
- be provided in draft form to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report.

Recommendation 5

8.18 The committee recommends that the Australian Government make it a legislated regulatory objective of the Australian Securities and Investments Commission or other regulatory authorities to establish and maintain a high-level of transparency of investigation and enforcement outcomes. Additionally, the committee recommends that these transparency objectives be supported by:

- establishing a searchable public register of civil or criminal outcomes arising from reports of alleged misconduct received and the outcome of the proposed regulatory authorities' handling those reports, subject to appropriate thresholds, similar to the approach taken by the US Consumer Financial Protection Bureau; and
- developing a consistent, long-term public reporting framework that quantifies and assesses the proposed regulatory authorities' performance and capacity to undertake its regulatory functions of investigating and enforcing breaches of corporations law.

Recommendation 6

8.19 The committee recommends that the Australian Government investigate amending the whistleblower protection provisions in the *Corporations Act 2001* to include pecuniary incentives and compensation for whistleblowers who make a substantiated disclosure. The committee recommends that the pecuniary provisions be examined with a view to:

- establishing a financial incentive for whistleblowers to make a disclosure in circumstances where addressing the misconduct would result in a significant public benefit; and
- establishing a financial compensation mechanism for whistleblowers who are unable to make a disclosure in the public benefit without experiencing significant personal detriment, such as loss of career prospects.

Recommendation 7

8.20 The committee recommends that regulatory authorities adopt an enforcement approach which prioritises the litigation of all serious instances of suspected breaches of corporations law, particularly in cases where consumer losses arise, or could have potentially arisen, from such breaches.

Recommendation 8

8.23 The committee recommends that the Australian Government review a new governance structure for the Australian Securities and Investments Commission or any new regulatory bodies. This structure would have a Chair or Chief Executive Officer as sole statutory appointee and accountable

authority and the appropriateness of the commission structure entirely should be explored.

Recommendation 9

8.24 The committee recommends that the Australian Government should ensure that a legislated code of conduct be included as part of the governing documents of ASIC or any alternative regulatory bodies, and that the Chair and any other statutory appointees can be sanctioned for workplace misconduct that is found to have breached this code. Further, the committee recommends that the Australian Government establish a mechanism by which an alleged breach of this code of conduct by a statutory appointee can be examined by an appropriately independent and qualified panel.

Recommendation 10

8.25 The committee recommends that the Australian Government reverse its decision, announced in the 2023–24 Budget, to reduce the frequency of Financial Regulator Assessment Authority (FRAA) reviews from every two years to every five years. Further, the committee recommends that the FRAA undertake an inquiry into the effectiveness of the oversight mechanisms of corporate regulators.

Recommendation 11

8.26 The committee recommends that the Australian Government reassess the funding arrangements for the Australian Securities and Investments Commission or any alternative regulatory authority so that:

- a greater level of funding can be directly resourced with the proceeds of regulatory fines—including late fees, court fines, penalties and infringement notices;
- all reasonable steps are taken to ensure levies charged on industry subsectors under the Industry Funding Model are reduced commensurate with increased resourcing to the regulator through the proceeds of fines; and
- it is ensured that regulatory authorities are accountable for the level of resourcing linked to cost-recovered activity, and face obligations to rationalise surplus resourcing to reduce costs on the industry subsector participants.

Chapter 1

Introduction

- 1.1 On 27 October 2022, the Senate referred an inquiry into the Australian Securities and Investments Commission (ASIC) to the Senate Economics References Committee (committee) for inquiry and report by the last sitting day in June 2024.¹
- 1.2 Under the terms of reference, the committee was required to examine the capacity and capability of ASIC to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct, with particular reference to:
- (a) the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action;
 - (b) the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;
 - (c) whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement;
 - (d) the range and use of various tools and their effectiveness in contributing to good market outcomes;
 - (e) the offences from which penalties can be considered and the nature of liability in these offences;
 - (f) the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner;
 - (g) opportunities to reduce duplicative regulation; and
 - (h) any other related matters.²
- 1.3 On 24 June 2024, the Senate granted the committee an extension of time to report to 3 July 2024.³

Conduct of the inquiry

- 1.4 The committee advertised the inquiry on its website and invited written submissions by 3 February 2023. The committee also wrote directly to relevant stakeholders to invite them to make a submission. Due to the high level of interest in the inquiry, the committee extended the due date for submissions to 28 February 2023.
- 1.5 The committee received 198 submissions and 12 supplementary submissions, as well as additional information and answers to questions on notice, as listed at

¹ *Journals of the Senate*, No. 18, 27 October 2022, pp. 528–529.

² *Journals of the Senate*, No. 18, 27 October 2022, pp. 528–529.

³ *Journals of the Senate*, No. 112, 24 June 2024, p. 3441.

Appendix 1. The committee also received correspondence from individuals who raised concerns about ASIC’s performance.

Public hearings

1.6 The committee held five public hearings for the inquiry, as noted below.

Table 1.1 Public hearings

Date	Location
23 June 2023	Parliament House, Canberra
23 August 2023	Parliament House, Canberra
24 August 2023	Parliament House, Canberra
4 October 2023	Parliament House, Canberra
1 November 2023	Parliament House, Canberra

1.7 A list of the witnesses that appeared at the hearings is listed at **Appendix 2**.⁴

1.8 ASIC gave evidence at the committee’s hearing on 23 June 2023. ASIC also gave evidence at Senate estimates hearings held during the course of the inquiry and relevant evidence from those hearings has been incorporated in this report.

Interim report

1.9 On 20 June 2023, the committee tabled an interim report in relation to 13 public interest immunity claims that ASIC made over information requested by the committee during the inquiry.⁵

1.10 The committee accepted two of ASIC’s public interest immunity claims, as the requested information related to ongoing ASIC investigations.⁶ However, the committee rejected the remaining eleven claims as ASIC did not provide sufficient evidence of the harms that would arise from providing the information requested by the committee.⁷ As a result, the Senate ordered ASIC to provide the information from the public interest immunity claims rejected by the committee.⁸

1.11 The committee’s concerns regarding ASIC’s engagement with the inquiry are discussed in further detail in Chapter 2.

⁴ Please note that the Hansard transcripts for the hearings are published on the inquiry webpage at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASICInvestigation

⁵ *Journals of the Senate*, No. 54, 20 June 2023, pp. 1557–1558.

⁶ Senate Economics References Committee, *Interim Report: Public interest immunity claims*, June 2023, pp. 1–2, [11].

⁷ Senate Economics References Committee, *Interim Report: Public interest immunity claims*, June 2023, pp. 1, [15–16], [19–20].

⁸ *Journals of the Senate*, No. 54, 20 June 2023, pp. 1557–1558.

Acknowledgements

- 1.12 The committee thanks the individuals and organisations who made written submissions and gave evidence at the committee's public hearings.
- 1.13 In particular, the committee thanks the individuals who made submissions which shared their personal experience with corporate misconduct. In many cases, the committee heard from people who lost significant sums of money and have experienced severe financial hardship as a result. As a result of their financial loss, some submitters have experienced significant adverse impacts on their health, social well-being and retirement outcomes.
- 1.14 The committee also received many submissions from individuals who raised concerns about ASIC's handling of their cases. This information was considered by the committee and helped inform the focus of this report.

Scope and structure of the report

- 1.15 The evidence received by the committee covered a range of issues regarding ASIC's performance as Australia's corporate regulator. The report centres on the key themes emerging from that evidence.
- 1.16 The report contains eight chapters:
- **Chapter 1**—outlines the scope and conduct of the inquiry;
 - **Chapter 2**—considers ASIC's engagement with the committee, including the public interest immunity claims made by ASIC;
 - **Chapter 3**—provides an overview of ASIC's role in regulating Australia's corporate and financial system, with a particular focus on ASIC's remit;
 - **Chapter 4**—examines evidence regarding ASIC's approach to investigating corporate misconduct, with a particular focus on ASIC's handling of reports of alleged misconduct;
 - **Chapter 5**—examines evidence regarding ASIC's approach to enforcement, particularly whether current enforcement outcomes are appropriate;
 - **Chapter 6**—considers ASIC's resourcing, particularly whether its industry funding model is fair and effective for regulated entities;
 - **Chapter 7**—considers issues related to the governance of ASIC, particularly concerns regarding ASIC's organisational culture; and
 - **Chapter 8**—provides the committee's conclusions and recommendations.
- 1.17 Further information relevant to the committee's inquiry is contained in the following appendices:
- overview of the legislation administered by ASIC (**Appendix 4**); and
 - past reviews which have considered ASIC's performance (**Appendix 5**).

Chapter 2

Engagement and conduct

2.1 This chapter discusses the progress of the inquiry in more depth, with a particular focus on ASIC's interactions with the committee. This chapter also discusses ASIC's attempts to influence the inquiry process from the outset, ASIC's reticence to engage with the committee, the interim report of the inquiry, as well as other Senate orders to produce documents.

Initial stages of inquiry

2.2 As stated in Chapter 1, the inquiry was referred on 27 October 2022. From the outset, the inquiry attracted significant community interest and a high volume of submissions, correspondence, and other documents from the public, many of them highlighting significant community concerns about ASIC's investigation and enforcement role in relation to the financial sector.

2.3 On 19 July 2023, ASIC published documents released under freedom of information (FOI) processes which showed the reaction of senior officials of ASIC at the time of the inquiry's commencement.

2.4 Emails revealed through FOI showed the Chair of ASIC, Mr Joseph Longo, expressing concern at the terms of reference proposed for the inquiry:

This is extraordinary. What can be done to narrow the breadth of the terms?
Can the PJC [Parliamentary Joint Committee on Corporations and Financial Services] do this??¹

2.5 Later communications showed other senior ASIC executive members discussing the concurrent inquiry started by the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS), and 'need[ing] to tailer [sic] a facts and figures brief for the months ahead.'²

¹ Australian Securities and Investments Commission, *Freedom of Information disclosure 090-2023 document no. 25*, July 2023, available at <https://asic.gov.au/about-asic/freedom-of-information-foi/foi-disclosure-log/foi-asic-disclosure-log-table-2022-current/> (accessed 27 March 2024).

² Australian Securities and Investments Commission, *Freedom of Information disclosure 090-2023 document no. 34*, July 2023, available at <https://asic.gov.au/about-asic/freedom-of-information-foi/foi-disclosure-log/foi-asic-disclosure-log-table-2022-current/> (accessed 27 March 2024).

- 2.6 Most concerningly, these FOI documents revealed communications between ASIC officials suggesting ‘we arrange a dorothy dixer³ to make sure it’s up front and early as loudly as possible’ during the early stages of the inquiry.⁴
- 2.7 When questioned about this incident, Mr Chris Savundra, General Counsel at ASIC, stated that this communication was ‘a throwaway line’ and it was not ASIC’s practice to approach parliamentarians to ask questions in parliamentary hearings.⁵

Concurrent inquiry

- 2.8 On the same day as the committee’s inquiry into ASIC was referred by the Senate, the PJCCFS commenced its own inquiry into ASIC, called the *Inquiry into ASIC’s capacity and capability to respond to reports of alleged misconduct*. This inquiry had almost identical terms of reference as the inquiry commenced by this committee.⁶
- 2.9 To date, the PJCCFS has not published any submissions, correspondence or additional information, has not held any public hearings, or published anything apart from a media release announcing the inquiry.

Public interest immunity claims and interim report

- 2.10 In the initial stages of the inquiry, members of the committee provided written questions on notice to ASIC about a variety of completed and ongoing investigation and enforcement matters. While providing answers to the majority of these questions, ASIC also made 13 public interest immunity claims, refusing to answer the relevant questions on notice. The committee rejected 11 of those 13 claims of public interest immunity.
- 2.11 Broadly speaking, the questions that ASIC made claims of public interest immunity against fell into three categories:
- questions relating to ASIC’s engagement with the Parliament;
 - questions relating to ASIC investigations; and

³ A ‘dorothy dixer’ is a political term referring to government backbenchers asking questions to Ministers during Question Time designed to highlight government achievements and policies rather than scrutinising the Government’s work. Parliamentary Education Office, *What is a Dorothy Dix question? And what is she doing in Parliament?* December 2023, <https://peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/what-is-a-dorothy-dix-question-and-what-is-she-doing-in-parliament> (accessed 27 March 2024).

⁴ Senator Andrew Bragg, Chair, Senate Economics References Committee, *Committee Hansard*, 23 June 2024, pp. 8–9.

⁵ Mr Chris Savundra, General Counsel, ASIC, *Committee Hansard*, 23 June 2024, p. 9.

⁶ Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS), *Inquiry into ASIC’s Capacity and Capability to respond to reports of alleged misconduct, Terms of Reference*, October 2022 (accessed 27 March 2024).

- questions relating to ASIC's discussions with the Minister.
- 2.12 An in-depth examination of these various questions and the grounds on which ASIC claimed public interest immunity was provided in the committee's interim report.⁷ For ease of reference, a brief discussion of these claims and the committee's responses to them is reproduced below.
- 2.13 In order for a public interest immunity claim made by a government agency to be successful the agency in question must state the grounds on which the claim is made and include an explanation of the harm which would be caused if the information requested was released. There are several grounds which have previously been accepted by the Senate for public interest immunity claims (examples include: prejudice to current legal proceedings or law enforcement investigations, unreasonable invasion of privacy, and disclosure of cabinet deliberations).⁸

Questions relating to ASIC's engagement with the Parliament

- 2.14 The committee asked questions on notice relating to ASIC's engagement with the Parliament prior to the commencement of the inquiry, as well as for the production of correspondence relating to the same.
- 2.15 ASIC refused to comply with this request and after a chain of correspondence between the committee and ASIC, Mr Joseph Longo (Chair of ASIC) made a public interest immunity claim relating to these questions on the grounds that providing the requested information would constitute an unreasonable invasion of privacy for the members of Parliament that had communicated with ASIC prior to the commencement of the inquiry.
- 2.16 In the report the committee expressed concerns about ASIC's conduct prior to the commencement of the inquiry, in particular the question of whether ASIC sought to influence the terms of reference of the inquiry prior to its commencement (see earlier discussion in this chapter), but did not make a recommendation in regard to the public interest immunity claims made on these questions on notice.

⁷ This report is available at the following link:
www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASICinvestigation/Interim_Report

⁸ Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 662.

2.17 The committee concluded that the Senate Standing Committee on Privileges would be a better venue for consideration of these concerns and left it open to an individual Senator to make a referral regarding these concerns.⁹

Questions relating to ASIC's investigations

2.18 In late 2022, the committee placed a number of questions on notice with ASIC on various investigations, in particular investigations into Nuix Ltd, ALS Limited, and a superannuation insider trading investigation. Subsequent questions also asked about ASIC's investigation into Magnis Technologies Ltd. Mr Longo made public interest immunity claims in relation to all these questions.

2.19 After correspondence between ASIC and the committee, the committee decided to accept two of the public interest immunity claims on the basis that the matters referred to in the questions were ongoing investigations. In the interim report, the committee considered ASIC's other grounds for public interest immunity claims.

2.20 In brief, these claims and the committee's reasons for rejecting them were:

- that ASIC releasing the information requested by the committee would prejudice legal proceedings and law enforcement investigations and methodologies. The committee noted that the claims made by ASIC for these questions were not clear and did not provide a specific harm which would occur if the information was released;
- that ASIC releasing this information would be an unreasonable invasion of privacy for third parties. The committee rejected this claim on the grounds that a specific harm was not stated by ASIC and there had been no suggestion on how to mitigate this harm; and
- that release of the information would impugn legal professional privilege between ASIC and its lawyers. The committee noted that legal professional privilege has never been accepted as a valid claim for public interest immunity.

2.21 As noted above, the committee rejected all these grounds for claiming public interest immunity and made a recommendation to the Senate ordering the production of the documents which had been requested by through the original questions on notice.¹⁰

⁹ Senate Standing Economics References Committee (SERC), *Australian Securities and Investments Commission investigation and enforcement Interim Report: Public interest immunity claims*, June 2023, pp. 5–8.

¹⁰ SERC, *Australian Securities and Investments Commission investigation and enforcement Interim Report: Public interest immunity claims*, June 2023, pp. 8–12.

Questions relating to ASIC's discussions with the Minister

- 2.22 ASIC also made a public interest immunity claim against a question asked by the committee relating to its correspondence with the Minister in relation to the PII claim regarding superannuation insider trading.
- 2.23 The grounds for ASIC's claim were two-fold:
- (a) that the communications/correspondence asked for related to ASIC's internal deliberations and advice to the Minister in response to the committee's questions, and
 - (b) that providing the requested information would undermine another accepted PII claim that ASIC had with the Parliamentary Joint Committee on Corporations and Financial Services.
- 2.24 The committee rejected both grounds for claiming public interest immunity. It stated that ASIC's claim that advice to the Minister gave rise to a public interest immunity claim did not exhibit sufficient harm to the public interest.
- 2.25 The committee stated in relation to the second ground:
- The decision by one committee to grant a public interest immunity claim in relation to a request for information does not bind another committee to make the same decision. Committee are made up of individual senators, and their deliberations and decisions will be unique to the considerations of that committee at that time.¹¹
- 2.26 The committee made a recommendation to the Senate ordering the production of documents which had been requested through the original questions on notice.¹²

Orders for the production of documents

- 2.27 The committee tabled the interim report on 20 June 2023 and subsequently the Senate ordered the production of documents as per the recommendations of the report. The Treasurer was ordered to provide the requested documents to the committee by 12.00 pm, 18 July 2023.
- 2.28 By 18 July 2023, the committee received no response from the Treasurer. On 19 July 2023, the committee tabled a Report on compliance with orders for the production of documents in the Senate.¹³

¹¹ SERC, *Australian Securities and Investments Commission investigation and enforcement interim report: Public interest immunity claims*, June 2023, p. 19.

¹² SERC, *Australian Securities and Investments Commission investigation and enforcement Interim Report: Public interest immunity claims*, June 2023, pp. 17–19.

¹³ SERC, *Australian Securities and Investments Commission investigation and enforcement: Report on compliance with orders for the production of documents*, July 2023, available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASICinvestigation/Report_on_compliance_with_orders_for_the_production_of_documents.

- 2.29 On the same day, the Minister representing the Treasurer, Senator the Hon Katy Gallagher (Minister for Finance), tabled in the Senate a letter in response to the order to produce documents. This letter, from the Hon Steven Jones MP, Assistant Treasurer and Minister for Financial Services, stated that the Government was not in possession of the documents which were requested by the original questions on notice and as such could not provide them to the committee.¹⁴
- 2.30 The letter also recommended that the committee accept an offer made by ASIC in previous correspondence to provide the information requested by the committee through an *in camera* hearing, as well as stating:
- The Australian Securities and Investments Commission (ASIC), as an independent regulator, only shares confidential information relating to investigations and enforcement matters with the Government in the very rare event that it is necessary and appropriate to do so. In the usual course of things, the Government does not intervene in ASIC's investigation and enforcement decisions. Indeed, as you would be aware, under section 12 of the ASIC Act the Government is unable to give ASIC any direction about particular cases, so the circumstances in which it is appropriate for the Government to request this kind of information are extremely uncommon.¹⁵
- 2.31 On 28 July 2023, the committee tabled a further report on compliance with the orders for the production of documents, stating that it had considered the above response and maintained its view that the orders had not been complied with.¹⁶
- 2.32 On 2 August 2023, the Minister representing the Treasurer, Senator the Hon Katy Gallagher, provided the response required by the orders to produce documents. This response largely reiterated points made in the letter sent by the Minister on 19 July 2023.¹⁷
- 2.33 This completed the formal processes relating to the orders to produce documents made in the interim report.

¹⁴ Senator the Hon Katy Gallagher, Minister for Finance, correspondence to President of the Senate the Hon Sue Lines tabled on 20 July 2024, p. 1, available at www.aph.gov.au/Parliamentary_Business/Tabled_Documents/2846.

¹⁵ Senator the Hon Katy Gallagher, *Tabled document – order of 20 June 2023 relating to Economics References Committee – Australian Securities and Investments Commission investigation and enforcement – Interim report: Public interest immunity claims*, 19 July 2023, p. 2.

¹⁶ SERC, *Australian Securities and Investments Commission investigation and enforcement: Further report on compliance with orders for the production of documents*, July 2023, available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASICinvestigation/Further_Report_on_compliance_with_orders_for_the_production_of_documents.

¹⁷ Senator the Hon Katy Gallagher, Minister for Finance, *Senate Hansard*, 2 August 2023, pp. 3320–3321.

ASIC's response

2.34 Not long after the tabling of the interim report, the committee held its first public hearing for the inquiry. This hearing was held on 23 June 2023, with the only witnesses being representatives of ASIC.

2.35 At that hearing, ASIC Chair Mr Joseph Longo was adamant that ASIC was not attempting to obstruct the work of the committee:

There is absolutely no evidence to support that assertion. Nor is there any evidence to support the assertion that ASIC attempted to undermine and influence the process of the inquiry from the outset. ASIC is accountable to parliament. This inquiry is an important part of ASIC's oversight. ASIC is taking an open, constructive and cooperative approach to this inquiry.¹⁸

2.36 Mr Longo further pointed out that ASIC had provided a submission and answered over 100 questions on notice since the commencement of the inquiry. There were limitations on the information ASIC could provide to the committee, however, due to its position as a law enforcement agency and the possibility of adverse impacts which could arise from providing the case file information the committee had requested.¹⁹

2.37 When asked at the hearing about how the inquiry was to be conducted with such a limited response from ASIC, Mr Longo acknowledged the committee's frustrations but pointed out there had been many parliamentary investigations into ASIC and other law enforcement bodies in the past which had concluded without the requirement to see case files. Mr Longo said:

...the claims of public interest immunity and LPP [legal professional privilege]...are entirely orthodox and conventional approaches. It's extremely unusual for committees, certainly in a public context—by which I mean in a hearing that's available publicly, as opposed to privately or in camera—to request material that is the subject of public interest immunity or LPP...I'm disappointed that the committee is so disappointed with us, but the approach we're taking is quite orthodox. We're upholding governance and the rule of law. We're trying to be cooperative with the committee but show respect for these fundamental principles.²⁰

2.38 Mr Chris Savundra, ASIC's General Counsel, expanded on this, noting that parliamentary inquiries in the past have had largely positive feedback on ASIC's engagement with the committee process. He noted in particular the inquiry in 2011 into the collapse of Trio Capital, the 2013 inquiry into ASIC's performance, and the 2021-22 inquiry into the Sterling Income Trust, none of which required the public disclosure of ASIC's case files in order to complete their reviews. Mr Savundra repeated claims that ASIC was happy to meet with the committee

¹⁸ Mr Joseph Longo, Chair, ASIC, *Committee Hansard*, 23 June 2024, p. 1.

¹⁹ Mr Joseph Longo, Chair, ASIC, *Committee Hansard*, 23 June 2024, pp. 1–2.

²⁰ Mr Joseph Longo, Chair, ASIC, *Committee Hansard*, 23 June 2024, p. 8.

in a private or *in camera* setting in order to discuss the various case file matters which the committee had questioned it about.²¹

Orders for production of documents relating to ASIC governance

2.39 There have been several governance matters relating to the conduct of senior ASIC officials where, as part of the committee's inquiry, Senators have sought documents from both ASIC and Treasury in order to investigate those matters. These investigations have involved orders for the production of documents agreed to by the Senate. In order to group these together with other governance matters relating to ASIC, these will be dealt with in chapter 7 of this report.

ASIC supplementary submission and other correspondence

2.40 On 17 June 2024, the committee received a supplementary submission from ASIC. This document provided an overview of ASIC's views of its conduct throughout the inquiry, including a reiteration of its reasons for making various claims of public interest immunity and not providing other documents to the committee.

2.41 In this document, ASIC rejected the suggestion that it has been uncooperative with the inquiry process, providing a list of the assistance it has provided to the committee and reiterating its reasons and grounds for making public interest immunity claims:

For the reasons set out in our previous correspondence, we maintain our claims of public interest immunity and other objections that we have raised with the Committee. These claims were made not only to minimise the harm caused to ASIC's investigation and law enforcement processes, but also to prevent the revelation of confidential sources of information and information exposing third parties to unfair prejudice and damage to their reputation, privacy and other legitimate interests and the risk of action. ASIC is not aware of any evidence which supports the suggestion that in raising such objections that ASIC has done so with the intent of undermining or obfuscating the Inquiry.²²

2.42 A further development also involved written questions on notice asked to ASIC. These questions, originally asked in July 2023, had been outstanding for some time and requested copies of correspondence between ASIC and Treasury relating to the alleged conduct of Ms Karen Chester between January and June 2021 (this time period being when she was investigated for alleged misconduct²³).

2.43 ASIC provided its answers to these questions to the committee in June 2024 as well as the requested correspondence and a letter from ASIC's General Counsel.

²¹ Mr Chris Savundra, General Counsel, ASIC, *Committee Hansard*, 23 June 2023, p. 8.

²² ASIC, *Submission 1.6*, p. 4.

²³ For more information about this investigation please see Chapter 7 of this report.

The correspondence in question was heavily redacted. ASIC's letter explained it would not provide the information for the following reasons:

- (a) the extent of the Government's existing claims of public interest immunity over related material and ASIC's concern that the uncovering of such information will be inconsistent with the basis of those claims; and
- (b) redactions to the personal information of individuals including current and former officials of ASIC, ASIC's legal advisers, and Treasury.²⁴

2.44 On 28 June 2024, the committee wrote back to ASIC, accepting the redactions made on grounds 'b', but rejecting ASIC's reliance on the government's previous PII claims in grounds 'a'. The committee requested that the documents be provided to the committee without the redactions made on grounds 'a'.

Committee view

2.45 It is clear from the information presented in this chapter that there have been significant concerns with ASIC's approach to this inquiry from its outset.

2.46 Information gained through freedom of information documents has shown that ASIC has continually viewed the committee's inquiry as an adversarial process rather than one of information gathering and finding ways to improve ASIC's processes and outcomes.

2.47 Throughout this inquiry process, the committee has received significant interest from stakeholders and the public about ASIC's investigation and enforcement priorities, including significant amounts of submissions and correspondence.

2.48 The committee acknowledges that ASIC has made some attempts to engage with the inquiry through providing submissions, attending public hearings and answering questions on notice. However, there has also been significant resistance from ASIC to engage with the committee in a transparent manner, and even a resistance to the very idea that ASIC was not meeting community expectations or its mandate.

2.49 Nothing better exemplifies this than ASIC's refusal to provide the committee with information from closed investigations matters, a refusal examined in detail in the committee's Interim Report.

2.50 The lengthy correspondence and administrative efforts that occupied the committee's repose to these public interest immunity claims was a significant drain on the committee's and ASIC's resources. This process could have been avoided had ASIC provided the information requested in a timely manner.

2.51 ASIC's rejoinder to the committee's concerns about attempting to gain access to these closed case matters has continually been two-fold: that providing this information would harm ASIC's ongoing investigations, through both revealing

²⁴ Mr Chris Savundra, General Counsel, ASIC, correspondence received 19 June 2024, p. 2.

investigative techniques and potentially revealing the identity of confidential sources of information; and also by making offers to provide the committee with the requested information in either an *in camera* or private briefing.

- 2.52 With all fairness to ASIC, the committee is of the view that this is not sufficient. The committee recognises that many aspects of ASIC's investigative work is sensitive in nature, but one of the repeating themes of submissions from the community is frustration at ASIC's lack of transparency and accountability.
- 2.53 Adding to this, the concerns listed above were known to the Senate when the Interim Report and various Orders for the Production of Documents were before it, and members of the Senate still voted to order that these documents be provided to the committee. These orders were ignored by ASIC and continued to frustrate the committee's inquiry process. ASIC failed to provide information as ordered by the Senate and, in doing so, undermined the committee's task of inquiring into ASIC's performance.
- 2.54 Even more concerning is the fact that the interim report of this inquiry, the Orders to Produce Documents, and the numerous pieces of correspondence between ASIC and the committee have not seemed to have any effect on ASIC's attitude toward the scrutiny work being done by this committee. The most recent correspondence from ASIC, received in the final weeks before the finalisation of this inquiry, and slightly less than a year after the relevant questions on notice were asked, are evidence of this.
- 2.55 The committee recognises that many aspects of ASIC's investigative work are sensitive; however, it is clear from community sentiment that ASIC is viewed as a black box, where complaints and concerns are raised only to seemingly disappear.
- 2.56 Even more disappointing is the repetitive nature of these concerns. The 2013-14 inquiry completed by this committee, *Performance of the Australian Securities and Investments Commission*, specifically commented that ASIC 'needs to be a harsh critic of its own performance with the drive to identify and implement improvements'.²⁵
- 2.57 There is little evidence to be found for ASIC performing this kind of criticism of its own performance. The fact that many of the complaints and comments made to the committee by members of the community about ASIC's investigation and enforcement (discussed in more depth in chapters 4 and 5 of this report) are similar in nature to the concerns raised in that 2014 report show that this recommendation was not implemented by ASIC.

²⁵ Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. xx.

2.58 All of this undermines the committee's confidence in ASIC's ability to drive its own improvement.

Chapter 3

The current regulatory system

3.1 This chapter provides an overview of the role of the Australian Securities and Investments Commission (ASIC). In particular, the chapter outlines ASIC's mandate, investigation and enforcement powers, and organisational structure.

Introduction

3.2 ASIC is Australia's combined regulator for 'companies, financial markets, financial services organisations, professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit'.¹ ASIC is responsible for enforcing corporate law, including through litigation.

3.3 Since its establishment, ASIC's statutory mandate has grown substantially, and ASIC now has 'one of the broadest' mandates of comparable regulators globally.² ASIC regulates a wide range of entities which differ in number, size and risk profile. For example, in 2021–22 ASIC's regulated population included:

...24,036 unlisted public companies and 1,841 listed companies, 16,621 financial advisers, 6,288 Australian financial service (AFS) licensees, 4,720 credit licensees and 39,711 credit representatives, 420 responsible entities, 51 licensed domestic and overseas financial markets, 1,183 securities dealers, 115 retail OTC derivatives issuers, 646 registered liquidators and 90 superannuation trustees.³

3.4 ASIC has a wide range of functions, including to: register companies; license and monitor financial services and markets; undertake consumer protection activities; and enforce directors' duties. ASIC also seeks to detect, investigate and punish breaches of corporate law. Indeed, ASIC has significant enforcement powers, including to compulsorily gather information, limit financial services licensees' activities and commence civil and criminal proceedings.⁴

3.5 ASIC is established as an independent statutory authority under the *Australian Securities and Investments Commission Act 2001* (ASIC Act). ASIC is led by a Commission, comprised of the Chair and commissioners, who are responsible for the management and administration of ASIC.⁵

¹ See, Financial Regulator Assessment Authority (FRAA), *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 10.

² FRAA, *Effectiveness and capability review of ASIC*, July 2022, pp. 3, 18.

³ Australian Securities and Investments Commission (ASIC), *Submission 1*, p. 11.

⁴ ASIC, [ASIC's approach to enforcement](#), August 2023 (accessed 31 January 2024).

⁵ ASIC, [Our structure](#), April 2024 (accessed 2 May 2024).

ASIC's broad mandate

- 3.6 This section provides an overview of ASIC's broad mandate, including its regulatory functions, role in financial regulation and expanding responsibilities.
- 3.7 ASIC's mandate is formed by several acts which confer significant regulatory responsibilities on ASIC. For example, ASIC administers and enforces the:
- the ASIC Act;
 - the *Business Names Registration Act 2011*;
 - the *Corporations Act 2001* (Corporations Act);
 - the *Insurance Contracts Act 1984*; and
 - the *National Consumer Credit Protections Act 2009* (NCCP Act).⁶
- 3.8 Most of ASIC's work is performed under the Corporations Act.⁷ Further, ASIC partly administers six other Commonwealth acts.⁸ ASIC can also take enforcement action regarding suspected contraventions of state and territory laws in relation to certain corporate and financial matters.⁹
- 3.9 A recent review by the Australian Law Reform Commission found that the Corporations Act and the ASIC Act were 'incoherent' and 'maze-like'.¹⁰ Indeed, the Corporations Act runs to more than 4000 pages and 800 000 words (having doubled in length since 2001) and contains more than 950 powers to make delegated legislation.¹¹ Chapter 7 of the Corporations Act—which deals with financial products, services and markets—is 'particularly complex,' with a length equivalent to the tenth longest act of Parliament and subject to notional amendments that could be contained in one of more than 1400 regulations.¹²
- 3.10 The impact of Australia's highly complex corporations law on ASIC's regulatory functions is a key theme of this report.

⁶ ASIC, answer to written question on notice set 68, 2 November 2023 (received 22 December 2023).

⁷ ASIC, [Our role](#), 28 June 2023 (accessed 30 January 2023).

⁸ Other Commonwealth laws partly administered by ASIC include the: *Banking Act 1959*; *Life Insurance Act 1995*; *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*; *Retirement Savings Account Act 1993*; *Superannuation (Resolution of Complaints) Act 1993*; and the *Superannuation Industry (Supervision) Act 1993*. ASIC, answer to written question on notice set 68, 2 November 2023 (received 22 December 2023).

⁹ These matters pertain to the 'management or affairs of a body corporate or managed investment scheme, or involve fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products'. ASIC, answer to written question on notice, Set 68, 2 November 2023 (received 22 December 2023).

¹⁰ Australian Law Reform Commission (ALRC), *Confronting Complexity: Reforming corporations and financial services legislation (Confronting complexity)*, November 2023, pp. 50–51.

¹¹ ALRC, *Confronting complexity*, Report 141, November 2023, p. 55.

¹² ALRC, *Confronting complexity*, Report 141, November 2023, pp. 41, 53 and 55.

Functions and objectives

3.11 ASIC's functions and objectives are stipulated by the ASIC Act.

3.12 ASIC has the function of 'monitoring and promoting market integrity and consumer protection' in relation to the financial system and the payments system.¹³ ASIC describes its regulatory functions as follows:

- **financial services regulation**—ASIC licenses and monitors financial services businesses to ensure that they operate efficiently, honestly and fairly. These businesses typically deal in superannuation, managed funds, shares and company securities, derivatives and insurance;
- **consumer credit regulation**—ASIC licenses and regulates people and businesses engaging in consumer credit activities, including banks, credit unions, finance companies, and mortgage and finance brokers. ASIC ensures that licensees meet the standards set out in the NCCP Act; and
- **markets regulation**—ASIC assesses authorised financial markets compliance with their legal obligations to operate fairly, orderly and transparently. ASIC supervises trading on licensed equity, derivatives and futures markets. ASIC also advises the Minister on authorising new markets.¹⁴

3.13 Further, ASIC's objectives are to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
- (b) promote the confident and informed participation of investors and consumers in the financial system;
- (c) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements;
- (d) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it;
- (e) ensure that information is available as soon as practicable for access by the public; and
- (f) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.¹⁵

3.14 Additionally, the ASIC Act requires ASIC to consider the effects of competition when performing its functions and exercising its powers.¹⁶

¹³ See, ASIC, *Submission 1*, p. 10; ASIC Act, ss. 12A(2).

¹⁴ ASIC, [Who we regulate](#), 23 January 2023 (accessed 25 May 2023).

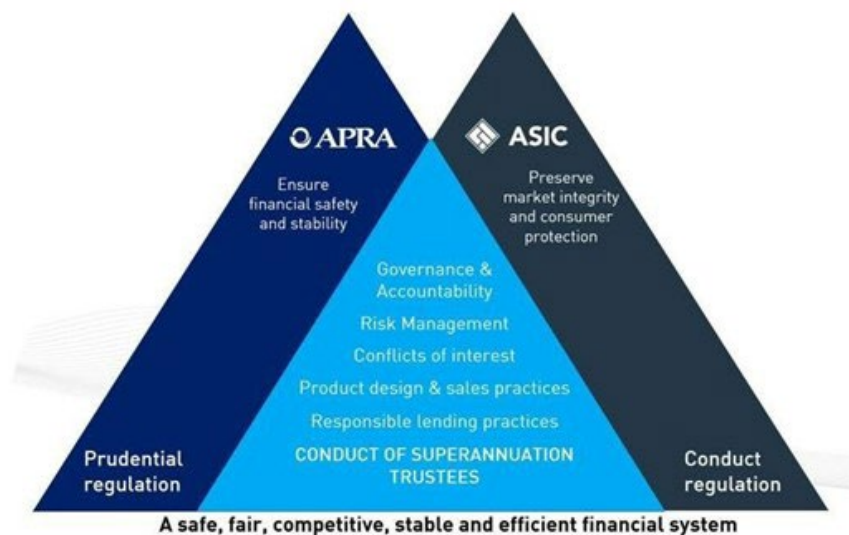
¹⁵ ASIC Act 2001, ss. 1(2).

¹⁶ See, Treasury Laws Amendment (Enhancing ASIC's capability) Bill 2018, *EM*, pp. 5–6; ASIC Act, ss. 1(2A).

ASIC's role in regulating the financial system

- 3.15 ASIC has key responsibilities in Australia's so-called 'twin peaks' model of financial system regulation. Under the model, regulatory responsibilities are divided into two distinct supervisory objectives. The first peak, ASIC, is responsible for conduct regulation and disclosure. The second peak, the Australian Prudential Regulation Authority (APRA), is responsible for prudential regulation and promoting financial system stability.¹⁷
- 3.16 ASIC and APRA are required by law to cooperate to perform their respective 'functions and powers effectively'.¹⁸ Below, **Figure 3.1** illustrates ASIC's and APRA's respective responsibilities.

Figure 3.1 Twin peaks of Australia's model of financial system regulation



- 3.17 Responsibility for other aspect of financial system regulation rests with several other Commonwealth entities. For instance:
- the Reserve Bank of Australia is responsible for monetary policy, financial system stability (including as the lender of last resort) and payments systems;¹⁹
 - the Australian Competition and Consumer Commission (ACCC) is responsible for the function of markets, fair trading and promoting competition;²⁰

¹⁷ See, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission), *Final report*, vol. 1, p. 255, 414; FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 17.

¹⁸ See, ASIC Act, ss. 12AA; APRA Act 1998, s. 10B.

¹⁹ See, FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 17.

²⁰ Note, ASIC and the ACCC share jurisdiction of consumer laws. ASIC is responsible for laws applying to financial products, services and credit and the ACCC responsible for laws applying to other products and services. See, FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 17.

- the Australian Financial Complaints Authority (AFCA) is responsible for the external dispute resolution scheme for financial products and services; and
 - the Australian Transaction Reports and Analysis Centre (AUSTRAC) is responsible for anti-money laundering and counter-terrorism financing.²¹
- 3.18 The twin peaks model has been used in Australia for over 25 years, following recommendations made in the 1996 Financial System Inquiry (Wallis Inquiry).²²
- 3.19 In 2019, the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Royal Commission) recommended retaining Australia's twin peaks model. In brief, the Royal Commission considered that it was ASIC's enforcement culture that should be the subject of change, not the size of its remit.²³ However, the Royal Commission proposed that consideration should be given to the establishment of a 'specialist civil enforcement agency' if it becomes apparent that ASIC 'is not sufficiently enforcing the laws within its remit, or if the size of its remit comes at the expense of its litigation capability'. In the Royal Commission's view, the establishment of such an agency would preserve the twin peaks model.²⁴
- 3.20 Submissions to the inquiry commented on the impact of ASIC's remit and on the twin peaks model. For example, Associate Professor Andy Schmulow submitted that the size of ASIC's remit had distorted Australia's twin peaks model:
- The irony is therefore withering, in that Australia – the benchmark example of Twin Peaks – does not have a dedicated financial-industry prudential regulator and a financial-industry conduct regulator. Instead, what we have is a dedicated financial-industry prudential regulator and a financial-industry-and-every-other-industry-and-everything-to-do-with-licensing-reporting- corporate-governance-(generally)-insolvency-money-commerce-business-and-the-economy- except-partnerships conduct regulator.²⁵
- 3.21 Further, Associate Professor Schmulow argued that the Royal Commission 'got it wrong' in respect of ASIC's remit, underestimating the scope of ASIC's remit and the challenge involved in administering it.²⁶ Additionally, Mr James Shipton, former Chair of ASIC, suggested that the establishment of a

²¹ See, Pamela Hanrahan, 'Twin Peaks after Hayne: Tensions and Trade-Offs in Regulatory Architecture', *Law and Financial Markets Review*, vol. 13, nos. 2–3, 2019, pp. 124–130.

²² Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 40.

²³ Royal Commission, *Final report*, vol. 1, pp. 422–423.

²⁴ Royal Commission, *Final report*, vol. 1, pp. 430–431.

²⁵ Associate Professor Andy Schmulow, *Submission 19*, p. 5.

²⁶ Associate Professor Andy Schmulow, *Submission 19*, p. 6.

separate civil enforcement agency should be considered as an option to ‘right size’ ASIC’s remit.²⁷

ASIC’s expanding remit

3.22 ASIC was established with extensive responsibilities and its responsibilities have since continued to expand.²⁸ This expansion has come through the enactment of new laws, and changes to existing laws for which ASIC has responsibility.²⁹ At the same time, the size of ASIC’s regulated population has increased.³⁰ As the Chair of ASIC, Mr Joseph Longo recently wrote:

ASIC started life as a markets and corporate governance regulator; and, while those responsibilities remain key elements of its mandate, the original architects of the Corporations Law could not have foreseen the scope and range of ASIC’s remit today.

The expansion of ASIC’s regulatory responsibilities reflects a number of factors – the dynamism of our markets and financial system, the increase in uptake of financial services (notably superannuation), changes in community expectations over time, and regular attempts by legislators to address, with varying degrees of ambition, the increasing complexity and sophistication of the Australian financial services sector.³¹

3.23 The expansion of ASIC’s remit follows a long arc of corporate law reform which has resulted in the centralisation of responsibilities in a single, national regulator. For many years, companies were largely regulated by state and territory governments.³² The notion of a national companies law only began to

²⁷ See, Mr James Shipton, *Submission 12*, pp. 11–12.

²⁸ Lloyd Freeburn and Ian Ramsay, ‘Accountability of the Australian Securities and Investments Commission and the Establishment of the Financial Regulator Assessment Authority – An Evaluation’, *Australian Business Law Review*, vol. 50, no. 1, 2022, pp. 6–33.

²⁹ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 133.

³⁰ James Shipton, Chair, ASIC, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry hearing transcript*, 22 November 2018, p. 6906.

³¹ Joseph Longo, ‘Corporate regulation in Australia: The legacy of Ian Ramsay’ in R. T. Langford (ed), *Corporate law and governance in the 21st century*, The Federation Press, 2023, pp. 58–59.

³² This was due to constitutional limitations that restricted the role of the Commonwealth. Section 51(xx) of the *Australian Constitution* empowers the Commonwealth Parliament to make laws in respect of ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. However, the High Court took a restrictive interpretation of this power in the 1909 case of *Huddart, Parker & Co vs Moorehead* and company law remained largely the purview of the states. See, Fady Anoun, Emma Armson, Olivia Dixon and Marina Nehme, *Redmond’s corporations and financial markets law*, 8th ed., Thomson Reuters, Sydney, 2023, p. 61.

gain acceptance in the late 1950s, and uniform companies acts were subsequently adopted in each of the states and territories between 1961 and 1963.³³

- 3.24 It was not until 1978 that ASIC's precursor, the National Companies and Securities Commission, was established to regulate the states application of federal companies and securities laws.³⁴ This co-operative scheme continued until 1991, when the Australian Securities Commission (ASC) was established and amalgamated the corporate affairs functions of the states and territories.³⁵
- 3.25 The ASC's enabling act, the *Australian Securities Commission Act 1989*, was passed alongside the *Corporations Act 1989* and significantly reformed corporations and securities law under a new, national scheme.³⁶ In 1998, the ASC was renamed to ASIC to reflect that it had been assigned new responsibilities for consumer protection in the financial sector, which were previously administered by the ACCC.³⁷ This change meant that ASIC would become the 'pre-eminent consumer protection and market integrity regulator across the financial system'.³⁸
- 3.26 Since then, there have been many occasions of ASIC being assigned further responsibilities. For example, in 2002, ASIC became responsible for financial services regulation, including banking, insurance, securities and superannuation.³⁹ In 2010, ASIC's responsibilities expanded further when it took on consumer credit regulation under the NCCP Act, including for licensing requirements, general conduct obligations and responsible lending

³³ See, Fady Anoun, Emma Armson, Olivia Dixon and Marina Nehme, *Redmond's corporations and financial markets law*, 8th ed., Thomson Reuters, Sydney, 2023, p. 61.

³⁴ See, Michael Adams, 'Twenty-Year Snapshot of the Developments in the Regulation of Small Corporations', *Journal of Business Systems, Governance and Ethics*, Vol 4, No 4, pp. 7–22.

³⁵ See, Australian Securities Commission Bill 1988, *Explanatory Memorandum*, 1988, pp. 2–7; ASIC, *History*, 19 June 2023 (accessed 26 June 2023). Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 30.

³⁶ The ASC's enabling act, the *Australian Securities Commission Act 1989*, was passed alongside the *Corporations Act 1989* and significantly reformed corporations and securities law under a new, national scheme. The national scheme relied on an applied law mechanism under which state laws applied the 1989 acts as laws of the relevant state or territory. The current national law governing corporations and securities, the *Corporations Act* and the *ASIC Act*, were passed in 2001 to address a High Court decision in *Wakim and Hughes* that found certain provisions of the 1989 acts to be invalid. The national law replicated the substantive provisions of the existing scheme (of 1991–2001) in a new scheme capable of operating nationally. See, ASIC Bill 2001, *EM*, pp. 3, 7; Corporations Bill 2001, *EM*, pp. 5, 7; Michael Adams, 'Twenty-Year Snapshot of the Developments in the Regulation of Small Corporations', *Journal of Business Systems, Governance and Ethics*, vol. 4, no. 4, 2009, p. 10.

³⁷ Ian Ramsay et. al., *Principles of Corporations Law*, Regulating companies, online ed., May 2023.

³⁸ The Hon Peter Costello, Treasurer, *House of Representatives Hansard*, 28 March 1998, p. 1653.

³⁹ FRAA, *Effectiveness and Capability Review of ASIC*, July 2022, p. 19.

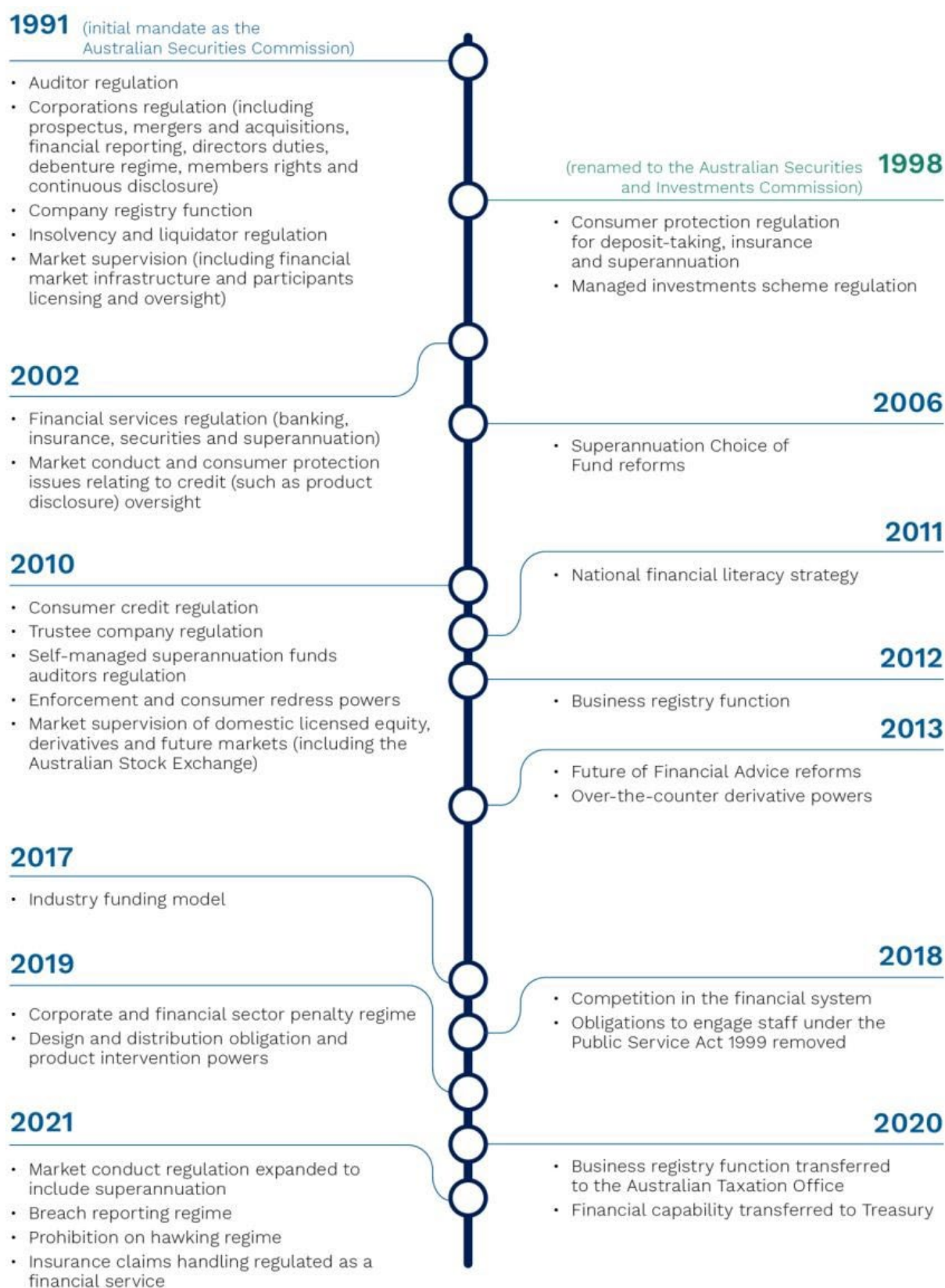
obligations.⁴⁰ That same year, ASIC also took on responsibilities for regulating trustee companies, finance broking and supervising trading on Australian equity, derivatives and futures markets.⁴¹

3.27 A timeline of the changes to ASIC's mandate is shown below in **Figure 3.2**.

⁴⁰ See, Senate Economics References Committee, *Performance of ASIC*, June 2014, p. 49.

⁴¹ ASIC, [History](#), 19 June 2023 (accessed 29 January 2024).

Figure 3.2 Changes to ASIC's mandate from 1991 to 2021



Source: Department of the Treasury, as presented in FRAA, Effectiveness and Capability Review of the Australian Securities and Investments Commission, July 2022, p. 19.

- 3.28 The increases to ASIC's responsibilities have resulted in a significant expansion of the size of ASIC's regulated population. The size of ASIC's regulated population has also increased as new regulated entities are established, and more financial products are created. Indeed, between 2010–11 and 2020–21 the number of companies registered by ASIC increased 61 per cent from 1.8 million to 2.9 million. Over the same period, the number of Australian financial services licensees increased 27 per cent from 4883 to 6179.⁴²
- 3.29 Further, ASIC's remit is impacted by the size of the Australian economy and the large amount of financial activity. Australia has the world's 12th largest economy and the 11th largest stock market.⁴³ As of September 2022, Australian financial institutions held USD \$7.3 trillion of assets, over five times nominal GDP.⁴⁴ Moreover, Australians are highly exposed to financial markets. Around 16 million Australians hold superannuation accounts,⁴⁵ and over 50 per cent of adults hold investments outside of superannuation and property.⁴⁶
- 3.30 Today, ASIC has one of the largest regulatory remits of any regulator in the world, including its counterparts in the United States, the United Kingdom, Germany, the Netherlands, Hong Kong, and New Zealand.⁴⁷
- 3.31 ASIC's remit is continuing to expand. A major example of this is ASIC 'increasingly being called upon to play an active role in the prevention of consumer harm arising from financial products or services that are poorly designed or marketed, as well as the prevention of financial scams'.⁴⁸ Indeed, scams are considered to be 'one of the biggest problems' currently faced by Australian consumers. As recently reported by consumer advocacy group Choice, scams cost Australians over \$2.7 billion in 2023.⁴⁹ ASIC has also recently reported on the significant and growing impact that scams are having on customers of Australia's major banks:

Between 1 July 2021 and 30 June 2022, more than 31,700 customers of the four major banks collectively lost more than \$558 million through scams.

⁴² See, ASIC data presented in Lloyd Freeburn and Ian Ramsay, 'Accountability of the Australian Securities and Investments Commission and the Establishment of the Financial Regulator Assessment Authority – An Evaluation', *Australian Business Law Review*, vol. 50, no. 1, 2022, pp. 6–33.

⁴³ Australian Trade and Investment Commission (AUSTRADE), *Economic landscape*, 2023 (accessed 12 May 2024); AUSTRADE, *Why Australia: Benchmark Report 2023*, August 2023, p. 12.

⁴⁴ AUSTRADE, *Benchmark report 2023*, p. 12.

⁴⁵ See, The Hon Dr Jim Chalmers MP, Treasurer, 'Opinion piece: Super must deliver in retirement', published in the *Australian Financial Review*, 4 December 2023.

⁴⁶ ASX, *Australian Investor Study*, 2023, pp. 6, 11.

⁴⁷ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 19.

⁴⁸ Law Council of Australia, *Submission 10*, p. 5.

⁴⁹ See, Choice, *Passing the buck: how businesses leave scam victims feeling alone and ashamed*, May 2024, p. 4.

This was an increase of 49% in customers and 50% in financial losses compared to the previous 12-month period. During the same period, banks paid approximately \$21 million in reimbursement and/or compensations payments to customers who fell victim to a scam.⁵⁰

3.32 Further, recent examples of ASIC's expanding remit include the transfer of responsibility for the Business Register from the Australian Taxation Office to ASIC in late May 2024. The Australian Institute of Company Directors observed that ASIC's workload would increase further with the commencement of the Financial Accountability Regime.⁵¹

Challenges of a broad remit

3.33 The breadth of ASIC's remit is directly relevant to its capacity to fulfil its mandate. In particular, ASIC's 'very wide remit' means it has to make decisions about its regulatory priorities.⁵² The committee heard that one of the biggest challenges ASIC faces is prioritising its enforcement priorities.⁵³ ASIC acknowledges that its remit constrains its investigation and enforcement capacity:

The scale of our regulatory task, which covers the activities of many thousands of entities and a vast number of transactions, means we cannot progress every potential matter to investigation and enforcement. Like all regulators, we need to make careful, well-founded choices. We can only undertake a fraction of the potential regulatory and enforcement actions we identify through our own surveillance, reports of alleged misconduct and other data and intelligence.⁵⁴

3.34 Concerns regarding the impact of ASIC's remit on its ability to undertake its functions were raised by many submitters to the inquiry. For example, the Australian Small Business and Family Enterprise Ombudsman submitted that 'ASIC's broad remit requires significant resources and may be contributing to its reduced efficacy in investigating and enforcing action against corporate misconduct'.⁵⁵ Maurice Blackburn Lawyers agreed with the view that 'the breadth of ASIC's role, and the sheer volume of economic activity falling within its remit, make effective enforcement action a substantial and difficult undertaking'.⁵⁶

⁵⁰ ASIC, *Scam prevention, detection and response by the four major banks*, Report 761, April 2023, p. 2.

⁵¹ See, Australian Institute of Company Directors, *Submission 11*, p. [7]. ASIC, 'APRA and ASIC commence joint administration of the new [FAR]', *Media release*, 3 October 2023.

⁵² Mr Joseph Longo, Chair, ASIC, *Economics Legislation Committee Hansard*, 9 November 2022, p. 68.

⁵³ See, Mr Joseph Longo, Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 5.

⁵⁴ ASIC, *Submission 1*, p. 3.

⁵⁵ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [4].

⁵⁶ Maurice Blackburn Lawyers, *Submission 4*, p. 2.

3.35 Further, the Australian Institute of Company Directors considered it ‘critical’ that ASIC’s resourcing be increased to ‘account for the depth of its regulatory activities and enforcement priorities’.⁵⁷ The Consumer Action Law Centre also considered that ASIC’s resourcing should be increased:

A regulator needs to be able to be well informed about its regulatory remit. There is a need for greater resourcing for ASIC to monitor the wide sector it is responsible for. Providing ASIC with sufficient resourcing to continuously undertake meaningful data collection and analysis of the financial sector would permit the Government to legislate faster, from a more informed perspective.⁵⁸

3.36 Former chairs of ASIC have also expressed concern about the scope of ASIC’s remit. For example, Mr Tony D’Aloisio, Chair of ASIC from 2007 to 2012, told the committee that two issues ‘created tension’ in relation to ASIC’s mandate. Firstly, Mr D’Aloisio said that while the Australian Parliament would pass legislation which expanded ASIC’s remit, the remit of that legislation would not always be clear. Secondly, Mr D’Aloisio considered that ‘ASIC was seen as a guarantor of last resort that had to actually stop losses occurring’, despite this not being supported by the design of the regulatory system.⁵⁹ Mr James Shipton, Chair of ASIC from 2018 to 2021, submitted that ‘ASIC’s jurisdiction expanded without appropriations keeping pace, reducing ASIC’s overall “funding envelope” including for enforcement’.⁶⁰ Mr Shipton added:

ASIC’s enforcement jurisdiction has become too large. It is being asked to do too much with too little. It has a larger breadth than most of its global peers, with more responsibilities added to it by successive governments. ASIC is one of the most complex regulatory agencies in the world. And even though many governments extended its jurisdiction, they failed to provide commensurate funding to support its (still) increasing jurisdiction.⁶¹

3.37 Moreover, some submitters considered that ASIC is failing to administer its broad remit. For instance, Mr Evan Jones argued that ‘ASIC has failed on the narrower agenda inherited from the ASC, and it has failed dismally on the grand remit accorded it by successive governments (and the Wallis Report) since 1998’.⁶² Mr Michael Sanderson contended that ASIC would have to be ‘many times its current size’ to carry out ‘appropriate due diligence’ on the complaints ASIC receives.⁶³

⁵⁷ Australian Institute of Company Directors, *Submission 11*, p. [2].

⁵⁸ Consumer Action Law Centre, *Submission 6*, p. 18.

⁵⁹ Mr Anthony Michael D’Aloisio, Private capacity, *Committee Hansard*, 1 November 2023, p. 9.

⁶⁰ Mr James Shipton, *Submission 12*, p. 10.

⁶¹ Mr James Shipton, *Submission 12*, p. 11.

⁶² Dr Evan Jones, *Submission 47*, p. 11.

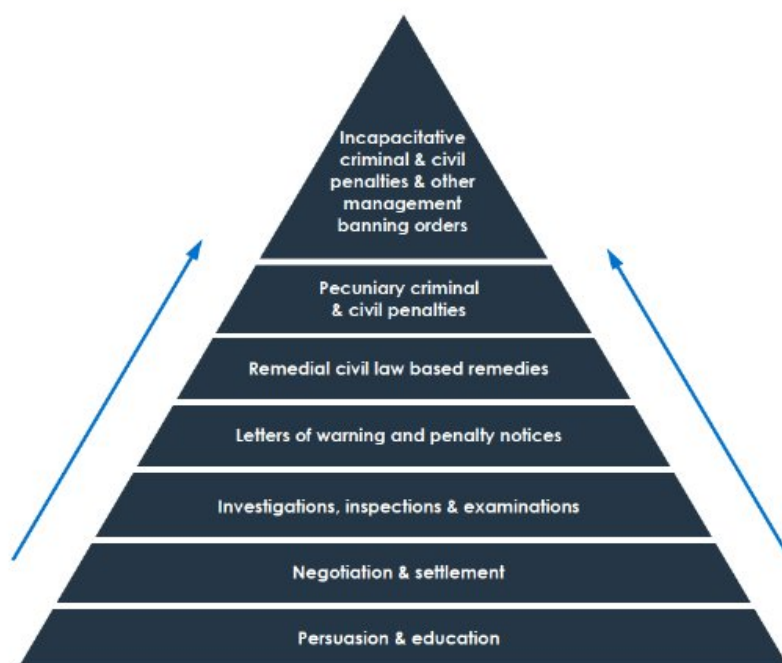
⁶³ Mr Michael Sanderson, *Submission 46*, p. 1.

Approach to regulation

3.38 ASIC's approach to regulation enforcement is guided by the theory of strategic regulation, also known as responsive regulation.⁶⁴ Responsive regulation promotes the use of enforcement tools of escalating severity 'to respond to the different motivations of different actors'.⁶⁵ These scaled enforcement sanctions are often described as the enforcement pyramid. Most regulatory activity occurs through less intrusive strategies such as persuasion and education, at the base of the pyramid. The most severe interventions, such as criminal penalties, are at the apex of the pyramid and used to respond to the most egregious misconduct.⁶⁶

3.39 An example of the enforcement pyramid is shown below in **Figure 3.3**.

Figure 3.3 Enforcement pyramid



Source: ASIC, Submission 1, p. 12 adapted from G. Gilligan, H. Bird and I. Ramsay, 'Civil penalties and the enforcement of directors' duties', *UNSW Law Journal*, vol. 22, no. 2, pp. 417–461.

3.40 Despite the availability of enforcement tools under the enforcement pyramid, ASIC has been criticised for struggling to apply the pyramid effectively.⁶⁷ For example, in 2019 the Royal Commission highlighted that it was inconsistent

⁶⁴ ASIC, *Submission 1*, p. 11.

⁶⁵ ASIC, *Submission 1*, p. 12.

⁶⁶ George Gilligan and Ian Ramsay, 'The Australian Securities and Investments Commission's Use of Enforceable Undertakings and Negotiated Enforcement', *International Company and Commercial Law Review*, vol. 34, no. 2, 2023, 43–67.

⁶⁷ Fady Anoun, Emma Armson, Oliva Dixon and Marina Nehme, *Redmond's Corporations and Financial Markers Law*, 8th ed, Thomson Reuters, 2023, p. 134.

with the enforcement pyramid that serious breaches of law by large entities were not being met with ‘highest level of regulatory response’.⁶⁸

3.41 Additionally, ASIC states that it takes a ‘harms-based, or problem-oriented’ approach to regulation to identify and respond to the most important risks within ASIC’s remit.⁶⁹ ASIC balances its resources between addressing emerging issues, including reports of alleged misconduct, and the strategic priorities identified in its corporate plan.⁷⁰

Strategic priorities

3.42 ASIC’s capacity to set and execute its strategic priorities is ‘central’ to ASIC’s overall effectiveness.⁷¹ ASIC’s priorities ‘focus’ its efforts on addressing areas or significant harm and ‘inform’ how ASIC responds to misconduct.⁷²

3.43 ASIC’s priorities are determined using an annual ‘organisation-wide strategic planning process’ which uses data on threats and harms to identify the priorities ASIC will focus on for the next four years.⁷³ The Deputy Chair of ASIC, Ms Sarah Court, explained ASIC’s approach to setting priorities:

...what we are trying to achieve by setting specific priorities is to identify those areas of conduct or harm that we think have the broadest potential detriment to consumers, to investors and to market integrity. ...the enforcement teams have at front of mind the priorities the commission has set out. Those matters are then prioritised with particular targets within those enforcement groups.⁷⁴

3.44 The ASIC Commission determines ASIC’s strategic priorities which include:

- External priorities which target the highest-risk issues in ASIC’s remit; and
- Internal priorities which focus on ASIC’s operational capabilities.⁷⁵

External priorities

3.45 For 2022–26, ASIC’s external strategic priorities are:

- *Product design and distribution*—reducing the risk of harm to consumers of financial and credit products from poor product design and other factors;

⁶⁸ Royal Commission, *Final report*, vol. 1, p. 433.

⁶⁹ ASIC, *Submission 11*, p. 13.

⁷⁰ ASIC, *Corporate Plan 2023–27: Focus 2023–24*, August 2023, p. 7.

⁷¹ FRAA, *Effectiveness and Capability Review of ASIC*, July 2022, p. 14.

⁷² ASIC, *Submission 11*, p. 13.

⁷³ ASIC, *Submission 1*, p. 13.

⁷⁴ Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 5.

⁷⁵ FRAA, *Effectiveness and Capability Review of [ASIC]*, July 2022, p. 31.

- *Sustainable finance*—supporting market integrity through proactive supervision and enforcement;
- *Retirement decision making*—protecting consumers as they plan for retirement, including by focusing on superannuation products; and
- *Technology risks*—focusing on the impacts of technology in financial markets and services, including digitally enabled misconduct such as scams.⁷⁶

3.46 As part of delivering its strategic priorities, ASIC is focusing on ‘six core strategic projects’ related to: scams; sustainable finance practices; crypto-assets; design and distribution obligations; cyber and operational resilience; and digital technology and data.⁷⁷ Additionally, ASIC reports that it is undertaking 34 industry-based, shorter-term projects to support its strategic priorities.⁷⁸

Internal priorities

3.47 To strengthen its capabilities, ASIC has set the following internal priorities:

- *Digital technology*—expanding the use of digital technology to support more efficient processes in ASIC’s regulatory work;
- *Data and analytics*—increasing ASIC’s efficiency and effectiveness by improving access to information and adopting new analytical tools; and
- *People and resourcing*—recruiting and retaining talent, enhancing ASIC’s skills and improving its budget and planning process.⁷⁹

3.48 The Financial Regulator Assessment Authority’s 2022 review of ASIC considered that ASIC’s approach to setting strategic priorities was generally effective.⁸⁰ However, the review identified potential areas for improvement, including how ASIC sets longer term priorities and how ASIC uses its strategic priorities to support decision-making.⁸¹

Enforcement priorities

3.49 In addition to its strategic priorities, ASIC sets annual priorities for its enforcement work. The purpose of the enforcement priorities is to communicate ASIC’s intent to industry and other stakeholders and provide a ‘clear indication’ of where ASIC will direct its resources.⁸²

⁷⁶ ASIC, *Corporate Plan 2023–27: Focus 2023–24*, August 2023, p. 7.

⁷⁷ ASIC, *Corporate Plan 2023–27: Focus 2023–24*, August 2023, pp. 8–11.

⁷⁸ ASIC, *Corporate Plan 2023–27: Focus 2023–24*, August 2023, pp. 12–15.

⁷⁹ See, ASIC, *Corporate Plan 2023–27: Focus 2023–24*, August 2023, pp. 7–11.

⁸⁰ See, FRAA, *Effectiveness and Capability Review of ASIC*, July 2022, p. 4.

⁸¹ FRAA, *Effectiveness and Capability Review of ASIC*, July 2022, pp. 33–36.

⁸² Sarah Court, Deputy Chair, ASIC, ‘ASIC Annual Forum 2023: Enforcement session opening remarks’, *Speech*, 21 November 2023.

3.50 For 2024, ASIC has set the following twelve enforcement priorities:

- enforcement action targeting poor distribution of financial products;
- misleading conduct in relation to sustainable finance;
- high-cost credit and predatory lending practices;
- member services failures in the superannuation sector;
- misconduct resulting in the systematic erosion of superannuation balances;
- insurance claims handling;
- compliance with the reportable situation regime;
- conduct impacting small business including small business creditors;
- enforcement action targeting gatekeepers facilitating misconduct;
- misconduct relating to used car financing to vulnerable consumers;
- compliance with financial hardship obligations; and
- technology and operational resilience for market operators and participants.⁸³

3.51 In addition to its annual enforcement priorities, ASIC has six enduring enforcement priorities. These are:

- misconduct damaging market integrity;
- misconduct impacting First Nations People;
- misconduct involving a high risk of significant consumer harm;
- systemic compliance failures by large financial institutions;
- new or emerging conduct risks within the financial system; and
- governance and directors' duties failures.⁸⁴

3.52 Frequently setting enforcement priorities has the potential to support ASIC in being responsive to emerging trends in the economy and financial markets. For example, ASIC has recently focused on predatory lending practices amid rising cost of living pressures:

Another area, just to give an example, is the issue of predatory conduct towards financially disadvantaged consumers or vulnerable consumers. We recognise that, moving into the current cost-of-living environment, a number of financially disadvantaged consumers are relying on alternative sources of credit, for example. We've got, as one of our enduring enforcement priorities, conduct that disproportionately impacts First Nations people, and so we are then looking at the suite of work and at the laws that are available to take those actions and ensuring that we have the staff, resources and teams allocated to make sure that we can drive forward investigations and cases in those areas.⁸⁵

⁸³ ASIC, [ASIC enforcement priorities](#), 21 November 2023 (accessed 7 February 2024).

⁸⁴ ASIC, [ASIC enforcement priorities](#), 21 November 2023 (accessed 7 February 2024).

⁸⁵ Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 6.

3.53 Further, ASIC states that the ‘public announcement of areas for enforcement can also have a compliance effect in and of itself’.⁸⁶ The Consumer Action Law Centre submitted that ASIC began publishing its enforcement priorities in late 2022 and considers this a ‘promising’ development in helping industry to improve practices before ASIC may need to consider taking enforcement action. As such, the Consumer Action Law Centre submitted that ASIC ‘should build on its enforcement priorities’ by adopting a ‘campaign approach’:

To deliver on these priorities, we encourage the regulator to adopt a campaign approach, which might include public communications about its concerns and expectations, producing information for the marketplace about good practice and compliance, raising issues directly with firms and sectors, undertaking investigations and thematic reviews, as well as taking enforcement actions.⁸⁷

3.54 However, the committee heard from the Small Business Development Corporation (SBDC) that ASIC’s ‘current policy settings are insufficient to effectively deter poor behaviour’. In particular, the SBDC considered that ASIC’s enforcement priorities ‘do not strike the right balance, with ASIC insufficiently focused or resourced to pursue more reports of alleged misconduct’.⁸⁸ In considering the balance of policy settings between ASIC’s reactive and proactive work on its enforcement priorities, Mr Shipton highlighted the importance of ASIC having clear expectations:

What you’ve essentially highlighted is the perennial challenge of the current regulatory system between ongoing supervision, surveillance, education and engagement and enforcement. Without the expectations, without clear guidance in statute and without an ongoing methodology for assessment, it is, I think, impossible for ASIC to make that decision. It’s impossible for them because they don’t have clear guidance. They can—and I’m sure they are trying very hard—to get that balance right.⁸⁹

Statement of expectations

3.55 On previous occasions, the Australian Government has set out its expectations for how ASIC will use its powers and achieve its objects. ASIC responds to the government’s statement of expectations with a statement of intent.⁹⁰

3.56 The last time the Australian Government issued a statement of expectations for ASIC was in August 2021.⁹¹ This statement was made by the previous

⁸⁶ Ms Sarah Court, Deputy Chair, ASIC, ‘ASIC Annual Forum 2023: Enforcement session opening remarks’, *Speech*, 21 November 2023.

⁸⁷ Consumer Action Law Centre, *Submission 6*, p. 8.

⁸⁸ Small Business Development Corporation, *Submission 9*, p. 2.

⁸⁹ Mr James Shipton, Private capacity, *Committee Hansard*, 23 August 2023, p. 49.

⁹⁰ ASIC, ‘Statement of expectations and intent’, 26 August 2021 (accessed 11 August 2023).

⁹¹ See, ASIC, ‘Statement of expectations and intent’, 26 August 2021 (accessed 11 August 2023).

government at the height of the COVID-19 pandemic.⁹² While the current government is reportedly preparing a new statement of expectations for ASIC, this had not occurred at the time of writing.⁹³ The committee heard from Mr Shipton that the 2021 statement of expectations is 'obsolete' and that the government should issue a new statement as a 'priority'.⁹⁴ Further, the Consumer Action Law Centre considered that a new statement of expectation could better reflect the 'community's expectations of ASIC'.⁹⁵

ASIC's significant powers of investigation and enforcement

3.57 ASIC has extensive powers to aid its investigation and enforcement activities.⁹⁶ The key elements of ASIC's powers are summarised below.

Investigation powers

3.58 Under section 13 of the ASIC Act, ASIC has power to investigate suspected breaches of corporations law, and other Commonwealth, state or territory laws to the extent they relate to a body corporate or managed investment scheme.⁹⁷ Additionally, section 247 of the NCCP gives ASIC the power to investigate suspected breaches of credit law and related matters.

3.59 Central to ASIC's investigation powers is its ability to compulsorily gather information. ASIC can use these powers to varying degrees during its formal investigations and, to a lesser extent, during its surveillance activities.⁹⁸ ASIC may undertake surveillance of an entity to 'obtain further evidence to determine whether formal investigation is warranted, or whether a better regulatory outcome would be achieved by other means'.⁹⁹ When undertaking surveillance, ASIC can only use its 'powers to inspect documents and compel the production of documents or the disclosure of information'.¹⁰⁰

⁹² Historically the Australian Government has issued statements of expectations to outline its position on how ASIC will achieve its objectives, carry out our functions and exercise its powers. ASIC responds to the government's statement of expectations with a statement of intent. See, ASIC, 'Statement of expectations and intent', 26 August 2021 (accessed 11 August 2023).

⁹³ See, Patrick Durkin, 'Chalmers sets new expectations for ASIC', *Australian Financial Review*, 21 November 2023.

⁹⁴ Mr James Shipton, *Submission 12*, p. 4.

⁹⁵ Consumer Action Law Centre, *Submission 6*, p. 11.

⁹⁶ See, *ASIC's approach to enforcement*, Information Sheet 151, 2 August 2023 (accessed 17 August 2023).

⁹⁷ See, ASIC Act, s. 13.

⁹⁸ ASIC, *Submission 1*, p. 31.

⁹⁹ ASIC, *Submission 1*, p. 6.

¹⁰⁰ ASIC, [ASIC's compulsory information-gathering powers](#), 7 March 2024 (accessed 10 April 2024).

3.60 ASIC may undertake a formal investigation where it suspects there has been a contravention of law. In doing so, ASIC can use the full complement of its compulsory information gathering powers.¹⁰¹ These powers include:

- the power to apply to a court for the issue of a warrant to search premises for books and records;
- the power to seek the issue of warrants to obtain stored telecommunications data from service providers;
- the power to require a person to attend an examination to answer questions on oath or to provide reasonable assistance;
- the power to inspect books and records;
- the power to compel the production of certain documents; and
- the power to conduct administrative hearings related to ASIC's functions or powers, including the power to summon witnesses.¹⁰²

3.61 ASIC's use of compulsory information gathering powers between 2019–20 and 2021–22 is summarised below in **Table 3.1**.

Table 3.1 Use of information-gathering powers, 2019–20 to 2021–22

Power ¹⁰³	Total times used
Requirements to appear for examination	3027
Requirements to give reasonable assistance	656
Requirements to produce documents	8930
Requirements to provide information	2288
Requirements to provide information or books (auditors and liquidators)	212
Search warrants executed	159
Total	15 272

Source: ASIC, answers to questions on notice set 1, (received 18 November 2022)

3.62 The commencement of an ASIC investigation is significant not just for the compulsory information gathering powers it triggers, but also for the

¹⁰¹ ASIC, [ASIC's compulsory information-gathering powers](#), 7 March 2024 (accessed 10 April 2024).

¹⁰² See, ASIC, [ASIC's compulsory information-gathering powers](#), 7 March 2024 (accessed 10 April 2024).

¹⁰³ Note, each of these categories combines data of various circumstances in which the power was used. For example, ASIC's the power to require a person to appear for examination is exercised under section 19 of the ASIC Act and, separately, under section 253 of the NCCP Act.

subsequent proceedings that may occur due 'the mere fact of the investigation's commencement or upon evidence received during the investigation'.¹⁰⁴

3.63 Further, statements made during an ASIC examination are admissible in subsequent criminal proceedings against the examinee. ASIC's investigation report is also admissible in subsequent civil proceedings 'as prima facie evidence of facts and matters disclosed'.¹⁰⁵

3.64 Evidence provided to the committee suggests that ASIC's powers of investigation are appropriate. For example, Dr Eugene Schofield-Georgeson provided research to the committee, based on former ASIC investigators' views of ASIC's coercive powers, which argued that 'ASIC's powers are well equipped to investigate corporate crime, but that ASIC rarely exercises these powers'.¹⁰⁶ Further, Dr Schofield-Georgeson submitted that:

ASIC's existing coercive investigation powers are fit-for purpose, amounting to something of a 'gold standard' in the view of investigators. A similar picture emerges when the laws are compared to those of similar international jurisdictions, particularly the US where investigators frequently struggle to bring corporate crime to heel. Rather, and according to ASIC's own former investigators, the failings of ASIC in bringing corporate crime to justice are institutional.¹⁰⁷

3.65 ASIC's approach to investigation is considered further in **Chapter 4**.

Enforcement powers

3.66 ASIC has extensive options to take a range of criminal, civil and administrative actions to 'respond flexibly and proportionately to a broad range of individual and corporate misconduct'.¹⁰⁸ Such options include:

- criminal prosecutions for breaches of fault-based, strict liability and absolute liability offences under the Corporations Act;
- disqualification of persons from managing corporations;
- civil penalty provisions;
- civil proceedings to which ASIC is a party;
- infringement notices for alleged contraventions of strict liability and absolute liability offences and other provisions, such as continuous disclosure provisions; and

¹⁰⁴ Fady Anoun, Emma Armson, Olivia Dixon and Marina Nehme, *Redmond's corporations and financial markets law*, 8th ed., Thomson Reuters, Sydney, 2023, p. 127.

¹⁰⁵ Fady Anoun, Emma Armson, Olivia Dixon and Marina Nehme, *Redmond's corporations and financial markets law*, 8th ed., Thomson Reuters, Sydney, 2023, p. 127.

¹⁰⁶ Dr Eugene Schofield-Georgeson, *Submission 198*, p. [3].

¹⁰⁷ Dr Eugene Schofield-Georgeson, *Submission 198*, p. [2].

¹⁰⁸ ASIC, [ASIC's approach to enforcement](#), 7 March 2024 (accessed 10 May 2024).

- enforceable undertakings.¹⁰⁹
- 3.67 Furthermore, ASIC can take a range of other protective administrative sanctions in relation to provisions of Chapter 7 of the Corporations Act in relation to financial products, services and markets. Such actions include: banning orders; suspension; varying or cancelling AFS licenses; product intervention orders; and product design and distribution obligations.¹¹⁰
- 3.68 For serious suspected breaches of the law, ASIC refers a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) for the prosecution of criminal offences.¹¹¹ However, the number of referrals ASIC made to the CDPP has halved in the last five years to 41 referrals in 2022–23, as shown in **Table 3.2**.

Table 3.2 ASIC referrals to the CDPP from 2018-19 to 2022-23

Financial year	Total referrals	Per cent of total referrals prosecutions instituted
2018–19	86	75.6%
2019–20	82	62.0%
2020–21	80	63.8%
2021–22	70	65.1%
2022–23	41	19.5%

Source: CDPP, answers to written question on notice set 2, 6 September 2023 (received 22 September 2023)

Discretionary powers

- 3.69 ASIC has discretionary powers in respect of the Corporations Act. ASIC can ‘alter the application of the *Corporations Act* to a particular case or category of cases, effectively a discretionary power to rewrite part of the corporations law’.¹¹² Further, ASIC can ‘exempt or modify the application to a person of provisions of Ch 6 (takeovers) of the Corporations Act, Ch 6A (compulsory

¹⁰⁹ Fady Anoun, Emma Armson, Olivia Dixon and Marina Nehme, *Redmond’s corporations and financial markets law*, 8th ed., Thomson Reuters, Sydney, 2023, p. 132.

¹¹⁰ Fady Anoun, Emma Armson, Olivia Dixon and Marina Nehme, *Redmond’s corporations and financial markets law*, 8th ed., Thomson Reuters, Sydney, 2023, pp. 132–133.

¹¹¹ See, ASIC, *Memorandum of Understanding: ASIC and the CDPP*, March 2006, p. 1.

¹¹² Lloyd Freeburn and Ian Ramsay, ‘Accountability of the Australian Securities and Investments Commission and the Establishment of the Financial Regulator Assessment Authority – An Evaluation’, *Australian Business Law Review*, vol. 50, no. 1, 2022, p. 12.

acquisition) and Ch 6C (substantial shareholdings and tracing beneficial ownership in shares)'.¹¹³

3.70 Notably, the Corporations Act contains over 950 powers for ASIC to make subordinate legislation, including:

- more than 880 regulation-making powers, with additional powers notionally inserted through the Corporations Regulations; and
- around 68 powers 'to make delegated legislation, often in the form of broad "exemption and modification" (notional amendment) powers'.¹¹⁴

3.71 Notional amendments are used extensively in the Corporations Act and are a 'major source of complexity and incoherence affecting corporations and financial services legislation'.¹¹⁵ The Australian Law Reform Commission recently found that there are currently over 1200 notional amendments in force, affecting over 600 provisions of the Corporations Act and Corporations Regulations.¹¹⁶ In effect, this results in multiple versions of the law and users lacking certainty regarding which provisions of the law actually apply.¹¹⁷

Expanding powers

3.72 Following the Royal Commission, ASIC's already extensive enforcement powers have been further expanded, along with increased penalties for breaches of corporations law. ASIC was given new powers to take stronger action against misleading conduct and reduce the risk of harm to consumers.¹¹⁸ These new powers:

...strengthened the criminal and civil penalties for financial sector misconduct and introduced a design and distribution obligations regime for financial services firms and a product intervention power for ASIC.¹¹⁹

¹¹³ Lloyd Freeburn and Ian Ramsay, 'Accountability of the Australian Securities and Investments Commission and the Establishment of the Financial Regulator Assessment Authority – An Evaluation', *Australian Business Law Review*, vol. 50, no. 1, 2022, pp. 12–13.

¹¹⁴ ALRC, *Conforming complexity*, Report 141, November 2023, p. 59.

¹¹⁵ ALRC, *Conforming complexity*, Report 141, November 2023, p. 51.

¹¹⁶ ALRC, *Conforming complexity*, Report 141, November 2023, p. 53.

¹¹⁷ ALRC, *Conforming complexity*, Report 141, November 2023, pp. 53–54.

¹¹⁸ Mr Joeseeph Longo, Chair, ASIC, *Senate Economics Legislation Committee Hansard*, 9 November 2022, p. 66.

¹¹⁹ ASIC, [Our role](#), 28 June 2023, (accessed 29 January 2023). See also, ASIC, 'ASIC welcomes approval of new laws to protect financial service consumers', *Media release*, 4 April 2019.

3.73 Since March 2019 there has been a ten-fold increase in the maximum penalties that apply to corporate misconduct.¹²⁰ For example, under the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*:

- the maximum prison penalties for serious offences increased to 15 years—such as breaches of directors’ duties and dishonest conduct;
- the maximum civil penalties for individuals increased to the greater of 5 000 penalty units (currently \$1.565 million) or ‘three times the benefit obtained and detriment avoided’;
- the maximum civil penalty for companies increased to the greater of 50 000 penalty units (currently \$15.65 million); three times the benefit obtained and detriment avoided, or 10 per cent of annual turnover, capped at 2.5 million penalty units (currently \$782.5 million).¹²¹

3.74 ASIC’s approach to enforcement, and the challenges posed by the complexity of the current regulatory framework, is considered further in **Chapter 5**.

Resourcing and governance

3.75 ASIC is an independent statutory authority and, at present, is led by five commissioners.¹²² In 2022–23, ASIC employed around 1800 staff and received \$426 million in funding from the Australian Government.¹²³

3.76 This section provides an overview of ASIC’s resourcing and governance.

Resourcing

3.77 ASIC’s budget is determined by the Australian Government and its costs are largely recovered under the ASIC Industry Funding Model (IFM). In the 2022–23 financial year, ASIC’s budget of \$485.5 million consisted of:

- \$426.3 million in departmental appropriations from government;
- \$32.3 million in revenue from independent sources; and
- \$26.8 million in capital appropriations.¹²⁴

3.78 Between 2012–13 and 2022–23, government funding for ASIC increased 22 per cent from \$350 million to \$426 million.¹²⁵ Following the Royal Commission in 2019, the Australian Government provided an additional \$400 million of funding

¹²⁰ Ms Sarah Court, Deputy Chair, ASIC, ‘ASIC’s 2024 enforcement priorities in the superannuation sector’, *Speech*, 1 February 2024.¹

¹²¹ ASIC, [Fines and penalties](#), 2 July 2023 (accessed 9 May 2024).

¹²² See, ASIC, [What we do](#), 21 June 2023 (accessed 9 May 2024).

¹²³ ASIC, *Annual Report 2022–23*, October 2023, pp. 14, 194.

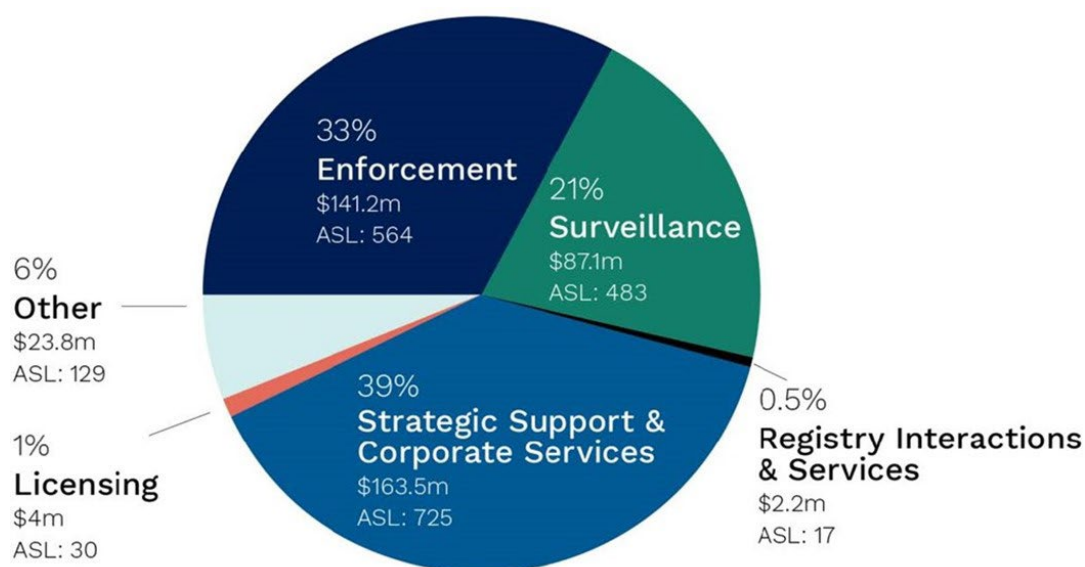
¹²⁴ ASIC, *Corporate Plan 2023–27*, August 2023, p. 19.

¹²⁵ See, ASIC, *Annual Report 2012–13*, October 2013, p. 84; ASIC, *Annual Report 2022–23*, October 2023, p. 114.

to ASIC over four years, representing a 25 per cent increase on its 2017–18 funding levels.¹²⁶

- 3.79 The majority of ASIC’s budget supports regulatory activities associated with enforcement, surveillance, and strategic support and corporate services. ASIC estimates that these activities made up approximately 82 per cent of its regulatory activities in 2023–24. In the 2021–22 financial year, total expenditure on these activities represented 93 per cent of ASIC’s internal budget, as shown below in **Figure 3.4**. ASIC ultimately determines the internal allocation of funding and resources across functional areas.¹²⁷
- 3.80 However, inquiry participants expressed concerns about whether ASIC’s current funding is commensurate with its broad regulatory remit.¹²⁸ Issues concerning ASIC’s budget are discussed further in **Chapter 6**.

Figure 3.4 ASIC's internal budget and staff allocation, as at 2021–22



Source: FRAA, *Effectiveness and Capability Review of ASIC*, July 2022, p. 9.

Industry Funding Model

- 3.81 ASIC’s IFM commenced in July 2017, following a recommendation of the Financial System Inquiry that the Australian Government introduce a cost

¹²⁶ Financial Services Council, *Submission 7*, p. 19.

¹²⁷ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 21.

¹²⁸ See, for example, AICD, *Submission 11*, p. [7]; Ms Caroline Read, *Submission 55*, p. 5; the Hon. Bob Katter MP, *Submission 192*, p. 9.

recovery model for ASIC.¹²⁹ Prior to the IFM, ASIC was primarily funded by taxpayers through government appropriations.¹³⁰

- 3.82 Under the IFM, ASIC recovers the costs associated with its regulatory activities from industry participants using levies and fees which reflect the cost of supervision and surveillance, enforcement, industry engagement, education, guidance, and other indirect costs.¹³¹ In 2021–22, industry funding levies were imposed on 52 industry sub-sectors. Fees-for-service are directly charged on individual entities for a specific service provided by ASIC.¹³²
- 3.83 A significant proportion of ASIC’s budget is sourced from the IFM. ASIC estimated that approximately 83 per cent of its departmental appropriation for the 2021–22 financial year would be recovered under the IFM, bringing the total amount recovered by the scheme to \$422 million for that period. This included:
- \$266 million for cost recovery;
 - \$66 million for statutory levies; and
 - \$17 million for fees-for-services.¹³³
- 3.84 The amount recovered by ASIC under the IFM is less than the total departmental appropriation due to costs incurred by non-regulatory activities.¹³⁴
- 3.85 Broadly, the IFM has been negatively received by participants to this inquiry. Industry participants have characterised the funding model as unfair, poorly administered, and counterproductive.¹³⁵ Issues regarding the IFM are discussed further in **Chapter 6**.

Staffing

- 3.86 To exercise its functions and duties, ASIC employs a wide range of staff under the ASIC Act. As of 30 June 2023, ASIC had 1831 full-time equivalent staff.¹³⁶ The majority of staff were employed at either ASIC Level 4, Executive Level 1, or Executive Level 2 employees. Fifty-seven of ASIC’s employees are classified as

¹²⁹ Department of the Treasury (Treasury), *Review of the Australian Securities and Investments Commission Industry Funding Model: Final report (Review of the ASIC IFM: Final report)*, June 2023, p. 5.

¹³⁰ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 1.

¹³¹ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 21.

¹³² Treasury, *Review of the ASIC IFM: Final report*, June 2023, pp. 14, 16, 42.

¹³³ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 21.

¹³⁴ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 21.

¹³⁵ See, for example, Financial Services Council, *Submission 7*, pp. 21–22; Stockbrokers and Investment Advisers Association, *Submission 16*, p. 2; Institute of Public Accountants, *Submission 17*, pp. 4–5.

¹³⁶ ASIC, *Corporate Plan 2023–27*, August 2023 p. 17.

Senior Executive Services staff.¹³⁷ The majority of ASIC staff are assigned to the Financial Services Enforcement, Markets, and Financial Services and Wealth teams, with each consisting of 194, 200 and 263 employees respectively.¹³⁸

- 3.87 Inquiry participants expressed concerns regarding the skills and capacity of ASIC staff as well as ASIC's staffing profile.¹³⁹ Issues regarding ASIC staff and its broader staffing profile are discussed further in **Chapter 6**.

Governance

- 3.88 ASIC is currently led by a five-person Commission comprised of the Chair, Deputy Chair and three commissioners.¹⁴⁰ The Commission is ASIC's 'governing body and is responsible for achieving ASIC's statutory objectives'.¹⁴¹ Further:

ASIC's Commission acts as a strategic non-executive body focussing on high-level regulatory and statutory decision making and stakeholder management, and provides support to the Chair on organisational oversight.¹⁴²

- 3.89 The Commission is supported by eight committees that assist with significant regulatory, governance and management functions. For instance, ASIC has three regulatory committees, comprised of the full Commission, which makes significant decisions regarding regulatory policy, enforcement and strategic risk.¹⁴³
- 3.90 The Chair is the accountable authority of ASIC under *Public Governance Performance and Accountability Act 2013*. The Chair has sole executive management responsibility for ASIC's organisational matters and relies on key ASIC executive to carry out day-to-day management and operational functions.¹⁴⁴
- 3.91 Commissioners are independent statutory appointees, appointed by the Governor-General on the nomination of the Minister under the ASIC Act.¹⁴⁵ The Chair is not subject to direction by ASIC, including the Commission.¹⁴⁶ ASIC

¹³⁷ ASIC, *Annual Report 2022–23*, October 2023, p. 196.

¹³⁸ ASIC, *Annual Report 2022–23*, October 2023, p. 198.

¹³⁹ Dr Schofield-Georgeson, *Submission 198*; Mr James Shipton, *Submission 12*, pp. 6 – 7, 10; Adams Economics, *Submission 21*, p. 40.

¹⁴⁰ ASIC, [ASIC senior leadership](#), 28 January 2024 (accessed 2 February 2024).

¹⁴¹ ASIC, [ASIC's governance and accountability](#), 24 August 2023 (accessed 2 February 2024).

¹⁴² ASIC, *Annual Report 2022–23*, October 2023, p. 94.

¹⁴³ ASIC, *Annual Report 2022–23*, October 2023, pp. 97–98.

¹⁴⁴ ASIC, *Annual Report 2022–23*, October 2023, p. 94.

¹⁴⁵ See, ASIC, answer to written question on notice, Set 65, 23 October 2022 (received 22 December 2023); ASIC Act, s. 9.

¹⁴⁶ ASIC Act, ss. 10(A).

commissioners do not report to the Chair, and their appointment can only be ended by the Governor-General.¹⁴⁷

- 3.92 ASIC is subject to a range of accountability mechanisms. These include ministerial oversight, parliamentary accountability and the preparation of public performance documents.¹⁴⁸ ASIC is also subject to external scrutiny by the Financial Regulator Assessment Authority and Australian National Audit Office.
- 3.93 ASIC's governance arrangements are considered further in **Chapter 7**.

Committee comment

- 3.94 This chapter has provided an overview of the current regulatory landscape in which ASIC operates and introduces some of the key themes that the committee will explore further in subsequent chapters of this report.
- 3.95 The committee makes a number of observations here, which will be expanded upon in subsequent chapters.
- 3.96 Firstly, ASIC has extensive responsibilities for corporate and financial system regulation and these responsibilities are continuing to grow. This expansive remit presents significant structural and resourcing challenges which constrain ASIC's approach to investigation and enforcement. Secondly, while ASIC has unprecedented powers and responsibilities to enforce corporations law in Australia, these powers are underutilised and bogged in legislative complexity. And, thirdly, that budget and staffing arrangements have a significant impact on ASIC's administration. Despite this, concerns remain about the appropriateness of ASIC's funding and the robustness of its governance.
- 3.97 The fact that ASIC's remit includes entities which, by and large, make up the Australian economy and financial markets underscores the importance of getting ASIC's regulatory settings 'right'. Yet, the issues which have undermined ASIC's performance have continued for so long that they have effectively become permanent features of Australia's corporate and financial system. Reforms to address those issues are of national importance and are considered further in **Chapter 8**.

¹⁴⁷ ASIC, answers to written question on notice set 65, 23 October 2023 (received 22 December 2023).

¹⁴⁸ ASIC, [ASIC's governance and accountability](#), 24 August 2023 (accessed 2 February 2024).

Chapter 4

Approach to investigation

- 4.1 This chapter considers the Australian Securities and Investments Commission's (ASIC) approach to investigating corporate misconduct. The chapter first considers concerns regarding ASIC's receipt and investigation of reports of alleged misconduct. The chapter then considers evidence regarding ASIC's handling of information on possible misconduct from other sources, including registered liquidators. Further, the chapter considers concerns raised in submitters' evidence regarding ASIC's investigatory methods.
- 4.2 The material in this chapter is closely related to issues regarding ASIC's approach to investigation in **Chapter 5** and should be read in conjunction with that chapter.

Introduction

- 4.3 ASIC receives a substantial amount of information on potential corporate misconduct.¹ In general, this information comes from:
- reports of alleged misconduct;
 - intelligence from ASIC's supervisory and surveillance activities; and
 - intelligence from other agencies or regulators.²
- 4.4 Given the breadth of ASIC's remit, it is not feasible for all matters of possible misconduct to be investigated. Rather, ASIC adopts a 'risk-based approach' to handling misconduct reports where investigation and enforcement resources are allocated to matters involving the most serious harm.³
- 4.5 However, concerns were raised during the inquiry regarding the effectiveness and efficiency of ASIC's approach to handling reports of alleged misconduct. In particular, submitters contended that ASIC's approach to handling misconduct reports sees alleged unlawful conduct go uninvestigated. In some cases, ASIC's apparent reluctance to investigate misconduct reports appears to have compounded the harm experienced by consumers and investors.
- 4.6 In the circumstances that ASIC does investigate alleged misconduct, ASIC has been criticised for failing to pursue matters in a timely and competent manner. Unfortunately, many of the concerns raised in this chapter echo concerns raised in other forums.

¹ Australian Securities and Investments Commission (ASIC), *Submission 1*, pp. 3–4.

² ASIC, *Submission 1*, pp. 4, 15.

³ ASIC, *Submission 1*, p. 5.

ASIC receives thousands of reports on possible misconduct

4.7 Misconduct reports are one of the main ways in which information on possible unlawful behaviour is brought to ASIC’s attention. These reports cover a broad range of potentially unlawful behaviour, including:

...insider trading, inappropriate financial advice, the offering of unlicensed financial services or credit, misleading and deceptive conduct or disclosure about financial products, harmful lending practices, poor insurance claims handling, director misconduct and investment scams.⁴

4.8 Each year, ASIC receives around 8000 to 10 000 misconduct reports from members of the public.⁵ Thousands of other reports are provided to ASIC via mandatory reporting pathways, as shown in **Table 4.1**.

Table 4.1 Misconduct reports by type, received from 2019–20 to 2022–23

Report type	2019–20	2020–21	2021–22	2022–23
Public and AFCA	12 355	10 711	8688	8149
Reportable situations	2721	2435	1969	1313
Auditor reports	1172	1174	1393	1968
Statutory reports	8560	5083	4645	6073
Total	24 808	19 403	16 695	17 503

Source: ASIC, *Supplementary submission 1.5*, p. 46.

4.9 When ASIC receives reports of alleged misconduct, ASIC considers its priorities and enforcement criteria to determine the action it will take.⁶ ASIC uses technology-based and manual methods to triage the reports and identify high risk matters which are then subject to more detailed assessments.⁷ For example:

- **reports of misconduct from the public**—are manually triaged and assigned a risk rating that correlates to ASIC’s strategic or enforcement priorities, or the egregiousness of the conduct involved;
- **statutory reports from liquidators**—are automatically triaged using digital tools, however supplementary liquidator reports are manually triaged and assessed in the same way as reports from members of the public; and
- **reportable situations form lodgements**—are automatically assigned a risk score and are subject to a selective review by ASIC.⁸

⁴ ASIC, *Submission 1*, p. 16.

⁵ ASIC, answers to written questions on notice set 19, 3 May 2023 (received 21 July 2023).

⁶ See, ASIC, answers to written questions on notice set 82, 13 June 2024 (received 21 June 2024).

⁷ ASIC, *Submission 1*, p. 5.

⁸ See, ASIC, *Submission 1*, p. 21.

4.10 According to ASIC, the criteria it uses to select cases for further action are confidential but generally include factors such as ‘the seriousness of the alleged conduct, the amount of loss suffered and the number of consumers affected’.⁹

4.11 Despite the importance of misconduct reports, the committee received evidence regarding various challenges people faced in making a report to ASIC.¹⁰ In particular, inquiry participants raised concerns about ASIC’s lack of transparency in handling reports of alleged misconduct from the public.¹¹ For example, Madgwicks’ submission to the inquiry outlined how it made a ‘detailed’ report to ASIC in 2022 regarding a ‘potential contravention of a ASX listed corporation’ only for ASIC to refuse to confirm whether they are investigating.¹² Madgwicks concluded that:

It seems unlikely that there has been any investigation by ASIC as the further conduct by the company does not show any regard for the director’s fiduciary duties, proper corporate governance or concern about the regulator’s oversight.¹³

4.12 Further, the committee heard from Ms Sarah Abood, Chief Executive Officer of the Financial Advice Association of Australia that ASIC ‘could better leverage and more transparently report intelligence from the financial adviser population’. Ms Abood continued:

Our members are very proud to be considered and trusted as professionals. They’re very well placed and highly motivated to identify and stop any problems on our early sector early. They do often ask us to pass on information about misconduct to ASIC. However, in many cases, no further information is provided or requested by ASIC. We’re unsure of whether any further action is being taken. This, of course, can be disheartening for those who have taken time and trouble and sometimes risk to report misbehaviour. It lessens the chances that further reports will be made.¹⁴

4.13 ASIC submitted that it acknowledges receipt of all misconduct reports (except for anonymous reports) and reporters are provided with a reference number.¹⁵

Most reports of alleged misconduct result in no further action

4.14 ASIC’s handling of misconduct reports can result in several outcomes, including investigation and possible enforcement. Most misconduct reports to ASIC,

⁹ ASIC, answers to questions on notice set 19, 3 May 2023 (received 21 July 2023).

¹⁰ Adams Economics, *Submission 21*, p. 4.

¹¹ See, for example, Mr Petrus Helberg, Private capacity, *Committee Hansard*, 4 October 2023, p. 8.

¹² Madgwicks, *Submission 59*, p. [4].

¹³ Madgwicks, *Submission 59*, p. [4].

¹⁴ Ms Sarah Abood, Chief Executive Officer, Financial Advice Association of Australia, *Committee Hansard*, 23 August 2023, p. 34.

¹⁵ ASIC, *Submission 1*, p. 17.

however, result in no further action. For example, in 2022–23, ASIC referred 14 per cent of misconduct reports for further action, while 63 per cent of reports resulted in no further action (and a further 14 per cent were assessed as being outside of ASIC’s jurisdiction), as seen below in **Table 4.2**.

Table 4.2 Misconduct reports by outcome, 2021–22 and 2022–23

Outcome	2021–22 percentage	2022–23 percentage
Referred for action by ASIC	13	14
Resolved	11	8
- Compliance achieved	1	1
- Warning letter issued	6	4
- Referred to internal or external dispute resolution	4	3
- Formal information release made under s127 of the ASIC Act	<0.5	<0.5
Analysed and assessed for no further action	66	63
- Insufficient evidence	43	29
- No action	23	34
No jurisdiction	19	14
No breach or offence	1	1
Total	100	100

Source: ASIC, *Annual Report 2022–23*, October 2023, pp. 207–208.

4.15 Moreover, the rate at which ASIC assesses misconduct reports as requiring no further action has increased significantly in recent years, having doubled from 33 per cent in 2011–12 to 66 per cent in 2021–22.¹⁶

4.16 According to ASIC, there are a range of circumstances which can lead to a misconduct report being assessed as requiring no further action. These include:

- the alleged perpetrators reside outside of Australia;
- the issue is being addressed by another agency;
- the issue is better suited to alternative dispute resolution;
- the issue does not relate to current priorities of ASIC;
- the conduct is aged;
- the evidence supporting the allegation is limited;
- the issue has been previously considered by ASIC;

¹⁶ See, ASIC, *Submission 1*, p. 50.

- the issue relates to matters for which there has been law reform;
- the issue is of importance only to the parties in dispute; and
- the issue is a private legal matter and intervening would be of limited benefit.¹⁷

4.17 ASIC's reliance on some of the above circumstances as a reason not to pursue cases was criticised during the inquiry. For instance, Mr Mark Alan, a lawyer who represented a whistleblower in relation to the Nuix initial public offering, told the committee:

The bad behaviour seems to be continuing with companies in Australia. I don't think it's enough for ASIC to repeatedly say that it is hampered by the lack of evidence, the factual matrix being complex or there were large quantities of data and written material to be reviewed. That's what ASIC is there to do. If ASIC, despite its financial and human resources, seems or feels it is powerless to stop these crashes occurring, I think it is up to ASIC to articulate what it needs to stop them occurring.¹⁸

4.18 Several other submitters raised concerns about ASIC's 'no further action' outcome.¹⁹

4.19 ASIC has spoken to the proportion of reports of alleged misconduct for which no further action is taken, compared with the proportion of reports referred for further action or formal investigation.²⁰ ASIC has emphasised that their purpose is to ensure the fair, efficient operation of markets and financial services, and to promote confidence and participation in the financial system. They explained that, like any regulator, they can only progress a finite number of actions, and do not seek to act on a fixed proportion of reports of alleged misconduct.²¹

ASIC commences only a small number of investigations each year

4.20 ASIC has significant powers to investigate suspected breaches of corporate law, credit law and related matters.²² In general, ASIC may commence an investigation in response to a misconduct report or as a result of ASIC's surveillance activities.

4.21 However, ASIC investigates only a relatively small number of cases of possible corporate misconduct each year. Over 12 years from 2011–23 to 2022–23, ASIC commenced an average of 162.5 investigations per year. In the last three years, ASIC has commenced an average of 117 investigations, a 28 per cent decline over the 12-year-average.²³

¹⁷ See, ASIC, answers to questions on notice set 25, 23 June 2023 (received 21 July 2023).

¹⁸ Mr Mark Alan, Private capacity, *Committee Hansard*, 23 August 2023, p. 29.

¹⁹ See, for example, Mr Laurence Thomas, *Submission 27*, p. [1].

²⁰ Australian Securities and Investments Commission, *Supplementary Submission 1.5*, p. 11.

²¹ Australian Securities and Investments Commission, *Supplementary Submission 1.5*, p. 11.

²² See, ASIC, *Submission 1*, p. 28; ASIC Act, s. 13; NCCP Act, s. 247.

²³ See, ASIC, *Supplementary Submission 1.5*, p. 51.

Table 4.3 Investigations commenced and completed, 2014–15 to 2021–22

Investigation status	2015–2016	2017–2018	2018–2019	2019–2020	2020–2021	2021–2022	2022–2023
Commenced	206	126	151	134	110	107	134
Completed	175	124	126	103	132	158	139

Source: ASIC, *Supplementary Submission 1.5*, p. 54.

4.22 ASIC routinely defends its approach to investigation. ASIC submitted that it undertakes only a small number of investigations as they are ‘resource intensive’ and, therefore, directed at the ‘most serious matters’.²⁴ Indeed, the Chair of ASIC, Mr Joseph Longo, recently claimed that ASIC is resourced only to do ‘around 150 to 200 investigations a year’.²⁵ Further, Mr Longo suggested that while increasing ASIC’s budget could result in more ASIC investigations he questioned whether such an increase would result in a decrease the complaints about ASIC.²⁶

4.23 In response to the declining number of ASIC investigations between 2014–15 and 2021–22, ASIC claimed that its enforcement resources are increasingly focussed on addressing instances of consumer harm.²⁷ ASIC told the committee:

While the number of formal investigations commenced under s13 of the ASIC Act has declined over the period, the number of civil and criminal actions commenced has increased over the same period. This reflects an increasing proportion of ASIC’s enforcement resources being dedicated to resource-intensive court-based action during this period.²⁸

4.24 However, the small number of cases pursued by ASIC has raised concerns that only a fraction of the information on possible corporate misconduct that ASIC receives is subject to formal investigation. Analysis of ASIC data by Adams Economics found that between 2011–12 to 2020–21 the average annual ratio of ASIC investigations to reports of alleged misconduct, breach reports and supplementary statutory reports from liquidators was just 1.27 per cent.²⁹ Furthermore, Adams Economics’ analysis suggests that the annual ratio of

²⁴ ASIC, *Submission 1*, p. 28.

²⁵ Mr Joseph Longo, Chair, ASIC, Parliamentary Joint Committee on Corporations and Financial Services’ inquiry into the Oversight of ASIC, the Takeovers Panel and the Corporations Legislation, *Proof Committee Hansard*, 30 April 2024, p. 4.

²⁶ Mr Joseph Longo, Chair, ASIC, Parliamentary Joint Committee on Corporations and Financial Services’ inquiry into the Oversight of ASIC, the Takeovers Panel and the Corporations Legislation, *Proof Committee Hansard*, 30 April 2024, p. 8.

²⁷ ASIC, answers to written questions on notice set 29, 28 June 2023 (received 7 August 2023).

²⁸ ASIC, answers to written questions on notice set 29, 28 June 2023 (received 7 August 2023).

²⁹ See, Adams Economics, *Handling of reports of alleged misconduct by the Australian Securities and Investments Commission*, 2022, p. 22 as contained in Adams Economics, *Submission 21*.

investigations to total reports of alleged misconduct peaked in 2014–15 and fell to a low of just 0.74 per cent in 2020–21.³⁰

4.25 Participants in the inquiry expressed concern regarding ASIC’s low rate of investigation, including the findings of Adams Economics’ analysis.³¹ For example, the former Chair of ASIC, Mr James Shipton, described Adams Economics’ figures as ‘sobering’ and argued that they show ASIC is overwhelmed and needs greater capacity.³² Further, the Small Business Development Corporation argued that ASIC needed to undertake a ‘significantly larger number of investigations and prosecutions’ for it to effectively penalise those engaged in misconduct.³³

4.26 Despite these concerns, ASIC argued that Adams Economics’ analysis was ‘oversimplified and superficial’.³⁴ Further, ASIC defended its approach to investigation by claiming critics ‘misunderstand’ its role and that ASIC is not a ‘complaint resolution body’.³⁵ As ASIC submitted:

We have been criticised for the proportion of reports of alleged misconduct that are progressed to formal investigation and enforcement. This criticism misunderstands the nature of our regulatory task. ASIC is not a complaint resolution body; its purpose is not to resolve individual consumer disputes and complaints. ASIC’s purpose is to gather information from many sources, across the range of entities that we regulate, and use it to make strategic decisions about when to intervene and how to do so.³⁶

4.27 Indeed, ASIC has sought to emphasise that it ‘does not intervene in disputes, give legal advice or act on behalf of individuals’.³⁷ Additionally, ASIC told the committee it does not routinely seek compensation for individuals affected by corporate misconduct, nor is ASIC resourced to do so.³⁸ Rather, ASIC states it ‘will advise the complainant of their right to take their complaint to either the firm’s IDR process or to AFCA to pursue a remedy’.³⁹

³⁰ Adams Economics, *Submission 21*, pp. 5–6.

³¹ See, for example, Small Business Development Corporation, *Submission 9*, p. 3; Dr Evan Jones, *Submission 47*, p. 11; Australian Citizens Party, *Submission 60*, p. 5.

³² Mr James Shipton, Private capacity, *Committee Hansard*, 23 August 2023, p. 49.

³³ Small Business Development Small Business Development Corporation, *Submission 9*, p. 3.

³⁴ ASIC, answers to written questions on notice set 29, 28 June 2023 (received 7 August 2023).

³⁵ ASIC, *Supplementary Submission 1.5*, p. 5.

³⁶ ASIC, *Supplementary Submission 1.5*, p. 5.

³⁷ ASIC, *Supplementary Submission 1.1*, pp. 24–25.

³⁸ Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 4.

³⁹ ASIC, *Submission 1*, p. 23.

4.28 Nonetheless, some submitters contended that ASIC should be more active in individual matters brought to ASIC's attention. For example, Dr Evan Jones argued that '[i]t is *precisely* ASIC's role to champion individual disputes in the courts because the victims lack the resources to do so.'⁴⁰ Moreover, several submitters criticised ASIC's approach to investigation and enforcement for reflecting underlying philosophies which, in their view, failed to protect consumers. For instance, some submitters raised concerns that ASIC's approach to regulation and enforcement was undermined by a philosophy of *caveat emptor*.⁴¹ As the Australian Citizens Party submitted:

ASIC's failings are not a management problem. Rather, they are baked into the structure of the regulator itself. ASIC cannot be fundamentally committed to regulation when it is committed to the discredited "efficient markets theory" ideology and a hands-off approach to regulation. Instead, ASIC has been faithful to the doctrine of *caveat emptor*—let the buyer beware—which blames the consumer for any losses they suffer, even if those losses are the work of unscrupulous individuals, and more often than not, financial criminals to whom ASIC's weak and ineffective regulation is no deterrent.⁴²

4.29 In addition, the committee received evidence that some ASIC investigations have been marred by poor practices and capabilities. For example, some inquiry participants raised concerns that ASIC investigators lacked appropriate legal and commercial knowledge relevant to the investigation.⁴³ In other instances, evidence suggests it appears ASIC investigations have taken an inordinately long time to progress, or were hampered by administrative issues.⁴⁴ ASIC has defended its investigation of some of these matters.⁴⁵

4.30 Two instances of alleged corporate misconduct appear to exemplify the lack of communication and significant delays which infect at least some ASIC investigations. Mr Petrus Helberg advised the committee that despite his working within a company whose financial products were alleged to be misleading, false or deceptive, ASIC repeatedly declined the witness' offer to provide information about the suspected major fraud.⁴⁶ Regarding ASIC's investigation of Kalkine Pty Ltd, witnesses recounted that ASIC has been largely

⁴⁰ Dr Evan Jones, *Submission 47*, p. 6.

⁴¹ See, for example, Ms Caroline Read, *Submission 55*, p. [1]; Mr Dennis Ryle, *Submission 26*, pp. [1–2]; Name withheld, *Submission 65*, p. [1].

⁴² Australian Citizens Party, *Submission 60*, p. 2.

⁴³ See, for example, Mr Daniel Schlaepfer, President and Founder, Select Vantage Inc., *Committee Hansard*, 24 August 2023, pp. 1–3.

⁴⁴ See, for example, Mr Travis Peluso, Private capacity, *Committee Hansard*, 23 August 2023, pp. 8–9.

⁴⁵ See, ASIC, *Supplementary submission 1.2*, pp. 28–30. ASIC, *Supplementary submission 1.3*, pp. 12–14.

⁴⁶ Mr Petrus Helberg, Private Capacity, *Committee Hansard*, 4 October 2023, pp. 6–7.

noncommunicative and unresponsive.⁴⁷ At the time of writing, ASIC has not yet decided whether regulatory action should be taken against Kalkine, despite numerous reports of misconduct over a number of years.⁴⁸ This contrasts with the actions of the New Zealand regulator, which has decisively intervened against Kalkine New Zealand and ordered that they cease making sales calls.⁴⁹

Missed opportunities to prevent harm to consumers and investors

4.31 The committee received approximately 150 public submissions from individuals who expressed significant concerns regarding ASIC's approach to investigation. In general, these submissions claimed that ASIC had failed to appropriately investigate various matters of corporate misconduct.

4.32 In some cases, submitters alleged that ASIC was aware of misconduct occurring for a significant period before acting.⁵⁰ As such, submitters were often critical of ASIC for not doing more to protect them, as consumers and investors, from the serious harms of unlawful corporate conduct. These harms included:

- losing their life savings to various instances of corporate misconduct;⁵¹
- losing their home;⁵²
- other forms of serious financial hardship, including difficulty paying for basic services or compromised retirement outcomes,⁵³ and

⁴⁷ Mr Christopher Pitts, Private Capacity, and Mr Brad Weatherstone, Private Capacity, *Committee Hansard*, 4 October 2023, pp. 9–11.

⁴⁸ ASIC, answers to questions on notice set 60, 18 October 2023 (received 27 November 2023).

⁴⁹ Senator Andrew Bragg, *Committee Hansard*, 4 October 2023, p. 11.

⁵⁰ See, for example, Mr Laurence Thomas, *Submission 27*, pp. [1–4]; Name withheld, *Submission 32*, p. [1]; Mr Rob Gower, *Submission 197*, p. [2]; Mrs Susan Barnett, Managing Director, SRG Advisory, *Committee Hansard*, 23 August 2023, p. 40.

⁵¹ See, for example, Name withheld, *Submission 101*, pp. [1–2]; Name withheld, *Submission 96*, p. [1]; Name withheld, *Submission 75*, p. [1]; Name withheld, *Submission 158*, p. [1]; Name withheld, *Submission 32*, p. [1]; Name withheld, *Submission 157*, p. [1]; Name withheld, *Submission 100*, p. [1]; See, for example, Name withheld, *Submission 152*, p. [1]; Name withheld, *Submission 70*, p. [1]; Name withheld, *Submission 91*, p. [3]; Name withheld, *Submission 73*, p. [1]; Name withheld, *Submission 31*, p. [1]; Name withheld, *Submission 68*, p. [1]; Name withheld, *Submission 71*, p. [1]; Name withheld, *Submission 148*, p. [2]; Name withheld, *Submission 33*, p. [1]; Name withheld, *Submission 35*, p. [1]; Mr Jamie Asher, *Submission 56*, pp. 1–2; Name withheld, *Submission 71*, p. [1].

⁵² See, for example, Name withheld, *Submission 92*, p. [i]; Name withheld, *Submission 149*, p. [1]; Name withheld, *Submission 89*, p. [1]; Name withheld, *Submission 34*, p. 2; Name withheld, *Submission 157*, p. [1]; Name withheld, *Submission 159*, p. [1].

⁵³ See, for example, Name withheld, *Submission 99*, p. [1]; Name withheld, *Submission 149*, p. [1]; Name withheld, *Submission 37*, p. [2]; Name withheld, *Submission 87*, p. [1]; Name withheld, *Submission 32*, p. [1]; Name withheld, *Submission 73*, p. [1]; Name withheld, *Submission 84*, p. [1]; Name withheld, *Submission 75*, p. [1].

- significant mental health and emotional impacts.⁵⁴
- 4.33 The following section details a range of cases in which submitters contended ASIC's approach to investigation missed important opportunities to prevent harm to consumers and investors.

Courtenay House Capital Trading Group

- 4.34 Courtenay House Capital Trading Group (Courtenay House) operated a Ponzi scheme which raised approximately \$180 million from around 585 Australians between 2011 and 2017.⁵⁵ Courtenay House told investors that funds they deposited with the company would be traded in foreign exchange and futures markets for attractive returns. However, only around three per cent of investors' funds were actually traded and 'monthly amounts paid to investors were derived from capital deposited from new investors'.⁵⁶
- 4.35 Three individuals have been prosecuted in relation to Courtenay House.⁵⁷
- 4.36 ASIC's regulatory response to Courtenay House was protracted. Indeed, ASIC was aware of concerns regarding Courtenay House some years prior to taking action to wind up the scheme, as show below in below in **Table 4.4**.

⁵⁴ See, for example, Name withheld, *Submission 94*, p. [1]; Name withheld, *Submission 100*, p. [1]; Name withheld, *Submission 70*, p. [1]; Name withheld, *Submission 149*, p. [1]; Name withheld, *Submission 69*, p. [1]; Name withheld, *Submission 68*, p. [1]; Name withheld, *Submission 37*, p. [2]; Name withheld, *Submission 160*, p. [1]. Name withheld, *Submission 158*, p. [1].

⁵⁵ See, ASIC, 'Former Courtenay House director pleads guilty to conducting \$180 million Ponzi scheme', *Media release*, 8 November 2022 (updated as at 14 May 2024); ASIC, answers to written questions on notice set 50, 6 September 2023 (received 29 September 2023).

⁵⁶ ASIC, 'Former Courtenay House director pleads guilty to conducting \$180 million Ponzi scheme', *Media release*, 8 November 2022 (updated as at 14 May 2024).

⁵⁷ Note, this includes Mr Tony Iervasi, Mr Athan Papoulias and Mr David Sipina. Mr Iervasi, the sole director and shareholder of Courtenay House, pled guilty to offences of engaging in dishonest conduct and was remanded in custody in May 2024, pending sentencing by the NSW Supreme Court. Mr Papoulias, a former contractor and promoter of Courtney House, pled guilty to charges of carrying on a financial services business without a license and dealing with the proceeds of crime and was sentenced in May 2023 to two years' imprisonment, to be served as an intensive corrections order. Mr Sipina pled guilty charges of carrying on a financial services business without a license and dealing with the proceeds of crime in March 2024, and is due to be sentenced by the Sydney District Court. See, ASIC, 'Former Courtenay House director pleads guilty to conducting \$180 million Ponzi scheme', *Media release*, 8 November 2022 (updated 14 May 2024); ASIC, 'Former Courtenay House contractor sentenced', *Media release*, 8 May 2023; ASIC, 'Third person pleads guilty in relation to Courtenay House Ponzi scheme', *Media release*, March 2024.

Table 4.4 Key dates from ASIC's response to Courtenay House

Date	Action
September 2014	ASIC became aware of concerns relating to Courtenay House when investigating 'a different matter'. ASIC 'registered an internal activity to consider these concerns'.
January to March 2015	ASIC received two reports in January and February 2015 that alleged Courtenay House of unlicensed conduct and misleading investors. In response, ASIC 'issued a warning letter to Mr Iervasi on 31 March 2015 requesting he remove the Courtenay House website and cease unlicensed conduct.'
March 2016	ASIC received a report from a licensed financial planner which alleged Courtney House 'was offering unlicensed financial advice' and 'purported returns were unrealistic'.
August 2016	ASIC 'commenced a surveillance' of Courtenay House.
January 2017	ASIC received a 'further report from an anonymous witness'.
March 2017	ASIC 'commenced a formal investigation into Courtenay House'.
April 2017	ASIC applied to the NSW Supreme Court to freeze assets' of the Courtenay House companies and persons of interest.
May 2017	The NSW Supreme Court appointed liquidators who found that Courtenay House 'had been running a Ponzi scheme since 2011'.
May 2020	ASIC 'referred a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) recommending charges against Mr Iervasi relating to running a Ponzi scheme'.
August 2020	ASIC referred charges against Mr Papoulias and Mr Sipina to the CDPP regarding their role in the Ponzi scheme.

Source: ASIC, answers to written questions on notice set 50, 6 September 2023 (received 29 September 2023).

Concerns regarding ASIC's regulatory response

4.37 The committee heard that shortcomings in ASIC's response to Courtenay House was a key factor in the financial losses experienced by victims.⁵⁸ For instance, Mrs Susan Barnett, Managing Director of SRG Advisory, told the committee that ASIC's investigation 'failed to identify shortcomings in the business model and legislative compliance'.⁵⁹ Further, Mrs Barnett noted that prior to the collapse of Courtenay House, ASIC received complaints about the company including from a 'licensed financial planner who asserted it was a Ponzi scheme'.⁶⁰

⁵⁸ See, for example, Name withheld, *Submission 98*, p. [1].

⁵⁹ Mrs Susan Barnett, Managing Director, SRG Advisory, *Committee Hansard*, 23 August 2023, p. 40.

⁶⁰ Mrs Susan Barnett, Managing Director, SRG Advisory, *Committee Hansard*, 23 August 2023, p. 40.

- 4.38 Submissions from victims often commented that they had undertaken due diligence in relation to Courtenay House, including by obtaining information on the company from ASIC,⁶¹ checking ASIC's banned and disqualified register,⁶² and meeting with Courtenay House staff at their offices.⁶³
- 4.39 Moreover, one victim explained that ASIC's lack of regulatory action had the effect of making Courtenay House appear legitimate:
- ASIC's inaction over several years only went to further legitimize Courtenay House in the eyes of both existing and new investors, including ourselves. As late as August 2016, ASIC staff claimed that there were no red flags on Courtenay House or its directors whatsoever, even though the liquidators found that Courtenay House had never submitted a tax return since it had been established in 2012.⁶⁴
- 4.40 Despite this, hundreds of people lost money to Courtenay House with often catastrophic impacts. For example, victims submitted that their financial losses included \$200 000; \$900 000; \$2.64 million of personal investments and \$4.39 million of SMSF investments; and their life savings.⁶⁵ In some cases, victims were forced to sell their homes.⁶⁶ Moreover, submitters experienced adverse impacts on their health, financial well-being and on their family relationships.⁶⁷
- 4.41 Several submitters raised concerns about the length of time it took ASIC to act in relation to Courtenay House.⁶⁸ Further, some submitters expressed anger that ASIC was not more transparent about the concerns in relation to Courtenay House. In some cases, victims deposited money in the scheme just days and weeks prior to ASIC taking action to freeze Courtenay House's assets.⁶⁹

⁶¹ See, for example, Name withheld, *Submission 34*, p. 1; Name withheld, *Submission 158*, p. [1]; Name withheld, *Submission 37*, pp. [1–2].

⁶² See, for example, Name withheld, *Submission 100*, p. [1]; Name withheld, *Submission 96*, p. [1]; Name withheld, *Submission 97*, p. [1].

⁶³ See, for example, Mr Carmelo Pesce, *Committee Hansard*, 23 August 2023, p. 40; Name withheld, *Submission 160*, p. [1].

⁶⁴ Name withheld, *Submission 98*, p. [1].

⁶⁵ See, Name withheld, *Submission 151*, p. [1]; Name withheld, *Submission 98*, p. [1]; Name withheld, *Submission 34*, p. 1; Name withheld, *Submission 96*, p. [1]; Name withheld, *Submission 158*, p. [1].

⁶⁶ See, Name withheld, *Submission 34*, p. 1; Name withheld, *Submission 104*, p. 1.

⁶⁷ See, for example, Name withheld, *Submission 98*, p. [1]; Name withheld, *Submission 34*, p. 1; Name withheld, *Submission 37*, p. [2]; Name withheld, *Submission 107*, p. 3–4.

⁶⁸ See, for example, Name withheld, *Submission 37*, p. [1]; Name withheld, *Submission 38*, p. [1].

⁶⁹ Name withheld, *Submission 104*, p. 1; Name withheld, *Submission 159*, p. [1].

Sterling Group

- 4.42 Sterling Group was a group of companies which, among other operations, controlled a complex investment scheme that resulted in devastating financial losses for hundreds of Australians when the company collapsed in 2019.⁷⁰
- 4.43 Sterling Group offered various financial products to investors, including the Stirling Income Trust (SIT), the Silverlink Income Rights Trust and Sterling New Life Lease (SNLL). Of particular concern was the SNLL; a managed housing investment scheme under which retirees would purchase units in the SIT, usually in the order of hundreds of thousands of dollars, to ‘cover the rent payable for a long-term property lease of up to 40 years’.⁷¹ For those retirees, their access to housing became dependent on the financial performance of Sterling Group and was severely compromised when the company collapsed.⁷²
- 4.44 As detailed in the committee’s 2022 inquiry, 527 people invested around \$30 million in the SIT. The SNLL product was purchased by 101 people—62 tenant-investors entered through the SIT while 39 tenant-investors contributed a further \$7.56 million through Silverlink’.⁷³
- 4.45 In November 2023, three people were charged in connection with the SIT.⁷⁴

Concerns regarding ASIC’s regulatory response

- 4.46 A number of people affected by the Sterling Group collapse wrote to the committee regarding their ongoing concerns about ASIC’s response to the case.⁷⁵ For instance, Sterling First Action Group claimed that:
- ASIC lacked the ‘ability to effectively undertake regulatory action and enforcement’, given that Sterling Group was purportedly managed by directors involved in previous high-profile company collapses;
 - ASIC failed to take regulatory action in response to early reports of misconduct and non-compliance;
 - ASIC failed to use its enforcement powers appropriately to control the operations of Sterling Group and protect investors;
 - ASIC did not allocate adequate resources to ensure its investigation and enforcement actions in response to Sterling Group were timely; and
 - ASIC was not transparent with investors when investigating Sterling Group.⁷⁶

⁷⁰ See, Senate Economics References Committee, *Sterling Income Trust*, February 2022, pp. 3–18.

⁷¹ See, Senate Economics References Committee, *Sterling Income Trust*, February 2022, pp. 3–6.

⁷² See, Senate Economics References Committee, *Sterling Income Trust*, February 2022, p. 8.

⁷³ ASIC cited in Senate Economics References Committee, *Sterling Income Trust*, February 2022, p. 8.

⁷⁴ ASIC, ‘Charges laid following ASIC’s investigation into the [SIT]’, *Media release*, 3 November 2023.

⁷⁵ See, for example, Mr Dennis Ryle, *Submission 26*, p. [1]; Mr Laurence Thomas, *Submission 27*, p. [1].

⁷⁶ Sterling First Action Group, *Submission 53*, p. 10.

- 4.47 Further, submitters emphasised that if ASIC had acted sooner to end Stirling First's operations, then the financial devastation experienced by consumers could have been prevented, particularly to vulnerable retirees.⁷⁷ Victims of the Sterling Group collapse submitted they were experiencing a range of significant adverse impacts. These included compromised and uncertain retirement outcomes,⁷⁸ and loss of, or facing eviction from, their homes.⁷⁹
- 4.48 In 2021, the Chair of ASIC summarised the considerations relevant to the ASIC's intervention in the Sterling Group:

We appreciate that those who have suffered losses have wished for us to have moved faster at times or to have intervened earlier. Any action we take must be based on the collection of proper evidence. We must follow due process before we can intervene, particularly in circumstances where there is incomplete or conflicting information. Our role also requires us to regularly make difficult choices about which reports of misconduct to examine and which apparent breaches to investigate. Our finite resources as well as those of the prosecuting authorities and courts mean we cannot pursue all possible breaches of the law.⁸⁰

- 4.49 Nonetheless, one submitter considered that ASIC had 'created such a web of complications to justify their poor duty of care' to those affected by the Courtenay House collapse.⁸¹ Moreover, at least one submitter argued that given ASIC was aware of unlawful corporate conduct by Sterling Group, ASIC should be liable to pay compensation to the victims of the scheme.⁸²

Greywolf Resources NL

- 4.50 The committee heard from Mr Garry Delaney, who invested nearly \$400 000 with Greywolf Resources NL (Greywolf) in 2010 and reported alleged misconduct to ASIC in November 2012.⁸³ ASIC assessed Mr Delaney's report and advised him that ASIC 'would not be taking any action'.⁸⁴

⁷⁷ See, for example, Caroline Read, *Submission 55*, p. [5]; Name withheld, *Submission 101*, p. [2].

⁷⁸ See, for example, Name withheld, *Submission 101*, p. [2].

⁷⁹ See, for example, Name withheld, *Submission 27*, pp. [2–4]; Name withheld, *Submission 89*, p. [1].

⁸⁰ Mr Joseph Longo, Chair, ASIC, *Committee Hansard*, Inquiry into Sterling Income Trust, 16 November 2021, p. 2.

⁸¹ Name withheld, *Submission 74*, p. [1].

⁸² Name withheld, *Submission 101*, p. [2].

⁸³ Mr Garry Delayney, Private capacity, *Committee Hansard*, 23 August 2023, pp. 26–28.

⁸⁴ ASIC, *Supplementary submission 1.3*, p. [11].

4.51 Between 2010 and 2022, ASIC received 22 misconduct reports in relation to Greywolf, in addition to five audit reports and one statutory report from a registered liquidator.⁸⁵ The misconduct reports raised concerns regarding:

...misleading statements, offers without a prospectus, failure to lodge financial statements, failure to retain sufficient books and records, failure to pay back loans, possible related party transactions, possible misappropriation, possible insolvency and failure to hold shareholder meetings.⁸⁶

4.52 ASIC appears to have taken limited action in response to Greywolf. ASIC wrote to Greywolf in relation to concerns regarding misleading statements, failure to lodge financial reports, and fundraising disclosure. ASIC also commenced court proceedings against Greywolf for not lodging financial reports and discontinued the proceedings when Greywolf supplied the reports.⁸⁷ However, ASIC states that it did not pursue allegations of misconduct because:

- there was little evidence of money being received from retail investors;
- there was insufficient material provided to support the allegations;
- there were avenues for aggrieved parties to take private legal action; or
- there were competing priorities among the other reports of misconduct.⁸⁸

4.53 ASIC states that it was not aware of investor losses at Greywolf until August 2022, when the Australian Broadcasting Corporation's *Four Corners* program reported on significant instances of poor corporate conduct at Greywolf.⁸⁹ This included raising significant capital from retirees and other vulnerable investors using misleading information about Greywolf's operations.⁹⁰

Disputes regarding loan products

4.54 During the inquiry, the committee received evidence from a number of submitters who raised concerns that ASIC had failed to pursue matters of alleged misconduct by financial service institutions in relation to loans to individuals or small businesses.

4.55 For instance, Mr Niall Coburn, a barrister and former ASIC investigator, made representations to the committee regarding the experience of 'many of the farmers who have lost their properties to the banks'.⁹¹ Mr Coburn stated that the

⁸⁵ ASIC, answers to written questions on notice set 48, 6 September 2023 (received 29 September 2023).

⁸⁶ ASIC, *Supplementary submission 1.3*, p. [10].

⁸⁷ ASIC, *Supplementary submission 1.3*, p. [10].

⁸⁸ ASIC, *Supplementary submission 1.3*, pp. [10–11].

⁸⁹ ASIC, *Supplementary submission 1.3*, p. [10].

⁹⁰ See, ABC, 'The Wolf of Woy Woy: The working-class investors duped by a man the regulators won't pursue', *Transcript*, 29 August 2022 (updated 1 September 2022).

⁹¹ Mr Niall Coburn, *Submission 49*, p. 3.

alleged misconduct experienced by farmers in relation to agricultural loans they held with the banks included:

...predatory lending or asset-based lending amounting to unconscionable conduct (section 12CB ASIC Act), fraud and forgery and failure to act efficiently, honestly and fairly (in breach of section 912A of the Corporations Act). The alleged misconduct also involves breaches of the banks' own internal compliance procedures and various forms of the Banking Code of Practice which amount to breaches of ASIC licence conditions.⁹²

4.56 Mr Coburn contends that ASIC has systemically failed investigate complaints of serious misconduct involving Australia's major banks. Indeed, Mr Coburn told the committee that of complaints made to ASIC by the 63 farmers he represented, ASIC had not investigated any of them.⁹³ Moreover, Mr Coburn submitted that it was difficult to understand why ASIC had decided not to commence a formal investigation under section 13 of the ASIC Act given that the farmers' complaints appear to meet ASIC's enforcement criteria.⁹⁴

4.57 ASIC rejected assertions that it 'did not properly consider reports of misconduct made over the years in relation to farming loans'. Further, ASIC stated:

Given the laws in place at the time of the conduct (which occurred from 1997 to mid-2010s) and ASIC's limited jurisdiction in relation to commercial lending, the main applicable provision is unconscionable conduct under the ASIC Act. In each case, the available evidence did not support such an action.⁹⁵

4.58 Submitting in relation to ASIC's investigation and enforcement of alleged breaches of the *National Consumer Credit Protection Act 2009* in the mortgage market, Mr David Lindsay argued that ASIC does not properly investigate serious allegations of mortgage fraud, including by not conducting interviews with affected mortgage holders or using their evidence in court proceedings.⁹⁶

Underutilising statutory reports by registered liquidators

4.59 Registered liquidators play a key role in investigating corporate misconduct in Australia.⁹⁷ When a company is being dissolved, liquidators investigate the company's affairs and are required by law to report to the company's creditors, members and ASIC.

⁹² Mr Niall Coburn, *Submission 49*, p. 3.

⁹³ Mr Niall Coburn, Private capacity, *Committee Hansard*, 4 October 2023, p. 2.

⁹⁴ Mr Niall Coburn, *Submission 49*, pp. 6–7.

⁹⁵ ASIC, *Supplementary submission 1.4*, p. 3.

⁹⁶ Mr Lindsay David, *Submission 57*, p. 1.

⁹⁷ See, Mr John Winter, Chief Executive Officer, Australian Restructuring, Insolvency and Turnaround Association (ARITA), *Committee Hansard*, 23 August 2023, p. 1.

- 4.60 Liquidators also provide initial statutory reports to ASIC under subsections 422(1), 438D(1) or 533(1) of the Corporations Act or under regulation 5.5.05 of the Corporations Regulations 2001.⁹⁸ These reports contain information on company directors who appear to be failing to meet their legal responsibilities, for example engaging in phoenixing activity, fraud and insolvent trading.⁹⁹
- 4.61 The damages associated with unlawful conduct by company directors is significant. For example, the committee heard from Mr Bill O’Chee, Partner of Himalaya Consulting, that a conservative estimate of the deficiency of assets to liabilities—debt that will not be repaid to creditors—for companies that became insolvent in 2018–19 was over \$8 billion. Of that, over \$1 billion was owed to the Commonwealth in the form of unpaid taxes and charges.¹⁰⁰ Further, from 1 July 2022 to 30 June 2023 insolvencies of small to medium size entities resulted in 96 per cent of creditors receiving only 0 – 11 cents in the dollar.¹⁰¹
- 4.62 The Australian Restructuring and Insolvency Turnaround Association (ARITA) told the committee that illegal phoenixing alone had an annual cost to the Australian community of more than \$4 billion.¹⁰² Further, the Small Business Development Corporation submitted that is ongoing:
- Despite the introduction of the 2019 phoenixing reforms, this unlawful activity is continuing with countless reports of suspected phoenixing across the country. Commentators have estimated that up to 10 per cent of recent company collapses across Australia are the result of illegal phoenix operators.¹⁰³
- 4.63 The committee also heard that liquidators are well-credentialed to report corporate misconduct to ASIC. As Mr Winter, Chief Executive Officer of ARITA explained:
- ...the difference between a community report or even an AFCA report that comes through is that liquidators are charged with the primary responsibility of investigating corporate malfeasance. They are trained to do this. They are trained to look at the evidence, to ascertain whether or not directors have failed in their statutory duties or they have phoenixed, failed to pay tax money or traded insolvent et cetera. These are the frontline investigators of bad corporate behaviour.¹⁰⁴

⁹⁸ See, ASIC, answers to questions on notice set 44, 6 September 2023 (received 29 September 2023).

⁹⁹ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 1.

¹⁰⁰ Mr Bill O’Chee, Partner, Himalaya Consulting, *Committee Hansard*, 1 November 2023, p. 21.

¹⁰¹ See, ASIC, ‘ASIC’s annual corporate insolvency statistics shows COVID-19 impact on small business’, *Media release*, 20 December 2023.

¹⁰² Mr Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 1.

¹⁰³ Small Business Development Corporation, *Submission 9*, p. 2.

¹⁰⁴ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 4.

- 4.64 Despite the unique position of liquidators to report misconduct, evidence provided to the committee shows that few liquidator reports are investigated by ASIC and even fewer reports lead to the prosecution of directors.
- 4.65 ARITA estimates that liquidators make an estimated 9000 to 10 000 misconduct reports to ASIC each year.¹⁰⁵ Yet, evidence suggests that ASIC responds to the majority of initial statutory reports from liquidators with an automated, no further action email within 40 seconds of the report being submitted.¹⁰⁶ In one example, the committee heard that a report submitted by an ‘experienced and highly regarded liquidator’ was automatically rejected even though the report involved illegal phoenix activity of around a quarter of a million dollars.¹⁰⁷
- 4.66 In another example, Mr Peter Keenan, an accountant of 30 years’ experience in the insolvency sector who submitted numerous reports to ASIC under section 533 of the Corporations Act, told the committee that:
- In many of those reports I asserted that, prima facie, one or more company officers had broken corporate laws, insolvency laws, breached their duties and/or engaged in other misconduct. The written response from ASIC and CAC was invariably that it had decided not to investigate.
- For many years insolvency practitioners who experienced the same outcomes have complained about the corporate regulator’s inadequate enforcement action with respect to insolvency offences.¹⁰⁸
- 4.67 Indeed, ASIC’s insolvency statistics suggest that alleged misconduct contained in liquidators reports are falling through the cracks. For instance, Mr O’Chee observed that in 2018–19 administrators’ reports to ASIC contained thousands of suspected potential breaches, including: 16 874 breaches of civil obligations; 772 alleged criminal offences that occurred prior to appointment and 2154 alleged criminal offences that occurred after appointment; and 185 alleged other offences.¹⁰⁹ Additionally, Mr O’Chee noted that in 77.9 per cent of the cases that administrators reported to ASIC in 2018–19, the administrator identified that they had documentary evidence of the alleged offence occurring.¹¹⁰
- 4.68 In 2021–22, ASIC received 3767 initial statutory reports from liquidators alleging possible misconduct and a further 332 supplementary reports were provided (of 593 supplementary reports requested by ASIC).¹¹¹ Professor Jason Harris

¹⁰⁵ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 4.

¹⁰⁶ See, Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [2].

¹⁰⁷ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 4.

¹⁰⁸ Mr Peter Keenan, *Submission 25*, pp. 2–3.

¹⁰⁹ Mr Bill O’Chee, Partner, Himalaya Consulting, *Committee Hansard*, 1 November 2023, p. 22.

¹¹⁰ Mr Bill O’Chee, Partner, Himalaya Consulting, *Committee Hansard*, 1 November 2023, p. 22.

¹¹¹ ASIC data cited by Professor Jason Harris, *Submission 20*, p. 1.

submitted that in 80 per cent of the cases where liquidators did provide a supplementary report, ASIC considered there 'was insufficient evidence to warrant commencing a formal investigation'.¹¹² Professor Harris continued:

Only 20% of supplementary reports (remembering these are themselves only a small subset of all misconduct reports each year) were then referred for further investigation (or 66 reports, out of 3,767 total reports). ASIC does not provide further information as to how many of those matters resulted in formal enforcement action and if so what the results of that action were.¹¹³

- 4.69 Professor Harris argued that while ASIC had 'recently introduced AI tools to assist with reviewing misconduct reports' this would 'not result in higher levels of enforcement activity because ASIC is refusing to take action where there is little or no evidence'. Additionally, Professor Harris noted 'there is usually little or no evidence in circumstances where the books and records have been destroyed or lost (or likely never kept in the first place)'.¹¹⁴
- 4.70 Given the above evidence, Professor Harris considered that ASIC's track record on taking enforcement action on matters arising from misconduct reports from liquidators has been 'manifestly inadequate for many years'.¹¹⁵ Further, Mr O'Chee concluded that ASIC's rate of investigation of liquidators reports 'was not good enough, because it is not doing justice to the victims of financial crime'.¹¹⁶ The Australian Small Business and Family Enterprise Ombudsman considered that ASIC should play a greater role in improving the financial acumen of businesses, noting that ASIC data shows many business failures are the result of poor business practices.¹¹⁷
- 4.71 Unsurprisingly, liquidators expressed frustration that their reports, which raise significant concerns regarding corporate misconduct, just 'go into a blackhole'.¹¹⁸ This frustration is compounded by the effort required by liquidators in making statutory reports to ASIC. As ARITA explained to the committee:

They put a lot of effort into it. Significantly, the Australian liquidator marketplace of 650 liquidators has to write off about \$100 million a year of unrecoverable fees because they are appointed to businesses where there's no money left to even pay their fees let alone to hand money to creditors.

¹¹² Professor Jason Harris, *Submission 20*, p. 1.

¹¹³ Professor Jason Harris, *Submission 20*, p. 1.

¹¹⁴ Professor Jason Harris, *Submission 20*, p. 1.

¹¹⁵ Professor Jason Harris, *Submission 20*, p. 1.

¹¹⁶ Mr Bill O'Chee, Partner, Himalaya Consulting, *Committee Hansard*, 1 November 2023, p. 22.

¹¹⁷ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, pp. [6–7].

¹¹⁸ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 4.

They are statutorily required to undertake very significant investigation work purely for the benefit of ASIC and its enforcement regime.¹¹⁹

- 4.72 In certain cases, making reports to ASIC regarding the conduct of liquidators themselves can be challenging. For example, ARITA made six referrals regarding alleged misconduct by liquidators to ASIC, under section 40–100 of the *Insolvency Law Reform Act 2016*. While ASIC responded to most of these within the statutory timeframe, there were instances where ARITA had to follow up with ASIC to seek a response. ARITA believes that ASIC should be treat these referrals with a ‘very rapid response in order to try to isolate any evidence and protect further harm occurring to the community’.¹²⁰
- 4.73 Other submitters also provided evidence on instances in which ASIC may not have properly investigated alleged misconduct by a liquidator.¹²¹

Better leveraging liquidators reports

- 4.74 Some inquiry participants considered that there is substantial scope for ASIC to improve the way it leverages the information on potential misconduct contained in reports from registered liquidators.
- 4.75 ARITA called for better engagement from ASIC with registered liquidators.¹²² ARITA said it had previously sought to work with ASIC to understand how liquidators can provide reports better suited to ASIC’s needs. However, it appears that ASIC has declined to support this work by sharing information on the risk weightings ASIC applies to liquidators’ reports.¹²³ As Mr Winter told the committee:

If ASIC doesn't want these reports, if there are clear hurdles that need to be crossed in terms of the significance of the malfeasance, then, of all people, liquidators should be told. They don't need to waste their time, which they're often not remunerated for, digging around and investigating these things if they know ASIC isn't going to do anything with it. Where we do know that ASIC will respond, if we are able to see what that is, then those things should be given an elevated path. Indeed, we've asked in the past as to whether or not there could be a channel to expedite matters of serious concern. The portal is the portal; that is what we've been told.¹²⁴

¹¹⁹ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 5.

¹²⁰ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, P. 2.

¹²¹ See, for example, Mr Geoff Shannon, Private capacity, *Committee Hansard*, 24 August 2023, p. 24; Name withheld, *Submission 102*, p. 5.

¹²² Ms Narelle Ferrier, Technical and Standards Director, ARITA, *Committee Hansard*, 23 August 2023, p. 5.

¹²³ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 5.

¹²⁴ Mr John Winter, Chief Executive Officer, ARITA, *Committee Hansard*, 23 August 2023, p. 6.

4.76 ARITA's calls for greater clarity on ASIC's reporting requirements were supported by other submitters. For example, the Australian Small Business and Family Enterprise (ASBFEO) recommended that ASIC provide 'greater clarity about how it makes decisions on which reports of misconduct progress to the next stage of investigation'. The ASBFEO said it understood ASIC's concerns that transparency on the filters applied in its automated algorithm for incoming insolvency practitioner reports may 'enable malfeasant business to avoid ASIC's detection'. However, the ASBFEO remained concerned about the 'number of reports of misconduct that do not see any investigation or enforcement action' and 'the economic impacts of unchecked misconduct', including from illegal phoenix activity. The ASBFEO argued that:

A clear understanding of how ASIC decides which reports progress would allow practitioners to target their investigation efforts. This would minimise costs to the businesses and their creditors, and result in greater enforcement action against illegal phoenixing.¹²⁵

4.77 Further, the ASBFEO raised concerns that, at present, ASIC does not have 'flexibility to adopt a tailored approach in responding to disputes, including availability of operator support where automated support is not appropriate or helpful'. The ASBFEO stated that including such flexibility, would allow insolvency practitioners to 'dispute matters of serious misconduct where a report was not progressed to the supplementary reporting stage by ASIC's algorithm'.¹²⁶ Further, the ASBFEO recommended ASIC include data in its insolvency statistics on 'on the estimated size of the business, extent of phoenixing activity, the outcomes of liquidations, insolvency-related fees per appointment'.¹²⁷

4.78 ASBFEO also called for legislative reform that would allow for it, and other dispute resolution agencies, to act as 'super-complainants'. Such a designated report pathway would enable such 'agencies to substantiate serious complaints to ASIC and trigger its review, allowing the relevant agencies to better assist with serious disputes'.¹²⁸ The Small Business Development Corporation also called for a 'super complaints' function that 'would enable trusted small business representative bodies to fast-track recommendations for investigations or actions'.¹²⁹

4.79 The committee notes that many of the issues raised in this inquiry regarding registered liquidator reports to ASIC were considered in detail during the 2023

¹²⁵ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [2].

¹²⁶ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, pp. [2–3].

¹²⁷ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 4.

¹²⁸ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [3].

¹²⁹ Small Business Development Corporation, *Submission 9*, p. 5.

inquiry into corporate insolvency in Australia by the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS). The committee also notes that much of the evidence referred to in this section was received prior to the publication of the PJCCFS report.

- 4.80 On 11 April 2024, ASIC released a consultation paper on guidance for reporting by external administrators and controllers. The consultation, in part, seeks to address recommendations from the PJCCFS inquiry for:

...a comprehensive review of whether the current statutory reporting obligations for insolvency practitioners are best serving the integrity, efficiency, and efficacy of the Australian corporate insolvency framework, including (but not limited to) the ability of ASIC to appropriately process, utilise and respond to initial statutory reports within our current resources.

In the interim the committee also recommended that ASIC consider whether any timely changes can be made to the regulations on reporting thresholds and ASIC's response to insolvency practitioner reports.¹³⁰

- 4.81 Further, the consultation paper sets out ASIC's proposed guidance on its expectation that '[a]n external administrator or controller is not required to carry out extensive investigations or incur significant costs in completing the initial statutory report'.¹³¹

- 4.82 In discussing the consultation, ASIC Commissioner Kate O'Rourke said that ASIC has heard the feedback regarding the 'inconsistencies and ambiguities' in its processes for receiving reports from liquidators, including that ASIC does not appear taking in action in relation when it requests supplementary reports.¹³² Commissioner O'Rourke added that ASIC '...is embarking on a body of work to improve how we screen, analyse and action (where required) the reports we receive from registered liquidators.'¹³³

- 4.83 In discussing the consultation, ASIC Commissioner Kate O'Rourke said that ASIC has heard the feedback regarding the 'inconsistencies and ambiguities' in its processes for receiving reports from liquidators, including that ASIC does not appear taking in action in relation when it requests supplementary reports.¹³⁴ Commissioner O'Rourke added that ASIC '...is embarking on a body of work

¹³⁰ ASIC, *Guidance for reporting by external administrators and controllers: Updates to RG 16*, Consultation Paper 337, April 2024, pp. 7-8.

¹³¹ ASIC, *Guidance for reporting by external administrators and controllers: Updates to RG 16*, Consultation Paper 337, April 2024, p. 11.

¹³² Kate O'Rourke, Commissioner, ASIC, 'Improving regulatory guidance for registered liquidators' *Speech*, 11 April 2024.

¹³³ Kate O'Rourke, Commissioner, ASIC, 'Improving regulatory guidance for registered liquidators' *Speech*, 11 April 2024.

¹³⁴ See, ASIC, *Submission 1*, p. 16; ASIC, *Regulatory guide 78: Breach reporting by AFS licensees and credit licensees*, December 2023, p. 9.

to improve how we screen, analyse and action (where required) the reports we receive from registered liquidators.¹³⁵

Opportunities to better use information on possible misconduct

4.84 Several inquiry participants provided evidence regarding opportunities for ASIC to better utilise information on possible misconduct from other sources, including reports from AFS license holders on reportable situations and reports from whistleblowers.

Reports from AFS license holders on reportable situations

4.85 Under section 912DAA of the *Corporations Act 2001* and section 50B of the *National Consumer Credit Protection Act 2009*, Australian financial services licensees and credit licensees are required to report reportable situations (previously referred to as ‘breach reports’) to ASIC, generally within 30 calendar days.¹³⁶

4.86 In general, reportable situations include:

- significant breaches or likely significant breaches of ‘core obligations’;
- investigations into whether there is a significant breach or likely breach of a ‘core obligation’ if the investigation continues for more than 30 days;
- the outcome of such an investigation if it discloses there is no significant breach or likely breach of a core obligation;
- conduct that constitutes gross negligence or serious fraud; and
- conduct of financial advisers and mortgage brokers who are representatives of other licensees in certain prescribed circumstances.¹³⁷

4.87 Under the reportable situation obligations, ASIC receives a very large number of reports. Indeed, the Law Council described ‘almost real-time data on the state of compliance with the financial services law’.¹³⁸

4.88 and the vast majority of these reports result in a ‘no further action’ outcome. In 2022–23, ASIC received 28 493 reportable situation reports from licensees and 160 reportable situation reports from licensees reporting another licensee.¹³⁹ Of the reports ASIC received in 2022–23, 93 per cent were assessed as requiring no further action.¹⁴⁰

4.89 Further, the committee received evidence that has been a substantial rise in the number of reportable situations for which ASIC takes no further action, having

¹³⁵ ASIC, [Reportable situations](#), 15 December 2023 (accessed 25 June 2024).

¹³⁶ ASIC, *Annual report 2022-23*, October 2023 p. 208.

¹³⁷ ASIC, *Annual report 2022-23*, October 2023 p. 209.

¹³⁸ Law Council of Australia, *Submission 10*,

¹³⁹ ASIC, *Annual report 2022–23*, October 2023 p. 208.

¹⁴⁰ ASIC, *Annual report 2022–23*, October 2023 p. 209.

increased from around 50 per cent in 2011–12 to 90 per cent in 2021–22.¹⁴¹ In response to a question on notice, ASIC explained there has been significant rise in number of breaches and the ‘no further action’ rate for reportable situation reports is ‘naturally correlated with the increase in reports received’.¹⁴²

4.90 Below, **Figure 4.1** summarises the reportable situation reports received by ASIC in the last two financial years.

Figure 4.1 Reportable situations by type and outcome, 2022–23 and 2021–22

	2022–23	2021–22
Type	Number	Number
Auditor breach reports	1,968	1,393
AFS licence notifications/updates	11	1,151
AFS licence and ACL licensee notifications	1,208	765
Another licensee notification	67	53
Dual APRA/ASIC reports	27	N/A
Total breach reports finalised	3,281	3,362
Outcome	Percentage	Percentage
Referred for action by ASIC	7	10
Referred for compliance, investigation or surveillance	7	10
Analysed and assessed for no further action	93	90
No further action	93	87
Awaiting update	0	3
Total	100	100

Source: ASIC, *Annual report 2022–23*, October 2023, p. 209.

4.91 Submitters to the inquiry raised concerns regarding the range of conduct required to be reported under the reportable situations regime and the resultant compliance costs for industry. For example, the Financial Services Council (FSC) submitted that the reportable situations regime ‘does not strike the right balance between market efficiency and deterrence of serious misconduct’.¹⁴³ In particular, the FSC stated that the reportable situations regime has created

¹⁴¹ See, Adams Economics, *Submission 21*, p. 7.

¹⁴² ASIC, answers to written questions on notice set 29, asked on 28 June 2023 (received 7 August 2023).

¹⁴³ Financial Services Council, *Submission 7*, p. 9.

significant additional costs and resourcing pressures on industry and the number of minor breaches reported should be reduced.¹⁴⁴

4.92 Further, Ms Cheyenne Walker, Managing Director, Australian Independent Compliance Solutions Pty Ltd, told the committee that while good processes and procedures were put in place in relation to reportable situations:

...there is so much heartache with the advisers in trying to deem if something that is reportable or not; that is reporting breaches and then having no responses, or having breaches that are investigated but where there doesn't seem to be much client harm, or anything associated with that. It is just not working practically, even though in theory it should be a good idea.¹⁴⁵

4.93 The committee also received evidence concerning ASIC's capacity to investigate and enforce the matters contained in the reportable situation reports. For instance, the Financial Services Committee of the Law Council of Australia (Law Council) raised a concern that the 'effectiveness of the reportable situations regime is undermined by the wide variety of incidents that are deemed reportable'.¹⁴⁶ Further, the Law Council submitted it was unclear whether ASIC has the 'systems or processes to adequately triage and review' a voluminous number of reportable situation reports and questioned whether ASIC had capacity to appropriately investigate and enforce suspected breaches.¹⁴⁷ The Financial Advice Association of Australia raised concerns that ASIC would become 'overloaded' with reports of an administrative or technical nature, rather than substantive matters involving consumer harm.¹⁴⁸

4.94 Additionally, the Financial Planning Association of Australia submitted the following about the provisions of the reportable situations regime under the Corporations Act:

...sections 912EA(1)(a) and 912EB(1)(a) restrict the obligation to notify the affected client of a reportable situation, and the requirement to investigate the reportable situation, to situations where personal advice has been provided to the affected client. This effectively provides an exemption from these obligations to all other financial services creating a significant gap in consumer protection, including the provision of personal advice to sophisticated investors and wholesale clients, general advice, the issuing of a product and other financial services.¹⁴⁹

¹⁴⁴ Financial Services Council, *Submission 7*, p. 10.

¹⁴⁵ Ms Cheyenne Walker, Managing Director, Australian Independent Compliance Solutions Pty Ltd, *Committee Hansard*, 24 August 2023, p. 8.

¹⁴⁶ Law Council of Australia, *Submission 10*, p. 3.

¹⁴⁷ Law Council of Australia, *Submission 10*, p. 3.

¹⁴⁸ Ms Sarah Abood, Chief Executive Officer, Financial Advice Association of Australia, *Committee Hansard*, 23 August 2023, p. 34.

¹⁴⁹ Financial Planning Association of Australia, *Submission 63*, p. 4.

Reports from whistleblowers

4.95 Whistleblower protection provisions are of critical importance to support disclosures made in the public interest to address corporate misconduct. Indeed, research suggests that company insiders are ‘often best placed to detect instances of misconduct’.¹⁵⁰ ASIC has also emphasised the importance of whistleblowers:

Whistleblowing is a key part of transparent, accountable and safe workplace culture. Whistleblowers provide early warning and visibility of issues, and can help identify and call out misconduct and harm to consumers and the community.¹⁵¹

4.96 Under the Corporations Act, an eligible whistleblower may access legal rights and protections in connection with their disclosure. In general, the criteria for protection as a whistleblower include:

- the whistleblower being a current or former employee or other specified close associate of the organisation to which the disclosure relates, or been a spouse, relative or dependent of that person;
- the disclosure is made in relation to a specified organisation type, including a company, incorporated association or other body corporate that is a trading or financial corporation;
- the disclosure must be made to a certain person, including to a senior person within the organisation or a third-party, such as ASIC.
- the whistleblower must have reasonable grounds to suspect the disclosure relates to misconduct or an improper state of affairs.¹⁵²

4.97 The committee notes that Australia’s whistleblower protection provisions have been considered in other forums, including in the 2017 inquiry of the Joint Parliamentary Committee on Corporations and Financial Services into Whistleblower protections in the corporate, public and not-for-profit sectors. Furthermore, in 2019 the Corporations Act was amended to strengthen the whistleblower protection regime for the corporate, financial and credit sectors.¹⁵³ Associate Professor Vivienne Brand and Mr Jordan Tutton submitted that data from ASIC shows there was a significant increase in the number of whistleblower reports made following the 2019 reforms:

¹⁵⁰ Associate Professor Vivienne Brand and Mr Jordan Tutton, *Submission 50*, p. [2].

¹⁵¹ Mr Joe Longo, Chair, ASIC, ‘ASIC’s corporate governance priorities and the year ahead’, Speech, 3 November 2022.

¹⁵² ASIC, [Whistleblower rights and protections \[Information Sheet 238\]](#), 3 July 2023 (accessed 25 June 2024).

¹⁵³ See, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*; Explanatory Memorandum (Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, p. 3.

- from July 2016 to June 2019 (under the previous laws), ASIC received on average 227 disclosures each year. Further action was not required for about 94 per cent of disclosures; and
- from July 2019 to June 2022 (under the 2019 reforms), ASIC received on average 745 disclosures each year. Further action was not required for about 92 per cent of disclosures.¹⁵⁴

4.98 Nonetheless, inquiry participants noted the challenging position whistleblowers can find themselves in under Australia's whistleblower regime. Further, inquiry participants considered the ways in which Australia's whistleblower regime could be improved to support better corporate law enforcement outcomes. For example, Associate Professor Andrew Schmulow of the University of Wollongong's School of Law told the committee:

Whistleblower protection in this country is like a bait-and-switch trick. You're told that there's whistleblower protection, and then anybody who tries to bring themselves under whistleblower protection is publicly crucified upside down so that all the other whistleblowers get the message: there will be no protection. You must remember that, when a whistleblower blows the whistle, it is potentially the end of his or her career. What they've done in the United States is provide whistleblowers with substantial protection, including a payout on the rest of what they could have expected to earn in a career that they have now torched. I think they are the kinds of protections that we need.¹⁵⁵

4.99 Support for better incentives and protections for whistleblowers was also expressed by other submitters. For example, Mr Allan Fels AO, former Chair of the Australian Competition and Consumer Commission, told the committee:

I've always been an advocate for rewards for whistleblowers. That is practised quite a lot in America. Certainly, in the field that I know about, which is antitrust, it's pretty common to do it. Whistleblowers tend to come out very poorly. Probably more could be done to protect them. I can't be very specific, but my sense is that more could be done to protect them. In the end, the incentives for whistleblowing, in economic terms, are very poor. You don't come out ahead by being a whistleblower; you get some satisfaction in that you help to uncover illegality.¹⁵⁶

4.100 International models of whistleblower protection were also raised in evidence from other inquiry participants. Associate Professor Vivienne Brand and Mr Jordan Tutton submitted that data from whistleblower incentive regimes in the United States and Canada suggest 'incentive schemes generate valuable information, leading to detection of corporate wrongdoing and contributing to

¹⁵⁴ Associate Professor Vivienne Brand and Mr Jordon Tutton, *Submission 50*, pp. [2–3].

¹⁵⁵ Associate Professor Andrew Schmulow, School of Law, University of Wollongong, *Committee Hansard*, 1 November 2024.

¹⁵⁶ Mr Allan Fels, Private capacity, *Committee Hansard*, 1 November 2023, p. 26.

enforcement outcomes'.¹⁵⁷ Associate Professor Brand's and Mr Tutton's submission drew attention to the experience of the United States Securities and Exchange Commission (SEC) Whistleblowers Office, which has stated that whistleblowers play a 'critical role' in its enforcement efforts, including to provide information in support of enforcement action which resulted in 'more than \$6.3 billion in total monetary sanctions' in 2022.¹⁵⁸

Committee view

- 4.101 As noted at the beginning of this report, Australia's regulatory architecture for corporations and financial services places ASIC in a unique position to receive information on alleged corporate misconduct. It follows that ASIC must have an appropriate capacity to investigate those reports.
- 4.102 On balance, evidence to the inquiry suggests that ASIC's capacity to investigate corporate misconduct is severely diminished. In turn, Australia's capacity to detect and, where appropriate, prosecute breaches of corporate law is greatly undermined.
- 4.103 The statistics on the number of reports of alleged misconduct that ASIC receives compared with the fraction of reports which are investigated by ASIC are deeply concerning to the committee. ASIC receives tens of thousands of misconduct reports each year, yet over the last five years ASIC has only commenced an average of 127 investigations per year. The committee considers ASIC's investigation of such limited cases of alleged corporate misconduct is deeply problematic.
- 4.104 By investigating so few misconduct reports, ASIC fails to do justice to the many thousands of Australians who become the victims of corporate crime each year. ASIC is a law enforcement agency and it should investigate the substantive allegations of unlawful conduct that are brought to its attention. While ASIC's capacity constraints lead it to make choices about which matters to pursue, it is profoundly unsatisfactory from a justice perspective that significant allegations of unlawful conduct go uninvestigated. Further, ASIC's lack of transparency about how it determines which matters to pursue, and how those investigations are undertaken, is a serious limitation on assessing ASIC's performance.
- 4.105 Furthermore, the committee considers it inappropriate that ASIC relies on such a wide range of circumstances to determine that a report of alleged misconduct should result in no further action. Indeed, last financial year this resulted in 63 per cent of misconduct being assessed as requiring no further action. People affected by corporate crime should have the opportunity to access redress not

¹⁵⁷ United States Securities and Exchange Commission cited by Associate Professor Vivienne Brand and Mr Jordan Tutton, *Submission 50*, p. [3].

¹⁵⁸ Associate Professor Vivienne Brand and Mr Jordan Tutton, *Submission 50*, p. [3].

only through private litigation, or external dispute resolution, but through the investigation and enforcement actions of ASIC as a law enforcement body.

- 4.106 In taking too long to commence an investigation, ASIC can compound the financial harm Australians experience as a result of corporate misconduct. In the committee's view, substantive reports of alleged misconduct should be an immediate trigger for ASIC to commence an investigation, particularly when it involves harm to consumers. Evidence to this committee shows that when a consumer or investor loses their savings to unlawful corporate conduct, their financial wellbeing often becomes severely compromised. This can have catastrophic consequences on victims' ability, and that of their families, to pay for basic necessities such as housing, energy, health care and education.
- 4.107 Corporate crimes must be investigated by ASIC with a level of urgency that is proportionate to the consumer and investor harm. Further, the committee considers that the Australian Government should weigh the considerable impact on the economy of having billions of dollars each year lost each year to corporate misconduct against the benefit of having a system of corporate regulation with sufficient capacity to investigate and deter those crimes. In the committee's view, it is a false economy for Australia to have an overburdened and capacity-constrained regulator.
- 4.108 Registered liquidators, auditors and industry are required by law to provide substantial amounts of information to ASIC on possible misconduct. Evidence to the committee shows that this often creates a considerable compliance burden for those entities, particularly given ASIC does not investigate the vast majority of those reports. The committee considers that it should be a core priority of ASIC to work with liquidators, auditors and industry to ensure that the reports they provided can be used, and investigated, by ASIC in a substantive way.
- 4.109 ASIC's rate of investigation of alleged corporate misconduct has been a perennial concern and it is clearly not meeting the expectations of the Australian community. Given the harms of corporate misconduct to consumers and investors and, more broadly, to the Australian economy, the committee considers it should be an urgent national priority to improve the systems for receiving and investigation reports of alleged misconduct.

Chapter 5

Enforcement outcomes and dispute resolution

- 5.1 This chapter considers the approach of the Australian Securities and Investments Commission's (ASIC) enforcement outcomes and whether those outcomes are adequate. First, the chapter considers ASIC's enforcement powers before turning to concerns regarding enforcement rates and the suitability of sanctions. The chapter then considers ASIC's enforcement response to issues of market integrity. The chapter concludes by considering the dispute resolution and compensation schemes which intersect with ASIC's enforcement functions.
- 5.2 The material in this chapter is closely related to issues regarding ASIC's approach to investigation in **Chapter 4** and should be read in conjunction with that chapter.

Introduction

- 5.3 ASIC's enforcement responsibilities span a wide range of misconduct, particularly under the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act).¹ Indeed, the breadth of ASIC's role coupled with the large volume of economic activity in Australia makes enforcement a substantial, difficult undertaking.²
- 5.4 ASIC's approach to enforcement is guided by principles of responsive and strategic regulation. In general, ASIC responds to misconduct with graduated penalties and enforcement action is targeted at high-risk behaviour.³
- 5.5 Following the Royal Commission, it was observed that ASIC was adopting a 'more active' enforcement stance.⁴ However, concerns have been raised that ASIC's commitment to 'tougher enforcement appears to have fallen by the wayside'.⁵ Further, the inquiry has received considerable evidence of serious concerns regarding the underenforcement of corporate law in Australia. This includes low rates of prosecution and inadequate penalties.
- 5.6 Further, while the establishment of external dispute resolution and compensation schemes are important developments in providing recourse for those affected by corporate misconduct, submitters raised various concerns about the coverage and administration of those schemes.

¹ Note, for further detail see Chapter 3 (paragraphs 3.7 and 3.8) and Appendix 3.

² Maurice Blackburn Lawyers, *Submission 4*, p. 2.

³ See, Chapter 3, paragraphs 3.48–3.42.

⁴ See, Australian Institute of Company Directors, *Submission 11*, p. [3].

⁵ See, Maurice Blackburn, *Submission 4*, p. 7.

ASIC's significant powers to enforce corporate law

- 5.7 Under the ASIC Act, ASIC must strive to take whatever action it can, or is necessary, to enforce the Commonwealth laws within its remit.⁶ As such, appropriate powers are necessary for ASIC to enforce breaches of corporate law. Indeed, ASIC has considerable powers to enforce corporate law, including taking a range of criminal, civil and administrative actions to respond to a broad range of individual and corporate misconduct.⁷
- 5.8 In general, inquiry participants supported ASIC having, and exercising, a diverse range of enforcement powers.⁸ For example, Dr Eugene Schofield-Georgeson submitted that responding to corporate crime requires wide powers to demand production of evidence, owing to several reasons. These reasons include complex facts, difficulty of detection, and often-indeterminate victims of corporate offending.⁹
- 5.9 When ASIC does use its coercive investigation powers, particularly under section 19 of the ASIC to require a person to appear for examination or compel assistance with an investigation, there is a reasonable chance of this resulting in enforcement action. For example, of the 342 cases matters in which ASIC had used its section 19 powers as of 31 October 2022:
- 58 were currently under investigation (17 per cent);
 - 29 had been referred to the CDPP (8 per cent);
 - 33 had commenced criminal proceedings (10 per cent);
 - 34 had commenced civil proceedings (10 per cent);
 - 65 had resulted in administrative and/or court outcomes (19 per cent); and
 - 123 had ended with no further action (36 per cent).¹⁰
- 5.10 Several submitters considered that ASIC's existing powers are appropriate to perform its functions. For example, the Financial Services Committee of the Law Council of Australia (Law Council) submitted that 'ASIC's existing regulatory tools are appropriate to meet its statutory objectives'.¹¹ The Australian Institute of Company Directors (AICD) also considered that that the range of enforcement mechanisms available to ASIC are appropriate.¹² Furthermore, the Law Council

⁶ ASIC Act, para. 1(2)(d).

⁷ See, Chapter 3, paragraph 3.69.

⁸ See, for example, Australian Institute of Company Directors, *Submission 11*, p. [6].

⁹ Dr Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say', *University of New South Wales Law Journal*, vol. 43, no. 4, p. 1407.

¹⁰ ASIC, answers to written questions on notice set 1, 3 November 2022 (received 18 November 2022), pp. [10–11].

¹¹ Law Council of Australia, *Submission 10*, p. 4.

¹² Australian Institute of Company Directors, *Submission 11*, pp. 2, 4–5.

highlighted that recent changes have ‘delivered ASIC with more powerful and tailored regulatory tools to prevent misconduct and reduce harm’, including design and distribution obligations and the reportable situations regime.¹³

- 5.11 However, some submitters considered that ASIC had too many powers. For example, Chartered Accountants Australia and New Zealand suggested that ASIC’s coercive powers ‘are not effective in contributing to good market outcomes’, noting a low conversion rate between the use of these powers to gather information and the number of prosecutions commenced.¹⁴
- 5.12 Other submitters considered that ASIC should have more powers. For example, multiple consumer groups argued that ASIC should have the power to give directions to financial services and credit licensees and that financial services firms should be ‘subject to stronger penalties for breaches of consumer protection provisions in the ASIC Act’.¹⁵

Low rates of corporate law enforcement

- 5.13 While ASIC has substantial powers to enforce corporate law, it is clear that only a fraction of reports of alleged misconduct result in enforcement action. As a broad example, ASIC received 17 503 misconduct reports in 2022–23, however only 32 individuals were charged with criminal offences as a result of ASIC enforcement activity that year.¹⁶
- 5.14 A summary of ASIC’s enforcement activities for 2022–23 are shown in **Figure 5.1**.

Figure 5.1 ASIC's 2022–23 enforcement activities



¹³ Law Council of Australia, *Submission 10*, p. 4.

¹⁴ Chartered Accountants Australia and New Zealand, *Submission 14*, pp. 5–6.

¹⁵ Consumer Action Law Centre et al., *Submission 6*, pp. 15–16.

¹⁶ See ASIC, *Supplementary submission 1.5*, pp. 8 and 46.

Source: ASIC, *Supplementary submission 1.5*, p. 8.

5.15 ASIC has repeatedly sought to frame its enforcement as ‘strong’ and has firmly defended its enforcement record.¹⁷ For instance, during the committee’s public hearing in June 2023, the Chair of ASIC argued that:

...we entirely reject assertions that ASIC is a weak corporate regulator. On the contrary, we have been and continue to be an effective litigator. Over the past three years, we’ve commenced over 125 criminal actions resulting in 92 criminal convictions and 39 custodial sentences.¹⁸

5.16 Further, Mr Longo has emphasised that ‘ASIC is one of the nation’s most active law enforcement agencies. Amongst our domestic peers, I don’t think you will find a regulator in court more often than we are.’¹⁹ He also emphasised that ASIC’s court action can be costly, resource-intensive, and complex.²⁰

5.17 However, data provided to the committee by the Commonwealth Director of Public Prosecutions (CDPP) highlights that ASIC’s referrals for serious criminal matters is in sharp decline. Indeed, there has been a 52 per cent decrease in the number of referrals ASIC made to the CDPP between 2018–19 and 2022–23, as shown below in **Figure 5.2**.

Figure 5.2 Referrals received by the CDPP from ASIC by financial year

Financial Year	Total Referred	Prosecution instituted	Prosecution not instituted	Pre-Brief	Being assessed	Percentage of total referrals prosecutions instituted	Percentage charged excluding pre-brief and under assessment
2018-19	86	65	13	7	1	75.58%	83.33%
2019-20	82	51	11	17	3	62.20%	82.26%
2020-21	80	51	15	5	9	63.75%	77.27%
2021-22	70	46	10	6	8	65.71%	82.14%
2022-23	41	8	3	11	19	19.51%	72.72%
2023-24 YTD	2				2		
Total	361	221	52	48	40		

Source: CDPP, answers to questions on notice set 1, 24 August 2023 (received 22 September 2023).

5.18 The relatively low numbers of civil and criminal matters commenced by ASIC are also cause for concern. Over the 12 years from 2011–12 to 2022–23, ASIC commenced 65 civil actions each year on average, and 30 criminal actions each year on average.²¹

¹⁷ See, for example, ASIC, *Submission 1*, p. 7.

¹⁸ Mr Joeseeph Longo, Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 2.

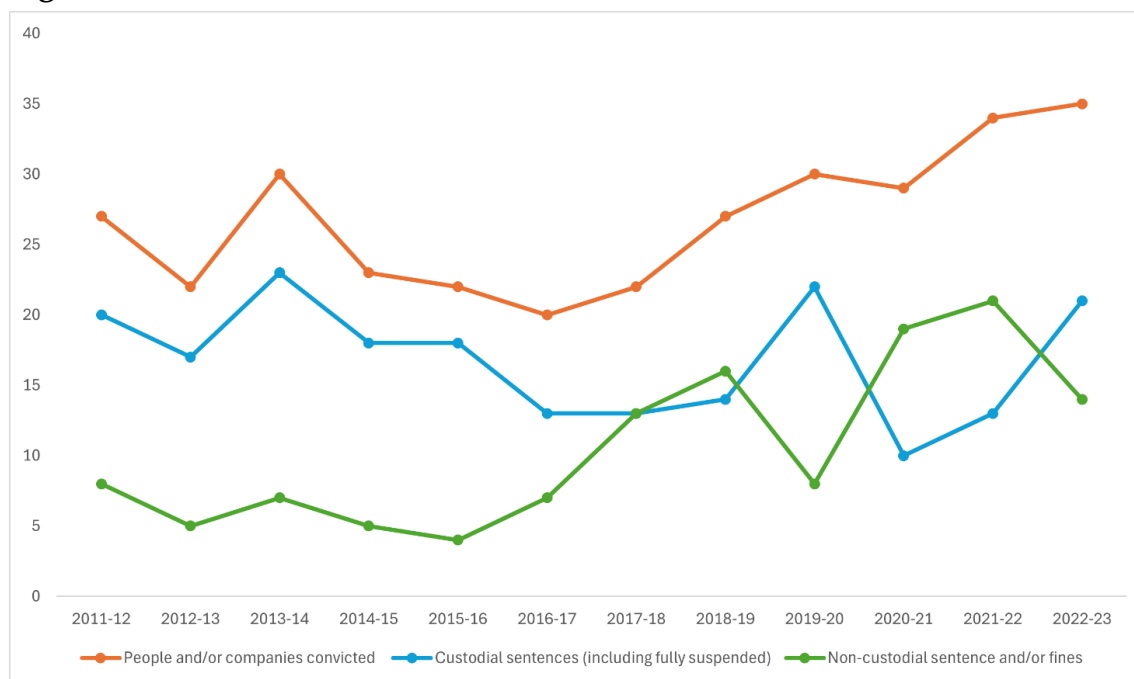
¹⁹ Mr Joeseeph Longo, ‘Parliamentary Joint Committee Opening Statement’, *Speech*, 14 June 2024.

²⁰ Mr Joeseeph Longo, ‘Parliamentary Joint Committee Opening Statement’, *Speech*, 14 June 2024.

²¹ See, ASIC, *Submission 1.5*, pp. 55–56.

5.19 The annual amount of civil pecuniary penalties arising from ASIC's enforcement activities over the last 12 years has increased significantly, rising from \$30 000 in 2011–12 to \$185.4 million in 2022–23.²² By comparison, there have been modest improvements to ASIC's criminal outcomes between 2011–12 and 2022–23, driven by increases to non-custodial sentences and fines, as seen below in **Figure 5.3**.

Figure 5.3 Criminal enforcement outcomes, custodial and non-custodial



Source: Data from ASIC, *Supplementary submission 1.5*, p. 55.

5.20 Other submitters also noted improvements in ASIC's enforcement rates.²³

5.21 In general, ASIC's submission shows that the number of civil actions commenced each year tends to be higher than the number of criminal actions commenced, for the period from 2011 to 2022.²⁴ Evidence from Mr Allan Fels AO, former Chair of the Australian Consumer Competition Commission (ACCC) suggests reasons that this may be the case:

The civil route is a lot easier. I'm working off ACCC, but I'm sure this applies to ASIC. If it is civil, first of all, you don't have to go through the Director of Public Prosecutions. You do the prosecution yourself and the burden of proof is quite low. It's basically balance of probabilities, not proof beyond reasonable doubt. Also, corporations don't fight that hard over civil penalties—they're just the cost of doing business—whereas, if there is a

²² See, ASIC, *Submission 1.5*, pp. 55–56.

²³ See, for example, Consumer Action Law Centre, *Submission 6*, p. 3.

²⁴ Australian Securities and Investments Commission, *Submission 1*, pp. 33–34.

criminal case, very often massive resources will go into the defence and they'll fight at every stage of the process.²⁵

- 5.22 Further, Mr Fels argued that 'parliament has made a lot of offences criminal and the law enforcers should follow that through in cases. If they happen to lose, we can go back to parliament and ask for some help'.²⁶

Concerns regarding the ASIC's low rate of enforcement action

- 5.23 Given ASIC's low rate of enforcement action, several inquiry participants called into question ASIC's capacity to appropriately enforce corporate law.

- 5.24 For example, Mr Fels told the committee that ASIC has 'always had a very poor enforcement culture' due, in part, to the Chair of ASIC having a background in big corporate law which is 'not close to the culture that's required for law enforcement'.²⁷ In particular, Mr Fels sharply criticised ASIC for selectively enforcing the laws within its remit:

...parliament has passed a law and it says that if you break the law you should suffer sanctions, such as fines and other things. When a matter comes to the attention of ASIC or the ACCC, it shouldn't look up an economic calculus of cost-benefit blah, blah. It should say, 'Someone has broken the law and our job is to get a court remedy,' by and large. It may be that it can't manage it all, so it cuts back on some of the lesser cases and things like that. But, on the whole, as these things arrive on your desk, you just say, 'We've got to enforce the law. We'll do our best. It may stretch our resources, but we'll do our best.'

I contrast that with a kind of resource allocation approach, which says, 'Oh, well, there's a law and we've got limited time and resources, so we're not going to enforce it all; we'll just get what we think is the best bang for the buck.' By the way, that calculus also has its own problems because often it's easy to win small cases and, if that's part of your mathematics, it tends to stop you going in on the tough things. I say that if there's any serious breach of the law, the regulator has to go in and take court action about it, rather than starting to worry about efficient resource allocation within the agency.

- 5.25 Further, Associate Professor Andy Schmulow of the University of Wollongong's School of Law argued that ASIC's approach of selectively enforcing the law does a disservice to the consumers such laws are designed to protect:

ASIC is not a traffic controller. ASIC's job is not to stand on a highway, directing traffic and saying, 'Let this stream come through and we'll hold this one so that we can have optimal traffic flow.' ASIC's job is to enforce the law, not to be a traffic controller. ...consumers must accept risk. They do accept risk. What they don't accept is fraud and theft. When you charge dead

²⁵ Mr Allan Fels, Private capacity, *Committee Hansard*, 1 November 2023, p. 26.

²⁶ Mr Allan Fels, Private capacity, *Committee Hansard*, 1 November 2023, p. 26.

²⁷ Mr Allan Fels, Private capacity, *Committee Hansard*, 1 November 2023, p. 25.

people for financial advice or charge people who you know to be dead life insurance premiums, that's not risk; that's fraud and theft.²⁸

- 5.26 A number of submitters raised concerns about ASIC's low rate of corporate law enforcement. For example, the Small Business Development Commission (SBDC), an independent statutory authority of the Government of Western Australia, expressed the view that 'significantly larger number of investigations and prosecutions should be undertaken by ASIC to penalise effectively those who deliberately engage in misconduct'.²⁹ Further, the SBDC commented that an increased rate of enforcement activity, including high-profile prosecutions, would act as a deterrent to corporate crime.³⁰
- 5.27 Further, the committee received evidence that ASIC rarely takes criminal enforcement action against corporate actors, preferring instead to take criminal proceedings against individuals for instances of reported misconduct. In its 2020 report, *Corporate Criminal Responsibility*, the ALRC observed that only five per cent of criminal proceedings brought under ASIC-enforced legislation that are publicly reported involve corporate defendants.³¹ In response to questioning about how ASIC decides whether to pursue a civil penalty or criminal sanction, Ms Sarah Court, Deputy Chair of ASIC, replied:
- ASIC frequently takes civil proceedings against corporate entities. We take criminal proceedings against individuals, and, on some occasions, corporate entities, where we have the evidence that will meet the criminal threshold ... Our role as a public enforcement agency is to take enforcement action that sends both specific deterrence to the company involved and general deterrence to the industry.³²
- 5.28 Inquiry participants expressed concerns that corporations can commit corporate crime on a much larger scale than individuals. These submitters emphasised the need to prosecute all instances of corporate crime, whether they are committed at the individual or corporate level. Ms Caroline Read stated that ASIC must be provided with sufficient enforcement powers to take criminal action against every instance of corporate crime.³³ These inquiry participants also contended that corporations can more easily avoid accountability for corporate crime than individuals due to their size and considerable resources. Mr William O'Chee,

²⁸ Associate Professor Andrew Schmulow, School of Law University of Wollongong, *Committee Hansard*, 1 November 2023, p. 36.

²⁹ Small Business Development Corporation, *Submission 9*, p. 4.

³⁰ Small Business Development Corporation, *Submission 9*, p. 4.

³¹ Australian Law Reform Commission, *Final report: Corporate criminal responsibility*, No. 136, April 2020, p. 97.

³² Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 4.

³³ Ms Caroline Read, *Submission 55*, p. 4.

Partner at Himalaya Consulting, expanded on this point in his evidence to the committee:

If I were a criminal, I know I could get away with a lot more using a company than I could by defrauding under my own name, because you create a buffer between yourself and your offences. It makes it very easy to lose the records. But, more importantly, you can get more victims quicker and in much greater amounts. So we now have to say, 'All right, we have massive financial crimes involving corporations. It is now time to stop treating these criminals as gentlemen who should be given special treatment under the Corporations Act and instead treat them as the financial criminals they are and have them investigated by the AFP'.³⁴

Poorly correlated enforcement action and inadequate penalties

5.29 ASIC's enforcement actions do not adequately reflect the seriousness of the crimes it seeks to police and do not act as a deterrent to corporate criminals in Australia.

5.30 In its submission to the inquiry, Maurice Blackburn Lawyers noted the importance of tailoring enforcement to handle both organisational and individual wrongdoing:

Without an objective standard of liability, profitable but unlawful conduct can persist as a result of flawed management and information systems, such that wrongdoing is either quarantined to low levels within the organisation or in effect distributed among individuals. Companies which tolerate or fail to detect misconduct without bearing the costs of doing so can thereby avoid being penalised and obtain a competitive advantage over those which take active steps to prevent it.³⁵

5.31 In evidence to the inquiry, Associate Professor Schmulow cited long-term research into the prosecutions under corporate law in Australia. This research indicated that in the 10-year period of the study there were 715 cases and 1427 criminal offences prosecuted under the Corporations Act and the ASIC Act. These 715 cases were brought under only 86 unique sections of both the Corporations Act and the ASIC Act, despite there being over 900 sections available across both Acts.³⁶

5.32 Associate Professor Schmulow attributed this statistic to a lack of expertise in corporate law for both the Commonwealth Director of Public Prosecutions (CDPP) and ASIC:

³⁴ Mr William O'Chee, Partner, Himalaya Consulting, *Committee Hansard*, November 2023, p. 22.

³⁵ Maurice Blackburn, *Submission 4*, p. 5.

³⁶ Dr George Gilligan and Professor Ian Ramsay, 'Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions Under the ASIC Act and Corporations Act: 2009–2018', *Company and Securities Law Journal*, vol. 38 no. 6, 2021, p. 8, as cited in, Associate Professor Andy Schmulow, *Submission 19*, p. 13.

...I think we can conclude that the CDPP is under-resourced when it comes to expertise in the Corporations Act and the ASIC Act, but so is ASIC. Mr Justice Perram, in *ASIC v Westpac*, said that ASIC doesn't understand or know the law. So, between ASIC and the CDPP, you've got two organisations that are across 86 out of 900 sections, with those 86 being the easiest sections to prove because they're administrative. The other 814 they don't want to touch because it's too difficult, they're too conservative and they don't want to lose.³⁷

5.33 These views were echoed by Mr John Winter of the Australian Restructuring, Insolvency and Turnaround Association:

My team and I lament the ASIC press releases that show the all-too-infrequent successful prosecutions against directors and the frankly laughable penalties that are often imposed by the court, penalties that show occasionally being found out is a small cost of doing business compared to the windfall of ill-gotten gains.³⁸

5.34 The fact that misconduct was seen by certain industry actors as the cost of doing business was roundly criticised during the Royal Commission and contributed to ASIC adopting its so-called 'why not litigate' strategy.³⁹

5.35 However, other submitters took a different view, arguing penalties imposed for misconduct were sometimes excessive. The Institute of Public Affairs (IPA) stated that white collar criminals should not be imprisoned but should suffer financial penalty. The IPA questioned the public benefit of ASIC's enforcement actions, particularly in high profile cases, and provided evidence that a more effective means of preventing crime is the likelihood someone will be apprehended rather than a particular penalty being in place.⁴⁰

5.36 The Small Business Development Corporation, while in favour of ASIC undertaking more prosecutions of those who deliberately engage in misconduct, also provided the views of small business owners who felt that the bar of compliance with the Corporations Act was too high and financial penalties for minor infractions were often highly onerous.⁴¹

5.37 The Law Council also raised concerns about ASIC's actions against small businesses, noting ASIC's use of infringement notices and how the costs of contesting such a notice in Court was often too high for a small business to

³⁷ Associate Professor Andrew Schmulow, School of Law, University of Wollongong, *Committee Hansard*, 1 November 2023, pp. 34–35.

³⁸ Mr John Winter, Chief Executive Officer, Australian Restructuring, Insolvency and Turnaround Association, *Committee Hansard*, 23 August 2023, p. 1.

³⁹ See, for example, Sean Hughes, Commissioner, ASIC, 'ASIC's approach to enforcement after the Royal Commission', *Speech*, 2 September 2019.

⁴⁰ Institute of Public Affairs, *Submission 8*, pp. 4–7.

⁴¹ Small Business Development Corporation, *Submission 9*, p. 4.

undertake. It also noted the reputational costs of such a notice being issued against a small business, which were often more onerous than the infringement notice itself.⁴²

5.38 The Law Council stated it would ‘welcome’ non-litigious dispute resolution outcomes:

...these represent a more tailored and efficient dispute resolution method for responding to actual or suspected breach of the laws that ASIC oversees. The FS Committee believes that, unlike litigation, the use of court enforceable undertakings gives ASIC the ability to shape and monitor aspects of firms’ behaviour and serves as a more tailored and facilitative enforcement process than the blunt and very costly instrument of litigation. The FS Committee also notes that, in litigious matters, it can sometimes take several years between the time when the offending conduct occurs and the final court outcome.⁴³

5.39 The AICD, while noting the importance of deterrence, also argued that an overly blunt approach to enforcement may discourage self-reporting and cooperation by regulated entities. It advocated for negotiated outcomes, and argued that enforceable undertakings could be an effective regulatory tool, noting their cost and time efficiency and that these undertakings often resulted in improved compliance.⁴⁴

5.40 In relation to the contracts-for-difference and margin foreign exchange markets, CISA Consulting submitted that this market was overregulated. CISA Consulting argued that ASIC was overly focused on the market as a whole rather than on bad actors, and this was leading to limited freedom of choice for investors.⁴⁵

Dixon Advisory

5.41 As outlined in the executive summary, the committee received concerning evidence regarding ASIC’s response to Dixon Advisory. ASIC instituted civil action against Dixon Advisory, and a fine of \$7.2 million was imposed. ASIC and Dixon Advisory agreed that the aggregate penalty of \$7.2 million was appropriate in the circumstances.⁴⁶ This outcome stands in contrast to the outcome of a class action against Dixon Advisory resulting in a settlement, where the court ordered that more than double this amount, no less than \$16 million, be paid to claimants. The judge noted that the likely return for the claimants is ‘already very small compared to the losses which [the claimants]

⁴² Law Council of Australia, *Submission 10*, pp. 6–7.

⁴³ Law Council of Australia, *Submission 10*, p. 2.

⁴⁴ Australian Institute of Company Directors, *Submission 11*, p. [6].

⁴⁵ CISA Consulting, *Submission 52*, p. [1].

⁴⁶ Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd [2022] FCA 1105, [47].

have sustained'.⁴⁷ Despite this, no criminal action was pursued against Dixon Advisory.

- 5.42 Additionally, ASIC did not take action against numerous, previous directors of Dixon Advisory, who were ultimately subject to neither civil nor criminal prosecution. ASIC identified that a majority of complaints made regarding Dixon Advisory raised concerns about the advice provided by authorised representatives,⁴⁸ but nevertheless ASIC focused on systematic issues involving the business model. ASIC considered the appropriate response was to take action against the company, and further disclosed that no formal ASIC investigations focused on advisers with Dixon Advisory.⁴⁹

Timeliness of enforcement action

- 5.43 The enforcement of corporate and financial services regulation must be timely for it to be effective.
- 5.44 In 2022–23, it took ASIC an average of five years to complete an investigation into instances of reported misconduct and for that misconduct to be resolved by the courts.⁵⁰ Therefore, based on ASIC's own numbers, it takes the regulator a period of five years after becoming aware of alleged misconduct to conclude its enforcement action.⁵¹ The timeliness of ASIC's enforcement action has deteriorated significantly since 2021–22, with delays increasing by 16 months on average. In 2021–22, it took the regulator an average of 44 months to complete an investigation into alleged misconduct and for that misconduct to be resolved by the courts.⁵²
- 5.45 When misconduct occurs in the corporate and financial services industry, it is essential that individuals harmed by this misconduct have confidence that the regulator will take swift and appropriate enforcement action. However, inquiry participants have expressed strong concerns that delays in ASIC's enforcement action have damaged public confidence in the regulator and enhanced the harms of corporate misconduct.⁵³

⁴⁷ *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval)* [2024] FCA 386, [153].

⁴⁸ Australian Securities and Investments Commission, answers to written questions on notice set 73, 23 November 2023 (received 22 December 2023), p. 3.

⁴⁹ Australian Securities and Investments Commission, answers to written questions on notice set 73, 23 November 2023 (received 22 December 2023).

⁵⁰ ASIC, *Annual Report 2022-23*, p. 22.

⁵¹ ASIC, *Annual Report 2022-23*, p. 22.

⁵² ASIC, *Annual Report 2022-23*, p. 22.

⁵³ See, for example, Chartered Accountants Australia New Zealand, *Submission 14*, pp. 4–5; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, pp. 2–3.

- 5.46 In its submission, Chartered Accountants Australia and New Zealand (CAANZ) referenced ASIC's investigation of Mr Rudolph Karel.⁵⁴ In December 2022, ASIC announced that Mr Karel had been disqualified from managing corporations for five years. However, this enforcement action was in response to misconduct occurring over 18 years from January 2000 to February 2018, when the misconduct was first reported to ASIC. Until the enforcement action was completed in December 2022, Mr Karel continued to run his businesses uninterrupted.⁵⁵ CAANZ warned that similar delays in enforcement action allow company directors to continue and benefit from their misconduct despite that misconduct being identified and reported.⁵⁶
- 5.47 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) expressed concerns about the volume of reports of misconduct that do not see any investigation or enforcement action. The ASBFEO highlighted the economic impacts of unchecked misconduct and the costs to business and their creditors.⁵⁷ In doing so, the ASBFEO referred to the Viewble Media case, in which over 1000 instances of potential misconduct were referred to ASIC. However, due to delays in ASIC's enforcement action, the misconduct went unaddressed for longer, compounding the harms to affected small businesses and consumers.⁵⁸ These concerns were echoed by the Australian Banking Association (ABA). The ABA submitted that unresolved matters which are left unactioned by the regulator damage consumer confidence and can create uncertainty in the industry as misconduct in the industry goes unaddressed.⁵⁹
- 5.48 Several inquiry participants recommended that ASIC's resourcing be increased to reduce delays in enforcement actions. The Financial Services Council (FSC) submitted that ASIC should have the resources to bring timely enforcement proceedings.⁶⁰ The ABA recommended that ASIC enhance its data and digital capabilities to better identify and act on potential misconduct, as well as engaging in better targeted dialogues with the industry.⁶¹

⁵⁴ Chartered Accountants Australia New Zealand, *Submission 14*, pp. 4–5

⁵⁵ Chartered Accountants Australia New Zealand, *Submission 14*, pp. 4–5

⁵⁶ Chartered Accountants Australia New Zealand, *Submission 14*, p. 5.

⁵⁷ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 2.

⁵⁸ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 3.

⁵⁹ Australian Banking Association, *Submission 5*, p. 1.

⁶⁰ Financial Services Council, *Submission 7*, pp. 19 – 20.

⁶¹ Australian Banking Association, *Submission 5*, p. 1.

Concerns regarding ASIC's ability to enforce market integrity

5.49 Strong investigation and enforcement measures are needed to ensure that investors maintain confidence in the integrity of financial markets. According to ASIC, misconduct which 'damages market integrity, including insider trading, is an enduring enforcement priority'.⁶²

5.50 However, the committee received evidence of instances where multiple, concurrent forms of misconduct that undermine the integrity of Australia's markets are routinely going undetected and unpunished.

5.51 Section 1043A of the Corporations Act prohibits a person who possesses inside information from trading in relevant financial products, or procuring another person to do so on their behalf.⁶³ Further, a person is prohibited from communicating inside information to another person where they anticipate that the person would trade in a relevant financial product, or procure a third party to do so.⁶⁴

5.52 ASIC has recognised the significant adverse impacts insider trading can have on Australian markets:

Insider trading can impact investor returns, can increase the cost of capital for Australian businesses and perpetuate the notion that markets are rigged in favour of those with privileged access to inside information. Left unchecked, it can damage Australia's reputation as a regional financial hub.⁶⁵

5.53 However, ASIC argued that it has a 'strong track record of enforcing insider trading laws and evidence shows Australia is one of the cleanest markets'.⁶⁶ Yet, ASIC's own data suggests that only a small proportion of alerts or reports of potential insider trading lead to investigation by ASIC and an even smaller number of reports result in prosecution and conviction. For example, from 2019–20 to 2021–22:

- ASIC received and reviewed 136 997 insider trading surveillance alerts;
- ASIC received 245 reports from brokers on suspicious trading activity;
- ASIC commenced 36 investigations into insider trading;
- the CDPP commenced 7 prosecutions against people or companies charged with insider trading (with a total of 32 charges laid); and
- six people or companies were convicted of insider trading offences.⁶⁷

⁶² ASIC, *Supplementary submission 1.2*, p. 7.

⁶³ Note, relevant financial products are stipulated by Division 3 of the Corporations Act.

⁶⁴ See, Corporations Act, para. 1043(A)(2).

⁶⁵ ASIC, *Supplementary submission 1.5*, p. 38.

⁶⁶ ASIC, *Supplementary submission 1.5*, p. 38.

⁶⁷ ASIC, answers to written questions on notice set 1, 3 November 2022 (received 18 November 2022).

- 5.54 In its submission, ASIC described insider trading as ‘hard to detect due to the nature of the suspicious trading patterns, information passing through personal relationships and technology increasingly facilitating unrecorded communications’. Further, ASIC noted that insider trading cases are ‘complex’, and involve the use of independent experts, securing challenging evidence and the execution of search warrants.⁶⁸
- 5.55 Through analysis of data from the CDPP, Dr George Gilligan and Professor Ian Ramsay AO identified that, where a defendant was alleged to have contravened section 1043A and pleaded not guilty, the prosecution had a relatively low rate of successfully proving the charge, with only 27.3 per cent of charges being proven.⁶⁹
- 5.56 As noted in the Financial Services Council’s (FSC) submission to the inquiry, ASIC recently investigated investment switches made by a number of superannuation fund executives in connection with possible charges for insider trading. However, the FSC said that while it became clear that the executives’ conduct did not technically breach insider trading laws, it ‘did raise serious concerns about how trustees manage conflicts of interest and could constitute breaches of other financial services laws’.⁷⁰ As such, the FSC recommended that the government ‘implements law reform to address the issue of investment switching by superannuation trustees on the basis of essentially information price-sensitive information known to them (but not publicly available).’⁷¹
- 5.57 Concerningly, some inquiry participants contended that insider trading is a common issue affecting the integrity of Australia’s primary securities exchange, the ASX. For example, Mr Lachlan Walden, an ASX investor and trader, submitted that:

A very conservative estimate would be that at least \$500 million annually is wrongly transferred from investors in small ASX companies to criminals that flagrantly break the law. Despite my best efforts to report to ASIC blatant illegal market manipulation, fraudulent upcoming IPOs and clear instances of insider trading, there seems to have been no tangible enforcement action taken on any matter. My confidence in the regulator to uphold the law and its own ASIC Market Integrity Rules is now severely lacking.⁷²

⁶⁸ ASIC, *Supplementary submission 1.5*, p. 39.

⁶⁹ Dr George Gilligan and Professor Ian Ramsay, ‘Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions Under the ASIC Act and Corporations Act: 2009–2018’, *Company and Securities Law Journal*, vol. 38 no. 6, 2021, pp. 16–17.

⁷⁰ ASIC cited in Financial Services Council, *Submission 7*, p. 11.

⁷¹ Financial Services Council, *Submission 7*, p. 11.

⁷² Mr Lachlan Walden, *Submission 61*, p. [1].

5.58 Concerns regarding the integrity of market sensitive information of small companies on the ASIC were also raised by Mr Travis Peluso:

...it also sits within that small cap type of company, where they don't have hundreds of people. They're small companies. There might be five, 10 or 15 employees. They are ASX listed. A flow of information goes from those organisations into retail investors and some institutions. I think there's certainly a lot of challenges in that small cap space. When you've got an employee who provides this type of information and then there's other employees and directors prepared to give information, that's when I find the process that I went through and the mechanisms of investigation within ASIC certainly failed on this occasion.

5.59 Furthermore, Mr Walden submitted that various forms of unlawful conduct are 'endemic on the ASX' and almost never detected by ASIC, including:

- insider trading when directors and/or management resign with negative price-sensitive information;
- insider trading on material positive news where the nature and/or timing of announcements is leaked in advance;
- insider trading around capital raisings where large shareholders are made aware in advance and sell their existing holdings at a premium;
- manipulation of closing share prices on a recurring basis;
- market manipulation by traders using sophisticated 'spoofing' techniques;
- non-disclosure of material negative news over a prolonged period;
- non-disclosure of material changes to previous positive announcements;
- investor and trader syndicate 'pump and dump' schemes;
- breaches of directors' statutory duties whereby company insiders collude to award themselves equity or loan company funds to directors;
- breaches of directors' statutory duties whereby an acquisition takes place from a related entity on non-commercial or unreasonable terms;
- non-disclosure of directors' interests where shares are held in entities controlled by directors; and
- non-disclosure by substantial shareholders of legally mandated notification of changes in interest over extended time periods.⁷³

5.60 Further, Mr Walden contended that ASIC is 'entirely incompetent at enforcing' market rules and pointed to causes for this beyond a 'lack of resourcing'. Mr Walden suggested that ASIC lacks market professionals with high-level trading knowledge and that ASIC's filters for insider trading surveillance are 'ineffective'.⁷⁴

5.61 In its submission to the FRAA's review of ASIC, the Business Council of Australia said that while ASIC's market surveillance function is 'technically

⁷³ Mr Lachlan Walden, *Submission 61*, pp. [1-3].

⁷⁴ Mr Lachlan Walden, *Submission 61*, p. [3].

sophisticated, and technically capable,' it considered ASIC investigators required 'greater market experience and understanding to interpret trading activity undertaken by professional portfolio managers'.⁷⁵

Breaches of continuous disclosure requirements

5.62 Continuous disclosure requirements are a fundamental component of market integrity. In general, Australia's continuous disclosure laws require that an entity disclose 'information that a reasonable person would expect to have a material effect on the price or value of the entity's securities on a continual basis and in a timely manner'.⁷⁶ Such requirements promote equal access to information so that trading on markets is done in a fair and transparent manner.

5.63 Submissions to the inquiry focussed on this important issue. For example, the AICD questioned why private legal actions are needed to enforce continuous disclosure laws when 'ASIC already has significant enforcement powers'.⁷⁷ Despite these powers, the AICD submitted that ASIC's enforcement of continuous disclosure matters, between 2018 and 2022, resulted in eight civil actions, seven administrative remedies and zero criminal actions. The AICD considered that this result reflected a:

...relatively low number of civil actions when compared with the volume of securities class actions over the same period, suggesting a disconnect between public and private enforcement.⁷⁸

5.64 Madgwicks, in their submission, identified a matter in which an unnamed company appeared to have failed to comply with its continuous disclosure obligations. Madgwicks outlined that significant time, effort and cost had been expended by investors in reporting this suspected misconduct to ASIC, and that ASIC has not confirmed whether it is investigating or taking action in the matter.⁷⁹

5.65 In **Box 5.1**, the committee evidence regarding the Nuix IPO indicates there were multiple issues that undermined market integrity, including breaches of continuous disclosure requirements, insider trading and governance issues.

⁷⁵ Business Council of Australia, 'Assessment of the Australian Securities and Investments Commission', *Submission to the Financial Regulator Assessment Authority*, January 2022, p. 7.

⁷⁶ Department of the Treasury, *Report of the independent review of the changes to the continuous disclosure laws: made by the Treasury Laws Amendment (2021 Measures No. 1) Act 2021*, February 2024, p. 5.

⁷⁷ Australian Institute of Company Directors, *Submission 11*, p. 7.

⁷⁸ Australian Institute of Company Directors, *Submission 11*, p. 5.

⁷⁹ Madgwicks, *Submission 59*.

Box 5.1 Nuix—Prospectus and corporate governance issues

Nuix is a provider of investigative analytics and intelligence software and was the largest company to list on the ASX in 2020. At the time of its listing in December 2020, Nuix’s market capitalisation was around \$1.8 billion.

Nuix’s shares were initially offered to investors at a price of \$5.31 and, on 22 January 2021, Nuix’s share price peaked at \$11.86.⁸⁰ However, after disclosing to the market that it would be unable to meet the revenue forecasts outlined in the prospectus for its initial public offering (IPO), Nuix’s share price rapidly declined. By June 2021, Nuix share price was trading at less than half the price it was offered to investors.

Evidence provided to the committee suggests there were significant issues that ASIC failed to detect in relation to Nuix’s prospectus and corporate governance arrangements.

Evidence from Mr Rolfe Krolke

Mr Rolfe Krolke, a senior executive at Nuix from 2018 to 2022, told the committee that the three reasons that Nuix’s IPO failed were:

- (i) Nuix ‘never had a chance of hitting its prospectus forecasts’
- (ii) Senior Nuix officers relied on inaccurate and incomplete data; and
- (iii) Nuix was not resourced to develop the company in the manner committed to in the prospectus.⁸¹

Mr Krolke stated that 90 per cent of the proceeds generated by Nuix’s IPO were used to ‘pay out’ existing shareholders, board members and executives with ‘very little...left to reinvest in the business’.⁸² Further, Mr Krolke detailed that as Nuix became aware it would not meet its prospectus forecast, there were breaches of its continuous disclosure requirements and insider trading of Nuix securities and failure of directors to meet their duties.⁸³

Mr Krolke called on ASIC to ‘take a closer look at the breaches in question, reopen investigations where necessary or commence new ones where no action has been taken’.⁸⁴

In relation to the ASIC’s assessment of the Nuix prospectus, Mr Krolke considered that the assessment was ‘probably not completely thorough’ and

⁸⁰ See, Miklos Bolza, ‘Underperforming’ Nuix stayed mum after \$1.8b float’, *Canberra Times*, 20 November 2023.

⁸¹ Mr Rolfe Krolke, Private capacity, *Committee Hansard*, 23 August 2023, p. 14.

⁸² Mr Rolfe Krolke, Private capacity, *Committee Hansard*, 23 August 2023, p. 14.

⁸³ Mr Rolfe Krolke, Private capacity, *Committee Hansard*, 23 August 2023, pp. 14–15.

⁸⁴ Mr Rolfe Krolke, Private capacity, *Committee Hansard*, 23 August 2023, pp. 15–17.

that ASIC appeared to have insufficient time to review the 300-page prospectus prior to the company becoming publicly traded.⁸⁵

ASIC provided submissions which disputed evidence provided to the committee on Nuix. For example, ASIC stated that it ‘conducted extensive investigations into various reports of alleged misconduct by Nuix’, including by ‘executing search warrants, issuing statutory notices, conducting section 19 examinations, obtaining information from other regulators, and considering significant volumes of documentary evidence and other materials’.⁸⁶ In particular, ASIC said it investigated the issues regarding the Nuix IPO

The role of whistleblowers

The committee also heard from Mr Mark Allen, a lawyer who was active on behalf of a whistleblower who made disclosures to ASIC in relation to the Nuix IPO. Mr Allen’s client sent letters to ASIC in relation to the IPO and subsequently met with ASIC to assist them with their inquiries.

However, the committee heard that, in Mr Allen’s experience, ASIC did not appear to regard whistleblowers as integral. According to Mr Allen, ASIC did not acknowledge receipt of the first letter the whistleblower sent to ASIC, and ASIC subsequently did not take action at an early stage to identify whether early concerns related to the Nuix prospectus were an indication of more serious problems.⁸⁷ Mr Allen’s client eventually did receive an acknowledgement, but only after they had written to ASIC commissioners and, by that time, ‘it was already too late’ for ASIC to respond given the very short period ASIC had to review the prospectus.⁸⁸

Mr Allen suggested that ASIC’s process for triaging complaints should be improved, along with improved requirements for prospectus documents and ASIC review processes.⁸⁹

ASIC’s enforcement of directors’ duties

5.66 The Corporations Act sets out the statutory duties and powers of directors of Australian Companies, as well as the duties of other officers. These duties are:

- the duty to exercise reasonable care and diligence (subsection 180(1) of Corporations Act);
- the duty to act in good faith (section 181 of the Corporations Act);

⁸⁵ Mr Rolfe Krolke, Private capacity, *Committee Hansard*, 23 August 2023, pp. 18–19.

⁸⁶ Nuix, *Submission 1.2*, p. 5.

⁸⁷ Mr Mark Allen, Private capacity, *Committee Hansard*, 23 August 2023, pp. 29–30.

⁸⁸ Mr Mark Allen, Private capacity, *Committee Hansard*, 23 August 2023, pp. 29–30.

⁸⁹ Mr Mark Allen, Private capacity, *Committee Hansard*, 23 August 2023, pp. 32–33.

- the duty not to improperly use position or information to gain an advantage or cause detriment to the company (section 182 of the Corporations Act);
 - the duty to prevent insolvent trading (section 588G of the Corporations Act);
 - the duty to avoid conflicts of interest (sections 191, 208 and 205G of the Corporations Act);
 - statutory duties in relation to financial record keeping and reporting (section 344 of the Corporations Act); and
 - statutory duties in relation to specific areas of law such as financial services, consumer law, workplace health and safety law and environmental legislation (various pieces of legislation at the state and federal level).⁹⁰
- 5.67 Contravention of these duties can result in criminal or civil sanctions or disqualification as a director.⁹¹ As the body that administers the Corporations Act, ASIC has a role in regulating directors conduct and enforcing breaches of director's duties.
- 5.68 Submitters raised concerns about the ASIC's role regulating directors, with the Australian Restructuring Insolvency and Turnaround Association (ARITA) noting that there was a 'virtual absence of enforcement action against directors for breaches of directors' duties, insolvent trading or any other misconduct that results in or is related to the failure of a company.'⁹² Mr John Winter, Chief Executive Officer of ARITA, reinforced this at a public hearing:
- Indeed, look at the number of times we see prosecutions around directors being responsible for a number of failing companies. Again, you see that pattern. If you have a number of failed companies, you are engaged in either gross incompetence or some type of fraudulent behaviour. At best, they'll get a director banning notice and generally a fine of \$5,000 to \$10,000 even though they might have absconded with a quarter of a million dollars plus worth of tax.⁹³
- 5.69 The committee also received several submissions from people who outline circumstances in which apparent breaches of directors have been subject to limited, if any, enforcement action by ASIC.⁹⁴
- 5.70 Several submissions, including ARITA's, noted the need for education around directors' duties and noted the success of the National Insolvency Trading

⁹⁰ AICD, [General duties of Directors](#), 2021, (accessed 26 June 2024), pp. 1–4.

⁹¹ AICD, [General duties of Directors](#), 2021, (accessed 26 June 2024), p. 5.

⁹² Australian Restructuring, Insolvency and Turnaround Association, *Submission 15*, p. 5.

⁹³ Mr John Winter, Chief Executive Officer, Australian Restructuring, Insolvency and Turnaround Association, *Committee Hansard*, 23 August 2023, p. 4.

⁹⁴ See, for example, Mr Donald Carter, *Submission 48*, pp. 1–3.

Program which had been run by ASIC from 2005 to 2010.⁹⁵ This program visited over 1500 companies for the period it was active and:

- provided awareness of directors' duties and the expectations of professional advisors for companies facing financial difficulties;
- encouraged directors to seek advice when significant insolvency indicators were present in their company from insolvency professionals;⁹⁶ and
- improved directors' knowledge about their options for insolvency, such as restructuring pathways, allowing these directors to save their business.⁹⁷

5.71 The ASBFEO recommended that the National Insolvency Trading Program, or something similar, be funded by government to support small businesses:

Such a program would provide a viability service to improve businesses' financial acumen, forward planning skills, and understanding of insolvency processes. It would also provide an opportunity to identify cash flow or other problems early and provide tools to remedy them, such as through restructuring, which may avoid an insolvency. This would free up ASIC's investigative and enforcement resources to focus on reports of serious or intentional misconduct.⁹⁸

5.72 Other evidence to the committee commented on ASIC's introduction of the Director ID System. This is a unique identifier 'which will help prevent the use of false or fraudulent director identities'.⁹⁹ The Small Business Development Corporation (SBDC) was very supportive of the introduction of this system, noting that it would help reduce director involvement in illegal phoenixing.¹⁰⁰

Illegal phoenix activity

5.73 The concerns raised by registered liquidators appear to be reflected in ASIC's data on administrative and criminal outcomes related to illegal phoenix activity. Between 2015–16 and 2021–22, ASIC achieved a median of seven administrative actions/outcomes each year in relation to illegal phoenix activity. The vast majority of these actions/outcomes were related to director disqualification.¹⁰¹ Further, between 2017–18 and 2021–22, ASIC achieved a

⁹⁵ Australian Restructuring, Insolvency and Turnaround Association, *Submission 15*, pp. 6–7; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [6].

⁹⁶ Australian Restructuring, Insolvency and Turnaround Association, *Submission 15*, p. 6;

⁹⁷ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [6].

⁹⁸ Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [6].

⁹⁹ ASIC, Director identification number,'

¹⁰⁰ Small Business Development Corporation, *Submission 9*, p. 3.

¹⁰¹ See, ASIC, *Submission 1*, p. 61.

median of 4 criminal actions actions/outcomes each year in relation to illegal phoenix activity.¹⁰²

5.74 Between 2019–20 and 2021–22, ASIC commenced 124 surveillances relating to potential illegal phoenix activity. ASIC completed 121 surveillances.¹⁰³ In that same period, ASIC:

- commenced 33 new investigations in relation to illegal phoenix activity;
- achieved 23 administrative outcomes; and
- achieved 9 criminal outcomes through the CDPP.¹⁰⁴

5.75 Further, ASIC stated:

As a result of our investigations, 22 persons were disqualified from managing companies, one registered liquidator had conditions imposed on their registration, and 9 people were convicted of criminal offences relating to illegal phoenix activity...¹⁰⁵

5.76 ARITA states that ASIC does regulate phoenixing activity and that this work is now being led by the Australian Taxation Office (ATO). However, ARITA argues that ASIC should be involved given that ASIC’s regulatory remit includes director conduct.

Complexity of corporate law and corporate criminal responsibility

5.77 The significant complexity of corporate law adds to the regulatory burden of enforcing and complying with corporations and financial services law. In its 2020 report, *Corporate Criminal Responsibility*, the Australian Law Reform Commission (ALRC), identified over 3100 offences across 25 identified statutes applicable to corporations. The ALRC concluded that these offences are opaque as currently drafted and that the volume of these offences obscures their collective rationale.¹⁰⁶

5.78 The ALRC also observed that the prosecution of corporations in Australia is ‘extremely rare’, with only one per cent of finalised appearances in criminal courts involving corporate actors.¹⁰⁷ Further, only five per cent of criminal proceedings brought under ASIC-enforced legislation that are publicly reported involve corporate defendants.¹⁰⁸ This is despite the findings of the Royal

¹⁰² See, ASIC, *Submission 1*, p. 61.

¹⁰³ ASIC, answers to written questions on notice set 1, 3 November 2022 (received 18 November 2022).

¹⁰⁴ ASIC, answers to written questions on notice set 1, 3 November 2022 (received 18 November 2022).

¹⁰⁵ ASIC, answers to written questions on notice set 1, 3 November 2022 (received 18 November 2022).

¹⁰⁶ Australian Law Reform Commission (ALRC), *Final report: Corporate criminal responsibility*, No. 136, April 2020, pp. 73–76.

¹⁰⁷ ALRC, *Final report: Corporate criminal responsibility*, No. 136, April 2020, p. 96.

¹⁰⁸ ALRC, *Final report: Corporate criminal responsibility*, No. 136, April 2020, p. 97.

Commission, which concluded that corporations do commit crimes, often attracting significant individual and social harms.¹⁰⁹ The low rate of corporate prosecutions is also in conflict with the large volume of criminal offences applicable to corporations.

- 5.79 The ALRC found that Commonwealth corporate criminal law is characterised by excessive complexity and specificity. The offences applying to corporations also vary widely in their severity and the size of the penalties they impose.
- 5.80 Australian corporate law provides ASIC with the power to notionally amend the Corporations Act to provide actors or classes of actors with exclusions and exemptions from provisions of the principal legislation. ASIC can impose conditions on the grant of these exclusions and exemptions, essentially creating *de facto* legislative schemes. These notional amendment powers provide ASIC with the flexibility to regulate around a highly prescriptive principal legislative framework.¹¹⁰
- 5.81 However, in its November 2021 report, *Financial Services Legislation: Interim Report A*, the ALRC concluded that ASIC's notional amendment powers have contributed to the complexity of Australian corporate law. The ALRC stated that these powers have made corporate regulation unnavigable, opaque, incoherent and unknowable.¹¹¹ ASIC's notional amendments do not appear on the face of the Corporations Act, nor are they exercised in accordance with established and known principles, creating a sporadic and disjointed regulatory framework.¹¹² The ALRC expressed concerns that the exercise of these powers has limited the accessibility of the law for industry participants.¹¹³ These concerns are consistent with the findings of the Hon Kenneth Hayne AC KC, in his role as Royal Commissioner:

... much of the complication [of the current regulatory regime] comes from piling exception upon exception, from carving out special rules for special interests. And, in almost every case, these special rules qualify the application of a more general principle to entities or transactions that are not different in any material way from those to which the general rule is applied.¹¹⁴

¹⁰⁹ ALRC, *Final report: Corporate criminal responsibility*, No. 136, April 2020, pp. 96–97.

¹¹⁰ ALRC, *Financial Services Legislation: Interim Report A*, No. 137, November 2021, pp. 401–402.

¹¹¹ ALRC, *Financial Services Legislation: Interim Report A*, No. 137, November 2021, pp. 399–400.

¹¹² ALRC, *Financial Services Legislation: Interim Report A*, No. 137, November 2021, pp. 399–400.

¹¹³ ALRC, *Financial Services Legislation: Interim Report A*, No. 137, November 2021, p. 408.

¹¹⁴ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report: Volume 1 (2019) [1.5.3], as cited by, Australian Law Reform Commission, *Final report: Corporate criminal responsibility*, No. 136, April 2020, p. 77.

- 5.82 Inquiry participants expressed concerns about the complexity of corporate law and the resulting regulatory burden on industry participants and the regulator itself. The Institute of Public Accountants contended that ASIC presides over ‘impenetrable’ legislation and that this places the regulator under considerable pressure. Accordingly, the Institute of Public Accountants recommended that the government consider the recommendations of the ALRC to simplify the corporate law.¹¹⁵ The Law Council also expressed strong support for measures to simplify and streamline the Corporations Act, particularly regarding provisions relating to financial services and markets.¹¹⁶
- 5.83 Further, ARITA submitted that the corporate law must be understandable and accessible to those seeking to comply with it.¹¹⁷ These concerns were echoed by the Association of Financial Advisers (AFA) which submitted that deterring poor behaviour in the financial services sector is made more difficult by an unnecessarily complex legislative and regulatory framework.¹¹⁸

Other issues raised in evidence

- 5.84 ASIC’s powers to remedy director misconduct without obtaining court orders are limited. Under section 206F of the Corporations Act, ASIC may only disqualify directors for a period of up to five years, even where a director has engaged in repeated misconduct that risks, or has caused, significant harm to consumers or investors.
- 5.85 Some submitters considered that ASIC was overly harsh when pursuing enforcement outcomes.
- 5.86 The AFA believed that media coverage of the Royal Commission caused market distortion and the ‘very poor outcome’ of ASIC adopting a ‘why not litigate’ operation model, where litigation is sometimes less preferable compared to the other regulatory tools available to ASIC.¹¹⁹ On the basis that there is a reduction in financial adviser numbers, the AFA expected ASIC staff numbers to have fallen, noting that financial advisers end up paying for some enforcement activity.¹²⁰
- 5.87 The AFA disclosed that the financial advice sector has complained about ASIC’s approach to enforcement. The AFA has stated that ASIC has set rules for the financial services industry through regulatory guidance and information sheets,

¹¹⁵ Institute of Public Accountants, *Submission 17*, p. 6.

¹¹⁶ Law Council of Australia, *Submission 10*, pp. 5–6.

¹¹⁷ Australian Restructuring Insolvency and Turnaround Association, *Submission 15*, p. 13.

¹¹⁸ Association of Financial Advisers (AFA), *Submission 143*, p. 6.

¹¹⁹ AFA, *Submission 143*, pp. 6–7.

¹²⁰ AFA, *Submission 143*, pp. 6–7.

that doing this was not always within ASIC's power, and that these guidance and information documents have received unwarranted emphasis in both ASIC's investigation and enforcement activity.¹²¹

- 5.88 ARITA did not view ASIC as successfully achieving enforcement outcomes, describing ASIC as taking an 'intensive approach' to the regulation of liquidators, with few successful disciplinary actions being undertaken in recent years. They also stated that 'ASIC only achieves limited successful outcomes' against company directors.¹²²
- 5.89 On the other hand, some inquiry participants considered that ASIC did not pursue enforcement outcomes forcefully enough. For example, Mr Peter Keenan stated that insolvency practitioners, lawyers and academics have criticised the inadequacy of ASIC's enforcement action. Mr Keenan recounted his personal experience as a liquidator, including an instance where he reported that criminal offences may have been committed by individuals in relation to a company. Mr Keenan described perceived reluctance by ASIC employees and managers to take enforcement action, and that ultimately no action was taken.¹²³
- 5.90 Submitters also pointed to issues in ASIC's reporting of its enforcement action, namely that reporting was inconsistent, potentially obfuscated, and did not include all useful information that could have been included.
- 5.91 Dr Jason Harris, in his submission, discussed the inconsistency in ASIC's transparency and accountability. He pointed to ASIC's approach to enforcement activity, focusing on case studies but not detail on its enforcement activities, making it impossible to track ASIC's actions over several years. He asserted that this is compounded by the difficulty of accessing information through ASIC's website.¹²⁴
- 5.92 This view was shared by Dr Marina Nehme, who unequivocally stated that ASIC needs to improve its reporting on enforcement matters, improving the detail and depth of what is currently mediocre reporting, with contradictions between different reports.¹²⁵
- 5.93 AFA believed that there needs to be an appeal channel or ombudsman for those who are subject to ASIC investigation action that they consider to be ineffective or excessive.¹²⁶

¹²¹ AFA, *Submission 143*, p. 2.

¹²² Australian Restructuring Insolvency and Turnaround Association, *Submission 15*, pp. 10–13.

¹²³ Mr Peter Keenan, *Submission 25*, p. 3.

¹²⁴ Professor Jason Harris, *Submission 20*, pp. 3–4.

¹²⁵ Associate Professor Marina Nehme, *Submission 18*, p. 6.

¹²⁶ AFA, *Submission 143*, pp. 2–3.

Dispute resolution and compensation schemes

- 5.94 Submitters noted the importance of an effective dispute resolution scheme as a mechanism to provide timely outcomes for parties to a dispute.¹²⁷ Both ASIC and the Australian Financial Complaints Authority (AFCA) recognised that effective dispute resolution and compensation schemes complemented regulatory action in protecting consumers from wrongdoing in the financial sector.¹²⁸
- 5.95 Where alleged misconduct in the financial industry does not become subject to regulatory or enforcement action, the effective functioning of dispute resolution and compensation schemes is important for ensuring that consumers can access redress for financial harm.

External dispute resolution scheme for the financial sector

- 5.96 Regulatory schemes applicable to financial firms establish obligations concerning internal dispute resolution. Individuals raising complaints can use internal dispute resolution in the first instance to attempt to resolve disputes. AFCA is responsible for operating the external dispute resolution (EDR) system, to be used when disputes are not resolved through internal dispute resolution.
- 5.97 In the EDR system, AFCA receives financial complaints from individuals and seeks to resolve disputes through a range of methods. While AFCA operates this system, ASIC is empowered to issue a variety of directions to AFCA under the Corporations Act,¹²⁹ and it is ultimately ASIC that is responsible for regulating the consumer protection system. AFCA is subject to obligations to report to ASIC under the Corporations Act and regulatory guidance issued by ASIC.¹³⁰
- 5.98 ASIC identified that, for 2021–22, AFCA received 72 358 complaints, reporting 67 systemic issues and 23 contraventions to regulators.¹³¹
- 5.99 The AFCA Rules, approved by ASIC, explain the process for parties who are dissatisfied with AFCA’s handling of the dispute resolution process, including possible escalation to consideration of the process by an Independent Assessor.¹³²

¹²⁷ See, for example, Financial Services Council, *Submission 7*, p. 7.

¹²⁸ See, for example, Consumer Action Law Centre et al, *Submission 6*, p. 14; Dr June Smith, Deputy Chief Ombudsman, Australian Financial Complaints Authority, *Committee Hansard*, 1 November 2023, p. 36.

¹²⁹ *Corporations Act 2001*, pt 7.10A div 2.

¹³⁰ Dr June Smith, Deputy Chief Ombudsman, Australian Financial Complaints Authority, *Committee Hansard*, 1 November 2023, p. 36.

¹³¹ Australian Securities and Investments Commission, *Submission 1*, pp. 8, 44.

¹³² AFCA, Approved Rules released 7 March 2024, p. 20.

Jurisdiction of AFCA

- 5.100 Only eligible people, as defined in the AFCA rules,¹³³ may bring a dispute to AFCA for resolution. The counterparty to the dispute must be a member of AFCA.¹³⁴
- 5.101 Certain entities which hold an Australian Financial Services (AFS) licence must be a member of AFCA, as a requirement of that AFS licence. ASIC Pro Forma 209 (PF 209) sets out standard AFS licence conditions,¹³⁵ which include external dispute resolution requirements.
- 5.102 PF 209 requires licensees that provide financial services to retail clients to be a member of AFCA.¹³⁶ Eligible people may bring disputes against such licensees to AFCA for consideration.
- 5.103 While it appears that not every AFS licensee is required to be a member of AFCA, licensees may still voluntarily become an AFCA member and become subject to dispute resolution processes through AFCA.
- 5.104 Some entities are not required to become an AFCA member, and do not voluntarily join AFCA as a member. Individuals are unable to bring disputes against such entities to AFCA.¹³⁷
- 5.105 The consumer groups which made a joint submission to this inquiry identified that EDR is often unavailable because membership of AFCA is only required of licence holders.¹³⁸ These submitters highlighted that these unlicensed entities are the very entities that often cause the most harm to consumers from blatant disregard for the law,¹³⁹ yet AFCA does not provide dispute resolution for individuals aggrieved by these entities.

Dissatisfaction with external dispute resolution

- 5.106 Several submitters raised concerns about AFCA's administration of the EDR scheme. For example, the Australian Citizens Party referenced various submissions to parliamentary inquiries which, in turn, have expressed concerns that AFCA has been captured by industry and makes biased and unfair determinations. The Australian Citizens Party further asserted that AFCA is

¹³³ AFCA, Approved Rules released 7 March 2024, p. 46, cl. A.4.1.

¹³⁴ AFCA, Approved Rules released 7 March 2024, cl. A.4.2.

¹³⁵ ASIC, Australian financial services licence conditions: Pro Forma 209.

¹³⁶ ASIC, Australian financial services licence conditions: Pro Forma 209, cl 32.

¹³⁷ See, for example, Roger and Tracy Gott, *Submission 194*, p. 2.

¹³⁸ Consumer Action Law Centre et al, *Submission 6*, pp. 16–17.

¹³⁹ Consumer Action Law Centre et al, *Submission 6*, pp. 16–17.

resistant to review and has been subject to reports alleging that it ignores evidence of serious financial crimes.¹⁴⁰

5.107 The Financial Services Council expressed concern that AFCA ‘is not able to consistently meet its obligations in providing a fair, efficient, timely and independent dispute resolution scheme to all parties’.¹⁴¹ In particular, the FSC submitted that AFCA:

- should not compensate consumers for an unsuccessful financial investment where the financial business has acted within the law;
- should remain cognisant that its role is to resolve disputes, not to make or administer law or policy;
- should adhere to a number of key principles; and
- should be subject to increased accountability mechanisms.¹⁴²

5.108 A number of individual submitters to this inquiry relayed their negative experiences with AFCA, and argued that that AFCA does not provide appropriate mediation services.¹⁴³

Compensation for affected individuals

5.109 AFCA provides dispute resolution, and can decide that a financial firm should compensate a complainant for financial loss.¹⁴⁴ ASIC noted that, as a result of 2019 reforms, firms that do not pay compensation in accordance with AFCA determinations can be subject to significant civil penalties. ASIC also identified that the compensation scheme of last resort (CSLR) was introduced to respond to unpaid consumer compensation awards typically as a result of firm insolvency.¹⁴⁵

5.110 Where ASIC brings civil action, it may secure compensation on behalf of those impacted by alleged misconduct,¹⁴⁶ but it does not seek compensation as a matter of course.¹⁴⁷ Ms Sarah Court, ASIC Deputy Chair, acknowledged that investors are ‘frequently left out of pocket by conduct that contravenes the

¹⁴⁰ Australian Citizens Party, *Submission 60*, pp. 7–8.

¹⁴¹ Financial Services Council, *Submission 7*, p. 7.

¹⁴² Financial Services Council, *Submission 7*, pp. 7–8.

¹⁴³ See, for example, Mr Christopher Pitts, Private Capacity, *Committee Hansard*, 4 October 2023, p. 9; Mr Brad Weatherstone, Private Capacity, *Committee Hansard*, 4 October 2023, p. 10.

¹⁴⁴ AFCA, Approved Rules released 7 March 2024, p. 39, cl. D.3.

¹⁴⁵ ASIC, *Submission 1*, pp. 46–47.

¹⁴⁶ See, for example, the Treasury, *Compensation Arrangements for Consumers of Financial Services; Report by Richard St. John*, April 2012, pp. 16–17.

¹⁴⁷ See, for example, Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 4.

Corporations Act'.¹⁴⁸ However, Ms Court claimed that it was not ASIC's role to seek compensation for individual consumers:

We don't, as a matter of course, in our civil proceedings, seek compensation for individuals impacted. We do from time to time, but we don't as a matter of course. We're not resourced to do so. Our role as a public enforcement agency is to take enforcement action that sends both specific deterrence to the company involved and general deterrence to the industry...¹⁴⁹

5.111 Maurice Blackburn argued that financial markets are characterised by information asymmetry and moral hazard which risks market failure and misconduct, as demonstrated by the Royal Commission. They argued that compensation payments are necessary to ensure that the 'costs of wrongdoing are internalised by the wrongdoers, rather than visited upon innocent market participants'.¹⁵⁰

5.112 Maurice Blackburn also identified that 'the maximum penalties available to ASIC pale in comparison to the quantum of the damage caused by misconduct'.¹⁵¹ This suggests that even if ASIC were to pursue compensation for individuals through civil action as a matter of course, these steps would likely be insufficient to provide adequate redress for those who have suffered loss.

5.113 With neither ASIC's regulatory conduct nor AFCA's financial industry dispute resolution reliably providing compensation to individuals who have suffered harm, identifying, preventing, and responding appropriately to misconduct is all the more important to ensure innocent individuals are not left out of pocket as a result of misconduct.

Compensation Scheme of Last Resort

5.114 In June 2023, the Parliament passed legislation to establish the CSLR. The CSLR was established following a recommendation of the 2017 Ramsay review.¹⁵² The CSLR commenced operations on 2 April 2024.

5.115 The CSLR 'can pay compensation to eligible people suffering from financial misconduct. Compensation payments of up to \$150,000 can be made'. The CSLR is funded through an industry levy and is likely to be drawn upon when an 'offending financial firm has ceased trading or become insolvent'.¹⁵³

¹⁴⁸ Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 4.

¹⁴⁹ Ms Sarah Court, Deputy Chair, ASIC, *Committee Hansard*, 23 June 2023, p. 4.

¹⁵⁰ Maurice Blackburn, *Submission 4*, p. 3.

¹⁵¹ Maurice Blackburn, *Submission 4*, p. 3.

¹⁵² Compensation Scheme of Last Resort, *What is CSLR?*, <https://cslr.org.au/about-us/what-cslr> (accessed 24 June 2024).

¹⁵³ Law Council of Australia, *Submission 10*, pp. 1–2.

- 5.116 ASIC identified that the CSLR is intended to provide public benefit by ensuring that customers affected by financial firm misconduct receive the compensation they have been awarded.¹⁵⁴
- 5.117 In November 2023, AFCA advised the committee that there had been approximately 5000 cases across 50 financial firms affected by insolvency that had been paused prior to the introduction of the CSLR, which were subsequently being processed by AFCA.¹⁵⁵
- 5.118 Some have long expressed views that compensation schemes such as the CSLR are unfair as they give rise to moral hazard.¹⁵⁶ A review by Richard St. John in 2012 stated that such compensation schemes can potentially lead to reducing incentives for stringent regulation or rigorous administration of compensation arrangements.¹⁵⁷
- 5.119 Participants in this inquiry have also expressed concerns about the moral hazard from the current CSLR. Participants have cautioned against organisations that did not engage in an instance of wrongdoing being required to compensate individuals who are harmed by the misconduct of other wrongdoers.
- 5.120 The Financial Services Council argued against the CSLR on the basis of moral hazard. They stated that the CSLR must not be used in a way that makes those with more resources and who have not engaged in wrongdoing fund the wrongdoings of those who have been poorly or inadequately resourced. They argued that without greater ASIC oversight and enforcement, these CSLR scheme shifts the cost of harms to companies who have done nothing wrong.¹⁵⁸
- 5.121 Financial Services Australia argued that, without better oversight and enforcement of existing laws, the CSLR will 'do little to reduce the consumer risk of unpaid AFCA determinations and simply shifts the cost, via levies, to financial services companies that have done nothing wrong'.¹⁵⁹
- 5.122 The Financial Planning Association of Australia criticised the CSLR on the basis that it was limited to contributions from product distributors and financial planners, and that AFCA determination statistics indicate few complaints related to financial planners. Data indicated that only 25 per cent of such

¹⁵⁴ ASIC, *Submission 1*, p. 47.

¹⁵⁵ Mr David Locke, Chief Ombudsman and Chief Executive Officer, Australian Financial Complaints Authority, *Committee Hansard*, 1 November 2023, p. 37.

¹⁵⁶ See, for example, Treasury, *Compensation Arrangements for Consumers of Financial Services; Report by Richard St. John*, April 2012.

¹⁵⁷ See, for example, Treasury, *Compensation Arrangements for Consumers of Financial Services; Report by Richard St. John*, April 2012, pp. 143–144.

¹⁵⁸ Financial Services Council, *Submission 7*, pp. 8–9.

¹⁵⁹ Financial Services Australia, *Submission 7*, p. 9.

complaints in a particular half year period were resolved in favour of the complainants.¹⁶⁰

Compensation for Detriment due to Defective Administration Scheme

5.123 Some submitters have argued that, in certain circumstances in which individuals suffer harm as a result of corporate misconduct, ASIC should compensate those individuals under the Compensation for Detriment due to Defective Administration (CDDA) Scheme. Whether ASIC may or ought to make payments to aggrieved individuals under the CDDA Scheme is a topic that has been raised in evidence and explored in a previous committee inquiry.¹⁶¹

5.124 The CDDA Scheme provides a mechanism for a Non-Corporate Commonwealth Entity to compensate people who have experienced detriment as a result of that entity's defective administration.¹⁶² Payments made under the CDDA Scheme are not subject to time limits or a cap on compensation, and are made on a discretionary, not mandatory, basis.¹⁶³

5.125 Some inquiry participants have argued that individuals who experience losses from corporate misconduct have experienced those losses in the context of deficient or insufficient enforcement action by ASIC, and that ASIC should therefore provide compensation for these losses.

5.126 Evidence provided to the committee indicates that ASIC has previously received and processed claims under the CDDA Scheme. A witness claimed that until 2019, CDDA claims against ASIC 'were routinely considered and paid over many, many years.'¹⁶⁴

5.127 The Sterling First Action Group (SFAG) argued that ASIC, through defective administration in failing to properly regulate the formation and operation of the companies comprising the Sterling Group, should be held responsible for losses incurred, and thereby victims should be able to access the CDDA Scheme for those losses.¹⁶⁵

¹⁶⁰ Financial Planning Association of Australia, *Submission 63*, pp. 3–4.

¹⁶¹ Parliamentary Joint Committee on Corporations and Financial Services, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament*, March 2022.

¹⁶² Department of Finance, [Scheme for Compensation for Detriment caused by Defective Administration \(CDDA Scheme\)](#) (accessed 1 July 2024).

¹⁶³ Senate Legal and Constitutional Affairs Committee, *Review of Government Compensation Payments*, December 2010, pp. 46–47.

¹⁶⁴ Mr Steve O'Reilly, Joint Principal, Prime Trust Action Group, *Committee Hansard*, 4 October 2023, p. 22.

¹⁶⁵ Sterling First Action Group, *Submission 53*.

- 5.128 SFAG argued that the chronology showed ASIC had identified non-compliance issues with relevant companies, and repeatedly took no further action or took actions which SFAG viewed as inadequate and disproportionate to the suspected or actual misconduct.¹⁶⁶
- 5.129 The Prime Trust Action Group (PTAG) gave evidence at the public hearing on 4 October 2023 and provided a submission relating to this inquiry. They provided context about Prime Trust and the responsible trustee Australian Property Custodian Holdings. The PTAG advised that Prime Trust was a managed investment scheme available to retail investors, that the scheme had approximately 8000 or 9000 investors, and that these investors collectively lost \$500 million through likely fraud.¹⁶⁷
- 5.130 The PTAG discussed ASIC's refusal to consider a claim brought by the PTAG made under the CDDA scheme in relation to Prime Trust. The PTAG obtained evidence in 2018–19, including written confirmation from the Department of Finance, that ASIC was covered by the scheme and could receive claims. The PTAG stated that, subsequent to lodging a claim under the CDDA scheme with ASIC in February 2019, ASIC advised that it had not been authorised to consider and determine such claims since 2015.¹⁶⁸
- 5.131 The PTAG contested this claim, citing authorisation from the executive government in 2015 for ASIC to determine CDDA claims. They believed that inconsistent claims from Commonwealth entities about authorisations to determination has resulted in ambiguity and confusion to the detriment of individuals who have suffered harm.¹⁶⁹

Act of grace payments

- 5.132 At the time of writing, the ASIC website advises that while ASIC is not currently authorised to consider applications made under the CDDA Scheme, the act of grace mechanism does apply to ASIC.¹⁷⁰ Act of grace payments are discretionary payments authorised under section 65 of the *Public Governance, Performance and Accountability Act 2013*.¹⁷¹
- 5.133 The PTAG asserted that there are a number of differences between the CDDA Scheme and act of grace payments. These include requirements for entities

¹⁶⁶ Sterling First Action Group, *Submission 53*, pp. 5–6.

¹⁶⁷ Mr Roger Pratt, Joint Principal, Prime Trust Action Group, *Committee Hansard*, 4 October 2023, pp. 22–24.

¹⁶⁸ Prime Trust Action Group, *Submission 51*, pp. 1–2.

¹⁶⁹ Prime Trust Action Group, *Submission 51*, pp. 3–4.

¹⁷⁰ Australian Securities and Investments Commission, [Financial compensation schemes](#), 1 November 2023 (accessed 25 June 2024).

¹⁷¹ Department of Finance, [Act of Grace Payments](#), 1 November 2023, (accessed 25 June 2024).

determining CDDA claims to act reasonably and according to principles of good decision-making, for CDDA claimants to be afforded procedural fairness, and for CDDA claims to only be rejected on publicly defensible reasons.¹⁷²

5.134 SRG Advisory told the committee that they had applied to the Department of Finance on behalf of three groups seeking compensation through act of grace payments. SRG Advisory argued that in all these cases, ASIC's performance of its regulatory duties had been derelict. SRG Advisory also criticised ASIC on the basis that it acted as 'judge, jury and witness' in hearing and deciding claims for act of grace payments.¹⁷³

Private litigation

5.135 Given the concerns raised regarding ASIC capacity to investigate (and enforce) corporate misconduct, as well as concerns about AFCA's capacity to provide redress for individuals experiencing disputes with entities in the financial industry, a question then arises as to what recourse is available for Australians who have experienced this type of misconduct.

5.136 Where compensation paid directly from a Commonwealth entity such as ASIC is not accessible to individuals, private litigation may be the main or only recourse for achieving compensation. Indeed, at least some 'no further action' responses from ASIC to misconduct reports also advise that private legal remedies are an option for complainants to pursue their matters.¹⁷⁴

5.137 Significant barriers exist for individuals who may wish to seek compensation through private legal action. Submitters identified that private litigation is not feasible for many individuals to access compensation, and that ASIC should play a role in acquiring compensation for individuals rather than relying on individuals to privately litigate.

5.138 Dr Evan Jones submitted that, unlike the moral and equitable basis of compensation schemes such as the CDDA and CSLR, the private legal sector 'offers no holistic or equitable fence at the top of the cliff'.¹⁷⁵ Noting that ASIC does not generally intervene in individual matters, Dr Jones argued it should be ASIC's role to 'champion individual disputes in the courts because the victims lack the resources to do so'.¹⁷⁶

¹⁷² Prime Trust Action Group, *Submission 51*, pp. 2–3.

¹⁷³ Mrs Susan Barnett, Managing Director, SRG Advisory, *Committee Hansard*, 23 August 2023, pp. 40–41.

¹⁷⁴ Dr Evan Jones, *Submission 47*, p. 4.

¹⁷⁵ Mr Michael Sanderson, *Submission 46*, p. 1.

¹⁷⁶ Dr Evan Jones, *Submission 47*, p. 6.

- 5.139 The AICD observed significant public interest in enforcing deceptive conduct provisions and continuous disclosure laws. They stated that '[t]here is a reasonable expectation that the corporate regulator should play an active enforcement role on these issues, rather than private litigants'.¹⁷⁷
- 5.140 As acknowledged by ASIC itself, clarifying or testing the law to ensure market participants understand their obligations is an important factor in the decision to pursue litigation; 'Judicial clarification is important for both regulator and regulated'.¹⁷⁸ Where ASIC defers matters to be privately prosecuted, cases in which the law would benefit from clarification may not be brought.

Committee view

- 5.141 As with many areas of ASIC's work, the committee finds itself concerned with ASIC's enforcement. ASIC's enforcement powers are wide ranging, there are a number of tools available to it, and yet the evidence received repeatedly through this inquiry process shows that ASIC is not using those tools.
- 5.142 It is clear that the community has broad concerns about ASIC's enforcement. The case studies the committee has explored in this chapter demonstrate the limitations of ASIC's enforcement culture and have shown it wanting. In particular, ASIC's actions, or lack of action, as it relates to Nuix Ltd and Dixon Advisory are highly concerning and serve as important case studies of ASIC's inaction.
- 5.143 Of particular concern to the committee was the decline in criminal actions referred to the Commonwealth Director of Public Prosecutions, as well as the generally very low levels of litigation that ASIC engages in. A 52 per cent decrease in referrals to the CDPP over five years is highly concerning.
- 5.144 The lengthy time for enforcement action to take place is also highly disappointing. The longer that ASIC takes to act in relation to corporate malfeasance, the more likely that there will be adverse consequences for the community at large. These consequences may include more people falling victim to a shady investment deal, or more generally a loss of confidence in Australia's corporate landscape as one where people can work and invest without fear.
- 5.145 As with the concerns raised about ASIC's investigations, there is a sense that ASIC is a 'black box' when it comes to enforcement. Actions are commenced or not commenced based on an opaque set of considerations which are not visible to the public. This leaves the people who reach out to ASIC for help feeling helpless and lost in an already complex legal and regulatory system. As such

¹⁷⁷ AICD, *Submission 11*, pp. 2–4.

¹⁷⁸ ASIC *ASIC's approach to enforcement after the Royal Commission*, 2 September 2019.

the committee has made recommendations around transparency and the regulatory system.

Chapter 6

Resourcing and capabilities

6.1 This chapter considers the resourcing and capabilities of the Australian Securities and Investments Commission (ASIC). This chapter discusses issues relating to ASIC's budget, Industry Funding Model, staffing arrangements and technological capabilities.

Introduction

6.2 ASIC's total funding is determined by the Australian Government.¹ ASIC receives government funding in the form of annual departmental appropriations.² These appropriations are partly recovered through industry funding levies and fees-for-service charged to industry participants on a cost recovery model referred to as the Industry Funding Model (IFM).³ In 2022–23, ASIC received approximately \$426 million in operating appropriation revenue from government. ASIC collected approximately \$1.835 billion for the Commonwealth in fees, charges, and supervisory cost recovery levies in the same period.⁴

6.3 ASIC employs approximately 1800 staff, with the majority allocated to just three areas, the Enforcement, Surveillance, and Strategic Support and Corporate Services groups.⁵ Under its Chair, Mr Joseph Longo, ASIC is seeking to enhance its use of emerging technologies and has embarked on a 'digital transformation' to increase its data analytics capabilities.⁶

6.4 In general, inquiry participants expressed significant concerns regarding either the adequacy of ASIC's resourcing or the lack of a corresponding relationship between resource levels and regulatory outcomes. Broadly, these inquiry participants expressed concerns about the following matters:

- the lack of improvements in ASIC's regulatory outcomes despite significant increases in funding in recent years;
- how ASIC's budget was determined by the government;
- the relationship between the government and the regulator; and

¹ ASIC, [How the industry funding model works](#), 28 June 2023 (accessed 29 June 2023).

² ASIC, *Corporate Plan 2023–27*, August 2023, p. 19.

³ ASIC, [How the industry funding model works](#), 28 June 2023 (accessed 29 June 2023).

⁴ ASIC, *Annual Report, 2022–23*, October 2023, p. 14.

⁵ ASIC, *Annual Report 2022–23*, October 2023, pp. 194, 198

⁶ ASIC, *Submission 1*, p. 40.

- the equity, effectiveness, and administration of the IFM.⁷
- 6.5 Further, some inquiry participants expressed concerns that ASIC's staffing profile was fundamentally unbalanced and insufficient, raising questions about the competency of ASIC's staff.⁸
- 6.6 In addition, inquiry participants questioned ASIC's embrace of new technologies and its commitment to digital transformation. Inquiry participants claimed that ASIC appears unwilling or unable to catch-up with technological developments in the corporate and financial services industry.⁹

Budget overview

- 6.7 ASIC has \$481.2 million in available funding for the 2023–24 financial year and has been allocated a departmental operating appropriation of \$433.7 million for the same period. As discussed in **Chapter 3**, these funds consist of resources provided by both departmental appropriations and revenue from independent sources. According to its 2023–27 Corporate Plan, ASIC received approximately \$433 million in departmental appropriations, \$23 million in revenue from independent sources and another \$23 million in capital appropriations for the 2023–24 financial year.¹⁰
- 6.8 ASIC's total budgeted resources are set to decrease to approximately \$464 million in 2024–25 before increasing to approximately \$475 million in 2026–27. Total funds sourced from departmental appropriations and capital appropriations are projected to remain steady through to 2026–27.¹¹

ASIC's budget over the past decade

- 6.9 As discussed in **Chapter 3**, ASIC's funding has increased substantially in the past decade. ASIC's agency resource statements show that ASIC's

⁷ See, for example, Dr Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say', vol. 43, no. 4, 2020, pp. 1426–1427, as cited in, Dr Schofield-Georgeson, *Submission 198*; Mr James Shipton, *Submission 12*, p. 10; Australian Institute of Company Directors, *Submission 11*, p. 7; Ms Caroline Read, *Submission 55*, p. 5; The Hon Bob Katter MP, *Submission 192*, p. 9; Financial Services Council, *Submission 7*, pp. 19–21; Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 3–7; Institute of Public Accountants, *Submission 17*, p. 5; National Credit Providers Association, *Submission 183*, pp. 1–2; Adams Economics, *Submission 21*, p. 49.

⁸ See, for example, Dr Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say', vol. 43, no. 4, 2020, pp. 1426–1427, as cited in, Dr Schofield-Georgeson, *Submission 198*; Mr James Shipton, *Submission 12*, pp. 6 – 7, 10; Adams Economics, *Submission 21*, p. 40. ASIC's internal culture is discussed further in **Chapter 7** to this report.

⁹ See, for example, Adams Economics, *Submission 21*, pp. 29–30; Institute of Public Accountants, *Submission 17*, pp. 3–4; Law Council of Australia, *Submission 10*, p. 5; Australian Banking Association, *Submission 5*, p. 1.

¹⁰ ASIC, *Corporate Plan 2023–27*, August 2023, p. 19.

¹¹ ASIC, *Corporate Plan 2023–27*, August 2023, p. 19.

appropriations have increased by 65.3 per cent from \$471.3 million in the 2011-12 financial year to \$779.1 million in the 2020–21 financial year.¹² These increases represent significant portions of ASIC’s pre-existing budget.

- 6.10 In the 2024-25 Budget, ASIC received \$42.5 million in additional funding over four years ‘to regulate and support new beneficial ownership transparency requirements for Australian companies and other entities’.¹³ This funding includes resources to improve data capability and cyber security, combat financial scams, modernise digital assets and payments regulation, and promote sustainable finance markets as part of the Future Made in Australia Act initiative.¹⁴
- 6.11 Mr Longo recently conceded that some matters for potential investigation reported to the regulator were not pursued due to a lack of funds.¹⁵ Mr Longo explained ‘there are matters we would like to run now we don’t run because they don’t meet our priorities’.¹⁶ Further, the Chair stated that although the regulator will always require more money, he was realistic about the prospect of enhanced resources, given the pressures on the federal budget. Mr Longo stated, ‘a regulator like us is very unlikely to ever be resourced to do all the things we would like’.¹⁷
- 6.12 ASIC has changed its approach to budgeting in recent years. In its 2022 review, the Financial Regulator Assessment Authority (FRAA) noted that ASIC had begun to take steps to integrate its budget processes with its broader strategic planning.¹⁸ The FRAA advised that ASIC will also conduct intra-year budget allocations through periodic reforecasting and budget review to improve the allocation of funds it receives via parliamentary appropriation, own-source revenue and capital appropriations. ASIC’s Executive Committee will oversee

¹² Adams Economics, *Submission 21*, p. 47.

¹³ Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2024–25*, pp. 183–184.

¹⁴ Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2024–25*, pp. 179–184.

¹⁵ Mr Joseph Longo, Chair, ASIC, Parliamentary Joint Committee on Corporations and Financial Services’ inquiry into the Oversight of ASIC, the Takeovers Panel and the Corporations Legislation *Committee Hansard*, 30 April 2024, p. 9.

¹⁶ Mr Joseph Longo, Chair, ASIC, Parliamentary Joint Committee on Corporations and Financial Services’ inquiry into the Oversight of ASIC, the Takeovers Panel and the Corporations Legislation *Committee Hansard*, 30 April 2024, p. 9.

¹⁷ Mr Joseph Longo, Chair, ASIC, Parliamentary Joint Committee on Corporations and Financial Services’ inquiry into the Oversight of ASIC, the Takeovers Panel and the Corporations Legislation *Committee Hansard*, 30 April 2024, p. 9.

¹⁸ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 21.

the application of any surplus funding to projects, and track overspending on other projects.¹⁹

ASIC's budget fails to adequately support its regulatory functions

- 6.13 Some inquiry participants expressed concerns that the size and determination of ASIC's budget has limited its overall effectiveness as the corporate and financial services regulator.
- 6.14 The committee heard from some submitters that ASIC's reliance on appropriations from government compromises its overall organisational capacity and flexibility.²⁰ For example, citing the evidence of one ASIC investigator, Dr Schofield-Georgeson provided evidence that the obligations associated with reliance on public funds restrains ASIC's ability to operate and delays its response time. Dr Schofield-Georgeson argued that the burdens associated with reliance on public funds has encouraged the regulator to settle actions brought against corporate actors rather than prosecute them.²¹
- 6.15 Further, former Chair of ASIC, Mr James Shipton, claimed that ASIC's ability to adequately perform its regulatory functions is limited by its reliance on government appropriations, creating a 'funding envelope'.²² Mr Shipton also claimed that ASIC had not been a funding priority for the government, despite its increasing regulatory scope.²³ Mr Shipton made the point that ASIC staff are in effect responsible for 'enforcing and policing the entirety of the Australian economy' but noted that ASIC's resourcing had not increased in line with the economy. Mr Shipton also noted that the dynamics of the economy had changed significantly since ASIC's commencement, increasing the demands on the regulator, but that ASIC's resources had not increased in line with these changes.²⁴
- 6.16 In general, inquiry participants claimed that ASIC's regulatory remit is simply too broad for its budget and that the regulator has insufficient funds to support

¹⁹ FRAA, *Effectiveness and capability review of ASIC*, July 2022, pp. 21–22.

²⁰ See, for example, Dr Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say', vol. 43, no. 4, 2020, pp. 1426–1427, as cited in, Dr Schofield-Georgeson, *Submission 198*; Mr James Shipton, *Submission 12*, p. 10.

²¹ Dr Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say', vol. 43, no. 4, 2020, pp. 1426–1427, as cited in, Dr Schofield-Georgeson, *Submission 198*.

²² Mr James Shipton, *Submission 12*, p. 10.

²³ Mr James Shipton, *Submission 12*, p. 10.

²⁴ Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, p. 46.

the full scope of its regulatory operations.²⁵ Submitters expressed support for increasing ASIC's budget to ensure it could adequately perform the full range of its regulatory functions.²⁶

- 6.17 In her evidence to the committee, legal academic Ms Helen Bird asserted that if ASIC's existing remit is to be maintained, its resources should be significantly increased to accommodate the full scope of its regulatory functions.²⁷ Ms Bird suggested that if the government was reluctant to fund ASIC commensurate with its broad regulatory remit, the regulator should be reconstituted into several separate agencies.²⁸
- 6.18 Other submitters expressed disappointment that ASIC's budget has continued to increase at a strong and consistent rate despite ongoing concerns about the capability and performance of the regulator.²⁹ For example, the Hon Bob Katter MP observed that while ASIC's budget had risen substantially to almost half a billion dollars in recent years, this increase has not been met with a corresponding improvement in the regulator's performance.³⁰

Industry funding model

- 6.19 As discussed in **Chapter 3**, under the IFM ASIC recovers costs associated with its regulatory activities from industry participants using levies and fees. These charges reflect the cost of regulating different sub-sectors of the corporate and financial services industry.³¹

Overview

- 6.20 The IFM was designed in accordance with two key principles: firstly, that cost recovery fees and levies attributable to regulated activity are considered as a funding mechanism prior to budget funding; and secondly, that those who create the need for government activity or regulation, should be responsible for financing it, rather than general taxpayers.³²
- 6.21 Recommending the adoption of an industry-based funding model in its 2014 final report, the Financial Systems Inquiry (the Inquiry) observed that the

²⁵ Dr Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say', vol. 43, no. 4, 2020, pp. 1426–1427, as cited in, Dr Schofield-Georgeson, *Submission 198*.

²⁶ See, for example, Australian Institute of Company Directors, *Submission 11*, p. 7; Caroline Read, *Submission 55*, p. 5.

²⁷ Ms Helen Bird, *Committee Hansard*, 24 August 2023, p. 16.

²⁸ Ms Helen Bird, *Committee Hansard*, 24 August 2023, p. 16.

²⁹ See, for example, the Hon. Bob Katter MP, *Submission 192*, p. 9.

³⁰ The Hon Bob Katter MP, *Submission 192*, p. 9.

³¹ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 21.

³² Department of the Treasury (Treasury), *Review of the ASIC IFM: Final report*, June 2023, p. 9.

adoption of such a model would increase the transparency and equity of costs charged to industry participants and would make ASIC's funding more secure and independent.³³ Prior to the introduction of the IFM, ASIC was primarily funded by taxpayers through government appropriations.³⁴

- 6.22 ASIC publishes an annual Cost Recovery Implementation Statement (CRIS) for consultation with industry participants. The CRIS outlines the estimated costs of ASIC's regulation and how the regulator intends to recover these costs through the IFM.³⁵ In 2022–23, ASIC estimated that it would recover \$352.0 million in regulatory costs under the IFM, including \$19.9 million in allowance for capital expenditure less costs funded by own-source revenue and adjustments from 2021–22.³⁶ According to the CRIS, approximately \$111.1 million or 31.6 per cent of these costs are related to enforcement activities.³⁷ ASIC collects and administers revenue and prescribed fees under a number of different statutes.³⁸
- 6.23 In June 2023, the Department of the Treasury (Treasury) undertook a review of the IFM to assess whether it was meeting the government's 2015 Charging Framework objectives and supporting the adequate performance of the regulator.³⁹
- 6.24 The review concluded that the settings of the IFM were broadly appropriate to support the performance of ASIC's regulatory responsibilities and that no substantial changes to the model were required. The review suggested that the principles which underpin the IFM should be expanded to 'account for the benefits entities receive from ASIC's regulatory activities'.⁴⁰ The review made a series of recommendations suggesting technical changes to how levies charged under the model are calculated. These recommendations also concerned ASIC's reporting, transparency and consultation requirements.⁴¹
- 6.25 The IFM consists of industry funding levies (both cost recovery levies and statutory levies) charged annually to entities across 52 industry sub-sectors and

³³ Treasury, *Financial System Inquiry: Final Report*, November 2014, pp. 250–251.

³⁴ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 1.

³⁵ ASIC, *Submission 1*, p. 38.

³⁶ ASIC, *CRIS: ASIC Industry Funding Model (2022–23)*, June 2023, p. 1.

³⁷ ASIC, *CRIS: ASIC Industry Funding Model (2022–23)*, June 2023, p. 2.

³⁸ See, *Corporations Act 2001; National Consumer Credit Protection Act 2009; Corporations (Fees) Act 2001; Corporations (Review Fees) Act 2003; Business Names Registration (Fees) Regulations 2010; Superannuation Industry (Supervision) Act 1993.*

³⁹ Treasury, *Review of the ASIC IFM: Final report*, June 2023, pp. 1–2.

⁴⁰ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 5.

⁴¹ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 5.

fees-for-service charged to individual entities.⁴² These two components of the IFM are outlined in more detail below.

Industry funding levies

6.26 The majority of ASIC's regulatory costs recovered under the IFM are collected through levies imposed on specific sub-sectors of the industry which fall under ASIC's regulatory remit. These funds are collected under the *ASIC Supervisory Cost Recovery Levy Act 2017* and the *ASIC Supervisory Cost Recovery Levy Regulations 2017*.⁴³ This revenue is not available to or accessible by ASIC and is remitted to the Commonwealth Official Public Account upon collection.⁴⁴

6.27 As discussed in **Chapter 3**, as of 2021–22, there are 52 industry sub-sectors from which ASIC recovers its regulatory costs through levies. Each sub-sector falls under one of the following categories:

- corporate (6 sub-sectors);
- deposit taking and credit (6 sub-sectors);
- investment management, superannuation, and related services (8 sub-sectors);
- market infrastructure and intermediaries (24 sub-sectors);
- financial advice (4 sub-sectors); and
- and insurance (4 sub-sectors).⁴⁵

6.28 These levies are calculated and invoiced at the end of the financial year to the 52 sub-sectors, with costs recovered based on the regulatory effort incurred by ASIC in regulating each sub-sector.⁴⁶ A time measurement system is used to calculate the cost of regulatory activities for each sub-sector. Once calculated, indirect costs are allocated to each sub-sector by ASIC proportionate to the internal support they receive and allocated to sub-sectors using the same methodology as direct costs.⁴⁷ ASIC expanded on this point in its evidence to the committee:

We efficiently manage the resources allocated to us by prioritising the most significant threats and harms in our regulatory environment. This is reflected in the allocation of levies under the industry funding model.⁴⁸

⁴² ASIC, *Cost recovery implementation statement 2022–23: Summary of ASIC's estimated costs and levies for sectors and subsectors*, June 2023, p. 8.

⁴³ ASIC, *Annual Report, 2022–23*, October 2023, p. 123.

⁴⁴ ASIC, *Annual Report, 2022–23*, October 2023, p. 123.

⁴⁵ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 14.

⁴⁶ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 16.

⁴⁷ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 16.

⁴⁸ ASIC, *Submission 1.3*, p. 6.

Fees-for-service

- 6.29 As part of the IFM, ASIC also directly charges fees for user-initiated and transaction-based activities where the regulator provides a specific service to individual entities. These fees are charged by ASIC when a service or regulatory activity is provided directly to an individual or organisation.⁴⁹ This includes, for example, an application fee for an Australian Financial Services License, which would be payable at the time of application by an individual or organisation.
- 6.30 The fees-for-service component of the IFM commenced in July 2018 and accounts for approximately 3 to 5 per cent of the total revenue recovered by ASIC under the IFM.⁵⁰ Under the charging framework, fee amounts are to be calculated in a way that reflects the cost to ASIC of administering the service and enables full cost recovery. The government retains the discretion to charge no or a partial fee if charging would not support achieving the government's policy objective.⁵¹
- 6.31 ASIC collects fees in relation to five distinct categories of activity;
- license application or variation services;
 - registration application services;
 - compliance review of documents lodged with ASIC;
 - requests for changes to market operating rules; and
 - applications for relief.⁵²

Concerns regarding the IFM

- 6.32 Evidence received by the committee indicated a high level of dissatisfaction with the IFM among industry participants and other relevant inquiry participants. Submitters to this inquiry claimed that the IFM was fundamentally inequitable, targeted particular industry sub-sections and lacked transparency.⁵³ Some inquiry participants also argued that the IFM compromised ASIC's independence from government by providing the regulator with a dual incentive to both regulate the corporate and financial services industry raise and revenue for the government.⁵⁴

⁴⁹ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 42.

⁵⁰ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 42.

⁵¹ Treasury, *Review of the ASIC IFM: Final report*, June 2023, p. 43.

⁵² Treasury, *Review of the ASIC IFM: Final report*, June 2023, pp. 41–42.

⁵³ See, for example, Financial Services Council, *Submission 7*, p. 21; Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 3–5; National Credit Providers Association, *Submission 183*, pp. 1–2; Institute of Public Accountants, *Submission 17*, p. 5.

⁵⁴ See, for example, Adams Economics, *Submission 21*, p. 49; Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 7–8; Institute of Public Accountants, *Submission 17*, p. 5; Financial Services Council, *Submission 7*, p. 20.

Levies are inequitable and inefficient

- 6.33 The Financial Services Council expressed concerns that ASIC's IFM places an excessive burden on financial services businesses and argued that further funding increases should be provided by government, not the industry.⁵⁵
- 6.34 The FSC noted that ASIC had consistently received substantial funding increases to properly perform its duties, with the majority of this additional cost burden falling on industry participants.⁵⁶ The FSC also objected to the IFM as a matter of principle, asserting that requiring third parties to pay for the wrongdoing of non-compliant actors in the financial services industry constituted a form of moral hazard.⁵⁷ The FSC questioned why the IFM does not include any funds from the government's consolidated revenue fund, considering that ASIC's activities serve and protect 'the public' at large more so than they do individual industry participants.⁵⁸
- 6.35 In response to a question on notice about the potential unfairness of making well-behaved firms pay for the cost of regulating poorly-behaved firms, ASIC responded that 'the operation of ASIC's industry funding model is a matter for Government' and referred to the Treasury review.⁵⁹

Disproportionate burden on financial advisers

- 6.36 Some inquiry participants expressed concerns that the IFM imposed a disproportionate regulatory burden on certain industry participants, including small financial advice firms, compromising their ability to provide quality financial services to consumers.
- 6.37 For example, the Stockbrokers and Investment Advisers Association (SIAA) submitted that levies charged on financial advisers under the IFM had increased exponentially since the model was first implemented. SIAA cited figures indicating that levies for financial advisers under the IFM had increased by 246 per cent over the 2018–19 estimate.⁶⁰ Despite claims from Treasury that the IFM would have a minimal impact on industry participants when introduced, SIAA stated that the levies had become unpredictable to the extent that financial advisers were incapable of reasonably budgeting for the levies each financial year.⁶¹

⁵⁵ Financial Services Council, *Submission 7*, p. 19.

⁵⁶ Financial Services Council, *Submission 7*, p. 21.

⁵⁷ Financial Services Council, *Submission 7*, p. 21.

⁵⁸ Financial Services Council, *Submission 7*, p. 21.

⁵⁹ ASIC, answers to written questions on notice set 46, 5 September 2023 (received 29 September 2023).

⁶⁰ Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 3–4.

⁶¹ Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 3–4.

6.38 SIAA also asserted that the burden of these levies on financial advisers was inconsistent with their relatively small presence in the industry.⁶² SIAA submitted that these levies do not accurately reflect the cost of regulating these firms, and therefore, are inconsistent with the model's design principles. SIAA claimed that smaller firms in the financial advice sub-sector are subsidising the costs of regulating larger firms which are outside of the financial advice sub-sector.⁶³ SIAA argued that under the IFM, the personal financial advice sub-sector was effectively funding large-scale litigation commenced by ASIC against non-compliant large financial services firms.⁶⁴

6.39 Mr Ross Smith, Director of Shenton Ltd and Shenton Pty Ltd, outlined the burden industry funding levies place on financial advisers:

... the ASIC industry funding levy on financial advisers is based on ASIC's dubious accounting of its investigation and enforcement costs. Financial advisers had no voice and no opportunity to reject the levy. ASIC said: 'It's in the legislation. You have the license; you have to pay.' This caused severe duress for financial advisers servicing their clients. We are not financial institutions with deep pockets. No other service providers have to pay an industry funding levy to recoup the costs of a government agency – not accountants, not actuaries, not real estate agents and not used-car salesman.⁶⁵

6.40 Other inquiry participants provided in-principle support for the IFM but argued that industry funding levies were too high and have continued to increase despite the concerns of industry participants.⁶⁶ The National Credit Providers Association (NCPA) stated that these levies were increasingly being imposed on small and medium sized credit providers with limited capacity to absorb them.⁶⁷ The NCPA also claimed that the levies were disproportionate to the costs of regulating these firms and their presence in the industry.⁶⁸

Levies are poorly calculated and lack transparency

6.41 Inquiry participants also expressed concerns about how these levies are calculated, and the transparency of the calculation process. SIAA submitted that, under the IFM, the cost of levies to stockbroking firms associated with ASIC Market Supervision activities was disproportionately large. SIAA submitted

⁶² Stockbrokers and Investment Advisers Association, *Submission 16*, p. 4.

⁶³ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 5.

⁶⁴ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 5.

⁶⁵ Mr Ross Smith, Director, Shenton Ltd and Shenton Pty Ltd, *Committee Hansard*, 4 October 2023, p. 16.

⁶⁶ See, for example, National Credit Providers Association, *Submission 183*, p. 1.

⁶⁷ National Credit Providers Association, *Submission 183*, p. 1.

⁶⁸ National Credit Providers Association, *Submission 183*, p. 2.

that these levies would particularly disadvantage participants employing many retail advisers.⁶⁹ Further, SIAA claimed that stockbrokers advising retail clients should not be charged the same fees as advisers in other financial sectors given significant differences between the two professions.⁷⁰

- 6.42 Inquiry participants also claimed that the calculation of industry funding levies lacked transparency and that there was little understanding about how regulatory costs were allocated among the industry sub-sectors by ASIC.⁷¹ SIAA claimed that industry participants should be able to know which regulatory activities or litigation their industry funding levies are being used to finance.⁷² Mr Smith expanded on this point in his evidence to the committee:

The industry funding levy [is] objectionable because (1) there's no factual evidence of disclosure, and (2) there's no open accountability on enforcement costs making up they levy on financial advisers. For my two small businesses last financial year, we estimate that our levies will be around \$35,000 for 10 advisers; that is four times the 2018 levy.⁷³

- 6.43 Other inquiry participants argued that this lack of transparency had a trickle-down effect on industry participants. These inquiry participants argued that a lack of transparency about how industry funding levies were calculated by ASIC meant that industry participants were unable to effectively determine their own budget due to an inability to predict costs charged under the IFM.⁷⁴ Mr Peter Alvarez, Navigate Wealth, expanded on this point:

The ASIC funding levy has risen from \$2,000 in 2019 to \$6,500 today – taking into account that the last two years were frozen due to the pandemic. We are required to forward project and budget our expenses annually as part of our annual audit obligations, but, if our ASIC funding levies are rising 30 to 40 per cent annually, how do you expect us to do this accurately, and how is this sustainable in the long term? Small accounting practices don't pay these sums of money to the ATO to regulate them, nor do lawyers pay these sums of money to the law societies, nor do other professions.⁷⁵

⁶⁹ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 3.

⁷⁰ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 3.

⁷¹ See, for example, Institute of Public Accountants, *Submission 17*, p. 5; Stockbrokers and Investment Advisers Association, *Submission 16*, p. 6.

⁷² Stockbrokers and Investment Advisers Association, *Submission 16*, p. 6.

⁷³ Mr Ross Smith, Director, Shenton Ltd and Shenton Pty Ltd, *Committee Hansard*, 4 October 2023, p. 16.

⁷⁴ See, for example, Stockbrokers and Investment Advisers Association, *Submission 16*, p. 7; Mr Peter Alvarez, Director and Responsible Manager, Navigate Wealth, *Committee Hansard*, 4 October 2023, p. 16.

⁷⁵ Mr Peter Alvarez, Director and Responsible Manager, Navigate Wealth, *Committee Hansard*, 4 October 2023, p. 16.

6.44 SIAA asserted that the design, structure, and legislative framework of the industry funding levies indicate that the model is not flexible enough to allow the regulator to adequately respond to changes in the markets.⁷⁶

ASIC's independence and budgetary integrity

6.45 ASIC is a substantial net revenue contributor to the Australian Government. In his submission, Mr John Adams noted that ASIC's net transfers to the Commonwealth Official Public Account have increased substantially from \$632.5 million in 2013–14 to \$1.67 billion in 2020–21.⁷⁷ ASIC's contributions to the Australian Government have led some inquiry participants to argue that the regulator has a 'dual mandate' of regulatory enforcement and revenue raising, creating a conflict of priorities.⁷⁸

6.46 Inquiry participants expressed concerns that ASIC's budget would increase exponentially under the IFM due to the lack of a control mechanism to restrain ASIC's expenditure.⁷⁹ SIAA submitted that the rate of increase in ASIC's funding will continue unchecked under the IFM as the model does not require the regulator to be held accountable for its expenditure. SIAA contended that this was distinct from parliamentary appropriations, where ASIC's expenditure is set by and accountable to government.⁸⁰ SIAA recommended that the government commit to funding at least 50 per cent of ASIC's budget with the remainder financed by the IFM. SIAA also submitted that the scope and nature of regulatory activities conducted by ASIC make departmental appropriations a more appropriate source of funding for the regulator than the IFM.⁸¹

6.47 Some inquiry participants expressed concerns that the IFM allows fines and other recovered costs associated with enforcement action to be paid into the consolidated revenue fund.⁸² These inquiry participants argued that this represented a windfall gain for the government, demonstrating that the model is being used to bolster government revenue, rather than genuinely offset ASIC's regulatory costs.⁸³

⁷⁶ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 7.

⁷⁷ Adams Economics, *Submission 21*, p. 49.

⁷⁸ Adams Economics, *Submission 21*, p. 49.

⁷⁹ See, for example, Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 1–2.

⁸⁰ Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 1–2.

⁸¹ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 8.

⁸² Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 3–4.

⁸³ Stockbrokers and Investment Advisers Association, *Submission 16*, pp. 3–4.

- 6.48 The Institute of Public Accountants (IPA) expressed concerns that the IFM treats industry participants as a 'slush fund' for ASIC, citing a 160 per cent increase in industry funding levies over the last two-to-three years.⁸⁴
- 6.49 To address these concerns, some submitters suggested that consideration should be given to changing the ASIC IFM from an ex-post model, where costs are recovered in the financial year after the regulatory costs were incurred, to an ex-ante model, where costs are recovered before they are expended. The FSC submitted that the ex-post model does not require ASIC to efficiently set a budget and determine resource allocations in advance, distinct from similar financial regulators in comparable jurisdictions.⁸⁵ Accordingly, the FSC recommended that costs be recovered under the IFM before they are expended to encourage responsible budgeting.⁸⁶
- 6.50 In response to these concerns, ASIC stated that 'the design and structure of ASIC's industry funding model is a matter for the Australian Government' and referred to the review of the IFM undertaken by Treasury.⁸⁷

Alternative funding models

- 6.51 Most inquiry participants providing views on the IFM expressed interest in alternative funding models. SIAA expressed support for a 50–50 funding model whereby half of ASIC's funds were provided by government with the remaining half sourced under a more equitable and better targeted version of the IFM.⁸⁸ If the government is reluctant to contribute to ASIC's costs, SIAA recommended that parliament legislate a cap on ASIC's budget.⁸⁹
- 6.52 The FSC recommended that increased funding for ASIC should not be provided through the IFM.⁹⁰ The FSC reiterated that it would be inappropriate to require the industry to pay more and suggested that increased funds be sourced from additional government appropriations or by diverting funds or further investment from ASIC's existing budget.⁹¹ The FSC also recommended that ASIC consider how it could better control enforcement costs by better allocating staff and funds to particular workstreams.⁹²

⁸⁴ Institute of Public Accountants, *Submission 17*, p. 5.

⁸⁵ Financial Services Council, *Submission 7*, p. 20.

⁸⁶ Financial Services Council, *Submission 7*, p. 20.

⁸⁷ ASIC, *Supplementary submission 1.5*, p. 36.

⁸⁸ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 2.

⁸⁹ Stockbrokers and Investment Advisers Association, *Submission 16*, p. 9.

⁹⁰ Financial Services Council, *Submission 7*, p. 5.

⁹¹ Financial Services Council, *Submission 7*, p. 5.

⁹² Financial Services Council, *Submission 7*, p. 20.

- 6.53 Other inquiry participants suggested that all of ASIC's regulatory costs associated with enforcement be sourced from the Enforcement Special Account (ESA), funded by government appropriations.⁹³ Currently, the ESA is designed to support 'large matters' which are 'exceptional matters of significant public interest'. ASIC requires the approval of the Treasurer on a case-by-case basis to access funds in the ESA.⁹⁴ Mr Shipton recommended that all of ASIC's enforcement activities should be funded by the ESA and that the regulator should be able to access this fund without the Treasurer's approval. Mr Shipton argued that this should replace ASIC's reliance on industry funding levies.⁹⁵
- 6.54 One submitter argued that the IFM should be reconstituted so that fines paid to ASIC for regulatory breaches are placed directly in a special account and paid to investors who have suffered detriment as a result of wrongdoing.⁹⁶

Staffing

- 6.55 Inquiry participants emphasised the need for ASIC to have qualified, experienced, and capable staff to perform its regulatory role and responsibilities. As discussed in **Chapter 3**, ASIC employed approximately 1831 full-time equivalent staff as of 30 June 2023.⁹⁷
- 6.56 ASIC's internal staffing profile has undergone significant changes since Mr Longo was appointed Chair in 2021. Following the conclusion of the FRAA's periodic review, in May 2023 Mr Longo announced a dramatic restructure of the regulator, merging its two enforcement teams into one and creating an expanded regulation and supervision division.⁹⁸
- 6.57 This restructure followed the departure of several senior executives including two ASIC commissioners, the Chief Financial Officer, and the Chief People Officer among other high-level officials.⁹⁹ Further, in May 2024 ASIC announced the departure of its Chief Executive Officer, seconded to the Department of Public Prosecutions, and the Executive Director of Enforcement and Compliance.¹⁰⁰

⁹³ See, for example, Mr James Shipton, *Submission 12*, p. 10.

⁹⁴ Mr James Shipton, *Submission 12*, p. 10.

⁹⁵ Mr James Shipton, *Submission 12*, p. 10.

⁹⁶ Name withheld, *Submission 71*, p. 1.

⁹⁷ ASIC, *Corporate Plan 2023–27*, August 2023, p. 17.

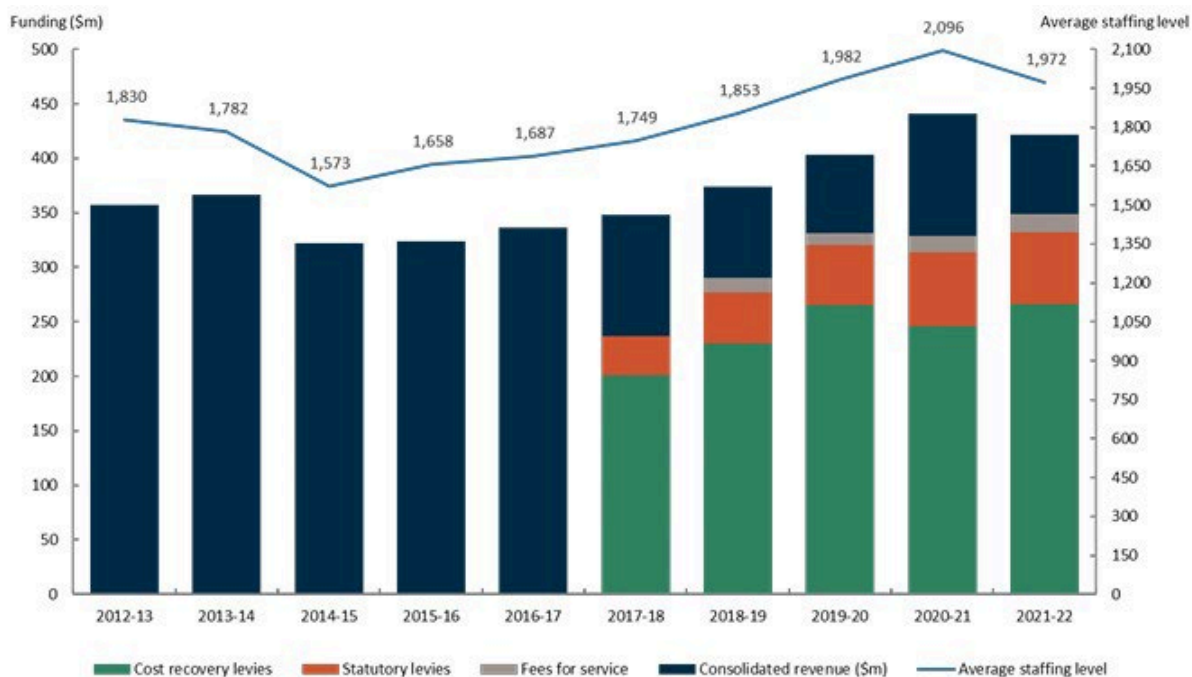
⁹⁸ Patrick Durkin and Campbell Kwan, '[ASIC muscles up its enforcement division as part of a major shake-up](#)', *Australian Financial Review*, 2 May 2023 (accessed 29 May 2024).

⁹⁹ Patrick Durkin and Campbell Kwan, '[ASIC muscles up its enforcement division as part of a major shake-up](#)', *Australian Financial Review*, 2 May 2023 (accessed 29 May 2024).

¹⁰⁰ ASIC, '[Changes to the Executive Leadership Team](#)', 15 April 2024 (accessed 29 May 2024).

6.58 Unfortunately, ASIC's staffing does not appear to have kept pace with either its expanding remit or its increased financial resources. In its first full year of operation, ASIC had a total staff of 1527.¹⁰¹ This figure has increased by just over 300 personnel as of June 2023.¹⁰² This is despite a substantial increase in ASIC's budget in the same period. Further, the number of ASIC employees has fallen since the 2020-21 financial year, as show below in **Figure 6.1**.

Figure 6.1 ASIC's funding, amounts recovered through the IFM and ASL from 2012–13 to 2020–21



Source: Australian Government, *Portfolio Budget Statements Treasury Portfolio, 2012–13 to 2022–23*; ASIC, *Cost Implementation Recovery Statement: ASIC industry funding model, 2017–18 to 2021–22*.

Concerns

6.59 The committee received a number of submissions expressing concerns about ASIC's staffing, particularly whether the skills and capabilities of ASIC staff are aligned to ASIC's wide spectrum of regulatory functions, and ASIC's approach to hiring more generally.¹⁰³

¹⁰¹ As of 30 June 1992. See, Australian Securities Commission, *Annual report 1991/92*, n.d., p. 62.

¹⁰² ASIC, *Annual Report 2022–23*, October 2023, p. 194.

¹⁰³ See, for example, Dr Schofield-Georgeson, *Submission 198*, p. 23; Mr James Shipton, *Submission 12*, pp. 6–7; Adams Economics, *Submission 21*, p. 40.

Skills, capabilities and number of ASIC staff

- 6.60 In its 2023–27 Corporate Plan, ASIC committed to providing staff with the necessary ‘tools, knowledge, and capabilities’ to maximise the effectiveness of its regulatory outcomes.¹⁰⁴
- 6.61 In its 2022 review, the FRAA observed that the capabilities and skills of ASIC’s workforce were central to the regulator’s success.¹⁰⁵ The final report of the Financial System Inquiry released in 2014 raised concerns about ASIC’s ability to attract staff who could support its regulatory remit and operational flexibility.¹⁰⁶ The Inquiry expressed concerns that ASIC’s target remuneration was too low to attract the staff it required to fulfill its regulatory responsibilities effectively.¹⁰⁷
- 6.62 Some witnesses claimed that ASIC’s staff lacked the requisite skills and knowledge to adequately perform ASIC’s regulatory activities.¹⁰⁸ Mr Daniel Schlaepfer, President and Founder of Select Vantage Inc., claimed that ASIC staff had handled his matter in an unprofessional manner and that the regulator was operating ‘below a level of experience and competence that we find with most other regulators’.¹⁰⁹ Mr Schlaepfer also told the committee that he found ASIC staff’s understanding of trading in Australia, and in general, inadequate.¹¹⁰ These concerns were echoed by Mr Lachlan Walden:

According to ASIC’s own submission to this inquiry, there are 82 full-time equivalent employees in their markets group responsible for market supervision ... you really have to wonder what these employees do. There’s a culture that’s grown where the dodgy characters on the ASX get away with small indiscretions, and, soon enough, company directors, brokers and traders push the limits, knowing that there’s no tough cop on the beat and there won’t be repercussions.¹¹¹

- 6.63 However, previous ASIC employees and other inquiry participants have rejected this characterisation of the regulator’s staff. In his evidence to the committee, Mr Shipton defended ASIC staff, characterising ASIC’s line officers

¹⁰⁴ ASIC, *Corporate Plan 2023–27*, August 2023, p. 17.

¹⁰⁵ FRAA, *Effectiveness and capability review of ASIC*, July 2022, pp. 86–87.

¹⁰⁶ Financial Systems Inquiry, *Final Report*, December 2014, p. 246.

¹⁰⁷ Financial Systems Inquiry, *Final Report*, December 2014, p. 246.

¹⁰⁸ See, for example, Mr Daniel Schlaepfer, President and Founder, Select Vantage Inc., *Committee Hansard*, 24 August 2023, p. 1; Mr Lachlan Walden, *Committee Hansard*, 4 October 2023, pp. 13–14.

¹⁰⁹ Mr Daniel Schlaepfer, *Committee Hansard*, 24 August 2023, p. 1

¹¹⁰ Mr Daniel Schlaepfer, *Committee Hansard*, 24 August 2023, p. 5.

¹¹¹ Mr Lachlan Walden, *Committee Hansard*, 4 October 2023, pp. 13–14.

as dedicated, focused, and motivated.¹¹² These views were echoed by Ms Peta Stead, Senior Regulatory Consultant at CISA Consulting Pty Ltd, who praised the dedication of ASIC staff. In her evidence to the committee, Ms Stead stated that ASIC staff have a strong worth ethic and are committed to supporting good regulatory outcomes.¹¹³

6.64 Questions have also been raised about ASIC's ability to retain qualified staff, with media reports indicating that ASIC officials are warning of a 'brain drain' within the agency. One such report suggested that the departure of three senior executives in April 2024 had erased '53 years of collective experience'.¹¹⁴

6.65 Further, Mr Shipton claimed that ASIC's staffing numbers are too small to adequately support the full scope of its regulatory remit. Mr Shipton stated that ASIC staff are effectively responsible for monitoring the entirety of the Australian economy. Mr Shipton compared ASIC's staffing numbers and regulatory remit with that of the police force:

... there are 2,000 people at ASIC around today. There are 65,000 police officers in Australia. The 65,000 police officers police, appropriately, the community, yet we have only 2,000 policing our massive financial and corporate sector, a corporate sector that is about the 13th largest economy in the world. To put that 2,000 personnel number in perspective, that's equivalent to the size of the Northern Territory police force. So essentially you have a small number of people trying to police and enforce against a massive economy and a massively growing economy. Meanwhile, the asks, both legislatively and from community expectations, are expanding.¹¹⁵

Unbalanced staffing profile

6.66 Some inquiry participants asserted that ASIC had an unbalanced staffing mix, with an asymmetric and 'top-heavy' staffing profile. In his submission, Dr Schofield-Georgeson asserted that 'neoliberal management' at ASIC had increased the number of senior executive staff at the expense of lower-level investigative staff with institutional knowledge of ASIC's role and responsibilities.¹¹⁶ Dr Schofield-Georgeson claimed that under-enforcement was

¹¹² Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, p. 49.

¹¹³ Ms Peta Stead, Senior Regulatory Consultant, CISA Consulting Pty Ltd, *Committee Hansard*, 24 August 2023, p. 27.

¹¹⁴ David Ross, '[ASIC brain drain as top executives exit](#)', *The Australian*, 20 April 2024.

¹¹⁵ Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, p. 46.

¹¹⁶ Dr Schofield-Georgeson, *Submission 198*, p. 23.

due to the capabilities of ASIC staff, attributing failures of the regulator to a lack of key skills within the agency itself.¹¹⁷

6.67 Some inquiry participants asserted that this unbalanced internal dynamic was reinforced by confusion relating to the employment of higher-level executives within ASIC. Mr Shipton noted that ASIC commissioners have structurally distinct employment arrangements from other ASIC staff and report directly to the Governor-General on the advice of the executive.¹¹⁸ Mr Shipton asserted that there remains considerable confusion about the precise role and responsibilities of ASIC commissioners and their place in ASIC's internal structure. Mr Shipton claimed that these distinct terms of employment limit the accountability and effectiveness of ASIC commissioners, potentially undermining the coherence of ASIC's internal structure.¹¹⁹

6.68 Further, other submitters expressed concerns about the lack of internal information sharing between ASIC employees and the impact this has on their overall knowledge, skills, and abilities. Mr John Adams of Adams Economics observed that the FRAA report indicated that information is rarely shared between different teams.¹²⁰ Mr Adams also noted that the capabilities of ASIC staff are crucial to its ability to meet its regulatory outcomes. To this point, Mr Adams highlighted a survey which indicated that only 13 per cent of those surveyed agreed that ASIC staff 'had the right skills and capabilities to make regulatory decisions'.¹²¹

Technological capabilities

6.69 ASIC has stressed that one of its primary objectives is 'to transform ASIC into a leading digitally enabled and data-informed regulator and law enforcement agency'.¹²² ASIC claimed that its 2022–23 organisational redesign would support the regulator's transformation in this respect.¹²³

Recent developments in ASIC's digital transformation and technology strategy

6.70 Mr Longo has acknowledged the importance of enhancing ASIC's digital and technology capabilities. Appearing before the Parliamentary Joint Committee on Corporations and Financial Services in June 2024, Mr Longo stated that

¹¹⁷ Dr Schofield-Georgeson, *Submission 198*, p. 23.

¹¹⁸ Mr James Shipton, *Submission 12*, pp. 6–7.

¹¹⁹ Mr James Shipton, *Submission 12*, pp. 6–7. Concerns regarding the arrangements that apply to the appointment and employment of Commissioners are considered further in **Chapter 7**.

¹²⁰ Adams Economics, *Submission 21*, p. 40.

¹²¹ Adams Economics, *Submission 21*, p. 40.

¹²² ASIC, *Annual Report 2022–23*, October 2023, p. 8.

¹²³ ASIC, *Annual Report 2022–23*, October 2023, p. 11.

enhanced technological capability was ‘more important than ever’ given the pace of innovation in the rapidly changing corporate and financial services sectors.¹²⁴

- 6.71 Accordingly, Mr Longo accepted the recommendation of the FRAA that ASIC significantly improve its data and technology capability in line with innovations in the corporate and financial services sectors. Mr Longo stressed the urgency and importance of this objective in his evidence to the committee:

ASIC is in a digital arms race, with AI rapidly being adopted in financial services firms and digitally-enabled misconduct is on the rise.¹²⁵

- 6.72 Mr Longo also emphasised the importance of ASIC’s technological capabilities matching those of the industry participants it seeks to regulate:

If I was to point to one issue that this agency faces in terms of its effectiveness and efficacy it's technology and data. If we do not invest in this area then our effectiveness as a law enforcement agency will diminish very quickly. Why is this? Well, it's obvious, isn't it? It's because there isn't a single business in the country or institution that is not itself reliant on data and technology. So, there isn't a single investigation or piece of work we do at ASIC where technology isn't a feature. If we don't invest in that then that will directly affect our efficacy.¹²⁶

- 6.73 In 2022–23, ASIC undertook a review of all external digital interactions and worked with external inquiry participants to identify areas for improvement. Among subsequent improvements, ASIC cited the redevelopment of its licensing systems, enhancement of its data platform and storage systems, including a data partnership with the Australian Prudential Regulation Authority (APRA), and the implementation of a data ethics framework.¹²⁷ ASIC elaborated on these developments in its 2023–27 Corporate Plan, stating it would ‘use data and technology to move quickly and accurately identify harms in our environment and to support improved decision making.’¹²⁸
- 6.74 Further, the Office of People, Transformation and Technology responsible for harnessing ‘the power of people, data, technology and digital transformation’ was recently elevated in a restructure announced by Mr Longo in May 2023.¹²⁹

¹²⁴ ASIC, [Parliamentary Joint Committee Opening Statement](#), 14 June 2024 (accessed 19 June 2024).

¹²⁵ ASIC, [Parliamentary Joint Committee Opening Statement](#), 14 June 2024 (accessed 19 June 2024).

¹²⁶ Mr Joseph Longo, Chair, ASIC, *Parliamentary Joint Committee on Corporations and Financial Services Hansard*, 30 April 2024, p. 16.

¹²⁷ ASIC, *Annual Report 2022–23*, October 2023, p. 34.

¹²⁸ ASIC, *Corporate Plan 2023–27*, August 2023, pp. 2, 11.

¹²⁹ Patrick Durkin and Campbell Kwan, ‘[ASIC muscles up its enforcement division as part of a major shake-up](#)’, *Australian Financial Review*, 2 May 2023.

- 6.75 ASIC also announced its intention to launch a ‘Professional Registers Search’ (PRS) in June 2024. The PRS will provide an improved search functionality for members of the public, allowing users to search for a license or registration across multiple databases.¹³⁰ Under the PRS users will be able to filter search results to find more specific information, such as a license or registration in their home state or territory. The PRS has been designed with a ‘user-first’ approach with more professional register extracts and documents to be made available by the end of 2024. ASIC stated that the PRS is a central element of its transformation into an ‘efficient data-driven regulator with a digital front door’.¹³¹
- 6.76 ASIC uses technology to assist with working through reports of alleged misconduct, specifically to determine how its resources should be best allocated to address the most serious harms. ASIC noted that as the volume of data it receives increases, the use of technology to effectively measure and address these complaints will become even more important.¹³² Associate Professor Vivienne Brand expanded on the potential for technology to assist ASIC’s investigatory and assessment functions in her evidence to the committee:

... technology is being used increasingly. AI has a part to play. It's being used. It's being used in a negative sense as well. The UK regulator relies upon probability analysis about particular industries and the number of tips they expect to be getting. If they're not getting tips from a particular entity within that industry at that rate, they then go looking because it suggests to them, for instance, that there is not sufficient whistleblowing occurring in that location. You can use technology in quite creative ways.¹³³

ASIC’s approach to Artificial Intelligence (AI) technologies

- 6.77 ASIC has increasingly explored the use of AI to enhance the performance of its regulatory functions. According to its 2023–2027 Corporate Plan, ASIC is ‘closely monitoring the development and application of artificial intelligence’ and is investigating its potential application to its regulatory activities, particularly the earlier detection of harm and misconduct.¹³⁴

Technological developments in the corporate and financial services industry

- 6.78 ASIC’s goal of enhancing its digital and technological capabilities follows significant technological developments in the corporate and financial services industry. These developments have substantially changed the behaviour of

¹³⁰ ASIC, [ASIC to launch new Professional Registers Search](#), 28 May 2024 (accessed 29 May 2024).

¹³¹ ASIC, [ASIC to launch new Professional Registers Search](#), 28 May 2024 (accessed 29 May 2024).

¹³² ASIC, *Submission 1*, p. 40.

¹³³ Associate Professor Vivienne Brand, *Committee Hansard*, 1 November 2023, p. 18.

¹³⁴ ASIC, *Corporate Plan 2023–27*, August 2023, p. 2.

industry participants and the dynamics of the industry, and have the potential to radically alter the role and responsibilities of the regulator itself.¹³⁵

- 6.79 Research indicates that corporate engagement and governance has changed significantly as a result of technological innovation, with online platforms giving rise to the democratisation of financial markets and altering the nature of corporate engagement with investors.¹³⁶ As a result, a larger proportion of corporate activity is occurring online, changing the volume and character of industry participants. Some academics have warned that these developments may render existing regulatory frameworks outdated and unworkable.¹³⁷
- 6.80 These technological developments have included the adoption of AI by some industry participants, notably large corporations. The use of AI in the corporate and financial services industry has the potential to significantly alter corporate governance and engagement frameworks, including the duties of company directors. As a result, research indicates that industry participants will need to employ more executive level staff with knowledge of and experience with AI and increase levels of understanding of AI across their organisation more broadly.¹³⁸
- 6.81 Academics have noted that some corporate regulators have already incorporated AI into their regulatory technology or ‘RegTech’, specifically in the banking, securities, insurance, and financial services sectors. However, research indicates that the use of the technology in the corporate and financial services sectors should be limited as the technology develops and balanced with human supervision and oversight.¹³⁹

ASIC’s take-up of new technologies in line with industry

- 6.82 Industry participants and government bodies have expressed concerns that ASIC is not sufficiently enhancing its data, digital and technology capabilities in

¹³⁵ Steve Kourabas, *The Role of Technological Innovation in the Evolution of Corporate Engagement* in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century*, The Federation Press, Sydney, 2015, pp. 205–213.

¹³⁶ Steve Kourabas, *The Role of Technological Innovation in the Evolution of Corporate Engagement* in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century*, The Federation Press, Sydney, 2015, pp. 206–207.

¹³⁷ Steve Kourabas, *The Role of Technological Innovation in the Evolution of Corporate Engagement*, in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century*, The Federation Press, Sydney, 2015, p. 210.

¹³⁸ Andrew Godwin, *A Duty to Use Artificial Intelligence? Learning from the Past and Hedging for the Future*, in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century*, The Federation Press, Sydney, 2015, p. 190.

¹³⁹ Andrew Godwin, *A Duty to Use Artificial Intelligence? Learning from the Past and Hedging for the Future*, in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century*, The Federation Press, Sydney, 2015, pp. 176–177.

line with developments in the industry. This is despite significant technological advancements, and ASIC itself acknowledging the importance of developing technological capabilities in line with industry.

- 6.83 In its July 2022 review of the regulator, the Financial Regulator Assessment Authority (FRAA) noted that ASIC required a ‘substantial uplift in its data and technological capability’.¹⁴⁰ The FRAA noted a ‘long-term underinvestment in ASIC’s data and technology capability’ and attributed this to a disproportionate focus on short-term concerns at the expense of strategic planning.¹⁴¹
- 6.84 According to the review, ASIC staff attributed this underinvestment to risk aversion, a lack of internal collaboration, and broader short-termism within the regulator.¹⁴² The FRAA observed that improved data, analytics, and technology capabilities would allow ASIC to better identify and action ‘emerging harms, strategic priorities, and deliver a digital inquiry participants experience’.¹⁴³ As referenced above, ASIC has noted and accepted the FRAA’s recommendation concerning the regulator’s technological capabilities and has placed new emphasis on its digital transformation.¹⁴⁴
- 6.85 Mr Shipton expressed concerns that restrictions on how the regulator could allocate its funds may have limited its ability to invest in new technologies. Mr Shipton claimed that, in addition to a general shortage of funds, limitations on re-classifying operational expenditure as capital expenditure have prevented ASIC from adequately investing in AI, machine learning, big data, coding and cyber protection.¹⁴⁵ This is inconsistent with Mr Longo’s commitment to lead a digital transformation within ASIC and encourage the use of new technologies.
- 6.86 To encourage adoption of these new technologies, Mr Shipton argued that government should provide ASIC with dedicated funding for emerging technologies and allow ASIC to reclassify and redirect funds in its budget to these investments.¹⁴⁶
- 6.87 Inquiry participants noted ASIC’s intention to create and enhance its digital strategy, but expressed disappointment that the regulator was behind on these

¹⁴⁰ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 5.

¹⁴¹ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 29.

¹⁴² FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 37.

¹⁴³ FRAA, *Effectiveness and capability review of ASIC*, July 2022, p. 29.

¹⁴⁴ ASIC, *Parliamentary Joint Committee Opening Statement*, 14 June 2024 (accessed 19 June 2024).

¹⁴⁵ Ronald Mizen, ‘[Lack of funding for tech holding back ASIC’s modernisation push](#)’, *Australian Financial Review*, 30 January 2023.

¹⁴⁶ Ronald Mizen, ‘[Lack of funding for tech holding back ASIC’s modernisation push](#)’, *Australian Financial Review*, 30 January 2023.

issues, given its substantial role and responsibilities.¹⁴⁷ For example, the IPA noted ASIC's intention to expand its data analytics, AI, and machine learning technologies but expressed concerns that the regulator had not been more proactive on these issues, given the importance of data collection to effective corporate regulation.¹⁴⁸

- 6.88 The IPA also observed that it had yet to see the benefits of ASIC's data and digital transformation, stating that ASIC's general approach to sharing information with inquiry participants falls short of an 'open data policy'.¹⁴⁹ The IPA recommended that ASIC's data and digital transformation be accelerated given the pace of technological advancement in the corporate and financial sectors.¹⁵⁰
- 6.89 Similarly, the Financial Services Committee of the Law Council of Australia (the Law Council) expressed concerns that ASIC was not using new technologies at the same rate as industry participants. The Law Council submitted that ASIC had not made the same level of investment in information technology to assist with identifying and measuring trends in its data as private sector financial institutions.¹⁵¹
- 6.90 The Law Council claimed that new fast-moving scams and other predatory operations powered by technological advancements have made it imperative that ASIC develop enhanced technological capabilities to monitor and eliminate these harmful activities. The Law Council concluded by observing that more sophisticated systems would allow ASIC to respond to misconduct faster and more effectively.¹⁵²
- 6.91 Other inquiry participants submitted that ASIC should enhance its data analytics capabilities to reduce delays in conducting investigation and enforcement activities.¹⁵³ The Australian Banking Association (ABA) expressed concerns about lengthy timeframes for the resolution of matters related to investigation or enforcement activities conducted by the regulator. The ABA noted that these lengthy wait-times are detrimental to consumer experiences and can create uncertainty within the industry.¹⁵⁴ To reduce these wait-times,

¹⁴⁷ See, for example, Institute of Public Accountants, *Submission 17*, pp. 3–4.

¹⁴⁸ Institute of Public Accountants, *Submission 17*, pp. 3–4.

¹⁴⁹ Institute of Public Accountants, *Submission 17*, p. 4.

¹⁵⁰ Institute of Public Accountants, *Submission 17*, p. 4.

¹⁵¹ Law Council of Australia, *Submission 10*, p. 5.

¹⁵² Law Council of Australia, *Submission 10*, p. 5.

¹⁵³ See, for example, Australian Banking Association, *Submission 5*, p. 1.

¹⁵⁴ Australian Banking Association, *Submission 5*, p. 1.

the ABA recommended that ASIC be provided with dedicated funding to enhance the regulator's data analytics capabilities.¹⁵⁵

- 6.92 Further, given ASIC's wide regulatory mandate, submitters recognised that its digital services must be accessible to industry participants and individuals seeking to make a complaint.¹⁵⁶
- 6.93 Mr Adams noted that ASIC's website contains a high volume of complex legal information which is not easily accessible to prospective complainants seeking to report wrongdoing.¹⁵⁷ Mr Adams highlighted the findings of a digital customer interaction expert that ASIC's digital services do not meet the Commonwealth's digital standards, do not support assistive technology, and fail to offer a contemporary experience to consumers.¹⁵⁸

Committee view

- 6.94 ASIC's resourcing is of paramount importance to its effectiveness as the corporate and financial services regulator. Without proper budgeting, funding, staffing and technological capabilities, ASIC will be incapable of protecting Australians from the harms of misconduct.
- 6.95 The committee is concerned by evidence received from a wide variety of inquiry participants indicating that ASIC's resourcing is inappropriate, ineffectual, and, in some respects, counterproductive.
- 6.96 The committee is also concerned by evidence indicating that ASIC's budget is not supporting adequate regulation of the corporate and financial services industry. The committee finds it astonishing that very significant increases in ASIC's total resourcing have not been matched by a corresponding, or indeed, any improvement in the regulator's performance.
- 6.97 The committee is disturbed that ASIC continues to take taxpayers' money, which could be better spent on hospitals, schools, or public services, while failing to protect the Australian people from the significant harms of corporate misconduct. The committee is troubled that ASIC appears neither aware, nor concerned, by its inability to match large increases in resourcing with tangible improvements in regulatory outcomes.
- 6.98 The committee acknowledges evidence that ASIC's regulatory remit is simply too broad to be supported by any increase in its budget. The committee notes

¹⁵⁵ Australian Banking Association, *Submission 5*, p. 1.

¹⁵⁶ See, for example, Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, p. 49; Adams Economics, *Submission 21*, p. 30; Institute of Public Accountants, *Submission 17*, pp. 3–4; Chartered Accountants Australia and New Zealand, *Submission 14*, p. 7.

¹⁵⁷ Adams Economics, *Submission 21*, p. 30.

¹⁵⁸ Adams Economics, *Submission 21*, p. 30.

that even ASIC's Chair, Mr Longo, has acknowledged that ASIC 'is unlikely to ever be resourced to do all the things we would like to do'. The committee questions the utility of continuing to provide ASIC with large increases in public money while regulatory outcomes deteriorate.

- 6.99 The committee is greatly concerned by evidence indicating that the IFM is inequitable, opaque, and counterproductive to ASIC's effectiveness. The committee is of the view that it is fundamentally inequitable and inappropriate to charge small-to-medium sized model industry participants for the cost of regulating malicious and non-compliant industry participants. The committee is of the view that charging good actors for the cost of regulating bad actors is unsustainable and creates a form of moral hazard which undermines public confidence in the regulator.
- 6.100 The committee is also concerned by evidence indicating that the IFM provides the regulator with a dual incentive to regulate the corporate and financial services industry and raise revenue for the Commonwealth. The committee is of the view that for ASIC to be a strong and effective regulator, it cannot have the state of the federal budget as one of its motivations or responsibilities.
- 6.101 ASIC's staff should be industry-leading, equipped with a comprehensive understanding of corporate and financial services regulation. The committee questions how effective the regulator can be if industry participants lack confidence in the capabilities, knowledge, or competency of ASIC's staff.
- 6.102 The corporate and financial services regulator should be industry-leading in its adoption of new technologies in the corporate and financial services industry. ASIC itself has acknowledged the importance of matching its own technological capabilities with that of the industry.
- 6.103 It is paramount that ASIC have a strong understanding of technological innovations in the industry, as well as its own corresponding capabilities, to guarantee effective corporate and financial services regulation. The committee is dismayed that ASIC's technological capabilities are considerably behind that of the industry. The committee questions how ASIC can effectively fulfill its mandate if it lacks the technological capabilities of the very industry it is responsible for regulating.
- 6.104 ASIC's resourcing is inadequate, inappropriate, and fundamentally insufficient across the board. The committee is of the view that ASIC's poor budgeting, funding, staffing profile and technological capabilities have significantly contributed to its poor regulatory performance. The committee believes that ASIC's deficiencies in resourcing demonstrate that the regulator is in desperate need of fundamental structural reform.

Chapter 7

Governance and leadership

7.1 This chapter will discuss a variety of matters which relate to the governance and leadership of ASIC. It will discuss the current organisational and commission structure of ASIC, external governance, employment and accountability measures for commissioners and organisational culture.

ASIC organisational structure and governance

7.2 ASIC is established by the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) as an independent statutory authority. As well as being established by the ASIC Act, it administers the Act and carries out the majority of its work under the *Corporations Act 2001*. For the purposes of the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act), ASIC is a non-corporate Commonwealth entity. Unlike most non-commonwealth corporate entities, however, ASIC does not engage its staff under the *Public Service Act 1999* and instead engages them under section 120 of the ASIC Act.¹

7.3 The management and administration of ASIC is handled by the Commission, which is made up of between three and eight members. From a recent report of the Auditor General:

ASIC is comprised of Commissioners who are appointed by the Governor-General on the nomination of the Treasurer. The ASIC Chair is the accountable authority of ASIC and is responsible for determining the ASIC Code of Conduct and the ASIC Values under sections 126B and 126C of the ASIC Act respectively. Under ASIC's governance framework, there is a separation of decision-making powers relating to regulatory functions and governance matters. ASIC distinguishes between Commission committees that are comprised of the Commissioners (including the ASIC Chair and Deputy Chairs) and management committees that are comprised of the ASIC Chair and senior executives.²

7.4 The Commission is currently composed of five members, being the Chair, the Deputy Chair and three Commissioners.³

7.5 The Commission acts as ASIC's governing body with responsibility for 'achieving ASIC's statutory objectives under the ASIC Act'.⁴ According to the

¹ Australian National Audit Office (ANAO), *Probity Management in Financial Regulators – Australian Securities and Investments Commission*, Audit Report No. 36, 2022-23, pp. 22–23.

² ANAO, *Probity management in financial regulators – Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, p. 23.

³ ASIC, [ASIC Organisation Chart](#), May 2024 (accessed 4 June 2024).

⁴ ASIC, [ASIC's governance and accountability framework](#), April 2024, (accessed 4 June 2024).

ASIC website, its focus is on high-level regulatory and statutory decision making, as well as stakeholder management. It also provides organisational oversight and support to the Chair.⁵

- 7.6 The Commission has a dual regulatory and governance role, sharing the governance role with the Chair as accountable authority for ASIC. These dual roles are outlined in the table below:

Table 7.1 Dual roles of the ASIC Commission

Regulatory Role	Governance Role (shared with the Accountable Authority)
Making decisions relating to ASIC's powers and functions, including strategic and significant regulatory decisions.	Providing: <ul style="list-style-type: none"> • strategic leadership; • determining budget and resourcing priorities; • ASIC's values and code of conduct; • overseeing management performance; and • accountability and audit processes.

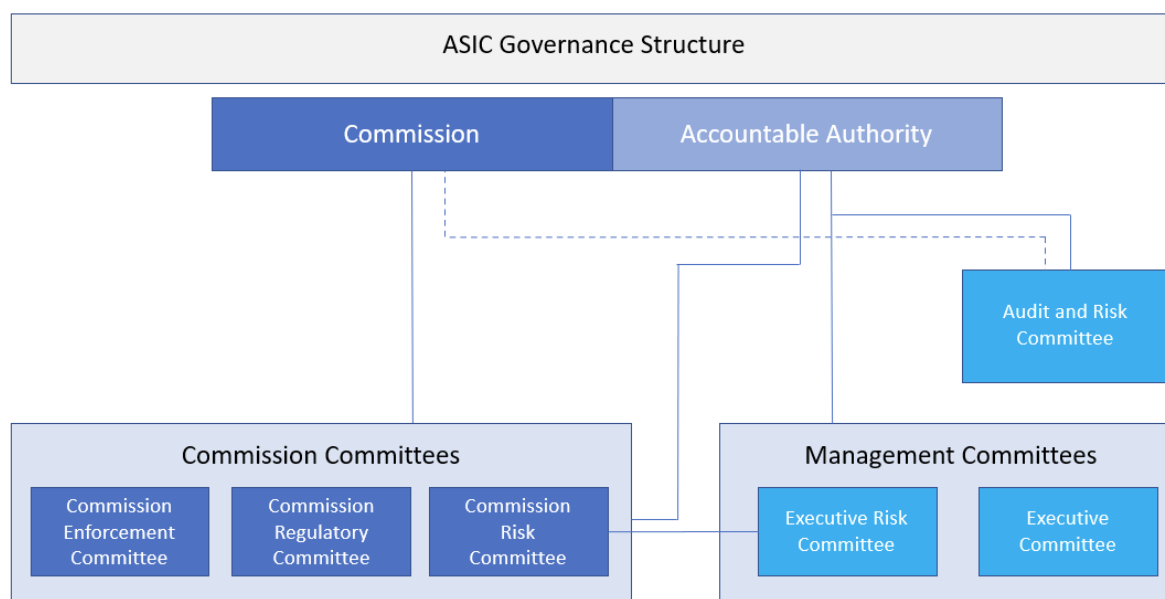
Source: ASIC, ASIC's governance and accountability framework, April 2024, <https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-s-governance-and-accountability/> (accessed 4 June 2024).

- 7.7 As mentioned above, the Chair is the accountable authority for ASIC and is responsible for its operations. The Commission supports the Chair on oversight of ASIC while day to day management of ASIC is delegated by the Chair to the senior executives.⁶
- 7.8 Beneath the Commission and the Chair there are several committees which assist in the performance of these officers' regulatory and governance roles. These committees are Commission Committees, Specialist Committees, Governance Committees and Management Committees.⁷ A visual representation of this is contained in figure 7.1 below:

⁵ ASIC, [ASIC's governance and accountability framework](#), April 2024, (accessed 4 June 2024).

⁶ Finance Regulator Assessment Authority (FRAA), *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 24.

⁷ ASIC, [ASIC's governance and accountability framework](#), April 2024, (accessed 4 June 2024).

Figure 7.1 ASIC governance structure

Source: ASIC, ASIC governance structure, April 2024, <https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-s-governance-and-accountability/> (accessed 6 June 2024).

7.9 The Commission Committees were established to allow the Commission to dedicate time to and provide a specific focus on important areas of ASIC's statutory mandate. These committees are:

- the Commission Enforcement Committee, which oversees ASIC's enforcement work, including making significant and/or strategic enforcement decisions;
- the Commission Regulatory Committee, which makes strategic and/or significant decisions in relation to law reform, regulatory policy, policy frameworks and reports, as well as overseeing ASIC's regulatory activities and functions; and
- the Commission Risk Committee, which is responsible for setting and monitoring ASIC's risk management framework and its risk appetite. It also considers all significant risk that affects ASIC, Australia's financial system, Australian consumers and ASIC's regulated population.⁸

7.10 The Governance Committees are made up of two committees, the Commission Risk Committee (mentioned above) and the Audit and Risk Committee. The Audit and Risk Committee assists the Chair to discharge their responsibilities for the use of Commonwealth Resources as well as providing assurance to the Chair and Commission on ASIC's systems of internal control, its risk management and oversight, and its financial and performance reporting. This committee operates independently of management.⁹

⁸ ASIC, [ASIC's governance and accountability framework](#), April 2024, (accessed 4 June 2024).

⁹ ASIC, [ASIC's governance and accountability framework](#), April 2024 (accessed 4 June 2024).

- 7.11 The Management Committees have responsibility for overseeing the daily management of ASIC. The two Management Committees are the Executive Committee (responsible for managing ASIC's budget and delivering its business plans, as well as the internal operations of ASIC) and the Executive Risk Committee (responsible for risk mitigation, overseeing and implementing audit and assurance processes, maintaining ASIC's risk management framework and monitoring significant risks to ASIC).¹⁰
- 7.12 In 2021, a new position of Chief Operating Officer (COO) was established with the responsibility of long-term organisational planning and the implementation of strategy. The COO is the Chair of the Executive Committee.¹¹

External governance

- 7.13 While ASIC is a statutory body that is independent from the executive government, it is accountable to the Parliament as well as other bodies.
- 7.14 ASIC is accountable to the Parliament through a number of committees, including:
- the Parliamentary Joint Committee on Corporations and Financial Services (the PJCCFS);
 - the Senate Standing Committees on Economics (both the Economics Legislation Committee and, this committee, the Economics References Committee); and
 - the House of Representatives Economics Committee.¹²
- 7.15 The PJCCFS is established by the ASIC Act and is required to inquire into and report on the activities of ASIC, the operations of the corporations legislation and any other legislation of the State, Commonwealth or a foreign law that significantly affects the operation of corporations legislation. The PJCCFS is also required to examine the annual reports of bodies established under the ASIC Act.¹³
- 7.16 In addition, the government regularly issues a statement of expectations to ASIC which ASIC responds to through a statement of intent. The last statement of expectations and statement of intent in response was released in August 2021.¹⁴

¹⁰ ASIC, [ASIC's governance and accountability framework](#), April 2024 (accessed 4 June 2024).

¹¹ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 24.

¹² ASIC, [ASIC's governance and accountability framework](#), April 2024, (accessed 4 June 2024).

¹³ PJCCFS, [Role of the Committee](#) (accessed 17 June 2024).

¹⁴ ASIC, *Statements of expectations and intent*, October 2023, [Statements of expectations and intent | ASIC](#) (accessed 6 June 2024).

- 7.17 ASIC's decisions can also be subject to review through decisions of the Courts, administrative tribunals, the Commonwealth Ombudsman, the Privacy Commissioner and the Office of the Australian Information Commissioner. The Financial Regulator Assessment Authority (FRAA) and the National Anti-Corruption Commission also have oversight over ASIC.¹⁵
- 7.18 The FRAA was established after the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), in response to recommendations 6.13 and 6.14 of the report of the Royal Commission.¹⁶
- 7.19 Established in June 2021, the FRAA is required to report on the effectiveness and capability of ASIC and APRA every two years. So far it has provided one report on ASIC which was completed in August 2022 and tabled in the Parliament.¹⁷ In the 2023-24 Budget, the government announced an intention to reduce the review cycle of the FRAA from two yearly to five yearly.¹⁸
- 7.20 The Chair of ASIC also has responsibilities under various statutes both in their role as ASIC's accountable authority and otherwise. These statutes include the PGPA Act and its associated rules, the *Public Interest Disclosure Act 2013*, and the ASIC Act. ASIC's Commissioners also have responsibilities as officers under the PGPA Act.¹⁹

History of ASIC governance

- 7.21 There have been several changes made to ASIC's governance framework throughout the organisation's history, often made after the recommendations of various reviews. Most recently, the FRAA provided an overview of this history in its report, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*. A diagram from this report (**Figure 7.2** below) provides an overview of this history.
- 7.22 The 2014 Report of this committee (SERC 2014 Report) raised concerns about the executive and non-executive roles of ASIC's Commissioners:

...the current governance framework has led to ASIC operating in silos with individual commissioners performing executive functions. ASIC's commission sets ASIC's priorities and strategic objectives, but the same commission, and individual commissioners, are also responsible for exercising ASIC's powers. As a result, any internal monitoring of ASIC's performance or challenge to how ASIC operates relies on the willingness

¹⁵ ASIC, [ASIC's governance and accountability framework](#), April 2024 (accessed 4 June 2024).

¹⁶ FRAA, [About FRAA](#) (accessed 17 June 2024).

¹⁷ FRAA, [Publications](#) (accessed 17 June 2024).

¹⁸ FRAA, [About FRAA](#) (accessed 17 June 2024).

¹⁹ ASIC, [ASIC's governance and accountability framework](#), April 2024 (accessed 4 June 2024).

and ability of the commissioners to scrutinise the decisions they have made.²⁰

- 7.23 While the committee at that time did not wish to make any recommendations that would result in disruptive changes to ASIC's structures, it did make a recommendation that two years after the tabling of that report the government review the ASIC Act, including ASIC's governance structures, and whether ASIC should be governed by an executive and non-executive board structure.²¹ We are still in the same position today.
- 7.24 This recommendation was noted by the government with the Government Response stating that this recommendation would be considered alongside the recommendations of the Financial Systems Inquiry which was then still ongoing.²²
- 7.25 The Financial Systems Inquiry 'considered the effectiveness of and need for financial regulation in Australia including the performance of financial regulators.'²³ The inquiry's final report, released in December 2014, took an opposing view to the SERC 2014 Report, noting the blurred accountability at APRA in the years prior to the collapse of HIH Insurance, and rejected the proposal that financial regulators should be governed by a non-executive board. Instead, the Financial Systems Inquiry made the following relevant recommendations:
- the creation of an external assessment board to conduct periodic reviews of APRA, the payment systems function of the RBA and ASIC; and
 - that financial regulators undertake periodic capability reviews.²⁴
- 7.26 This recommendation led to the 2015 report, *Fit for the Future: A capability review of the Australian Securities and Investments Commission* (the ASIC Capability Review). This broad ranging review found that ASIC's governance structure did not allow ASIC's Commissioners sufficient time to focus on a number of matters, including oversight and accountability, external engagement and strategic

²⁰ SERC, *The Performance of the Australian Securities and Investments Commission*, June 2014, p. 431.

²¹ SERC, *The Performance of the Australian Securities and Investments Commission*, June 2014, pp. 432–433.

²² Australian Government, *Australian Government Response to the Senate Economics References Committee Report: Performance of the Australian Securities and Investments Commission*, October 2014, p. 26.

²³ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 27.

²⁴ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 27.

matters.²⁵ It also noted that ASIC's internal culture was 'more defensive, inward looking, risk adverse and reactive than is desirable for a conduct regulator.'²⁶

7.27 The ASIC Capability review made several recommendations around governance coming from these findings, in particular:

- that the Commission move to being a full time non-executive body with a strategic focus and external accountability without an executive management role;
- that a new 'head of office' role be established in ASIC to handle the executive management responsibilities which would no longer be in the remit of the Commission; and
- that senior executives be delegated these executive management responsibilities and report to the new head of office.²⁷

7.28 Although not the primary focus of the Royal Commission, the Letters Patent for the Royal Commission included a requirement to report on the effectiveness of financial regulators to identify and address misconduct.²⁸

7.29 The Royal Commission also considered the idea of ASIC having a non-executive board but did not make any recommendations around this. Instead, the Royal Commission made a recommendation for the introduction of capability reviews to occur every four years for ASIC and APRA, as well as the introduction of a new oversight authority. This led to the creation of the FRAA (as explained above).²⁹

7.30 The PJCCFS also considered ASIC's governance structure in its March 2022 report, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament Report*. This report considered the recent review of ASIC which had been completed by Treasury's *Abridged report on the review of ASIC governance arrangements* (the Thom Report) that had been completed after the

²⁵ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 27.

²⁶ Australian Government, *Fit for the Future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 19.

²⁷ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 28.

²⁸ Royal Commission, [Misconduct in the Banking, Superannuation and Financial Services Industry: Letters Patent](#), 14 December 2017 (accessed 11 June 2024).

²⁹ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 28.

Auditor-General had raised concerns about payments made to management personnel at ASIC.³⁰

- 7.31 The PJCCFS report considered the various reviews which had come before it, different models of statutory governance which were employed by similar independent statutory agencies, as well as the views of academics and other experts, and found:

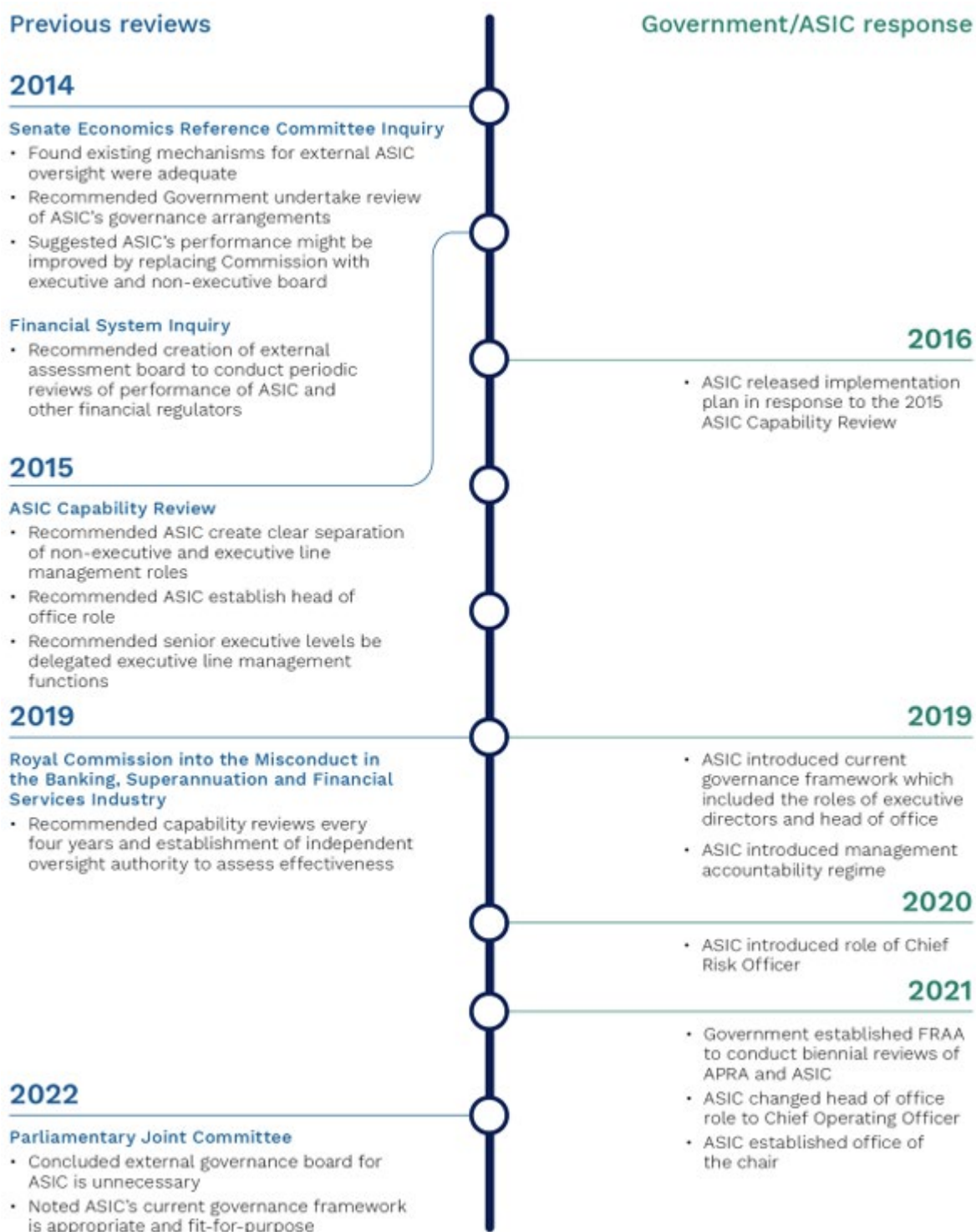
While no governance model or framework for a statutory authority is perfect, ASIC's current governance framework appears appropriate and fit-for-purpose. Apart from noting its concern about the position of Chief Operating Officer having sufficient seniority and authority within ASIC's current governance framework, the committee considers it important for there to be a period of stability at ASIC. While the idea of an external board may be superficially attractive, it is manifestly inappropriate for an independent statutory authority such as ASIC and would create far more problems than those it purports to solve.³¹

- 7.32 The most recent report which discussed ASIC's governance was the FRAA's abovementioned first report into ASIC (the FRAA Review). While this review stated that governance was not an area of focus, they had received feedback from ASIC staff on governance, which will be discussed further below.

³⁰ PJCCFS, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament Report*, March 2022, p. 5

³¹ PJCCFS, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament Report*, March 2022, p. 28.

Figure 7.2 Timeline of ASIC governance reviews and subsequent action



Source: FRAA, Effectiveness and Capability Review of the Australian Securities and Investments Commission, July 2022, p. 36.

Commentary on governance structure

7.33 When questioned about the current state of governance at ASIC, ASIC was positive about its governance framework, stating that it considers its governance

framework 'to have operated effectively over a significant period of time.'³² It further stated:

ASIC's Governance and Accountability Framework (Framework) was established in 2019 following the Financial Services Royal Commission and has been reviewed and refined since that time. This reflects the legislative framework within which ASIC operates, consistent with ASIC being an independent Commonwealth agency created as a statutory body corporate. The objective of the (Framework) is to promote effective, efficient and impartial decision making at ASIC and articulate clear accountabilities. The Framework seeks to ensure ASIC acts strategically, with integrity and effectively delivers on its statutory objectives.³³

7.34 ASIC also noted that its current governance framework was similar to the frameworks in place at other independent statutory agencies such as the ACCC and APRA.³⁴

7.35 The FRAA Review, which collected staff and management views as part of its review process, noted that ASIC Commissioners and senior staff were positive about the recent changes to governance, saying the introduction of the Chief Operating Officer had assisted Commissioners in moving away from holding both executive and non-executive roles.³⁵ However there was acknowledgment that these changes had not fully matured and there was further room for improvement:

ASIC's commissioners and executive directors acknowledged that more time is needed to embed the shift in responsibilities and accountabilities arising from changes to the governance structure. In the ASIC staff survey, respondents noted that ASIC could provide greater clarity about the responsibilities of commissioners and executive directors. Some ASIC staff members below senior executive leader level noted that the separation of responsibilities and powers is unclear.³⁶

7.36 Other evidence before the committee was less positive. Mr James Shipton, former ASIC Chair, described ASIC as having 'Swiss cheese' governance arrangements, noting that ASIC governance was covered by two Acts (the ASIC

³² ASIC, answer to written question on notice set 64, 23 October 2023 (received 22 December 2023), p. 1.

³³ ASIC, answer to written question on notice set 64, 23 October 2023 (received 22 December 2023), p. 1.

³⁴ ASIC, *Submission 1.5*, p. 36.

³⁵ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 29.

³⁶ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p. 29.

Act and the PGPA Act) over three different governing organs, being the Chair, the Commission and the Accountable Authority.³⁷

7.37 Mr Shipton went on to state:

There is insufficient legislative cohesion between these three organs. This results in a lack of clarity in the executive, strategic and governance roles of the Chair (and Accountable Authority) and the other commissioners. This causes confusion, sometimes tension, in decision making settings, including when making enforcement decisions. In 2020 an organisational restructure was attempted to streamline this legislative complication, and the 2021 Statement of Expectations attempted to clarify the legislative uncertainty. Ultimately, Parliament ought clarify ASIC's governance structures to provide managerial certainty given the statutory confusion.³⁸

7.38 In evidence before the committee, Mr Shipton suggested that poor governance structures tied into the other matters the committee had considered through the course of the inquiry, saying '[p]oor governance will lead to poor outcomes'.³⁹

7.39 These views were echoed by the Australian Institute of Company Directors (AICD), who commented on the dual nature of the ASIC Commission:

While the Commission is responsible for the exercise of ASIC's functions and powers, ASIC's strategic direction and its priorities, the Commission does not formally operate as a board of directors. External perspectives are instead provided through its external panels, which meet on a relatively infrequent basis and without any decision-making authority.

In their regulatory role, the Commissioners perform management functions in relation to business activities of ASIC. In this role, they lead groups of business lines with direct reporting from executive directors to individual Commissioners, and make decisions on regulatory and/or operational matters. At the same time, in their non-executive role, the Commissioners have ultimate decision-making authority as to the strategic oversight and direction of the organisation.⁴⁰

7.40 The AICD went on to say that although the current composition of the Commission provides a high level of organisational understanding, it was of the view that performance and accountability could be improved by introducing a board composed of a majority of non-executive independent directors. This would bring a higher degree of executive oversight to the organisation and external perspectives.⁴¹

³⁷ Mr James Shipton, *Submission 12*, pp. 5–6.

³⁸ Mr James Shipton, *Submission 12*, p. 6.

³⁹ Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, pp. 47–48.

⁴⁰ Australian Institute of Company Directors, *Submission 11*, p. [8].

⁴¹ Australian Institute of Company Directors, *Submission 11*, p. [9].

7.41 The AICD recommended that alternative governance models be considered for ASIC, such as:

- RBA model: retaining some or all of the Commissioners as executive directors supplemented by a majority of practising non-executive directors with the appropriate knowledge, skills and experience to form a ‘board of the Commission’. Under this model the current ASIC Chair would be the Chair of the new board. This would be consistent with the board structure of the RBA; or
- FCA [Financial Conduct Authority, UK] model: establishing an independent board, separate from the Commission, comprised of the current ASIC Chair and practising non-executive directors. Under this model, Commissioners would remain on the Commission and retain their executive role with oversight of day-to-day management functions, regulatory decisions and executive leaders. However, the Commissioners would be separate from the non-executive governance function provided by the independent board. The current ASIC Chair would become the CEO of the regulator and a new, independent non-executive Chair would be appointed. This would be consistent with the board structure of the FCA.⁴²

Employment and accountability arrangements for Commissioners

7.42 In discussing ASIC’s governance arrangements, there was also discussion and evidence before the committee about the employment and accountability arrangements of ASIC’s Commissioners.

7.43 As with other statutory appointments, ASIC Commissioners are not employees of ASIC, but are independent appointments by the Governor-General, made on the nomination of the relevant Minister, as per section 9 of the ASIC Act.⁴³

7.44 Similarly, ASIC Commissioners can only be removed through section 111 of the ASIC Act by the Governor-General. They do not report to the Chair but are instead accountable to the Parliament and the relevant Minister. They are also accountable as officials under the PGPA Act. ASIC also has a Code of Conduct which Commissioners are subject to, however there are no formal sanctions which can be imposed on a Commissioner who breaches this code.⁴⁴

7.45 In response to written questions on notice asked to ASIC about the accountability arrangements for its Commissioners, ASIC was of the view that its current arrangements ‘have worked effectively, without significant issues for

⁴² Australian Institute of Company Directors, *Submission 11*, p. [10].

⁴³ ASIC, answers to questions on notice set 65, 23 October 2023 (received 22 December 2023).

⁴⁴ ASIC, answers to questions on notice set 65, 23 October 2023 (received 22 December 2023).

many years' and noted similar employment frameworks are used for comparable agencies, such as APRA and the ACCC.⁴⁵

7.46 Mr Joseph Longo, current Chair of ASIC, was clear that the bar for removal of Commissioners was a very high. He stated further:

The first point I would make is that the issues that might be raised in connection with ASIC are not unique to ASIC. There are other agencies in the Commonwealth that are outside the Australian Public Service. The ones that quickly come to mind are entities like APRA and the Reserve Bank...Secondly, it obviously raises some very significant and potentially sensitive policy issues...We're talking about statutory appointees appointed by the Governor-General on the advice of cabinet. So we're talking about a relatively small group of people who are put into very senior roles discharging duties of a wide nature in the public interest...wherever we land on this it has to be a whole-of-government approach...⁴⁶

7.47 The former Chair of ASIC, Mr Shipton, advocated for the creation of an independent agency to deal with accountability for statutory office holders:

The accountability arrangements for statutory officials are also clouded, as these recent experiences are showing. There needs to be an independent agency that can deal with these types of issues with appropriate procedures and appropriate methodologies so that everyone can have confidence in them. These recent experiences show that they don't. These employment arrangements for statutory officials are extraordinary. The fact is that there's actually not an employment contract for a statutory official. They cannot point to one document and say, 'That exhaustively covers all of my employment contracts.' Nor does that contract then tie back to a code of conduct like an ordinary employee would have in most, if not all, workplaces.⁴⁷

7.48 Mr Shipton underlined this point further:

The practical reality is that a CEO can only do something about an employee's behaviour if they have the support of the broader system and is empowered to act. ASIC's deficient governance structures that need reform meant that I did not have the authority over this person. Meanwhile, Treasury failed to intervene. So even though I was nominally superior to the transgressor, the behaviour continued right up to my last days in office.⁴⁸

7.49 Recently, the Hon Stephen Jones MP, Assistant Treasurer and Minister for Financial Services, commented on ASIC governance, making the point that there

⁴⁵ ASIC, answer to question on notice set 64, 23 October 2023 (received 22 December 2023).

⁴⁶ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 15 February 2024, p. 26.

⁴⁷ Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, p. 47.

⁴⁸ Mr James Shipton, Senior Fellow, School of Government, University of Melbourne, *Committee Hansard*, 23 August 2023, p. 45.

was a balance to be found between the independence of statutory office holders and accountability for unacceptable workplace behaviour. He said further that this was a matter Treasury was looking into.⁴⁹

Organisational culture

7.50 Evidence to the committee highlighted the organisational culture within ASIC as part of the issues relating to governance.

7.51 The AICD made the point that going back to the 2015 Capability Review of ASIC, there had been concerns that ASIC's culture was 'variable, overly defensive, inward looking, risk averse and reactive' and that this contributed to governance arrangements which limited the empowerment of staff and leadership and blurred responsibility and accountability.⁵⁰

7.52 Several high-profile internal governance issues have also led to broad concerns about ASIC's internal culture and whether its governance arrangements are adequate.

The Thom Review

7.53 As mentioned briefly above, the Thom Review was instituted in October 2020 when the Auditor-General raised concerns with the Treasurer about payments made to senior management at ASIC.⁵¹ In brief, the two matters of concern were:

- accommodation payments of \$750 a week made to then Deputy Chair, Mr Daniel Crennan KC; and
- the conduct of then Chair, Mr James Shipton, in relation to the 'circumstances of a decision by a senior official to increase the level of tax advice support to Mr Shipton.'⁵²

7.54 While this review made no adverse findings against Mr Shipton or Mr Crennan KC, it did make recommendations for significant improvements to ASIC's internal practices and processes, including in relation to internal audit

⁴⁹ Ronald Mizen, '[No easy fix on ASIC code of conduct breaches: Jones](#)', *The Australian Financial Review*, 25 February 2024 (accessed 17 June 2024).

⁵⁰ Australian Institute of Company Directors, *Submission 11*, p. [9].

⁵¹ This matter received significant interest from the public as well as media reporting. See for example John Kehoe and Ronald Mizen, '[ASIC chief clings on as expenses scandal hits](#)' *The Australian Financial Review*, 23 October 2020, (accessed 17 June 2024); Pamela Williams, '[Inside Story: How the ASIC soap opera forced Frydenberg to act](#)', *The Australian Financial Review*, 15 April 2021, (accessed 17 June 2024).

⁵² Dr Vivienne Thom AM, CPM Reviews Pty Ltd, *Abridged report on the review of ASIC governance arrangements*, January 2021, pp. 4–5.

management, improving the management and controls for spending relating to Commissioners and the quality assurance of its legal advising processes.⁵³

7.55 ASIC implemented the recommendations of the Thom Review. In its 2020-21 Annual Report, the Chair's Report stated:

At 30 June 2021, ASIC had implemented a number of the recommendations of the Thom Review directed at ASIC through a program of change designed to deliver long-term improvement to ASIC's risk and compliance practices and capabilities. ASIC completed its implementation of the recommendations of the Thom Review in August 2021.⁵⁴

Bullying and misconduct allegations

7.56 There have been several high-profile allegations of misconduct by senior members of ASIC which have received a great deal of interest from the committee. These have included the investigation of ASIC Deputy Chair Karen Chester regarding allegations about her behaviour towards other staff members of ASIC, as well as concerns about the behaviour of the Chair, Mr Joseph Longo.

Investigation of matters relating to Ms Karen Chester

7.57 This matter was initially raised in the 2022-23 Supplementary Budget Estimates of the Senate Economics Legislation Committee, with Senators questioning the Chair of ASIC about whether there had been any investigations into ASIC Commissioners.⁵⁵ Ms Chester advised in the same session that she was aware that in 2021 allegations were made against her which led to a referral and subsequent investigation conducted by Treasury.⁵⁶ Furthermore, when first asked about the investigation at this Estimates hearing, ASIC Chair Joseph Longo initially appeared to mislead the Senate about the existence of such an investigation:

Box 7.1 2022–23 Supplementary budget estimates, 16 February 2023

Senator Andrew Bragg: Have there been any investigations under the PGPA Act, Chair, into any of the commissioners?

Mr Joe Longo: Not that I'm aware of.

Senator Bragg: In the past two years?

Mr Longo: Not that I'm aware of.

⁵³ The Hon Josh Frydenberg MP, Treasurer, 'Outcomes of review of ASIC Governance', *Media Release*, 29 January 2024.

⁵⁴ ASIC, *Annual Report 2020-21*, p. 6.

⁵⁵ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 16 February 2023, p. 7.

⁵⁶ Ms Karen Chester, Deputy Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 16 February 2023, p. 14.

Senator Bragg: There have been no inquiries that you are aware of into any ASIC commissioner in the last two years under the PGPA Act?

Mr Longo: Not that I'm aware of.

Source: Senate Economics Legislation Committee Estimates, Committee Hansard, 16 February 2023, p. 6.

7.58 Later in the same Estimates session this line of questioning continued:

Box 7.2 2022–23 Supplementary budget estimates, 16 February 2023

Senator Bragg: Have you received any letters from the secretary of the Treasury in relation to any investigations conducted into any of the ASIC commissioners in your tenure?

Mr Longo: I would like to take that on notice.

Senator Bragg: You don't know?

Mr Longo: I receive a lot of correspondence. Let me step back from this. As far as I am aware—I think Chris Savundra has confirmed this—I'm not aware of any provisions of the PGPA Act that provide for investigations or inquiries into the conduct of statutory appointees. I am happy to be corrected on that. I would just like to confirm that's the case before answering that question, which I think is what you are particularly interested in.

Senate Economics Legislation Committee Estimates, Committee Hansard, 16 February 2023, p.7.

7.59 The committee discovered there had been an independent investigation of alleged conduct by Ms Chester which had cost Treasury \$180 000 and that one of the initial complaints had been made by former Chair of ASIC, Mr James Shipton.⁵⁷ The committee received evidence, through a letter from the Treasury Secretary to ASIC Chair Mr Longo dated 1 February 2022, that the investigation found that 'many of the instances of alleged conduct could be wholly or partially substantiated.'⁵⁸

7.60 The Senate made an order for the production of documents (Order of 7 March 2023 [160]) for the investigation report into Ms Chester's alleged conduct which had been completed by a law firm engaged by Treasury. The government made a claim of public interest immunity over this document based on the grounds of unreasonable disclosure of private information of persons who took part in the investigation (both as complainants and third parties) and

⁵⁷ Ronald Mizen, '[Shipton accuses Treasury of 'tin ear' over bad behaviour claims](#)', *The Australian Financial Review*, 4 September 2023, (accessed 17 June 2024).

⁵⁸ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, additional information received 22 February 2023, p. [3].

the undue prejudice to Ms Chester which would arise should the report be released.⁵⁹

- 7.61 A further order for the production of documents (Order of 9 August 2023 [291]) was made in relation to a summary document which was used to brief the Treasurer on the investigation into these allegations. A similar document called a Ministerial Submission was provided to the Senate with redactions (a claim of public interest immunity being made in relation to the redacted parts) in response to this.⁶⁰
- 7.62 The Ministerial Submission document noted that the investigation into Ms Chester had concluded and, while many of the instances of alleged conduct had been wholly or partially substantiated, none of them reached the level of recommending that Ms Chester be terminated from her role under section 111 of the ASIC Act.⁶¹
- 7.63 This should be contrasted with Ms Chester's comments during 2022-23 supplementary budget estimates where she contended that there had been a 'very comprehensive' Treasury investigation into allegations made against her but there were no adverse findings from that investigation.⁶²

Treasury assurance review into the conduct of Mr Joseph Longo

- 7.64 At the same budget estimates session, Mr Longo confirmed that there had been a Treasury assurance review of his conduct after an 'emotional outburst' during a meeting of ASIC's enforcement committee.⁶³
- 7.65 On 1 August 2023, the Senate agreed to an order to produce documents for the Minister representing the Treasurer to provide by 10 August 2023:

...the final report of a Treasury assurance review into the conduct of the Australian Securities and Investments Commission (ASIC) Chair, Mr Joe Longo, referred to in an article published in the *Australian Financial Review* on 30 January 2023 entitled 'ASIC chairman gave 'abject' apology for emotional outburst'.⁶⁴

⁵⁹ Senator the Hon Katy Gallagher, Minister for Finance, *Order of 7 March 2023 (160) relating to the Australian Securities and Investments Commission Deputy Chair*, tabled 9 March 2023, p. [2].

⁶⁰ Senator the Hon Katy Gallagher, Minister for Finance, *Order of 9 August 2023 (291) relating to Deputy Chair of ASIC – Summary of finding*, tabled 5 September 2023, p. 2.

⁶¹ Senator the Hon Katy Gallagher, Minister for Finance, *Order of 9 August 2023 (291) relating to Deputy Chair of ASIC – Summary of finding*, tabled 5 September 2023, pp. 4–5.

⁶² Ms Karen Chester, Deputy Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 16 February 2023, p. 14.

⁶³ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 16 February 2023, p. 6.

⁶⁴ Senator Ross Cadell, *Senate Hansard*, 1 August 2023, p. 3087.

7.66 A redacted version of this report (the Review Report) was provided to the Senate on 10 August 2023 and a claim of public interest immunity was made by the Treasurer on the redacted sections of the report. The ground relied upon was impact on the privacy of individuals who were mentioned and took part in the review as well as the integrity of fact-finding investigations.⁶⁵

7.67 The Review Report came to the conclusion that the matter had been handled appropriately and there was no factual dispute about what had occurred. In one of the unredacted sections of the report it stated:

The Chairperson [Mr Longo] has acknowledged the seriousness of his conduct, its potential damage to ASIC and his change agenda and its negative impact on ASIC officers. He apologised to the relevant officers both in person and through a general apology at the next ASIC Enforcement Committee meeting on 25 August 2022...⁶⁶

7.68 On 5 September 2023, the Senate agreed to an order for the production of documents for an unredacted version of the Review Report to be provided to the committee by no later than midday, 7 September 2023.⁶⁷ This was recorded in the Hansard as OPD 298.

7.69 The Review Report was not provided to the committee by the due date. ASIC provided a response to the order to produce documents via letter, stating that it could not provide the Review Report due to the Minister representing the Treasurer's previous public interest immunity claim.⁶⁸

7.70 ASIC explained further:

If ASIC were to respond to OPD 298 by producing an unredacted copy of the Report to the Committee this would be inconsistent with ASIC's understanding of the practices established by the Senate. The relevant practice being that following a determination to not accept the Government's claim of public interest immunity, the Senate will engage with the Government on its refusal to provide information. ASIC is also concerned that if it were to take steps to produce an unredacted copy of the Report to the Committee, that doing so would not provide proper regard to the Government PII Claim, and would undermine that claim in the absence of the Minister being provided the opportunity to give due consideration to the Senate's orders.⁶⁹

⁶⁵ Senator Matt O'Sullivan, *Senate Hansard*, 5 September 2023, p. 3894.

⁶⁶ Senator the Hon Katy Gallagher, Minister for Finance, *Order of 1 August 2023 (268) relating to Australian Securities and Investments Commission – Conduct of Chair review*, tabled 10 August 2023, pp. [6–7].

⁶⁷ Senator Matt O'Sullivan, *Senate Hansard*, 5 September 2023, p. 3894.

⁶⁸ Mr Chris Savundra, General Counsel, ASIC, correspondence received 7 September 2023, p. 2.

⁶⁹ Mr Chris Savundra, General Counsel, ASIC, correspondence received 7 September 2023, p. 2.

- 7.71 The committee reported on ASIC's compliance with the order and confirmed that ASIC had not complied with the Senate's order to produce documents.⁷⁰
- 7.72 In a supplementary submission provided to the committee, ASIC provided the following information about its response to orders by the Senate to produce documents:

...ASIC has produced material and provided evidence to the Committee where it is possible and appropriate to do so. In some instances, it has been necessary for ASIC to raise concerns about the production of such material in light of the Government's claims of public interest immunity. We refer in particular to the Government's claims made on 9 March 2023 in response to Order for Production of Documents No. 160, and on 4 September 2023 in response to Order for Production of Documents No. 290 and 291. Where ASIC has not produced materials to the Committee or redacted information, it has done so with proper regard to the Government's claims and to ensure that it has not acted inconsistently with, or undermined, those claims. In those circumstances, there is no basis, nor evidence before the Committee, to support a finding that ASIC has dealt with requests by the Committee for such information with the intent to obfuscate or undermine the Inquiry.⁷¹

ASIC staff survey

- 7.73 More recently, in a response to a written question on notice, ASIC provided the committee with its most recent staff survey. This document showed concerning results for staff satisfaction within ASIC, with staff reporting low levels of satisfaction, motivation, role clarity, and high levels of job insecurity and stress.⁷²
- 7.74 Data included in the survey indicated that under 20 per cent of ASIC employees were satisfied with their role and that just over 30 per cent registered an intention to stay with the agency.⁷³ Further, only approximately 25 per cent of ASIC employees stated that they had clarity regarding their role, with overall organisational level quality rated at just five out of 100.⁷⁴
- 7.75 Responding to the results of this survey, Mr Longo claimed that there were positive aspects of ASIC's culture but acknowledged that 'there are areas we can and will improve.'⁷⁵ This acknowledgement marked a clear departure from previous evidence provided by Mr Longo to the Senate Economics Legislation

⁷⁰ Senate Economics References Committee, *Report on compliance with orders for the production of documents*, 11 September 2023, p. 1 (tabled 11 September 2023).

⁷¹ ASIC, *Submission 1.6*, p. 2.

⁷² ASIC, answer to written question on notice set 78, 2 April 2024, p. 4 (received 13 May 2024).

⁷³ ASIC, answer to written question on notice set 78, 2 April 2024, p. 4 (received 13 May 2024).

⁷⁴ ASIC, answer to written question on notice set 78, 2 April 2024, p. 4 (received 13 May 2024).

⁷⁵ Adele Ferguson, ['From deals with banks to dodgy cryptocurrency schemes, recent issues could spell crucial reform for ASIC'](#), *ABC News*, 27 May 2024, (accessed 29 May 2024).

Committee in March 2023, where he denied that ASIC had a poor internal culture.⁷⁶ In his evidence, Mr Longo stated:

I think ASIC has a strong culture. From the day I started, all the people I've worked with at ASIC are highly motivated and hardworking. We have a very diverse group. I think people feel good about working at ASIC; there's a good culture. I personally don't think ASIC has a cultural problem.⁷⁷

7.76 Further, Mr Longo discussed the survey at the 2024–25 Budget Estimates hearings, characterising the results of the survey as 'mixed'.⁷⁸ Mr Longo stated that the survey indicated both areas of strength and areas for improvement within ASIC's culture and that the cultural issues revealed by the survey had built up over an extended period. He confirmed that ASIC's executive was committed to 'addressing areas for improvement'.⁷⁹

Committee view

7.77 The committee is highly concerned about governance as it stands in ASIC. As this chapter has shown, there are significant gaps in the legislative model for ASIC governance as well as continuing problems in both a practical and a personal sense.

7.78 This is a matter of key importance, as ASIC being competently governed has a clear downstream effect on its ability to effectively perform its remit in regard to investigation and enforcement.

7.79 The committee notes the various reviews which have been written about ASIC examining its governance structure. The PJCCFS's view that ASIC did not need any significant changes in management, and the FRAA's views that the current governance structure needed time to mature are noted by the committee. However, these reports were both completed in 2022 and the committee is left wondering how much more time ASIC needs to mature its governance structure before there can be an admission of failure.

7.80 Indeed, ASIC's behaviour throughout this inquiry process, both in its behaviour towards the committee (as discussed in detail in **Chapter 2**) and the disputes within ASIC's leadership, seems only to confirm that the views expressed in the

⁷⁶ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 1 March 2023, pp. 12–13.

⁷⁷ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 1 March 2023, pp. 12–13.

⁷⁸ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 4 June 2024, p. 17.

⁷⁹ Mr Joseph Longo, Chair, ASIC, Senate Economics Legislation Committee Estimates, *Committee Hansard*, 4 June 2024, pp. 17–18.

2015 ASIC Capability Review—that ASIC’s culture is defensive, inward facing and reactive—is still as relevant as it was when it was written.

- 7.81 The committee does however agree with the PJCCFS’s view that the solution to ASIC’s problems is not an executive and non-executive board structure. There are other statutory agencies with similar structures which do not seem to face the continuing issues ASIC faces.
- 7.82 Despite this, the committee found the evidence provided, that ASIC was operating with a ‘Swiss cheese’ approach to governance, compelling. The current governance arrangements, with overlapping pieces of legislation, are clearly unsatisfactory and have left ASIC vulnerable to poor leadership. It is difficult to see how commissioners can exercise significant executive functions without any formal method of accountability as to their performance or conduct.
- 7.83 It is also clear to the committee that there is a need for more governance rather than less in relation to ASIC. As discussed in other chapters, ASIC’s remit has expanded significantly since its inception, however ASIC’s governance has not changed to suit this.
- 7.84 The committee is of the view that the FRAA is an important addition to the governance arrangements for ASIC and is concerned by the government’s decision to reduce its reporting timeframe from two yearly to five yearly. The committee strongly encourages the government to reconsider this decision and has made a recommendation to that effect in **Chapter 8** of this report.
- 7.85 It is also very clear to the committee that ASIC’s employment and accountability arrangements for its Commissioners are inadequate. The continuing waves of scandal which have engulfed ASIC’s senior leadership, both prior to and through this inquiry process, are evidence of this. The infighting played out through various media outlets in the past few years does not instil confidence in the committee or the broader public that ASIC is performing its functions to the highest level, and must no doubt give some comfort to the corporate criminals operating within Australia.
- 7.86 The committee is also concerned by the government’s decisions to make public interest immunity claims over the investigation into Ms Chester. It is highly concerning that a government would seek to prevent the release of an investigation report into the conduct of a senior statutory appointee of an independent regulator. This raises serious concerns about the government’s approach to transparency.
- 7.87 It is clear to the committee that once the independent report had substantiated the allegations (in whole or in part), there were extremely limited options available to the Minister. The only option available was the Minister recommending termination to the Governor-General, an extreme but undesirable outcome. A law reform process is needed to avoid repetition of this unfortunate situation.

- 7.88 Without wanting to cast any judgements, the committee is of the view that it may have been better if there were more opportunities to address issues such as this through a graduated penalty scheme, which is addressed in a recommendation in **Chapter 8**.
- 7.89 Further, at a minimum, this investigation should not have been kept secret from the public.
- 7.90 The committee is also alarmed by the poor state of ASIC's internal culture, as revealed by ASIC's most recent staff survey. The committee is dismayed by low levels of confidence in the regulator's capabilities and its effectiveness among ASIC's own staff. The committee considers these results an indictment of ASIC's leadership and its approach to staffing.
- 7.91 Recent news that ASIC has made changes to its senior leadership are encouraging, but until the committee sees evidence that these changes have resulted in positive investigation and enforcement outcomes, the committee cannot help but see this as another shifting of the deck chairs on the Titanic.
- 7.92 The committee is pleased to note that the Australian Government is looking into accountability measures for statutory office holders and strongly urges the government to make progress on this issue. The committee has also made a recommendation in this regard in **Chapter 8** of this report.

Chapter 8

Conclusions and recommendations

- 8.1 As foreshadowed by previous chapters of this report, this chapter presents the committee's recommendations from all chapters of this report.
- 8.2 The committee views written in chapters one to seven set out the reasoning for the recommendations made below. The recommendations should be read alongside the supporting committee views in the relevant chapters.

Too much and not enough—ASIC's remit

- 8.3 This report and indeed the whole inquiry process have shown that ASIC is not a capable regulator. From the opening days of this inquiry, when the committee was inundated with numerous stories of Australians who had lost their life savings, the family home, or their dignity to shady investment schemes and corporate criminals, to ASIC's continuing attempts to evade this committee's scrutiny, to the high levels of evidence the committee has received detailing ASIC's shortcomings, the committee is left with little option other than making the recommendations below.
- 8.4 The value of a robust system of corporate regulation is significant in that it fosters economic productivity and market integrity. The overburdening of ASIC with its excessive remit is one of the principal issues facing Australia's system of corporate regulation.
- 8.5 In the years ahead, the administration of ASIC's remit will conceivably become even more challenging, as financial markets and products grow and become more complex, and the threat of digitally enabled misconduct continues to grow.
- 8.6 As such, all recommendations for this chapter flow from recommendations one and two.

Recommendation 1

- 8.7 **The committee recommends that the Australian Government should recognise that the Australian Securities and Investments Commission has comprehensively failed to fulfil its regulatory remit.**

Recommendation 2

- 8.8 **The committee recommends that the Australian Government should recognise, based on the finding of recommendation one, that the Australian Securities and Investments Commission's regulatory failures call into question whether its remit is too broad for it to be an effective and efficient**

agency, and the government should strongly consider separating its functions between a companies regulator and a separate financial conduct authority.

- 8.9 As all further recommendations of the committee follow from these two recommendations, they refer to the potential replacement bodies for ASIC rather than just to ASIC itself.

Reforms to investigation

- 8.10 More so than other law enforcement bodies, ASIC's role in enforcing corporations law has as its core object the protection of financial service consumers and investors. This role demands a high degree of transparency from ASIC. It is a fundamental principle of efficient and free markets that goods and services are voluntarily exchanged based on the demand exercised by buyers and the supply offered by sellers.
- 8.11 However, when ASIC's *modus operandi* is to undertake investigation and enforcement work in secret, the Australian public is deprived of information that would allow it to engage with financial markets in an informed way. The adverse effects of this information asymmetry was painfully apparent in ASIC's handling of some of the case studies mentioned in previous chapters, in particular the Courtenay House scheme. As submitters detailed, victims of Courtenay House were continuing to deposit money in the weeks and months immediately before ASIC taking action to end the scheme.
- 8.12 The committee makes the following recommendations relating to investigation:

Recommendation 3

- 8.13 **The committee recommends that the Australian Government urgently address the shortcomings in Australia's system for handling reports of alleged corporate misconduct. In doing so, the committee recommends that the Australian Government make it a legislative requirement of the Australian Securities and Investments Commission or future regulatory authorities to investigate reports of alleged misconduct at an appropriate rate. Further, the committee recommends that:**
- **the regulator develop consistent standards to transparently report data to the public on the handling of reports of alleged misconduct; and**
 - **the regulator establish service standards to require that people who submit reports of alleged misconduct are provided with clear, detailed and timely information on the tangible actions taken in response to their report.**

Improving enforcement outcomes

- 8.14 Under ASIC's responsive regulation approach, ASIC has access to a range of enforcement tools to allow it to respond in a proportionate way to escalating misconduct. ASIC's enforcement tools include significant powers to respond to

severe misconduct. The fact that ASIC wields a 'big stick' means that it should be able to 'speak softly'.

8.15 During the inquiry, the committee received evidence of instances where ASIC could have acted earlier and, in doing so, prevented the harm to consumers and investors. While the committee is mindful that corporate misconduct can be inherently difficult to detect, the committee is deeply concerned about the harms to the public that result from the under-enforcement of corporate law.

8.16 As such the committee has made the following recommendations relating to enforcement outcomes:

Recommendation 4

8.17 **The committee recommends that the statement of expectations which is currently issued for the Australian Securities and Investments Commission:**

- **contain, among other things, expectations and priorities relating to transparency; and**
- **be provided in draft form to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report.**

Recommendation 5

8.18 **The committee recommends that the Australian Government make it a legislated regulatory objective of the Australian Securities and Investments Commission or other regulatory authorities to establish and maintain a high-level of transparency of investigation and enforcement outcomes. Additionally, the committee recommends that these transparency objectives be supported by:**

- **establishing a searchable public register of civil or criminal outcomes arising from reports of alleged misconduct received and the outcome of the proposed regulatory authorities' handling those reports, subject to appropriate thresholds, similar to the approach taken by the US Consumer Financial Protection Bureau; and**
- **developing a consistent, long-term public reporting framework that quantifies and assesses the proposed regulatory authorities' performance and capacity to undertake its regulatory functions of investigating and enforcing breaches of corporations law.**

Recommendation 6

8.19 **The committee recommends that the Australian Government investigate amending the whistleblower protection provisions in the *Corporations Act 2001* to include pecuniary incentives and compensation for whistleblowers who make a substantiated disclosure. The committee recommends that the pecuniary provisions be examined with a view to:**

- **establishing a financial incentive for whistleblowers to make a disclosure in circumstances where addressing the misconduct would result in a significant public benefit; and**
- **establishing a financial compensation mechanism for whistleblowers who are unable to make a disclosure in the public benefit without experiencing significant personal detriment, such as loss of career prospects.**

Recommendation 7

8.20 The committee recommends that regulatory authorities adopt an enforcement approach which prioritises the litigation of all serious instances of suspected breaches of corporations law, particularly in cases where consumer losses arise, or could have potentially arisen, from such breaches.

Governance and funding

8.21 ASIC's governance arrangements show a clear need for reform. The 'Swiss cheese' approach to governance which is the current *status quo* in ASIC is clearly unsatisfactory and has allowed for poor performance and infighting between its statutory appointees to become the norm.

8.22 The committee has also made recommendations around ASIC's funding arrangements based on the evidence it received that the industry funding model was not fit for purpose.

Recommendation 8

8.23 The committee recommends that the Australian Government review a new governance structure for the Australian Securities and Investments Commission or any new regulatory bodies. This structure would have a Chair or Chief Executive Officer as sole statutory appointee and accountable authority and the appropriateness of the commission structure entirely should be explored.

Recommendation 9

8.24 The committee recommends that the Australian Government should ensure that a legislated code of conduct be included as part of the governing documents of ASIC or any alternative regulatory bodies, and that the Chair and any other statutory appointees can be sanctioned for workplace misconduct that is found to have breached this code. Further, the committee recommends that the Australian Government establish a mechanism by which an alleged breach of this code of conduct by a statutory appointee can be examined by an appropriately independent and qualified panel.

Recommendation 10

8.25 The committee recommends that the Australian Government reverse its decision, announced in the 2023–24 Budget, to reduce the frequency of Financial Regulator Assessment Authority (FRAA) reviews from every two years to every five years. Further, the committee recommends that the FRAA undertake an inquiry into the effectiveness of the oversight mechanisms of corporate regulators.

Recommendation 11

8.26 The committee recommends that the Australian Government reassess the funding arrangements for the Australian Securities and Investments Commission or any alternative regulatory authority so that:

- a greater level of funding can be directly resourced with the proceeds of regulatory fines—including late fees, court fines, penalties and infringement notices;
- all reasonable steps are taken to ensure levies charged on industry subsectors under the Industry Funding Model are reduced commensurate with increased resourcing to the regulator through the proceeds of fines; and
- it is ensured that regulatory authorities are accountable for the level of resourcing linked to cost-recovered activity, and face obligations to rationalise surplus resourcing to reduce costs on the industry subsector participants.

Senator Andrew Bragg
Chair
Liberal Senator for New South Wales

Government Senators' additional comments

- 1.1 The Chair's report, starting with recommendation 1, reduces significant evidence provided to the Inquiry in a complex area of regulation over the past almost two years to little more than a headline.
- 1.2 The simplification of these complex issues detracts from the practical improvements to ASIC's operation suggested by witnesses, and indeed by ASIC itself, throughout the Inquiry.
- 1.3 So too does the call in recommendation 2 to separate ASIC's functions into 'a companies regulator and a separate financial conduct authority'.
- 1.4 We note that ASIC's wide remit has long been the subject of various inquiries and reviews, including and notably the Hayne Royal Commission and the previous FRAA review.¹ Evidence was indeed provided to this Inquiry that ASIC's remit is broad, and that this is unique when compared to comparable regulators globally.
- 1.5 Some evidence was received that the broad remit assists enforcement, and some evidence suggested it leads to ASIC being spread too thin.
- 1.6 The Chair's report does not further progress this longstanding debate, because it lacks detail on any potential model for separating the markets, corporations and financial services functions of the regulator, the timeframe over which this might occur, and the process to achieve it. It also does not properly weigh evidence presented to the inquiry in favour of ASIC's broad remit.
- 1.7 Government Senators were provided just 24 hours to assess the Chair's report and its recommendations but are, however, in agreement that there remains opportunity for improvement in ASIC's operations and this is why we have chosen to write additional comments rather than a dissenting report.
- 1.8 This Inquiry received various useful evidence and suggestions from a cross section of stakeholders that provide a genuine opportunity for ASIC to improve.²
- 1.9 We thank the many witnesses and submitters who have shared their experiences and provided evidence to the Committee to contribute to improvements in our corporate regulator.
- 1.10 Views from stakeholders who frequently interact with ASIC have largely been ignored in the Chair's recommendations, which assume ASIC will be split

¹ FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission (ASIC) 2022*.

² See for example: Consumer Groups Joint Submission, *Submission 6*, p. 1; Financial Services Council, *Submission 7*.

without detailing how that could occur, and overlooks sensible reforms which could take place today.

- 1.11 Consistently, witnesses and submitters informed the committee of their disappointment at being unsupported having made referrals of misconduct, because of the lack of response and information provided by ASIC.
- 1.12 Coupled with the common misunderstanding that ASIC is a complaints-handling body, this lack of responsiveness has contributed to a significant perception problem that ASIC must address to build confidence in its capabilities.
- 1.13 Government Senators agree that significant improvements are required to communicate with those who report allegations of misconduct, and we broadly support improvements suggested in the Chair's Report at Recommendation 3 for ASIC to transparently report data on the handling of reports of alleged misconduct. This must be done in a manner that does not jeopardise ASIC's important investigation and litigation work. We do not consider this requires legislation.
- 1.14 Based on the evidence received to this inquiry, we make a number of further points about practical enforcement improvements which are tangible and do not require wholesale changes to the operations and structures of ASIC to improve outcomes.
 - Some witnesses to the inquiry spoke highly of the effectiveness of ASIC's work in taking a campaign approach to enforcement in its thematic reviews. The outcomes of thematic campaigns were particularly welcomed by consumer advocates, for example in relation to consumer credit providers.³
 - Government Senators encourage the expansion of thematic, campaign approaches to maximise enforcement outcomes.
 - In this vein, we also note evidence provided to the Inquiry supporting an enhanced role for professional associations in both providing intelligence about potential misconduct to their members, and in educating members on ASIC campaign themes as well. For example, the Financial Advice Association of Australia detailed member experiences making reports of unlicensed advisors, and suggested improved relationships with ASIC could help triage and elevate relevant misconduct reports.
 - Government Senators encourage ASIC to better utilise professional bodies within its remit in these ways.

³ Ms Stephanie Tonkin, CEO, Consumer Action Law Centre, *Committee Hansard*, 23 August 2023, p. 51; Ms Fiona Gutherie, CEO, Financial Counselling Australia, *Committee Hansard*, 23 August 2023, p. 54.

- Government Senators note that the organisational restructure to streamline decision-making and improve responses to misconduct took effect from July 2023.⁴ This should be monitored for impact and outcomes.
- 1.15 Government Senators further note that the duty of lifting standards and perceptions lies with ASIC leadership, including demonstrating the positive work they do and engaging meaningfully in their commitments to improve.
- 1.16 The Chair’s report also canvasses a range of matters around internal governance matters at ASIC in the recent past, the role of litigation in achieving enforcement outcomes, protections for whistleblowers, and the ASIC funding model. Government Senators note that discussion of such matters contributes to public debate about the effectiveness of regulators.
- 1.17 Finally, the Chair’s report calls for a new Statement of Expectations from the Government.
- 1.18 Government Senators note that a new statement will be provided by the Treasurer,⁵ and believe this Statement should give strong guidance for high standards of enforcement and consumer protection at ASIC. It should also consider emerging risks and opportunities, including those presented through the ongoing digital and net zero transformations.

Senator Jess Walsh
Deputy Chair
Labor Senator for Victoria

Senator Deborah O’Neill
Member
Labor Senator for New South Wales

Senator Jana Stewart
Member
Labor Senator for Victoria

⁴ ASIC, *Supplementary submission 1.5*, p. 4.

⁵ Patrick Durkin, ‘Chalmers sets new expectations for ASIC’, *The Australian Financial Review*, <https://www.afr.com/policy/economy/chalmers-sets-new-expectations-for-asic-20231121-p5eljr> (1 July 2024).

Appendix 1

Submissions and additional information

- 1 Australian Securities and Investments Commission
 - 1.1 Supplementary to submission 1
 - 1.2 Supplementary to submission 1
 - 1.3 Supplementary to submission 1
 - 1.4 Supplementary to submission 1
 - 1.5 Supplementary to submission 1
 - 1.6 Supplementary to submission 1
- 2 Australian Financial Complaints Authority
 - Additional Information 1
- 3 Australian Small Business and Family Enterprise Ombudsman
- 4 Maurice Blackburn Lawyers
- 5 Australian Banking Association
- 6 Consumer Action Law Centre
- 7 Financial Services Council
- 8 Institute of Public Affairs
- 9 Small Business Development Corporation
- 10 Law Council of Australia
- 11 Australian Institute of Company Directors
- 12 Mr James Shipton, Melbourne School of Government
- 13 Dr David Millhouse
 - Additional Information 1
- 14 Chartered Accountants Australia and New Zealand
- 15 Australian Restructuring Insolvency and Turnaround Association
- 16 Stockbrokers and Investment Advisers Association
- 17 Institute of Public Accountants
- 18 Associate Professor Marina Nehme
- 19 Associate Professor Andy Schmulow
- 20 Professor Jason Harris
- 21 Adams Economics
 - 21.1 Supplementary to submission 21
- 22 Confidential
 - 22.1 Confidential
- 23 Confidential
- 24 Mr John Hinde
- 25 Mr Peter Keenan
- 26 Mr Dennis Ryle
- 27 Mr Laurence Thomas

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- 40 Confidential
- 41 Confidential
- 42 Confidential
- 43 Confidential
- 44 Confidential
- 45 Confidential
- 46 Mr Michael Sanderson
- 47 Dr Evan Jones
- 48 Mr Donald Carter
- 49 Mr Niall Coburn
- 50 A/Prof Vivienne Brand and Mr Jordan Tutton
- 51 Prime Trust Action Group
- 52 CISA Consulting Pty Ltd
- 53 Sterling First Action Group
- 54 Mrs Denise Brailey
- 55 Ms Caroline Read
- 56 Mr Jaime Asher
- 57 Mr Lindsay David
- 58 Mr Graeme Medhurst
- 59 Madgwicks
- 60 Australian Citizens Party
- 61 Mr Lachlan Walden
- 62 Bank Reform Now
- 63 Financial Planning Association
- 64 Name Withheld
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- 164 CPA Australia
- 165 Chartered Accountants Australia and New Zealand
- 166 Tax Practitioners Board
- 167 Professor Andy Schmulow, Dr Corinne Cortese, Professor Brendan Lyon and Dr John-Paul Monck
- 168 Confidential
- 169 Confidential
- 170 Australian Taxation Office
- 171 Professor James Guthrie, Professor John Dunmay, Professor Jane Andrew and Dr Erin Twyford
- 172 Confidential
- 173 Adams Economics
- 173.1 Supplementary to submission 173
- 174 Confidential
- 175 Confidential
- 176 Name Withheld
- 177 Confidential
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- 178 Confidential
- 179 Mr Mark Allen
- 180 Confidential
- 181 Confidential
- 182 Dr Ian Cornford
- 183 National Credit Providers Association
- 184 Confidential
- 185 Mr Stephen Helberg
- 186 Confidential
- 187 Name Withheld
- 188 Mr Christopher Budd

- 189 Confidential
- 190 Name Withheld
- 191 Confidential
- 192 the Honorable Mr Bob Katter Federal Member for Kennedy
- 193 Name Withheld
- 194 Mr & Mrs Roger & Tracy Gott
 - Additional Information 1
 - Additional Information 2
- 195 Confidential
- 196 Confidential
- 197 Mr Rob Gower
- 198 Dr Eugene Schofield-Georgeson

Additional Information

- 1 Correspondence to the Committee - Mark Bishop - Written inputs on Whistleblowing - Received 3.11.23
- 2 Correspondence to the Committee - AFCA letter of correction regarding information provided during 1 November 2023 Public Hearing in Canberra - Received 1.12.23

Answers to Question on Notice

- 1 ASIC-001: answers to written questions on notice asked by Senator Andrew Bragg - Engagement with federal parliament (received on 18 November 2022).
- 2 ASIC-002: answers to written questions on notice asked by Senator Andrew Bragg - Nuix (received on 5 December 2022).
- 3 ASIC-003: answers to written questions on notice asked by Senator Andrew Bragg - Bronx & superannuation insider trading investigation 2020-2021 (received on 5 December 2022).
- 4 ASIC-004: answers to written questions on notice asked by Senator Andrew Bragg - Request for copies of correspondence to Senator's office (received on 25 November 2022).
- 5 ASIC-005: answers to written questions on notice asked by Senator Andrew Bragg - ALS Limited (received on 5 December 2022).
- 6 ASIC-006: answers to written questions on notice asked by Senator Andrew Bragg - Superannuation insider trading investigation 2021-22 – PII claim (received on 2 March 2023).
- 7 ASIC-007: answers to written questions on notice asked by Senator Andrew Bragg - Nuix - Insider trading - Black Hat investigation (received on 6 February 2023).
- 8 ASIC-008: answers to written questions on notice asked by Senator Andrew Bragg - Nuix – Insider trading - Ongoing investigation (received on 6 February 2023).

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- 9 ASIC-009: answer to written questions on notice asked by Senator Andrew Bragg - Kalkine (received on 16 January 2023).
 - 10 ASIC-010: answers to written questions on notice asked by Senator Andrew Bragg - AFR articles (received on 2 March 2023).
 - 11 ASIC-011: answers to written questions on notice asked by Senator Andrew Bragg - Melissa Caddick (received on 20 February 2023).
 - 12 ASIC-012: answers to written questions on notice asked by Senator Andrew Bragg - Magnis (received on 21 February 2023).
 - 13 ASIC-013: answers to written questions on notice asked by Senator Andrew Bragg - JFS Hair Management (received on 3 March 2023).
 - 14 ASIC-014: answers to written questions on notice asked by Senator Andrew Bragg - Commissioner Hughes LinkedIn post (received on 3 March 2023).
 - 15 ASIC-015: answers to written questions on notice asked by Senator Andrew Bragg - IRexchange (received on 30 March 2023).
 - 16 ASIC-016: answers to written questions on notice asked by Senator Andrew Bragg - Melissa Caddick (received on 30 March 2023).
 - 17 ASIC-017: answers to written questions on notice asked by Senator Andrew Bragg - Treasury Investigation(received on 28 June 2023).
 - 18 ASIC-018: answers to written questions on notice asked by Senator Andrew Bragg - Kris Ridgway(received on 8 June 2023).
 - 19 ASIC-019: answers to questions on notice asked by Senator Jess Walsh at private briefing on 3 May 2023- Prioritising complaints (received on 21 July 2023).
 - 20 ASIC-020: answers to questions on notice asked by Senator Andrew Bragg at private briefing on 3 May 2023- Complaints from professional bodies(received on 29 June 2023).
 - 21 ASIC-021: answers to questions on notice asked by Senator Andrew Bragg at private briefing on 3 May 2023- Serious Financial Crimes Taskforce (received on 29 June 2023).
 - 22 ASIC-022: answers to questions on notice asked by Senator Andrew Bragg at public hearing on 23 June 2023- Unions and superannuation (received on 21 July 2023).
 - 23 ASIC-023: answers to questions on notice asked by Senator Andrew Bragg at public hearing on 23 June 2023- Dixon Advisory Settlement (received on 21 July 2023).
 - 24 ASIC-024: answers to questions on notice asked by Senator Andrew Bragg at public hearing on 23 June 2023- AFR Article - Communicating with Treasury (received on 21 July 2023).
 - 25 ASIC-025: answers to questions on notice asked by Senator Jess Walsh at public hearing on 23 June 2023- Matters Assessed as needing no further action (received on 21 July 2023).

- 26 ASIC-026: answers to questions on notice asked by Senator Jess Walsh at public hearing on 23 June 2023- How ASIC handles reports of misconduct (received on 21 July 2023).
- 27 ASIC-027: answers to questions on notice asked by Senator Andrew Bragg at public hearing on 23 June 2023- ASIC Policy about Devices (received on 21 July 2023).
- 28 ASIC-028: answers to questions on notice asked by Senator Deborah O'Neil at public hearing on 23 June 2023- PwC Authorised Representatives (received on 26 July 2023).
- 29 ASIC-029: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - ASIC investigation record (received on 7 August 2023).
- 30 ASIC-030: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - ASIC Organisational Review (received on 7 August 2023).
- 31 ASIC-031: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - FOI Documents provided to Mr Adams (received on 7 August 2023).
- 32 ASIC-032: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - ASIC ability to speak about ASIC investigations with Government (received on 7 August 2023).
- 33 ASIC-033: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - ASIC procedures relating to National Anti-Corruption Commission (received on 7 August 2023).
- 34 ASIC-034: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - ASIC enforcement errors and Office of Enforcement training (received on 7 August 2023).
- 35 ASIC-035: answers to questions on notice asked by Senator Malcolm Roberts post public hearing 23 June 2023 on 28 June 2023 - ASIC phone policy (received on 7 August 2023).
- 36 ASIC-036: answers to written questions on notice asked by Senator Andrew Bragg on 4 July 2023 - Plutus Payroll tax fraud (received 4 September 2023).
- 37 CDPP-001: answers to questions on notice asked by Senator Andrew Bragg at a public hearing on 24 August 2023 – ASIC referrals to the CDPP (received 22 September 2023).
- 38 FAAA-001: answers to questions on notice asked by Senator Andrew Bragg at a public hearing on 23 August 2023 – Financial advisors (received 22 September 2023).
- 39 CDPP-002: answers to questions on notice asked by Senator Andrew Bragg – Prosecution of corporate crime matters (Received on 6 October 2023).
- 40 ASIC-038: answers to questions on notice written by Chair Senator Andrew Bragg on 1 August 2023 - Weekend Australian Article on Mayfair Case (received on 23 October 2023).

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- 41 ASIC-051: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023- ASIC Corporate (received on 23 October 2023).
- 42 ASIC-052: answers to questions on notice written by Senator Malcolm Roberts on 14 September 2023- Investigation from Adams and Coburns report (received on 23 October 2023).
- 43 ASIC-039: answers to questions on notice written by Chair Senator Andrew Bragg on 1 August 2023- ASIC Organisation Review and Travel (received on 29 September 2023). Correction Letter to question on notice received 7 December 2023.
- 44 ASIC-041: answers to questions on notice written by Chair Senator Andrew Bragg on 10 August 2023- Boutique Capital (received on 29 September 2023).
- 45 ASIC-042: answers to questions on notice written by Chair Senator Andrew Bragg on 10 August 2023 - Blue Sky (received on 29 September 2023).
- 46 ASIC-043: answers to questions on notice written by Chair Senator Andrew Bragg on 5 September 2023 - Nigel Flowers (received on 29 September 2023).
- 47 ASIC-044: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - Insolvency (received on 29 September 2023).
- 48 ASIC-046: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - Nuix (received on 29 September 2023).
- 49 ASIC-048: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - Greywolf Mining Resources (received on 29 September 2023).
- 50 ASIC-049: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - Financial Advisers (received on 29 September 2023).
- 51 ASIC-050: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - Coutenay House (received on 29 September 2023).
- 52 CDPP- 003: answers to questions on notice written by Chair Senator Andrew Bragg on 28 September 2023 – Prosecution of corporate crime matters (received 30 October 2023)
- 53 Treasury-001: answers to written questions on notice asked by Chair Senator Andrew Bragg on 23 October 2023 - Multiple Subjects (received on 9 November 2023).
- 54 ASIC-055: answers to questions on notice written by Chair Senator Andrew Bragg on 10 October 2023 - Team Allocation (received on 13 November 2023).
- 55 CDPP-003: answers to questions on notice written by Chair Senator Andrew Bragg on 2 November 2023 - ACCC Referrals (received on 24 November 2023).
- 56 ASIC-056: answers to questions on notice written by Chair Senator Andrew Bragg on 11 October 2023 - Gabriel Bernarde and Shortselling (received on 27 November 2023).

- 57 ASIC-057: answers to questions on notice written by Chair Senator Andrew Bragg on 12 October 2023 - Australian Home Investments (received on 27 November 2023).
- 58 ASIC-058: answers to questions on notice written by Chair Senator Andrew Bragg on 18 October 2023 - Farmers and Agricultural Loans (received on 27 November 2023).
- 59 ASIC-059: answers to questions on notice written by Chair Senator Andrew Bragg on 18 October 2023 - Sutton (received on 27 November 2023).
- 60 ASIC-060: answers to questions on notice written by Chair Senator Andrew Bragg on 18 October 2023 - Kalkine (received on 27 November 2023).
- 61 ASIC-061: answers to questions on notice written by Chair Senator Andrew Bragg on 18 October 2023 - DW8 (received on 27 November 2023).
- 62 ASIC-045: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - Magnis Technologies (received on 29 September 2023).
- 63 ASIC-047: answers to questions on notice written by Chair Senator Andrew Bragg on 6 September 2023 - IRexchange (received on 29 September 2023).
- 64 AFCA-001: Answers to questions on notice asked by Senator Andrew Bragg at 1 November 2023 Public Hearing - Reports on ASIC (Received 1 December 2023).
- 65 Treasury-002: answers to questions on notice asked by Senator Andrew Bragg at 1 November 2023 public hearing - White Collar crime in Australia (received 1 December 2023).
- 66 Treasury-003: answers to question on notice asked by Senator Andrew Bragg at 1 November 2023 public hearing - Effectiveness of enforcement mechanisms for corporate crime (received 1 December 2023).
- 67 Schmulow-001: answers to questions on notice asked by Senator Andrew Bragg at 1 November 2023 public hearing - Various subjects in relation to financial regulators (received on 4 December 2023).
- 68 ASIC-054: answers to questions on notice written by Chair Senator Andrew Bragg on 6 October 2023 - Accommodation Expenditure (received on 7 December 2023).
- 69 Tutton & Brand-001: answers to questions on notice asked by Senator Jess Walsh on 1 November 2023- Misconduct reports from the public (received on 24 November 2023).
- 70 ASIC-062: answers to questions on notice written by Chair Senator Andrew Bragg on 18 October 2023 - Prime Trust (received on 22 December 2023).
- 71 ASIC-063: answers to questions on notice written by Chair Senator Andrew Bragg on 18 October 2023 - Brian Locke (received on 22 December 2023).
- 72 ASIC-064: answers to questions on notice written by Chair Senator Andrew Bragg on 23 October 2023 - Governance Structures (received on 22 December 2023).

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- 73 ASIC-065: answers to questions on notice written by Chair Senator Andrew Bragg on 23 October 2023 - Employment and accountability arrangements for commissioners (received on 22 December 2023).
- 74 ASIC-066: answers to questions on notice written by Chair Senator Andrew Bragg on 23 October 2023 - Response to allegations of bullying (received on 22 December 2023).
- 75 ASIC-067: answers to questions on notice written by Chair Senator Andrew Bragg on 23 October 2023 - Providing accurate evidence to Parliament (received on 22 December 2023).
- 76 ASIC-068: answers to questions on notice written by Chair Senator Andrew Bragg on 2 November 2023 - Unconscionable conduct (received on 22 December 2023).
- 77 ASIC-069: answers to questions on notice written by Chair Senator Andrew Bragg on 3 November 2023 - Dominique Grubisa (received on 22 December 2023).
- 78 ASIC-070: answers to questions on notice written by Chair Senator Andrew Bragg on 8 November 2023 - CDPP Data (received on 22 December 2023).
- 79 ASIC-071: answers to questions on notice written by Chair Senator Andrew Bragg on 13 November 2023 - Travel Expenses (received on 22 December 2023).
- 80 ASIC-072: answers to questions on notice written by Chair Senator Andrew Bragg on 17 November 2023 - Dixon Advisory (received on 22 December 2023).
- 81 ASIC-073: answers to questions on notice written by Chair Senator Andrew Bragg on 23 November 2023 - Dixon Advisory (received on 22 December 2023).
- 82 ASIC-074: answers to questions on notice written by Chair Senator Andrew Bragg on 8 November 2023 - Aust-Homes Investments (received on 22 December 2023).
- 83 ASIC-075: answers to questions on notice written by Chair Senator Andrew Bragg on 3 January 2024 - Foreign Bribery and Phoslock Environmental Technologies (received on 23 February 2024).
- 84 ASIC-076: answers to questions on notice written by Senator Malcolm Roberts on 5 February 2024- ASIC Investigation from Adams and Coburn Report (received on 23 February 2024).
- 85 ASIC-078: answers to questions on notice written by Senator Andrew Bragg on 2 April 2024 – ASIC’s staff survey (received 13 May 2024).
- 86 ASIC-079: answers to questions on notice written by Senator Andrew Bragg on 19 April 2024 – Appropriation, levies and regulator fine (received 13 May 2024).
- 87 ASIC-077: answers to written questions on notice from Senator Malcolm Roberts on 28 March 2024 – ASIC investigation from Adams and Coburn report (received on 13 June 2024).

- 88 ASIC-080: answers to written questions on notice from Senator Andrew Bragg on 17 May 2024 – ASIC’s overall expenditure (received 13 June 2024).
- 89 ASIC-081: answers to written questions on notice from Senator Andrew Bragg on 30 May 2024 –CDPP Referrals (received on 19 June 2024).
- 90 ASIC-082: answers to written questions on notice from Senator Andrew Bragg on 13 June 2024 –Gold and Copper Resources (received on 21 June 2024).
- 91 ASIC-083: answers to written questions on notice from Senator Andrew Bragg on 14 June 2024 –Mr Anton Wilson (received on 21 June 2024).

Tabled Documents

- 1 Opening statement made by Mr Joe Longo for the Australian Securities & Investments Commission during a public hearing in Canberra on Friday, 23 June 2023.

Appendix 2

Public hearings and witnesses

Friday, 23 June 2023

Committee Room 2S1

Parliament House

Canberra

Australian Securities and Investments Commission

- Mr Joseph Longo, Chair
- Ms Sarah Court, Deputy Chair
- Mr Warren Day, Chief Operating Officer
- Mr Chris Savundra, General Counsel
- Mr Tim Mullaly, Executive Director, Financial Services Enforcement

Wednesday, 23 August 2023

Committee Room 2S3

Parliament House

Canberra

Australian Restructuring Insolvency and Turnaround Association

- Ms Narelle Ferrier, Technical and Standards Director
- Mr John Winter, Chief Executive Officer

Mr Travis Peluso, Private capacity

Mr Rolfe Krolke, Private capacity

Mr James Baillieu, Private capacity

Mr Gary Delaney, Private capacity

Mr Mark Allen, Private capacity

Financial Advice Association of Australia

- Ms Sarah Abood, Chief Executive Officer
- Ms Heather McEvoy, Senior Policy Manager
- Mr George John, Senior Manager, Government Relations and Policy

Courtenay House Victims Roundtable

- Mrs Susie Barnett
- Mr Carmello Pesce

Mr James Shipton, Private capacity

Consumer Groups Roundtable

- Ms Karen Cox, Chief Executive Officer - Financial Rights Legal Centre
- Ms Fiona Guthrie, Chief Executive Officer - Financial Counselling Australia
- Ms Stephanie Tonkin, Chief Executive Officer - Consumer Action Law Centre

Thursday, 24 August 2023

Committee Room 2S3

Parliament House

Canberra

Mr. Daniel Schlaepfer

Australian Independent Compliance Solutions

- Ms Cheyenne Walker, Managing Director

Professor Jason Harris

Swinburne University

- Ms Helen Bird

Southern Cross Payments

- Mr Tim Hart, Executive Chairman

Mr. Geoff Shannon

CISA Consulting

- Ms Peta Stead, Senior Regulatory Consultant

Commonwealth Director of Public Prosecutions

- Mr James Carter, Acting Commonwealth Solicitor for Public Prosecutions
- Ms Joanna Philipson, Deputy Director, Serious Financial and Corporate Crime Group

Wednesday, 4 October 2023

Committee Room 2S1

Parliament House

Canberra

Mr Niall Coburn, Private capacity

Mr Gerard O'Grady, Private capacity

Mr Petrus Helberg, Private capacity

Mr Christopher Pitts, Private capacity

Mr Brad Weatherstone, Private capacity

Mr Lachlan Walden, Private capacity

Navigate Wealth

- Mr Peter Alvarez, Director and Responsible Manger

Shenton Ltd and Shenton Pty Ltd

- Mr Ross Smith, Director

Prime Trust Action Group

- Mr Steve O'Reilly, Joint Principle
- Mr Roger Pratt, Joint Principle

National Credit Providers Association

- Mr Michael Rudd, Chairman and Director
- Mr Jake Tiver, Director

Stockbrokers and Investment Advisers Association

- Ms Michelle Huckel, Policy Manager

Wednesday, 1 November 2023

Committee Room 2R1

Parliament House

Canberra

Department of the Treasury

- Mr Timothy Joseph Baird, Assistant Secretary, Financial Systems Division
- Ms Nghi Luu, Acting First Secretary, Financial Systems Division
- Mr Brenton Philip, Deputy Secretary, Markets Group

Transparency Taskforce UK

- Mr Mark Bishop, Head of Strategy and Public Affairs

Mr Anthony D'Aloisio AM, Private capacity

Mr Gabriel Bernarde, Private capacity

Mr Domenic Lucarelli, Private capacity

A/Prof Vivienne Brand and Mr Jordan Tutton, Private capacity

Himalaya Consulting

- Mr William O'Chee, Partner

Dr Allan Fels AO, Private capacity

Dr Evan Jones, Private capacity

Associate Professor Andy Schmulow, Private capacity

Australian Financial Complaints Authority

- Mr David Locke, Chief Ombudsman and Chief Executive Officer
- Dr June Smith, Deputy Chief Ombudsman

Appendix 3

Legislation administered by ASIC

1.1 As the corporate and financial services regulator, ASIC is responsible for administering and enforcing several pieces of Commonwealth legislation. This includes legislation in which ASIC has a considerable administrative role (class 1 legislation) as well as legislation in which ASIC has a reduced administrative role (class 2 legislation). In total, ASIC is responsible for 10 pieces of Commonwealth legislation. Each of these statutes is outlined in brief below along with ASIC's role in their administration and enforcement.

Class 1 legislation administered by ASIC

1.2 ASIC is responsible for administering core elements of the following legislation:

- the *Australian Securities and Investments Commission Act 2001*;
- the *Business Names Registration Act 2011*;
- the *Corporations Act 2001*;
- the *Insurance Contracts Act 1984*; and
- the *National Consumer Credit Protections Act 2009*.¹

1.3 Each of these statutes is outlined in detail below alongside ASIC's role in their administration and enforcement.

Australian Securities and Investments Commission Act 2001

1.4 The *Australian Securities and Investments Commission Act 2001* (ASIC Act) establishes the Australian Securities and Investments Commission (ASIC) and outlines its core functions, powers, and responsibilities.² The ASIC Act establishes several bodies associated with ASIC including the Takeovers Panel, Companies Auditors Disciplinary Board, Financial Reporting Council, Australian Accounting Standards Board, Auditing and Assurance Standards board and the Parliamentary Joint Committee on Corporations and Financial Services.³

1.5 The ASIC Act mandates that in performing its functions and exercising its powers, ASIC must aim to improve the performance of the financial system, promote the participation of actors in the financial system, administer relevant laws, appropriately store information, provide this information to the public,

¹ ASIC, answer to written question on notice, Set 68, 2 November 2023 (received 22 December 2023).

² *Australian Securities and Investments Commission Act 2001*, s 1.

³ *Australian Securities and Investments Commission Act 2001*, s 1.

and do whatever else is required to give effect to the laws of the Commonwealth.⁴

Business Names Registration Act 2011

- 1.6 The *Business Names Registration Act 2011* (the Act) establishes a National Business Names Registration System.⁵ The national register was designed to ensure that entities behind businesses or corporations can be easily identified in a single registration system. The Act imposes penalties on entities carrying on a business under an unregistered business name or otherwise failing to adequately display or use their official business name.⁶
- 1.7 Under the Act, ASIC can provide online services relating to the administration and convenience of the national register and request information from entities relating to the maintenance of the national register. ASIC also has responsibility for providing extracts of entries on the register requested by an individual.⁷ Further, ASIC can engage with the Registrar of the Australian Business Register for the purpose of performing its functions outlined above.⁸

Corporations Act 2001

- 1.8 The *Corporations Act 2001* (Corporations Act) outlines the laws governing the corporate and financial sectors of the Australian economy.⁹ The Corporations Act is the foundation of Australian corporate law and applies nationwide. The Corporations Act outlines key areas of Australian corporate law such as company registration, the basic features of a company, corporate officers and employees, appointment and cessation of directors, corporate meetings and other related matters.¹⁰
- 1.9 ASIC has a wide variety of responsibilities and functions under the Corporations Act. For example, ASIC is responsible for the general administration of the Corporations Act and exercises several associated enforcement and direction powers.¹¹ The legislation also permits ASIC to notionally amend the Corporations Act via delegated legislation.¹²

⁴ *Australian Securities and Investments Commission Act 2001*, s 1.

⁵ *Australian Securities and Investments Commission Act 2001*, Explanatory Memorandum, p. 4.

⁶ *Australian Securities and Investments Commission Act 2001*, Explanatory Memorandum, p. 4.

⁷ *Australian Securities and Investments Commission Act 2001*, Explanatory Memorandum, p. 5.

⁸ *Australian Securities and Investments Commission Act 2001*, Explanatory Memorandum, p. 5.

⁹ *Corporations Act 2001*.

¹⁰ *Corporations Act 2001*.

¹¹ *Corporations Act 2001*.

¹² *Corporations Act 2001*.

Insurance Contracts Act 1984

- 1.10 The *Insurance Contracts Act 1984* (ICA) provides standards for insurance contracts at the federal level.¹³ The ICA imposes duties on an insurer and an insured party to protect the interests of insurers, insured parties, and other members of the public.¹⁴
- 1.11 ASIC is responsible for the general administration of the ICA subject to the directions of the Minister.¹⁵ The legislation provides ASIC with the power to take necessary measures to administer the ICA including promoting the development of facilities for handling insurance inquiries, monitoring complaints, liaising with stakeholders, and reviewing relevant documents among other activities.¹⁶
- 1.12 Further, the ICA provides ASIC with supervisory powers to obtain insurance documents and review administrative arrangements.¹⁷ The ICA also provides ASIC with the ability to intervene in proceedings relating to a matter arising under the legislation.¹⁸

National Consumer Credit Protections Act 2009

- 1.13 The *National Consumer Credit Protections Act 2009* (NCCP Act) established the current national consumer credit regime. Under the legislation, ASIC is responsible for administering the licensing regime for actors engaging in credit activities with an Australian credit license.¹⁹ ASIC has the power to refuse an application of registration and suspend or cancel a license or registration.²⁰
- 1.14 The NCCP Act also provides ASIC with the ability to seek a court declaration for contravention of a civil penalty in the legislation and seek a pecuniary penalty accordingly. ASIC can also issue infringement notices for strict liability offences and civil penalties prescribed in the regulations.²¹

Class 2 legislation administered by ASIC

- 1.15 ASIC has a reduced role in administering the following legislation:

- *Banking Act 1959*;

¹³ *Insurance Contracts Act 1984*.

¹⁴ *Insurance Contracts Act 1984*.

¹⁵ *Insurance Contracts Act 1984*, s. 11A.

¹⁶ *Insurance Contracts Act 1984*, s. 11B.

¹⁷ *Insurance Contracts Act 1984*, ss. 11C, 11D.

¹⁸ *Insurance Contracts Act 1984*, s. 11F.

¹⁹ *National Consumer Credit Protections Act 2009*, Explanatory Memorandum, p. 3.

²⁰ *National Consumer Credit Protections Act 2009*, Explanatory Memorandum, p. 4.

²¹ *National Consumer Credit Protections Act 2009*, Explanatory Memorandum, p. 5.

- *Life Insurance Act 1995*;
- *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*;
- *Retirement Savings Account Act 1997*; and
- *Superannuation Industry (Supervision) Act 1993*.²²

1.16 Each of these statutes is outlined in detail below alongside ASIC's role in their administration and enforcement.

Banking Act 1959

1.17 The *Banking Act 1959* (Banking Act) outlines the core features of Australian banking law. The objectives of the Banking Act include protecting the interests of depositors, fostering the development of a viable, competitive, and innovative banking industry, and promoting the stability of financial systems.²³

1.18 The Banking Act prescribes several prudential standards for the Australian banking and financial services industry and maintains supervision of banks and other financial institutions.²⁴ The Banking Act contains several provisions requiring the Minister to consult with ASIC prior to making declarations under the legislation and provides the Minister with the ability to delegate powers to ASIC or ASIC officials and request formal advice from the regulator.²⁵

Life Insurance Act 1995

1.19 The *Life Insurance Act 1995* (LIA) regulates insurance companies in Australia including their operation, composition, sale, and closure. The official objects of the LIA include to protect the interests of owners of life insurance policies, promote the development of the insurance industry, and protect the stability of financial systems in Australia.²⁶

1.20 ASIC is also responsible for the general administration of Part 10 of the LIA relating to life insurance policies. Under Part 10, ASIC may request information from life insurance companies regarding their policies and take adverse action if life insurance policies are inconsistent with the LIA.²⁷ Life insurance companies under the legislation must also provide a statement detailing the amount of unclaimed money to ASIC at the end of each calendar year.²⁸

²² ASIC, answer to written question on notice, Set 68, 2 November 2023 (received 22 December 2023).

²³ *Banking Act 1959*.

²⁴ *Banking Act 1959*.

²⁵ *Banking Act 1959*.

²⁶ *Life Insurance Act 1995*, s. 3.

²⁷ *Life Insurance Act 1995*, para. 7(1)(b).

²⁸ *Life Insurance Act 1995*, Part 10.

Medical Indemnity (Prudential Supervision and Product Standards) Act 2003

- 1.21 The *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Medical Indemnity Act) regulates medical indemnity insurance for health care professionals. The objects of the legislation include to ensure that health care professionals have access to properly registered medical indemnity cover and provide minimum standards for this cover.²⁹
- 1.22 ASIC is responsible for the general administration of Part 3 of the Medical Indemnity Act relating to product standards for medical indemnity insurance contracts.³⁰ Section 30(2) provides that the Minister may give ASIC directions about the performance or exercise of its functions under Part 3.³¹

Retirement Savings Account Act 1997

- 1.23 The *Retirement Savings Account Act 1997* (RSA Act) provides for retirement savings accounts to be offered by certain financial institutions. The RSA Act sets out the definition of retirement savings accounts, places restrictions on these accounts consistent with similar superannuation products and provides for the concessional taxation and social security treatment of these accounts. The RSA Act also outlines which institutions can offer these accounts.³²
- 1.24 ASIC has responsibility for the general administration of Part 5 and Part 7 of the legislation relating to the duties of retirement savings account providers and employers and associated prohibited conduct respectively.³³ Part 5 provides ASIC with the ability to establish regulations relating to dispute resolution systems involving RSA providers.³⁴ Parts 1 to 2, 10, 12 to 15, and 16 of the RSA Act confer powers and duties on ASIC associated with the regulator's administration of provisions for which it is responsible.³⁵

Superannuation Industry (Supervision) Act 1993

- 1.25 The *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides a legal framework for the supervision of entities engaged in the superannuation industry such as superannuation funds, approved deposit funds, and pooled superannuation trusts.³⁶

²⁹ *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*, s. 3.

³⁰ *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*, ss. 30(1).

³¹ *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*, ss. 30(2).

³² *Retirement Savings Act 1997*, s. 7.

³³ *Retirement Savings Act 1997*, para. 3(1)(c).

³⁴ *Retirement Savings Act 1997*, Part 5.

³⁵ *Retirement Savings Act 1997*, ss. 3(2).

³⁶ *Superannuation Industry (Supervision) Act 1993*, s. 3.

1.26 Sections 5 and 6 provide that APRA, ASIC and the Commissioner of Taxation are responsible for the general administration of the legislation. ASIC's powers under these provisions extend to investigations, information sharing with other regulators, and the general enforcement of the legislation.³⁷

³⁷ *Superannuation Industry (Supervision) Act 1993*, ss. 5, 6.

Appendix 4

Past reviews of ASIC's performance

- 1.1 This appendix provides an overview of the previous reviews that have considered, or relate to, ASIC's performance as a regulator.
- 1.2 Given the breadth of ASIC's regulatory role, there have been numerous reviews that have considered ASIC's role in administering and enforcing corporate law. In this section, the committee focused on the recent reports that are most relevant to the committee's inquiry. These reviews are grouped as follows:
- parliamentary inquiries;
 - government initiated reviews; and
 - independent reviews.

Parliamentary inquiries

- 1.3 Key examples of the several parliamentary inquiries which have considered ASIC's performance in various capacities are summarised below.

Parliamentary Joint Committee on Corporations and Financial Services

- 1.4 The Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) is established under the *Australian Securities and Investments Commission Act 2001* and has a statutory responsibility to inquire into and report to the Parliament on the activities of ASIC.¹

Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament

- 1.5 In 2022, the PJCCFS reviewed ASIC's governance arrangements following issues at ASIC regarding payments made to the then Chair and then Deputy Chair:
- ...during part of the 46th Parliament, ASIC was distracted from the performance of its duties as a regulator as ASIC's own standards of governance were subject to investigation and review because of its handling of two questionable decisions related to the remuneration of its then Chair and one of its then Deputy Chairs.²
- 1.6 The PJCCFS noted that the review led by Dr Vivienne Thom (discussed further below) found that there was no wrongdoing on the part of then Chair or that of then Deputy Chair.³ However, the PJCCFS concluded that ASIC's 'internal audit

¹ See, *Australian Securities and Investments Commission Act 2001*, s. 14 and s. 234.

² Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS), *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament*, March 2022, p. 3.

³ PJCCFS, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament*, March 2022, p. 3.

and accountability processes were inadequate with respect to those matters' and that ASIC's governance framework, at that time was 'ineffective'.⁴

- 1.7 The PJCCFS considered recent changes ASIC had made to improve its governance framework. The PJCCFS welcomed the 'clear steps' ASIC had taken to delineate the role of the Commission from the ASIC executive. This appeared to empower senior executive leaders to take on day-to-day organisational and operations matters. By relinquishing these duties, ASIC commissioners would be able to focus on 'decision-making and setting and maintaining ASIC's strategic direction'.⁵

2023—*Corporate insolvency in Australia*

- 1.8 In 2023, the PJCCFS inquired into the effectiveness of Australia's corporate insolvency laws. At the time of its report, the PJCCFS noted that there appeared to be an increase in the number of Australian companies entering external administration.⁶ Indeed, ASIC data shows that over 7900 companies went into external administration in 2022–23, up from over 4900 companies in 2021–22.⁷

- 1.9 ASIC is responsible for administering and regulating Australia's corporate insolvency framework.⁸ The content of the PJCCFS report is widely relevant to ASIC's remit. However, the PJCCFS report also made several recommendations for near term reforms and actions that directly reference ASIC. These recommendations include:

- Recommendation 4—the collection of high quality, granular data by ASIC;
- Recommendation 10—ASIC collecting and analysing data from an appropriately sized sample of voluntary and compulsory deregistrations, to provide greater visibility of the solvency status of deregistered companies; and

⁴ PJCCFS, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament*, March 2022, p. 25.

⁵ PJCCFS, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament*, March 2022, p. 25.

⁶ PJCCFS, *Corporate Insolvency in Australia*, July 2023, p. 12.

⁷ See, ASIC, *Insolvency statistics*, Series 1, Table 1, 28 November 2023 release, <https://download.asic.gov.au/media/pl5hywy4/asic-insolvency-statistics-series-1-and-series-2-published-28-november-2023.xlsx> (accessed 4 December 2023).

⁸ The corporate insolvency framework is set out in Chapter 5 of the *Corporations Act 2001*, the *Corporations Regulations 2001*, and the *Insolvency Practice Rules*. See, PJCCFS, *Corporate Insolvency in Australia*, July 2023, p. 6.

- Recommendation 19—consideration of amendments to the thresholds for reporting requirements for insolvency practitioners, and ASIC’s responses to them.⁹

Senate Economics References Committee inquiry into the performance of the Australian Securities and Investments Commission

- 1.10 In 2014, the Senate Economics References Committee reported on ASIC’s performance (the 2014 report), including whether there are any barriers preventing ASIC from performing its legislative responsibilities and obligations.¹⁰ While the committee recognised the ‘good work ASIC has done in a challenging environment,’ it found that ASIC should be a much more proactive regulator and a ‘harsh critic of its own performance with the drive to identify and implement improvements’.¹¹
- 1.11 The committee’s report made 61 recommendations that focussed on enabling ASIC to perform its duties more effectively. The committee presented its recommendations across five parts, as summarised below.
- 1.12 Firstly, the committee considered ASIC’s operating context, including its role in regulating a growing financial services sector. For example, the committee noted that in 2013 the estimated value of Australia’s superannuation was \$1.8 trillion.¹² Today, superannuation assets exceed \$3.5 trillion.¹³ The committee further considered ASIC’s extensive regulatory functions and strategies for effective financial regulation.¹⁴ The committee noted that as millions of Australians are involved in the financial sector, including through compulsory superannuation, it is essential that financial regulators such as ASIC are ‘at the top of their game’.¹⁵
- 1.13 Secondly, the committee examined case studies in which consumers experienced financial harm as a result of poor financial advice. These included

⁹ PJCCFS, *Corporate Insolvency in Australia*, July 2023, p. xxviii.

¹⁰ See, Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 3.

¹¹ Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. xx.

¹² Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 9.

¹³ Latest data as of the September 2023. See, Australian Prudential Regulation Authority, *Quarterly superannuation performance statistics highlights*, November 2023, p. 3.

¹⁴ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 17–44.

¹⁵ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 15.

'claims of unethical and irresponsible lending practices between 2002 and 2010 that affected vulnerable people' and ASIC's response to 'serious and widespread misconduct within Commonwealth Financial Planning Limited'.¹⁶ In relation to lending practices, the committee considered that, in not intervening more overtly, ASIC failed to send a strong message to lenders and failed to appropriately 'alert Australian consumers to the risks associated with low doc loans.'¹⁷ In summary, the committee concluded that:

The one compelling lesson to be learnt from the many cases on predatory lending that occurred between 2002 and 2010 is that ASIC must be more proactive and more assertive in stepping forward and exposing poor practices as soon as they surface.¹⁸

1.14 Thirdly, the committee examined ASIC's varied investigation and enforcement responsibilities. The committee considered the need to reform Australia's corporate whistleblower laws and made several recommendations. The committee also considered evidence that ASIC does not respond appropriately to reports from individuals and professionals that warn of significant corporate misconduct. The committee observed that ASIC relies heavily on others in its surveillance of corporate misconduct and made several substantial recommendations for ASIC to improve its response to reports of misconduct.¹⁹ In regards to enforcement responsibilities, the committee reported that submissions to the inquiry showed:

- concerns with the cases in which ASIC did, or did not, decide to take enforcement action;
- concerns with the type of enforcement action ASIC pursued, the penalties ASIC achieved and the prolonged nature of enforcement action; and
- concerns that ASIC is reluctant to take on complex cases, or take appropriate enforcement action against well-resourced entities.²⁰

1.15 While the committee noted that ASIC faces difficult decisions in taking enforcement action, the committee was of the view that the public interest would be best served by ASIC being prepared to take on more complex litigation

¹⁶ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 47.

¹⁷ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 69.

¹⁸ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 70.

¹⁹ See, Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 244, 255.

²⁰ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 262–264.

against large entities.²¹ The committee made several recommendations related to improving outcomes for enforcing corporate law, particularly in relation to the use of enforceable undertakings by ASIC.²²

- 1.16 Fourthly, the committee considered ASIC's communication and engagement with those that interact with it. The committee found that, on balance, corporate and industry bodies and consumer groups were 'generally supportive of ASIC's approach to consultation' however the committee recommended that the relationship between ASIC and accounting bodies be repaired.²³ The committee also considered consumers' expectations of ASIC and made recommendations relating to ASIC's role in helping to improve consumers' financial decision-making.²⁴ Further, the committee recommended that ASIC take action regarding the way in which it manages complaints from retail investors.²⁵
- 1.17 The committee also considered ASIC's service delivery and access to information and raised several issues. The committee was concerned with evidence it had received that showed small business had, in certain circumstances, had considerable difficulty dealing with ASIC.²⁶ The committee also found that ASIC's website 'appears cluttered and not user-friendly', despite the website being relied on by many people as an important source of information.
- 1.18 Finally, the committee examined options for enhancing ASIC's ability to fulfill its obligations in the future.

Australian National Audit Office reports

- 1.19 The Australian National Audit Office (ANAO) published several reports in the last decade that comment on ASIC's performance.²⁷ Below, the committee

²¹ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 278.

²² Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 280–281.

²³ See, Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 317–318.

²⁴ See, Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 329.

²⁵ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 345.

²⁶ Senate Economics Reference Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 347–351.

²⁷ Note, the purpose of the Australian National Audit Office (ANAO) is to 'support accountability and transparency in the Australian Government sector through independent reporting to the Parliament, and thereby contribute to improved public sector performance.' ANAO, [Purpose of the ANAO](#), 19 February 2024 (accessed 27 June 2024).

highlights two ANAO reports in which ASIC has a central responsibility for the performance area being reported on and which are of relevance to this inquiry.

Administration of enforceable undertakings

1.20 In 2015, the ANAO examined ASIC's administration of enforceable undertakings. An enforceable undertaking is a 'written undertaking given to ASIC by a company or individual that it will operate in a certain way'.²⁸ Enforceable undertakings are generally used when ASIC becomes aware of potential misconduct by an entity, particularly less serious misconduct. Compared to other enforcement outcomes available to ASIC, enforcement undertakings:

...can be a relatively quick remedy where: results are more certain than the outcomes of court proceedings; it has the potential to change the compliance culture of an organisation; and it may achieve an outcome that is comparable to, or better than, that obtained in court.²⁹

1.21 In general, the ANAO considered that ASIC had 'effectively administered the [enforceable undertakings] it has negotiated and accepted'.³⁰ The ANAO found that ASIC had 'sound processes' for each major steps in the enforceable undertakings process, however noted that there is 'considerable scope' for ASIC to improve record-keeping of its decisions and compliance monitoring.³¹ The ANAO also found that ASIC enters into enforceable undertakings in a consistent and transparent manner, and consistent with ASIC's policies. Further, the ANAO considered that ASIC entered into enforceable undertakings that were generally aligned with the type of non-compliance the undertakings were intended to address, however ASIC could be clearer about the misconduct that was the subject of ASIC's concerns.³²

Probity Management in Financial Regulators—ASIC

1.22 In 2023, the ANAO assessed the effectiveness of ASIC's probity management. The ANAO conducted the assessment as it considered it 'essential that financial regulators uphold high probity standards, to strengthen the legitimacy and integrity of the regulator and support the objectives of the regulatory scheme'.³³

²⁸ Australian National Audit Office (ANAO), *Administration of enforceable undertakings*, Audit report No. 38, 2014–2015, p. 14.

²⁹ ANAO, *Administration of enforceable undertakings*, Audit Report No. 38, 2014–2015, p. 14.

³⁰ ANAO, *Administration of enforceable undertakings*, Audit Report No. 38, 2014–2015, p. 16.

³¹ ANAO, *Administration of enforceable undertakings*, Audit Report No. 38, 2014–2015, pp. 16–17.

³² ANAO, *Administration of enforceable undertakings*, Audit Report No. 38, 2014–2015, p. 17.

³³ ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, p. 8.

The ANAO identified several high-level criteria and probity risks for examination and focussed on the period of July 2020 to November 2022.³⁴

- 1.23 In summary, the ANAO considered that probity management at ASIC was largely effective.³⁵ The ANAO found that ASIC had arrangements to manage probity risks in the areas reviewed and had arrangements for ‘monitoring the effectiveness of internal controls and compliance with probity requirements’.³⁶ However, the ANAO also identified that ASIC could improve its references to the regulatory capture risks in its corporate plan.³⁷ The ANAO also found that ASIC could improve its arrangements relating to the acceptance of gifts, benefits and hospitality.³⁸

Government reports

- 1.24 There have been several recent reviews commissioned by government into the operations of ASIC. This section outlines the key considerations of those reviews which are most relevant to the committee’s inquiry.

Fit for the future—A capability review of ASIC (2015)

- 1.25 In 2015, the Australian Government announced a review of the capabilities of ASIC. The review formed part of the Australian Government’s response to the Financial System Inquiry and was chaired by Ms Karen Chester. The review considered how ASIC uses its resources and powers to deliver its statutory objectives and assessed ASIC’s ability to perform as a capable and transparent regulator.³⁹
- 1.26 The review used a capability review framework to assess ASIC in the key areas of governance and leadership, strategy, and delivery. The review found that ASIC’s capabilities varied significantly across the areas assessed. For example:
- ASIC had some regulatory capabilities that reflected global best practice, such as its real-time market supervision;

³⁴ Note, the ANAO did not assess ‘specific investigations into ASIC personnel or review ASIC’s corporate governance arrangements. See, ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, pp. 8–9.

³⁵ ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, p. 9.

³⁶ ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, pp. 27, 59.

³⁷ ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, p. 27.

³⁸ ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, p. 66.

³⁹ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 1.

- ASIC had some areas in which its approach reflected that of other regulators but could be improved, including in the areas of surveillance;
- ASIC had some areas in which its approach reflected most other areas but which did not leave ASIC fit for the future, such as in big data analytics; and
- ASIC had a number of areas where its 'capabilities show material gaps to what the Panel considers to be good practice, and where improvement is required without delay'. Such areas included ASIC's 'governance model and leadership related processes'.⁴⁰

1.27 The review also identified five key themes across its assessment of ASIC, as summarised below.

Theme 1 – Sound governance architecture, not well used

1.28 The review considered that, in several areas, ASIC's governance architecture was well designed but was being used in a way that produced sub-optimal results. For example, the review highlighted that an ASIC commissioner held non-executive responsibilities (governance) and executive (management) responsibilities, including for the day-to-day management of a particular ASIC business area. While the review considered that dual non-executive and executive role offered alignment between operational and strategic decision making, it also considered that the dual role 'inherently undermines accountability'.⁴¹ Given this, the review raised concerns that Commissioners would be unable to consistently detach themselves from their non-executive functions to take an independent and organisation-wide perspective on ASIC's governance.⁴²

Theme 2 – The 'expectations gap' is much greater than expected

1.29 In a number of areas, the review found that there was a gap in the expectations between ASIC leadership and external stakeholders on ASIC's performance and what it could achieve. In some areas, the expectations gap was significant and much larger than the review expected. For example, only 23 per cent of external stakeholders considered that ASIC was proactive in identifying risks in the financial system compared to 95 per cent of ASIC's leadership, a gap of some 72 per cent.⁴³

⁴⁰ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 5.

⁴¹ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 6.

⁴² Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 6.

⁴³ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 9.

Theme 3 – The opportunity to reorient for great external focus

1.30 In areas of areas of governance and leadership, strategy and delivery, the review found that ASIC ‘had an inward-looking orientation to its culture and practices’. For example, the review concluded that ASIC’s leadership ‘spends insufficient time engaging with the market and tends to be overly focused on internal challenges and operations’.⁴⁴ The review also found that ASIC could use a wider variety of perspectives to identify ‘emerging risks and trends to inform the selection of its strategic priorities’.⁴⁵

Theme 4 – Cultural shift needed to become less reactive and more strategic and confident

1.31 The review found that ASIC ‘has a tendency to be reactive in the way it uses the regulatory tools at its disposal and is often excessively issue driven’.⁴⁶ One major driver of this tendency was identified as ASIC external current arrangements. Indeed, the review considered that ASIC’s interactions with its oversight bodies are ‘overwhelmingly focussed on topical issues’ and that such ‘heavily issue driven oversight is highly likely to contribute towards a reactive culture at ASIC’.⁴⁷

Theme 5 – ‘Future-proofing’ and forward-looking approaches needed

1.32 The review found that initiatives to address ASIC’s capability gaps need to be rolled out with both current and future needs in mind.⁴⁸ Further, the review considered that such initiatives would likely need to be accelerated for ASIC to ‘keep pace with the rate of change in the markets, products and services which it regulates’.⁴⁹ The review provided examples of workforce planning and IT infrastructure development as initiatives in which ASIC was lagging.⁵⁰

⁴⁴ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 10.

⁴⁵ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 10.

⁴⁶ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 11.

⁴⁷ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 11.

⁴⁸ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 12.

⁴⁹ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 12.

⁵⁰ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 12.

Recommendations

- 1.33 The review made 34 recommendations across the capability review framework areas of governance and leadership, strategy and delivery. The review considered that the recommendations should be implemented without delay. The review also considered that the recommendations related to improving ASIC's governance and leadership were 'the most critical and enduring and therefore matter most'.⁵¹
- 1.34 While ASIC supported most of the review's findings and recommendations there were several that ASIC did not support. For example, ASIC supported recommendations for refining its approach to performance measurement and strengthening its internal culture and developing staff capability.⁵² However, ASIC refuted the review's findings in several key areas, including in relation to the expectations gap, commissioners' dual strategic and operational responsibilities, and ASIC's culture. Additionally, ASIC did not support several of the review's recommendations in relation to ASIC's approach to enforcement and its internal governance.⁵³

ASIC Enforcement Review (2017)

- 1.35 In 2016, the Australian Government established the ASIC Enforcement Review Taskforce (taskforce) in response to recommendation of the Financial System Inquiry (2014).⁵⁴ The taskforce reviewed ASIC's enforcement regime and assessed the adequacy of the regulatory tools available to ASIC.⁵⁵
- 1.36 The review examined several key areas where it identified opportunities to improve ASIC's enforcement framework.

Thom review – 2021

- 1.37 In October 2020, the Department of the Treasury appointed Dr Vivienne Thom AM to review findings of the ANAO audit of ASIC's financial statements in relation to 'payments made to key management personnel of ASIC and related

⁵¹ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 13.

⁵² Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 171.

⁵³ Australian Government, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015, p. 177–179.

⁵⁴ Australian Government, *ASIC enforcement review taskforce report*, December 2017, p. x.

⁵⁵ Australian Government, *ASIC enforcement review taskforce report*, December 2017, pp. viii–ix; Note, the taskforce panel was chaired by the Department of the Treasury and included senior representatives from ASIC, the Attorney-General's Department and the Commonwealth Department of Public Prosecutions.

governance matters'.⁵⁶ The ANAO's audit had identified certain payments to the ASIC Chair and Deputy Chair which exceeded the limits set by the Remuneration Tribunal.⁵⁷ Further, the ANAO identified that certain payments to the ASIC Chair did not follow Commonwealth Procurement Rules and lacked appropriate governance mechanisms.⁵⁸

- 1.38 An abridged version of Dr Thom's report was released in January 2021. It included eight recommendations relating to ASIC's corporate governance and accountability, internal monitoring and oversight arrangements, and policies relating to the payment of Commissioner expenses.⁵⁹ Five of the recommendations were directed to ASIC, including for ASIC to change processes for managing risks identified through audit processes. Three recommendations were directed to Treasury, including that it would be open to Treasury to seek legal advice regarding whether the then-Chair had breached the ASIC Code of Conduct.⁶⁰

Review of the Australian Securities and Investments Commission Industry Funding Model—2023

- 1.39 In 2023, the Department of the Treasury published a review into the ASIC Industry Funding Model (IFM). The review examined the application and design of the IFM, including the types of costs recovered from industry and how ASIC allocates costs. However, the review did not consider the appropriateness of ASIC's total level of funding or matters related to ASIC's remit and resourcing.⁶¹
- 1.40 Overall, the review found that 'broadly the settings of the ASIC IFM remain appropriate and substantial changes to the model should not be made'.⁶²
- 1.41 Of the review's ten recommendations, six were directed to Australian Government on improving the levies and fees framework and the way in which

⁵⁶ Dr Vivienne Thom AM, Executive Reviewer, CPM Reviews Pty Ltd, *Abridged report on the review of ASIC governance arrangements*, January 2021, p. 4.

⁵⁷ Dr Vivienne Thom AM, Executive Reviewer, CPM Reviews Pty Ltd, *Abridged report on the review of ASIC governance arrangements*, January 2021, pp. 4, 8.

⁵⁸ Dr Vivienne Thom AM, Executive Reviewer, CPM Reviews Pty Ltd, *Abridged report on the review of ASIC governance arrangements*, January 2021, pp. 4, 8.

⁵⁹ ANAO, *Probity management in financial regulators—Australian Securities and Investments Commission*, Audit Report No. 36, 2022–2023, pp. 24–25.

⁶⁰ Dr Vivienne Thom AM, Executive Reviewer, CPM Reviews Pty Ltd, *Abridged report on the review of ASIC governance arrangements*, January 2021, pp. 4–7.

⁶¹ Treasury, *Review of the Australian Securities and Investments Commission Industry Funding Model: Final report*, June 2023, p. 1.

⁶² Treasury, *Review of the Australian Securities and Investments Commission Industry Funding Model: Final report*, June 2023, p. 5.

certain costs are recovered. Four recommendations were directed to ASIC on streamlining its 'reporting, transparency and consultation requirements as well as improving how ASIC's industry funding arrangements are communicated to stakeholders.'⁶³

- 1.42 In relation to unlicensed conduct, the review found that the 'current approach of allocating costs to the 'relevant' sub-sector does not align with the principle that those entities in sub-sectors who cause the need for ASIC's regulatory effort should be charged for it'.⁶⁴

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

- 1.43 The Financial Services Royal Commission (the Royal Commission) found significant evidence of misconduct by many financial services firms that had caused substantial financial loss to many consumers. This misconduct was often in breach of the law and fell short of community expectations.⁶⁵

- The Royal Commission was acutely critical of ASIC's role in responding to scandals in the financial services sector.

- 1.44 ASIC and APRA were criticised during the Royal Commission for failing to appropriately punish misconduct in the financial services industry:

When misconduct was revealed, it either went unpunished or the consequences did not meet the seriousness of what had been done. The conduct regulator, ASIC, rarely went to court to seek public denunciation of and punishment for misconduct. The prudential regulator, APRA, never went to court. Much more often than not, when misconduct was revealed, little happened beyond apology from the entity, a drawn out remediation program and protracted negotiation with ASIC of a media release, an infringement notice, or an enforceable undertaking that acknowledged no more than that ASIC had reasonable 'concerns' about the entity's conduct.⁶⁶

⁶³ Treasury, *Review of the Australian Securities and Investments Commission Industry Funding Model: Final report*, June 2023, p. 5.

⁶⁴ Treasury, *Review of the Australian Securities and Investments Commission Industry Funding Model: Final report*, June 2023, p. 26.

⁶⁵ See, for example, Parliamentary Library, *Financial Regulator Assessment Authority Bill 2021 [and] Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021*, Bills Digest No 73, 2020–21, 18 June 2021.

⁶⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim report*, vol. 1, Banking Royal Commission, Canberra, 2018, p. xix.

- 1.45 As such, the Royal Commission considered that ASIC's enforcement approach had led to market conduct that treated breaches of the law as 'calculated risks' with consequences that were 'just a cost of doing business'.⁶⁷
- 1.46 The Royal Commission made 76 of recommendations, including several recommendations to 'improve the effectiveness of the regulators in deterring misconduct and ensuring that there are just and appropriate consequences for misconduct'.⁶⁸ It also recommended the establishment of the Financial Regulator Assessment Authority.⁶⁹
- 1.47 Following the Royal Commission, ASIC adopted an enforcement approach that favoured court action which was colloquially referred to as 'Why not litigate?'.⁷⁰ However, public commentary suggests that ASIC may have wound back its 'Why not litigate?' approach, following updates to ASIC's 2021–2025 Corporate Plan and its high-profile litigation loss in the so-called 'wagyu and shiraz' case.⁷¹

Financial Regulator Assessment Authority

- 1.48 The Financial Regulator Assessment Authority (FRAA) is an independent statutory body 'tasked with assessing and reporting on the effectiveness and capability' of ASIC and APRA.⁷² The FRAA was established in June 2021 in response to a recommendation of the FSRC to 'establish an independent oversight authority tasked with assessing the effectiveness and capability of APRA and ASIC'.^{73 74}

⁶⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim report*, vol. 1, September 2018, p. 288.

⁶⁸ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final report*, vol. 1, February 2019, p. 46.

⁶⁹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim report*, vol. 1, September 2018, p. 41.

⁷⁰ Sean Hughes, Commissioner, ASIC, 'ASIC's approach to enforcement after the Royal Commission', *Speech*, 30 August 2019 (as published 2 September 2019).

⁷¹ See, for example, Ronald Mizen, 'ASIC dumps 'why not litigate' policy as Frydenberg resets path', *Australian Financial Review*, 26 August 2021; Jacob Uljans, "'Why litigate?' Financial services regulatory enforcement in the wake of ASIC's new Corporate Plan', *Hall and Wilcox*, 30 August 2021; Stephanie Chalmers, 'Westpac's win stands in 'wagyu and shiraz' home lending case as ASIC appeal dismissed', *ABC News*, 26 June 2020.

⁷² Financial Regulator Assessment Authority (FRAA), *Home*, <https://fraa.gov.au/>, n.d. (accessed 20 October 2023).

⁷³ FRAA, *Draft financial system and regulator metrics: Consultation paper*, June 2023, p. 5.

⁷⁴ Note, in accordance with s. 13 of the *Financial Regulator Assessment Authority Act 2021*, the FRAA is required to assess and report on the capability of ASIC's effectiveness and capability every two financial years. However, the Australian Government has since stated that the frequency of the

1.49 As discussed further below, the FRAA has published the following work in relation to ASIC:

- a review of the effectiveness and capability of ASIC (August 2022); and
- a consultation paper on financial system and regulator metrics (June 2023).

Review of the effectiveness and capability of ASIC

1.50 The FRAA's inaugural review assessed ASIC's effectiveness and capability in 'strategic prioritisation, planning and decision-making and its surveillance and licensing functions'.⁷⁵

1.51 While the FRAA found that ASIC is 'generally effective and capable in the areas reviewed', it considered that were 'important opportunities to enhance its performance'.⁷⁶ For example, the FRAA considered that:

- ASIC 'needs to identify and clearly communicate its critical priorities as well as target, measure and report outcomes to stakeholders';
- ASIC can 'increase the effectiveness of its surveillance functions, including through the improved use of data analytics and better engagement with its regulated population'; and
- ASIC 'should place greater emphasis on the experience of licence applicants and consider the benefits of its licensing staff members engaging in more direct communications with applicants'.⁷⁷

1.52 The FRAA noted its review showed common themes that formed the basis for its recommendations. These themes related to ASIC's 'data and technology capability, the nature of its relationships particularly with external stakeholders, the need for it to assess the outcomes of its activities and the skill sets of its people to support those areas'.⁷⁸

1.53 The FRAA's four recommendations for ASIC's improvement are set out in Box 4.1. In making the recommendations, the FRAA noted that implementation of the recommendations would 'require a cultural shift in the way that ASIC

FRAA's review of ASIC will be decreased to a five-year cycle. See, Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2023–24*, p. 214.

⁷⁵ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 14.

⁷⁶ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 3.

⁷⁷ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 4.

⁷⁸ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 81.

approaches its work and engages with its regulated population and broader stakeholders'.⁷⁹

Box 4.1 FRAA—Review recommendations⁸⁰

- ASIC requires a substantial uplift in its data and technology capability, which will involve cultural change.
- ASIC should have a stronger focus across the organisation on enhancing the quality of its engagement with stakeholders.
- ASIC should enhance its ability to measure its own effectiveness and capability and communicate the outcomes of such assessment transparently, both internally and externally.
- ASIC should continue to broaden its mix of skill sets to ensure it can meet the current and future needs of the organisation.

Developing metrics for assessing the financial system

1.54 In its review, the FRAA noted that, at present, there are 'no settled metrics to assess regulatory effectiveness and capability and there are substantial complexities in comparing regulators'.⁸¹ The FRAA indicated it would work with relevant stakeholders to develop appropriate metrics.⁸² In June 2023, the FRAA released a consultation paper on a draft financial system and regulator metrics framework. The FRAA stated that the purpose of the metrics is twofold. Firstly, the metrics are intended to provide a further input into the FRAA's future assessments of ASIC and APRA. Secondly, some metrics are intended to 'assist the FRAA to provide broader context and insights into its reviews'.⁸³

Australian Law Reform Commission—Confronting Complexity: Reforming Corporations and Financial Services Legislation

1.55 In January 2024, the Australian Law Reform Commission (ALRC) presented the final report for its inquiry into the potential simplification of Australia's Corporations Act and the *Corporations Regulations 2001*. The final report was tabled in Parliament by the Attorney-General, the Hon Mark Dreyfus KC MP,

⁷⁹ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 3.

⁸⁰ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 3.

⁸¹ FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 10.

⁸² FRAA, *Effectiveness and capability review of the Australian Securities and Investments Commission*, July 2022, p. 10.

⁸³ FRAA, *Draft financial system and regulator metrics framework: Consultation paper*, June 2023, p. 7.

on 18 January 2024. The ALRC published three interim reports on 30 November 2021, 30 September 2022, and 22 June 2023 respectively.⁸⁴

Background

1.56 On 11 September 2020, the ALRC received terms of reference from the then Government to begin an inquiry into the simplification of the legislative framework for corporations and financial services regulation.⁸⁵ The inquiry was part of the Australian Government's response to the Financial Services Royal Commission and the terms of reference instructed the ALRC to have regard to the 2019 Final Report of the Royal Commission during the inquiry.⁸⁶

1.57 The terms of reference drew the ALRC's attention to three topics in corporations and financial services law which could be simplified or rationalised; the use of definitions in corporations and financial services legislation (Topic A), the coherence of regulatory design and hierarchy of laws (Topic B), and options for reforming Chapter 7 of the Corporations Act (Topic C).⁸⁷

Final Report – Overview

1.58 The Final Report (the report) concluded that corporations and financial services legislation has become unnecessarily complex to the detriment of corporations, consumers, lawyers, judges, and the general public.⁸⁸ The ALRC characterised the terms of reference as underscored by a focus on simplification and listed five key principles it had referred to throughout the inquiry:

- **Principle one:** It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible.
- **Principle two:** Legislation should identify what fundamental norms of behaviour are being pursued.
- **Principle three:** Legislation should be designed in such a manner as to promote meaningful compliance with the substance and intent of the law.
- **Principle four:** Legislation should provide an effective framework for conveying how the law applies.

⁸⁴ Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 5–6.

⁸⁵ Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 5–6.

⁸⁶ Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 5–6.

⁸⁷ Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 5–6.

⁸⁸ Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 33–34.

- **Principle five:** The legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory arrangements.⁸⁹

Notional Amendment Powers of the Australian Securities and Investments Commission

1.59 The report identified several principal problems with the existing legislative framework for corporations and financial services law.⁹⁰ However, the report focused extensively on the notional amendment powers of the Australian Securities and Investments Commission (ASIC), attributing the complexity of the Corporations Act to the ‘legislative maze’ created by legislative instruments issued by the regulator.⁹¹ The report concluded that ASIC’s ability to amend the Corporations Act via legislative instrument had confused the principal legislation, rendering the law unnavigable. The report also expressed concern that these notional amendments are not visible on the face of the principal legislation, requiring users of the law to review both the Corporations Act and all relevant legislative instruments issued by ASIC.⁹²

1.60 The report concluded that corporations and financial services law exists in an incoherent legislative hierarchy. As a result, provisions of Australian corporate and financial services law are inconsistently and unpredictably located across primary legislation, delegated legislation, and administrative instruments. The report found that this was a result of overly prescriptive primary legislation and inappropriate delegated legislation created via ASIC’s notional amendment powers.⁹³ The report noted that since its creation in 2001, the Corporations Act has almost doubled in length, sitting at 4000 pages and 800 000 words as of November 2023, longer than either *War and Peace* or *The Lord of the Rings*.⁹⁴ The report noted that the law is often also internally incoherent, with an influx of

⁸⁹ Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 35.

⁹⁰ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 7.

⁹¹ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 7–10.

⁹² Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 8.

⁹³ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 8–9.

⁹⁴ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 9.

legislative instruments creating a ‘legislative maze’ of connections between primary and secondary legislation.⁹⁵

- 1.61 Further, the report noted that problems associated with reforming corporate and financial services law and the general legislative maintenance of the Corporations Act are both a cause and a symptom of the complexity of the principal legislation. The report concluded that the complexity of corporate and financial services law makes the principal legislation a poor platform for policy development, limiting the options and opportunities for law reform.⁹⁶

Recommendations

- 1.62 The ALRC made a number of recommendations to reduce the complexity of Australian corporate and financial services law. In Interim Report A, the ALRC suggested reforms to improve the navigability and comprehensibility of the legislation, including simplifying key terms and definitions.⁹⁷ In Interim Reports B and C, the ALRC recommended that the Australian Government simplify the legislative framework for financial services via the following three steps; restructure the primary legislation in the form of a new Financial Services Law; issue a single legislative instrument containing matters that adjust the scope of the regulatory regime; and issue thematic rulebooks providing guidance on how the regulatory regime applies to distinct products, services, and individuals.⁹⁸
- 1.63 According to the report, this new legislative model proposed by the ALRC would create a more ‘principled, coherent, and navigable legislative hierarchy’. The report argued that the new legislative model would eliminate the need for notional amendments which alter the regulatory scope and application of the principal legislation, enhancing the coherence and structural integrity of the law.⁹⁹ Further, the ALRC concluded that these reforms would ensure that law-making powers delegated to the Minister and ASIC are consistent with maintaining an appropriate delegation of legislative authority.¹⁰⁰

⁹⁵ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 9–10.

⁹⁶ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 10.

⁹⁷ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 11.

⁹⁸ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, pp. 11–12.

⁹⁹ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 12.

¹⁰⁰ Australian Law Reform Commission, *Summary Report, Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, November 2023, p. 12.