

*Submission to the Senate Economics References Committee
James Shipton, Senior Fellow, Melbourne School of Government*

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Melbourne School of Government,
The University of Melbourne**

1. Introduction and Summary

1.1 Summary and Recommendations

Set out below is an analysis of ASIC's enforcement effectiveness using a framework specifically developed to assess regulatory performance. This framework analyses the constituent elements of regulatory effectiveness, namely *capability, capacity and coverage*, with reference to the agency's *regulatory objectives*. This *regulatory objectives-capability-capacity-coverage* (**ROCCC**) framework is outlined in 1.2 below.

The ROCCC framework has been applied in this submission to make comment on ASIC's enforcement effectiveness. This analysis led to the following recommendations for the Senate Economics References Committee (the **Committee**) to consider:

1. *ASIC, and its oversight bodies, adopt an appropriate, consistent, and long-term assessment framework and consider adopting the regulatory objectives-capability-capacity-coverage (ROCCC) framework.*
2. *ASIC's statutory objectives, particularly the prioritisation (and primacy) of its enforcement mandate, be reviewed and restated.*
3. *The Government should issue ASIC with a Statement of Expectations as a matter of priority.*
4. *Review ASIC's governance arrangements under the ASIC and PGPA acts to enhance governance structures and clarify the roles and responsibilities of the different governing organs.*
5. *The employment terms of ASIC commissioners be reviewed and clarified, and that they be provided with employment contracts.*
6. *Statutory appointments to the ASIC Commission should follow established processes and guidelines.*
7. *Conduct reviews of statutory appointees, like ASIC commissioners, be performed by an independent body with established procedural guidelines.*
8. *The extent of ASIC's independence from government be reviewed and clarified.*
9. *Consideration be given to what government departmental portfolio(s) ASIC, or its constituent functions, should be allocated.*
10. *ASIC's oversight arrangements be reviewed and clarified to provide better coordination between the various oversight bodies, and provide a long-term accountability framework (as mentioned in Recommendation 1) for regular systematic reviews of whether ASIC is achieving its regulatory objectives.*
11. *All ASIC's enforcement expenditure be funded by an independent 'Enforcement Special Account', and that ASIC's industry funding levies not fund that account.*

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12. *In the event of intimidatory conduct by a person being investigated by ASIC, ASIC act with priority to deter such conduct and provide immediate support to the affected law enforcement officer.*
13. *ASIC's jurisdiction be reviewed, and particular consideration be given to the merits of establishing a separate civil enforcement agency (or other regulatory agencies).*

Arguably, the last recommendation, relating to the consideration of a stand-alone civil enforcement agency, is the most 'radical'¹. It would also impact the other recommendations. Accordingly, it should be kept in mind throughout this submission.

1.2 The Importance of a Performance Assessment Framework

The Senate has directed the Committee to inquire into "the *capacity* and *capability* of the Australian Securities and Investments Commission (**ASIC**) to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct".

Whilst I concur that that ASIC's enforcement *capability* and *capacity* are important considerations, it is also necessary to consider ASIC's enforcement *coverage* (i.e. its ability to sufficiently cover its jurisdiction) to properly assess its overall enforcement effectiveness. This is because regulatory effectiveness is determined by a combination of an agency's *capability*, *capacity* and *coverage* with reference to its *regulatory objectives*². It is also necessary to apply practical and consistent definitions to each of these concepts.

This is my first observation: To enhance regulatory effectiveness generally, and enforcement effectiveness specifically, ASIC and its oversight bodies need to adopt a long term, consistent, performance assessment framework. Unfortunately, there is no universally accepted assessment methodology for regulatory effectiveness. In Australia the standard assessment used is that of a '*capability review*'³. Capability reviews, originally designed for policy agencies, are structured to be an "*independent, forward-looking... [assessment of] an agency's ability to meet future objectives and challenges. They consider how an organisation aligns processes, systems and the expertise of its people to deliver on objectives.*"⁴ Nevertheless, capability reviews have a structural limitation as they "***do not explicitly make an assessment of an agency's past performance, but instead focus on strengths and development areas in the context of the anticipated future operating environment***"⁵.

This is an unfortunate omission. Current and historical performance is a necessary input for determining contemporaneous regulatory effectiveness and informed strategic planning. Another omission is reference to the *current* statutory mandate and (where applicable) government expectations. The *anticipated future operating environment* is also extremely difficult, if not impossible, to identify with precision. This is especially true of the future risk and operating environment, political and economic context, and resource (including funding) availability. Moreover, these are all dynamic concepts making anticipated future challenges extremely difficult to identify.

¹ See Royal Commission, Final Report, Vol.1 p429.

² This is the basis of regulatory effectiveness methodology I am developing with the assistance of the Melbourne School of Government and leading international regulators.

³ See <https://www.apsc.gov.au/initiatives-and-programs/workforce-information/research-analysis-and-publications/capability-review-program>.

⁴ <https://www.apsc.gov.au/initiatives-and-programs/workforce-information/research-analysis-and-publications/capability-review-program>.

⁵ Emphasis added. *Ibid*.

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Regulatory effectiveness, including enforcement, is a function of *capability, capacity and coverage* all referenced to the agency's *regulatory objectives*⁶. Regulatory objectives must be referenced because regulators "*must be able to make decisions that are **always** guided by the objects of*" their constituent legislation⁷. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) also noted that ASIC (and APRA) are "*defined by statute and the tasks entrusted to each regulator by its statute must be the foundation of any assessment*"⁸.

It is important to note here that assessing a regulator's *outcomes* provides a superior indicator of the achievement of *objectives* compared to the common focus on *outputs*. On this point, the Royal Commission noted that "*the number of proceedings filed, or infringement notices issued, will say little about ASIC's enforcement culture unless the decisions behind those numbers are evaluated*"⁹.

To aid the Committee, and for the purposes of this submission, I define and apply the following concepts (and suggest this ROCCC framework be applied more broadly):

- *Regulatory objectives* are ASIC's statutory objectives and purpose. These are set by Parliament under the ASIC Act. They also refer to the Government's Statement of Expectations.
- *Capability* is the extent ASIC possesses the *means* and *skill* to achieve its regulatory objectives. Means are the actions or systems by which ASIC pursues its objectives (such as regulatory tools). Meanwhile, skill is ASIC's ability, talent, or proficiency to achieve its objectives.
- *Capacity* is the maximum amount of capability that ASIC can apply. Capacity is a function of the internal and external constraints inhibiting, or impacting, ASIC's capability.
- *Coverage* is the extent to which ASIC's capability and capacity deals with, applies or fills its regulatory perimeter. This includes the depth and breadth of ASIC's work.

I set out below a *prima facie* (and a limited) analysis of ASIC's enforcement *objectives, capability, capacity and coverage* in order to assess its enforcement effectiveness. In doing so, I arrive at several strategic conclusions and recommendations. I also use the ROCCC framework to demonstrate a possible long term, assessment methodology that could be applied by ASIC and its accountability bodies. These oversight bodies include this (and other) parliamentary committee(s), as well as the Financial Regulator Assessment Authority (**FRAA**). I encourage the Committee to adopt the ROCCC framework outlined herein.

Recommendation 1:

ASIC, and its oversight bodies, adopt an appropriate, consistent, and long-term assessment framework and consider adopting the regulatory objectives-capability-capacity-coverage (ROCCC) framework.

⁶ This multidimensional nature of what constitutes regulatory effectiveness has also been identified by Prof. Alan Fels as '**operating capability**'. Prof. Fels identifies it as "*physical, human, and financial resources, culture, and organizational structure and arrangements that exist to carry out the tasks of the regulatory authority.... It also refers to the legal powers of the agency, e.g., the powers of investigation and decision-making.*" (See <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1066&context=luclj>).

⁷ Emphasis added, *Report of the Inquiry under section 143 of the Casino Control Act 1992 (NSW)*, 1 February 2021, Volume 2, paragraph 37 at page 652 (see <https://www.parliament.nsw.gov.au/tp/files/79129/Volume%202%20-%20Inquiry%20under%20section%20143%20of%20the%20Casino%20Control%20Act%201992.pdf>).

⁸ Royal Commission, Final Report, Vol 1 p474.

⁹ Royal Commission, Final Report, Vol 1 p474.

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2. ASIC's Regulatory Objectives

2.1 Objectives under the ASIC Act

A regulator's statutory objectives perform two important functions: first, they set its strategic goals; and second, they act as performance benchmarks to assess effectiveness¹⁰.

ASIC has six statutory objectives¹¹. The two that primarily impact ASIC's enforcement function are:

- The first objective is to *"maintain... and improve... the financial system and [its] entities... in the interests of commercial certainty, reducing business costs, and... [economic] efficiency and development"*.
- In contrast, the sixth is to *"enforce"* the law, including against these same 'financial system entities'. Reportedly, enforcement was deliberately left last by the enacting government¹².

These two objectives are difficult to reconcile. This tension is further complicated by an additional obligation that ASIC consider competition when performing its functions¹³, including enforcement. Consequently, ASIC lacks clear strategic objectives and performance benchmarks for its enforcement work.

2.2 Statement of Expectations

ASIC's current Statement of Expectations was issued by the Morrison Government in August 2021 (the **2021 Expectations Statement**). Given that eighteen months has passed since this was issued in the height of the COVID pandemic, and that there has been a change in Government, practically speaking the 2021 Expectations Statement is obsolete.

Accordingly, it would be difficult for ASIC to determine the weight it should give to the 2021 Expectations Statement when determining its forward strategy in 2023. It is also difficult to assess the weight that should be given to the statement when considering whether its expectations should be utilised as performance benchmarks.

If these expectations statements are to be issued (noting there is a debate about the extent of ASIC's independence from Government – see 3.3 below), then they need to be issued and/or updated regularly so that they remain relevant. If they are to be issued, they need to be issued on a timely basis. If they are not issued on a timely basis, they should not be issued at all as dated statements only serve to complicate ASIC's decision making. It is difficult for a regulator to develop strategy, and for its performance to be assessed, within a legislative structure that provides for Government guidance when the Government does not guide.

It is regrettable that ASIC's statements of expectation have been issued so infrequently by various governments¹⁴ given their absence, and their issue on an *ad hoc* basis, has real operational implications.

¹⁰ Royal Commission, Final Report, Vol 1, p474.

¹¹ ASIC Act, s1(2)

¹² <https://www.afr.com/companies/financial-services/shipton-litigation-era-ends-with-longo-shake-up-20210429-p57nhg>

¹³ ASIC Act, s1(2A)

¹⁴ ASIC has received only four statements of expectation since 2007 - in 2007, 2014, 2018 and 2021 (see <https://asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/statements-of-expectations-and-intent/>).

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2.3 ASIC's Regulatory Objectives

The irreconcilable nature of ASIC's statutory objectives relating to enforcement, and the absence of an up-to-date Government statement of expectations, makes it difficult to determine, with precision, ASIC's *regulatory objectives* (as defined above). The irreconcilable nature of these objectives hampers ASIC's decision-making setting processes. This is a structural deficiency and, ultimately, inhibits ASIC's enforcement capability and effectiveness.

The irreconcilable nature of ASIC's regulatory objectives also inhibits ASIC's ability to determine enforcement strategy (see further, 3. *Enforcement Capability* below). Moreover, it means that performance benchmarks to assess ASIC's enforcement functions are in tension. This is a design fault that impacts ASIC's regulatory capability generally, and enforcement capability specifically.

Recommendation 2:

ASIC's statutory objectives, particularly the prioritisation (and primacy) of its enforcement mandate, be reviewed and restated.

Recommendation 3:

The Government should issue ASIC with a Statement of Expectations as a matter of priority.

3. Enforcement Capability

Enforcement *capability* is the extent ASIC possesses the necessary means and skill to enforce the laws that ASIC administers. Capability has two limbs: (i) means; and (ii) skill.

Several factors impact ASIC's current enforcement *capability*. These factors include:

- i. ASIC's stated strategic approach to enforcement. This includes its enforcement posture.
- ii. The sufficiency of ASIC's enforcement powers and tools.
- iii. ASIC's organisational culture, leadership and decision-making processes impacting and enlivening its enforcement powers.
- iv. ASIC's enforcement systems (including data, analytical and technical platforms) and processes.

I am unable to assess all these factors and I encourage the Committee to separately evaluate each of them. Nevertheless, as regards (i), it is important that ASIC's articulated posture relating to enforcement is clear as deterrence relies on both action *and* posture. I also comment below on four matters, relating to (iii) that impact ASIC's enforcement decision-making capability, they are:

1. ASIC's legislated governance structure.
2. The employment and accountability arrangements for ASIC commissioners.
3. ASIC's relationship with the Government, particularly the extent that ASIC's enforcement function is independent.
4. ASIC's oversight and accountability arrangements.

3.1. ASIC's Legislated Governance Structure

ASIC has overlapping statutes that unfortunately leave it with 'Swiss Cheese' governance arrangements. ASIC is governed by two ill-fitting pieces of legislation, the ASIC Act and the

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Public Governance, Performance and Accountability Act (the **PGPA**). These two statutes provide for three different overlapping governing organs, namely the:

- i. Commission,
- ii. Chair (who has separate procedural powers to the other commissioners); and
- iii. Accountable Authority (who is the same person as the Chair).

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 complication¹⁵, 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.

Recommendation 4:

Review ASIC's governance arrangements under the ASIC and PGPA acts to enhance governance structures and clarify the roles and responsibilities of the different governing organs.

3.2 Employment and Accountability Arrangements for ASIC Commissioners

There is also legislative confusion relating to the employment and accountability arrangements of ASIC commissioners. This results in commissioners having structurally different employment arrangements to ordinary ASIC staff. In turn, this impacts the effectiveness and cohesion of ASIC's decision-making forums, including ASIC's Enforcement Committee.

Unlike other ASIC staff, who are governed by employment contracts that (amongst other matters) incorporate codes of conduct, commissioners do not have employment contracts. It is also unclear, as a matter of employment law, to whom commissioners, deputy-chairs, and chairs 'report' to. Nominally, but not practically, they report to the Governor-General, but His Excellency cannot be expected to take on an operational oversight role over the many statutory appointees, including ASIC commissioners. Moreover, since commissioners are 'independent' statutory appointees they do not actually 'report' to the Chair (or the Accountable Authority). This means the commissioners are not readily subject to the same accountability processes as other public sector employees. The Royal Commission recognised this lacuna with its recommendation that a new, permanent oversight body for ASIC and APRA assess (*inter alia*) "the performance of the leaders and decision-makers within the regulator"¹⁶.

Instead of having employment contracts, the various determinations of the Remuneration Tribunal apply to ASIC commissioners. If those determinations are silent on a subject (which they are on many) then either terms specifically set in legislation, by the Government or that otherwise exist for ASIC staff, apply. Put simply, this is a 'Swiss Cheese' arrangement.

Commissioners are also not subject to the same termination-for-cause provisions as other ASIC employees. Unlike ordinary employees who, by virtue of their employment contracts, can be terminated for a code of conduct breach, commissioners can only be terminated by the Governor-General for statutory 'misbehaviour'. This 'misbehaviour' needs to be extremely serious, such as a criminal, or near criminal, act. This is rare and is not the standard threshold

¹⁵ <https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-s-governance-and-accountability/>

¹⁶ Royal Commission, Final Report, Vol.1 p474.

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in employment law. Accordingly, the ultimate ‘deterrence’ of termination for a (standard) code breach does not apply to commissioners even though it does to their subordinates. Again, this impacts accountability.

It is relevant that the Governor-General is the only official empowered to terminate ASIC commissioners. This means, by convention, that he could only do so at the recommendation of Cabinet. This brings the process into the political domain. It is also political because there are no established, transparent, independent mechanisms or procedures for dealing with questionable conduct by a commissioner. Instead, as matters currently stand, the Government, often the very same minister who appointed the statutory official, is responsible for any conduct inquiry. This places the minister in an invidious position. There also does not appear to be consistency in the way these inquiries are handled.

The confused employment and accountability arrangements mean that the accountability scaffolding that exists for private sector directors and senior executives, encouraging cohesion and collaboration, does not exist for ASIC commissioners. This, along with the legislative confusion around commissioner roles and responsibilities, impacts the interactions of the commissioners between themselves and with the Chair/ Accountable Authority. In turn, this has significant cultural ramifications on the broader organisation. This is particularly unfortunate given ASIC’s role as the custodian of directors’ duties in Australia.

Recommended reforms include providing comprehensive and clear employment arrangements for commissioners, preferably via employment contracts. Linking the commissioner termination provision of the ASIC Act¹⁷ to a breach of the relevant code is another way to better align commissioner employment terms with ordinary staff. Ministerial appointments of commissioners should also follow proper transparent processes and never be without any consultation or proper background checks.

Moreover, an independent body should be tasked with any conduct review of statutory appointees like ASIC commissioners¹⁸. This independent body should be governed by uniform guidelines to ensure it applies due process, adopts appropriate transparency, and acknowledges victims’ rights. Its guidelines should require that investigations follow appropriate, not politically imposed, timetables and require that complex legal issues be considered by appropriately qualified lawyers. It should also mandate strict adherence to the rules of procedural fairness both during and after an investigation. This includes mandating complete document disclosure and prohibiting briefings by an investigator to a witness once a confidential review has concluded. Victims’ rights also need to be enshrined. Currently they appear to be overlooked.

Recommendation 5:

The employment terms of ASIC commissioners be reviewed and clarified, and that they be provided with employment contracts.

Recommendation 6:

Statutory appointments to the ASIC Commission should follow established processes and guidelines.

¹⁷ s111.

¹⁸ See James Shipton, *The Australian*, 15 August 2022. Former ASIC Chair Tony D’Aloisio AM made a similar recommendation (see ‘Shipton predecessor seeks protection for watchdog chairman’s role’, *The Australian*, 31 January 2021).

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Recommendation 7:

Conduct reviews of statutory appointees, like ASIC commissioners, be performed by an independent body with established procedural guidelines.

3.3 ASIC's Relationship with Government

There does not appear to be consensus to what extent ASIC is 'independent of government'. Particularly, whether ASIC is as independent as the DPP when exercising its enforcement powers. In my experience¹⁹, different governments, and even different ministers within the same government, applied different definitions of 'independence'. Structurally, ASIC is given some level of independence (particularly as regards enforcement), and its commissioners are independent statutory appointees (as seen above). Nevertheless, ASIC is subject to Government guidance via expectations' statements. Regrettably, ASIC's governing legislation is convoluted on the point.

Independence is also relevant to the employment terms of commissioners since many concepts that exist to keep judges independent of political interference have been applied to agencies like ASIC. An example is limiting the power to terminate a commissioner exclusively to the Governor-General and then only for (extremely serious) 'misbehaviour' or 'incapacity'²⁰. (This has been covered in 3.2 above).

Best practice suggests that ASIC's enforcement functions be as independent as the DPP (which is not subject to a statement of expectations). The structural possibility of political influence (or interference) in relation to the general types of matters ASIC pursues clouds ASIC's enforcement capability. Accordingly, clarity around the degree of ASIC independence in enforcement decision-making is needed in order enhance decision-making processes, and thus enforcement effectiveness.

Recommendation 8:

The extent of ASIC's independence from government be reviewed and clarified.

Currently, ASIC forms part of the Treasury portfolio. Treasury's stated role is of 'a central policy agency' that 'analyse[s] policy issues with a whole-of-economy perspective' and 'provide[s]... economic analysis and... policy advice on issues such as the economy, budget, taxation, the financial sector, foreign investment, structural policy, superannuation, small business, housing affordability and international economic policy'²¹. This economic and policy-oriented mandate does not appear to align neatly with public interest law enforcement.

The fact that ASIC forms part of Treasury's economic portfolio further complicates the irreconcilable nature of ASIC's statutory objectives (mentioned above in 3.1). Accordingly, there is merit in, at least, placing ASIC's enforcement (and perhaps other) functions under the Attorney-General's Department's (**AGD's**) portfolio like other law enforcement and regulatory agencies. AGD's stated role to 'deliver programs and policies to maintain and improve Australia's law and justice framework'²² appears more aligned with ASIC's enforcement responsibilities. Consideration could also be given to allocating different ASIC functions between, respectively, Treasury's and the AGD's portfolios.

¹⁹ I was ASIC's Chair from 2018 to 2021.

²⁰ See ASIC Act, s111.

²¹ See <https://treasury.gov.au/the-department/about-treasury>

²² <https://www.ag.gov.au/about-us/what-we-do>

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Recommendation 9:

Consideration be given to what government departmental portfolio(s) ASIC, or its constituent functions, should be allocated.

3.3 ASIC's Oversight and Accountability Arrangements

Following the Royal Commission there is a new statutory oversight body – FRAA – that supplements the oversight roles of (the current) five parliamentary committees (three permanent standing committees and two (temporary) references committees). The Royal Commission observed²³ (emphasis added) that:

Parliamentary oversight necessarily has some limitations. Those limitations include the amount of time that can be devoted to a particular entity or topic, the time available to committee members to prepare for the hearings and the training, skill and experience of the members of the committee, who will sometimes need to review and assess complex information on matters of expertise.

Mr Shipton²⁴ acknowledged that the current arrangements for parliamentary scrutiny of ASIC could be improved. He suggested that ASIC could develop frameworks, metrics and methodologies for review of its performance. The Joint Committee could then review ASIC's performance against the agreed benchmarks.

The Royal Commission also noted that “As with parliamentary accountability, ministerial oversight of regulators is essential but **has limitations**”²⁵ (emphasis added). Importantly, the Royal Commission recognised that “None of the existing [oversight] processes requires **regular and systematic review of how well [ASIC or APRA] discharges its statutory functions or exercises its statutory powers**”²⁶ (emphasis added). This was a key finding of the Royal Commission.

The creation of FRAA recognised that the Parliamentary committees and ministers were ‘limited’ in their ability to perform the oversight role expected of them. When creating FRAA, the then Government observed that the existing accountability bodies were not subjecting ASIC (and APRA) “to consistent and independent expert reviews over time”²⁷

In my experience²⁸, oversight of ASIC became *ad hoc* because it lacked clear performance benchmarks linked to its statutory objectives. In the last Parliament, some (not all) committees became platforms for politically motivated interventions, instead of being forums for interrogating adherence to ASIC's regulatory objectives. The current Parliament should reconsider, and redefine, their important oversight responsibilities and work out how to best coordinate between themselves and with FRAA. Effective parliamentary oversight of statutory bodies is a core principle of Australia's constitutional framework. To enhance oversight effectiveness, these bodies need to adopt a comprehensive, long term, accountability framework, possibly along the lines contemplated in this submission.

²³ Royal Commission Final Report, Vol. 1 p470.

²⁴ The Chair of ASIC from 2018 to 2021 and the author of this submission.

²⁵ Royal Commission Final Report, Vol. 1 p472.

²⁶ Royal Commission Final Report Vol.1 p473.

²⁷ https://fraa.gov.au/sites/fraa.gov.au/files/2021-11/226579_ASIC_assessment_scope.pdf.

²⁸ I was ASIC's Chair from 2018 to 2021.

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Recommendation 10:

ASIC's oversight arrangements be reviewed and clarified to provide better coordination between the various oversight bodies, and provide a long-term accountability framework (as mentioned in Recommendation 1) for regular systematic reviews of whether ASIC is achieving its regulatory objectives.

4. ASIC's Enforcement Capacity

Several factors ultimately determine ASIC's enforcement capacity (that is the extent it can apply its enforcement capability). These include the:

- i. Extent of ASIC's budget, particularly its enforcement budget.
- ii. Extent of human and professional resources applied to enforcement (and supporting functions).
- iii. Extent of system, and operational, support given to enforcement.
- iv. Risk appetite and posture applied to enforcement.
- v. Dependencies, contingencies, and constraints relevant to ASIC's enforcement function.
- vi. Extent that external pressures and perceptions, and internal and external performance indicators, support or inhibit ASIC's enforcement function.

Again, I am not in a position to assess all these factors and encourage the Committee to do so. Nevertheless, I make comment on some aspects of (i) - ASIC's budget constraints, and (vi) - potential external pressures that could inhibit ASIC's enforcement function.

On (i), ASIC's vast regulatory jurisdiction includes enforcing the law within this ever-expanding jurisdiction (see further 4. *Regulatory Coverage* below). ASIC's activities are budget-constrained since ASIC relies on appropriations from the Government, creating a 'funding envelope'. Over many years ASIC's jurisdiction expanded without appropriations keeping pace, reducing ASIC's overall 'funding envelope' including for enforcement. Unfortunately, with the exception of the period of the Royal Commission (2018-19), ASIC has not been a funding priority for the Government.

Consequently, ASIC increasingly relied on a separate 'fund' known as the Enforcement Special Account (**ESA**)²⁹ to support its enforcement activities. The ESA is designed for '*large matters*'³⁰ which are '*exceptional matters of significant public interest*'³¹. ASIC needs the Treasurer's (not the Attorney-General's) case-by-case approval to utilise the ESA³².

Consideration should be given to having *all* ASIC's enforcement matters funded by a 'Special Account' of sufficient size. This fund would support all ASIC's enforcement matters, not just larger ones of 'exceptional public interest', on an ongoing basis. Utilising this fund should not be contingent on the Treasurer's (or Government's) approval. Moreover, consideration should be given to removing ASIC's enforcement budget from reliance on ASIC's industry levies³³ for public interest reasons. This latter position has industry support because it is considered

²⁹ A special account is an appropriation mechanism that notionally sets aside an amount within the CRF to be expended for specific purposes (see <https://www.transparency.gov.au/annual-reports/departments-finance/2018/part-5-financial-statements/special-accounts>).

³⁰ <https://treasury.gov.au/sites/default/files/2022-09/c2022-317130-disc.pdf>, p18.

³¹ For an explanation see note 34 at https://download.asic.gov.au/media/1817558/asic_annual_report_06-07_part_4.pdf

³² This also further clouds the independence of ASIC's enforcement decision-making processes.

³³ ASIC's industry funding model essentially recoups ASIC's expenditure via levies on ASIC's regulated population.

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‘unfair’ for industry-wide levies to fund ASIC’s (public interest) enforcement actions against individual entities or persons³⁴.

Recommendation 11:

All ASIC’s enforcement expenditure be funded by an independent ‘Enforcement Special Account’, and that ASIC’s industry funding levies not fund that account.

On (vi) – external pressures, the threat of intimidatory conduct by a person being investigated by ASIC has the potential to be a constraint on enforcement, thus impacting enforcement capacity. Whilst several incidences of intimation by persons-of-interest have occurred in recent years, there is no suggestion that those incidents *actually* perverted the course of any investigation³⁵. Nevertheless, history suggests that the threat of their reoccurrence is real. Accordingly, when these incidents occur ASIC, the Government and other law enforcement agencies should act immediately to protect the relevant law enforcement officer. This includes protecting an officer from unfounded and defamatory character attacks. Such tactics could be used to attempt to intimidate ASIC officers to disrupt an investigation. Any such campaign is not just an attack on an individual, it is an affront to the system of justice itself. Law officers must be protected when performing their duties, especially when they are not in a position to do so themselves.

Accordingly, there needs to be credible deterrence against such behaviour. Any incidents should be pursued with priority and immediacy by ASIC and the Government. Moreover, law enforcement officers affected by intimidatory conduct should be provided with immediate and full support from ASIC and the Government. For example, they should not have to wait four months before being offered work health and safety support, nor should they have to wait a total of six months before any action is taken to stop the intimidatory conduct.

Recommendation 12:

In the event of intimidatory conduct by a person under investigation by ASIC, ASIC act with priority to deter such conduct and provide immediate support to the affected law enforcement officer.

5. ASIC’s Enforcement Coverage

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.

On this point, the Royal Commission observed³⁶:

ASIC’s remit is very large. It has increased greatly since ASIC was first established.

ASIC now administers 11 pieces of legislation and their associated regulations. The legislation itself has grown longer and more complex. The length of the Corporations

³⁴ For example, see <https://afma.com.au/getattachment/2950c663-70c1-4336-8c56-4c644f4aa848/R19-22-AFMA-submission-Review-of-the-ASIC-Industry-Funding-Model.pdf?lang=en-AU&ext=.pdf>.

³⁵ Whether or not there was an *attempt* to pervert the course of an investigation has not been analysed.

³⁶ Royal Commission, Final Report, Vol 1, p419.

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Act, for example, has increased by 178% since 1981. In preparing Background Papers for its hearings, this Commission found that an introductory overview of the law governing consumer credit in Australia required 86 pages of explanation; financial advice and sale of financial products required 114; and small business lending law that did not overlap with that governing consumer lending, required 41 pages to explain.

Right sizing ASIC's jurisdiction requires careful analysis. Two structural reforms could be considered in this exercise.

Firstly, a separate civil enforcement agency that would take serious actions referred to it by ASIC (as well as APRA and, perhaps, other regulators) should be considered. This would ringfence funding for deterrence and allow this single body to quickly get matters to court. It would also allow the separate enforcement agency to have statutory objectives, like the DPP, focused exclusively on law enforcement. This body could also form part of the Attorney-General's portfolio. This would clarify regulatory objectives pertaining to enforcement and thus assist strategy setting, and accountability mechanisms.

Whilst this suggestion is considered in the context of ASIC's regulatory coverage (and objectives), there are also potential capability and capacity benefits to a separate enforcement agency. To this end, the Royal Commission assessed the relative merits, saying (original emphasis retained):

Another option would be to establish a specialist civil enforcement agency, just as the Commonwealth and all of the states and territories have specialist agencies to prosecute criminal breaches.

The creation of a specialist civil enforcement agency would preserve all of ASIC's regulatory tools, save for the right to litigate in respect of civil penalty provisions. ASIC would be required to prepare a brief of materials to the new agency if a particular evidentiary threshold was reached. It would then be for the enforcement agency to make any decision about whether to commence proceedings. In other words, ASIC would act as the investigators, but not make the decision to commence civil penalty proceedings.

There would be some benefits in such an arrangement. A specialised litigation agency would have to develop core skills in what is an increasingly specialised area of the law. This arrangement would repose responsibility for determining whether public interest considerations required action or no action in a professional body that would become skilled in making those judgments.

At the same time, the twin peaks model would be preserved. ASIC would retain its licensing authority and the power to take action under a licence. It would remain the entity in regular contact with the regulated population. And the risk of industry capture affecting litigation decisions would be removed, by placing that decision in an independent agency.

Notwithstanding the prospect of those benefits, I do not recommend such a radical change. It may be that the removal of a regulatory tool as important as civil penalty litigation would have other effects for ASIC's work. Those effects would need to be properly understood before taking such a large step. But, more importantly, ASIC has acknowledged that its enforcement culture must change. It should be given time to

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demonstrate that changes can be made and to demonstrate that, once made, the changes are durable.

Although I do not now recommend the establishment of a specialist civil enforcement agency, ASIC's progress in reforming its enforcement function should be closely monitored. If, over the coming years, 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, further consideration should be given to developing a specialist agency of the type I have described.³⁷

An assessment of whether there is a need for a civil enforcement agency along the lines contemplated by the Royal Commission has merit. On this point, the Royal Commission also suggested that “An important consideration” for FRAA “will be [to determine] how effective [ASIC and APRA] are in enforcing the laws within their remit. (That will determine whether more radical steps, such as creating a specialist civil enforcement agency, should be reconsidered.)”³⁸

Secondly, the other reform that could be considered, like some other leading jurisdictions, is a specialist, stand-alone, superannuation regulator. Superannuation is vital to every single Australian, and its regulation is currently shared between ASIC and APRA, mostly splitting prudential and conduct oversight. Instead, there could be a single regulator that looks at both. A stand-alone regulator along these lines could also be considered for insurance.

Recommendation 13:

ASIC's jurisdiction be reviewed, and particular consideration be given to the merits of establishing a separate civil enforcement agency (or other regulatory agencies).

6. Concluding Remarks

I hope the ROCCC analysis, and the conclusion and recommendations coming from it, are of use to the Committee. I wish the Committee every success in this important review.

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³⁷ Royal Commission, Final Report, Vol 1 pp428 & 429.

³⁸ Royal Commission, Final Report, Vol 1 p474.