Parliamentary Joint Committee on Corporations and Financial Services

Answers to QoNs and additional information from 28 March 2014

Index	**Page**
Answers to questions on notice	3
Appendix A to question 16	29
Attachment to question 1 – Senior ASIC qualifications experience	35
Attachment to question 8 – Survey of securities laws and enforcement	41
Attachment to question 12 – CALDB review	87
Attachment 1 to question 19 – Small business booklet	99
Attachment 2 to question 19 – ASIC's deregulatory initiatives	107
Additional information – ASIC's performance management policy	133
Additional information – ASIC's talent management framework	159

COMMONWEALTH OF AUSTRALIA

Parliamentary Joint Committee on Corporations and Financial Services

Oversight of the Australian Securities and Investments Commission and the Takeovers Panel

Friday, 28 March 2014, Canberra

Question 1

CHAIR: On page 67 of the annual report you talk about your graduate program and about how you manage and retain talent in the organisation. You talk about the number of graduates who have applied from a range of disciplines. How many new intakes into ASIC are graduates, and how many are people who have relevant industry experience across the different sectors that you regulate?

Answer:

Graduates

The number of graduates recruited annually since 2010 is outlined in the table below. ASIC hires graduates from Law, Commerce, Economics, Business and Accounting disciplines. 70% have a grade point average of distinction or high distinction and many have industry related work experience. Work experience is one of the selection criteria.

Year	Number of graduates hired
2010	24
2011	21
2012	22
2013	19
2014	20

For more information on the skills and experience of ASIC staff, refer to the attachment titled *Senior ASIC qualifications and experience.*

Question 2

CHAIR: I am happy if you take the numbers on notice, but could you talk in principle in terms of how you plan to structure your workforce and how you approach that issue?

Answer:
The organisational structure is built around three clusters: Registry and Licensing, Investors & Financial Consumers (I&FC) and Markets which are aligned to our three strategic priorities. There are no plans to change this. Our regulatory teams are structured into stakeholder groups who regulate specific groups such as financial advisors, auditors or banks and insurers. The stakeholder team structure was adopted around 5 years ago, specifically to enable ASIC staff to have clearer accountability for particular segments of ASIC's regulated population or activity. In this respect, a significant benefit of this structure has been improving ASIC's engagement with and understanding of the industries we regulate. Enforcement teams are aligned to either the Markets or I&FC clusters. There are no plans to change this. We have recently changed the reporting lines of some teams to ensure registry activities are separated from regulatory activities. This is in recognition of the fact that the registry business has different drivers and requires different skills to the regulatory business, to ensure we understand the full cost of registry and regulatory activities, and to improve our ability to make decisions on the regulatory side of the business independent from the registry.

Question 3&4

CHAIR: Can you give us an idea of how large that secondment program is? Are we talking half a dozen people or 60 people?

Mr Medcraft: I will come back to you with some statistics on that, but it is something that we do encourage. Ideally what we try to do is have a swap—where basically they send somebody into ASIC and then we send the ASIC person out, so that essentially we maintain our resource. I think the swap arrangement is not a bad thing to have. We will come back to you on that.

CHAIR: With the data you provide, could you give us a breakdown not only of numbers but of the sectors and the level of seniority that people go into.

And

CHAIR: Particularly for the secondment situation, I am assuming you have appropriate probity structures in place. Do they take the form of an MOU, or how is it structured?

Answer:
Secondments
In the past five years, there have been 41 secondments of ASIC staff out to industry.

- **90% have been SES or executive level staff.**
- **The ASIC secondees have gone to the following organisations or their future names: AMP, Macquarie Group, Financial Planning Association, ASX, Ernst & Young, WHK, Treasury, McCullough Robertson Lawyers, Maurice Blackburn, King + Wood Mallesons, Ashurst, Gilbert and Tobin, Clayton Utz, AMP, Norton Rose, UBS, Hong Kong SFC, Ontario Securities Commission, APRA, China Securities Regulatory Commission, FMA New Zealand, Australian Indigenous Government Institute, ICAC, Australian Crime Commission, Australian Accounting Standards Board, CDPP, ACMA, VIC Roads.**
- **There are four levels of probity checks for secondees into ASIC:**
    - **Mandatory completion of a security clearance to Highly Protected status**
    - **Secondee's organisation signs Secondment Agreement, which includes their obligations on real or perceived conflicts during and after the secondment. Secondee signs Deed of Acknowledgement.**
    - **Completion of a work schedule outling duties and tasks and both parties identifying confidential information which the secondee may have access to.**
    - **Completion of on-line conflict of interest e-learning module before receiving access to any ASIC systems.**
- **In the past five years, there have been 14 secondments into ASIC.**
- **These have all been executive level staff.**
- **These secondees have come from: Ashurst, APRA, ACCC, McCullough Robertson Lawyers, Gilbert & Tobin, AMP, ANZ, CDPP, ATO, Clayton Utz, Queensland Audit Office.**

Question 5

CHAIR: You mention your senior managers' development on page 66, and it says sixty senior managers took up an invitation to develop their leadership. Is that purely a voluntary scheme or do you specify competencies for the different levels of management and then proactively seek to ensure that the personnel attain, develop and maintain those required competencies? Beyond the generic job description, have you specified for any given level of management within ASIC particular competencies, that is, qualifications plus experience, that you expect your people to have? And at this point in time, are you comfortable that 100 per cent, 90 per cent or 50 per cent achieve those competencies across the board?

Answer:

Senior Manager Development

81% (109) of our current senior managers have attended development centres where they were assessed against Australian Public Service Integrated Leadership Competencies (ILS).

60 Senior Managers attended business coaching groups in 2012/13. These groups were established to address needs identified in the development centres. An individual's decision to attend was based on whether the coaching group would address an identified development area.

To embed leadership, technical and managerial competencies, the Australian Public Service Integrated Leadership System (ILS) competencies are used throughout ASIC's HR processes, including job descriptions, behavioural interviewing questions, learning and development activities and talent identification.

The approach to ensuring staff maintain and increase their professional skills is based on the Continuing Professional Development (CPD) practices determined by the legal and accounting industry bodies. ASIC has three Professional Networks and Communities of Practice covering legal, auditing & accounting and investigatory areas of expertise, which deliver development activities and programs relevant to ASIC to ensure staff maintain specific expertise and obtain CPD points required by their professional bodies. While investigators are not required to have CPD points, they do have a network that caters specifically to their needs. It is mandatory for investigators to attend the *Managing Investigations* program. The majority of ASIC investigators are either lawyers or accountants.

In addition to our Professional Networks and Communities of Practice, over 200 sessions on technical subjects and management development are delivered every year. These programs address needs identified from individual development plans, training needs analyses and strategic initiatives.

The following on-line modules are mandatory for all ASIC staff: Induction, Behaviour at ASIC, Fraud Awareness, Safety in the Workplace, ASIC Security Induction, Valuing and Handling Information and Conflicts of Interest.

The performance and behaviors of staff are reviewed through the performance management system. The development planning process is also a part of this system.

A short biography of the majority of our Senior Leaders is attached below (and available on the ASIC website) to indicate the high quality of their experiences and qualifications.

ASIC Chairman

Greg Medcraft BCom (Melb)

Greg Medcraft was appointed ASIC Chairman on 13 May 2011 for a five-year term.

Greg joined as ASIC Commissioner in February 2009. Prior to ASIC, Greg was Chief Executive Officer and Executive Director at the Australian Securitisation Forum (ASF).

Greg spent nearly 30 years in investment banking at Société Générale in Australia, Asia, Europe and the Americas. More recently, he was the Managing Director and Global Head of Securitisation, based in New York.

In 2002, Greg co-founded the American Securitization Forum and was its Chairman from 2005 until 2007 when he returned to Australia. The American Securitization Forum is an industry group representing some 350 member institutions comprising all major stakeholders in the US$1 trillion US securitisation market. In January 2008, he was appointed Chairman Emeritus of the Forum.

Before joining Société Générale, Greg worked as a Chartered Accountant with KPMG.

Greg was elected by the IOSCO Board in May 2012 as its next Chair. His current term commenced in March 2013 and is due to finish in September 2014. In his capacity as IOSCO Board Chair, Greg is also a member of the Financial Stability Board, which reports to the G20.

ASIC Deputy Chair

Peter Kell BA (Hons) (Syd)

Peter Kell commenced as Deputy Chair on 6 May 2013. Prior to this appointment he was Commissioner from 7 November 2011.

From August 2008 Peter was Deputy Chair of the Australian Competition and Consumer Commission. He was President of the International Consumer Protection Enforcement Network in 2009-2010, and also served on the Consumer Policy Committee of the Organisation for Economic Cooperation and Development. Peter has been on the Australian Government Financial Literacy Board since its establishment, and is a member of the Commonwealth Consumer Affairs Advisory Committee.

Before joining the ACCC, Peter was Chief Executive of CHOICE (the Australian Consumers' Association) and a board member of the global consumer organisation Consumers International.

Between 1998 and 2004 he was ASIC's Executive Director of Consumer Protection and its New South Wales Regional Commissioner.

ASIC Commissioners

<u>Greg Tanzer BEc and LLB (Hons) (ANU)</u>

Greg Tanzer commenced as an ASIC Commissioner on 5 March 2012.

He served as Secretary General of the International Organization of Securities Commissions (IOSCO) from 2008 until early 2012.

Greg was previously Executive Director for Consumer Protection and International at ASIC, where he worked in various senior positions from 1992 to 2008.

Before joining ASIC, Greg worked in the Australian Government Attorney-General's Department and the Department of Finance. He is a qualified solicitor and barrister.

<u>John Price BA, LLB (Hons)(Queensland)</u>

John Price commenced as an ASIC Commissioner on 21 March 2012.

Since joining ASIC in 1999 John has held a number of senior roles including most recently as Senior Executive Leader, Strategy and Policy. John's previous roles at ASIC include Senior Executive Leader, Corporations, Acting Executive Director, Regulation and Director, Applications and Licensing.

In these roles John has been closely involved in the development and implementation of regulatory policy, the regulatory aspects of major transactions, and the identification and development of regulatory responses to emerging issues and risks. His regulatory experience includes matters relating to fundraising, mergers and acquisitions, financial services and accounting and audit.

John is also a member of the Financial Reporting Council, the Council of Financial Regulators and the Corporations and Markets Advisory Committee.

Prior to joining ASIC, John worked in the Gold Coast and Brisbane offices of Corrs Chambers Westgarth, a national law firm.

<u>Cathie Armour BEc, LLB (Hons) (ANU); LLM (Sydney)</u>

Cathie Armour' commenced as an ASIC Commissioner on 3 June 2013.

Cathie has 18 years experience in legal counsel leadership roles in international financial institutions. Most recently, she was General Counsel for Macquarie Capital and an Executive Director of Macquarie Group, advising on equity, debt and private capital markets, mergers and acquisitions and financial investment transactions. She has also held senior compliance and operational risk positions at Macquarie Capital and at JP Morgan in Australia. Before she joined ASIC, Cathie was also a member of the ASX Tribunal.

Cathie previously worked in private legal practice for the forerunners of the firms King & Wood Mallesons and Allens in Sydney and for Milbank,Tweed, Hadley & McCloy in New York.

Senior Executive Leaders

Michael Kingston:
Chief Legal Officer. Michael is a Victorian barrister whose areas of practice include Banking and Finance, Commercial Law and Companies and Securities. He was a partner in the Mergers and Acquisitions group of Mallesons until July 2003 and has worked on numerous large transactions.

The CLO will also lead ASIC's new team of Special Counsel and contribute to legal professional development for the whole of ASIC. These Special Counsel have been recruited through internal promotion and external recruitment. They will provide strategic, legal and other input into major cases and assist the deterrence teams.

Greg Kirk:
Senior Executive Leader – Strategy Group, former Senior Executive Leader - Deposit Takers, Credit and Insurance Providers and Director, Compliance and Campaigns, Consumer Protection, ASIC. Former Principal Solicitor, Public Interest Advocacy Centre. Greg has led the Compliance and Campaign team on work on problems within the mortgage broking industry and home underinsurance. Greg also led ASIC's focus on false and misleading advertising, including targeted enforcement action.

Andrew Fawcett:
Senior Executive Leader, Strategy and Policy. Andrew was previously a Special Counsel in ASIC's Chief Legal Office and has held senior positions in the Investment Banks and Strategic Policy teams. Andrew has been closely involved in projects such as the Future of Financial Advice reforms, the short selling ban and licensing of credit rating agencies. Prior to joining ASIC, Andrew worked on electricity reform for the Victorian Department of Treasury and in a national law firm.

Matthew Abbott:
Senior Executive Leader - Corporate Affairs. Matthew joined ASIC in 2010 as Senior Executive Leader - Corporate Affairs. Before ASIC, Matthew was a director of a public affairs consultancy that included six months on secondment with the Salteri family working on the sale of Tenix's defence assets. For several years, he also held a senior corporate affairs role with global shopping centre company, the Westfield Group. Matthew was an adviser to former Federal minister Hon Joe Hockey MP in the Howard Government and has worked with several NSW Liberal leaders. He has worked as a financial journalist in the United Kingdom and started his career as a staff reporter with the Australian Financial Review. Matthew has a Bachelor of Commerce (UNSW) and a Master of Public Affairs (Sydney University).

Investors and financial consumers

Chris Van Homrigh:
NSW Regional Commissioner and Senior Executive leader - Investment Banks. With a wealth of international and domestic experience Chris was a Managing Director with Société Générale having been based in Japan, Canada and Australia managing the bank's securitisation business and teams. Prior to this he spent 10 years with Citibank. Chris is also a Chartered Accountant.

David McGuinness:
Senior Executive Leader - Financial Services (1). Former Director, NSW and ACT Enforcement, ASIC. In this role David had site and operational management of the staff and enforcement investigations undertaken by ASIC in Sydney and Canberra. Prior to joining ASIC, David was a

senior partner of Blake Dawson Waldron in its Litigation & Dispute Resolution practice and held a number of leadership positions in that firm.

Tim Mullaly:
Senior Executive Leader - Financial Services (2). Former Director, Licensed Enforcement, ASIC. Former Assistant Director (Vic & Tas) Enforcement, ASIC. Tim is responsible for the leadership, management and strategic direction of ASIC's complex and publicly sensitive enforcement projects in relation to licensed entities. Tim has also led teams comprising 80 staff in delivering high-quality and responsive enforcement results. Tim has also worked as a Senior Accountant in private practice.

Ged Fitzpatrick:
Senior Executive Leader, Investment Managers and Superannuation. In this role Ged is responsible for the regulation of fund management, custodial services and the non-prudential aspects of superannuation funds. He was previously Senior Executive Leader for Credit at ASIC, where he was responsible for market intermediaries and non-bank lenders operating under the recently introduced credit legislation.

Prior to joining ASIC he was General Manager, Policy & Government Relations with the Financial Planning Association of Australia, dealing with a range of issues including superannuation, investment, credit and margin lending. He is a former Secretary General of the Institutional Money Market Funds Association and International Policy Adviser for the Investment Management Association in London.

Joanna Bird:
Senior Executive Leader of the Financial Advisers. Joanna Bird is the Senior Executive Leader of the Financial Advisers team, a position she shares with Louise Macaulay. The Financial Advisers team is responsible for the regulation of the financial advice industry, oversight of the ASIC approved external dispute resolution schemes and general consumer protection policy work. Previously, Joanna was an Associate Professor at the Sydney Law School at the University of Sydney, teaching and researching in the area of financial services regulation and regulatory theory and practice. She has also worked in ASIC's strategic policy area, and as a solicitor in private legal practice.

She has a Bachelor of Arts and a Bachelor of Laws (First Class Honours and University Medal) from the University of Sydney and a Bachelor of Civil Laws from the University of Oxford.

Louise Macaulay:
Senior Executive Leader of the Financial Advisers. Louise Macaulay is the Senior Executive Leader of the Financial Advisers team, a position she shares with Joanna Bird.The Financial Advisers team is responsible for the regulation of the financial advice industry, oversight of the ASIC approved external dispute resolution schemes and general consumer protection policy work.

Previously Louise was ASIC's Commission Counsel. Prior to that she led ASIC's enforcement policy, practice and law reform agenda. Before joining ASIC, Louise was a Senior Associate at Allens. Louise holds a Master of Laws from the University of Sydney, and a Bachelor of Laws and a Bachelor of Arts (Hons) from ANU.

Markets

Oliver Harvey:
Senior Executive Leader - Financial Market Infrastructure. Oliver leads ASIC's Financial Market Infrastructure team, which has primary responsibility for oversight of financial market operators,

clearing & settlement facilities and trade repositories. Prior to joining ASIC, Oliver worked with McKinsey & Company in their New York Office, in the Global Corporate & Institutional Banking Practice. In that role, Oliver served a number of clients, including large exchanges, investment banks and professional services firms. Oliver is a qualified lawyer and commenced his career with a major international law firm.

Greg Yanco:
Senior Executive Leader - Market & Participant Supervision. Former Chief Executive Officer, AXE ECN Pty Limited and former Manager Institutional and Wholesale Markets, during his career at the Australian Stock Exchange (1986-2006). Greg has extensive experience and knowledge in financial market development, regulation and supervision. At the ASX, Greg implemented equity market structure changes and managed the operations of the market surveillance and investigations units.

George Stogdale:
Senior Executive Leader - Market Integrity (2). Former Senior Partner, Middleton Commercial Litigation Group. Team leader – commercial dispute, professional indemnity and media practice. George has broad experience in commercial law, including risk management, disputes, mediation, court proceedings and compliance. During four years as a board member at Middletons, George was intimately involved in assessing merger/takeover proposals when the firm merged with KPMG Solicitor Corporation and Acuiti Legal in NSW.

Doug Niven:
Senior Executive Leader - Accountants and Auditors. Doug joined the ASIC as Deputy Chief Accountant in 1998. He oversaw the development of ASIC's financial reporting and audit policy, and the financial reporting surveillance program. Doug previously worked at Deloitte Touche Tohmatsu where he managed audits of companies in the financial services sector.

Chris Savundra:
Senior Executive Leader - Markets Enforcement. Chris leads ASIC's Markets Enforcement team, which is responsible for investigating and taking enforcement action in relation to market misconduct, corporate governance and financial crime related matters and disciplinary action against auditors, insolvency practitioners and market participants. Chris is a former Litigation Counsel within ASIC's Chief Legal Office. He has been responsible for the carriage of a number of ASIC's major investigations and litigation. Chris has led the team on many of ASIC's recent insider trading outcomes. Prior to joining ASIC, Chris worked in the litigation group of Allens Arthur Robinson and Herbert Smith (London).

Jane Eccleston
Senior Executive Leader - Corporations. This team is responsible for operational and project-based work relating to corporations, including mergers & acquisitions, schemes of arrangement, fundraisings, continuous disclosure, corporate governance and financial reporting. Prior to this Jane was Assistant Director in the ASIC team responsible for supervising ASX and other licensed financial markets. Before joining ASIC, Jane was a Senior Associate with Mallesons Stephen Jaques and has also worked as in house counsel for Westpac. Jane holds a Bachelor of Laws (Hons) and a Bachelor of Arts (Hons) from the University of Sydney.

Kate O'Rourke
Senior Executive Leader - Corporations. This team is responsible for operational and project-based work relating to corporations, including mergers & acquisitions, schemes of arrangement, fundraisings, continuous disclosure, corporate governance and financial reporting. Prior to joining ASIC, Kate was an associate with Sullivan & Cromwell, working in both their New York and Sydney

offices. Kate holds a Master of Laws from New York University, and a Bachelor of Laws and a Bachelor of Economics (Social Science) from the University of Sydney.

Jane Gouvernet

Regional Commissioner WA and Senior Executive Leader - Emerging, Mining & Resources. Jane was appointed Regional Commissioner WA on 29 January 2014 and Senior Executive - Emerging, Mining & Resources on 16 December 2013. Jane has spent her professional life working predominantly in the Western Australian market in a regulatory capacity, including in a number of senior ASIC positions within the markets enforcement and strategy teams. Prior to working at ASIC Jane consulted to the Rothwells Taskforce, worked with the London Stock Exchange, The Securities Association and the Australian Stock Exchange in both Perth and Sydney. Over the course of her career, and particularly in her most recent role as Senior Manager - Emerging, Mining and Resources, Jane has developed a deep and varied knowledge of the West Australian regulatory market.

Jane is a graduate member of the AICD and FINSIA.

Registry and licensing

Rosanne Bell:

Senior Executive Leader - Registry Services and Licensing. Former Director, Public Information Program, ASIC. In this role, Rosanne's responsibilities have included: administration of Australia's public registers of companies and professionals, including information lodgment and searching functions; responding to enquiries through ASIC's national call centre and the provision of on-line and over the counter services. In 2003, Rosanne led ASIC's implementation of Government policy reforms known as CLERP 7 to simplify compliance and lodgement obligations of small businesses interacting with ASIC.

Brett Bassett:

Queensland Regional Commissioner and Senior Executive Leader - Small Business Compliance and Deterrence. Brett is a former founding member of KordaMentha Forensic. Prior to joining KordaMentha Forensic, Brett was a Director and Manager at Deloitte where he consulted on investigations and fraud risk management. Before working in consulting, Brett was a Queensland Police Officer and also worked in regulatory roles with the Office of Fair Trading (NSW), Australian Competition and Consumer Commission and ASIC.

Operations

Carlos Iglesias:

Chief of Operations. Former Executive Director, Finance, ASIC. Carlos is responsible for funding, budget management, capital adequacy and management as well as financial and management accounting matters. He is also responsible for knowledge management. Before joining ASIC in 1992, he worked at the Australian Taxation Office, CPA Australia and Deloittes in a range of management, accounting and consulting roles.

Wendy Bryant:

Senior Executive (Information Technology) - Chief Information Officer, responsible for ASIC's IT Department. Formerly an Executive Director at IBM, with a background in managing large IT delivery teams. Wendy was a Trustee Director on IBM's corporate superannuation fund for seven years and also a member of IBM's Diversity Council and a spokesperson on Work/Life balance issues.

Helen O'Loughlin

Senior Executive Leader, People & Development - Before joining ASIC in 2011 Helen was Head of Human Resources for Regional Banking at Westpac Banking Corporation. She also acted as Head of Regional Banking for WA. During her 11 years at Westpac she had a number of senior roles including led the people stream of work in the St George and Westpac merger. She also led the functional areas of talent, recruitment and learning for the entire bank. Helen also worked at the Commonwealth bank in their Communications department and spent eight years in various management roles within the NSW Department of Technical and Further Education. Helen has degrees in Arts and Education from Adelaide University.

Question 6

CHAIR: I would like to go to a paper that you have provided, which looks at some of your strategic policy initiatives, and one of them is improving the regulatory tool kit. We have discussed previously the concept of co-regulation with industry. I would like to link that to specific measures that you are putting in place in terms of your personnel and their understanding of your policy objectives, as well as your thoughts on innovation and what you are doing to change or empower a culture to engage with industry with a concept of co-regulation as opposed to acting as 'the regulator'—the capital 'R' regulator with the big stick. Could you talk to the committee about concrete steps that you have taken or are taking in that area.

Answer:
We expect all staff to operate within, and have an understanding of, ASIC's Strategic Framework. This is achieved through regular team and organisational communications and forums. Our staff survey monitors the levels of understanding and engagement with our priorities, the culture, the work environment - including the level to which staff believe they have the tools and authority to do their job. Annual action plans are developed to address survey findings. ASIC management and our external Audit Committee monitor the outcomes and progress of these action plans.

In 2008, ASIC undertook a major restructure and established stakeholder teams. The purpose of these teams was to build and manage relationships with industry groups on an on-going basis. This model remains in place and is a critical part of ASIC's regulatory practices. Staff who have specific responsibilities in terms of stakeholders have these clearly articulated in their performance agreements and are managed against these.

In 2011/12, we refreshed and implemented ASIC's values of Accountability, Professionalism and Teamwork which guide behaviours internally and externally. The Values drive behaviours around innovation (finding better ways to do things), openness to the views of others (including our stakeholders) and achieving results. The Values are embedded in our recruitment, development and performance management practices.

Question 7

CHAIR: Are you aware of any studies that look at the nature of that information which is behind the pay wall and the potential productivity which may be gained by the broader business sector if that were freely available? That is the contention of the whole open data movement. Are you aware of any that pertain particularly to those items and information that are behind your pay wall?

Mr Tanzer: I am not specifically aware with respect to the ASIC information. But I will go back and check on that, because I know that we have looked at this broader policy issue on previous occasions, typically around when the policy issue arises about whether or not they want it freely available. I am not aware of anything specific, but I will check.

Mr Medcraft: One thing you may want to check is whether other comparable jurisdictions—

Mr Tanzer: There certainly are in other jurisdictions.

Answer:

ASIC confirms it is not aware of any studies that have looked at the nature of that information which is behind the pay wall and the potential productivity which may be gained by the broader business sector if that information was freely available.

Question 8

CHAIR: Do you have any longitudinal evidence from other jurisdictions, whether they be in Australia—and you mentioned the ACCC—or overseas, where, having brought in these higher civil penalties, they have actually seen a drop-off in the occurrence of this intentional regulatory breach, or have the numbers continued? I ask that question because there has been a long civil-society debate around things like the death penalty and harsh sentencing, and some say that it does not actually change either the initial rate of crime or, for those who are jailed, the reoffence level.

Mr Medcraft: We actually have a very good example in Australia, because, with insider trading offences, the penalties were doubled from 5 years to 10 years. Chris, you may want to comment on this, but what we found is that it has changed things a lot, hasn't it?

Mr Savundra: Yes, I think there is a greater willingness now to plead guilty and obtain discounts, given the doubling of the penalty. So there has been a greater number of outcomes, and particularly a greater number of guilty pleas, as a result.

Mr Medcraft: I do recall—and I will take it on notice, if that is okay—that there has been a study, I believe through the World Bank, that found that it was not so much the drafting of insider trading laws that had an impact on insider trading; it was their enforcement.

Answer:

Please see page 18 of the study found here and attached
https://openknowledge.worldbank.org/handle/10986/14243

Question 9

CHAIR: This is my last question on this area. You mentioned before the discretion to decide whether it was an unintentional or innocent error versus an intentional act. That clearly goes to the quality of regulation and hence my thinking that the more that can be co-regulation, so industry are very much engaged in setting a sensible and understandable set of regulations—can you just talk through your view of how you would manage that considerably higher penalty regime with, correspondingly, a government drive towards deregulation and providing a framework whereby both industry and you as the regulator were comfortable that those lines were clear enough to both parties, in that accurate and consistent decisions around intent and breaches could be made?

Mr Medcraft: I think that is a very good question. If you do not mind, I will take it on notice and come back to you. It is a very good question. I will take it on notice.

CHAIR: Philosophically, though, Mr Medcraft, you must have some—

Mr Medcraft: Philosophically, having come from an industry group and having run an industry group, I think that co-regulation can work very well, but co-regulation with an industry group does mean that the industry group has to go from just simply being in advocacy and education to actually being its own, if you want, enforcement body. So, if you are an industry group, you have to accept that that is part and parcel. Many of them do not want to move to that, but, if they do want to, it does mean taking a different shape. But I do think that a co-regulatory solution can work, and we see it working very successfully in Australia and around the world, so I am actually quite supportive of it. But I think that at the end of the day it has to have the right checks and balances in it to make sure that it does work properly. Certainly, for example, in the audit profession there has been a lot of talk about what you do about auditors. There is an example where I think you could actually do a lot more in terms of better co-regulation. I think the profession pretty well is self-regulated at the moment. I think there probably needs to be a strengthening of oversight, but then we need to strengthen the checks and balance. That is my view. I think that it can be made to work and I think it can clearly be made to work in the context of a deregulatory environment, frankly. It clearly close to deregulation. I guess what you want to do is make sure that the outcomes that you are getting are as good as, if not better than the outcomes you are getting today. I always take the view that generally industry is in a better position to deal with these issues because they often know where the problems are in their particular sector. So I think it can work and I think that it is often more efficient as long as the industry is willing to take on that role of policing its own sector. So hopefully, that gives you some feel for it, but we will come back to you.

Answer:

ASIC is committed to delivering smarter, not more regulation.

Having penalties available that create an incentive to comply with the law can facilitate this objective.

Those who intentionally break the law and cause serious damage should face tough penalties. This will make them—and others—think twice about breaking the law. Equally, where penalties act as an effective incentive to comply with the law, the risk of non-compliance is reduced. This allows

regulators to tailor their regulatory responses so that they are less onerous on business (for example, by conducting fewer surveillances). In contrast, where penalties are too low, there is a risk that they will be simply considered as a 'cost of doing business'. In these circumstances, the risk of non-compliance can increase and, as a result, regulators may be forced to pursue more burdensome regulation (for example, by conducting a larger number of surveillances and addressing wrongdoing through enforcement).

ASIC adopts a transparent approach to enforcing the law. ASIC's Information Sheet 151 *ASIC's Approach to Enforcement* explains to our stakeholders, including industry, the factors we consider when deciding whether to investigate alleged breaches of the law and possibly take enforcement action seeking criminal or civil penalties. One key factor we consider is the seriousness of the alleged misconduct (e.g. was it dishonest or deliberate, or did it lead to widespread public harm?).

Question 10

Mr COLEMAN: What about when you search something on an ASIC site—and I have done this myself—and you basically get to the point where it says: this is $50 or $100, do you want to go any further? Are you catching that in the seven per cent?

Mr Tanzer: That is right. If you pay the $50—

Mr COLEMAN: If you did not pay the $50 because you are a consumer and you get to that point and you say you do not want to pay the $50 and you stop?

Mr Tanzer: If you did not pay the $50, that is counted as a free search.

Mr COLEMAN: That is probably not the greatest statistic then, because—again, I am speaking from experience—over the years I have searched the ASIC website for lots of things and you might get to a point where you are asked to pay and you just stop the process, because it is a sufficient disincentive that you are not going to pay the $50 or whatever it is. Do you have any statistics on how many people get to that point and then stop.

Mr Tanzer: I will check. I suspect we would now, because this free search service online is a relatively new service over the last couple of years.

Mr Medcraft: We had 68 million searches overall in 2012-13. Did we mention that number?

Mr Tanzer: Yes. In 2013-14 to date there have been over 19 million free searches and about 189,000 paid searches.

Mr COLEMAN: But the way you are defining a free search includes searching that is free but ultimately gets you to a point at which you are asked to pay and stop searching?

Mr Tanzer: Yes.

Mr Day: No. Can you please clarify that question, Mr Coleman.

Mr COLEMAN: Unless the site has changed recently—

Mr Day: The data that Commissioner Tanzer has given you is about when you receive the information product—that is, the results of the search. It is not including the point where it identifies that certain information might be available but you have to pay for it. That is not included as a search result.

Mr COLEMAN: So that is not in the data at all?

Mr Day: We can get you that data, as Commissioner Tanzer indicated. But you were indicating by that question just then that if you seek certain information and then the system indicates that there is certain information available that you then have to go on and pay for—I took it that your question was saying that that is counted as a search that was free.

Mr Tanzer: If that is your question, that is not right. As I understand it, the free searches are ones where you have asked about information about David Coleman Pty Ltd, you have got the

information back from the free search about what you can get, and then you say, 'I see that I can pay for this extra; can I get that?' and you are told that you need to pay, that does not count as a search. If you pay for it, that counts as a paid search. The bit where you got the free information counts as a free search. Sorry, I thought what you would have done is run your David Coleman Pty Ltd search and got back what it is—and that counts as a free search—and then you go on and ask for something further that requires extra payment. Unless you make that payment—

Mr COLEMAN: That is neither a free search nor a paid search; it is just some other category of search.

Mr Tanzer: It will not be anything that is made.

Mr Day: We can potentially get you that data, Mr Coleman.

Mr Medcraft: It would be interesting to see whether we can get the data, if it is possible, of those that go that far. But then—

Mr COLEMAN: I suspect that is a significant number because it goes to the question of how many people are not actually getting what they want because they do not want to pay the $50 or whatever it is.

Mr Medcraft: It would be quite interesting. I would just remind you that, obviously, the revenue that comes from this does not come to ASIC.

Answer:

- **In 2012-13 there were a total of 67,995,147 searches conducted with ASIC. 93% of all searches were conducted for free of charge, with the remaining 7% attracting a fee.**
- **The high volume paid searches are the Current Company Extract and the Current and Historical Company Extract.**

The design of the website combines the free information and the decision point to purchase paid information on a single screen.

It is not possible with the current design to distinguish those users who have exited the site because they were satisfied with the free search, and those who exited the site after a decision not to pay the fees - $9.00 current company extract, $18.00 historical company extract to obtain further information. For this reason ASIC cannot determine if people are receiving the information they want for free of charge and leaving the site satisfied, or leaving the site dissatisfied due to the requirement to pay a fee to obtain further information.

	Counts
Free search	**1 free search**
Free search followed by a paid search	**1 free search, 1 paid search**
Free search where searcher chooses not to follow with a paid search	**1 free search**

Question 11

CHAIR: One of our colleagues who could not be here today has been monitoring proceedings and has just sent me through a message to ask you to clarify this, just coming back to the issue of penalties. You made the comment, both in your article that was in *The Australian* and in your talk today, about a maximum of $200,000. He indicated that potentially the Corporations Act allows for maximum penalties, including for things like insider trading and market manipulation, of up to $765,000 or three times the value of the benefits obtained by the offence, whichever is greater, or, for corporations, $7.65 million or three times the value of the benefits, whichever is the greater. I am happy for you to take it on notice, but could you confirm to the committee if that is correct and whether that applies to ASIC's range of options?

Ms Armour: That is correct. It was recently changed by—

Mr Medcraft: That is actually in the report, yes.

Answer:

ASIC's REP 387 *Penalties for corporate wrongdoing* indicates that:

- **the maximum criminal fine available in Australia for insider trading for individuals is the greater of $765,000, or three times the benefit gained (see Table 4 of REP 387); and**
- **the maximum civil penalty for individuals in Australia for insider trading is $200,000 (see Table 5 of REP 387).**

The equivalent penalties for corporations are the greater of $7.65 million, three times the benefit gained or 10% of annual turnover for criminal matters, or $1 million for civil penalty actions.

There are legal and practical barriers that prevent ASIC from seeking both criminal and civil penalties for the same contravention. Whether we take criminal or civil penalty action in a particular case will often turn on available evidence, as well as what outcomes we want to—and can—achieve.

One of the key findings in REP 387 is that while the Australia's maximum criminal penalties are broadly consistent with those available in the jurisdictions reviewed, Australia's non-criminal penalties (civil and administrative penalties) are not. In other jurisdictions, REP 387 demonstrates that criminal penalties, as well as administrative or civil penalties, have been obtained for the same conduct.

Question 12

CHAIR: You also undertook a review of the costs of ASIC's support to the Companies Auditors and Liquidators Disciplinary Board. What were the findings of that review? What has been implemented as a result of those findings?

Mr Medcraft: We can take that on notice and come back to you, Senator. We did actually do an efficiency review and there were some adjustments made to the staffing and also to the accommodation arrangements. But it would probably be better to come back to you with the detail.

Answer:

Please see attached CALDB Operational Efficiency Review

Question 13 (Only for noting)

CHAIR: You have a number of tables in your annual report for various areas. Generally speaking from a longitudinal perspective, I think the most I have seen is about two years in a contiguous table. What would be useful for the committee is to have tables that go over a longer period even just at the summary level. But if you can throughout the detail, that would be good. It would give us an understanding of trend in looking at workforce expenses et cetera against the different activities that ASIC has undertaken. If in future you could include those in your annual report, that could be useful.

Mr Medcraft: Sure. Would you like to come back to us with suggestions as to which ones you think we could—

CHAIR: Take it as a general comment but, if there are ones that you think are going to be excessive in workload to produce, come back and we will tell you if we are happy for them not to have that more longitudinal approach. Preferably, if you can, across all of them would be useful.

Mr Medcraft: On page 152 we do have stakeholder data back to 2008. That is six years. We will look at the others as well.

Question 14

CHAIR: Thank you. I am happy for you to take this question on notice. Obviously the AAT is one of the key appeals processes, except for takeovers, where you have the Takeovers Panel. How many decisions have been made by the AAT in relation to ASIC? Can you provide some information about the time taken, both for the outliers—what is the quickest and what is the longest—and on your average time taken for the AAT? Have you done any work to understand the cost not just to ASIC but to industry of that time? Are there any proposals you have to improve the appeals mechanism for the commercial sector?

Mr Tanzer: Since July 2009 we have had 153 matters appealed from ASIC to the AAT. The general areas that they fall into relate to decisions to disqualify or ban directors, to ban a person from the financial services industry or the credit industry, or to cancel or refuse a licence. Those tend to be the larger categories. More recently, just in the last 12 months or so, an emerging category is business name refusals—refusals to register a particular business name. We took that function on a little over two years ago. It is difficult to make a calculation, because the time periods differ, but one in five or so decisions that we make to refuse or cancel a licence or discipline a person in some way might be appealed to the AAT. The success rate, if you call it that—the decisions that would be varied or upheld by the AAT—is about one in 10 of those that are appealed, broadly speaking. So you would say that one in 50 might be upheld and one in five might be appealed out of a population of, say, 200. When I talk about director disqualifications, over that period we might have had about 200 director disqualifications, and about 20 would have been appealed the AAT. We will take the time frame issue on notice.

CHAIR: What I am concerned about is to understand whether the process is as efficient as it can be and whether there is a better way to have an appeals process that imposes less cost on both you as a regulator and, particularly, on the sector.

Mr Medcraft: We will take that on notice.

Answer:

- **Of the 185 AAT appeals we have data for, we only have sufficient data about 153 at hand to enable calculation the timeframes involved.**
- **After removing matters that were withdrawn or that are ongoing, we have data for 69 finalised applications.**
- **The average time of each review was 11.40 months.**
- **The shortest review was 0.62 months.**
- **The longest review was 55.66 months (4.6 years).**
- **49 of these reviews were completed within 12 months.**
- **60 were completed within 18 months.**
- **76 were completed within 36 months (3years).**
- **3 took between 49.78 to 55.66 months (4.1 – 4.6 years).**

Question 15

CHAIR: Given the time, I will ask you to take this on notice. Given the increased interest in the use of virtual currencies like bitcoin—I believe there are 191 of them now available in the market—and the fact that some of our mainstream financial providers such as banks are, I understand, starting to provide an interface with those virtual currencies, I would be interested to know whether ASIC believes there is a role for a government as a whole, but specifically you as a regulator, to look at that area.

Mr Kell: We are happy to provide that. We will take it on notice.

Mr Medcraft: We have a detailed response which we will provide to you.

Answer:

Virtual currencies such as bitcoins are a developing area globally. ASIC monitors new developments in the marketplace and, accordingly, ASIC is considering whether and how the legislation it administers, such as the Corporations Act, applies to virtual currencies.

ASIC's view is that bitcoins themselves (and other virtual currencies) are not financial products and are not regulated under the legislation we administer. Unlike Australian dollars or other traditional currencies, bitcoins are not issued by a central bank and do not give the bitcoin holder any right to make payments in this form. The ability of a person to use bitcoins for making a payment depends entirely upon the other party agreeing to accept bitcoins. As a result, the following conduct would not involve a financial service and would not trigger the financial services licensing and conduct regime:

- **making offers to buy or sell bitcoins;**
- **operating a trading platform through which others can buy and sell bitcoins; and**
- **providing advice to others about whether to buy, hold or sell bitcoins**

ASIC is also considering whether and how the legislation we administer applies to other facilities related to virtual currencies, including services for the completion of transactions. Whether or not these facilities amount to regulated conduct depends upon the terms of each facility. ASIC is consulting with other Australian regulators that are also giving consideration to the regulation of virtual currencies. This includes both financial regulators and law enforcement agencies that are examining the use of bitcoin in criminal activities. Additionally, the regulation of bitcoins is being considered by regulators and policy makers internationally.

We understand that some Australian banks are closing the accounts of their business customers who primarily trade in bitcoin and similar crypto currencies. http://www.smh.com.au/it-pro/business-it/nab-severs-ties-with-bitcoin-vendors-20140410-zqt3b.html

ASIC has published information for consumers about virtual currencies and the risks associated with using these currencies on our MoneySmart website.

Question 16

CHAIR: Thank you very much. I ask the same question in relation to social impact bonds or social benefit bonds.

Mr Medcraft: We are happy to provide you with detail on that.

CHAIR: That is, as you know, increasing in popularity in New South Wales, in South Australia and potentially overseas.

Mr Medcraft: I actually had a discussion with Mike Baird only yesterday about social bonds and what they are doing.

CHAIR: Very briefly—I will obviously look for your detailed response—is that something you believe there is a role for ASIC to take a particular view on?

Mr Medcraft: We will come back to you, but it is certainly an area, as a form of capital markets, which is quite interesting. Yes, we have a briefing prepared on this issue, and we will provide you wth comment.

Answer:

Summary

Social Bonds are an emerging financial product that aim to produce positive social outcomes. They involve a partnership between government, non-government charities/not-for profit bodies, and private investors. Private investors or philanthropists provide initial funding for social programs that are expected to save taxpayer dollars. If the policy goals are met and savings materialise, the investors receive their money back with interest. See Appendix A for a diagrammatical representation.

Social Bonds are a departure from the traditional approach of Government-funded community services where the government provides funding directly to a charitable or not-for-profit organisation that delivers a specific program on the Government's behalf.

Social Bonds have been trialled overseas, mostly in the UK and the USA. In Australia, the first Social Bond was sponsored by the New South Wales State Government, in partnership with various charities and not-for-profits.

Social Bonds are debentures under the *Corporations Act 2001*. If offered to retail investors the disclosure, trustee and licensing provisions of the Act would apply to any charitable or not-for-profit issuer of Social Bonds. ASIC provides relief to charities from some of the requirements of the Act in connection with the issuing of debentures. If the debentures are issued by state or territory governments or certain exempt bodies, the Corporations Act provisions generally do not apply.

Any policy view on the merits of social bonds is more appropriately formed by the government. We note that the issuance of these financial products can be accommodated within the regulatory settings of the Corporations Act.

Overseas Trials

Social Bonds have been trialled in the UK and the USA. They have been used primarily to combat social disadvantage of communities, children and families as well as addressing homelessness, public safety, recidivism and chronic health issues.

The world's first Social Bond was aimed at reducing recidivism rates at Peterborough Prison in the UK. The Bond raised £5 million which was used to offer former inmates skills to increase their education levels, vocational skills and confidence during and after confinement. Interim results as at 31 October 2013 have found a 12% reduction in the frequency of further conviction per 100 former prisoners since 2008, compared with an increase of 11% nationally over the same period.

In the US, a Bond to reduce re-incarceration of adolescents in New York was launched in 2012. Goldman Sachs invested $9.6 million in the Bond which is supported by a guarantee of $7.2 million provided by Bloomberg Philanthropies. Earlier this year, Goldman Sachs partnered with Chicago philanthropist JB Prizker to put up a combined $7 million for at-risk children to attend preschool.

President Obama has made $100 million provision in the 2012 Budget Plan for up to seven "Pay for Success Bonds", and a number of US states have begun their own development work.

Australian Trials

The NSW Government launched the first pilot Australian Social Bond in March 2013. It funds UnitingCare Burnside's New Parent and Infant Network that works with struggling families to keep them together. The Bond issue raised $7 million. The bond was issued by UnitingCare Burnside and underwritten by Social Ventures Australia.

The NSW Government launched a second Social Bond in June 2013 which funds the Resilient Families Service provided by The Benevolent Society. The social outcome is to prevent children entering into out-of-home care. This bond was backed by Westpac and CBA.

The NSW Government is currently working on a third Social Bond pilot to reduce adult reoffending in the criminal justice system.

There has also been interest in the Social Bond models elsewhere in Australia including a discussion of the model at hearings of the Senate Economics References Committee Inquiry into Finance for the Not-for-Profit Sector as well as a research paper, 'Understanding Social Impact Partnerships', into their application in Western Australia. The South Australian Government released a discussion paper into Social Bonds in February 2014 but is yet to make any recommendations.

Application of the Australian Legal and Regulatory Framework to social bonds

Social Bonds are debentures.[1] The rules applicable to the issuance and sale of social bonds as a type of debenture depends on who is buying and selling them.

Disclosure requirements

Generally someone wishing to offer social bonds to retail investors needs to prepare a prospectus describing the security and their business.

[1] A debenture is defined by the *Corporations Act 2001* (the **Act**) to be a 'chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body' *Corporations Act 2001* s9.

However, if the social bonds are not being offered to retail investors, that is, they are instead being offered to professional or sophisticated investors, a prospectus or other disclosure document does not need to be prepared.

If the social bonds are issued by State and Territory Government authorities and agencies, they would are covered by an exception from the disclosure requirements of Chapter 6D that would ordinarily require the preparation of a prospectus for the offering of securities. Further relief from the disclosure requirements in Ch 6D is provided to 'exempt bodies'. An 'exempt body' is a body corporate, but not a company, that is incorporated under State or Territory Law.

Debenture Requirements in Chapter 2L of the Act

Chapter 2L of the Act imposes specific requirements when debentures are offered to retail investors including the appointment of a trustee and entering into a trust deed. Once again, if not offered to retail investors, these rules do not apply.

The provisions of Chapter 2L apply to a 'body' that makes an offer of debentures to investors under Chapter 6D. This will include any body corporate or an unincorporated body, and includes, for example a society or association. This broad definition extends to charities and not-for-profits.

Relief from the Provisions of Chapter 2L and Chapter 6D

Specific relief from the requirements of Chapter 2L and Chapter 6D is provided for charities in ASIC Class Order 02/184 *Charitable investment schemes – fundraising*. CO 02/184 also provides charities with relief from the licensing and managed investment scheme provisions in Chapters 7 and 5C of the Act.

ASIC Regulatory Guide 87: *Charities* states that the term 'charity' is used to describe religious, education, community and other organisations. Charities are commonly defined by reference to the relevant provisions of the *Income Tax Assessment Act 1997*.

While CO 02/184 still requires charities to provide certain information about offers of debentures, the underlying principle of the relief is that where these disclosures are made and the charity accepts liability for any loss or damages to investors arising from the conduct of that charity, charities should not have to apply individually to ASIC to gain relief.

Appendix A

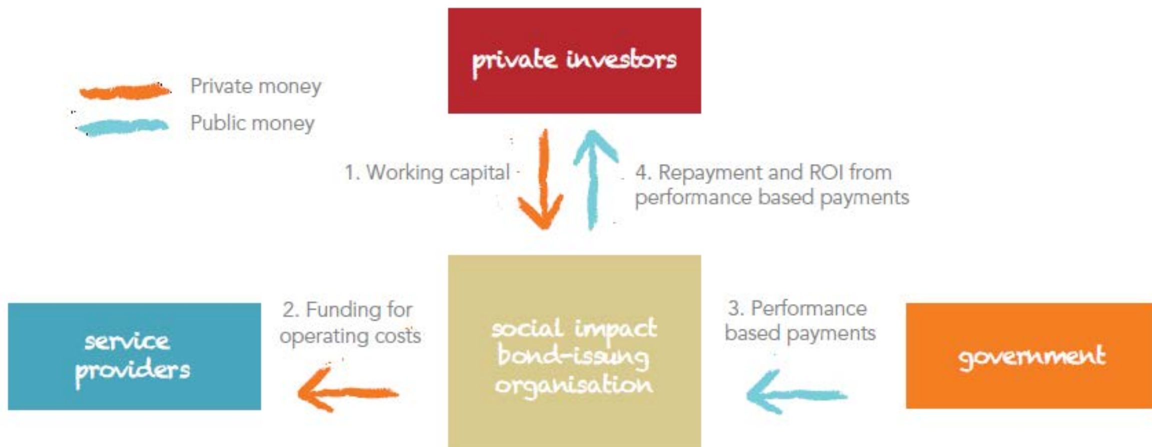


Figure 1 – Source: Government of South Australia, "Building a Stronger Society: A Discussion Paper on Social Impact Investment" (February 2014) page 4.

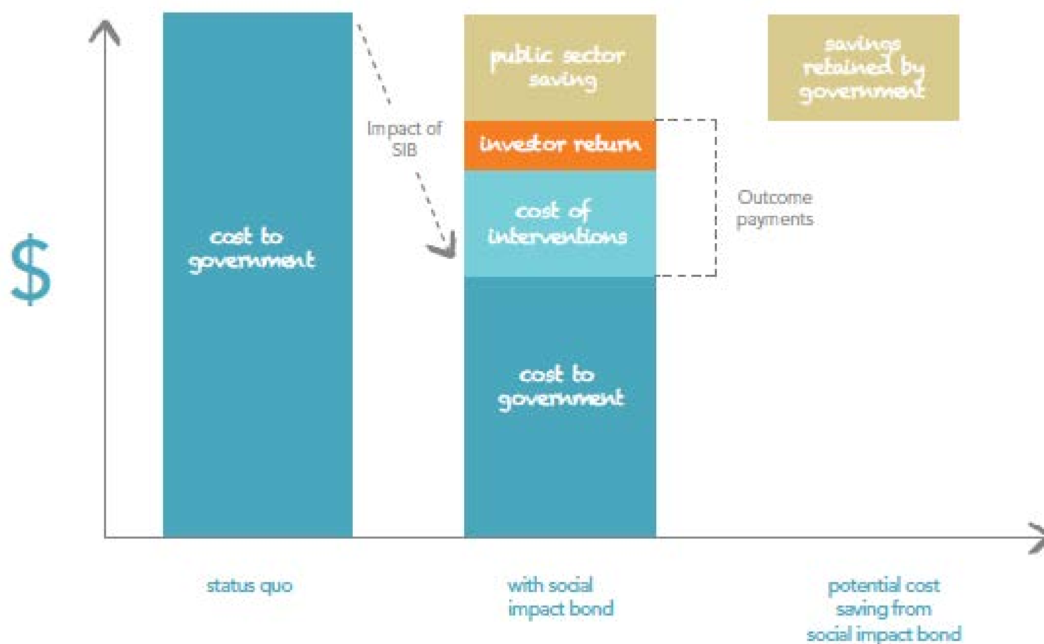


Figure 2 – Return on Investment, Source: Government of South Australia, "Building a Stronger Society: A Discussion Paper on Social Impact Investment" (February 2014) page 4.

Question 17

Senator DASTYARI: Sure. I understand. Finally, is there any update on where you understand things are at with Leighton Holdings. I know this falls into that very complicated space we talked about before, which is that there are criminal matters which are AFP issues. We have had many discussions around it before. Obviously putting aside what the AFP are doing, have they come back to you and said that they are dropping everything?

Mr Savundra: Senator, there are obviously limits to what I can say but my understanding—and, again, I do not want to speak on the behalf of the AFP—is that their investigation is ongoing. We have a separate investigation, which is on foot.

Senator DASTYARI: So you have started a parallel investigation?

Mr Savundra: I am trying to recall whether it was Senate estimates or this committee that we advised on the last occasion or on a previous occasion that they were investigating. I can confirm that we are continuing to investigate.

Mr Medcraft: It means we have opened a formal investigation, so we can use our compulsory powers.

Senator DASTYARI: Can you tell me when that started—or whatever you would normally disclose?

Mr Savundra: I would have to take that on notice. It was this calendar year. Again, as we said last time, we transitioned to a formal investigation where it is necessary to use—

Answer:

ASIC first started investigating this matter on 21 October 2013 and progressed to a formal investigation on 21 March 2014.

Question 18

Senator DASTYARI: I know you have got the memorandum and that one of your guys has been seconded to the AFP. I am very, very conscious of the time. The AFP are working on their own investigation, which is looking at the criminal accusations of bribery, which are obviously quite serious but are not spaces for ASIC. They are not corporate; they are criminal. I understand that you are helping them with their investigation, but how would they be helping you in your investigation? They cannot give you their documents. You have to get them yourself each time.

Mr Savundra: That is right. But they are looking at Corporations Act matters from a criminal perspective. We are looking at it from a civil perspective.

Senator DASTYARI: When you say you get timed out in six years, is that up until when you—

Mr Savundra: We issue the proceeding. So it is from the date of the alleged breach or contravention to the commencement of the proceeding.

Senator DASTYARI: Do you know what the date of the alleged breach is?

Mr Savundra: I would have to take that on notice.

Answer:

There is no single alleged breach that we are investigating. The period of misconduct ASIC is looking at is from the start of 2009 through to 2012. So the earliest breach that ASIC is investigating is from the start of 2009.

Question 19

CHAIR: Having just gone quickly through your submission, there are a number of reports and reviews that are referred to. I am aware that you may not be able to provide all of them. There is the deregulation report to Treasury. If it is possible, could the committee receive a copy of that as well as the small business booklet?

Mr Medcraft: That is due to be provided to Treasury in April, so we will copy the PJC when that is provided.

Mr Tanzer: And the small business booklet

Answer:

Please see attached small business booklet and the deregulation report.

Question 20

CHAIR: You talk about conducting a wholesale review of 84 class orders that are sunsetting. Some visibility of that would be useful. Also, you are making law reform suggestions. An indication of what those reforms are would also be useful. I note again in here that you talk about $200,000 figure. You have just confirmed that the Corporations Act did in fact have the $765,000 and the $7.65 million figures. An explanation as to why you have stuck with that lower figure when the act actually allows a higher figure would be useful.

Mr Medcraft: In fact, the report did carve out that it did not include the corporate governance and market related offences. We will come back and clarify that.

Answer:

i) In conducting the proposed reviews, ASIC will consult publicly as necessary in accordance with the requirements of the Legislative Instruments Act 2003 and the Office of Best Practice Regulation's guidance.

ii) The deregulation report will include ASIC's law reform suggestions. As noted in response to question 19 we will provide the Committee with a copy of the report when it is publicly released shortly.

iii) For clarification the reference in ASIC's opening statement to the Parliamentary Joint Committee on Corporations and Financial Services (28 March 2014) to $200,000 refers to the maximum civil penalty (non-criminal) for an individual, whereas $765,000 (or three times the benefit gained) is the maximum criminal penalty for an individual. Higher equivalent criminal and civil penalties apply to corporations.

The key findings in REP 387 *Penalties for corporate wrongdoing* included that criminal penalties—imprisonment and fines—available to ASIC are broadly consistent with those available in other jurisdictions. However, a broader range of non-criminal monetary penalties is available in other jurisdictions, which have greater flexibility to impose higher non-criminal penalties and scope to use non-criminal penalties against a wider range of wrongdoing. For example, in some jurisdictions, the quantum of non-criminal penalties may be a multiple such as three times the financial benefit for some contraventions, and other international jurisdictions generally have the ability to require disgorgement (i.e. removal of financial benefit). In addition, the maximum civil penalties available to ASIC are lower than those available to other Australian regulators and are fixed amounts, not multiples of the financial benefits obtained from wrongdoing.

Senior ASIC qualifications experience
An inventory of the experience and qualifications of all the Senior Executive Service; Executive level 1&2 in ASIC's Stakeholder, Enforcement, and Legal functions, and all graduates.

Educational Qualifications

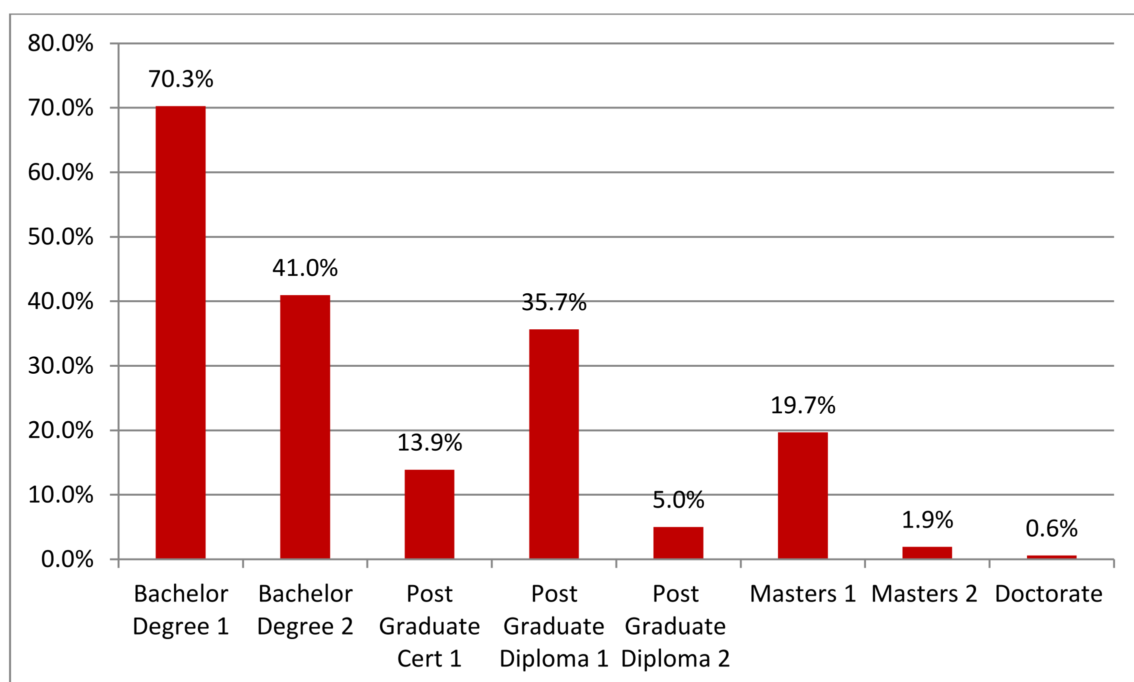
- 96.3% of the cohort are tertiary qualified.
- The type of qualifications are:
  - 70.3% bachelor degree
  - 41% second bachelor degree or a combined degree
  - 35.7% post graduate diploma, with an additional 5% holding more than one qualification at this level
  - 13.9% post graduate certificate
  - 19.7% Masters, and 1.9% have a second Masters level degree
  - A small number of ASIC staff have a PhD.
- The majority of qualifications are combined arts/law, commerce and business.

Qualifications: By Degree type

- Type of Degree
  - Bachelor Degree
  - Post Graduate Certificate
  - Post Graduate Diploma
  - Masters
  - Doctorate

Table 1 shows the qualifications held by each individual. Note that many individuals hold more than one qualification.

Table 1: ASIC qualifications: By Degree type - EL1 and above and graduates



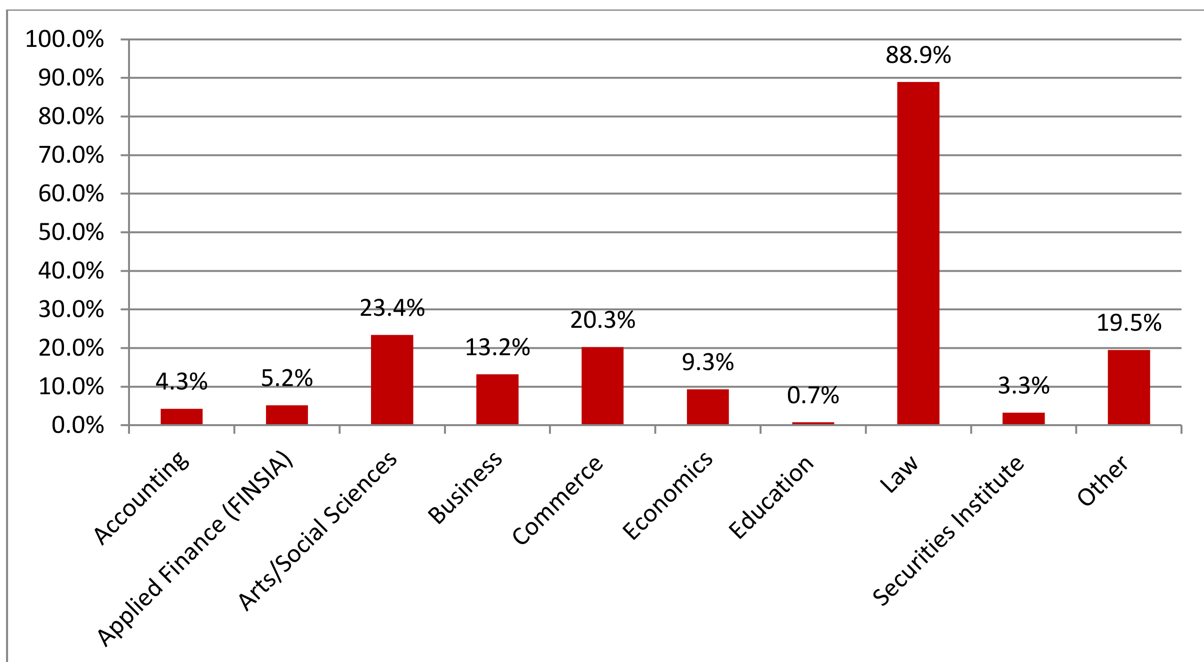
1

Qualifications by Degree discipline

- Degree Discipline
    - Accounting
    - Applied Finance (FINSIA)
    - Arts/Social Sciences
    - Business
    - Commerce
    - Economics
    - Education
    - Law
    - Securities Institute
    - Other (e.g. engineering, science)

Table 2 shows the qualifications held by each individual according to the discipline. Many also have qualifications in more than one discipline e.g. Economics and Law. A significant proportion of our staff (88.9%) have a degree in law, while over 80% have a degree in a business or financial related discipline.

Table 2: ASIC qualifications: Degree discipline- EL1 and above, and recent graduates



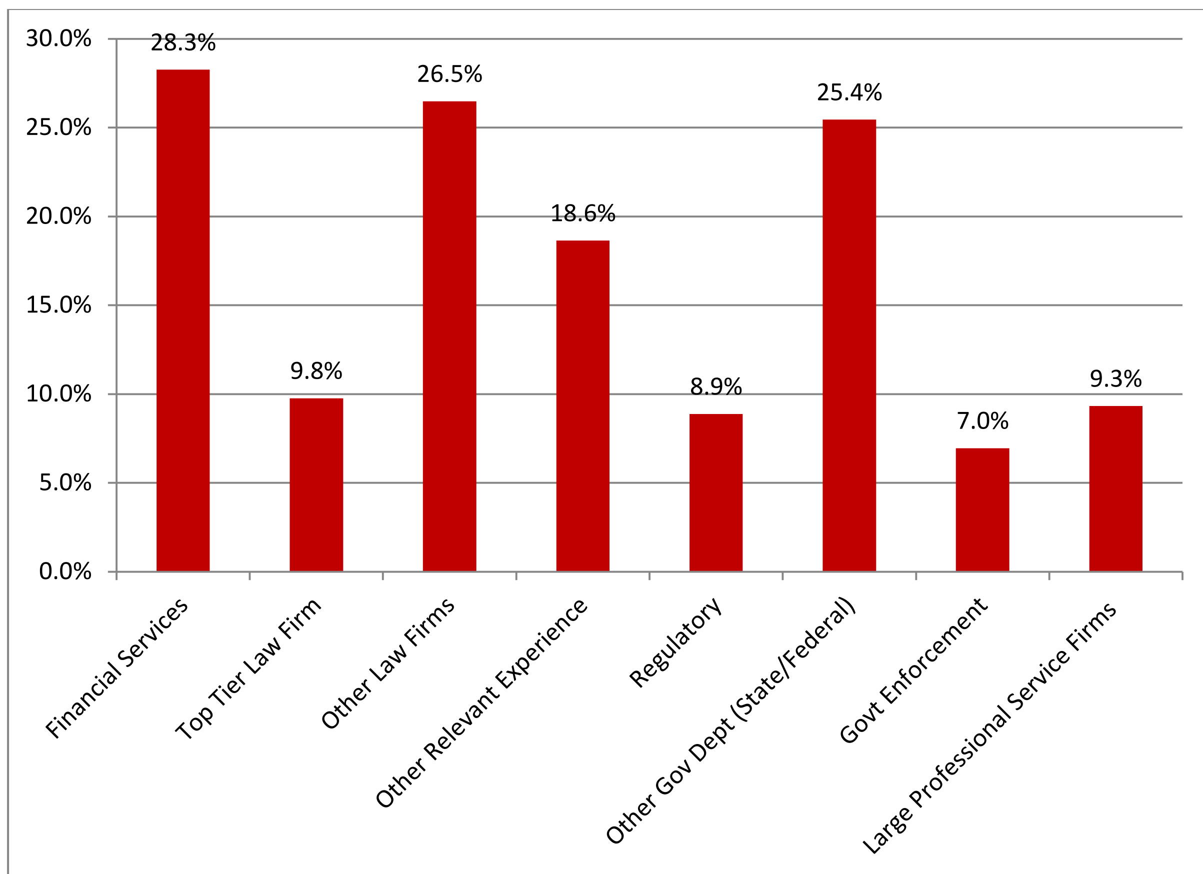
ASIC Experience

This analysis was based on industry experience using the following categories:

- Financial Services
- Top Tier Law Firms
  - Allens
  - Blake Dawson/Ashurst
  - Clayton Utz
  - Freehills/Herbert Smith Freehills
  - King and Wood Mallesons
  - Minter Ellison
- Other Law Firms
- Other relevant experience
  - Large corporations and institutions excluding Financial Services (e.g. Communications, Technology, Mining, Energy, Gas)
  - Small businesses
- Regulatory
  - Australian Consumer and Competition Commission (ACCC)
  - Australian Taxation Office (ATO)
  - Australian Prudential Regulation Authority (APRA)
  - Reserve Bank
  - Independent Commission Against Corruption (ICAC)
  - Other
- Other Government Department (State/Federal)
- Government Enforcement
  - Police
  - Australian Federal Police (AFP)
  - Crime Commission
  - Other
- Professional Service Firms
  - Deloitte
  - KPMG
  - Price Waterhouse Coopers (PWC)
  - Ernst and Young

The analysis focussed on experience gained in those sectors most relevant to ASIC's regulatory role.

Table 3: Experience: ASIC EL1 and above and graduates



Experience

- The work experience of the cohort is:
  - 28.3% have experience in financial services
  - 36.3% in law firms (9.8% in the top tier law firms)
  - 7.0% in government enforcement agencies (including Australian Federal Police, Police, Crime Commission)
  - 8.9% in regulatory bodies other than ASIC (including ACCC, ATO, APRA, Reserve Bank, overseas regulatory bodies)
  - 25.4% in other government departments (including DEWR, Environmental Protection agency, Customs and universities)
  - 9.3% in large professional services firms
  - *Other relevant experience* (18.6%) includes experience gained in large corporations and institutions across a range of industry sectors - but excluding Financial Services - (e.g. telecommunications, technology, mining, energy, oil and gas, small businesses and so on). An example would be experience gained as a corporate lawyer in Mobil Oil.

Average length of service

The average length ASIC service for the cohort is 7.5 years.

The current average length of service for all ASIC staff is 8.46 years.

Recent recruitment activity: Qualifications and experience

Of those staff recruited during the past year at the SES and executive levels in our stakeholder, enforcement and legal functions:

- 84% have industry experience with 49% in financial services
- 49% have worked in law firms (9.6% in the top tier law firms)
- 4% have backgrounds in government enforcement agencies
- 10% have had experience in regulatory bodies other than ASIC
- 27% have worked in other government departments
- 12% have experience working in professional services firms
- 20% have international experience.

ASIC is consistently able to attract strong fields of candidates from the market.

The majority of successful applicants lodge their application directly via the ASIC careers site (hosted on the ASIC public website), indicating that candidates specifically seek out roles in ASIC. Prior to the commencement of the recruitment freeze, 80% of successful candidates lodged their application via the site.

Public Disclosure Authorized

WPS3405

Public Disclosure Authorized

A Survey of Securities Laws and Enforcement

Preliminary Draft

By

Florencio Lopez-de-Silanes

YALE University and NBER

October 2003

*I am indebted to Patricio Amador, Jose Caballero and Manuel Garcia-Huitron for their comments and excellent research assistance. I would also like to thank the Global Corporate Governance Forum and the International Institute of Corporate Governance at Yale University for funding. This paper draws on my previous work with several coauthors, including Simeon Djankov, Simon Johnson, Rafael La Porta, Andrei Shleifer and Robert. W. Vishny.

A Survey of Securities Laws and Enforcement

Abstract

We examine the theoretical and empirical literature pertaining to securities laws and their enforcement by regulators and courts to establish what is known and what is yet unclear. Recent empirical research in the field has established that law matters. Mandatory disclosure requirements, insider trading laws, safeguards against self dealing transactions, adequate regulatory powers and simple laws that are easily enforced aid in the development of capital markets. The debate is now focused on identifying which components of securities laws matter most and on what the optimal regulatory framework for each country should be. Although public enforcement of securities laws is important, I find that the largest impact comes from aspects of the law that facilitate private enforcement. This means that the development of capital markets depends crucially on the creation of laws that facilitate enforcement and the improvement of court procedures that allow for a more efficient dispute resolution.

Introduction

Securities laws have long been a controversial issue. An important tradition in law and economics, originating in the work of Coase (1960) and Stigler (1964), and most clearly articulated in the context of financial markets by Easterbrook and Fischel (1984) and Macey 1994), holds that securities laws are either irrelevant or damaging. According to this tradition, financial transactions take place between sophisticated issuers and investors and therefore market mechanisms suffice to ensure that securities markets prosper. To obtain the highest price for the shares they sell and to avoid sanctions, Issuers have incentives to disclose accurate information. Investors have an interest in collecting and analyzing relevant information regarding the securities they wish to purchase and to do so only form reputable firms as to avoid being cheated. Securities laws, therefore, are either irrelevant, to the extent that they codify existing market arrangements or damaging, in so far as they raise costs and interfere with the optimal functioning of markets.

An alternative tradition argues that "law matters", and securities laws in particular are important market-supporting institutions. This argument has a long tradition in regulatory economics (Landis 1938, Friend and Herman 1964), and has recently been rejuvenated by a new generation of legal scholars (Coffee 1984, 1989, 2002, Mahoney 1995, Fox 1999, Black 2001, Beny 2002). According to this viewpoint, general law and private contracting are insufficient to keep promoters from cheating investors because the incentives to misbehave may overrule the "long run" benefits of honesty and because private litigation may be too expensive and unpredictable to serve as a deterrent (see, e.g., Djankov et al. 2003). To reduce enforcement

costs and opportunistic behavior, a regulatory and contracting framework dictated by securities laws is required.

Recent empirical evidence supports this position. Glaeser, Johnson, Shleifer (2001) point to differences in securities laws to explain why securities markets stagnated in the Czech Republic but developed quickly in Poland during their transition from socialism. Coffee (1999), Siegel (2002), Stulz (1999), Doidge et al. (2001), Mitton (2002) and Reese and Weisbach (2002) examine the role of ADRs as bonding mechanisms and show that firms that have them are more valuable and have better access to external finance than do firms from the same country not listed in the US. This argument is also supported by Bhattacharya and Daouk (2002) who show that the cost of equity in a country decreases significantly after the first enforcement of insider trading laws and by La Porta et al. (1997, 1998), who find that countries with better legal protections of investors have better developed financial markets.

Enforcement of securities laws depend crucially on two pillars: the characteristics and powers of the regulator and the efficiency of courts. It has been argued that particular characteristics of the regulator make them more or less efficient (Holmstrom and Milgrom, 1991; Spiller and Ferejohn, 1992; Johnson, Glaeser, and Shleifer, 2001 and Pistor and Xu, 2002 among others). The effectiveness of a regulator depends on its degree of independence from the executive and on its degree of specificity. A regulator that is independent of the executive will probably be able to resist political pressure; while a regulator that is dedicated specifically to the securities market runs less risk of being distracted by other concerns. The powers of the regulator are also of vital importance. The Regulator's investigative powers, its right to sanction misconduct and the ability to command documents, prevent certain actions and impose criminal

sanctions may make a difference in the behavior of financial markets. In this paper, I explore the issues raised above to distinguish which characteristics are truly important and which are superfluous. This type of analysis is of great importance when designing or reforming a regulatory institution because important factors are often overlooked while other characteristics that matter only marginally receive attention. Criminal Sanctions, for example, are hailed as a vital reform for efficient securities regulation none withstanding the fact that empirical evidence shows that their actual impact is negligible.

The second pillar of the enforcement of securities laws is the courts system. The outcome from securities laws depends on the efficient execution of these laws through the courts system. Although the enforcement of securities rights and of property rights in general is crucial for economic development, theory alone is not sufficient to determine which mechanism is optimum. No system is perfect, therefore we need to analyze each to determine which one is optimum for a particular situation. Private enforcement works well in certain circumstances, but runs the risk of degenerating into violence. Public enforcement is also effective, but runs the risk of being "captured" by special interests or unduly influenced by agents with political power.

There are three basic theories about the origins of a legal system. The "development theory" argues that courts, like all institutions, are a fixed cost and will thus not develop efficiently until an appropriate level of development is reached (Demsetz, 1967; North 1981). According to this theory, a poor society will seldom have an efficient legal system while a rich one will. The "incentive" theory of courts holds that the incentives of the participants shape the outcome and the efficiency of the legal system (Messick, 1999). Courts will work poorly if agents are given incentives to drag out legal processes or to resort to litigation to resolve trivial

matters, while thy will work efficiently if there are incentives to resolve disputes expediently and agents must face the costs of resorting to the legal system (i.e., looser pays the legal fees). The third theory is "procedural formalism" and argues that the core characteristics of most legal systems are not endogenous but were transplanted years ago from a limited family of legal families (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2003). This paper follows the procedural formalism theory and explores the relationship between the inherited level of judicial formalism and its effect on financial markets.

Following the introduction, section2 reviews the theoretical literature on the relevance of securities laws and stock market regulations and their enforcement. Section 3 reviews some recent empirical studies on insider trading laws and their enforcement, the impact of improved disclosure through cross-listing, and the relevance of securities laws for initial public offerings. Section 3 also establishes the basis fro the analysis of the impact of enforcement through two channels: first, regulatory sanctions or actions by the market regulator and, second private litigation through the court system. Finally, section 4 presents some preliminary conclusions and suggest areas for further work in the field.

Theoretical Section

The theoretical literature has long argued the relative merits and disadvantages of securities laws. Many scholars insist that regulation of securities is beneficial because it protects investors by mandating disclosure and that it foments the growth of markets by increasing the supply of truthful information. However, not everybody is convinced by these arguments and instead believe that securities laws are either irrelevant, because they contribute nothing the

market has not taken into account already, or damaging, because they restrict certain kinds of transactions and increase the costs of doing business.

Easterbrook (1984) analyses the effects of the securities acts of 1933 and 1934 and claims that, although securities regulation and mandatory disclosure of relevant information could lead to more efficient market outcomes, there is no evidence that existing Securities and Exchange Commission (SEC) rules have improved market efficiency. Macey (1994) criticizes securities regulation and regulators, the SEC particularly, because he feels that these institutions have fallen into obsolescence. Both authors agree that securities regulations have the potential to be market enhancing institutions, but that in their current form they do more harm than good.

Easterbrook (1984) claims that it is more likely that securities regulation protect and benefit special interest groups and other vested interests than investors. Disclosure rules, for example, give large firms a competitive edge over their rivals since the cost of disclosure is mostly independent of firm size. Investment banks and audit firms also benefit from regulations because all firms that wish to list on the stock exchange need to purchase their products. Instead of allowing firms to explore alternate paths to the market, all must settle for what regulators deem the “best path.” Macey (1994) acknowledges that current regulations were probably beneficial at their inception to assuage the fear brought about by the 1929 stock market crash, but argues that technological and administrative change have made them obsolete. Instead of reducing transaction costs and fraud, regulations now stifle innovation because of the increased risk of litigation and the arduous task of regulatory approval.

Both authors refute the argument that securities regulation is necessary to protect minority investors by increasing the amount of truthful information in the market. The existence

of a large pool of sophisticated or “educated” investors in the market guarantees that all available information is priced into the market. Therefore, uneducated investors are not in any risk of being exploited, on the contrary they benefit from the research of educated investors without paying any of the costs. Small investors are uninformed or unsophisticated because they chose to; because their perceived benefits of free-riding off other investor’s research and information is higher than that of analyzing and processing the information themselves. Moreover, they could easily receive the same benefits, if any, by “renting” institutional investors through mutual funds or other professionally managed services.

Lastly, although mandatory disclosure laws can be a market enhancing mechanism if they allow information to be gathered by the agent with the lowest social costs, it does not follow that more is always better. Securities regulation seldom reflects the best available economic knowledge and is instead driven by political considerations and ambitions. Turf-wars and burocratic imperialism is the order of the day as new rules and regulations are implemented without regards to a cost benefit analysis but simply on the notion that any problem merits a regulatory solution.

An alternative view sees the function of the laws, as reducing the costs of private contracting and enforcement (Hay, Shleifer, and Vishny 1996, Hay and Shleifer 1998, Glaeser and Shleifer 2001a, Bergman and Nicolaievsky 2002). Efficiency considerations suggest that the lowest cost provider of information about a security should collect and present this information, and be held accountable if he omits or misleads. An efficient system would provide them with incentives to collect and present information to investors, and hold them liable if they do not. In securities laws, this strategy generally takes the form of disclosure requirements and liability

rules that make it cheaper for investors to recover damages when information is wrong or omitted. We attempt to capture empirically the fundamental features of mandatory disclosure and of private litigation enforcing it.

Grossman and Hart (1980) show that with perfect law enforcement (i.e., automatic criminal sanctions for not telling the truth), promoters have an incentive to reveal everything they know. The reasoning is that without such revelation, potential investors would assume the absolute worst and under price the stock by more than if they knew the truth. They cannot say anything more optimistic than the truth because of the automatic criminal sanctions. Crucially, Grossman and Hart point out that, without perfect enforcement, or with positive costs for disclosure, these extremely favorable results for the market solution do not hold. For example, the existence of positive transaction costs would justify a securities law on the grounds of social welfare; because, through regulation, the burden of disclosure or certification can be assigned to different agents depending on which scenario yield a lower social cost.

In most legal systems, establishing and enforcing a claim against them is a difficult and expensive matter. First, there is the problem of allocating responsibility among directors, officers, accountants, and distributors. Second, there is the problem of errors: criminal sanctions often require the proof of intent, and defendants can often claim that they erred rather than deceived even if the information they supplied initially was strictly inaccurate. Third, and most importantly, severe problems in security issuance arise from sins of omission, not commission. A promoter can fail to reveal the debts of a company's subsidiary, or special arrangements with another firm he or his family controls.

When dealing with omissions, enforcement becomes a severe problem. Proving criminal intent is even harder and it may be extremely costly for the plaintiffs – who after all are new shareholders with only moderate sums invested in the shares – to establish liability of the defendants. The issuer, the accountant, or the distributors usually claim that the omitted information was not material, and hence it was not negligent of them to omit its disclosure. A court must then take the position as to whether the omission is material – a decision fraught with delays, uncertainty, and costs to the plaintiffs. The negligence issue is even more extreme for distributors, who usually claim that they relied on what the management told them – and when the news is bad enough, the distributors might be the only ones with resources to compensate investors. The bottom line is that with costly enforcement an investor cannot rely on markets and private litigation to secure accurate disclosure of information.

This enforcement-based reasoning forms the analytical foundation of the case for securities laws. Market mechanisms and litigation supporting private contracting may be too expensive and therefore securities laws, in so far as they reduce the cost of contracting and resolving disputes, can encourage equity financing of firms and stock market development.

The requirement of mandated disclosure can be divided into requirements with respect to specific pieces of information and residual requirements. There are three important specific areas of disclosure: ownership and compensation, contracts, and transactions between the company and its directors. First, there is the issue of whether the prospectus must disclose share ownership and compensation as well as the overall ownership structure. This is important as executive compensation is a potential source of self-dealing or tunneling (Johnson et al. 2000). Likewise, complicated patterns of cross-ownership are often used to divert cash flows from shareholders of

public firms to promoters or related parties (Bertrand et al. 2002). Secondly, it is relevant to know about extraordinary contracts as these raise serious adverse selection and moral hazard problems. In a well-known Polish case, for example, the major national state company gave up a significant share of a new business to an entrepreneur who secured for it a government license, and did not disclose this fact in the prospectus (Johnson et al. 2001). Thirdly, there is the issue of mandatory disclosure of related party transactions. Countries have varying disclosure requirements about transactions between the issuing company and its directors, officers, and/or large shareholders – such transactions are the major form of tunneling in most of the world (Johnson et al. 2000, La Porta, Lopez-de-Silanes, and Zamarripa 2003). Presumably, the more comprehensive disclosure of such transactions can both limit them and present potential investors with a more accurate picture of what they are buying.

Specific items in the prospectus, however, are not the most important matter information required to be disclosed. Residual disclosure requirements include all material information that may be of interest to the average investor. When bad news hits after a security issuance, the relevant question becomes whether the information available to investors was sufficient or if they were mislead by the issuer, the distributor, and/or the accountants who prepared the prospectus. Recall that, from the efficiency perspective, these parties should be collecting the information and be held automatically responsible when they fail to present it (Grossman and Hart 1980). A central question about the bite of the mandatory disclosure requirements is how investors can recover losses from the omission of material information.

There are three liability regimes. In the "base" case, the standard of liability is negligence: the plaintiff must show that the issuer, the underwriter, or the accountant was

negligent in omitting information from the prospectus. Some countries make it even harder for the plaintiffs, who must show that the defendants were grossly negligent or intentioned in omitting the information that later comes to light. But perhaps most interestingly, several countries shift the burden of proof from the plaintiffs to the defendants. Sometimes the defendants are strictly liable and thus cannot avoid liability. Alternatively, they must themselves show that they exercised due diligence in preparing the prospectus. This shift in the burden of proof can, in principle, significantly reduce the costs to the plaintiffs of establishing liability.

The first view of how securities laws matter holds that private enforcement incentives are often insufficient, and a public enforcer, such as a Securities and Exchange Commission, is needed to support trade. A private plaintiff owns only a few shares, and his potential payoff does not suffice to pay for the lawsuit. A public enforcer can produce and interpret rules and regulations, as well as sanction misconduct either on its own or by bringing suit. A public enforcer might have an advantage over a private plaintiff because it is focused, expert, or can be presented with incentives better reflecting the social benefits of enforcement (Becker 1968, Polinsky and Shavell 2000). The view that the central benefit of securities laws is the creation of a public enforcer has been originally advocated by Landis (1938), and has been recently discussed in both theoretical and empirical work (Glaeser, Johnson, and Shleifer 2001, Glaeser and Shleifer 2001b, Pistor and Xu 2002).

A different view of why securities law matters holds that its principal benefit is not the creation of a public enforcer, but rather the direct reduction in the costs of private contracting and enforcement. Regulation can standardize securities contracts by mandating disclosure requirements or limiting certain kinds of transactions as well as simplify private litigation.

Without standardized contracts, litigation would be governed by contract and tort law, with grave uncertainty about outcomes because such matters as intent and negligence need to be sorted out in court (Easterbrook and Fischel 1984). Securities law can structure contracting and litigation by explicitly describing the obligations of various parties and burdens of proof, thereby reducing the costs to them and to the court of establishing liability (Hay, Shleifer, and Vishny 1996, Glaeser and Shleifer 2001a, 2002, Bergman and Nicolaievsky 2002). With standardized contracts and litigation, the costs of writing and enforcing contracts decline, benefiting markets.

For private enforcement to succeed however, it is necessary to establish an efficient enforcement mechanism and a set of civil procedures that allow for expedient and just litigation. Too often, burdensome formalism and unnecessary blockages prevent the judicial system form fulfilling its intended role as guarantor of private enforcement. For this reason, it is essential to look at the structure of courts and their procedures. The enforcement of laws and contracts are almost always taken for granted by economists who endlessly discuss the difficulties related to efficient contracts such as asymmetric information and moral hazard while ignoring this potentially larger source of inefficiency. It is vital to take into account the difficulties related to the enforcement of laws and contracts and to study what characteristics of the legal system can be modified to minimize costs and thus maximize economic growth.

Legal institutions have evolved to enforce contracts and represent a sample we can exploit to analyze the determinants of the efficiency the judicial system. Ceteris paribus, higher formalism of the judicial system is related to longer durations of dispute resolution, lower enforceability of contracts, higher corruption and lower honesty in the courts (Djankov et al. 2003). This clearly suggests that different mechanism for enforcing laws make a substantial

difference and that legal systems with strictly coded procedures that drag out litigation are related with a less efficient enforcement of contracts and laws.

Beyond the general debate regarding the benefits of regulation, there is also uncertainty regarding the most appropriate rules and the characteristics of the regulator. One of the most common ideas is that the Supervisor should be insulated; to prevent Executive interference in its decision making that might force it to side with politically influential albeit dishonest promoters. A related idea is that an effective Supervisor must be focused on the securities market, to ensure that all the attention is focused on the success of financial markets rather than being distracted by other considerations (Holmstrom and Milgrom, 1991).

A second crucial question is what powers should the regulator posses. Three broad categories are usually considered: the power to regulate, the power to investigate, and the power to sanction misconduct. The power to regulate has been studied most closely (e.g., Spiller and Ferejohn 1992); the idea is that the legislature writing securities laws do not have sufficient information or resources to produce all the desirable rules, especially as the market evolves. It therefore delegates these powers to a regulator, who has the expertise and the resources to change the rules (Landis 1938, Pistor and Xu 2002). The second is the power of investigation. Unless the issuer is strictly liable after all adverse news events following security issuance, the question arises as to why the information was not revealed to investors and what the costs of this omission are. Answering these questions is costly, particularly for private plaintiffs pursuing litigation (Johnson, Glaeser, and Shleifer 2001). A Supervisor can be empowered to command documents from issuers, distributors, or accountants, as well as with the power to subpoena the testimony of witnesses. Such powers can in principle enable the Supervisor to ascertain the

reasons for omission, which can then – as a public good – become the basis for sanctions, or for criminal or civil litigation. The third power of the Supervisor is that of imposing sanctions. These may involve ordering the directors of a public firm to rectify non-compliance with disclosure requirements, forcing the implementation of changes recommended by outside reviewers, and/or compensating investors for their losses.

A particular form of sanctions, and one which many countries have in their laws, is that of criminal charges. These provisions can apply to directors, distributors, or accountants. The effect of these penalties are of special interest since a popular sentiment in the current discussions of securities laws sees criminal sanctions as essential to enforcing good practices.

Ultimately, the issues discussed above regarding the importance of securities regulation and the structure of the optimal regulatory body can only be answered empirically. In the next section we survey several of the most important papers regarding securities laws and attempt to provide answers to the questions raised above.

Empirical Section

There are numerous empirical studies that attempt to quantify the effects of different securities laws on firm performance and capital markets development. Although most papers are related in some fashion, we separate them into three broad categories; insider trading laws, Increased disclosure through cross-listing, and securities laws of initial public offerings (IPOs). Recent studies have focused on the effects that insider trading laws on capital markets and on firm performance (Beny, 2000; Bhattacharya and Hazem 2002). They find that markets with effective laws against insider trading have a wider shareholder base, more liquidity in the market

and provide companies with a lower cost of capital. Others analyze Disclosure laws and the effects of cross listing (Doidge, Karolyi and Stulz, 2001; Reese and Weisback, 2002). By reducing transaction costs and asymmetrical information, disclosure requirements help provide firms with a cheaper access to capital. Similarly, firms from other counties can gain by cross-listing as this is tantamount to engaging in self imposed mandatory disclosure. Finally, La Porta, Lopez-de-Silanes and Shleifer (2003) analyze the impact of securities laws in IPOs and conclude that securities regulation make a substantial difference in the development of stock markets. Moreover, they find little evidence that public enforcement matters and extensive evidence that private enforcement drives the positive results.

Insider Trading Laws

Insider trading (IT) is a problem for capital markets because of two main reasons. The first is that the presence of asymmetrical information in the marketplace, due to insider trading, increases the bid-ask spreads and thus the transaction costs of trading stock. Increases in transaction costs lead investors to demand a higher expected return on investments and thus increase the cost to firms of raising capital. The second reason is that, with no penalty for insider trading, controlling shareholders may be tempted to make profits trough stock tips rather than from more efficient monitoring. In sum, laws against insider trading should reduce asymmetrical information, enhance monitoring and therefore reduce the cost of capital.

Beny (2000) uses a cross-section of 33 countries to test the effect of IT laws on ownership concentration and on market liquidity. The first hypothesis states that strong IT laws should be negatively related to the concentration of ownership because they weaken the private

benefits of control. As Demset (1986) and Bhide (1993) argue, in order for majority owners to engage in costly oversight activities, they need to be compensated for their efforts and one way this can happen is by using insider information to trade stock. The second hypothesis is that strong IT laws should be positively related to market liquidity because they reduce transaction by reducing asymmetrical in the market.

To test his hypothesis, Beny (2000) constructs an IT law index to serve as a proxy for the severity of IT laws in a country. It compromises five dummy variables: the first component is if third persons tipped off about non-public information are penalized, the second is whether corporate agents are punished for tipping off third parties, the third is whether the monetary fines imposed on insider traders are proportional to the insider trading profits, the fourth is whether the law grants injured investors a private right of action; and the last one is whether there are criminal penalties for insider trading.

The results show that ownership concentration, estimated as the percentage of shares held by the top 3 shareholders in the ten larges firms, is negatively correlated with the strength of IT laws. An increase of 0.72 in the IT index, approximately the distance between the average of the English and French legal system countries, leads to a 6.6% decrease in market concentration. On the other hand, market liquidity, is positively correlated with the IT index, as an increase of the same magnitude as above increases the rate of market turnover by 16.5 percent.

Bhattacharya and Daouk (2002) test whether the presence and enforcement of IT laws by a country decreases its costs of capital. After collecting information on all countries that have stock markets, 103 in 1998, they find that 87 have laws banning insider trading but only 38 of them have ever enforced them. These numbers were 34 and 9 respectively before 1990; which

leads to the conclusion that insider-trading laws are only a recent phenomenon in securities laws. They test their hypothesis in four ways: first, using descriptive statistics they analyze the mean returns and liquidity of firms five years before the introduction (enforcement) of IT laws and five years afterwards; second, they use an international asset-pricing factor to determine the impact of IT laws and enforcement on the value of companies; third they use a constant growth dividend discount model to extrapolate the cost of equity from changes in dividend yields; the fourth and final test involves using surveys of country risk forecasts as predictors of the cross section of expected equity.

All models find that the cost of capital is unaffected by the presence of IT laws, but is strongly affected by the enforcement of these. The coefficients estimated for the various models show a minimum effect of 0.3 percentage points (for the credit rating approach) and a maximum of 7 percentage points (the international asset pricing model approach). It is clear that enforcement of IT laws has a negative and significant effect on the cost of capital, but the authors warn that the results should be taken with care because it is possible that the relationship between IT laws and the value of companies captures spurious correlations or is biased by the endogeneity of enforcement.

Current empirical evidence suggests that laws banning insider trading are an important, if recent, addition to securities laws. By reducing the presence of asymmetrical in the market and by constraining management and controlling shareholders to focus on running the firm, IT laws can reduce the cost of capital and increase the liquidity of the market. Moreover, it is not enough simply to put the laws on the books, as agents must credibly believe that they will be prosecuted it they break them for the laws to have their desired effect.

Disclosure Requirements

Recent research has focused on the value of disclosure requirements and effective securities regulation to protect minority shareholders. A natural experiment that allows us to observe the value of this protection is the cross-listing of firms from countries with weak protection on stock markets from countries with high investor protection. As Doidge, Karolyi and Stulz (2001) explain, cross listing premiums cannot be explained by the typical assumption that listing in the U.S. lowers the costs of raising capital by enlarging the shareholder base and allowing companies to tap previously unattainable sources of finance. If this were true, all companies with perceived benefits from lower capital costs sufficient to pay for the costs of listing (investment-bank fees, accounting certification etc…) would list in the U.S. The number of firms that actually list is much lower. Also, the argument of tapping previously unavailable sources of finance would imply that listing in the U.S. would have been more attractive in the past than now and would be more attractive for countries with less integrated capital markets than for those with capital markets that are highly integrated to the United States or other strong markets. Both of these assumptions are found to be incorrect. Cross border listings have increased substantially in the past 10 years and firms that receive the highest cross-listing premiums come from counties with well developed and integrated capital markets. Finally, the standard asset pricing models cannot explain why the premium for cross listing is larger for exchange listings than for private placements.

Doidge, Karolyi and Stulz (2001) find that firms cross-listed in the US trade at an average Tobin q that is a 16.5% larger than those that do not. Using information on 955 cross-

listed firms and 7,725 locally listed firms from 40 countries they confirm that cross-listed firms are valued more and provide clues as to why this is so. For the sub-sample of firms that are exchange-listed (the category that requires most disclosure), the average premium increases to 36.5%. These results are robust even when controlling for growth opportunities of the firms, shareholder protection proxies, capital market development variables, other country specific factors and endogeneity of the decision to cross-list. The hypothesis offered is that listing in the U.S. is not mainly about widening the shareholder base or tapping previously unavailable sources of finance but instead that of signaling to minority shareholders that they will not be exploited by controlling groups. It might be in the best interest of majority shareholders to make these commitments in order to secure a lower cost of capital to finance a greater number of growth projects. This alternative theory helps explain why only a few companies list in the U.S; although most companies would benefit from cross listing, most controlling shareholders would lose.

Reese and Weisback (2002) provide similar evidence regarding cross-listings. They believe that foreign firms cross-list in the US primarily as a way of increasing investor protection rights and therefore the value of the company. Their sample compromises 2,038 foreign companies that cross list in the United States between 1985 and 1999.

If increased protection for minority shareholders is the main reason for cross-listing, we would expect to observe three things: first, equity issues should increase following all cross-listings regardless of shareholder protection; second, the increase should be larger for cross-listings form countries with weak investor protection; finally, equity issues following cross listings in the US would tend to be in the US from countries with strong protection and outside

the US for countries with weak protection. All three hypotheses are proved correct and are robust to the inclusion of instrumental variables and controls for firm characteristics.

Although there is ample empirical evidence that cross listing increases the protection of minority shareholders and that this is the principal reason that firms do it, not everybody agrees that firms can "borrow" a securities regime from another country. Siegel (2002) argues that this "convergence hypothesis" is false because firms cross-listed in the U.S. have not been subject to the same regulations (in practice) as domestic firms and are thus undeterred by stricter securities laws. Of all Mexican companies listed prior to the 1994-1995 crisis, there is conclusive evidence that eight of them suffered from some form of illegal expropriation from insiders. From these eight, three were directly listed on the U.S. stock exchange and all were in some way tied to a company that was cross-listed. In fact, even when controlling for the economic sector of activity, size of the firm, openness to external markets and leverage, firms with ADR´s are about 20 percent more likely to suffer from insider theft than firms that don't. Moreover, Siegel (2002) argues that the discovery of fraud had nothing to do with being listed on the US stock exchange. The toughest penalty that has been placed on a fraudulent firms is that of de-listing and no claims for the recovery of funds have been filed by the SEC or by private parties in the US. These findings suggest that bonding to a U.S. stock exchange may not necessarily entail higher levels of protection for minority shareholders.

Cross-listing is one of the main ways we can asses the impact of securities laws. Recent empirical works suggest that firms are able to "borrow" the regulatory regime of more developed countries and benefit from a lower cost of capital. Although we cannot rule out other hypothesis that attempt to explain cross listing to overcoming fragmented capital markets, the pattern of

equity issues and evidence about the type of firm that engages in cross-listing supports the hypothesis that the main benefit is gained through a greater protection of shareholder rights. Nevertheless, given the significant gap between laws on paper and actual enforcement, not everybody is convinced that countries can effectively borrow securities regulation from other jurisdictions. The SEC's poor record regarding securities laws violations of Mexican firms listed in the U.S. hardly supports the conclusion that insiders had an incentive to respect minority rights any more after cross-listing than they did before.

Securities Laws of Initial Public Offers

Most of the recent literature regarding securities laws agrees that regulation is an essential market supporting institution with the potential to deepen capitals markets and provide firms with cheaper access to capital. Nevertheless, the approach outlined so far have been limited in the scope of laws they consider or the sample they test. To overcome these shortfalls, La Porta, Lopez-de-Silanes and Shleifer (2003) use a comprehensive sample to test if securities laws make a difference, to gauge the relative importance of public and private enforcement and to determine the components of securities regulation that matter most.

Using a sample of 49 countries, they construct indexes for disclosure requirements, burden of proof, characteristics of the supervisor, investigative powers of the supervisor, and sanctions available to the supervisor. The most important proxies they use to gauge the development of securities markets are the five year average of the ratio of stock market capitalization to GDP, the logarithm of domestic publicly-traded firms in each country relative to its population, and the value of initial public offerings as a percentage of GDP.

Besides testing the effect of securities laws on the dependent variables outlined above, they investigate the relative role of public vs. private enforcement. The relative efficiency of these measures and their likely interrelation with the level of economic development of a country can provide useful insights when recommending securities reform as the best policy for regulating securities transactions in a developed country may not necessarily be the best policy for developing countries.

Regressions that control for Anti-director rights, GDP per capita and Efficiency of the Judiciary allow us to extrapolate the relationship between our measures of enforcement and our measures of market development. Although both higher GDP per capita and efficiency of the judiciary are associated with larger stock markets, public enforcement is not significantly related to market capitalization. Although there is a positive relationship between these two variables, it fails to achieve statistical significance. Moreover, none of its individual sub-indexes- Supervisor Characteristics, Investigative Powers, Orders and Criminal Index- is a significant predictor of market capitalization. These week results are also observed for other proxies of market development: Supervisor characteristics do not matter for any of the outcome variables while Investigative Powers are only associated with a larger number of domestic firms per capita. Similarly, the power to issue Orders and to impose Criminal Sanctions matters only for the number of IPOs. These patchy results regarding the effects of public enforcement suggest that it is private enforcement is the driving force behind the effect of laws on securities markets and that public enforcement plays only a secondary role.

The effects of private enforcement can be observed in Figures 2-4. These show that private enforcement and both of its sub indexes –Enforcement Requirements and Burden of

Proof- are positively related to market capitalization. The relationship is statistically significant and quantitatively large. To put it in perspective, the external-market-capitalization-to-GDP ratio ranges from 0.002 in Uruguay to 1.44 in Switzerland. The estimated coefficients suggests that improving disclosure requirements index by two standard deviations – roughly the distance from Denmark or Norway to the U.S. – is associated with an increase in the market-capitalization-to-GDP ratio of 0.27. Similarly, lowering the index of burden of proof by two standard deviations – the distance from Ireland to the U.S. – is associated with an increase in the market-capitalization-to-GDP ratio of 0.20. Moreover the effect of private enforcement is on the development of capital markets is not limited to market capitalization. Figure 5 shows the positive relationship between private enforcement and the number of IPOs per capita. Figure 6 shows that access to equity is also positively related to private enforcement. These results are statistically significant at the 1 percent level.

Panel A in Table 2 shows, that private enforcement is associated with more developed stock markets for all seven dependent variables. The estimated coefficients predict that a two-standard deviation increase in private enforcement is (roughly the distance from Ireland to the U.S.) is associated with an increase of 0.30 in the external market-to-GDP ratio, a 55% rise in listed firms per capita, a 2.34 increase in the IPO-to-GDP ratio, a 12 percentage point drop in the block premia, an improvement of 1 point in the access-to-equity index, a decrease of 5.25 points in the earnings manipulation index, and a 10 percentage point drop in ownership concentration.

As already discussed, the results for public enforcement in Panel B are less consistent. For the number of listed domestic firms and IPOs, it is public enforcement, but not anti-director rights, that matters, and the economic effect of public enforcement in these regressions is large.

A two-standard deviation increase in public enforcement (roughly from Sweden to the U.S.) is associated with a 42% increase in listed firms per capita and adds 1.6 to the IPO-to-GDP ratio. In contrast, anti-director rights, but not public enforcement, typically matters for the other measures of stock market development (with the exception of earnings manipulation for which neither variable matters).

Finally, Panel C presents the results of a horse race between our proxies for private and public enforcement. The key result is that private enforcement is significant in all but one of the regressions (earnings manipulation). In contrast, public enforcement is never significant when combined with private enforcement (i.e., private enforcement knocks out public enforcement from the regressions for domestic firms and IPOs).

To ensure the robustness of these results, a few additional issues are addressed to correct for possible weakness of the results stemming from measurement problems, from the possibility that omitted variables may explain the strength of the results on private enforcement and for the possible endogeneity of private enforcement.

Public enforcement may only be effective in countries with efficient government bureaucracies. To address this concern the authors reran the regressions for the sub-sample of countries with per capita GDP above the median. They find no consistent evidence that public enforcement is correlated with larger securities markets in these countries (See Table 3). A related concern is that public enforcement may be ineffective if the Supervisor lacks adequate resources. To address this concern, they collected data on the number of employees that work for the Supervisor and found them to be insignificant when included in the regressions. To capture any interactions between public enforcement and the resources of the Supervisor, they separate

the sample according to whether the number of employees working for the Supervisor is above or below the sample median and ran separate regressions for both groups of countries. Public enforcement is statistically significant only for IPOs and earnings manipulation in countries with well-staffed regulators (and for domestic firms in countries with poorly-staffed ones).

It might be argued that financial markets are small where the state is large. For example, few firms may be publicly-traded in countries where the state owns most of the capital. Omitted variable bias may thus account for the strength of the results if private enforcement is negatively correlated with the role of the state in the economy. To address this concern, they included two measures of the role of the state in the economy in our regressions: (1) the fraction of the capital stock in the hands of state-owned companies from La Porta et al. (1999); and (2) the fraction of the banking assets controlled by government-owned banks from La Porta, Lopez-de-Silanes, and Shleifer (2002). The results on securities laws remain qualitatively unchanged. Another omitted variable story holds that countries with large capital markets may come to rely on private enforcement because their institutions are more responsive to the interests of small investors. However, measures of democracy and political rights are uncorrelated with private enforcement (and public enforcement). Moreover, such measures were not significant predictors of financial development in the regressions.

Finally, it is possible that governments adopt better securities laws in countries with buoyant financial markets. For example, countries with large financial markets may adopt good regulations because there are fixed costs of doing so. This argument is undermined by the systematic differences in investor protection across legal origins. Reverse causality is also undermined by the fact that the dimensions of the law that are expensive to implement – for

example, having an independent and focused regulator – do not seem to matter. On the contrary, the rules that matter most are cheap to introduce. A second reverse causality argument holds that regulators swarm toward large securities markets, because there are bigger rents to secure from regulating them. This argument is also undermined by the fact that it is precisely the regulations that render the unimportant, namely those that standardize private contracting and litigation that have the tightest association with stock market development. The endogeneity of private enforcement can be partially addressed using instrumental variable. The legal origin of a country is almost always determined exogenously; that is by conquest or transplantation decades or centuries ago. Even though legal systems have evolved since them, they often keep certain core characteristics that make the legal system of one family similar to others with the same origin. For example, countries with English legal origin usually have a significantly higher degree of formalism in their court system and tend to rely more on private enforcement than countries with French legal system. Using Legal origin as an instrumental variable together with the principal components of anti-director right and private enforcement, they carry out a two stage least squares analysis and confirm that the results regarding private enforcement are robust.

The fact that private enforcement has such a large impact makes it a necessity to take a look at the mechanisms through which private litigation takes place. The functioning of courts across countries is far from the ideal assumed by most economic models as there seems to be substantial costs associated to the enforcement of contracts and laws through litigation. There are also great variations among counties, which begs the question of what can be changed in the judicial system to make courts function efficiently. To answer this question, Djankov, La Porta, Lopez-de-Silanes and Shleifer (2003) analyze the exact legal procedures required to evict a

tenant for non-payment of rent and to collect a bounced check using local courts in the country's largest city. They collect information derived from questionnaire answered by attorneys from 109 countries associated to Lex Mundi and Lex Africa. The questionnaire covered detailed information regarding the amount of the claim, the location and main characteristics of the litigants, the presence of city regulations, the nature of the remedy requested y the plaintiff, the merit of the plaintiff's and defendant's claim, and the social implications of the judicial outcome.

Figure 7 shows that court formalism clearly maps into a longer duration of the Judicial Process. The results are statistically significant at the one percent level. It is often argued that even if extra formalism leads to lengthier processes, this should not be a concern because it is the cost a country must pay for a fairer and more objective legal system. Figure 8 however shows this to be false. Contrary to what might be expected, greater formalism in the judicial system is related to less fairness and impartiality of the system. Not only does formalism come at a cost in terms of the length of the process, but there seems to be no upside to it it terms of fairness or impartiality. These results are robust to instrumental variables that take into account the possible endogenous nature of court formalism.

Conclusion.

It is clear from available empirical evidence that securities laws make a difference; the answer to the question of whether "law matters" is a definite yes. Although there are theoretical arguments for and against securities regulations, there is mounting evidence that securities laws matter to the development of capital markets. Evidence from the studies on insider trading laws and disclosure through cross-listing suggests that enforcement is equally important. Laws that

stay on the books and are not enforced are tantamount to not having regulation at all.

The findings of La Porta, Lopez-de-Silanes and Shleifer (2003) suggest that securities laws matter because they reduce the costs of private contracting and litigation rather than provide for public regulatory enforcement. That is, laws that facilitate the private enforcement of the law matter the most, especially in less developed countries. Several aspects of public enforcement, such as having an independent and/or focused regulator or criminal sanctions, do not matter; while aspects of private enforcement such as extensive disclosure requirements and having simple procedures to facilitate recovery of losses for investors matter a great deal and are associated with larger stock markets. Moreover, court efficiency is of fundamental importance to the development of capital markets and one which has typically been neglected by economists. Far from the ideal of perfect and free enforcement of laws and contracts, countries have extensive and complicated legal systems. The optimal institutional framework will depend on the tradeoff between the costs of market and government failure. For securities markets, the empirical evidence points towards greater efficiency in the private enforcement of public rules.

References

Becker, Gary, 1968, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, 169-217.

Beny, Laura, 2000, "A comparative empirical investigation of agency and market theories of insider trading," Harvard University mimeo.

Bergman, Nittai and Daniel Nicolaievsky, 2002, "Investor Protection and the Coasian View," Harvard University mimeo.

Bertrand, Marianne, Paras Mehta and Sendhil Mullainathan, 2002, "Ferreting out Tunneling: An Application to Indian Business Groups," *Quarterly Journal of Economics* 117, 121-148.

Bhattacharya, Utpal, and Hazem Daouk, 2002, "The world price of insider trading," *Journal of Finance* 57, 75-108.

Black, Bernard, 2001, "The Legal and Institutional Preconditions for Strong Securities Markets," *UCLA Law Review* 48, 781-858.

Coase, Ronald H., 1960, "The Problem of Social Cost," *Journal of Law and Economics* 3, 1-44.

Coffee, John C. Jr., 1989, "The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role," *Columbia Law Review* 89, 1618-1691.

Coffee, John C. Jr., 2002, "The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership Control," *Yale Law Review* 111.

Coffee, John C. Jr., 1984, "Market Failure and the Economic Case for a Mandatory Disclosure System," *Virginia Law Review* 70, 717-753.

Coffee, John C. Jr., 1999, "The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications," *Northwestern Law Review* 93, 641-707.

Dechow, Patricia, Richard Sloan, and Amy Sweeney, "Causes and Consequences of Earnings Manipulations: An Analysis of Firms Subject to Enforcement Actions by the SEC", Contemporary Accounting Research 13:1,1-36.

Demset, Harold, "Towards a Theory of Property Rights," *American Economic Review*, 57, (1967), 347-359.

Djankov, Simeon, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 2003 "Courts" *The Quarterly Journal of Economics*, 118, 453-517.

Doidge, Craig, G. Andrew Karolyi, and René Stulz, 2001, "Why are foreign firms listed in the U.S. worth more?," NBER Working paper 8538.

Easterbrook, Frank H. and Daniel Fischel, 1984, "Mandatory Disclosure and the Protection of Investors," *Virginia Law Review* 70, 669-715.

Fox, Merritt B., 1999, "Retaining mandatory disclosure: Why issuer choice is not investor empowerment," *Virginia Law Review* 85, 1335-419.

Friend, Irwin and Edward S. Herman, 1964, "The S.E.C. Through a Glass Darkly," *Journal of Business* 37, 382-405.

Glaeser, Edward and Andrei Shleifer, 2001a, "A Reason for Quantity Regulation," *American Economic Review Papers and Proceedings* 91, 431-435.

Glaeser, Edward and Andrei Shleifer, 2001b, "The Rise of the Regulatory State," NBER Working Paper 8650.

Glaeser, Edward and Andrei Shleifer, 2002, "Legal Origins," *Quarterly Journal of Economics* forthcoming.

Glaeser, Edward, Simon Johnson and Andrei Shleifer, 2001, "Coase versus the Coasians," *Quarterly Journal of Economics* 116, 853-899.

Grossman, Sanford and Oliver Hart, 1980, "Disclosure Laws and Takeover Bids," *Journal of Finance* 35, 323-334.

Hay, Jonathan R. and Andrei Shleifer, 1998, "Private Enforcement of Public Laws: A Theory of Legal Reform," *American Economic Review Papers and Proceedings* 88, 398-403.

Hay, Jonathan R., Andrei Shleifer and Robert Vishny, 1996, "Toward a Theory of Legal Reform," *European Economic Review* 40, 559-567.

Holmstrom, Bengt and Paul Milgrom, 1991, "Multitask Principal-Agent Analyses," *Journal of Law, Economics and Organization* 7, 24-52.

Johnson, Simon, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 2000, "Tunneling," *American Economic Review Papers and Proceedings* 90, 141-146.

La Porta, Rafael, Florencio Lopez-de-Silanes and Andrei Shleifer, 2003 "What Works in Securities Laws?" NBER Working Paper 9882.

La Porta, Rafael, Florencio Lopez-de-Silanes and Guillermo Zamarripa, 2003, "Related Lending," *Quarterly Journal of Economics*, forthcoming.

La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, 1997, "Legal Determinants of External Finance," *Journal of Finance* 52, 1131-1150.

La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, 1998, "Law and Finance," *Journal of Political Economy* 106, 1113-1155.

La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, 1999, "TheQuality of Government," *Journal of Law, Economics and Organization* 15, 222-279

La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, 2000, "Investor Protection and Corporate Governance," *Journal of Financial Economics* 57, 3-26.

Landis, James, 1938, *The Administrative Process*, (New Haven, CT: Yale University Press).

Leuz, Christian, Dhananjay Nanda and Peter D. Wysocki, 2002, Earnings Management and Investor Protection: An International Comparison, forthcoming *Journal of Financial Economics.*

Macey, Jonathan, 1994, "Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty," *Cardozo Law Review* 15, 909-949.

Mahoney, Paul, 1995, "Mandatory Disclosure as a Solution to Agency Problems," *University of Chicago Law Review* 62, 1047-1112.

Messick, Richard "Judicial Reform and Economic Development: A Survey of the Issues," *World Bank Research Observer*, 14, (1999), 17-136.

Milton, Todd, 2002, "A Cross-Firm Analysis of the Impact of Corporate Governance on the East Asian Financial Crisis," *Journal of Financial Economics 64:2,* 215-241.

North, Douglass, 1981, *Structure and Change in Economic History*, (New York: Norton).

Pistor, Katharina and Chenggang Xu, 2002, "Law Enforcement under Incomplete Law: Theory and Evidence from Financial Market Regulation," *Columbia Law School* mimeo.

Polinsky, Mitchell and Steven Shavell, 2000, "The Economic Theory of Public Enforcement of Law," *Journal of Economic Literature* 38, 45-76.

Reese, William A. Jr. and Michael S. Weisbach, 2002, "Protection of minority shareholder interests, cross-listings in the United States, and subsequent equity offerings," *Journal of Financial Economics* 66:1, 65-104.

Seligman, Joel, 1995, *The transformation of Wall Street : a history of the Securities and Exchange Commission and modern corporate finance*, (Boston : Northeastern University Press).

Shleifer, Andrei and Daniel Wolfenzon, 2002, "Investor Protection and Equity Markets," *Journal of Financial Economics* 66:1, 3-27.

Siegel, Jordan, 2002, "Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?," MIT mimeo.

Simon, Carol, 1989, "The Effect of the 1933 Securities Act on Investor Information and the Performance of New Issues," *American Economic Review* 79, 295-318.

Spiller, Pablo and John Ferejohn, 1992, "The Economics and Politics of Administrative Law and Procedures: An Introduction," *Journal of Law, Economics and Organization* 8, 1-7.

Stigler, George, 1964, "Public Regulation of the Securities Market," *Journal of Business* 37, 117-142.

Stigler, George, 1971, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2, 3-21.

Stulz, René M., 1999, "Globalization of Equity Markets and the Cost of Capital," *Journal of Applied Corporate Finance* 12, 8-25.

Teoh, Siew Hong, Ivo Welch, and T.J. Wong, 1998, "Earnings Management and the Long-Run Market Performance of Initial Public Offerings," *The Journal of Finance* 53:6, 1395-1974.

TheQuality of Government," *Journal of Law, Economics and Organization* 15, 222-279

Velthuyse, Heleen E.M. and Francine M. Schlingmann, 1995, "Prospectus Liability in The Netherlands," *Journal of International Business Law*, 229-236.

Table 1

Summary of Recent Empirical Work

Author	Data and time period	Methodology	Results and Conclusions
Beny (2000)	Cross section of 33 countries.	Constructs an Insider Trading (IT) law index and uses it to check the relationship between the severity of IT laws and the degree of ownership concentration and market liquidity	A change in the IT index of 0.72 (the distance between the averages of English and French legal origin) reduces concentration by 6.6% and increases liquidity by 16.5%.
Bhattacharya and Daouk (2002)	Information on 103 countries (sample includes all countries with a stock market as of 1998)	Test the effect of IT laws and IT enforcement actions on the cost of capital (CC) through 4 methodologies: descriptive statistics, international asset pricing model, dividend yields and country risk forecast surveys.	Existence of IT laws does not reduce the CC but the enforcement of these laws has a statistically significant negative effect on CC ranging from 0.3% to 7%.
Doidge, Karolyi and Stulz (2001)	955 cross-listed (CL) firms and 7725 control firms from 40 countries. Firm data is from 1997.	Country average Tobin Q measures are estimated for CL firms and for control firms. Inferences regarding the reasons to cross-list can be obtained by observing the premiums paid for these companies.	There is an average premium of 16%for CL firms and a premium of 36.5% for exchange-listed CL firms (this is the toughest category regarding disclosure requirements). Evidence shows that the main reason to cross-list is to give shareholders the certainty that they will not be exploited; and thus raise capital more cheaply.
Fox (1999)	Reviews empirical work done by Stigler (1961), Simon (1989) and Benston (1973).		Mandatory disclosure is the best way to achieve the social maximizing outcome. Studies that attack the benefits of disclosure are fundamentally flawed and concepts of Issuer choice are riddled with problems that make them impossible to implement.
Glaeser, Johnson and Shleifer (2001)	Polish and Czech stock markets during the 1990's. Information of Market capitalization, number of firms and IPO's	Compares the relative performance of the Polish stock market (regulated) with the Czech stock market (less regulated). Performance is measured by market capitalization, number of listed firms and number of IPO's.	The Polish stock exchange outperformed the Czech one by a wide margin on all measures of performance.

Author	Data and time period	Methodology	Results and Conclusions
La Porta, Lopez-de-Silanes and Shleifer (2003)	Extensive database of information for securities laws governing the issuance of stock in the 49 counties with largest market capitalization in 1993.	Analyze the characteristics of laws governing securities regulations for IPO's as well as the responsibilities of the issuers and distributors to find their relationship with 7 measures of market development	Conclude that securities laws matter a great deal to market development.. They find little evidence that public enforcement benefits stock markets and strong evidence that laws that facilitate private enforcement, through disclosure and liability rules, benefit stock markets.
Leuz, Nanda and Wysocki (2002)	Financial accounts for 8,000 firms from 31 countries from 1990-1999 for a total of 70,995 firm-year observations.	Use four proxies for earnings management to estimate which countries engage more frequently in this practice.	Countries fall into one of three groups, and sorting is very similar to what it would have been if legal origin was the variable of choice. "outside economies" are mostly common law countries with large stock markets and low earnings management. The reverse is true for "insider countries" which are mostly from French legal origin.
Reese and Weisback (2002)	Sample of 2,038 foreign companies listed in the for the period 1985-1999. Restricted sample of 1,051 firms for which detailed financial information is available.	Test the hypothesis that the main reason why firms cross-list is to increase investor protection. If this were true, we would expect: equity issues to increase after cross-listing; a larger increase for firms from countries with weak legal protection; and equity issues from countries with stong protection should be in the US while those of weak countries should be outside the US.	All three hypothesis are found to be true and are robust to instrumental variables.
Siegel (2002)	All Mexican listed companies before the 1994 crisis. Extensive information regarding published news of theft in Mexican companies. Information on cross listed companies in the US from 1995-2002.	Challenges the "convergence hypothesis". Tests the enforcement record of the SEC with regards to Mexican cross-listed firms and estimates the impact of being a CL firm on the probability of having assets stolen by an insider.	Finds extremely poor performance by the SEC in preventing or punishing abuse by CL firms. Surprisingly, having an ADR increases the probability of asset theft by insiders by 19.76% to 23.29%. In the six years, from 1995 to 2002 no action was taken against CL firms from an emerging market; despite the Mexican, Asian and Russian crisis.
Simon (1989)	Return information on stocks and stock issues from 1926-1940.	Compares the relative performance of new issues with old stock before and after the 1933 SEC Act.	Finds no evidence that greater disclosure has lead to an improvement in the efficiency of the market or in a lower cost of capital.

Table 2

Public Versus Private Enforcement.

Panel A: Private Enforcement

	Market capitalization	Number of firms	IPOs	Block premia	Access to equity	Earnings manipulation	Ownership concentration
Private enforcement	0.7113[a]	1.3100[b]	5.5700[a]	0.2818[b]	2.3605[a]	-12.4908[c]	-0.2306[b]
	(0.1535)	(0.4913)	(1.5166)	(0.1049)	(0.5610)	(7.2779)	(0.0962)
Efficiency judicial system	0.0396[b]	0.2326[a]	-0.0744	-0.0051	0.1828[a]	-0.3941	-0.0074
	(0.0196)	(0.0696)	(0.1970)	(0.0117)	(0.0582)	(0.7531)	(0.0094)
Log GDP per capita	0.0889[a]	0.2668[b]	1.0875[a]	-0.0062	0.1378	-0.6236	-0.0263[c]
	(0.0223)	(0.1082)	(0.2297)	(0.0217)	(0.0903)	(1.3012)	(0.0140)
Constant	-1.1558[a]	-2.5775[a]	-9.1621[a]	0.4071[b]	1.5276[b]	37.7485[a]	0.9370[a]
	(0.1967)	(0.7167)	(1.7745)	(0.1636)	(0.7095)	(9.4019)	(0.1002)
Observations	49	49	49	37	44	29	49
Adjusted R^2	0.56	0.69	0.39	0.32	0.57	0.25	0.37

Panel B: Public Enforcement

	Market capitalization	Number of firms	IPOs	Block premia	Access to equity	Earnings manipulation	Ownership concentration
Public enforcement	0.2525	0.9491[b]	3.5689[b]	-0.0212	0.3107	-8.5273	0.0774
	(0.2054)	(0.4531)	(1.6541)	(0.0689)	(0.5688)	(6.0478)	(0.0866)
Efficiency judicial system	0.0480[b]	0.2499[a]	-0.0026	-0.0038	0.1899[b]	-0.5103	-0.0095
	(0.0234)	(0.0711)	(0.2136)	(0.0123)	(0.0731)	(0.7458)	(0.0110)
Log GDP per capita	0.1034[a]	0.3013[a]	1.2267[a]	-0.0144	0.1982	-0.7688	-0.0284[c]
	(0.0221)	(0.1034)	(0.2668)	(0.0219)	(0.1257)	(1.2831)	(0.0153)
Constant	-1.2210[a]	-2.9110[a]	10.3742[a]	0.3995[b]	1.5136	37.3778[a]	0.8880[a]
	(0.2084)	(0.7264)	(1.9645)	(0.1812)	(1.0289)	(10.2820)	(0.1093)
Observations	49	49	49	37	44	29	49
Adjusted R^2	0.46	0.67	0.34	0.15	0.38	0.24	0.29

Panel C: Private and Public Enforcement

	Market capitalization	Number of firms	IPOs	Block premia	Access to equity	Earnings manipulation	Ownership concentration
Private Enforcement	0.6849[a]	1.0900[b]	4.7998[a]	-0.3100[a]	2.5366[a]	-9.0592	-0.2784[a]
	(0.1681)	(0.5260)	(1.6681)	(0.1128)	(0.6580)	(7.7796)	(0.0998)
Public Enforcement	0.0814	0.6767	2.3692	0.0702	-0.4469	-5.4508	0.1469
	(0.2062)	(0.4723)	(1.8046)	(0.0689)	(0.6966)	(6.8066)	(0.0951)
Efficiency judicial system	0.0402[b]	0.2376[a]	-0.0568	-0.0061	0.1845[a]	-0.4468	-0.0063
	(0.0198)	(0.0672)	(0.2043)	(0.0119)	(0.0582)	(0.7566)	(0.0096)
Log GDP per capita	0.0907[a]	0.2810[b]	1.1375[a]	-0.0005	0.1129	-0.7772	-0.0232[c]
	(0.0213)	(0.1053)	(0.2371)	(0.0235)	(0.0944)	(1.2605)	(0.0133)
Constant	-1.1899[a]	-2.8616[a]	10.1569[a]	0.3538[c]	1.8034[b]	39.4791[a]	0.8753[a]
	-0.2099	-0.757	-1.9611	-0.1802	-0.7371	-9.6686	-0.1089
Observations	49	49	49	37	44	29	49
Adjusted R^2	0.55	0.7	0.39	0.32	0.57	0.24	0.4

a = significant at 1 percent level; b = significant at 5 percent level; c= significant at 10 percent level.

Ordinary least squares regressions of the cross-section of countries. The dependent variables are defined as follows: (1) External market capitalization ratio is the average of the ratio of stock market capitalization of the ten largest, privately owned (the state is not a known shareholder) non-financial firms held by small shareholders (stock market capitalization outstanding not in the hands of the top three shareholders) to gross domestic product for the period 1996-2000; (2)Number of firms is the logarithm of the average ratio of domestic firms over the county's population (in millions) for the period 1996-2000; (3) IPO´s is the average of the ratio of the equity issued by newly' listed firms in a given country)in thousands= to its GDP)in millions) over the period 1996-2000; (4) Block premia is the difference between the price per share paid for a controlling block and the exchange price two days after the announcement of the control transaction; (5) Access to equity is an index that measures the extent to which business executives in a country agree with the statement "Stock markets are open to new firms and medium-sized firms". It is scaled from 1 (strongly agree) to 7 (Strongly disagree); (6) Earnings manipulation is an aggregate index of the pervasiveness of earnings management across countries between 1990 and 1999; (7) Ownership concentration is the average percentage of common shares not owned by the top three shareholders in the ten largest non-financial privately-owned (the state is not a known shareholder) firms in a given country.

Source: La Porta, Lopez-de-Silanes and Shleifer (2003)

Table 3

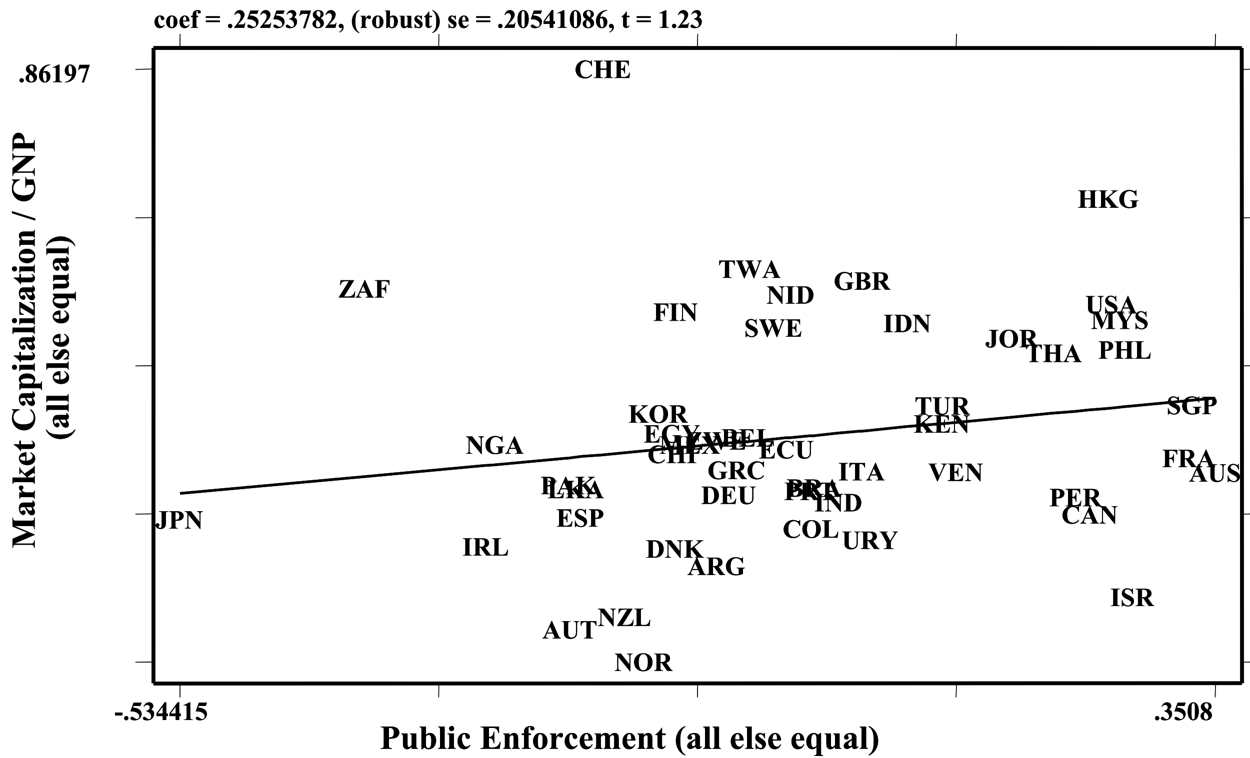
Indices of Regulation of Securities Markets by Level of Economic Development

By GDP level - Mean	Disclosure Requirements	Burden of Proof	Private enforcement	Supervisor's Attributes	Investigative Powers	Orders	Criminal Sanctions	Public Enforcement
Bottom 25 Percent	0.60	0.43	0.51	0.62	0.63	0.37	0.49	0.53
Middle 50 Percent	0.57	0.45	0.51	0.52	0.68	0.40	0.51	0.52
Top 25 percent	0.65	0.61	0.63	0.35	0.40	0.38	0.51	0.41
World mean	0.60	0.49	0.54	0.50	0.60	0.38	0.50	0.50
T-tests								
Bottom 25 vs. middle 50	0.31	-0.25	0.03	1.39	-0.34	-0.22	-0.23	0.03
Bottom 25 vs. top 25	-0.63	-1.76[c]	-1.40	2.90[a]	1.48	-0.06	-0.23	1.32
Middle 50 vs. top 25	-1.00	-1.70[c]	-1.55	1.90[c]	2.22[b]	0.14	-0.07	1.35

a = significant at 1 percent level; b = significant at 5 percent level; c= significant at 10 percent level.
Source: La Porta, Lopez-de-Silanes and Shleifer (2003)

Figure 1

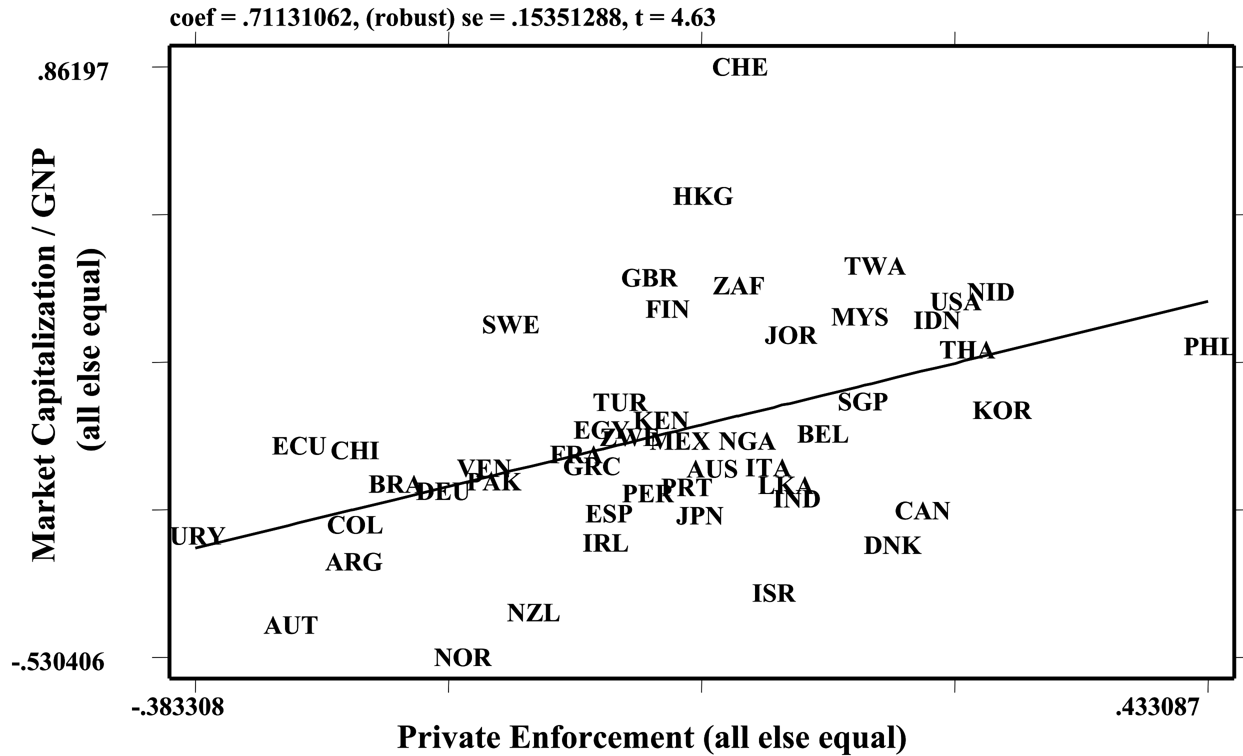
Public Enforcement: partial scatter plot of Public Enforcement index and Market Capitalization



The figure shows a partial scatter plot derived from a regression of the public enforcement index on market capitalization. The regression controls for: (1) Anti-director rights; (2) Efficiency of the Judicial System and; (3) Log of GDP per capita.

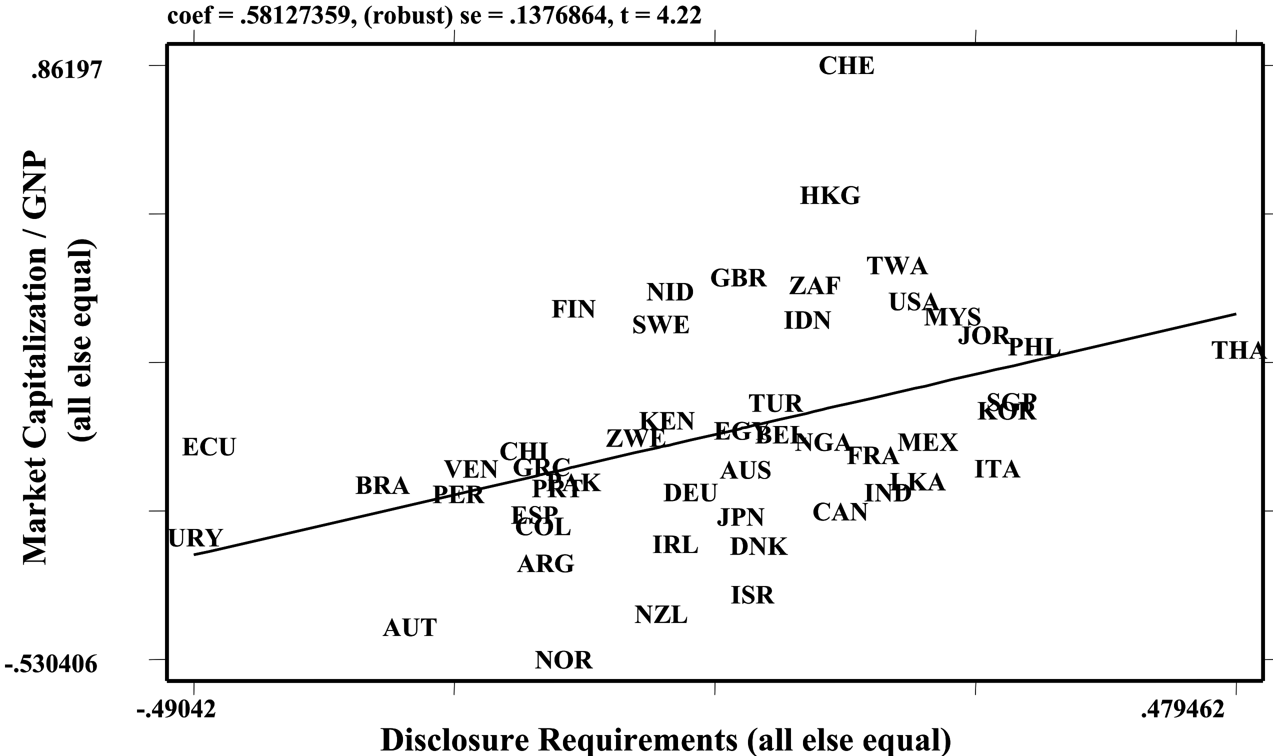
Figure 2

Private Enforcement: partial scatter plot of Private Enforcement Index and Market Capitalization



The figure shows a partial scatter plot derived from a regression of the private enforcement index on market capitalization. The regression controls for: (1) Anti-director rights; (2) Efficiency of the Judicial System and; (3) Log of GDP per capita.

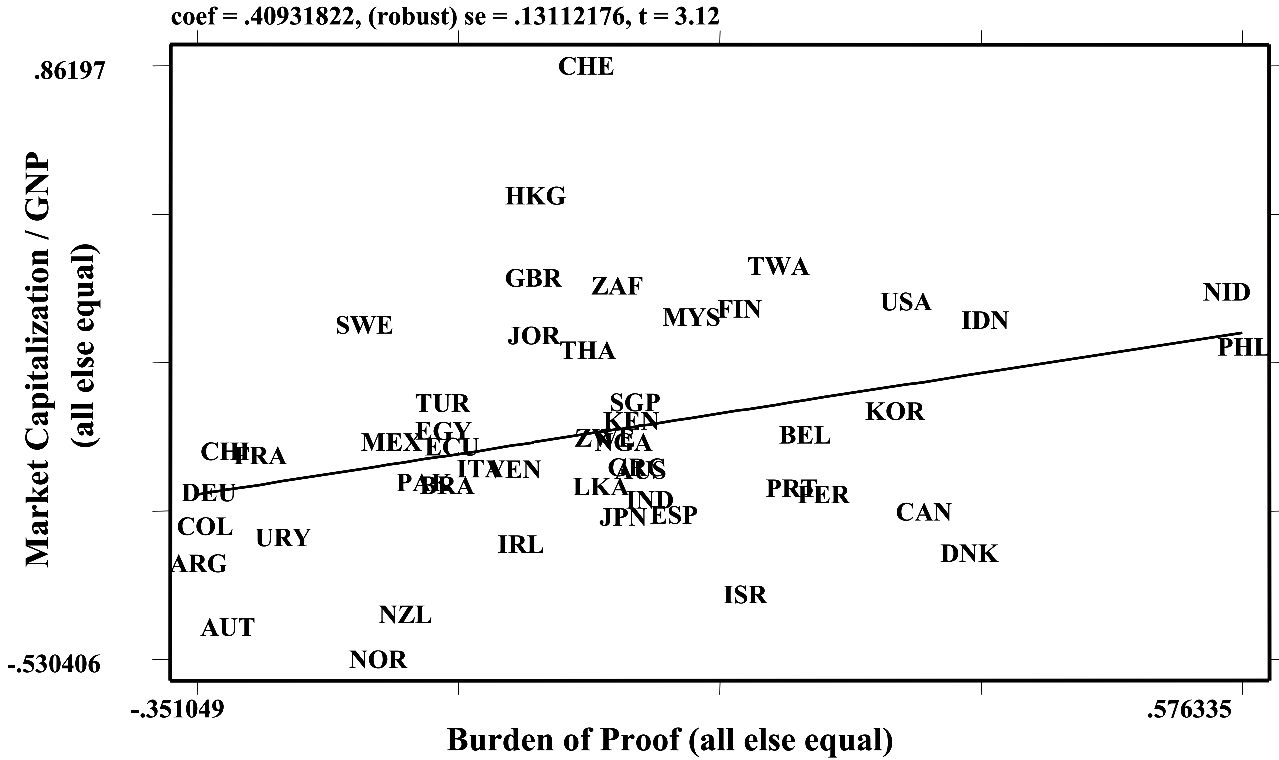
Figure 3
Private Enforcement: Partial scatter plot of Disclosure Requirements and Market Capitalization



The figure shows a partial scatter plot derived from a regression of the Disclosure Requirements sub-index on market capitalization. The regression controls for: (1) Anti-director rights; (2) Efficiency of the Judicial System and; (3) Log of GDP per capita.

Figure 4

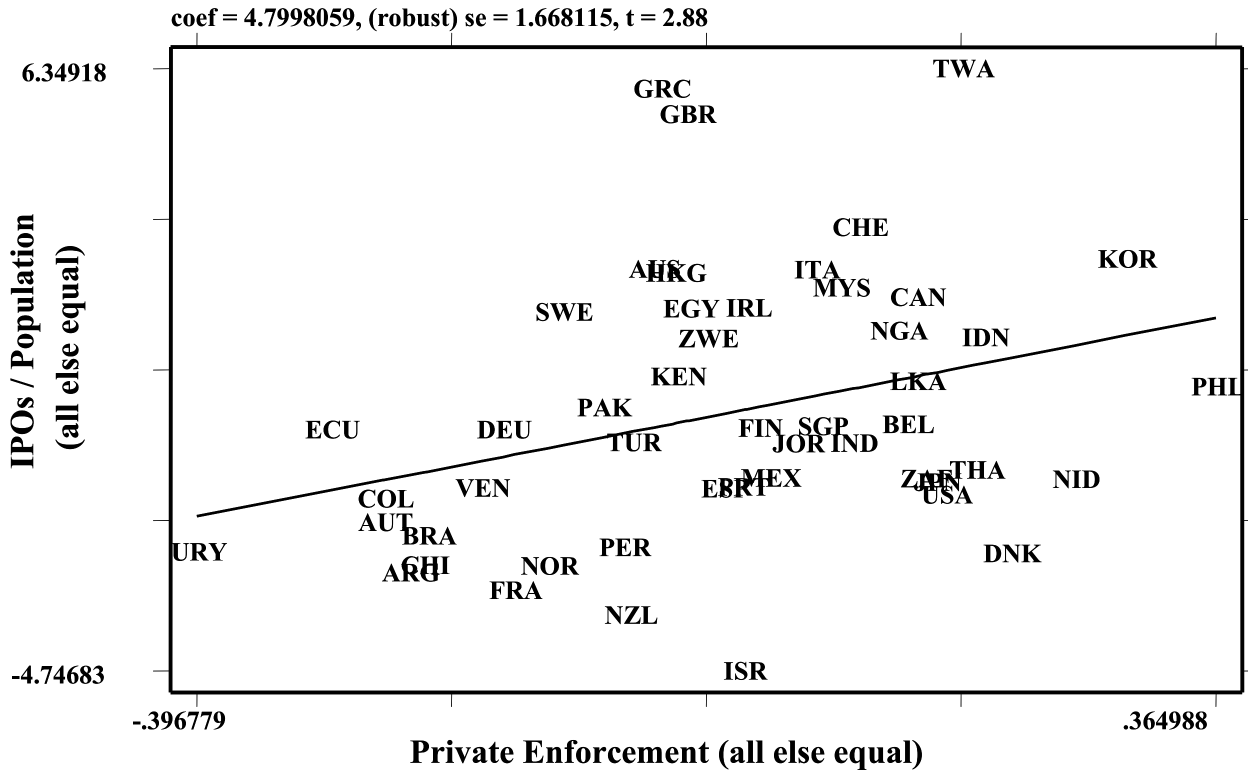
Private Enforcement: partial scatter plot of Burden of Proof and Market Capitalization



The figure shows a partial scatter plot derived from a regression of the burden of proof sub-index on market capitalization. The regression controls for: (1) Anti-director rights; (2) Efficiency of the Judicial System and; (3) Log of GDP per capita.

Figure 5

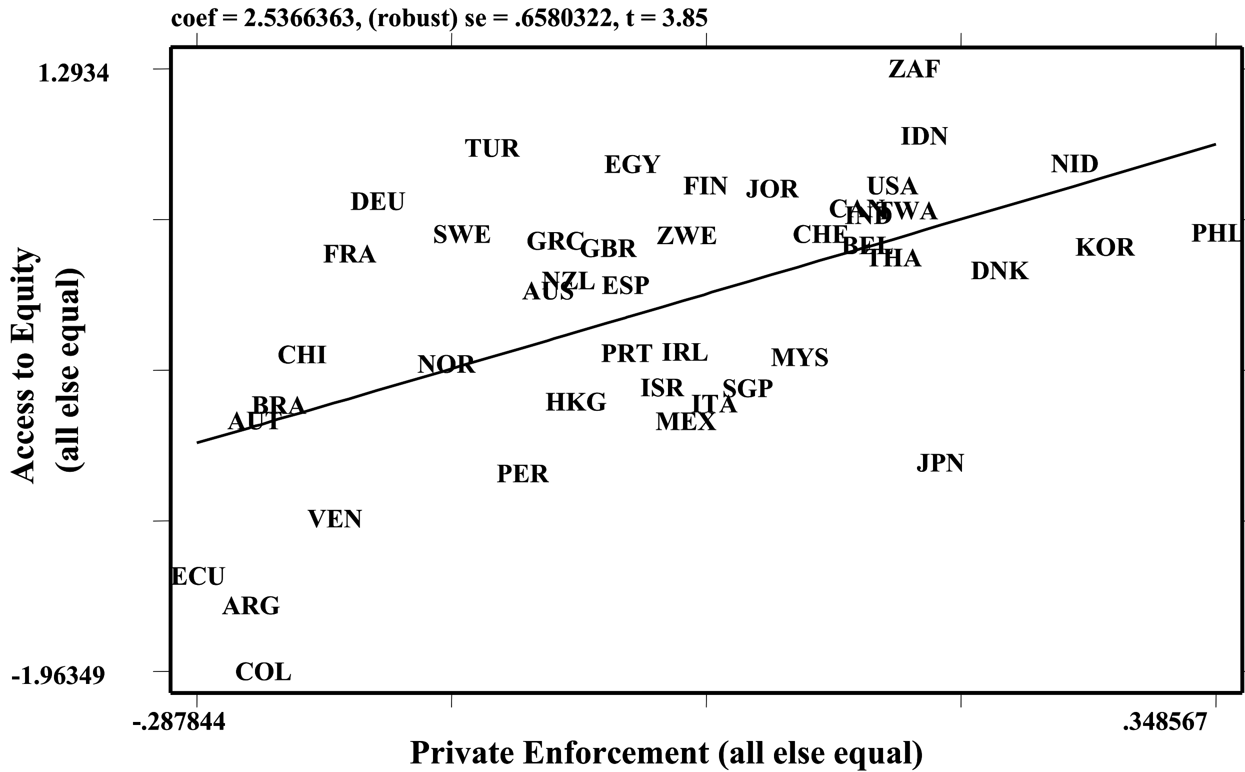
Private Enforcement: partial scatter plot of Private Enforcement Index and Initial Public Offers



The figure shows a partial scatter plot derived from a regression of the private enforcement index on IPOs \ Population. The regression controls for: (1) Anti-director rights; (2) Efficiency of the Judicial System and; (3) Log of GDP per capita.

Figure 6

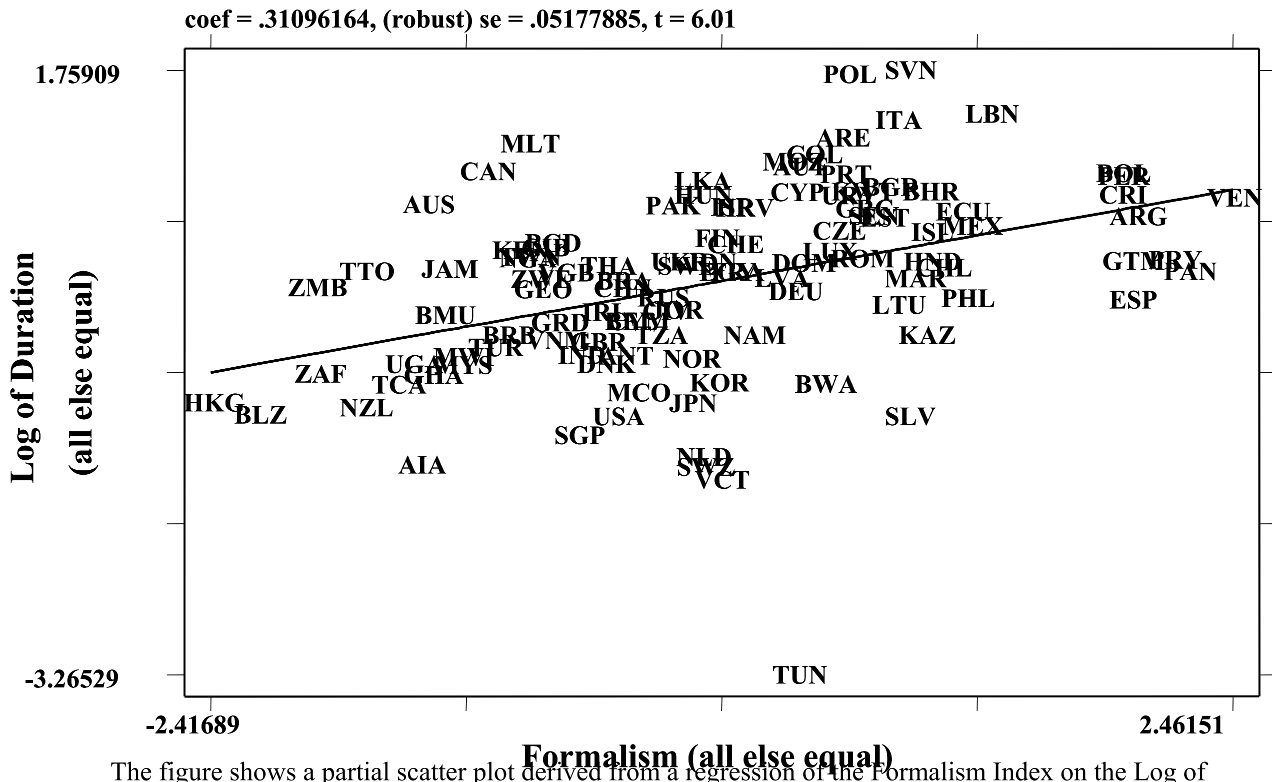
Private Enforcement: partial scatter plot of Private Enforcement Index and Access to Equity



The figure shows a partial scatter plot derived from a regression of the private enforcement index on Access to Equity. The regression controls for: (1) Anti-director rights; (2) Efficiency of the Judicial System and; (3) Log of GDP per capita.

Figure 7

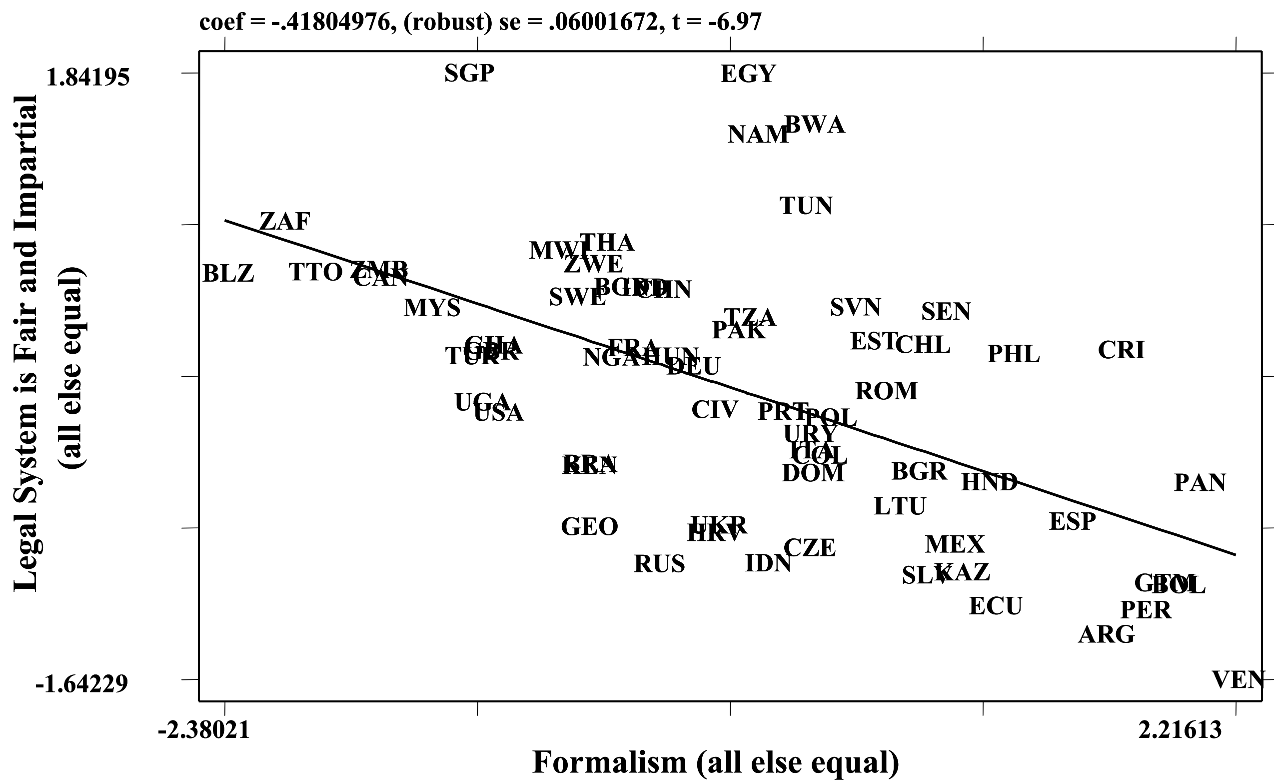
Court Formalism: partial scatter plot of Formalism Index and Log of Duration.



The figure shows a partial scatter plot derived from a regression of the Formalism Index on the Log of Duration. The regression controls for: (1) Judicial Efficiency; (2) Access to Justice; (3) Enforceability of Contracts; (4) Corruption and; (5) Human Rights.

Figure 8

Court Formalism: partial scatter plot of Court Formalism and Fairness and Impartiality of the Legal System



The figure shows a partial scatter plot derived from a regression of the Formalism Index on the Fairness and impartiality of the legal system. The regression controls for the following indexes: (1) Legal system is honest or uncorrupt; (2) Legal system is quick; (3) Legal system is affordable; (4) Legal system is consistent; (5) Court decisions are enforced and; (6) Confidence in legal system.

Deloitte.

ASIC

Australian Securities & Investments Commission

CALDB
Operational Audit – Preliminary Findings

DRAFT

As at 17 July 2013

Role and structure of the Board and the application process

Role of CALDB

The Companies Auditors and Liquidators Disciplinary Board (CALDB) is an independent statutory body established by Part 11 of the ASIC Act. The main role of the Board is to consider applications for the cancellation or suspension of the registration of registered auditors or registers liquidators under the provisions of the Corporations ACT. The Board's responsibilities are intended to provide an incentive to registered auditors and liquidators to maintain high professional standards.

Structure of the Board

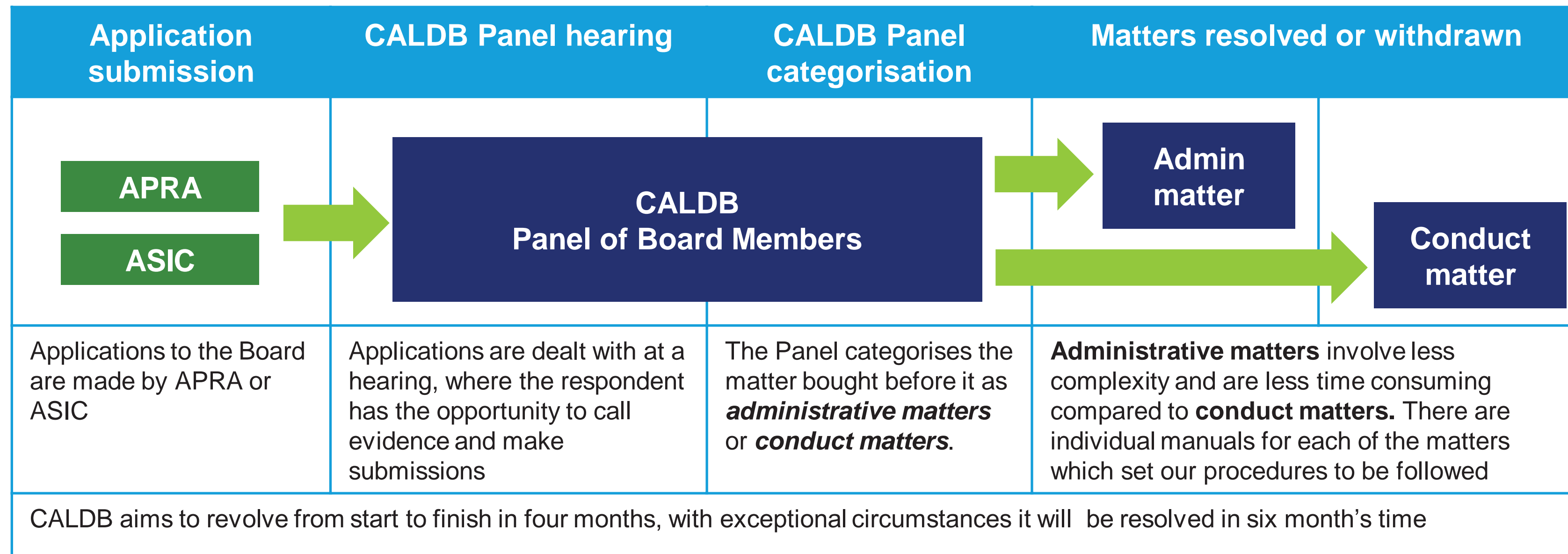
The ASIC Act provides that the Board consists of the following:

(a) a Chairperson;
(b) a Deputy Chairperson;
(c) six accounting members selected by the Minister; and
(d) six business members selected by the Minister.

The administrative business and operations of the Board are conducted by its Registrar, Mr Gary Hoare.

Location and facilities

The Board's office is located at Level 16, 60 Margaret Street, Sydney, as is the Board's principal hearing room. Hearings are also held, as needed, at other locations around Australia, and occasionally by telephone or video link. It is the policy of the Board that a hearing will normally be held in the capital city of the State or Territory of residence of the Respondent.



Application submission	CALDB Panel hearing	CALDB Panel categorisation	Matters resolved or withdrawn
Applications to the Board are made by APRA or ASIC	Applications are dealt with at a hearing, where the respondent has the opportunity to call evidence and make submissions	The Panel categorises the matter bought before it as ***administrative matters*** or ***conduct matters***.	**Administrative matters** involve less complexity and are less time consuming compared to **conduct matters.** There are individual manuals for each of the matters which set our procedures to be followed

CALDB aims to revolve from start to finish in four months, with exceptional circumstances it will be resolved in six month's time

DRAFT

© 2013 Deloitte Touche Tohmatsu

Summary: Current workload trends have created an opportunity for efficiencies in relation to property and employee expenses

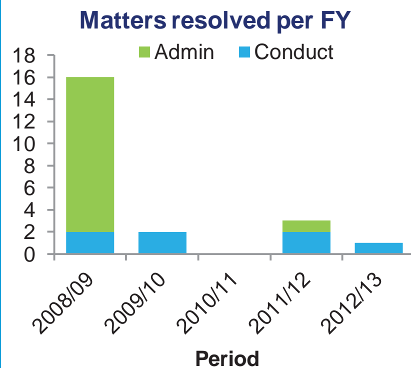
Recent History

In December 2011, the then Attorney-General, the Hon Robert McClelland MP, and the then Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, released a proposal paper '*A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*'. That paper proposed, amongst other things, amendments to the framework for discipline of breaches of the law by insolvency practitioners. In particular it was proposed that CALDB would no longer be responsible for disciplinary matters involving registered liquidators. On March 8 2013 submissions closed for draft legislation removing the discipline of liquidators from the responsibilities of CALDB.

Drivers of workload and cost

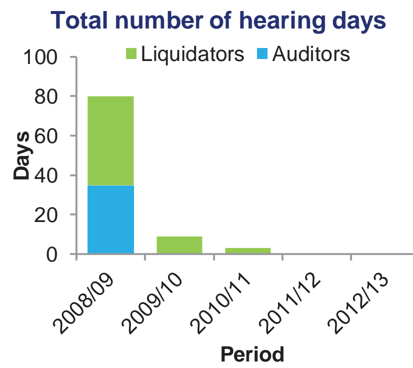
A low number of matters are resolved…

- Since 2009/10 there have been a low number of matters resolved with an average of 1.25 conduct and 0.25 admin matters.
- Half of the applications submitted to CALDB are withdrawn



…which aligned with the decrease in hearing days

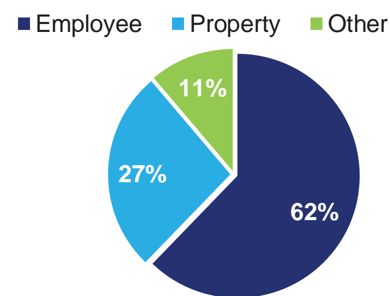
- The decrease in the number of applications has meant that the total number of hearing days has decreased
- This means that the Board has been in less demand which has flow-on implications in sitting fees and travel expenses



Efficiency opportunities

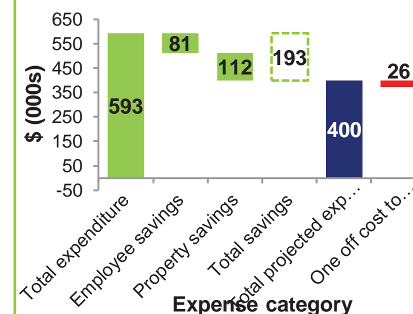
There are savings that can be realised…

- Employee and property expenses account for 89% of all operating expenses for CALDB; these are the two key areas of cost savings
- This amount is consistent with previous years where employee and property costs have accounting for approximately 90% of annual operating expenses



…through co-locating CALDB with ASIC

- Cost efficiencies can be realised by co-locating the CALDB offices with ASIC
- The cost of property expenses will decrease the cost of rent which is currently excessive
- Current tasks performed by the administrative assistant can be performed by the ASIC shared services centre



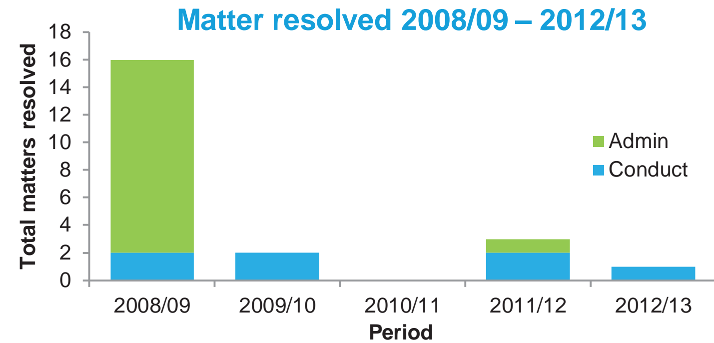
DRAFT

© 2013 Deloitte Touche Tohmatsu

The level of activity at CALDB has decreased significantly since 2008/09

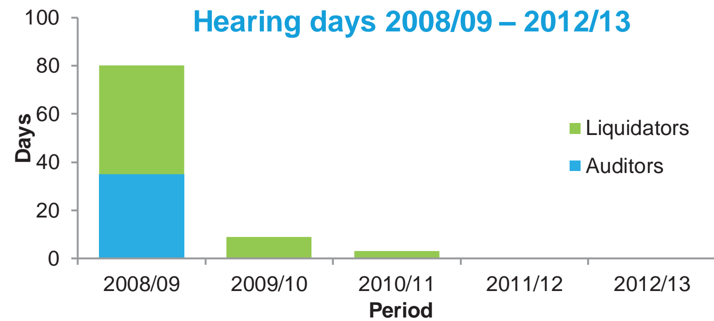
The number of matters resolved has decreased…

- The overall number of matters has decreased since 2008/09 when CALDB resolved 18 matters
- Since then the maximum number of matters resolved in a financial year has been three
- The number of matters referred to CALDB from 2009/10 has dropped off because ASIC changed its letter of notification to the concerned parties that ASIC will refer the matter to CALDB. Prior to that, the ASIC letter stated that ASIC may refer the matter to the CALDB
- It is noted that towards the end of 2012/13 there were two additional liquidator conduct matters submitted which are due to be resolved in the next financial year



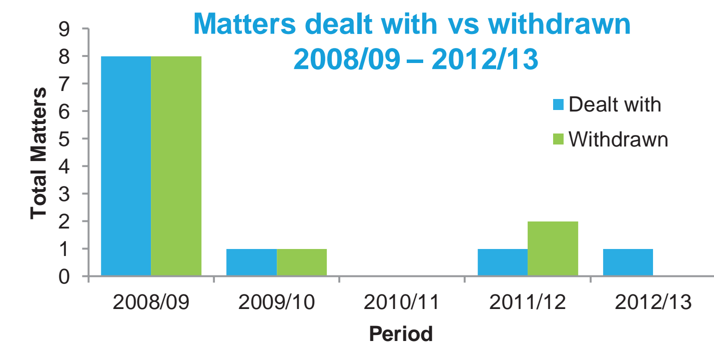
… which has decreased the number of hearing days…

- The decrease in the number of matters being resolved is in line with the decrease in the number of hearing days, with no hearing days in the last two years
- Over the last five years Liquidators hearing days have accounted for more than 60% of total hearing days
- Insolvency reforms have been submitted which, when approved, will mean that liquidators matters will not go through to CALDB as these matters will be resolved through a different body and process



… with half of the matters ending up being withdrawn

- Over the last five years approximately half of the matters which CALDB has handled were withdrawn
- Eight out of the 11 matters which have been withdrawn were admin matters

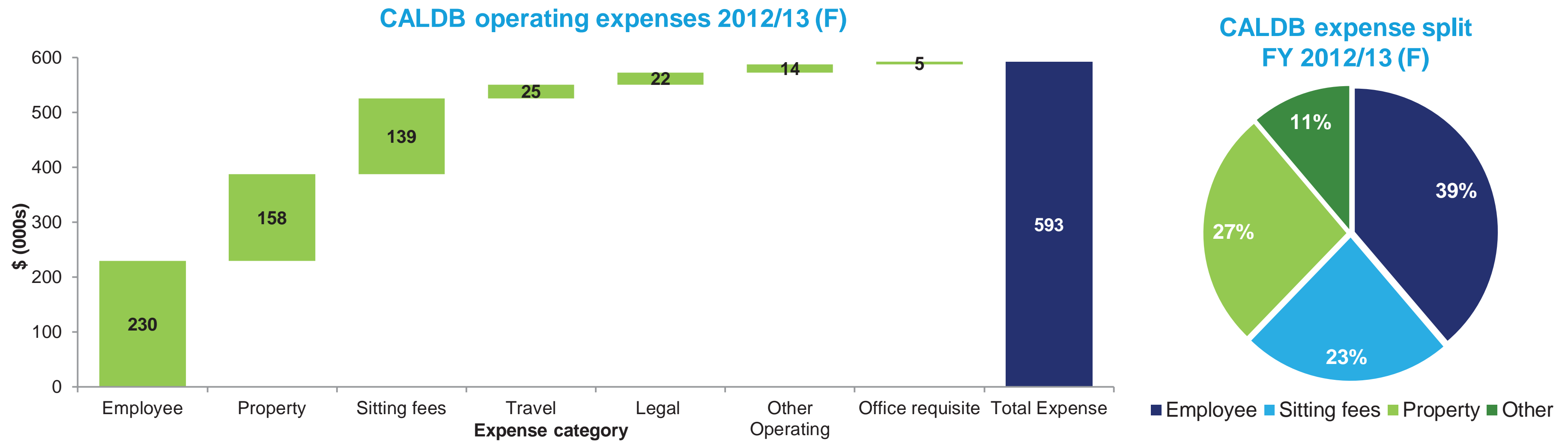


Source: numbers provided by Gary Hoare on 23 May 2013, updated hearing numbers days not provided

© 2013 Deloitte Touche Tohmatsu

DRAFT

Employee and property expenditure appear to be excessive, given the low levels of CALBD activity in recent years



Source: Pro-rated actual CALDB expenditure from Jul-12 until May-13

Employee (inc. sitting fees) and property expenses are the main areas of focus for this review as they account for 89% of the total operating expense for CALDB in the last financial year

Employee

- Employee expenditure accounts for approximately 39% of all operating expenses
- $230K was spent on full time CALDB employee wages and on-costs for the registrar and an administrative support resource
- The registrar is an EL2 resource and the admin assistant is an ASIC 3 level resource

Sitting fees

- In addition to employee expenses, sitting fees represent 23% of overall expenses for CALDB and include panel member remuneration and time spent on workshops
- Panel members are paid on the following rules for each day spent:
  - Nil if time spent is less than 1 hour
  - 1/3 is time spent is more than an hour
  - 2/3 if time spent is more than 2 hours
  - 1 day if time spent is more than 3 hours

Property

- Property expenses of $158K account for 27% of all operating expenditure
- The majority of the expense is for office rental for the premises which is located at 160 Margaret Street, Sydney
- The office space includes an office for the chairperson which is not regularly used, two workstations for the registrar and the support resource, a shared hearing room, meetings rooms and kitchen
- Current premises is shared with CAMAC

 (F) = Forecast

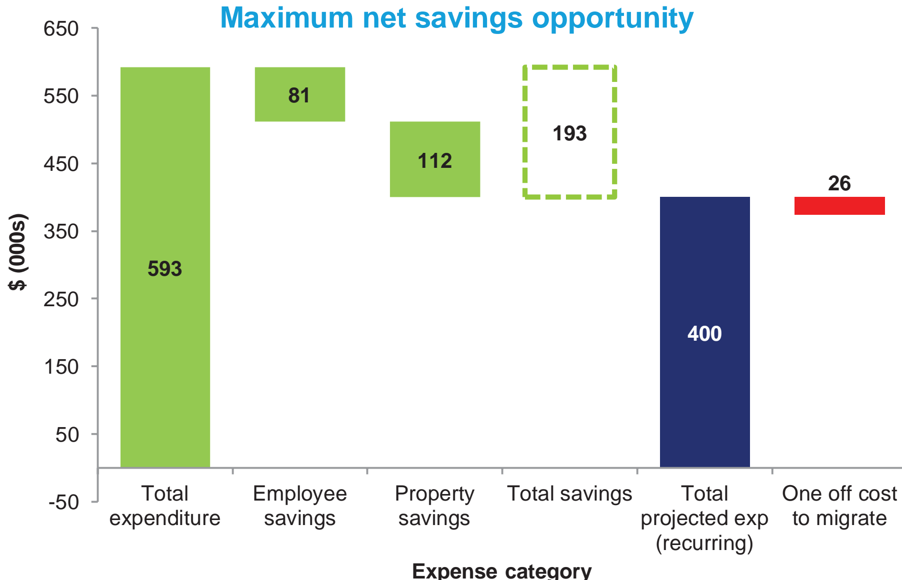
DRAFT

© 2013 Deloitte Touche Tohmatsu

A potential $193K of recurring annual savings can be realised by co-locating CALDB offices with ASIC offices, requiring $15K upfront costs

Potential cost saving summary

- An estimated $193K of maximum operating expenses can be saved per annum through the co-location of office with ASIC, leveraging ASICs capability to provide admin and support services and by rationalising resources so that it's in line with expected work load
- With total CALDB operating expenses of $593K in the last financial year, a saving of $193K per annum represents a reduction of 32.5% in total operating expenses
- There are also a number of unquantified benefits which come from having greater access to ASIC capabilities and services
- Achievement of this ongoing saving requires an upfront cost of $24K for transferring to the ASIC office and redundancy costs.



Source: Pro-rated actual CALDB expenditure from Jul-12 until May-13

Summary of estimated savings

Employee

- Admin support resource: $80K

Property

- Reduction in occupancy costs: $112K

Other unquantified benefits

- Ongoing access to utilise ASIC shared services and electronic document management system

Summary of estimated costs

Employee

- Redundancy for admin support resource: $24K

Property

- Removal costs: $2K

Other unquantified costs

- Time and effort spend to move offices
- Training for using ASIC facilities

Other considerations

Electronic records management

- CALDB will require the capability to electronically store documents as per federal government requirement, however this is cost neutral and will be a requirement regardless of co-location

DRAFT

© 2013 Deloitte Touche Tohmatsu

Using ASIC shared services for administrative support can save approximately $80K p.a

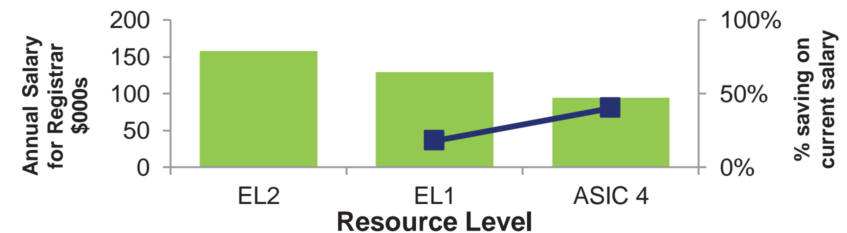
Administrative tasks can be performed by ASIC…

- The admin support resource is currently an ASIC 3 and is paid an annual salary of $80K
- The tasks that the administrative support resource currently undertakes are not complex and do not require special expertise to perform
- Most of the tasks performed are available as a service that is currently being offered by the ASIC Shared Services function
- We do not anticipate that there will be a substantial impact to the running of CALDB if these activities are performed by ASIC shared services resources

Activity performed	ASIC shared services?	Current cost
Document review and design	×	$80K p.a
Processing invoices against POs	✓	
Organises archives and couriers	✓	
Keep records of CALDB processes	✓	
Records matters into database	✓	
Maintenance issues	✓	
First aid officer	✓	
Potential efficiencies		**$80K p.a**

… however, a full time registrar is still required

- The registrar is responsible for the administrative business and operations of the Board. Specific duties of the role include:
  1. Preparing the CALDB annual report
  2. Maintaining the manuals (inc conduct, admin, cost and members manual which is updated annually)
  3. Organising prehearing conferences, setting up conferences, notifying board members, preparing materials
  4. Providing reports to the Board relating to matters under review
  5. Preparing media releases and uploading onto the website
  6. Approving timesheets submitted by the Board members
  7. Attending court with AGS lawyers where necessary
  8. Taking telephone calls from members of the public
- Despite the decrease in matters since 2008/09 there is still need for a full time resource due to the risk of fluctuations in the number of matters submitted, especially given current economic conditions
- Employee savings can be realised if the resource level of the Registrar is decreased from an EL2 as represented on the chart below. However, it is appropriate to maintain this role at EL2 given the nature of the matters involved and stakeholders with whom the registrar interacts



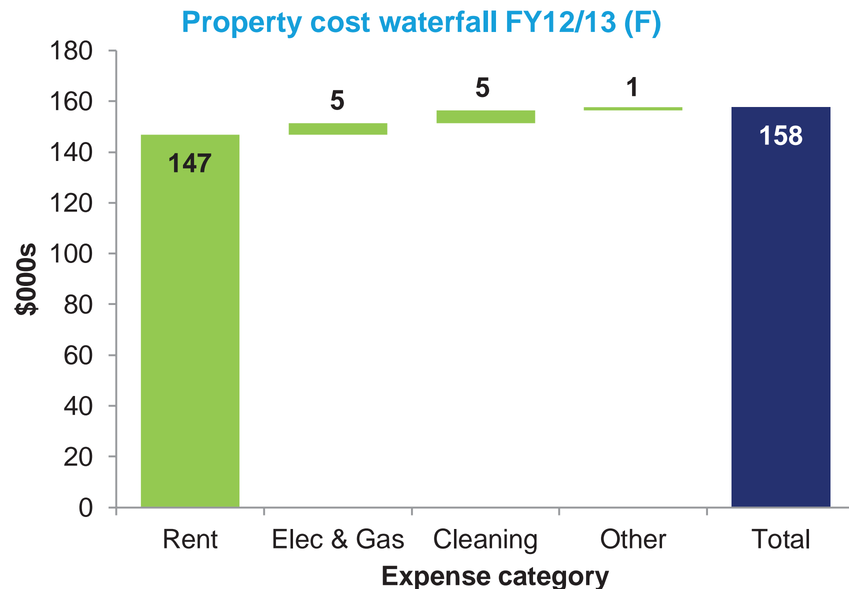
Source: Average ASIC level rates according to ASIC Enterprise agreement 2011-2014

DRAFT
© 2013 Deloitte Touche Tohmatsu

CALDB pays $159K p.a in occupancy expenses for its current office; there are no immediate barriers to co-locating with ASIC

Current rental costs appear to be excessive…

- Property expense for the CALDB Margaret Street office was $159,000 in the last financial year which is 27% of the total operating expenses. The vast majority of this spend is for rent
- CALDB's current office has a floor space of 224m² and includes an office, two workstations, a shared hearing room, shared meeting rooms and kitchen
- The office is for the CALDB chairman, who works out of his own Chambers in Phillip Street, and it is rarely used
- The CALDB property costs are not justified by the current use. The proposed solution of CALDB being co-located with ASIC would be a more efficient use of government resources



Source: Pro-rated actual CALDB expenditure from Jul-12 until May-13

… there appear to be no immediate barriers to co-locating with ASIC…

- CALDB has independence requirements which drives a requirement to remain physically separated from the rest of ASIC
- However from a security management perspective CALDB is rated as having low level risk due to the limited number of sensitive hearings that CALDB organises
- ASIC has confirmed that it is able to set up the CALDB offices to be quarantined from the rest of ASIC
- ASIC has also confirmed that there is sufficient capacity in its 100 Market Street building to provide the space that CALDB requires
- The lease agreement for the current CALDB premises is expected to expire in Jan 2014. The lessor has already been informed that CALDB will not be renewing its lease

… and costs to migrate are expected to be low

There are a number of costs to be considered if planning co-location with ASIC, but none are expected to be substantial

- IT infrastructure: there is no IT infrastructure equipment which needs to be moved as it is hosted remotely by ASIC
- CALDB computers, systems and data can be lifted and shifted immediately with minimal disruptions
- Physical files: There is one bay of files in the compactus, which will require a number of archive boxes
- Removalists: will be required to move files, archive boxes, computers and other
- Fit out make good: apportioned and already budgeted for in line with current lease agreement

DRAFT

© 2013 Deloitte Touche Tohmatsu

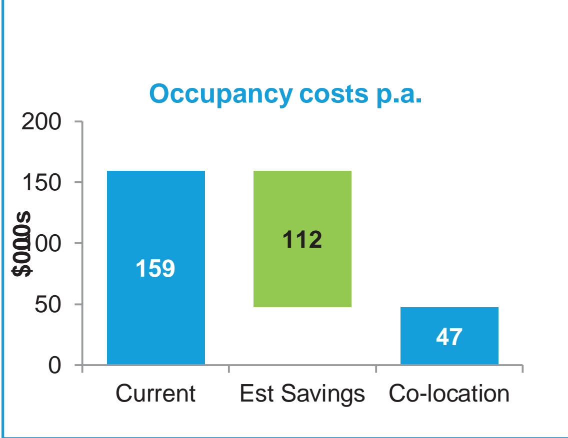
Co-location offers CALDB an opportunity to save on rental expenses and give access to ASIC technology and resources

Co-location has multiple benefits

- Ongoing cost savings on rental costs
- Access to better facilities, technology and support services offered by ASIC
- Closer to PRODAC compliant occupancy with space to grow

Savings in rental cost

- In the last financial year CALDB spent an estimated $159K on property and rental costs
- If CALDB moves to the ASIC building the expected rental allocation is estimated to be $47,480 which represents a saving of $112K on property and occupancy expenses
- ASIC has estimated rental allocation of $23,740 per workstation which includes cleaning, maintenance and energy costs

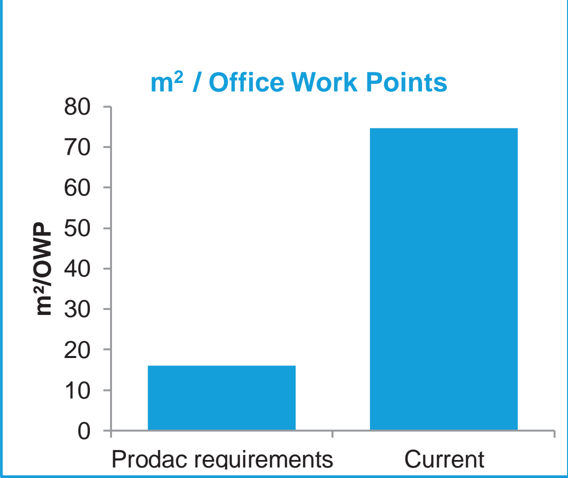


Other benefits of co-locating

- Access to support services: ability to utilise ASIC support services as required, which leads to better management of hearings especially if there is an increase in applications
- A more secure facility: increased security compared to current CALDB offices, due to minimum ASIC security standards
- Access to better technologies such as ASIC electronic document management facilities
- Receptionist and professional frontage: co-locating with ASIC presents an opportunity for CALDB to take advantage of a full-time reception presence (which can be a shared resource) and signed frontage
- Access to better facilities : co-locating with ASIC gives CALDB access to a larger range of meeting rooms and sizes, so that the facilities used are fit for purpose. CALDB would also benefit from being able to access video conferencing facilities which may help reduce travel expenses for hearings

PRODAC requirements awareness

- PRODAC targets 14m^2/OWP which is a government standard for floor space
- CALDB is less than 500m^2 in total which means that it does not have to abide by the PRODAC requirements
- However, the current CALDB office space greatly exceeds the PRODAC standards. Co-locating with ASIC can help CALDB to be closer to the standards



DRAFT

© 2013 Deloitte Touche Tohmatsu

Moving to electronic records management and centralised support will help comply with National Archives guidelines

Reduce the cost of physical storage…

- CALDB currently has the equivalent of 3 compactus bays to file its hearing related documents.
- CALDB estimates that space equivalent to 3 compactus bays will be required to store non-hearing related documents and pre-purchased stationery
- CALBD does not currently have the capability to make digital copies of its files and will need to make an investment to introduce the capability

…and comply with the requirement to go digital…

- Under the Commonwealth's Digital Transition Policy, all Government agencies are required to move towards digital recordkeeping, regardless of their legislative status. Digital recordkeeping means that:
  - the majority of records should be created, stored and managed digitally
  - incoming paper records scanned so that new paper files are not created
- CALBD is required to comply with this requirement from the beginning of 2015.

…by adopting ASIC's Objective ECM…

- The approximate cost of setting CALDB up for ECM use is expected to be in the range of $136K-$162K which includes implementation, training and initial licence costs. The ongoing annual cost is estimated to be $4,500
- CALDB is required by the Commonwealth to comply and these charges will need to be incurred irrespective of co-location with ASIC. Consideration should be given to applying for dedicated NPP funding to support this
- Implementation and training may be easier if CALDB is co-located with ASIC as it means the trainers and IT consultants do not need to go to a satellite site. The incremental cost has not been quantified as it is expected to be minimal

…and centralising record management support

- CALDB has minimal record management requirements; it has not produced any files in the last three years
- Currently ASIC Corporate Services provides Records Management Services
- It is anticipated that the records created by CALDB can be absorbed by the Melbourne Records Management team with a negligible increase to the Service Charge

DRAFT
© 2013 Deloitte Touche Tohmatsu

Co-locating will increase the level of security and will not impact the current IT disaster recovery

Backup and security of electronic information will not be impacted

- CALDB currently has all its files saved onto a hard drive with backups stored on a network drive. All IT, including backup, is managed off site centrally by ASIC
- CALDB is currently covered by ASIC's IT disaster recovery plan; this will not change or be impacted through co-location
- Co-location with ASIC means that the IT department can service any IT matters locally rather than sending staff to the CALDB office. This makes it easier to manage, especially for IT enquiries which cannot be settled remotely

Security requirements will increase from co-location

- The current CALDB offices do meet minimum security requirements, and further investment to increase security is not required. CALDB is seen as a low risk areas and has lower security requirements compared to ASIC
- There are times where additional temporary security needs to be hired when CALDB have matters dealing with high profile respondents
- The ASIC building at 100 Market Street provides a higher level of security (i.e. reception, lift, lift passes, general security, etc.) which means that the cost incurred to provide additional security for high profile matters is not required
- Co-location will also mean that security will not need to manage and respond to security matters relating to the satellite site

DRAFT

© 2013 Deloitte Touche Tohmatsu

Limitations of our Work
General Use Restriction

This report is prepared solely for the internal use of ASIC as part of its Operational Audit of SCT. This report is not intended to and should not be used or relied upon by anyone else and we accept no duty of care to any other person or entity. The report has been prepared for the purpose set out in our engagement letter dated 15 March 2013. You should not refer to or use our name or the advice for any other purpose.

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/au/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.
Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte's approximately 195,000 professionals are committed to becoming the standard of excellence.

About Deloitte Australia

In Australia, the member firm is the Australian partnership of Deloitte Touche Tohmatsu. As one of Australia's leading professional services firms. Deloitte Touche Tohmatsu and its affiliates provide audit, tax, consulting, and financial advisory services through approximately 6,000 people across the country. Focused on the creation of value and growth, and known as an employer of choice for innovative human resources programs, we are dedicated to helping our clients and our people excel. For more information, please visit our web site at www.deloitte.com.au.

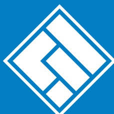
Liability limited by a scheme approved under Professional Standards Legislation.

Member of Deloitte Touche Tohmatsu Limited

DRAFT

© 2013 Deloitte Touche Tohmatsu

Your obligations as a small business operator



ASIC

Australian Securities & Investments Commission

ASIC and small business

ASIC is an independent Commonwealth government agency that regulates businesses, financial markets and financial services industries in Australia

A key function of ASIC is to help businesses operate within the law. This will help ensure that businesses in Australia are managed and operate fairly and transparently. Another key function of ASIC is to educate businesses on what it means to operate within the law.

If you operate a small business as a registered company or under a registered business name, this brochure is for you. It explains ASIC's role and the laws you must meet, specifically:

- under the *Corporations Act 2001*, if you operate your business as a registered company, and
- under the *Business Names Registration Act 2011*, if you have a registered business name.

Operating your business as a registered company

Small businesses can be established and operate in Australia in various ways

Many small businesses choose to operate as registered companies. ASIC is responsible for registering companies and for ensuring that persons that manage or operate companies comply with the *Corporations Act 2001*.

When ASIC registers a company, it can conduct business throughout Australia, without needing to register in individual states and territories.

A registered company:

- is a separate legal entity distinct from its members (i.e. shareholders) and directors
- remains in existence until deregistered
- has the same powers as individuals
- is entitled to privileges (e.g. a corporate tax rate, limited liability)
- can hold property, enter into contracts, sue and be sued, and
- has money and assets that must be used for the company's purpose.

Company officers are responsible for managing companies and businesses

A registered company is required to have at least one director, and a company secretary unless it is a proprietary company

People who operate as directors and company secretaries are, by definition, officers of the company. This means that they are required to ensure that the company operates within the law.

Before someone can become a director or company secretary, they must meet certain conditions. Some of these are listed below:

- directors and company secretaries must be at least 18 years of age
- a proprietary company must have at least one director, but does not require a company secretary
- directors and company secretaries must ordinarily live in Australia, and
- directors may be liable for debts incurred if the company trades while insolvent.

Because directors and company secretaries make decisions that affect the business, these are positions of responsibility. The law says that a person is disqualified from managing a company if they:

- are an undischarged bankrupt
- have been convicted of dishonesty offences (e.g. theft or fraud), or
- have been disqualified by ASIC from managing a company.

It is a serious criminal offence to manage a company if you fall into one of these categories.

Your obligations as an officer of a registered company

Obligation	Description
Have a registered office	A company must have a registered office in Australia and must inform ASIC of its location. The purpose of having a registered office is to have a place where communications can be sent to the company.
Have a principal place of business	If a company operates from a location that is different from the registered office, ASIC must be informed of the location.
Disclose personal details of directors and secretaries	A company must inform ASIC of the name, date of birth and current residential address of directors and company secretaries. A post office box cannot be used as the registered office, principal place of business, or for the personal contact details of company officers.
Keep financial records	Company officers must keep up-to-date financial records that correctly record and explain transactions and explain the company's financial position and performance. While small proprietary companies are not required to lodge financial reports with ASIC, they are required to keep records.
Pay relevant fees to ASIC	ASIC imposes fees when registering a company and lodging certain documents. We may also impose late lodgement fees.
Notify ASIC of changes	A company must notify ASIC if certain changes occur, with the most common being changes of: • registered office (within 28 days) • principal place of business (within 28 days) • personal details of directors and company secretaries (within 28 days) • company share issues (within 28 days), and • the location of the company's share register (within 7 days).

What happens if you don't comply with your obligations?

We may send a compliance notice or a warning letter, obtain a court order, and/or take civil or criminal action.

Receive annual statements	When a company receives its annual statements, directors must ensure that the details on ASIC's registers are accurate and up-to-date. Importantly, directors must complete the solvency report.
Ensure the company is solvent and can pay its debts on time	A company is insolvent if it cannot pay its debts as and when they become payable. Common signs of insolvency include low operating profits or cash flow from the business, problems paying trade suppliers and other creditors on time, trade suppliers refusing to extend further credit to the company, problems with meeting loan repayments on time or difficulty in keeping within overdraft limits, and legal action taken, or threatened, by trade suppliers or other creditors over money owed to them.
Act in the company's best interests	You must act in the company's best interests even if this may not be in your own interests, and even though you may have set up the company for personal or taxation reasons.
Use information appropriately	You must use any information you get through your position properly and in the best interests of the company. Using that information to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company, may be a crime or may expose you to other claims. This information need not be confidential. If you use it the wrong way or dishonestly, it may still be a crime.
Do not illegally 'phoenix' assets of a company	This involves the intentional transfer of assets to a new company without paying the true value for those assets. The directors leave the debts with the old company, and the new company often has the same directors and is involved in the same industry as the old company. By engaging in this illegal practice, the directors avoid paying debts that are owed to creditors, employees and statutory bodies (i.e. ATO). Illegal phoenix activity is a serious crime and may result in directors being imprisoned.

Registering your business name

ASIC is responsible for registering, renewing and administering business names throughout Australia.

The National Business Names Register, introduced in May 2012, replaces eight state and territory registry services.

All of the existing 1.6 million registered business names that were previously registered in states and territories have been transferred to the new national register.

Generally, you must register a business name on our Business Names Register if you are conducting a business or trade within Australia and you are not trading under your name.

You do not need to register a business name if you are:

- an individual and your business name is your name (your first name and surname)
- a registered company and the business name is the company's name, or
- a partnership and the business name consists of all of the partners' names.

To register, update or search business name details, go to ASIC Connect at **www.asic.gov.au**.

For more information

Visit our website, www.asic.gov.au, for more information on:

Your obligations to operate a business as a registered company

- Information Sheet 7 *Are your company details up to date?*
- Information Sheet 12 *ASIC search information and fees*
- Information Sheet 14 *Bankruptcy and personal insolvency agreements*
- Information Sheet 25 *Voluntarily deregistering a company*
- Information Sheet 26 *Dealing with businesses and companies: How to avoid being swindled*
- Information Sheet 30 *Fees for commonly lodged documents*
- Information Sheet 42 *Insolvency: A guide for directors*
- Information Sheet 47 *Members of a company*
- Information Sheet 49 *Minimum officeholders*
- Information Sheet 61 *How to register a company*
- Information Sheet 76 *What books and records should my company keep?*
- Information Sheet 79 *Your company and the law*
- Information Sheet 151 *ASIC's approach to enforcement*

Registering your business name

- Regulatory Guide 235 *Registering your business name*
- Our booklet *National Business Names Register: ASIC Connect - Making it easier to do business.*

www.asic.gov.au | www.moneysmart.gov.au | ASIC Infoline: 1300 300 630

Disclaimer
Please note that this is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice.

© Australian Securities and Investments Commission 2013 **| ISBN 978-0-9805534-9-9 | July 2013**

ASIC

Australian Securities & Investments Commission

REPORT 391

ASIC's deregulatory initiatives

May 2014

About this report

This report provides an overview of ASIC's commitment to reduce compliance costs for our regulated population, including ongoing work and new initiatives.

It should be read by all businesses and individuals who are required to comply with laws and regulations administered by ASIC and those who have an interest in engaging with ASIC on our approach to deregulation.

Contents

A Our mandate and approach to cutting red tape 3
Our approach to deregulation 4
Overview of our deregulatory initiatives..5
Feedback 6

B Our ongoing work and recent progress 7
Waivers from the law ('relief') 7
Savings to business as a result of our international work 8
Guidance and communication 9
Improvements to the AFS licence application process..........................11
Simplification of business names registration.......................................11

C New initiatives 12
Streamlining ASIC forms 12
Proposed legislative reform to facilitate business 13
Removing barriers that inhibit innovation in disclosure 15
Harmonising ASIC market integrity rules..17
'Sunsetting' legislative instruments..17
Improvements to auditor resignation requirements 17
New guidance and communication projects 18

Appendix 1: Forms identified for removal, consolidation or simplification..19

Appendix 2: Proposed minor or technical law reform............................22

Key terms 24

A Our mandate and approach to cutting red tape

Key points

ASIC is specifically required to strive to reduce business costs and administer the law effectively with a minimum of procedural requirements. We have recently made significant progress in reducing the burden of red tape for businesses and individuals, and have a number of ongoing and new deregulatory initiatives.

1 ASIC's mandate under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) specifically requires us to strive to reduce business costs and administer the law effectively with a minimum of procedural requirements. Our mandate clearly requires a balance between:

- facilitating markets and business; and
- safeguarding those markets to ensure stability and to promote confident and informed participation by investors and consumers in the financial system.

2 This is reflected in our strategic priorities, which are to ensure:

- confident and informed investors and financial consumers;
- fair and efficient markets; and
- efficient registration and licensing.

3 We will continue to reduce red tape for individuals and businesses and will work with Treasury to propose changes to the law where we see a net regulatory benefit, or where a minimal regulatory detriment is clearly outweighed by compliance cost savings. This will be achieved through both new and ongoing deregulatory initiatives. We have already made significant recent progress in reducing the burden of red tape for businesses and individuals, which will contribute to the Government's $1 billion red-tape reduction target.

4 Our previous work on deregulatory initiatives—such as 'Better Regulation',[1] 'Rethinking Regulation' and our work on the Corporate and Financial Services Regulation Review[2] in 2005 and 2006—are also examples of our commitment to reducing red tape to make it easier for regulated businesses to meet their obligations.

---

[1] See, for example, *Better regulation: ASIC initiatives*, report, ASIC, April 2006, www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Better_regulation.pdf/$file/Better_regulation.pdf.
[2] See Media Release (06-402MR) *ASIC welcomes regulation review proposals paper* (17 November 2006), www.asic.gov.au/asic/asic.nsf/byheadline/06-402+ASIC+welcomes+regulation+review+proposals+paper.

Our approach to deregulation

5 We take a broad approach to deregulation. We believe the following are the key areas that contribute to the goal of reduced regulatory burden and lower compliance costs for the people and businesses we regulate:

- reducing the total number of regulations that must be complied with;
- removing existing regulation that is onerous, excessive or does not serve clear policy goals;
- increasing the clarity of regulatory requirements to ensure regulation is more effective by being easier and less costly to comply with;
- ensuring regulatory requirements are set out in as few locations as possible, to make it easier for businesses to understand their obligations and how to comply with them;
- considering alternative or non-government regulation where appropriate, including self-regulation and co-regulation;
- reducing the cost of complying with regulation—for example, by reducing the number of processes that are required to be satisfied, or the number of times a person has to interact with a government agency; and
- improving the processes by which regulation is developed and ensuring that any regulation developed is well designed to meet its policy goals.

6 For most of these areas, our role is primarily to use our regulatory experiences and our relationships with, and insights into, businesses and markets to identify where changes might be valuable and alert Government to these areas, as well as contribute to policy development.

7 We have the most impact regarding reducing the cost of complying with regulation by working closely with businesses and individuals to ensure that our activity does not introduce unnecessary additional regulatory requirements, and providing guidance and relief where appropriate. We also strive to adopt a risk-based approach to regulation so that our actions are appropriate and proportionate—for example, the level of information we seek from Australian financial services (AFS) licence applicants depends on a risk assessment.

8 As well as specific deregulatory projects, much of our business-as-usual work reduces the regulatory burden for businesses complying with the legislation we administer. For example, our regulatory guidance helps businesses comply with their obligations, and our class order and individual waivers from the law facilitate business.

9 We promote accountability and transparency in our actions by working closely with stakeholders to develop our guidance and to address issues promptly, as well as encouraging and monitoring the role of key gatekeepers such as auditors, liquidators and directors. We also seek regular feedback on

our performance and change our processes and practices in response to this feedback. We want to achieve our and the Government's regulatory goals in a way that ensures businesses are able to comply with the law with as little effort and paperwork as possible.

Overview of our deregulatory initiatives

10 Much of our ongoing work minimises compliance costs and red tape. To complement our ongoing work we periodically undertake specific initiatives targeted at reducing compliance costs and burdens for regulated businesses. The following initiatives, which are discussed in Section B, are examples of initiatives that have delivered compliance cost savings:

- continuing to provide waivers from the law ('relief') where there is a net regulatory benefit in doing so;
- promoting recognition of Australian laws and substituted compliance through our international work;
- engaging with the regulated population to improve our guidance and communication, including the launch of a new online hub dedicated to small business;
- an update to the AFS licence application process; and
- simplification of business names registration.

11 Subject to feedback on this report, we are also planning work in the following areas (discussed in Section C) to reduce red tape and the regulatory burden for individuals and businesses:

- streamlining ASIC forms;
- discussing possible legislative changes with Treasury;
- removing barriers that inhibit innovation in disclosure;
- harmonising ASIC market integrity rules;
- 'sunsetting' class orders (class waivers) that are no longer required and reviewing the conditions of continuing class orders;
- improvements to auditor resignation requirements to allow more flexibility for public companies; and
- strengthening our engagement and communication with our regulated population.

ASIC's deregulation team

12 We have set up a deregulation team within ASIC to further work on our deregulatory initiatives, to identify further initiatives and to ensure that all of our work continues to be undertaken with a view to minimising red tape for

our regulated population. To promote this focus right across ASIC, we have taken a number of steps to foster a deregulatory culture, including engaging all staff through ASIC-wide presentations and establishing a single email portal to encourage all staff to identify opportunities to cut red tape and to feed those ideas back to the deregulation team.

13 The deregulation team is also working closely with Treasury, the Office of Best Practice Regulation and the Government to identify and cut red tape.

Feedback

14 We welcome feedback on the specific initiatives in this report and, more broadly, on particular areas where we can make it easier for businesses and individuals to meet their obligations under the laws and regulations we administer, where doing this does not undermine our strategic priorities of ensuring investors and financial consumers are confident and informed and markets are fair and efficient.

15 We are seeking specific proposals that provide a net regulatory benefit, or a minimal regulatory detriment that is clearly outweighed by a demonstrated commercial benefit.

16 In particular, we seek views on:

- any changes that might be made to ASIC forms;
- suggestions for regulatory change that ASIC might discuss further with Treasury and the Government; and
- any changes that might be made to ASIC processes or procedures.

17 While we welcome ongoing feedback, initial comments are invited by 18 June 2014.

18 Please provide feedback to:

Ashly Hope, Strategic Policy Advisor
Australian Securities and Investments Commission
GPO Box 9827 Melbourne VIC 3001
Email: deregulation@asic.gov.au

B Our ongoing work and recent progress

Key points

Much of our ongoing work and some of our recent projects have delivered or are expected to deliver substantial compliance cost savings for regulated businesses. While this report does not attempt to account for the entirety of our action to reduce compliance costs, the examples in this section provide a snapshot of recent achievements and ongoing work to cut red tape and reduce costs for business. The initiatives highlighted include:

- continuing to provide waivers from the law ('relief') where there is a net regulatory benefit in doing so;
- promoting recognition of Australian laws and substituted compliance through ASIC's international work;
- engaging with the regulated population to improve our guidance and communication;
- an update to the AFS licence application process; and
- the simplification of business names registration.

Waivers from the law ('relief')

19 ASIC has powers under the *Corporations Act 2001* (Corporations Act) to exempt a person or a class of persons from the law and to modify the law in many cases. We use our discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit, or where the benefits of facilitating business outweigh the regulatory detriment. Guidance on when we will grant relief is set out in Regulatory Guide 51 *Applications for relief* (RG 51) and other ASIC policies. Our relief makes the law more adaptable and facilitates innovations in products, services or transactions.

20 Businesses frequently approach ASIC for assistance to help make the law work better through class orders or individual relief and waivers. In determining relief applications (both class order relief and individual relief applications), we are transparent about the policy we apply. We make consistent decisions and engage with applicants throughout the process.

21 In 2013 we granted 52 class orders and received 2,744 individual relief applications. Around 85% of individual applications were approved for relief.

Savings to business as a result of our international work

22 Our international engagement includes contributing to the development of international regulation as well as securing recognition of Australian laws and substituted compliance, resulting in compliance savings for businesses operating across jurisdictions. Below are two examples of how our recent international work has achieved real savings for business.

OTC substituted compliance

23 We have been implementing international principles and standards resulting from the G20 over-the-counter (OTC) derivatives reform process, such as the CPSS–IOSCO *Principles for financial market infrastructures*. Implementing international standards facilitates cross-border activity by increasing the likelihood that Australian regulatory regimes will be judged equivalent by foreign regulators. This:

- enables Australian entities that are subject to the rules of foreign regulators to use compliance with Australian laws in satisfaction of the foreign rules, reducing the cost of compliance with multiple regulatory regimes; and
- facilitates recognition of Australian entities by foreign regulators, minimising the potential compliance burden for Australian entities seeking to enter foreign markets.

24 An example of this has been our work with the European Securities and Markets Authority (ESMA) and the US Commodity Futures and Trading Commission (CFTC). In 2013, we worked with the Council of Financial Regulators, in particular APRA, and industry and obtained positive equivalence assessments from ESMA[3] and the CFTC to have aspects of Australia's regulatory regime on OTC derivatives considered equivalent or comparable to the regimes in the European Union. In addition, in 2013 the CFTC approved substituted compliance for Australia in relation to a number of requirements applying to swap dealers.

25 By ensuring consistency with international standards and by aligning our rules to those already in place in other major jurisdictions, our approach has also enabled market participants to leverage existing infrastructure and relationships, such as those established with derivative trade repositories for trade reporting, and minimise costs associated with implementing new requirements.

26 We estimate that this initiative will deliver significant initial and ongoing compliance cost savings. We have also continued to provide transitional

[3] ESMA has made a recommendation to the European Union in relation to substituted compliance for Australia. As at 5 May 2014, the European Union had not yet decided on this recommendation.

relief (beyond that mentioned above) to a range of reporting entities, delivering significant savings to those entities.

Alternative investment funds: EU offerings

27 In July 2013 we entered into 29 supervisory cooperation arrangements with EU securities regulators, agreeing to help each other supervise fund managers operating across borders. The cooperation is crucial in allowing Australian fund managers to manage and market alternative investment funds (AIFs) to professional investors in the European Union under the rules of the Alternative Investment Fund Managers Directive (AIFMD). AIFs include hedge funds, private equity funds and real estate funds, among others.

28 The agreements we have entered into will enable funds to take advantage of the private placement exception under AIFMD, rather than seeking authorisation under the directive, resulting in substantial compliance cost savings for those funds.

Guidance and communication

29 ASIC knows that the way we apply the law and the way in which we communicate with the people we regulate has a significant impact on the way those people experience regulation.

30 Engagement with industry and stakeholders is one of our key regulatory tools. We are conscious that the burden of regulation can be different, and can be perceived differently, depending on the approach of the regulator. We are therefore committed to broad and deep consultation and provide substantial resources to help people comply with the law. As part of this, ASIC teams and the ASIC Commission meet regularly with stakeholders and we have six key external committees and panels that inform our work.

Small business

31 Small business is our largest stakeholder group. Of all the Australian companies and businesses registered with us, approximately 96% are considered to be small businesses. Improving the service we provide to small businesses is one of our key priorities.

32 We have recently launched a range of tools specifically designed for small businesses, including guides, newsletters, and a dedicated online hub. The new online hub dedicated to small business was launched in November 2013. Links are prominently displayed on the home page of the ASIC

website. The online hub provides relevant information for small business operators in a format that is easy to access and understand.

33 The small business hub includes 'one-minute guides' to various compliance topics, answers to frequently asked questions and acts as a signpost to more detailed information contained in other parts of our website. Small business owners can also subscribe to an eNewsletter, sent out on a quarterly basis.

34 Since its launch, the small business hub has been accessed more than 13,000 times and the feedback from small business owners has been positive. In August 2013, we also released a practical guide about small business compliance obligations, *Your obligations as a small business operator*, which is available in hard copy and online. Approximately 10,000 hard copies have been distributed and the feedback from small business owners has been positive.

35 We have also recently launched our second Small Business Survey. While we undertake regular surveys of our regulated population, we appreciate that small business operators can have different experiences in dealing with us and complying with their obligations compared to other entities that we regulate. This survey will give a voice to small business operators and facilitate continuous service improvement in our interactions with these very important stakeholders.

Cooperation between regulators: APRA and ASIC reporting standards

36 We are aware that many regulated entities deal with a number of regulators and the interaction between the requirements imposed and administered by different regulators can cause concern. As such, we work closely with our fellow financial regulators to articulate our role, minimise overlap and streamline requirements where possible.

37 For example, ASIC and APRA recently issued a joint letter to registrable superannuation entity (RSE) licensees to clarify the relationship that exists between ASIC disclosure requirements and the data required to be reported to APRA under s29QC of the *Superannuation Industry (Supervision) Act 1993*.

38 The purpose of the s29QC requirements is to improve the comparability of information about superannuation products and the letter explained the role of each regulator, the implications of s29QC and also ASIC's compliance approach. We have also updated the frequently asked questions on our website's superannuation page to include guidance on what information must be aligned with APRA's reporting standards.

Regulatory guidance

39 Through our regulatory guidance we try to provide clear and consistent messages to the people we regulate about how we will apply the law and how businesses can ensure they are meeting their compliance obligations. We will update and produce guidance in consultation with stakeholders as needed.

40 For example, we recently updated Regulatory Guide 107 *Fundraising: Facilitating electronic offers of securities* (RG 107) to facilitate and encourage the use of the internet and other interactive media for making offers of securities. The updated policy benefits companies looking to raise capital quickly and gain market opportunities, and recognises that there are many advantages to using the internet and other electronic means to distribute disclosure documents and application forms (e.g. information can be easier to access, read and understand for investors).

Improvements to the AFS licence application process

41 In early 2012 we reviewed the AFS licence application and our internal process to assess applications for AFS licences. We amended the online licence application by removing 46 questions and rewording a majority of the remaining questions to increase usability of the application.

42 We also removed some of the certifications required when submitting supporting documents and enabled applicants to submit the supporting documents to an email account rather than in hard copy. This means the 1,300 or so AFS licensees or potential licensees who use this form each year can use it more easily and more quickly.

43 We estimate that this initiative has saved more than 10,000 hours of compliance time each year for potential AFS licensees, many of whom are small businesses.

Simplification of business names registration

44 The Business Names Register, launched in May 2012, replaced eight state and territory systems and simplified business registration in Australia by offering a single online service to register, renew and search business names. Businesses can apply to register or renew a business name online and in most cases receive confirmation of their registration straight away. As a consequence, 99.9% of business name registrations are completed online and costs for registering a business name have come down. There is also a joint process for registering for an Australian Business Number (ABN) and a national business name, the two most common registrations when starting a business.

© Australian Securities and Investments Commission May 2014

C New initiatives

Key points

We are progressing work on new initiatives that are consistent with the Government's objective and will result in a reduction of red tape and regulatory burden for individuals and businesses, including:

- streamlining ASIC forms;
- discussing possible legislative changes with Treasury and the Government;
- removing barriers that inhibit innovation in disclosure;
- harmonising ASIC market integrity rules;
- 'sunsetting' class orders (class waivers) that are no longer required;
- improvements to auditor resignation requirements; and
- strengthening our engagement and communication with our regulated population.

Streamlining ASIC forms

45 We collect a significant volume of information from our licensees and stakeholder groups through forms both prescribed by legislation or by ASIC to meet information requirements set under legislation. We have recently identified and catalogued 362 forms that we receive.

46 The 362 forms that comprise the data catalogue were examined to identify opportunities for reducing the regulatory burden on stakeholders. Forms were examined to ascertain whether they could be either removed if the information was not required or used regularly by ASIC or the public, or consolidated or streamlined to lessen the burden on business of providing this information to ASIC. Our preliminary analysis has identified that approximately 10% of forms could be removed, consolidated or streamlined.

47 Appendix 1 lists the forms that might be considered for removal (see Table 1) and consolidation or simplification (see Table 2). A number of the forms identified for removal are currently required to be provided to ASIC under the law, but provide information that might not be necessary for ASIC to hold. Subject to stakeholder comments, we may suggest that these forms be removed through legislative amendment.

Proposed legislative reform to facilitate business

48 We have undertaken a preliminary process to identify:

- potentially redundant or no longer justified legislative and regulatory provisions; and
- provisions that might be reformed to reduce business compliance costs with little regulatory detriment, or with regulatory benefits.

This resulted in the following deregulatory proposals, about which we are seeking further comment.

Simplifying wholly owned financial reporting relief

49 We provide relief from the law requiring all companies to prepare, audit and lodge financial reports for companies if they are the wholly owned subsidiary of another company that lodges financial reports, provided the companies enter into deeds of cross-guarantee and meet certain other conditions. However, our inability to modify the insolvency provisions of the Corporations Act means the relief provided in Class Order [CO 98/1418] *Wholly-owned entities* is complex.

50 This relief provides a substantial compliance cost saving to those entities that rely on it, but the complexity of the relief itself could be reduced by incorporating the relief directly into Ch 2M of the Corporations Act and making changes to the insolvency provisions of the Act to remove the need for deeds of cross-guarantee.

Market stabilisation

51 Consideration might be given to consulting on whether there is a need for legislative amendment to allow market stabilisation activities in appropriate circumstances.

52 Market stabilisation aims to achieve a more orderly secondary market for securities following an initial issue or sale. An argument for market stabilisation is that it enhances confidence in the market for new issues or sales of securities and facilitates corporate fundraising. An offer of securities may lead to a fall in the price of those securities because of the sudden increase in supply and imperfections in the pricing and allocation process.

53 A number of other jurisdictions have legislated to facilitate stabilisation practices, including the United States, Hong Kong, New Zealand and the United Kingdom.

54 The Corporations Act prohibits a person from engaging in misleading or deceptive conduct, false trading and market rigging, and insider trading. Because market stabilisation activities are designed to have a price effect

that might not otherwise occur, this could be considered a breach of these provisions. We have previously undertaken to provide no-action letters where the risk of creating a false, misled or uninformed market is mitigated by conditions on market stabilisation activity. A no-action letter states to a particular person that we do not intend to take regulatory action over a particular state of affairs or particular conduct. Key to ASIC's provision of no-action letters are disclosure obligations clearly identifying on-market stabilisation activity and daily reports of aggregate stabilisation activity.

Enabling automatic registration for managed investment schemes under s601EB of the Corporations Act

55 Rather than the current arrangement where we must grant registration of a managed investment scheme within 14 days, we suggest that managed investment schemes could be automatically registered when an application is lodged. To ensure that we could prevent the operation of non-compliant schemes, stop order and directions powers could also be incorporated into the law. Those provisions would, as an alternative to scheme deregistration, enable ASIC to stop any issue of interests on an interim and final basis, similar to Product Disclosure Statement (PDS) stop orders under s1020E, or make direct amendments to the constitution necessary to ensure compliance with the Corporations Act.

56 Although estimated compliance cost savings are relatively small, it would mean that schemes would be assessed, and subsequently monitored, using a risk-based approach. Only schemes assessed as higher risk would be scrutinised more closely.

57 We note that a similar suggestion has been made by the Corporations and Markets Advisory Committee (CAMAC) in the discussion paper, *The establishment and operation of managed investment schemes*.[4]

Replacing the requirement for an unlisted disclosing entity to lodge continuous disclosures with ASIC with a requirement to instead publish disclosures on the entity's website

58 Unlisted disclosing entities must lodge material information with ASIC under s675 of the Corporations Act, even though this may not be the most effective way of communicating with investors. We currently administer the law as though publishing material information on a website is a substitute for lodgement with ASIC, provided disclosing entities comply with our good practice guidance: see Regulatory Guide 198 *Unlisted disclosing entities:*

[4] CAMAC, *The establishment and operation of managed investment schemes*, discussion paper, March 2014, p. 53, www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion+Papers_1/$file/MIS_DP_MARCH2014.pdf.

Continuous disclosure obligations (RG 198). However, disclosing entities are still legally required to lodge material information with ASIC.

59 Removing the obligation to lodge with ASIC and instead requiring an entity to disclose material information on its website, or giving the entity a choice to either lodge with ASIC or disclose on the entity's website, will lead to lower compliance costs for unlisted disclosing entities and better outcomes for consumers who will be able to access information on the entity's website rather than needing to search via ASIC (for which there is a fee).

Amending the content of the forms to be lodged under s671B (information about substantial holdings) to address market concerns

60 Currently, the exact wording of the content of the forms to provide information about substantial holdings is mandated in Sch 2 of the Corporations Regulations 2001 (Corporations Regulations). We have received extensive feedback from industry that these substantial holding forms (Forms 603, 604 and 605) can be difficult to complete, and present the information in a confusing and unhelpful way.

61 If the regulations were amended to allow ASIC to prescribe the form, we would work with the market to design forms that provided information necessary for the market in a way that was simpler to understand and easier for the company filling out the form to complete.

Proposed minor or technical law reform

We also invite feedback on more minor legislative changes (identified as part of our preliminary process) that we might raise with Treasury and the Government: see Table 3 in Appendix 2. These proposals are those where our preliminary view is that the burden of compliance with the regulation outweighs the benefits to consumers or the market or where provisions no longer have effect and could be cleared from the statute books after further consultation.

Removing barriers that inhibit innovation in disclosure

Electronic disclosure

62 We are undertaking a project to examine the regulatory and commercial barriers that inhibit electronic delivery of disclosure material right across our regulated population, including disclosures about financial services, consumer credit and securities. Feedback from our External Advisory Panel, the market and from Treasury consultation on modernising disclosure

© Australian Securities and Investments Commission May 2014

suggests that there is issuer and consumer appetite for more electronic delivery of disclosure material.

63 There are a number of advantages to electronic delivery of disclosure, including convenience of delivery and updating, convenience of access and storage, timeliness of delivery, environmental savings, and security and privacy advantages. In particular, we expect an increase in electronic disclosure to reduce costs, specifically printing and distribution costs, for business.

64 We are currently undertaking targeted consultation with market participants to identify where the barriers lie to increased electronic disclosure, with a view to removing those barriers and facilitating more electronic disclosure where possible.

Investor self-assessment and key facts sheets

65 Traditionally, disclosure regulation has focused on what information about the product must be disclosed by issuers, rather than tools to help investors understand the product. To address perceived limitations of this approach, we are exploring a proposal that would enable issuers of a simple managed investment scheme to give investors:

- *a key facts sheet with prescribed content*—links to additional information (provided by the issuer or third parties on a website) may also be given. This additional information would be optional and would not form part of the PDS; and
- *a tool for investors* to, should they wish to, assess their understanding of the facts outlined in the key facts sheet and (at a basic level) the suitability of the investment for them (investor self-assessment).

66 The key facts sheet and additional information could be given electronically and incorporate video, audio or interactive presentations. An issuer who adopts this approach would not need to issue a PDS that complies with the shorter PDS regime.

67 We expect the benefits of the proposal for product issuers to be:

- to give them early warning about whether investors understand their product and whether there is a problem with the disclosure material; and
- reduced compliance costs through issuers not needing to produce a PDS, only a short key facts sheet with the ability to link to additional material, as well as reduced costs of electronic distribution. The proposal would give issuers the opportunity to explore the use of new media in disclosure.

68 The benefit of the investor self-assessment for consumers is that it would give them the ability to test their understanding of the key features of the product before they invest.

69 We will work with a small number of product issuers to undertake a pilot to test the contents and delivery of the key facts sheet and the efficacy of the self-assessment in promoting investor understanding, as well as the benefits for issuers, before consulting more broadly.

Harmonising ASIC market integrity rules

70 Currently, there are eight discrete market integrity rule 'books' that govern various market operators and market participants. We are undertaking a project to harmonise the ASIC market integrity rules of all exchanges operating in Australia, such that trading will take place on the basis of one set of minimum requirements. The aim of the harmonisation exercise is to create a single unified rule book for all market operators, market participants and exchange traded products. We are aiming to issue final, harmonised market integrity rules by the end of 2016, subject to any resourcing constraints.

'Sunsetting' legislative instruments

71 We administer approximately 400 class orders that are due to expire ('sunset') from 2015 under the *Legislative Instruments Act 2003*.

72 We have accelerated consideration of these instruments and have identified 47 instruments that we can repeal immediately. The remaining instruments will be either remade, if necessary, or subject to a substantive policy review to assess the need for the particular instrument.

73 Where it is necessary to remake instruments, we are focusing on making the instruments clear and user-friendly. We will also, where possible, simplify and rationalise the content and conditions of the instruments we remake. We will remove or reduce an obligation or burden in a class order if we are able to do so without undermining our priorities of confident and informed investors and financial consumers and fair and efficient markets.

Improvements to auditor resignation requirements

74 Under s329(6) of the Corporations Act, the auditor of a public company can only resign with our consent. Our current policy is to consent to the resignation of an auditor at the next annual general meeting, unless there are exceptional circumstances. Subject to further consultation, we are proposing to implement a change to this policy so that auditors may resign at any time,

unless there is some evidence (such as disagreements with management) to suggest that we should not give consent to the resignation. Consent would be conditional on market disclosures being made about the details of both the resigning and incoming auditor, and the reason for the change.

75 This would more closely align with the approach in the United States and would allow more flexibility for public companies. We also propose similar improvements for changes of auditors of managed investment scheme financial reports and compliance plans, AFS licensees and credit licensee trust accounts.

New guidance and communication projects

ASIC strategic outlook

76 We are working towards giving industry greater transparency about the work we are doing to ensure a 'no surprises' approach to regulation. Engagement with industry through, for example, publishing a strategic outlook covering the risks consumers, markets and market participants face, and what regulatory responses we intend to pursue to address these, can help business understand our key priorities and reduce uncertainty that regulatory and other change can bring. It is our view that greater engagement with the community in this way will help reduce the regulatory burden on our regulated population.

Updated website at www.asic.gov.au

77 Over 2014, we are undertaking a substantial IT project to update www.asic.gov.au to meet whole-of-Government accessibility obligations, and using this as an opportunity to also greatly improve the look, feel and usability of the website. This will mean easier and more efficient stakeholder use of the website and information on it. We expect this to reduce the time needed to access information and enable easier and more efficient compliance with regulatory obligations, thereby reducing overall costs for many of our regulated businesses.

Appendix 1: Forms identified for removal, consolidation or simplification

Table 1: Forms for removal (subject to consultation)

Form no.	Form name	Basis for removal	Legislative reform required?
142	*Cover sheet for friendly society disclosure document*	Obsolete	No
313	*Notification of address in Australia of information relating to financial records kept outside Australia*	Information available from the company	Yes
909	*Notification of office at which register is kept*	Information available from the company	Yes
991	*Notification of location of books on computer*	Information available from the company	Yes
992	*Notification of change of location of books kept on computer*	Information available from the company	Yes
6074	*Notice regarding location of register of relevant interests*	Information not used by ASIC	Yes
207Z	*Certification of compliance with stamp duty law*	Information not used by ASIC	Yes
5130	*Notification of the office at which register of interests is kept*	Information not used by ASIC	Yes
FS89	*Notice of change to fees and charges in a PDS*	Information not used by ASIC	Yes
FS92	*Notification of intention to comply with Future of Financial Advice provisions*	Obsolete	Yes
907	*Presentation of triennial statement by an auditor*	Obsolete	No
314	*Notification of return of members of firms of auditors*	Information not used by ASIC	Yes
104	*Record of lodgement of documents*	Administrative only	No
110	*Record of lodgement of documents: Local ASIC representative*	Administrative only	No

© Australian Securities and Investments Commission May 2014

Form no.	Form name	Basis for removal	Legislative reform required?
408	*Notification in relation to the register of a registered foreign company under section 601CM*	Information not used by ASIC	Yes
911	*Verification or certification of a document*	Information not used by ASIC	Yes
540	*Statement in writing of posting of notices of appointment to settle list or supplementary list of contributories*	Information not used by ASIC	Yes
545	*Statement in writing of giving notice to persons placed on the list or supplementary list of contributories*	Information not used by ASIC	Yes
555	*Notice of controller extending time to submit report as to affairs*	Information not used by ASIC	Yes
558	*Court order extending time to provide report as to affairs*	Information not used by ASIC	Yes
562	*Notice of liquidator extending time to submit report as to affairs*	Information not used by ASIC	Yes

Table 2: Forms for consolidation or simplification (subject to consultation)

Form no.	Form name	Basis for consolidation/simplification	Legislative reform required?
131	*Notice of meeting (demutualisation)*	Forms 131 and 132 can be consolidated	No
132	*Notice of meeting or consent process (demutualisation)*		
403	*Verification of copy of document authorising on behalf of a foreign company, execution of a document appointing a local agent*	Consolidate into Form 418	No

Form no.	Form name	Basis for consolidation/simplification	Legislative reform required?
211	*Notification of division or conversion of classes of shares*	Consolidate into Form 484	No
362	*Notification of appointment or cessation of a registered agent by a company*	Consolidate into Form 484 and company registration	No
486	*Notification to nominate, change or cease a contact address for a company*	Consolidate into Form 484 and company registration	No
489	*Notification of change of registered office or office hours of a registered body*	Consolidate into Form 484	No
490	*Notification of change to directors of a registered body*	Consolidate into Form 484	No
FS88	*PDS in-use notice*	Simplification	No
FS90	*Notice that a product in a PDS has ceased to be available*	Simplification	No
522	*Notification of meeting of creditors to consider appointing a new liquidator*	Consolidate into Form 505	No
529	*Notice of meeting: Creditors to consider voluntary winding up*	Simplification	No
905A	*Notification of ceasing to act as or change to details of a liquidator*	Simplification	No
5138A	*Notification of commencement or completion of winding up of a registered scheme*		No
6010/A	*Application for a voluntary deregistration of a company/managed investment scheme*	Combine into one deregistration form	Yes
407	*Notification of cessation, winding up or dissolution of a foreign company or registered Australian body*		No

© Australian Securities and Investments Commission May 2014

Appendix 2: Proposed minor or technical law reform

Table 3: Proposed minor or technical law reform (subject to consultation)

Proposal	Rationale/notes	Business/individuals affected
Enable large partnerships to be registered as a managed investment scheme (s115: restrictions on size of partnerships and size of non-incorporated bodies).	We think that the managed investment scheme regulatory framework is sufficient to govern large managed investment scheme partnerships, and so the prohibition on a partnership or association with greater than 20 members that has an object of gain should not apply to registered schemes.	Future partners
Empower the operator of a timesharing scheme to execute any instrument of transfer or do any other act necessary for the transfer on behalf of a member in relation to the interest in the scheme property where necessary to deal with members who have forfeited their interest in a timesharing scheme.	This is largely intended to facilitate such transfers for existing schemes whose constitutions do not enable this.	Operators and members of a small number of old timesharing schemes
Reframe s601GB of the Corporations Act so that the obligation is not on the responsible entity to ensure the constitution is enforceable but, rather, the Act confers enforceability.	This would remove a compliance obligation from the responsible entity.	Responsible entities and future members of registered schemes
Modify the s428 and 429 requirements for responsible entities or custodial or depository service providers to use 'in receivership' in public documents and for officers to report when only the assets of a particular scheme or client are affected. In the case of reporting to the controller, the affairs that are the subject of the reporting obligation should be affairs that relate to the relevant scheme or assets held in providing a custodial or depository service.	Instead, the requirement could be to note that a receiver has been appointed to property of the relevant scheme or held under the relevant service, but only in any public document of the responsible entity or corporation relating to that scheme.	Responsible entities, and trustees and controllers

© Australian Securities and Investments Commission May 2014

Proposal	Rationale/notes	Business/individuals affected
Enable a responsible entity to be appointed by ordinary resolution at a meeting called by a temporary responsible entity under s601FQ.	When a temporary responsible entity is appointed, and the alternative is winding up, a majority voting for the temporary responsible entity should be able to avoid winding up, even in the face of non-voting by others.	Temporary responsible entities and members of registered schemes
Repeal the requirement for a constitution to provide a method for dealing with complaints.	This largely duplicates the s912B requirement for AFS licensees to have adequate dispute resolution.	Responsible entities
Enable alternate persons (not just registered company auditors) to audit a managed investment scheme's compliance plan.	Under s601HG, the responsible entity of a registered scheme must have an auditor in place at all times to audit compliance with the scheme's compliance plan. It is not always the case that a registered auditor is best placed to undertake such an audit. Therefore, we suggest consideration be given to expanding the range of qualified persons for the purpose of this audit. In addition, a materiality limit could be explicit in the opinion required—that is, the opinion about the adequacy of the compliance plan is that, at all times during the financial year, the compliance plan then in force met the requirements of the Corporations Act in all material respects. Material should be defined by reference to whether there is an unreasonable risk of non-compliance materially adversely affecting the interests of a member or members remaining if the compliance plan were complied with. These proposals would increase competition in providing compliance auditing services and make the requirement more practical.	Responsible entities and members of registered schemes, compliance plan auditors
Repeal reg 1.2A.01(b) of the Corporations Regulations.	The company 'Australian Bloodstock Exchange Limited' no longer exists.	
Repeal reg 7.1.06B of the Corporations Regulations.	This duplicates reg. 7.1.05.	
Repeal reg 7.9.75(1A) of the Corporations Regulations.	This was a transitional provision and is spent.	
Repeal reg 7.9.64(l)(i) of the Corporations Regulations.	This provision is spent.	

© Australian Securities and Investments Commission May 2014

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
AIF	Alternative investment fund
AIFMD	Alternative Investment Fund Managers Directive
APRA	Australian Prudential Regulation Authority
ASIC Act	*Australian Securities and Investments Commission Act 2001*
CAMAC	Corporations and Markets Advisory Committee
CFTC	Commodity Futures and Trading Commission (US)
Ch 2M	A chapter of the Corporations Act (in this example numbered 2M), unless otherwise specified
[CO 98/1418] (for example)	An ASIC class order (in this example numbered 98/1418)
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CPSS	Committee on Payment and Settlement Systems of the Bank of International Settlement
CPSS–IOSCO Principles	CPSS–IOSCO, *Principles for financial market infrastructures*, as revised from time to time, available at www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf
ESMA	European Securities and Markets Authority
EU	European Union
G20	Group of finance ministers and central bank governors from 19 of the world's largest economies, and the European Union
IOSCO	International Organization of Securities Commissions
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets

© Australian Securities and Investments Commission May 2014

Term	Meaning in this document
OTC	Over the counter
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04)
RSE	Registrable superannuation entity
s766E (for example)	A section of the Corporations Act (in this example numbered 766E), unless otherwise specified
shorter PDS	A PDS that is required to comply with the shorter PDS regime
shorter PDS regime	The requirements set out in Div 3A of Pt 7.9 of the Corporations Act as modified by Subdivs 4.2 to 4.2C and Schs 10B, 10C, 10D and 10E of the Corporations Regulations, which prescribe the content and length of the PDS for first home saver accounts, margin loans, superannuation products and simple managed investment schemes

ASIC

Australian Securities & Investments Commission

PEOPLE & DEVELOPMENT

Performance Management Policy

2013

About this policy

This policy describes ASIC’s performance management philosophy and provides a framework to acknowledge contribution and build capability to ensure ASIC achieves its strategic priorities.

This policy supports ASIC's values of **ACCOUNTABILITY**, **PROFESSIONALISM** and **TEAMWORK**.

Policy ownership

The Senior Manager, Performance & Reward is responsible for the development and implementation of this policy.

Policy application

This policy applies to all ASIC workers including ongoing and non-ongoing team members.

Policy application is subject to adoption by the Senior Executive Leader, People & Development.

This policy is referred to as the *Performance Management Framework* in the ASIC Enterprise Agreement (2011 – 2014).

Policy approval

This policy has been reviewed and approved by the following parties on the following dates:

Version	Reviewer	Comments	Approved	Date
1.2	Helen O'Loughlin		Approved	25 November 2013

Policy distribution

This policy has been distributed to the following parties on the following dates:

Version	Date	Distribution List
1.0	3 April 2013	National Consultative Committee
1.1	17 July 2013	People & Development
1.1	July 2013	National Consultative Committee

Policy location

This policy is published on myASIC, People & Development.

Contents

A What this policy is about? 4
B Principles....5
C Accountability....6
Team member 6
People leader....6
D Probation 7
People leader....7
Team member 7
E Performance management cycle 8
Plan (July)....8
Continuous feedback....9
Mid-point review (December) 10
Reflect (June) 10
Calibration (June) 11
End-of-year review (July)....11
F Performance rating scale....13
G Reward and recognition....14
H Improvement Required 15
Providing regular feedback....15
Improvement Required discussion 15
I Managing underperformance....17
What is underperformance? 17
Underperformance principles 17
Wellbeing....17
Underperformance process....18
Recording keeping....20
J Non-ongoing team member....21
K Review process....22
Review of decisions....22
Review of employment decisions 22
Annexure 'A' – The process for managing underperformance (high-level) 23
Key terms 24
Related information....25

FOR FURTHER INFORMATION CONTACT P&D ADVISORY ON #87799

A What this policy is about?

1 Performance management is an important part of building a high performance culture based on accountability, development and achievement.

This policy is designed to assist team members perform to the best of their ability by:

- Developing a clear and shared understanding of performance expectations and measures of success
- Clarifying behaviours for modelling our values of Accountability, Professionalism and Teamwork
- Providing opportunities for professional development
- Coaching and supporting where development is needed
- Acknowledging and recognizing achievements, and
- Providing effective performance feedback.

If you are a people leader, this policy outlines performance management practices that are essential for successfully managing the achievements of your team.

Team members and people leaders have a mutual obligation to ensure timely and meaningful participation in all performance management processes, including addressing underperformance.

Further guidance

Information on performance bonuses can be found in the Remuneration Policy.

A glossary of key terms is provided on page 24 of this policy.

B Principles

2 This policy is guided by the following principles:

Principles
• Individual performance agreements are linked to strategic priorities and business plans.
• Performance and development are linked in order to build the skills and work experience required to deliver priorities.
• Performance is reviewed regularly and feedback is provided, ensuring a continued understanding of performance expectations.
• A clear and transparent process which is applied consistently across ASIC
• Multi-source feedback including peer review, upward feedback and 360 degree feedback may be used as part of any review and development discussions.
• Individual achievements and contribution to the team will be recognised and rewarded.
• People leaders are responsible for a team member's performance review with input from other people.
• Salary advancement, bonus and rewards other than pay will be determined on the basis of performance.

C Accountability

Team member

3 Team members are accountable for driving their own results by:

- Understanding how their role and performance expectations contribute to the achievement of ASIC's strategic priorities and team business plan
- Taking ownership for all aspects of their performance agreement
- Actively participating in performance planning and review discussions
- Seeking out coaching and feedback opportunities
- Preparing a self-assessment and asking for feedback from the people they work with prior to a review, and
- Acknowledging performance feedback, applying key development actions and looking for opportunities to improve.

People leader

4 People leaders are accountable for driving the results of their team by:

- Ensuring team members actively participate in performance planning and reviews
- Clearly communicating performance expectations and measures at the beginning and throughout the cycle
- Providing access to learning and on-the-job development opportunities
- Providing continuous feedback and coaching to help team members achieve their performance expectations
- Acknowledging and rewarding good performance
- Providing two formal performance reviews at the mid-point and end-of-year, taking into account multi-source feedback
- Taking appropriate and timely action where performance does not meet the agreed expectations and behavioural standards, and
- Actively seeking out training and skills that enable them to effectively manage the performance of the team.

D Probation

People leader

5 Most new staff to ASIC will be subject to a six month probation period. To effectively manage the probation process, it's essential that a people leader:

- Establish a probation agreement with the new team member within two weeks of commencing employment at ASIC
- Inform the new team member of their work responsibilities and standard of work expected
- Holds performance planning and review meetings over the probation period in addition to regular one-on-one meetings with the new team member
- Identifies performance-related issues early, including work performance and behaviour. This is particularly important during probation to ensure alignment with ASIC values, behaviours and performance expectations
- Makes a decision to continue or terminate the employment of a new team member. When considering a decision to terminate employment, the people leader must to contact People & Development four weeks before the end of the probation period
- Enters an Satisfactory or Unsatisfactory rating in myPeopleSoftHR at the conclusion of probation
- Completes a performance agreement with the team member, following the completion of the probation period.

The process outlined in Section I, Managing underperformance, is not applicable during the probation period.

Team member

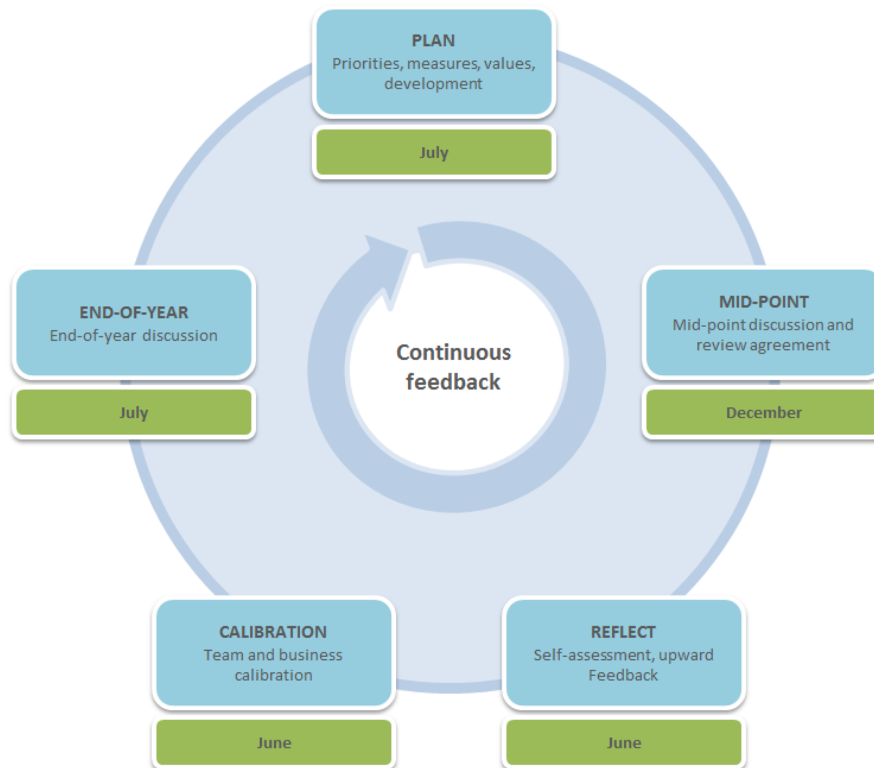
6 Probation is an important aspect of the first six months at ASIC. A team member needs to:

- Agree with their people leader a probation agreement within two weeks of commencing employment at ASIC
- Ask any questions to ensure a clear understanding of the requirements of the probation agreement, and
- Ensure a new performance agreement is agreed with their people leader at the completion of the probation period.

E Performance management cycle

7 ASIC's performance management cycle commences on 1 July and concludes on 30 June each year. The cycle has six distinct stages and requires feedback to be given by a people leader on a continual basis.

Performance Management Cycle



Plan (July)

8 At the beginning of the cycle (1 July) a people leader and their team member will meet to plan and agree performance priorities and measures, discuss ASIC's values and what learning and development is needed to meet the priorities.

A performance agreement must be in place within four weeks (or later if agreed as a result of circumstances such as leave) after the beginning of the cycle. A team member who moves teams will need to develop a new performance agreement within four weeks of commencing in the new position.

Finalised performance agreements must be documented on myPeopleSoftHR.

9 **Team members role**

- Draft your agreement prior to the planning meeting with your people leader
- Consider your professional and personal development goals
- Ensure that you have a clear understanding about what successful performance looks like by the end of the planning meeting, and
- Enter your final agreement in myPeopleSoftHR.

10 **People leaders role**

- Ensure your team members understands the link between their work and the business plan
- Collaboratively define priorities, agreeing actions and measures
- Discuss ASIC's values, considering what is expected and how they link to performance priorities
- Consider what learning, tools or support may be needed for your team members to be successful
- Explore career aspirations, and
- Approve the agreement.

Continuous feedback

11 ASIC requires a people leader to provide continuous feedback to their team members. This facilitates an ongoing performance dialogue to ensure things are tracking well and to identify opportunities for improvement. Continuous feedback can simply form part of regular one-on-one meetings.

12 **Team members role**

- Ask your people leader for coaching and constructive feedback
- Listen and respond to the feedback, and
- Understand and act on the feedback provided.

13 **People leaders role**

- Schedule regular one-on-one meetings with your team member (e.g. fortnightly or monthly)
- Provide regular day-to-day coaching, recognising good work and coaching on areas for development, and
- Offer advice and guidance.

Mid-point review (December)

14 A people leader will conduct a mid-point review six months into the cycle to review the team member's performance, discuss progress and adjust priorities where required. This also includes a review of the performance agreement.

15 Team members role

- Review your performance agreement prior to the mid-point review
- Talk about your performance - what you do well, how you could improve, how you demonstrated the values and what you would like to learn
- Listen to feedback and ask questions to clarify information
- Offer ideas for improving performance
- Update your performance agreement to reflect new or changing priorities, and
- Invite your people leader to offer suggestions on how they can help you achieve your objectives.

16 People leaders role

- Schedule a mid-point review
- Review progress against the performance agreement
- Use the meeting as an opportunity to talk about successes, areas for development, and the mid-point rating to be given.
- Agree any revisions to the agreement, and
- Enter the mid-point rating in myPeopleSoftHR.

Reflect (June)

17 A team member will need to prepare for the end-of-year review by reflecting on their own performance and completing a self-assessment. A self-assessment improves the quality of a review as it encourages team members to note achievements and development opportunities so that these can be discussed with their people leader.

Team members may also benefit from requesting performance feedback from peers, stakeholders or customers.

18 ASIC encourages people leaders to request upward feedback from their team. An alternative approach is 360 degree feedback where feedback is gathered from a wide range of commentators – typically direct reports, peers and colleagues as well as the line people leader.

19 Team members role

- Ask peers, stakeholders and customers for feedback

- Complete a self assessment in a thoughtful way and rate your performance
- Reflect on your career goals, and
- Share the self-assessment with your people leader.

20 **People leaders role**

- Request upward feedback on yourself, and
- Ask the team member to complete a self-assessment prior to calibration.

Calibration (June)

21 End-of-year performance ratings and consideration for bonus (ASIC 4 and Executive Level 1 and 2 only) will undergo a calibration process to deliver a fair and consistent application of performance criteria across ASIC.

Calibration is a two-stage process. Firstly senior executives and people leaders discuss individual and team performance to ensure ratings are fair, consistent and true reflection of performance over the past 12 months.

Secondly, a business level meeting is held with commissioners and senior executives to ensure performance assessment of individual teams is fair and consistent when compared to other teams across locations and against key diversity indicators (including gender and full and part time arrangements).

In some instances, ratings and bonuses may change following the end-of-year review discussion between a team member and their people leader. Changes should be approved by the relevant Senior Executive to ensure that ratings have been applied consistently at the team level.

22 **People leaders role**

- Prior to calibration, review the team's performance agreements and consider the team members' self-assessment and feedback from other people, and
- Participate in the team calibration meeting, discussing each team member's relevant experiences and current information such as performance on projects, behaviours and contribution to the team.

End-of-year review (July)

23 End-of-year reviews will be conducted with a team member and their people leader. This discussion will include reviewing the self-assessment and performance over the cycle, and is a forum for open and constructive feedback. During the review, people leaders will discuss a team member's performance rating and bonus (if eligible). Development and career aspirations for the following year will also be discussed.

For team members who have performed more than one role throughout the year, the performance review will be based on combined people leader feedback from the entire 12 months.

24

Team members role

- Review your performance agreement in advance
- Share information from your self-assessment
- At your review, talk about your performance - what you do well, how you could improve, how you demonstrated the values and what you would like to learn
- Listen to feedback and ask questions to clarify information
- Offer suggestions and ideas for improving performance, and
- Identify areas for learning and development.

25

People leaders role

- Schedule the end-of-year review in advance
- Review the team member's self-assessment
- Seek input from other people leaders where the team member has worked on a number of different projects or moved teams
- Provide open, honest and constructive feedback on delivery on priorities and demonstrating ASIC's values
- Discuss learning and development
- Communicate final rating and bonus (if applicable), and
- Enter a rating, bonus (if eligible) and comments in myPeopleSoftHR.

F Performance rating scale

26 ASIC uses the following rating scale:

Outstanding

Consistently goes above and beyond the performance expectations for their level to produce outstanding results in all performance areas including demonstrating ASIC's values.

Exceeding

Willing to go the extra mile and exceeds in most performance areas and meets expected standards for their level in all performance areas including demonstrating ASIC's values.

Achieving

Valued team member and competent performer who achieves expected standards for their level overall in all performance areas including demonstrating ASIC's values.

Improvement Required

Contributes at a basic level and has the necessary ability to handle their current role but requires assistance to perform aspects of the role which may include ASIC's values and improvement is required.

Unsatisfactory

Performance falls short of expectations in terms of quality and/or quantity and demonstrating ASIC's values. This rating will lead to automatic implementation of a performance management improvement plan.

27 A team member who has at least three months' service in the performance cycle must receive a mid-point or end-of-year performance rating. For a team member on long-term leave, the rating provided prior to commencing leave or an 'Employee not available' rating must be entered to myPeopleSoftHR.

28 A team member on probation must be rated in accordance with the probation procedure.

G Reward and recognition

29 It is important for people leaders to acknowledge their team's work related achievements and demonstrate genuine recognition for individual and team success. While this may happen regularly over the cycle, performance reviews are an opportunity for people leaders to acknowledge their team and reflect on achievements.

Recognition can be in the form of positive feedback, congratulations or a formal program as outlined in the *Reward and Recognition Guidelines.*

ASIC also enables people leaders to reward and recognise through a number of reward initiatives, including:

- Performance bonus
- Salary progression based on end-of-year performance rating
- Study assistance
- Professional development opportunities
- Payment of a professional membership
- Higher duties opportunities, or
- Secondments.

H Improvement Required

30 A team member can be rated as Improvement Required at any point in the performance cycle, including at the mid-point and end-of-year review.

The rating is used when a team member has the ability to perform their role at the basic level however is unable to perform aspects without assistance. For example, some tasks may be completed inaccurately on a regular basis, delivered late or require frequent supervision.

A people leader must be able to clearly articulate their reasons for an Improvement Required rating.

A people leader should be addressing performance issues as they occur to ensure the team member has every opportunity to address the issue.

A team member who receives a rating of Improvement Required at two consecutive end-of-year performance reviews will be subject to the underperformance process (refer to Section I). A team member may also be subject to the underperformance process if they are unable to lift their performance to an Achieving level after having an Improvement Required discussion(s).

Providing regular feedback

31 As a people leader, providing regular feedback is an important part of managing performance effectively. Where there are concerns about performance, people leaders should discuss areas for improvement through regular conversations, for example at one-on-one meetings.

Performance and behavioural concerns should be raised and discussed as early as possible. Topics to cover may include which aspect of performance specifically needs improvement, what standards team members should be performing at and what they can do to improve their performance.

Improvement Required discussion

32 Where performance hasn't improved through regular feedback, a people leader may consider rating the team member's performance as Improvement Required and a discussion should be held.

The discussion should include what aspects of their performance require improvement (including examples) and the intended development actions. People leaders will note the areas for development in the Performance Agreement.

Improvement required discussions allow people leaders to have a more targeted approach in supporting their team member with lifting performance to an Achieving level. Team members may be supported and/or represented at these discussions.

33 People leaders should schedule regular discussions with their team member in order to:

- Agree on any technical and/or behavioural capability gaps that need to be improved, and
- Agree on a list of clear development actions that will support the team member to lift performance to an Achieving level, ensuring:

1. There is a completion date for each development action, and

2. There is an agreed feedback schedule to discuss the progress and completion of development actions.

People leaders should maintain notes on discussions, particularly where a team member is experiencing an issue with progressing or completing their development actions.

34 If the team member is able to lift their performance, actions to maintain acceptable performance over the long term should be agreed. If the same performance issue reoccurs within 12 months from the initial improvement required discussion, a people leader may decide to follow the managing underperformance process (refer to Section I).

35 On occasions where the team member is unable to raise their performance to the achieving level, the managing underperformance process (refer Section I) may need to be followed.

I Managing underperformance

36 People leaders are responsible for managing underperformance in a timely manner. While this can require a challenging conversation, it can open a dialogue into the reasons for underperformance and help give the team member the support needed.

What is underperformance?

37 Underperformance can be demonstrated in a number of ways, including:

- Unacceptable work performance, that is, a failure to perform the duties of the position or to perform them to an Achieving level, and/or
- Unacceptable behaviours in the workplace.

Non-compliance with ASIC policies or procedures is considered a breach of the Code of Conduct and will be managed through ASIC's Code of Conduct Policy.

Underperformance principles

38 The principles for managing underperformance are to ensure:

- Early identification and action of issues with a view of returning the team member's performance to an Achieving level
- Due process and procedural fairness is applied at every stage of the process
- Actively involving the team member in developing the solutions
- That the team member is provided an appropriate level of support and assistance (Including training when appropriate).
- That the team member takes responsibility for improving their performance
- That due the process is applied timely, fairly and transparently, and
- The team member has the right to be represented at any point during the process.

These principles apply to all ASIC team members unless on probation.

If a team member is on a Higher Duties Allowance (HDA) and is underperforming in that position, the HDA can be finished early at the discretion of the people leader.

Wellbeing

39 When working through underperformance related issues, the people leader needs to consider the impact on the team member's wellbeing. Underperformance conversations need to be handled sensitively with a focus on working together to find solutions to the underlying problem.

In this situation it is essential that people leaders prepare for the conversation, identifying examples of positive and negative performance and behaviour. Completing a risk assessment may assist.

Planning should also involve developing strategies to minimise the impact on the team member and provide them with sufficient support. The team member may wish to seek advice from People & Development and/or the Employee Assistance Program (EAP). The EAP also provides a Manager Assist service for people leaders.

Underperformance process

Refer to Annexure 'A' for a high level summary of the process.

40 In circumstances where the team member does not demonstrate an acceptable level of performance after the Improvement Required process, or the underperformance is of a serious nature in the first instance, the underperformance process should be followed.

The process is initiated through a team member's performance being rated as Unsatisfactory, which can occur at any point during the performance cycle and involves:

1. Meeting with the team member to discuss the issue

41 A people leader will hold a meeting with the team member, providing advance notice, covering:

- What aspects of their performance are considered unacceptable provide examples of where work is not acceptable and how their performance may impact on the workplace or the team
- Providing an opportunity for the team member to respond
- The intended action if their performance does not improve by the end of the assessment period and is not sustained after, and
- The support services provided through the Employee Assistance Program.

A representative from People & Development may be present at the meeting.

The team member may be assisted by a support person, which includes a staff representative or a union member. The team member must inform the people leader (or People & Development) prior to the meeting that a support person or representative will be present at the meeting.

As part of the meeting, people leaders need to advise the team member in writing:

1. That their performance has been found to be unacceptable
2. The reasons for which such a view has been formed, and
3. The consequences if their performance does not improve.

2. Writing a Performance Improvement Plan

42

Following the meeting, the people leader will work with the team member in consultation with People & Development, to write a Performance Improvement Plan (PIP).

The PIP must clearly document the area(s) for improvement, the agreed action items and time frames. The PIP will also set out the assistance to be provided to enable the team member to achieve an Achieving level of performance prior to the completion of the assessment period.

An assessment period will:

- Be a continuous period of 90 calendar days irrespective of whether the team member is full or part time, and
- End when the team member is rated at an Achieving level or after 90 calendar days, whichever happens first.

Where performance is rated Achieving prior to the end of 90 calendar days, the remaining days can be used should the performance move to an unsatisfactory level within 12 months (from when the underperformance was first formally drawn to their attention).

3. Monitoring performance

43

A people leader must hold regular review meetings over the assessment period to discuss the team member's performance against the agreed PIP and provide them with feedback and coaching.

The team member must prepare for these meetings, providing a written update of achievements against the PIP prior to the meeting.

4. Final meeting and outcome

44

At the end of the assessment period, a final meeting will be held to discuss whether or not the team member's performance is at an Achieving level. A representative from People & Development may be present at the meeting. The team member will be provided with advance notice of the meeting.

The team member must prepare for this meeting, completing a self-assessment against the PIP prior to the meeting.

When performance improves

45

If at the end of the assessment period, the team member's performance improves to an Achieving level, the people leader will inform the team member that the underperformance issue has been addressed.

Additional feedback should be provided to the team member on how to ensure performance improvements can be sustained.

When performance is unsatisfactory

46

If at the end of the assessment period the team member’s performance is assessed as Unsatisfactory, the people leader will inform the team member that the performance issue has not improved sufficiently enough and outline the next steps to be taken.

In this situation, the Chairman (or their delegate) may issue a notice of intention to:

- Allocate reasonable alternate duties (if available) to the team member
- Reduce the team member's work level, if this is practicable and work is available at a lower level, or
- Terminate the team member's employment.

47 The team member will have seven calendar days to show reasons why one of the above actions should not be taken. The Chairman (or their delegate) has the discretion to extend this seven-day period in special circumstances. After the seven days, you will inform the team member of the final decision.

Recording keeping

48 A people leader must maintain records of all meetings with the team member, and a copy of the PIP.

In addition, people leaders or the People & Development representative must note the minutes of the meetings, including actions to be taken. These will be circulated to all attendees after each meeting.

J Non-ongoing team member

49 A non-ongoing team member employed for a specified term or task whose continuous employment is for six months or more will participate in performance management and should have a performance agreement in place.

A non-ongoing team member employed for less than six months should have their performance continually monitored and assessed by their people leader through their probation period. Clear work tasks and outcomes should be discussed and documented at the commencement of employment.

Underperformance issues will be managed through the process described in this policy. Non-ongoing team members should be made aware that continued underperformance may lead to the early termination of their employment contract.

K Review process

Review of decisions

50 Should a team member want to appeal their performance rating, this will need to be raised with their people leader in the first instance. The team member should provide reasons why they disagree.

If the team member remains dissatisfied with the decision following the discussion, the matter may be referred to their Senior Executive for further consideration either through the People Leader, or the People & Development team.

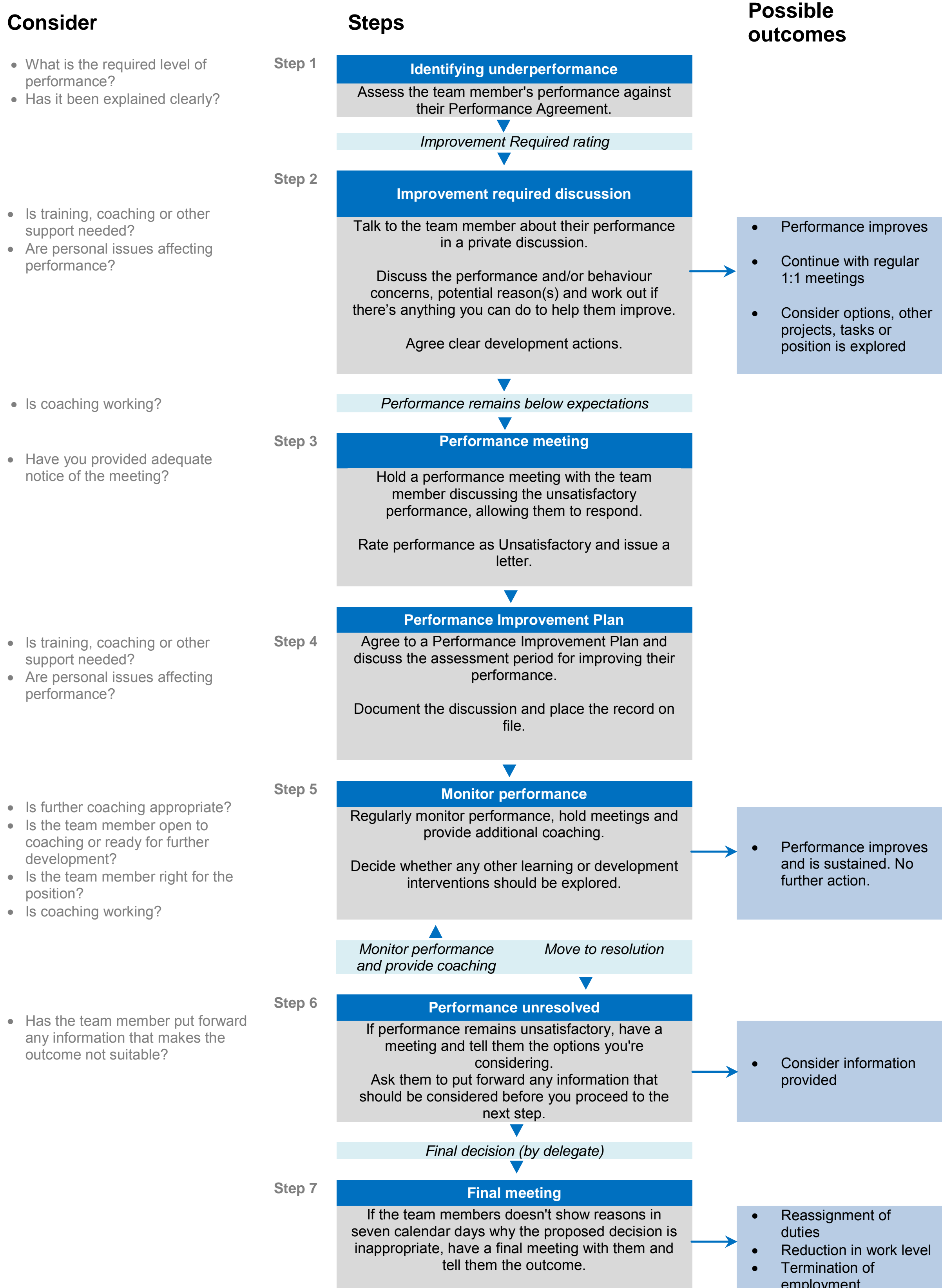
For more formal reviews, refer to the *Review of Actions Policy*.

Review of employment decisions

51 For employment decisions covered in Section I, Managing Underperformance, team members may, subject to eligibility requirements, have a range of rights under the *Fair Work Act 2009* and the *Public Service Act 1999* in relation to termination of employment decisions.

Where a decision to reduce a team member's work level has been made, a review can bed sort under Part 7 of the *Public Service Regulations*.

Annexure 'A' – The process for managing underperformance (high-level)



Key terms

Term	Meaning in this policy
People leader	An ASIC employee with people management responsibilities. For example a Senior Executive, Senior Manager, Manager or Team Leader.
Team member	An ASIC employee, either ongoing or non-ongoing.
MyPeopleSoftHR	ASICs online human resource information system.

Related information

ASIC Enterprise Agreement (2011-14)

Remuneration Policy

Review of Actions Policy

Reward and Recognition Guidelines

Talent Management Framework

Updated August 2013

Table of contents

1	**Overview**
2	Talent & succession identification
3	Development planning
4	Talent council
5	Appendices

1. Overview

Why do we need a talent management framework?

- ASIC aims to engage and develop **all** of its team members through our people management and development processes.

- Our performance management process assists us to identify our current high and under performers:
  - Individuals whose consistently go above and beyond the performance expectations (Outstanding and Exceeding rating); and
  - Individuals whose performance falls short of expectations (Improvement Required or Unsatisfactory rating).
- However, it is also beneficial to identify and develop our team members that are our high potentials – people who demonstrate leadership potential.

- The benefits of the framework are:
  - Assists us to retain and identify high potentials and critical talent and increases their engagement;
  - Provides opportunity to reflect on the potential and performance of all Executive Level;
  - Enables us to target learning opportunities and critical experiences for high potentials;
  - Identify strategies for people resourcing across the whole team; and
  - Supports the identification of successors for critical roles.

We will identify high potentials using the following framework:

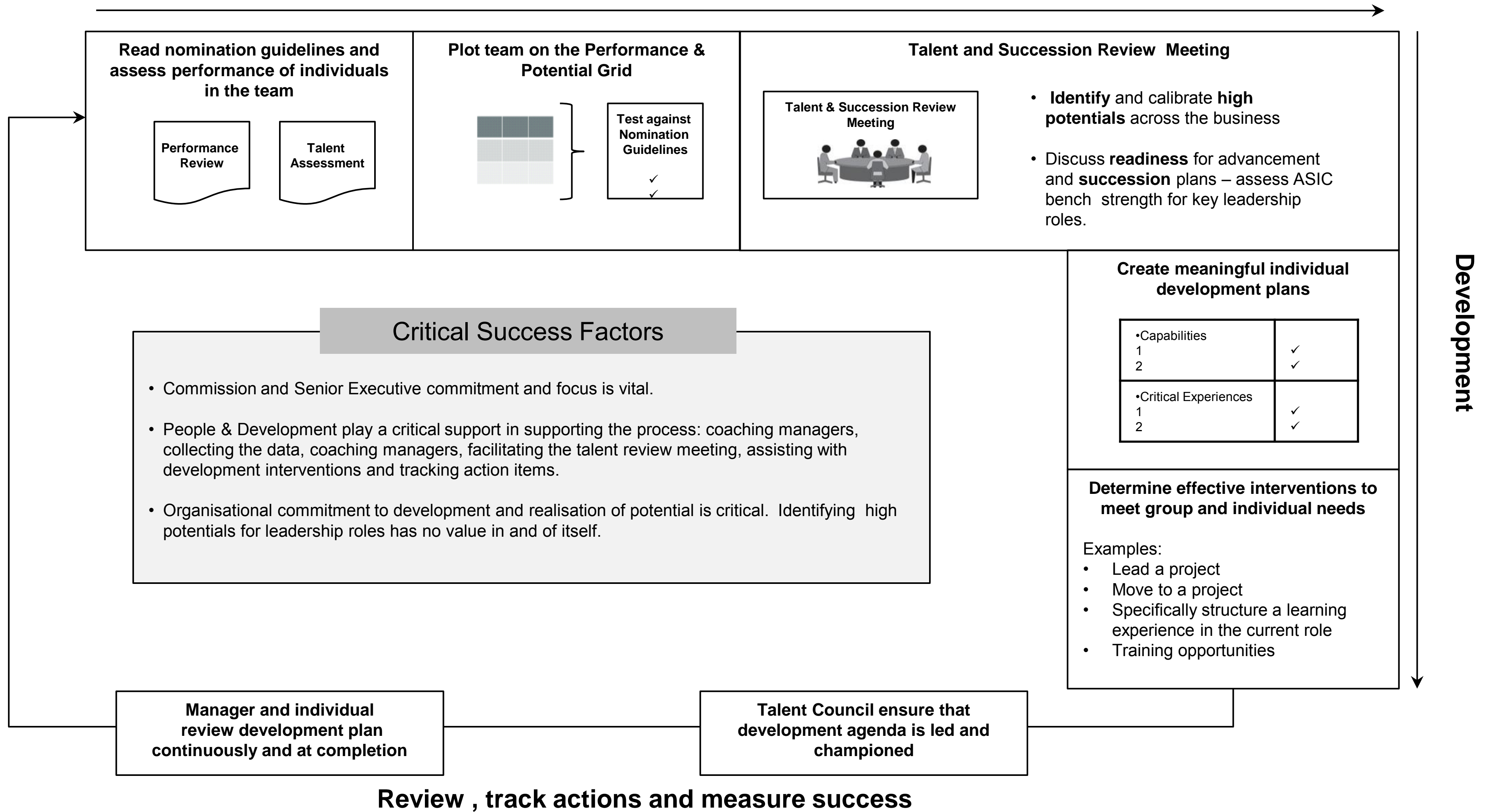
- We define high potentials as having the **ability**, **engagement, aspiration** and **performance** to rise and succeed in more senior and critical positions. They are people who can ultimately move into a Manager or Senior Executive role.
- High potentials can be found at all levels of the talent pipeline. We will focus on identifying and developing leadership potential at three tiers:

Tier One:	Senior Executive
Tier Two:	Senior Managers and Executive Level 2
Tier Three:	Executive Level 1 and ASIC 4

- Only a small proportion of the workforce has the potential to succeed at the next level or above, and while current high performance is a pre-requisite to high potential, most high performers are not high potential - research indicates that it is no more than 5-10% of a population.
- We will have organisation-wide visibility of our high potentials at the Senior Executive and Senior Manager level through the Talent Council. Executive Level 2s will be identified and managed at the relevant business level.
- High potentials will be nominated by their relevant managers and discussed and agreed during a review meeting.
- We will identify and calibrate people against their peers using a performance and potential grid and challenge our thinking against a set of criteria using performance data, management judgement and formal assessment.
- Our development framework is focussed on experience-based learning and learning from others as research shows experience to be the biggest accelerator of development.
- Each high potential should have a short, practical, action-oriented development plan based on their individual development needs. SES and Senior Manager plans will be reviewed regularly at Talent Council.

1. Overview

Summary of process



1. Overview

Key responsibilities

Individual

- Think about their career path.
- Create development plan, with input from their People Leader.
- Implement their plan.
- Seek new opportunities.
- Keep track of internal opportunities.
- Network internally and externally.
- Reflect on their learning experiences, including feedback from those they work closely with.

People Leader

- Participate in Talent & Succession Review Meeting.
- Conduct development discussions with high potential, including career development , and create clear actions.
- Support the implementation of the plan.
- Provide the right critical experiences and opportunities and structure challenges.
- Coach

Talent Council

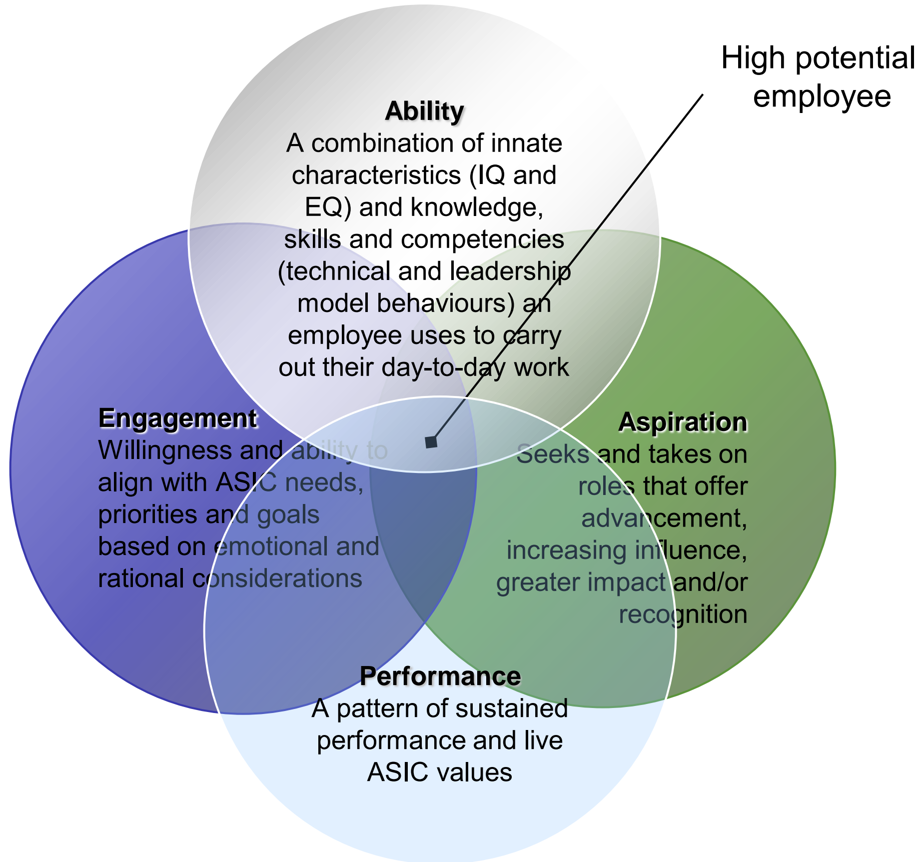
- ASIC-wide view of talent and succession pools.
- Review, discuss and document critical positions.
- Senior Executive talent identification and management.
- Discuss high potential pools, recommending changes were needed.
- Discuss opportunities to develop high potentials.
- Monitor diversity of talent pool.

People & Development

- Support and coach on identification framework – create momentum.
- Facilitate the development planning process – 3 way conversations. Advising on development plans.
- Support managers in providing critical experiences and career advice.
- Support the Talent Council.

1. Overview

High potentials are those current high performers with the ability, engagement and aspiration to rise to and succeed in more senior, leadership positions



Ability

The innate characteristics and learned skills a person uses to carry out their day-to-day work:

Innate Characteristics

- **Mental/cognitive** agility
- **Emotional** intelligence

Learned Skills

- **Technical** skills
- **Interpersonal and leadership** skills

Engagement

Engagement consists of the following four elements:

- **Emotional Commitment**—The extent the person values, enjoys, and believes in ASIC.
- **Rational Commitment**—The extent the person believes that staying with ASIC is in their best self-interest.
- **Discretionary Effort**— The persons willingness to go above and beyond the call of duty.
- **Intent to Stay**— desire to stay with ASIC.

Aspiration

The person wants or desires:

- **Prestige** and **recognition**
- **Advancement** and **influence**
- **Financial rewards**
- **Work-life balance**
- Overall **job enjoyment**

Performance

- **Sustained performance** (at least 2 years of Outstanding or Exceeding rating)
- Exemplary reflection of ASIC's **values**
- Consistently outperformed their peers
- Limited management derailers which will prevent their success in more senior roles

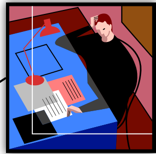
Table of contents

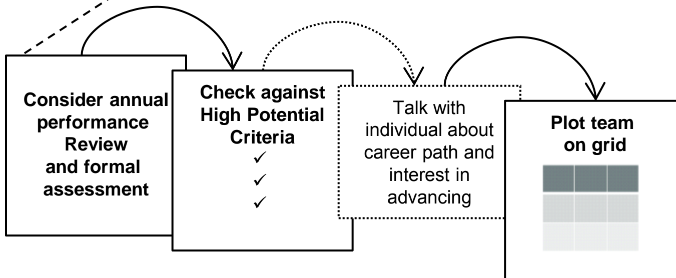
1	Overview
2	**Talent & succession identification**
3	Development planning
4	Talent council
5	Appendices

2. Talent & succession identification

Identification and development process

Step 1. Before the meeting, People Leader plots their team. Identify high potentials.





Factors to Consider

- Current high performance is a pre-requisite for high potential. However, potential is about future.
- **Ability** is the strongest driver of future potential. Does the person have what it takes?
- **Aspiration:** Have you had a conversation with them to find out if they are interested in a more senior role? Don't assume that they want what the organisation wants.
- **Engagement**: This is the factor that has the largest influence. What can we do to increase engagement?

Step 2. Discuss and agree people in a Talent & Succession Review Meeting

- People Leader presents their team plot, focusing on high potentials and justifies the individual(s) in the grid.
- Discussion and calibration of the individuals based on the criteria
- The group agrees the final list of high potentials on the ASIC performance and potential grid.
- Discussion around development options – discuss strengths and areas for development.
- Discussion on potential successors for leadership roles, calibrating the decisions against the talent grid.

Step 3. Development discussion and planning

After the meeting, create individual, actionable development plans in partnership with the high potential.

Discussion will assist in determining the relative potential of individuals and associated development actions.

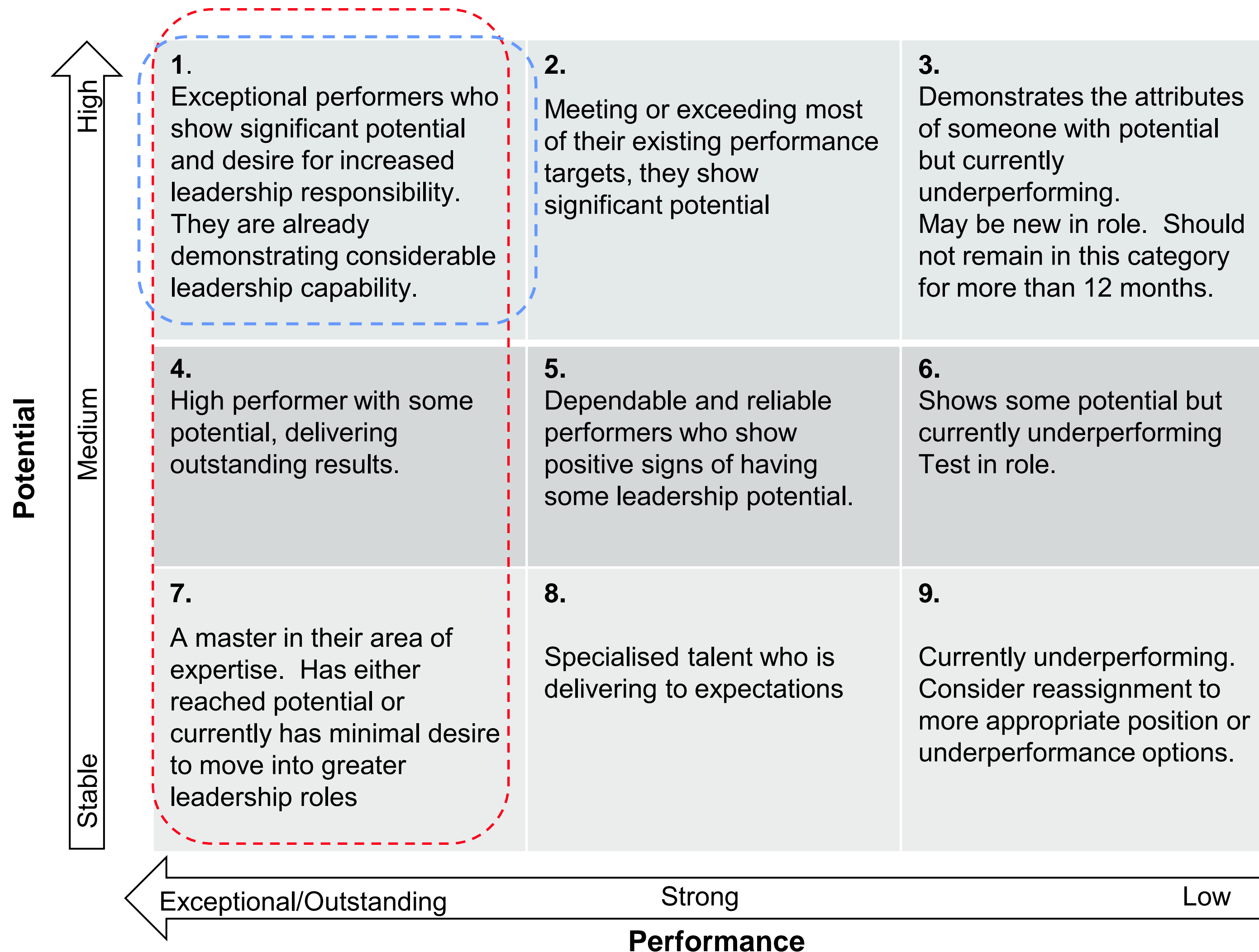
People Leaders create appropriate development and resourcing strategy for the rest of the team.

Step 4. Coaching and review

Provide formal and informal feedback during the life of the plan.

2. Talent & succession identification

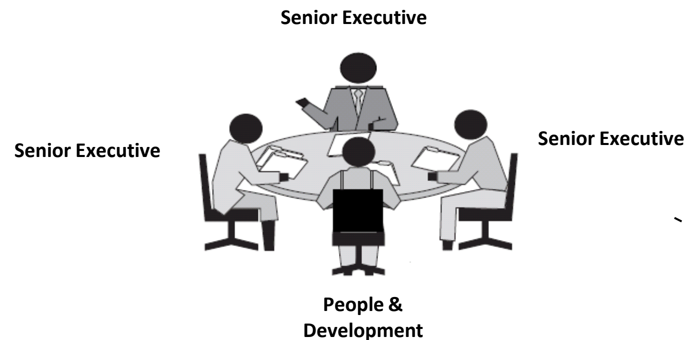
Performance & Potential Grid



- **High potentials** will be able to manage across ASIC, not just in their own area. They are able to translate their skills to other areas and manage large teams.
- Not all high performers are high potentials.
- Some are **Masters**, technical experts who are outstanding at the job that they do, producing high quality work in their area of expertise. They have little desire and/or ability to translate those skills to other areas or manage large multi-disciplinary teams.
- Others are **high impact performers**. They have some potential but limited potential to move to a larger role with more responsibilities in a similar area/function to their current one.

2. Talent & succession identification
Talent and Succession Review Meeting

- The meeting is the “calibration” step where people leaders come together to agree on high potentials and development plans. Succession plans are also be discussed.
- Primarily a discussion on high potentials, though full team plots will be presented.
- Attended by relevant Senior Executives to present and discuss review of their high potentials – discuss Senior Managers and Executive Level 2’s.
- Facilitated by P&D representative, including Senior Manager, Performance & Reward, Senior Manager Relationship Management and/or P&D Relationship Managers.
- Agree on high potentials.



Meeting Attendees

Tier One: Senior Executive

Attended by Commissioners and Senior Executive Leader, People & Development.

Tier Two: Senior Managers and Executive Level 2

Attended by Commissioners (optional), Senior Executive Leaders and People & Development.

Tier Three: Executive Level 1 and ASIC 4

Attended by Senior Executive Leaders, Senior Managers, Senior Specialists (optional) and People & Development.

Agenda

1.Present high potentials giving examples
2.Individuals are calibrated based on discussion and against criteria Refer to plot.
3.Group agrees final list
4.Next step – development plan
5.Succession plans

Your role

1. Think ASIC, not individual teams
2. Talk in specifics, not generalities
3. Share views
4. Each view has legitimacy
5. Everyone has development needs

2. Talent & succession identification

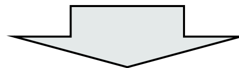
Succession planning

- Succession planning is the process to ensure that ASIC has the right people leaders in the right place with the right skills and support to deliver on strategic priorities and business plans
- Succession planning involves managing the following talent risks:
    - **Vacancy risk:** Safeguarding critical business skills
    - **Retention risk:** Avoiding regrettable losses
    - **Knowledge management**: Identify knowledge risks for high potentials who may be a retention risk
- A critical role plays an important role in achieving ASIC's priorities and business plans and are likely to cause the greatest disruption if the role is vacant or incorrectly appointed.

Criteria for a Critical Role

The role …

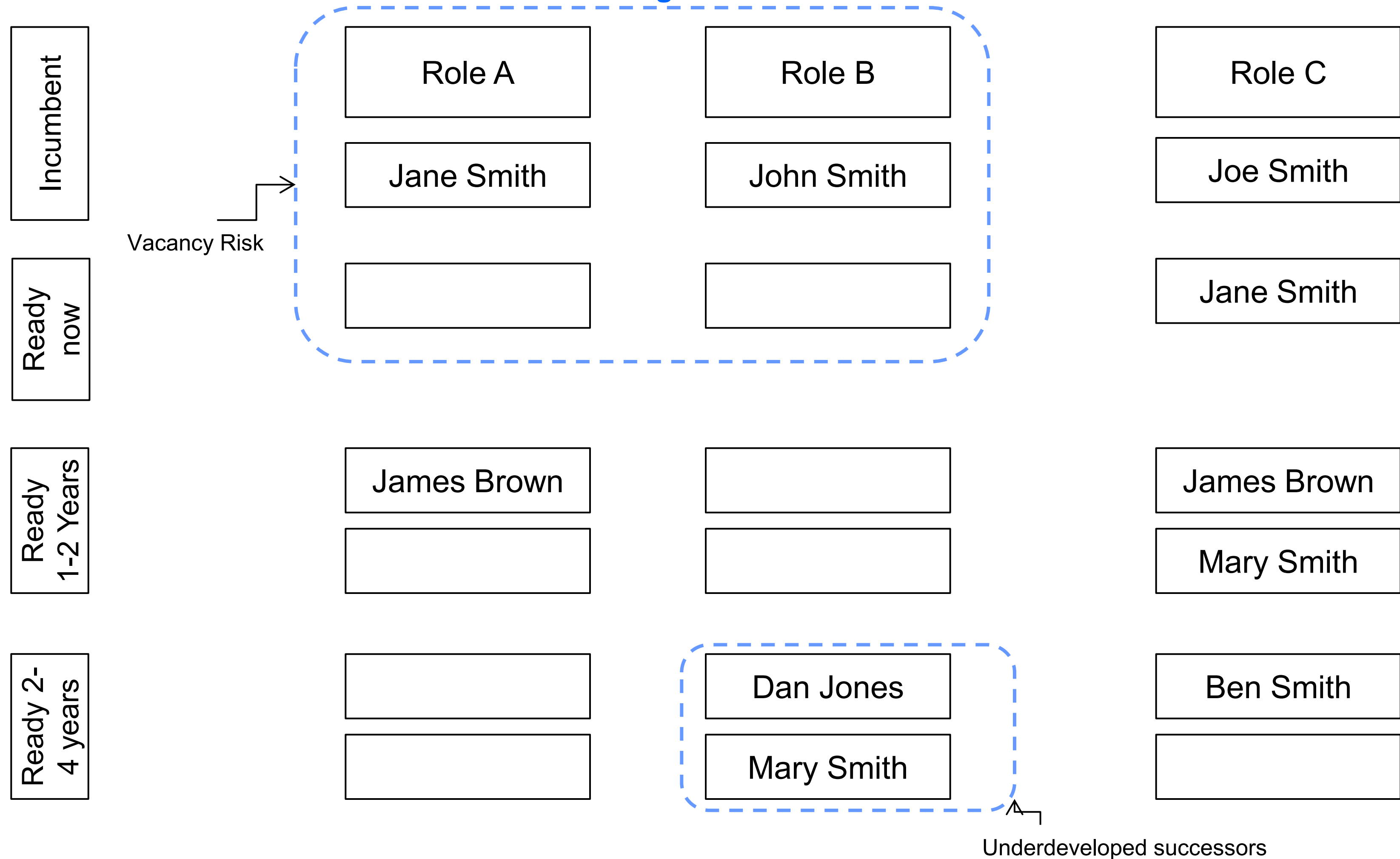
- is strongly linked to delivering ASIC's strategic objectives and goals.
- typically delivers core business function/s – e.g. external customer focus.
- would be difficult to fill from the external market should the incumbent resign.
- requires scarce skills – e.g. specialist technical expertise or market expertise.
- has a high level of risk for ASIC will the role is vacant for a period of time.



We will focus on managing the vacancy risk for critical roles first and then view succession planning as a broader process.

Example

Once we know our critical roles, we can manage vacancy risk by determining whether we have identified successors for our critical roles in the short and long term.



1	Overview
2	Talent & succession identification
3	**Development planning**
4	Talent council
5	Appendices

People leaders play a critical role in the high potential development process, having the right conversation at the right time and in the right place.

Development conversation process

STEP ONE: Set the scene for the development conversation with the high potential

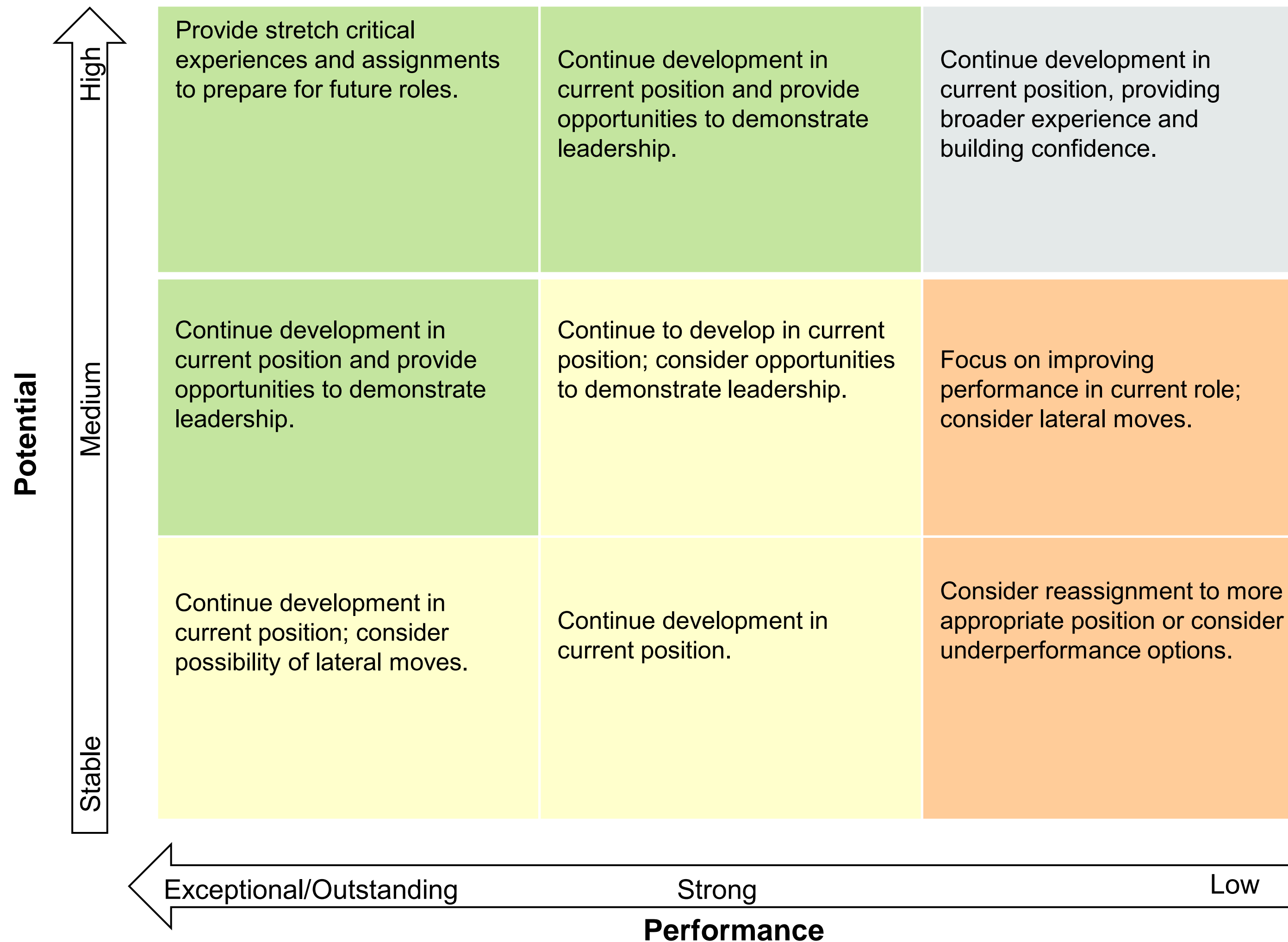
STEP TWO: Conduct the development conversation

STEP THREE: Agree on a Development Plan

STEP FOUR: Ongoing coaching and feedback

3. Development planning

Using the grid to guide development



A short, 15 minute pre meeting.

Set the scene …

- Give context for the meeting.
- Give the high potential clear feedback on how they are perceived by leadership.
- Discuss the identification process at a high level.

(Refer to page 17 for guidance)

… and start a discussion around career interests and aspirations.

- Engage the high potential in an initial development dialogue to understand their career goals, capabilities, and commitment level (refer to Appendix 5).
- Ask them to go way and consider the career interests before meeting to agree a development plan.

A short 'pre-meeting' will allow for a open and honest development conversation. It give the high potential time to stop and reflect on their career.

3. Development planning

STEP ONE: Set the scene

Key points to communicate:

- Over the past months, the leadership team has made a concerted effort to identify and get to know some of the talent across ASIC.
- You are an important person to ASIC and we see you as a high potential.
- As a leadership team, we have reviewed your background and experiences, including your strengths, growth areas, experience gaps, and openness to learning and feedback.
- We see a great future for you and we would like to provide you with targeted developmental experiences.
- These experiences may include new challenges in your role, broadening your responsibilities or formal courses.
- We hope that this provides you the ability to learn and grow at an accelerated pace, along with opportunities to apply your skills to special projects and key ASIC initiatives.
- You will have increased visibility to senior management and Commission (if relevant).
- We would like to discuss your career aspirations and future movements within ASIC.
- We will discuss and agree a development plan with you and provide opportunities.

Avoid:

- Discussing the actual performance and potential grid (e.g. “we have identified you in grid one and see you as a high potential). The grid is simply a management tool and should be the main focus.
- Indicate that they’re part of a ‘group’ or a program.

A manager communicates to the individual that we see a strong future for them at ASIC and discusses

Why we have a development discussion with our high potentials:

- Ambitious high performers are often aware of their worth in the employment market and will actively look for opportunities to develop and fulfil their potential.
- ASIC would like to reassure them that they are valued and that specific, targeted development opportunities will be made available to them.
- We don't want to imply that they're part of a specific program, or label them, but need them to understand that they're important to ASIC and we want to commit to their development and experiences.

Critical step

If we haven't had a conversation with the individual about their aspiration, now is the time to do it.

Openly address the promotion issue.

The purpose of developing planning is not about guaranteeing the high potential a one-up position. It's to provide the right experiences and targeted development to place the them in the best position should future career opportunities arise.

Think broader and consider …

- A rotation to another team
- Broadening responsibilities in current role
- Greater autonomy

Conducting 3-way development meetings can create focused, outcome orientated development plans

3-way development meeting

- Involves the manager, high potential and P&D Relationship Manager.
- Manager-led conversation, with the P&D Relationship Manager providing support and asking probing questions.
- Discuss strengths, development areas and development opportunities including potential experiences.

Benefit

- High-touch approach for the high potential.
- Robust and meaningful development conversations.
- Safe environment may be created with People & Development present.

Benefits for P&D Relationship Manager

- Correctly frame the development conversation.
- Partnership approach, providing an opportunity to **guide** and **coach** the manager in development conversations.
- High potential builds a relationship with People & Development.
- Deeper understanding of challenges associated with implementing the development plan.
- Hold the manager and high potential accountable for action.

3. Development planning

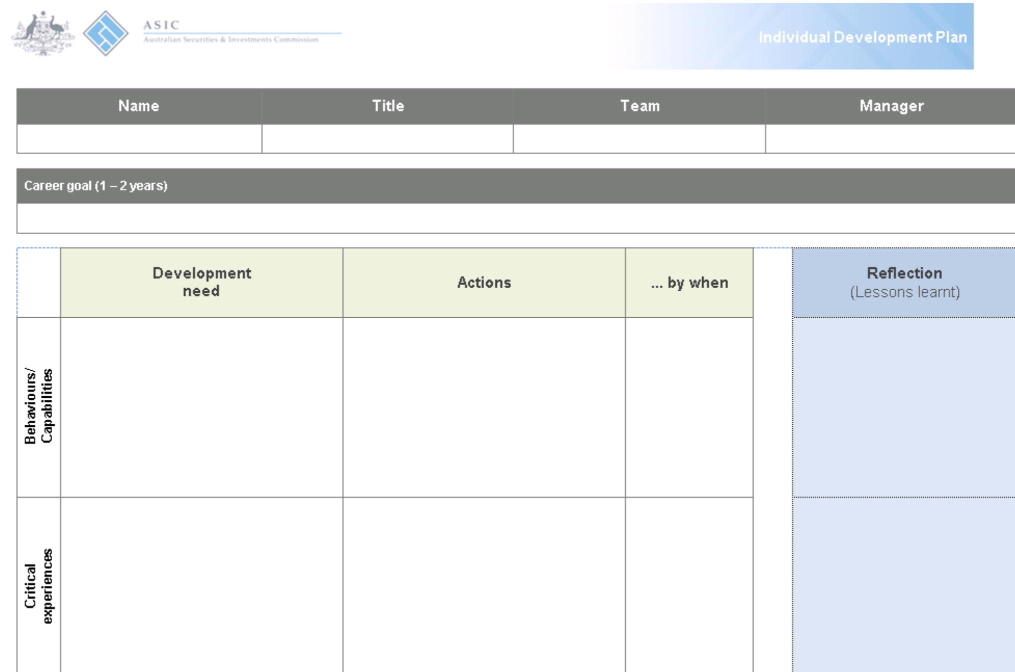
STEP THREE: Agree a Development Plan

Each high potential will have a short, practical, action-oriented development plan based on their individual development needs.

Development plans should be short, actionable and specific

- Each individual should have a development plan. The development plan will be based on the needs identified in the Talent & Succession Review Meeting.
- The development plan should not be complicated but should focus on the key experiences/development that they require.
- The development plan is the responsibility of the management group who ‘owns’ the high potential – it should not be simply the responsibility of the people leader.
- The value of the development plan is in the action, not the form.

An example development plan


ASIC

Individual Development Plan

Name	Title	Team	Manager

Career goal (1 – 2 years)

	Development need	Actions	... by when	Reflection (Lessons learnt)
Behaviours/ Capabilities				
Critical experiences				

Progress against the development plan should be managed at the level of management that ‘owns’ the high potential.

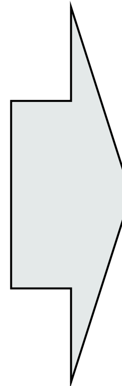
Development plans should focus critical experiences that are valuable in developing an individual

The value of critical experiences

- Effective leaders learn from and develop their skills through experiences
- **The best experiences force individuals to develop core skills that they will need to be successful in the future – these are the critical experiences**
- Critical experiences will differ per industry but will usually contain similar elements (people management, large scale change, customer/relationship interface, business risk)
- Understanding which roles the high potential individual is a successor for, will help to determine the appropriate experiences

These critical experiences can be given through:

- a promotion to a higher role
- a lateral move
- a project
- constructed within a current role



Examples of critical experiences

They may include:

- To lead a large scale, strategic change
- To manage significant business risk, including media aspects
- To work in partnership with a Senior Executive or Commission member
- To manage a large team and budget
- To move to an unfamiliar area, outside of primary technical expertise
- To manage significant relationships with external regulators

Generally, critical experiences will normally involve performing a new role. However this may be at level and not a level above.

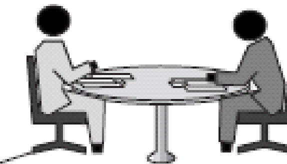
Refer to Appendix 4 for more detail.

3. Development planning

STEP FOUR: Coaching

A people leader and high potential should meet and review upon completion of each experience

- Formal review/coaching sessions recognises that high potentials cannot just be assigned experiences and then be asked to synthesize knowledge from these experiences on their own.
- Important for their manager provide both informal coaching and formal feedback sessions to ensure that the individual absorbs as much as possible from each experience.



Sample Questions

1. What did you hope to achieve from this experience? What were your top priorities and your secondary plans?
2. Did you achieve your objectives? Why/why not?
3. What were the biggest challenges you faced?
4. Did you have any surprises that did not match up to your expectations of this experience?
5. What are the top three lessons you learned from this?
6. How are you going to apply that learning?

Critical Success Factor

- Research shows that discussing and the active analysis of the lessons of career experiences contribute to accelerated development.

1	Overview
2	Talent & succession identification
3	Development planning
4	**Talent council**
5	Appendices

The Talent Council is an effective way for the ASIC leadership team to demonstrate commitment to and manage high potential issues on a regular basis

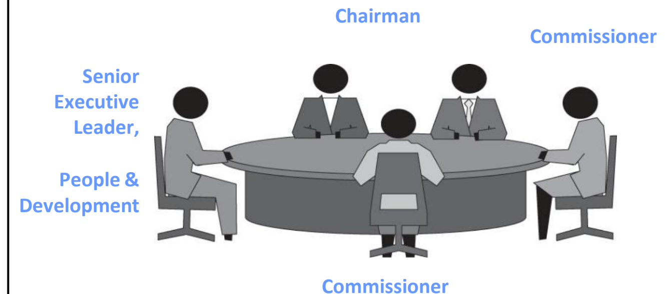
The Talent Council will meet twice a performance year. High potential plans & issues are discussed in a similar way to strategy issues...

1

Goal
- To discuss and resolve emerging leader management issues
- To drive cross-business ownership of emerging leaders
- Demonstrate commitment to managing emerging leaders to ASIC

Types of issues discussed
- Leadership capability to deliver strategy
- Review Performance and Potential grids (SES and Senior Manager/EL2)
- Development and management of key individuals (e.g emerging leaders , masters, critical roles)
- Review succession and benchstrength plans
- Manage succession risks:
  - Succession Risks
  - Vacancy Risks
  - Retention Risks
  - Transition Risks
- Diversity and metrics

The Talent Council



... And Senior Executives are held accountable for actions and outcomes

2

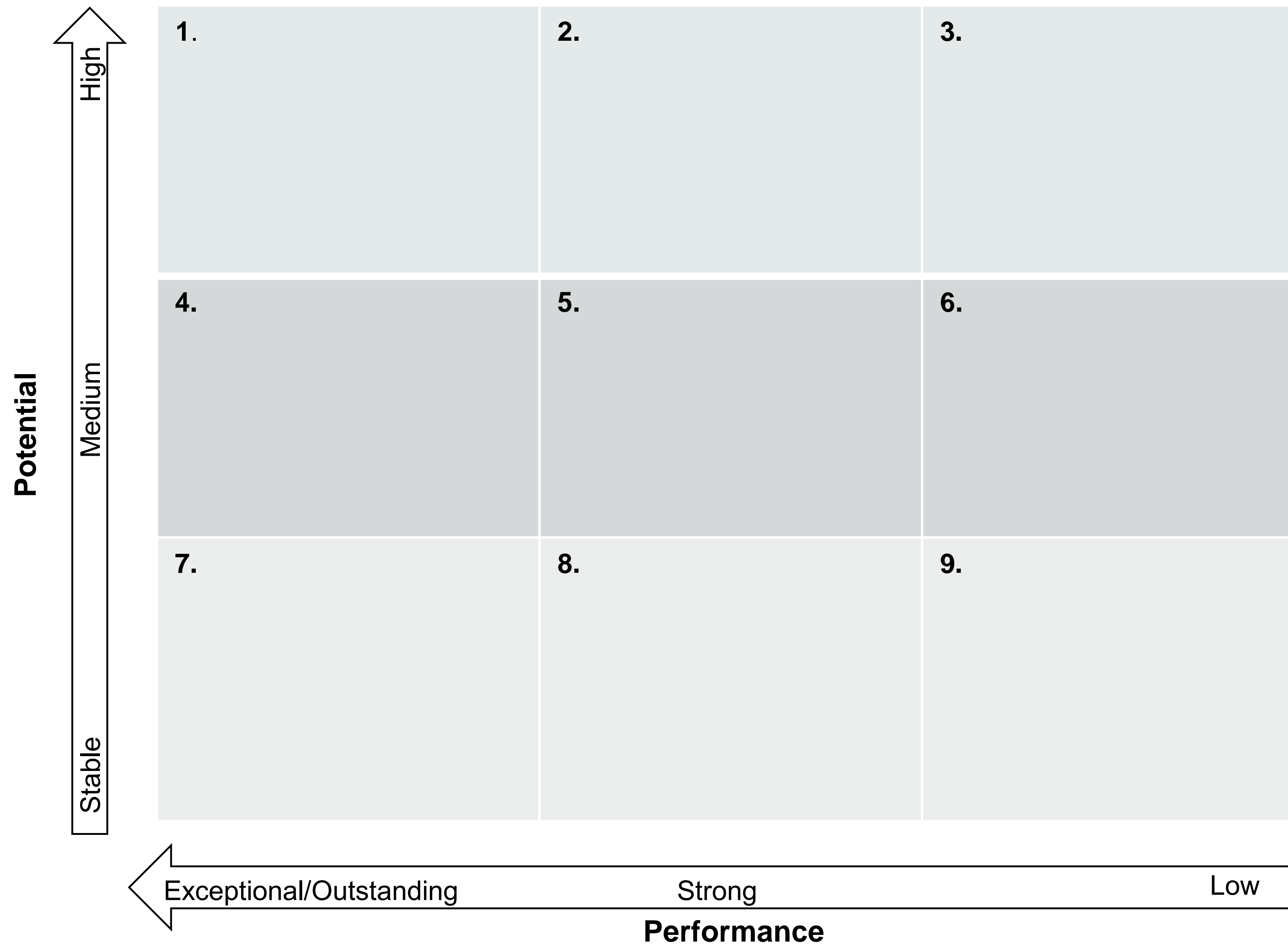
Action Items

✓Follow-up discussion

Action items are assigned, tracked and reported on at next meeting

1	Overview
2	Talent & succession identification
3	Development planning
4	Talent council
5	**Appendices**

Appendix 1
ASIC performance and potential grid



Appendix 2
Questions to promote thinking and discussion during the Talent & Succession Review Meeting

These questions are about encouraging discussion and calibration of the individuals rather than analytically scoring individuals against each answer.

Performance

1.What has been the person's performance ratings in the past two years?

2.What this person's most significant accomplishments in the past two years?

3.Does this person display and live ASIC's values?

4.What development do you believe this person needs to accomplish their career goals?

Ability

1.Does this person display the ASIC's leadership capabilities to succeed? For example:

a) Does this person think strategically?

b) Does this person demonstrate good communication skills?

c) How does this person maintain productive relationships even with difficult co-workers?

d) Does this person absorb complex concepts and incorporate them into his/her work? Please give examples.

e) Can this person solve an ambiguous problem?

f) How does this person arrive at creative solutions to problems?

2.Has the ability to assume greater responsibility within next two years? Is this person capable of moving up one level immediately?

3.Does this person lead and inspire others and keep his/her direct reports informed?

4.What are this person's limitations? Can they be addressed through experience and/or development?

(Cont)

Engagement

1.Does this person feel pride in ASIC? Please give examples

2.Is this person positive about ASIC and his/her career trajectory within the organisation?

3.Is the employee personally connected to the success of ASIC and their team?

4.Does this person volunteer for additional duties? Please give examples.

5.Does this person ask for ways they can do their job better? How frequently?

6.What is this person's level of attrition risk ranging from low to high:

   1. Low – reasonably low level risk of person leaving – loyal, high performing
   2. High – person likely to leave during the next 6 months – may seek more challenge, may be career competitive, may be targeted by head hunters

Aspiration

1.Does this person display initiative to take on responsibilities outside their role?

2.Does this person aim to assume more responsibility year after year?

3.Does this person strive to be recognised within and outside the ASIC?

4.How well does this person handle stress on the job?

5.Does this person wish to rise to a senior, more critical role? To what level do they aspire to? What are their limitations in doing so?

Appendix 3
Critical Experience Guide

Below are some examples of experiences available for high potentials

Critical Experience	Executive Level 2 to Senior Manager		Senior Manager to Senior Executive	
	Action	Expected Learning Outcome	Action	Expected Learning Outcome
To lead a large scale, strategic change	• Develop & implement a project plan or long-term strategy e.g. registry transformation • Participate on a project that changes focus from business to organisational goals e.g. credit reform. • Implement a change that impacts internal and external stakeholders e.g. project migrate	• Project management. • Strategic thinking (business) • Stakeholder management. • Managing internal and external communication strategies.	• Lead project group working on large, change reform – e.g. FOFA, credit reform, SMURF & stronger super. • Manage a project that requires cultural change or complex stakeholder management – e.g. restructure.	• Change management • Internal and external stakeholder management • High level communication skills • Strategic thinking (ASIC level)
To manage significant business risk, including media aspects	• Write and present complex material to be understood by the audience e.g. commission paper • Roll out a high profile initiative across a business unit e.g. virtual environment	• Effective reporting writing skills. • Stakeholder management • Goal setting	• Work on a broader project that requires a deep understanding of the regulatory context and media e.g. money smart • Work on major critical projects e.g. funding review. • Work on start-up projects e.g. credit reform • Plan press releases and develop ways to use media to develop priorities.	• Complex analysis and problem solving • Media management • Stakeholder collaboration.
To work in partnership with a Senior Executive or Commission member	• Set team business plan with Senior Executive. • Participate on a project board.	• Senior relationship management • Understand and respond to different point-of-view.	• Present at a Commission Meeting. • Present at Senior Executive Forum. • Responsibility for high profile business initiative requiring Commission involvement i.e. funding review	• Senior relationship management • Leadership, coaching & mentoring skills • Effective presentation and influencing skills.

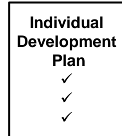
To lead a large team and budget	• Responsibility for a business plan priority • Deliver initiatives through team. • Responsibility for one section of the budget (own it for 12mths). E.g. for a project, employee budget. • Improve performance – have difficult staff conversations. Manage performance reviews.	• Understanding of financial, budget management • People management, including performance management – setting plans, stretch goals and development • Ability to engage & motivate	• Provide leadership i.e. deliver results through people (10 or more). • Responsibility for team's budget. • Receive 360 degree feedback • Drive actions resulting from staff survey	• Understanding of financial, budget management. • Decisions made based Cost Benefit Anaylsis. • Workforce & succession planning skills
To move to an unfamiliar area, outside of primary technical expertise	• Take on a different role in another team or business area • Participate on a project board not in current team scope e.g. property board	• Dealing with ambiguity • Maintain positive attitude, in the face of unexpected or rapidly changing situations.	• Secondments to external organisation • International secondment • Manage a crisis. • Work on cross ASIC taskforce. • Be a project sponsor of area not familiar with e.g. property, IT, EA Business reference group	• Dealing with ambiguity • Maintain positive attitude, in the face of unexpected or rapidly changing situations. • Change management • Adaptability, resilience & self-awareness skills • Scenario planning
To manage significant relationships with external regulators	• Work on a cross agency project or task force. • Secondments to external regulator.	• Broader understanding of regulatory and/or government frameworks.	• Secondments to external regulators. • Working on projects with significant interaction with other government agencies i.e. DOFTA & treasury e.g. SMURF • Responsibility for managing an agency relationship.	• Broader understanding of regulatory and/or government frameworks. • Serve as a good ambassador of ASIC – build ASIC creditability.

Appendix 4: Questions to identify high potential career interests

Sample questions to identify high potential career interests
❑ Are you looking to address a specific development area or acquire a specific skill over the next 1-2 years?
❑ What do you believe is your route map for you to get to the role you want to achieve?
❑ Where else in ASIC do you want to work?
❑ Are there any specific types of projects on which you would like to work?
❑ What challenges would you like exposure to?
❑ What level and nature of support do you expect from me as you work on your projects?
❑ What other resources or developmental opportunities do you feel you need in order to be effective in this role?

Appendix 5: Coaching
Provide Timely, Actionable, and Informal Feedback

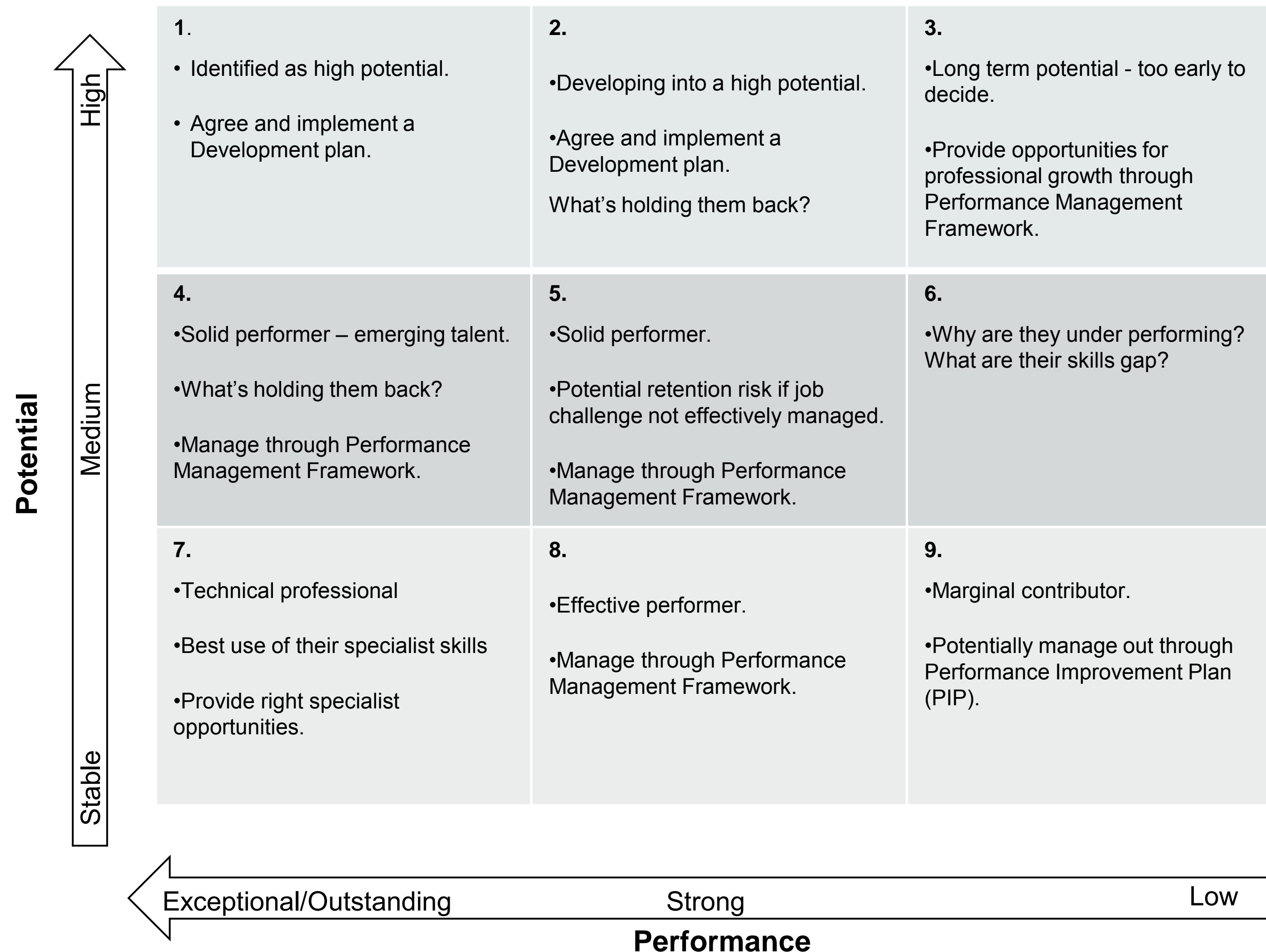
Preparation



Manager Review - Individual Development Plan
To what extent has the person been able to achieve the identified development needs and actions?
What are the person's key learning experiences from the actions?
In what ways did the actual experiences address or fail to address the identified development needs and/or actions?
With what does the person continue to struggle? What are his/her unaddressed challenges?
Which behaviors do you think have the potential to impede the persons success in future roles?
Overall, what are your recommendations for the emerging leaders in terms of possible next steps for him/her to move to senior levels?

Coaching questions – reviewing Individual Development Plan
How have you progressed against your identified development needs and actions?
What were your most valuable learning experiences from the opportunities provided? Could have you learnt more?
Do you enjoy working on your day-to-day tasks and assignments?
Where their any areas/tasks that you struggled with? Are there any unaddressed challenges?
Did you expect a greater level of support from me (your manager) or ASIC? If yes, please elaborate what kind of support.
What can we improve/modify in your development plan or current role to better engage you?
Do you believe that you would benefit from time in another team in ASIC?
Have new strengths or development opportunities come to light that would serve as better areas of focus for the future?
Are you happy in your current role?

Appendix 6:
ASIC performance and potential grid – Potential strategies



Roles and responsibilities

Stage	Task	Performance & Reward	P&D Relationship Manager	Senior Executive/ Manager
Framework	Develop and maintain Talent Management Framework	◆		
	Develop and maintain supporting documents	◆		
	Train Senior Executives on Talent and Succession	◆	◆ (support)	
Identification	Brief Senior Executives and Managers on Framework		◆	
	Plot team on Performance and Potential Grid		◆ (support)	◆
	Talent and Succession Review Meeting	◆	◆ (support)	◆
Development	Create Development Plans with high potentials		◆ (support)	◆
	Determine effective critical experiences and implement		◆ (support)	◆
Review and track	Coordinate Talent Council	◆		
	Talent Profile and process against Development Plans		◆	
	Manager and individual review Development Plan		◆ (support)	◆
Succession planning	Identify vacancy risk		◆ (support)	◆
	Identify succession readiness		◆ (support)	◆
	Create and update succession charts	◆	◆	

◆ Primary responsibility

◆ Support role