

# Chapter 26

## Accountability and governance structure

26.1 As an independent Australian government statutory authority entrusted with significant powers, it is essential that ASIC is subject to robust accountability processes. The accountability framework must also require the regulator to exercise its powers fairly and transparently. As Professor Dimity Kingsford Smith observed that ASIC's legitimacy as a regulator:

...comes partly from ASIC being transparent and accountable in a number of ways: financially, procedurally, and substantially. Ultimately, ASIC is a *public* institution, which works best when its decisions and processes are seen by the public.<sup>1</sup>

26.2 It is also essential, however, that the accountability framework applied to ASIC recognises, and safeguards, the autonomy needed for ASIC to have legitimacy among the regulated population and in the broader community. The importance of accountability to agencies such as ASIC is recognised in the terms of reference for this inquiry, which directs the committee to examine the accountability framework to which ASIC is subject, and whether this needs to be strengthened. The means for applying external accountability to ASIC is one of the issues considered by this chapter.

26.3 ASIC's performance can also be influenced by its internal governance framework. To ensure high-quality public governance, efficiency and good decision-making it is essential that ASIC's internal governance framework is appropriate and works effectively. This chapter considers the model of governance currently applied to ASIC by the ASIC Act and possible alternatives.

### ASIC's lines of accountability

26.4 ASIC is subject to several formal and informal accountability mechanisms. The following paragraphs describe these processes.

#### *Relationship with government*

26.5 As is the case with other independent statutory authorities, the government, through an assigned minister,<sup>2</sup> retains responsibility for the administration of ASIC. The relationship between the government and ASIC is evident in several ways, but perhaps most notable are that the government appoints ASIC's statutory office holders

---

1 Professor Dimity Kingsford Smith, *Submission 153*, p. 11.

2 Currently, the Assistant Treasurer is responsible for the administration of ASIC.

(i.e. the chairperson, deputy chairperson and other commissioners)<sup>3</sup> and that ASIC relies on funds appropriated by the Parliament. The ASIC Act also outlines the following specific areas where ASIC and the minister may interact:

- ASIC has the function of advising the minister if ASIC considers that changes to the corporations legislation (other than the excluded provisions)<sup>4</sup> or other legislation that confers on ASIC functions and powers are needed to overcome, or to assist in overcoming, problems that ASIC has encountered while performing or exercising its functions and powers;<sup>5</sup> and
- sections 12 and 14 of the ASIC Act enable the minister to give ASIC a written direction relating to ASIC's policies or priorities, or directing that a particular matter be investigated.<sup>6</sup>

26.6 As a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act), ASIC's management of finances and property are governed by the framework provided for by that Act.<sup>7</sup> In particular, as a chief executive of an FMA Act agency, the chairman of ASIC must manage the affairs of ASIC in a way that promotes proper use of the Commonwealth resources.<sup>8</sup> Further, under the FMA Act both the responsible minister and the Finance Minister may request any reports, documents and information that they may require.<sup>9</sup>

---

3 ASIC's chairperson, deputy chairperson and commissioners are appointed by the Governor-General on the advice of the minister: *Australian Securities and Investments Commission Act 2001*, ss. 9, 10.

4 The excluded provisions are section 12A and division 2 of part 2 of the ASIC Act. Section 12A outlines ASIC's other functions and powers, including ASIC's functions and powers under legislation other than the ASIC Act and the Corporations Act (e.g. the *Insurance Contracts Act 1984*) and its monitoring and promoting market integrity and consumer protection functions in relation to the Australian financial system and the payments system. Division 2 of part 2 deals with unconscionable conduct and consumer protection in relation to financial services. *Australian Securities and Investments Commission Act 2001*, s. 5.

5 *Australian Securities and Investments Commission Act 2001*, ss. 11(2)(b), 12A(5).

6 Section 12 directions relate to policies that ASIC should pursue or priorities it should follow in performing or exercising any of its functions or powers under the corporations legislation (other than the excluded provisions). Section 14 directions may be given where, in the minister's opinion, it is in the public interest that particular matters be investigated (although the minister cannot give a direction about a particular case). See *Australian Securities and Investments Commission Act 2001*, s. 14(2). Only one ministerial direction has been given to ASIC—in 1992 a direction was given regarding collaboration and consultation between ASIC and the CDPP. International Monetary Fund, *Australia: IOSCO Objectives and Principles of Securities Regulation—Detailed Assessment of Implementation*, IMF Country Report, no. 12/314, November 2012, p. 33; Australian Government, 'Statement of Expectations for the Australian Securities and Investments Commission', 20 February 2007, p. [5].

7 On 1 July 2014, the *Public Governance, Performance and Accountability Act 2013* will replace the FMA Act.

8 *Financial Management and Accountability Act 1997*, s. 44.

9 *Financial Management and Accountability Act 1997*, s. 44A.

---

### *Parliamentary oversight*

26.7 Two key mechanisms for ongoing parliamentary oversight of ASIC are the scrutiny associated with proposed government expenditure through the budget process and the requirement that an annual report on ASIC's activities be presented to the Parliament. This dedicated inquiry into ASIC demonstrates another way that ASIC is responsible to Parliament for its operations. Further, the Auditor-General, an independent officer of the Parliament supported by the Australian National Audit Office (ANAO), audits financial statements of government agencies and conducts performance audits. These reports assist the Parliament to perform its functions.<sup>10</sup>

26.8 ASIC is subject to ongoing parliamentary oversight via two committees:

- the Senate Economics Legislation Committee, which examines all Treasury portfolio agencies including ASIC as part of Senate estimates (generally three times a year) and reviews the annual reports of these agencies; and
- the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS)—a committee established under the ASIC Act charged with inquiring into the activities of ASIC and the operation of the corporations legislation, as well as reviewing the annual reports of bodies established under the ASIC Act.

### *Parliamentary Joint Committee on Corporations and Financial Services*

26.9 The PJCCFS was established by the *Australian Securities Commission Act 1989*. The decision to create a dedicated parliamentary committee to oversee ASIC and the corporations legislation followed concern about the complexity of the corporations legislation and ASIC's power to modify or suspend the application of legislation to individuals or classes.<sup>11</sup> In 1989, a parliamentary joint select committee concluded that a permanent committee should be established to 'monitor the work and activities' of the bodies now known as ASIC and the Takeovers Panel. That committee wrote:

---

10 In its submission, the ANAO outlined the financial and performance audits of ASIC it has undertaken, advising that ASIC has been involved in seven performance audits since 2005 (five were cross-agency and two related specifically to ASIC). The ANAO is currently conducting a performance audit of the administration of the business name register which includes ASIC and will be tabled in late 2013–14. ANAO, *Submission 114*, p. 2.

11 In a submission to a parliamentary committee considering the Australian Securities Commission Bill 1988, the National Companies and Securities Commission (NCSC), which was subsequently replaced by the ASC and then ASIC, advised that 'the main rationale for making specific statutory provision for such a Parliamentary Committee can be found in the extensive nature of the legislation, the established need for frequent amendment of it, the powers of the ASC to modify or suspend the impact of the legislation on individuals or classes and the implications of the adjudicative decisions of these bodies so far as future legislation is concerned'. Joint Select Committee on Corporations Legislation, *Report*, April 1989, p. 71.

The Committee believes that if the powers of such a Parliamentary Committee are carefully drafted and imaginatively employed they will enable the Committee to identify important issues and inquire into and report on these matters and make a positive contribution to the efficiency and effectiveness of the ASC and its associated bodies.<sup>12</sup>

26.10 The PJCCFS's duties are outlined in section 243 of the ASIC Act. Among other things, the PJCCFS's tasks include inquiring into the activities of ASIC and examining its annual report.<sup>13</sup> In fulfilling these statutory duties, the PJCCFS conducts regular public hearings with ASIC.<sup>14</sup> The PJCCFS also conducts wider inquiries that gather written and oral evidence and lead to detailed reports. Particularly notable inquiries conducted in recent years include those into the Franchising Code of Conduct, financial products and services (also known as the Ripoll Inquiry after committee's then chair Mr Bernie Ripoll MP), and the collapse of Trio Capital. The PJCCFS has also been tasked with reviewing significant legislative changes, such as the 2012 Future of Financial Advice (FOFA) legislation.

### ***Other accountability mechanisms***

26.11 A number of other formal and informal accountability mechanisms exist. Certain decisions made by ASIC under the ASIC Act, Corporations Act and other Acts can be reviewed by the AAT or the Takeovers Panel.<sup>15</sup> Decisions can be subject to judicial review. ASIC is also required to comply with other legislation or policies that are applied to government bodies generally, including:

- the *Freedom of Information Act 1982*;
- the Legal Services Directions 2005, which includes a requirement to act as a model litigant in the conduct of litigation, as well as policies on the procurement of Commonwealth legal work;<sup>16</sup>

---

12 Joint Select Committee on Corporations Legislation, *Report*, April 1989, Parliamentary Paper No. 117/1989, p. 72.

13 *Australian Securities and Investments Commission Act 2001*, s. 243(a)(i) and (b).

14 In recent years, ASIC has been called up to four times a year to give evidence.

15 The Takeovers Panel may review decision made by ASIC to exempt a person from the provisions of chapter 6 of the Corporations Act, or modify the application of that chapter to that person. During a takeover bid, the Takeovers Panel may also consider decisions by ASIC under chapter 6C. Chapter 6 contains the takeover provisions of the Corporations Act and chapter 6C requires information to be provided about the ownership of listed companies and managed investment schemes. ASIC's regulatory guidance states that the discretionary power is intended to address cases where a proposed acquisition does not fall within the terms of the exceptions already provided for in the Corporations Act. ASIC, *Takeovers: Exceptions to the general prohibition*, Regulatory Guide 6, June 2013, p. 7.

16 Appendix F of the Legal Services Directions 2005 specifies that an FMA Act agency may use only approved providers of Commonwealth legal work. The approved list (the Legal Services Multi-use List), of external legal providers is determined by the Office of Legal Services Coordination within the Attorney-General's Department.

- the Commonwealth Procurement Rules; and
- as ASIC's staff must be employed under the *Public Service Act 1999*, ASIC is bound by that Act, including the directions about employment matters made by the Australian Public Service Commissioner. ASIC's employees must also abide by the Australian Public Service (APS) Code of Conduct and Values.<sup>17</sup>

26.12 The Commonwealth Ombudsman, which investigates complaints alleging unfair or unreasonable treatment by an Australian government department or agency, can investigate complaints about how ASIC has handled a particular administrative matter. Effective informal scrutiny of ASIC's activities can also be provided by the media and academics.

### ***Upcoming and possible changes to the current accountability framework***

26.13 Some changes to the whole-of-government accountability framework are already scheduled to be implemented and further changes that specifically relate to ASIC may also be under consideration. The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) will reform the financial framework that applies to all Commonwealth entities. The PGPA Act will replace the FMA Act and the *Commonwealth Authorities and Companies Act 1997* on 1 July 2014.

26.14 In March 2014, the parliamentary committee with responsibility for oversight of the Australian Commission for Law Enforcement Integrity (ACLEI) commenced an inquiry into the jurisdiction of ACLEI. Among other things, that inquiry will consider the desirability and feasibility of extending the jurisdiction of the ACLEI to include oversight of ASIC (and certain other government agencies).<sup>18</sup> This follows concern expressed by the Parliamentary Joint Committee on Law Enforcement in 2013 about ASIC being able to gain access to a national repository of criminal intelligence without being subject to ACLEI oversight.<sup>19</sup>

---

17 These are outlined in sections 10 and 13 of the *Public Service Act 1999*. Under section 14, agency heads and statutory office holders (subject to any regulations) are bound by the code of conduct in the same way as APS employees.

18 See Parliamentary Joint Committee on the Australian Commission for Law Enforcement, 'Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity: Terms of Reference', [www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Australian Commission for Law Enforcement Integrity/Jurisdiction of ACLEI/Terms of Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Jurisdiction_of_ACLEI/Terms_of_Reference) (accessed 11 March 2014).

19 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, Parliamentary Paper No. 119/2013, p. 93.

## Views on the current accountability framework

26.15 Several submissions from aggrieved individuals and other observers argued that ASIC is not being held accountable. Some examples are below:

There is no accountability when a regulator does nothing in the face of years of evidence of bad loans. There is nothing in ASIC's annual reporting obligations that requires it to explain actions it has taken to prevent and put an end to corrupt and immoral business practices. Banks should be required to disclose the number and value of loans they have foreclosed, the number and value of properties they have repossessed, and the number of customers they have placed in bankruptcy. Where these exceed a very low threshold, ASIC should be required to automatically investigate, and all these statistics should be reported to Parliament.<sup>20</sup>

\* \* \*

ASIC is subject to no accountability whatsoever. There is the razzmatazz of Senate sub-Committee hearings, and the formal reporting requirements—but these are just going through the motions. ASIC's Annual Report is annually an exemplar of managerialist blah, a box-ticking waste of paper.<sup>21</sup>

26.16 Others suggested that there appears to be sufficient oversight of ASIC, but that 'whether it is effective depends upon the powers and performance of the overseers'. With the exception of dedicated inquiries such as that being conducted by this committee, it was argued that the Commonwealth Ombudsman is best placed to oversee ASIC on an ongoing basis.<sup>22</sup>

26.17 Organisations and stakeholders that engage with ASIC on a regular basis, and academics, had few concerns with the current accountability arrangements. For example, the Association of Financial Advisers stated that oversight of ASIC by the Australian Parliament is the most appropriate accountability mechanism, and it does not consider there is a need for any significant change.<sup>23</sup> The Law Council's Corporations Committee similarly considered that the current accountability mechanisms are 'satisfactory and effective'. It suggested that 'an evidence-based case would need to be made to suggest additional mechanisms or structures'.<sup>24</sup> The Australian Shareholders' Association advised that it has no evidence that suggests there is a need to strengthen ASIC's accountability framework.<sup>25</sup> Dr Marina Nehme also argued that the overall accountability framework does not need to be changed.

---

20 Mr Stephen Tyrrell, *Submission 179*, p. 1.

21 Dr Evan Jones, *Submission 295*, p. 5 (footnote omitted).

22 Mr Adrian Cox, *Submission 91.3*, p. 4.

23 Association of Financial Advisers, *Submission 117*, p. 2.

24 Corporations Committee, Business Law Section, Law Council of Australia, *Submission 150*, p. 7.

25 Australian Shareholders' Association, *Submission 151*, p. 1.

Dr Nehme highlighted the principles underpinning the current system and the risks associated with any potential amendments:

[The framework] currently provides a good balance between ensuring the accountability and the independence of ASIC. It is essential that the independence of this regulator is not eroded in any way to enable it to achieve its objectives efficiently.<sup>26</sup>

26.18 ASIC addressed the issue of accountability in its main submission. While it noted the criticism in some submissions about ASIC not being held accountable, ASIC countered that it is accountable 'for all aspects of our work', and that the current accountability framework is 'extensive, multi-layered, and rigorous', and works well in practice.<sup>27</sup>

26.19 While there was minimal support for significantly altering ASIC's accountability framework, some minor enhancements that could be considered were identified. Dr Nehme and CPA Australia commented on a past practice of the government issuing ASIC with a public statement of expectations and requiring ASIC to respond with a public statement of intent.<sup>28</sup> CPA Australia called for the practice to be reinstated; it argued that the process had the effect of making ASIC accountable and constrained by the statement of intent it made:

By articulating an annual plan and agreement with the government, a regulator such as ASIC can ensure that it works towards meeting the Government's expectations and appropriately manages its resources...This requirement is not only good policy but increases the transparency and certainty for the market, consumers and government. Good regulatory policy is based on outcomes, not on the volume of rules a regulator produces.<sup>29</sup>

26.20 In April 2014, the government issued a new statement of expectations to ASIC.<sup>30</sup>

### ***Committee view***

26.21 The committee notes that the government has recommenced the practice of issuing statutory agencies such as ASIC with statements of expectations. However, to ensure this framework is as effective as possible, consideration should be given to how adherence to the statement of intent could be monitored. Given that ASIC is subject to ongoing oversight by the PJCCFS, that committee may be well-placed

---

26 Dr Marina Nehme, *Submission 140*, p. 9.

27 ASIC, *Submission 45.2*, p. 57.

28 Dr Marina Nehme, *Submission 140*, p. 9; CPA Australia, *Submission 209*, p. 1.

29 CPA Australia, *Submission 209*, pp. 1–2.

30 The April 2014 statement of expectations can be viewed here: [www.asic.gov.au/asic/asic.nsf/byheadline/Statement-of-expectations--April-2014?openDocument](http://www.asic.gov.au/asic/asic.nsf/byheadline/Statement-of-expectations--April-2014?openDocument).

to review these statements and question ASIC about them on a regular basis. This process could inform the development of the next statements.

26.22 The committee has not received compelling evidence that suggests the mechanisms currently in place for providing external oversight of ASIC's activities need to be reviewed. Undertaking external oversight of an agency such as ASIC will be inherently difficult regardless of the model in place for doing so. Over the years, the PJCCFS has performed its challenging task commendably, with a number of landmark inquiries such as the Ripoll Inquiry leading to substantial reforms and continuing to influence policy discussions today.

26.23 The PJCCFS may wish to consider whether it can pivot its oversight function towards emerging risks. It is evident that many PJCCFS inquiries have reacted to a number of events, such as Storm Financial, Opes Prime and Trio Capital. Sadly, inquiring into collapses such as these that lead to personal misery and significant financial losses has been a necessary function of parliamentary committees, particularly in the wake of the global financial crisis. However, in addition to undertaking inquiries that assess what went wrong after the fact, the PJCCFS could place greater pressure on ASIC about emerging issues and industry developments with a view to limiting the number of minor issues that become major scandals. It may be necessary for the PJCCFS to question ASIC about the matters raised by individual complaints, as this committee has done with a number of submissions. As a first step, the PJCCFS may wish to consider dedicating one of its ASIC oversight hearings each year to emerging issues and early warning signals that, if appropriate and timely action were taken in response, could limit the potential for widespread investor losses or major fraud. The PJCCFS would also be well-placed to develop inquiries into the lifting of professional, ethical and educational standards in the financial services industry, a recurrent theme in this review of ASIC

### **Recommendation 52**

**26.24 The committee notes that the Parliamentary Joint Committee on Corporations and Financial Services could be well-placed to monitor ASIC's performance against the government's statement of expectations and ASIC's statement of intent. The committee recommends that the Parliamentary Joint Committee consider this as part of its statutory ASIC oversight function.**

### **Recommendation 53**

**26.25 The committee recommends that the Parliamentary Joint Committee on Corporations and Financial Services consider how it could undertake its statutory duties in a way that places a greater emphasis on emerging issues and how action could be taken to pre-empt widespread investor losses or major frauds. As a first step the Parliamentary Joint Committee could, on an annual basis, reserve a public hearing to emerging issues, taking evidence from both ASIC and relevant experts.**

---

## Recommendation 54

**26.26 The committee recommends that the Parliamentary Joint Committee on Corporations and Financial Services inquire into the various proposals which call for a lifting of professional, ethical and educational standards in the financial services industry.**

### ASIC's governance structure

26.27 As is the case with large organisations generally, having in place a governance structure that encourages good decision-making with the most appropriate people involved is fundamental to ASIC fulfilling its objectives. Given the independent status ASIC enjoys and the significant powers it is entrusted with exercising, a sound governance structure is needed to promote stakeholder and public confidence in ASIC's operations and protect against inappropriate conduct.

26.28 The commission that governs ASIC is comprised of a chairperson, a deputy chairperson and between one and six other members. The commission meets on a monthly basis, although more frequently if required, to make decisions about matters 'within ASIC's regulatory functions and powers that have strategic significance', to provide input about matters of significance and to oversee and to ensure that ASIC's statutory objectives are being met. The commission also oversees the management and operations of ASIC as a Commonwealth agency.<sup>31</sup> Specific commissioners are allocated executive responsibility for groups of ASIC's stakeholder and enforcement teams.<sup>32</sup> Senior Executive Leaders (SELs) manage these teams and exercise various powers and functions delegated to them by the commission.<sup>33</sup> A number of internal and external committees and bodies assist the commission to carry out its functions.<sup>34</sup> The ASIC Act includes procedures for ASIC's chairman and commissioners to disclose and manage conflicts of interest.<sup>35</sup> However, unlike other regulators such as the ACCC,<sup>36</sup> ASIC does not publish a code of conduct for its commissioners.

26.29 It is evident that there are different models in place for governing regulatory agencies. Like ASIC, the ACCC is similarly governed by a commission. However,

---

31 ASIC, *Submission 45.2*, p. 14.

32 ASIC, *Submission 45.2*, p. 14.

33 ASIC, *Annual Report 2012–13*, p. 142.

34 Internal bodies include the Enforcement Committee, Emerging Risk Committee and the Regulatory Policy Group. External bodies include the External Advisory Panel, Consumer Advisory Panel, ASIC's Audit Committee, Market Supervision Advisory Panel and the Registry and Licensing Business Advisory Committee. The external panels were discussed in Chapter 19. ASIC, *Submission 45.2*, p. 58; 'ASIC External Advisory Panel: Purpose, Governance and Practices Summary, March 2012', [www.asic.gov.au](http://www.asic.gov.au) (accessed 8 July 2013).

35 *Australian Securities and Investments Commission Act 2001*, ss. 123, 124.

36 See [www.accc.gov.au/system/files/Code%20of%20Conduct%20for%20Commission%20Members%20and%20Associate%20Members%202012.pdf](http://www.accc.gov.au/system/files/Code%20of%20Conduct%20for%20Commission%20Members%20and%20Associate%20Members%202012.pdf).

while the ACCC's commissioners may chair internal committees that relate to particular areas of the ACCC's remit, they are not formally aligned with particular work areas and teams. The ACCC's commission also appears to be collectively involved to a significant extent in decision-making; according to its published guidance, the commission usually meets on a weekly basis to make decisions about investigations and regulatory matters.<sup>37</sup> The ACCC previously had a separate chairman and chief executive officer, however, the chief executive officer position has been recently abolished.<sup>38</sup>

26.30 APRA is governed by an executive group comprised of the chairman and the other members appointed (in total, the executive group consists of between three and five members). APRA's executive group meets at least on a monthly basis but also meets with senior management weekly 'for high-level information sharing and decisions on more routine supervisory and organisational matters'.<sup>39</sup>

26.31 Board structures can be used as a governance structure for regulators, although they are more common in other countries. The RBA has two boards: the Reserve Bank Board and the Payments System Board. The Governor of the RBA chairs the boards and has responsibility for managing the RBA. The UK's Financial Conduct Authority is governed by a board of executive and non-executive members, with separate chairman and chief executive officer positions. The New Zealand Financial Markets Authority has a non-executive board.

### ***Views on ASIC's governance structure***

26.32 The public perception of an agency's performance, accountability and legitimacy can be affected by the governance model in place and the composition of the governing body's members.<sup>40</sup> Aggrieved borrowers in particular criticised recent appointments made to ASIC; for example, one submission objected to past and present chairmen and commissioners having banking backgrounds or entering the banking sector after leaving ASIC.<sup>41</sup> Levitt Robinson Solicitors suggested that the United States system of Senate confirmations for certain executive appointments should be adopted in Australia for ASIC office-holders.<sup>42</sup>

---

37 ACCC, 'Decision making processes', [www.accc.gov.au/about-us/australian-competition-consumer-commission/decision-making-processes](http://www.accc.gov.au/about-us/australian-competition-consumer-commission/decision-making-processes) (accessed 23 April 2014).

38 See Mr Rod Sims, Chairman, ACCC, *Senate Economics Legislation Committee Hansard*, Estimates, 26 February 2014, p. 74.

39 APRA, 'APRA's governance', [www.apra.gov.au/AboutAPRA/Pages/Governance.aspx](http://www.apra.gov.au/AboutAPRA/Pages/Governance.aspx) (accessed 23 April 2014).

40 Demonstrating this, the committee received several submissions opposed to the composition of the boards that govern FOS and COSL because the boards include directors with financial services industry backgrounds. For example, see *Submission 26*.

41 Mr and Mrs Neil and Deb Toplis, *Submission 6.1*, p. 1.

42 Levitt Robinson Solicitors, *Submission 276*, p. 1.

26.33 The committee sought views on ASIC's governance structure and tested the advantages and disadvantages of different governance models. Professor Dimity Kingsford Smith highlighted how the accountability of a regulator can be shaped by the governance structure by reviewing various foreign regulators:

In the US the Securities Exchange Commissioners are overtly political non-executive appointments: the GFC suggests that this model may make a commission more susceptible to political or industry influence. In New Zealand the Financial Markets Authority has a CEO and a non-executive board from industry and related groups. In the UK the Financial Conduct Authority has an executive chair and CEO and a non-executive board from industry and consumer groups. These models rely on individual executives being expert in a broad range of financial activities, immune to industry influence through board composition and fearless 'lone-wolf' decision-makers.<sup>43</sup>

26.34 Professor Kingsford Smith concluded that the commission-based models adopted by agencies like ASIC are 'more robustly independent and provide a better spread of expertise'. However, she added that ultimately the structure of an organisation 'is less influential than the calibre of personnel appointed'.<sup>44</sup>

26.35 When asked about ASIC's governance structure, Mr Douglas Gration of the Governance Institute of Australia identified two issues: ASIC's ability to draw on industry experience and the independence of those overseeing ASIC. Mr Gration observed that the existing model allowed ASIC to gain industry experience, as ASIC's past and present chairmen and commissioners have had private sector experience at senior levels. However, Mr Gration remarked that the issue of independence is not addressed in the current structure:

[ASIC] is like a company that is composed entirely of executive directors. The ASX corporate governance principles that we have been heavily involved with others in developing very much value the presence of independent directors on a corporate board. It is not obvious why ASIC would not benefit similarly from the expertise of having commissioners who were not, in effect, full-time executives and employees of ASIC as well.<sup>45</sup>

26.36 Mr Gration concluded that the lack of expertise from outside the organisation could result in ASIC 'very much living in its own world and in its own cocoon'.<sup>46</sup> He also highlighted how ASIC could suffer as a result of the governance framework not encouraging the contestability of ideas:

---

43 Professor Dimity Kingsford Smith, *Submission 153*, p. 5.

44 Professor Dimity Kingsford Smith, *Submission 153*, p. 5.

45 Mr Douglas Gration, Director, Governance Institute of Australia, *Proof Committee Hansard*, 10 April 2014, p. 64.

46 Mr Douglas Gration, *Proof Committee Hansard*, 10 April 2014, p. 64.

Undoubtedly, the private sector recognises that there is value in having independent directors, independent non-executive directors, on the board of a company who are not employees. It is an odd arrangement that you have the chair of the commission, and in one sense all the other commissioners are beholden to the chair. It makes it quite difficult to have an independent line of thinking there. If you have got a terrific chair, that is okay; but even a terrific chair can benefit from that sort of independent thinking.<sup>47</sup>

26.37 Other witnesses also commented on the influence of ASIC's chairman in ASIC's current governance structure. Dr Stuart Fysh, an individual prosecuted as a result of an ASIC investigation and later acquitted, pointed to the changes in approach that have occurred as a result of the latest change in chairmanship. Dr Fysh concluded that 'the organisation is too imprinted with the stamp of the guy at the top' and as a result 'the culture of the organisation swings around'.<sup>48</sup> Dr Fysh commented on his experience at BG Group, an international energy company involved in gas exploration and production, to demonstrate the benefits that a board structure at ASIC could provide:

For example, in BG Group they would largely be functions of the group executive, which of course exist in—but half a dozen times a year human-resource policy would be discussed with the board. If we had killed somebody because we had an incompetent operator in place—which is kind of what ASIC has done—the board would want to understand: 'Was that just an accident? Was this guy some sort of nut? How did he get through our system?' They would spend a day looking at the core competencies that we want in investigators or gas operators... If I were on the board of ASIC I would be saying to them, 'Look we've just lost this Fysh case. Could you chaps just come in—and don't just bring in all your senior people; bring some of the junior people in, so we get a look at the horseflesh in the organisation—and run me through the flow chart of how a prosecution happens. I want to spend a couple of hours with you really kicking it around. I want to know what went wrong.'... That is what I think a board would do.<sup>49</sup>

26.38 Dr Fysh added:

In any large enterprise we all benefit from someone standing back and advising us. I do not think anyone is quite as good as they would need to be to be doing a great job. Look at the brittleness in ASIC. I have referred to it; you have seen it. We have the chairman's bloody travel schedule on the web site of our national regulator. Don't tell me it is not a brittle organisation!<sup>50</sup>

---

47 Mr Douglas Gration, *Proof Committee Hansard*, 10 April 2014, p. 64.

48 Dr Stuart Fysh, *Proof Committee Hansard*, 2 April 2014, p. 4.

49 Dr Stuart Fysh, *Proof Committee Hansard*, 2 April 2014, pp. 3–4.

50 Dr Stuart Fysh, *Proof Committee Hansard*, 2 April 2014, p. 5.

26.39 ASIC was questioned about its governance structure. Mr Medcraft noted that with 30 years' experience in investment banking, he has had significant exposure to the private sector approach to governance. Mr Medcraft emphasised that ASIC has access to independent experts through its External Advisory Panel. Mr Medcraft provided the following testimony regarding that panel:

We use that external advisory panel as a key reference body. We tell them what we are doing, but we also get their views. The external advisory panel are people taken from across the sectors that we regulate. For example, one member is the current CEO of Google because I was keen that we have somebody in technology. We can provide you a list of the external advisory panel members. They include people such as David Gonski. We have established an arrangement with the Business Council of Australia that whoever is the chairman—it was Tony Shepherd—is a continuing member of the external advisory panel so that we have that strong connection with the Business Council. We are basically across the sectors. We essentially have very senior people and it includes key consumer representatives as well. That external advisory panel is actually quite important. In addition to all the other governance mechanisms we have, that is quite important.<sup>51</sup>

26.40 ASIC commissioner Mr Greg Tanzer noted that APRA previously had a board structure, but that this was removed following the royal commission into the collapse of HIH Insurance. Mr Tanzer also noted that the non-executive advisory board utilised by the UK Financial Services Authority, the predecessor to the FCA, did not prevent criticism of the agency's performance through the global financial crisis.<sup>52</sup>

### *Committee view*

26.41 In theory, a commission-structure of governance such as that applied to ASIC by the ASIC Act appears sound. A commission approach to governance encourages collective decision-making and responsibility. It can lead to better decision-making by drawing in the opinions and scrutiny of others and limiting the power of individuals. It potentially filters from the decision-making process the inclinations, peculiarities and flaws that an individual decision-maker could possess. However, the committee is concerned that the current governance framework has led to ASIC operating in silos with individual commissioners performing executive functions. ASIC's commission sets ASIC's priorities and strategic objectives, but the same commission, and individual commissioners, are also responsible for exercising ASIC's powers. As a result, any internal monitoring of ASIC's performance or challenge to how ASIC operates relies on the willingness and ability of the commissioners to scrutinise the decisions they have made. Although ASIC engages external persons through groups such as its External Advisory Panel, these groups focus on current areas of interest that relate to ASIC's regulatory work. They are not well-placed to scrutinise ASIC's performance or how the agency operates.

---

51 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 89.

52 Mr Greg Tanzer, Commissioner, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 89.

## **Conclusion and recommendation**

26.42 One suggestion discussed during the public hearings was that ASIC be governed by the equivalent of an executive and non-executive board. The committee has taken particular care when contemplating possible recommendations about ASIC's governance structure. The committee wishes to avoid disruptive changes that could potentially destabilise ASIC and distract it from its core functions. The committee is of a firm view, however, that ASIC's governance structure is not serving the agency well.

26.43 Over time, ASIC's performance may well be improved by replacing its commission structure of governance with an executive and non-executive board to which management would report. Introducing a board as the governing body for ASIC would create a stronger foundation for internal oversight. The board would provide leadership to the agency and assess management's performance. A board could provide ASIC's management with access to a range of experienced individuals and allow this informed group to scrutinise cases where things went wrong, particularly if they had access to ASIC's employees and internal policies. A chief executive officer would assume executive responsibility for ASIC's operations, although the board would provide guidance and challenge the chief executive officer where necessary. The responsibilities of the chairman and chief executive officer would not be performed by the same individual.

26.44 However, the committee has made a number of recommendations in this report that are intended to:

- improve the overall regulatory environment and allow ASIC to focus on areas of most concern;
- encourage ASIC to become more of a self-evaluating and self-correcting organisation; and
- provide insight into the conduct and draw on the knowledge, experience and expertise of people in the corporate world.

26.45 The committee considers that these recommendations should be adopted, monitored and allowed time to work before any further consideration of ASIC's governance framework takes place. A fundamental restructure of ASIC would be a major reform and require extensive consultation. By the end of two years, the committee's recommendations and ASIC's internal reform process should have had time to take effect. At that time, if the need for further reform is apparent, ASIC's governance arrangements and the extent to which they affect the agency's performance should be revisited.

---

**Recommendation 55**

**26.46** The committee recommends that at the end of two years, the government undertake a review of the *Australian Securities and Investments Commission Act 2001* that would consider ASIC's governance arrangements, including whether ASIC should be governed by a board comprised of executive and non-executive members.

26.47 Should the government decide that the governing body of ASIC be changed from a full-time commission to an executive and non-executive board, the word 'commission' would need to be removed from ASIC's name. This would also be an appropriate time to consider whether ASIC's current name suitably describes its responsibilities. As ASIC's chairman observed, ASIC is a financial services and markets regulator. In his view ASIC's current name, the Australian Securities and Investments Commission, 'means nothing to the average person'.<sup>53</sup> A possible new name is the Financial Services and Markets Authority.

26.48 Although the committee has concluded that its other recommendations should have had time to take effect before ASIC's governance arrangements are considered further, the committee does urge ASIC to take steps to increase the transparency of its internal accountability arrangements. Simple changes such as publishing internal policies and guidelines on matters such as the management of conflicts of interest could strengthen public confidence in how these issues are addressed and demonstrate that they are taken seriously within ASIC.

**Recommendation 56**

**26.49** The committee recommends that ASIC publish a code of conduct for its statutory office-holders.

---

53 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 33.

