
The Parliament of the Commonwealth of Australia

Review of the Australian Securities and Investments Commission Annual Report 2019

House of Representatives
Standing Committee on Economics

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Chair's foreword

2020 has been a challenging year for Australians, businesses and our institutions; and ASIC has not been exempted because of COVID-19 as well as self-generated problems.

The COVID-19 pandemic has caused unprecedented disruption to our lives. While the pandemic is primarily a public health issue, it has significantly impacted economies and financial systems around the world. It has led to the closure of our borders; the biggest economic downturn in close to a century; pressure on many small and medium businesses from tough public health measures; and historically low interest rates.

The Australian financial sector and its regulators responded quickly to the pandemic. Financial institutions provided support to Australian families and businesses as they worked to manage their mortgages and debts during a time when income is disrupted. The Morrison government's early release scheme reunited Australians with their own superannuation savings to help them during this difficult time. While some uncertainty remains, it is encouraging that there appears to be a strong economic comeback for Australia against the experience of many other economies.

On the health side, being 'girt by sea' enabled Australia to be one of the few nations that was able to close its international borders and effectively stop COVID-19 entering. Closing our international borders has been the single biggest public health measure taken to protect Australians. The only examples of community transmission have come as a result of a breach of those borders.

On the economic side, when the Australian economy went into this crisis it was better positioned than most to weather the storm. Having a Federal Budget in balance has ensured that lockdown measures could be offset by fiscal support through temporary increases in JobSeeker and the creation of the temporary JobKeeper program. It is a reminder that you are prudent on 'sunny days' in the hope that 'rainy days' never come, but inevitably do.

The opportunity of Australia's economic comeback is to not simply resuscitate Australia's 20th Century economy but build a forward-looking, modern 21st Century economy that provides the foundation for sustainable growth that provides the next generation of Australians with opportunity, employment and home ownership.

However, the economic comeback brings its own challenges. It is essential that governments, regulators, and financial institutions continue to be proactive and work together as the immediacy of the crisis fades and the hard work of economic comeback continues.

The committee notes ASIC's timely response to the pandemic. ASIC quickly adapted to the challenges of the pandemic, adjusting its regulatory priorities to focus on protecting vulnerable consumers, maintaining the integrity of markets, and supporting businesses. In particular, the committee notes ASIC's prompt and ongoing release of guidance regarding retail lenders obligations and ASIC's expectations when assisting consumers who are experiencing financial difficulties due to COVID-19.

The committee notes ASIC's proactive and ongoing engagement with peak bodies, superannuation funds, and financial institutions throughout the various stages and changing circumstances of the pandemic. In particular, the committee notes the strong relationship and high level of cooperation and coordination that ASIC and APRA have displayed during this challenging period.

The committee notes ASIC's progress regarding the implementation of the Royal Commission's recommendations, acknowledging the disruption caused by the pandemic and the deferral of implementation of commitments associated with the Royal Commission. The committee also notes that ASIC has also continued its enforcement work during this challenging period.

However, ASIC's progress and its rapid response to the COVID-19 pandemic are overshadowed by problems of its own making. It is difficult to say that there is as much confidence in ASIC today as there was at the same time last year and ASIC should seek to address these issues as a matter of urgency because they go to the heart of their capacity and internal processes.

As an example, the Committee has been concerned about ASIC's continual refusal to accept responsibility for its misleading and deceptive 'SMSF fact sheet' that has made spectacular and unsupported claims of the cost of establishing and running a self-managed superannuation fund. While this matter may appear trivial, it raises serious questions about the internal processes for approval within ASIC for information that is promoted to inform consumers and their choices, and whether ASIC understands the products they are regulating. It is simply absurd that ASIC would put information in the public square that claimed the cost of running an SMSF annually exceeded half the cost of the maximum contribution that could be made to it without scrutiny of the underlying data. It has only been because of the diligence and persistence of the committee that the inaccuracies of

this fact sheet have been highlighted. To date there has been no acknowledgement of this error, and apology for it. Instead ASIC has stood by it and claimed that new data has simply superseded it. This attitude undermines ASIC's credibility. Had a regulated business made similarly misleading statements about a competitor product they would face sanction. Yet those who impose sanctions are holding themselves to a different standard.

Unfortunately, these concerns of ASIC's internal processes have now been validated following independent investigations into payments made by ASIC on behalf of two of ASIC's most senior officers, the Chair and Deputy Chair Crennan.

The committee will not comment on the substance of these matters, as the independent review is still underway at the time of writing. However, the committee is very disappointed that such a review is necessary. ASIC should be leading by example. It must be beyond reproach in its governance and accountability structures and processes.

ASIC has a lot of work to do to rebuild its credibility and confidence with the committee, and likely the wider business and Australian community. Declining confidence did not originate with the investigations into the Chair and Deputy Chair, though it has substantially compounded it.

The committee takes its role of the oversight of ASIC very seriously. In 2021 it would be fruitful if ASIC demonstrated to the committee how it is reviewing its internal processes to address these issues, so such errors do not occur again; that it has accepted responsibility and that accountability exists within the organisation; and that it is clearly focused on its core duties of enforcement.

While it remains a matter for the Treasurer, these issues justify consideration for reform of ASIC to help rebuild confidence in its capacity, so it fulfils the important statutory functions the Parliament entrusts it with.

In 2021 the committee will closely follow the outcome of the independent review. It will continue to scrutinise ASIC's performance, particularly ASIC's ongoing response to the COVID-19 pandemic and its implementation of the Royal Commission's recommendations.

On behalf of the committee, I thank ASIC representatives for appearing at the public hearings on 5 August 2020 and 23 October 2020.

Tim Wilson MP
Chair



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Membership of the Committee

Chair	Mr Tim Wilson MP
Deputy Chair	Hon Dr Andrew Leigh MP
Members	Dr Anne Aly MP (to 8 October 2020)
	Mrs Bridget Archer MP (to 27 August 2020)
	Mr Adam Bandt MP
	Mr Jason Falinski MP
	Ms Celia Hammond MP (from 27 August 2020)
	Mr Craig Kelly MP
	Mr Andrew Laming MP
	Dr Daniel Mulino MP
	Ms Peta Murphy MP (from 8 October 2020)
	Mr Ted O'Brien MP (to 27 August 2020)
	Mr Julian Simmonds MP (from 27 August 2020)

Committee Secretariat

Secretary Ms Casey Mazarella (from 3 August 2020)

Mr Stephen Boyd (to 31 July 2020)

Senior Research Officer Ms Stephanie Woodbridge

Research Officer Ms Miriam El-Chami

Administrative Officer Ms Jazmine Rakic



Terms of reference

The House of Representatives Standing Committee on Economics is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House that stand referred to the committee for any inquiry the committee may wish to make. The reports stand referred in accordance with the schedule tabled by the Speaker to record the areas of responsibility of the committee.



List of abbreviations

ABA	Australian Banking Association
ACCC	Australian Consumer and Competition Commission
AFCA	Australian Financial Complaints Authority
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
BEAR	Banking Executive Accountability Regime
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
MoU	Memorandum of Understanding
National Credit Act	<i>National Consumer Credit Protection Act 2001 (Cth)</i>
Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
SME	Small and medium-sized enterprise
SMSFs	Self-Managed Super Funds

Introduction

Background

- 1.1 The House of Representatives Standing Committee on Economics (the committee) is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House that stand referred to the committee in accordance with the Speaker's Schedule.
- 1.2 The Australian Securities and Investments Commission (ASIC) 2019 Annual Report (annual report) stands referred to the committee in accordance with this schedule. The committee resolved at its meeting on 10 June 2020 that it would conduct an inquiry into the annual report.
- 1.3 ASIC is Australia's integrated corporate, markets, financial services, and consumer credit regulator. It is an independent Commonwealth statutory authority and administers the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the *Corporations Act 2001* (Corporations Act), as well as a range of additional legislation.¹
- 1.4 ASIC was established in 1991 as the Australian Securities Commission, replacing the National Companies and Securities Commission and the Corporate Affairs offices of the states and territories. It was renamed ASIC in 1998 when it was given responsibility for consumer protections in superannuation, insurance, and deposit taking. ASIC's responsibilities were expanded in 2010 to regulate trustee companies; consumer credit and

¹ ASIC, 'Laws we administer', <<https://asic.gov.au/about-asic/what-we-do/laws-we-administer/>>, accessed 12 November 2020.

finance broking; and for supervising trading on Australian licensed equity, derivatives and futures markets.²

1.5 ASIC's vision is for 'a fair, strong and efficient financial system for all Australians'. To realise this vision, ASIC stated that it will use its regulatory tools to:

- change behaviours to drive good consumer and investor outcomes;
- act against misconduct to maintain trust and integrity in the financial system;
- promote strong and innovative development of the financial system;
- help Australians to be in control of their financial lives; and
- provide efficient and accessible business registers that make it easier to do business.³

Areas of responsibility

1.6 As the corporate, markets, financial services, and consumer credit regulator, ASIC has a wide range of responsibilities. It is required by the ASIC Act to:

- maintain, facilitate, and improve the performance of the financial system and entities within it;
- promote confident and informed participation by investors and consumers in the financial system;
- administer the law effectively and with minimal procedural requirements;
- efficiently receive, process, and store information;
- make information about companies and other bodies available to the public as soon as practicable; and
- take whatever action it can, and which is necessary, to enforce and give effect to the law.⁴

2 ASIC, 'How we operate: History', <<https://asic.gov.au/about-asic/what-we-do/our-role/history/>>, accessed 3 August 2020.

3 ASIC, 'Our role', <<https://asic.gov.au/about-asic/what-we-do/our-role/asic-vision-and-mission/>>, accessed 3 August 2020.

- 1.7 ASIC's service charter further describes its role in relation to corporate, market, and financial system regulation encompassing, among other activities:
- registering companies and managed investment schemes;
 - registering auditors and liquidators;
 - registering business names;
 - licensing financial services and consumer credit businesses; and
 - examining new market license proposals.⁵
- 1.8 ASIC maintains publicly accessible registers of companies, and registered and licensed entities, as well as disqualified directors and people who are banned from the financial services industry.⁶
- 1.9 ASIC may also grant relief for companies or individuals from some sections of the Corporations Act and the *National Consumer Credit Protection Act 2009* (National Credit Act).⁷

Enforcement outcomes

- 1.10 ASIC is responsible for pursuing companies or individuals that may have breached the laws it administers. The ASIC Act directs ASIC to 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it'.⁸
- 1.11 Following the Royal Commission's recommendation regarding ASIC's approach to enforcement, in July 2019, ASIC established an Office of

4 ASIC, 'Our role', <<https://asic.gov.au/about-asic/what-we-do/our-role/>>, accessed 12 November 2020.

5 ASIC, 'ASIC service charter', <<https://asic.gov.au/about-asic/what-we-do/how-we-operate/performance-and-review/asic-service-charter/asic-service-charter/>>, accessed 3 August 2020.

6 ASIC, 'ASIC service charter', <<https://asic.gov.au/about-asic/what-we-do/how-we-operate/performance-and-review/asic-service-charter/asic-service-charter/>>, accessed 3 August 2020.

7 ASIC, 'ASIC service charter', <<https://asic.gov.au/about-asic/what-we-do/how-we-operate/performance-and-review/asic-service-charter/asic-service-charter/>>, accessed 3 August 2020.

8 *Australian Securities and Investments Commission Act 2001*, s. 1.

Enforcement. The purpose of the Office is to ‘strengthen ASIC’s enforcement effectiveness’ and its ‘decision making and capabilities’.⁹

1.12 ASIC stated a key priority in 2019-20 will be ‘ensuring high deterrence enforcement action’ and ‘[continuing] to prioritise referrals from the Royal Commission for investigation and litigation’. ASIC explained it will ‘focus on efficient and effective enforcement action and on targeting cases of egregious harm, especially those involving vulnerable consumers’.¹⁰ ASIC reported that, from January 2019 to January 2020, there has been:

- a 10 per cent increase in the number of ASIC enforcement investigations; and
- a 52 per cent increase in enforcement investigations involving CBA, NAB, Westpac, ANZ and AMP (or their officers or subsidiary companies).¹¹

Scope and conduct of the review

1.13 ASIC appeared before the committee at two public hearings on 5 August 2020 and 23 October 2020 in Canberra via videoconference. Details of the hearings are provided at Appendix A.

1.14 The proceedings of the hearing were webcast through the Parliament’s website, allowing interested parties to view or listen to the proceedings as they occurred. The transcripts of the hearings are available on the committee’s website.¹²

1.15 ASIC’s responses to the committee’s questions on notice and in writing are provided on the committee’s website.¹³

1.16 This report focuses on matters raised at the public hearings.

9 ASIC, *Annual Report 2018-19*, p. 31.

10 ASIC, *Annual Report 2018-19*, p. 31.

11 ASIC, *ASIC Update: September 2019 to February 2020*, p. 5.

12 House of Representatives Standing Committee on Economics, <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/ASICAnnualReport2019/Public_Hearings>.

13 House of Representatives Standing Committee on Economics, <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/ASICAnnualReport2019/Documents>.

Current issues in financial systems regulation

Overview

- 2.1 The Australian Securities and Investments Commission (ASIC) appeared before the House of Representatives Standing Committee on Economics (the committee) at two public hearings held via videoconference on 5 August 2020 and 23 October 2020 as part of its review of the ASIC Annual Report 2019.
- 2.2 Issues raised at the hearings focused on ASIC's response and regulatory approach to the COVID-19 pandemic including loan repayment deferrals, guidance to banks, and the early release of superannuation scheme. The committee also scrutinised ASIC on the findings of the Australian National Audit Office (ANAO) audit of ASIC's financial statement, following the announcement at the committee's public hearing that ASIC Chair, Mr James Shipton, would be 'standing aside' pending the outcome of an independent review of the issues raised by the ANAO.
- 2.3 Other matters discussed included ASIC's continued implementation of the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission).

Financial Services Royal Commission

- 2.4 The Royal Commission raised questions regarding regulators' ability to anticipate and deal forcefully with the widespread misconduct that it uncovered. In particular, the Royal Commission raised concerns regarding ASIC's 'deeply entrenched culture of negotiating outcomes rather than

insisting upon public denunciation of, and punishment for, wrongdoing', and cautioned that, whilst remediation of consumers is important, it is 'not the only consideration relevant to the regulator'.¹

- 2.5 The Royal Commission made several recommendations regarding ASIC's remit and regulatory approach. The Government and ASIC agreed to implement the recommendations.

Update on progress since previous report

- 2.6 To date, ASIC has released three updates (in February and September 2019 and February 2020) on its progress implementing the changes recommended by the Royal Commission. From September 2019 to February 2020, ASIC has:

- operationalised and expanded its Office of Enforcement to focus on Royal Commission referrals and contraventions of the financial services laws by the major banks, superannuation trustees, and insurers;
- continued its enhanced supervision program across large listed entities in the financial services and other sectors, focusing on non-financial risk management and oversight; and
- continued to implement and use its new regulatory powers to identify and address misconduct and poor consumer outcomes.²

- 2.7 ASIC stated it has completed its implementation of four of the 10 recommendations by the Royal Commission and provided significant input to Government on its legislative reform program in response to the Royal Commission's recommendations.³ Details of the status and actions taken to date by ASIC as of February 2020 are at Table 2.1.

1 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 1, February 2019, pp. 424-425.

2 ASIC, *ASIC update: September 2019 to February 2020*, <<https://download.asic.gov.au/media/5475302/asic-update-published-27-february-2020.pdf>>, accessed 27 August 2020.

3 ASIC, *ASIC update: September 2019 to February 2020*, <<https://download.asic.gov.au/media/5475302/asic-update-published-27-february-2020.pdf>>, accessed 27 August 2020.

Table 2.1 ASIC's actions on the Royal Commission recommendations

Recommendation	Status and ASIC's action
1.8, 1.10, 1.13, 1.16 Amendments to the banking code	Completed. In December 2019, ASIC approved an updated version of the Australian Banking Association's (ABA) Banking Code of Practice, which commenced on 1 March 2020. ⁴
2.4 End of grandfathered commissions	In progress. ASIC is investigating the extent to which grandfathering is being voluntarily ended before 1 January 2021, including the extent to which the benefits are being passed on to affected clients. ASIC will analyse the information from its reviews and report to the Treasurer by 30 June 2021. ⁵
2.5 Life risk insurance commissions	In progress. ASIC will include the factors identified by the Royal Commission in undertaking its post implementation review of the 2017 life insurance reforms. ASIC's review will take place in 2021. ⁶
4.9 Enforceable code provisions	In progress. As of February 2020, ASIC has provided input to the Government's proposed legislative reform in relation to industry codes, scheduled to be introduced into Parliament before 30 June 2020. ⁷
6.2 ASIC's approach to enforcement	Completed. ASIC has established an Office of Enforcement within ASIC. The purpose is to strengthen ASIC's enforcement culture and effectiveness, and to implement a single enforcement strategy for ASIC. The Office will lead the application of ASIC's 'why not litigate' enforcement approach. ⁸
6.10 Co-operation memorandum	Completed. APRA and ASIC issued a revised Memorandum of Understanding (MOU) on 29 November 2019. ⁹
6.12 Application of the BEAR to regulators	Completed. In December 2019, ASIC published its <i>Management and Accountability Regime</i> . ¹⁰

Source ASIC, *ASIC update: September 2019 to February 2020*, pp.18-20.

New enforcement approach

2.8 Enforcement is one of ASIC's key regulatory functions. The *Australian Securities and Investments Commission Act 2001* (ASIC ACT) allows ASIC to 'take whatever action it can take, and is necessary, in order to enforce and

4 ASIC, 'ASIC approves an updated Banking Code of Practice', *Media Release 19-358MR*, 17 December 2019.

5 ASIC, 'ASIC to review industry transition towards ending grandfathered remuneration for financial advice', *Media Release 19-218MR*, 21 August 2019.

6 ASIC, *ASIC update: September 2019 to February 2020*, February 2020, p. 19.

7 ASIC, *ASIC update: September 2019 to February 2020*, February 2020, p. 19.

8 ASIC, *Annual Report 2018-19*, p. 31.

9 ASIC, 'ASIC and APRA issue updated MoU', *Media Release 19-327MR*, 29 November 2019.

10 ASIC, *ASIC's Management Accountability Regime*, December 2019, <<https://download.asic.gov.au/media/5419743/amar-accountability-statements-chairs-and-commissioners-published-19-12-2019.pdf>>, accessed 9 November 2020.

give effect to the laws of the Commonwealth that confer functions and powers on it'.¹¹ ASIC is charged with using 'a range of regulatory and enforcement sanctions and remedies to bring wrongdoers to account and ensure appropriate punishment and public denunciation for misconduct'.¹²

- 2.9 In July 2019, ASIC's Office of Enforcement became operational. ASIC stated that it has been 'significantly increasing and accelerating [its] investigations, which should translate into more court-based outcomes as part of [its] new enforcement strategy'. In 2018-19 there has been:
- a 20 per cent increase in the number of ASIC enforcement investigations;
 - a 51 per cent increase in enforcement investigations involving Australia's largest financial institutions (or their officers, employees or subsidiary companies); and
 - a 216 per cent increase in wealth management investigations.¹³
- 2.10 ASIC stated that in 2019-20, 'ensuring high deterrence enforcement action' will be a key priority. ASIC advised that it will 'focus on efficient and effective enforcement action and on targeting cases of egregious harm, especially those involving vulnerable consumers'. ASIC noted that it 'will also continue to prioritise referrals from the Royal Commission for investigation and litigation'.¹⁴
- 2.11 The committee noted reports that a number of cases are anticipated to be filed by ASIC before the end of 2020. ASIC told the committee in the period from 23 October 2020 through to 31 December 2020, subject to evidentiary requirements being met and the availability of external resources such as legal counsel and experts, it expects to:
- file approximately 15 civil cases;
 - refer approximately 20 briefs of evidence to the Commonwealth Director of Public Prosecutions, relating to approximately 25 individuals or companies; and
 - refer approximately 10 individuals for administrative action.¹⁵

11 *Australian Securities and Investments Commission Act 2001*, s 1.

12 ASIC, *Annual Report 2018-19*, p. 47.

13 ASIC, *Annual Report 2018-19*, pp. 31-32.

14 ASIC, *Annual Report 2018-19*, p. 31.

15 ASIC, *Response to question on notice, ASIC34QON*, p. 1.

Outstanding matters arising from the Royal Commission

2.12 The committee asked for an update regarding the outstanding matters arising from the Royal Commission. ASIC advised that 'one matter is awaiting sentencing, three matters are being considered by the Commonwealth prosecutor, and eight matters remain under investigation'. ASIC told the committee that the eight matters under investigation are 'well progressed'.¹⁶

Remediation

2.13 The committee raised concerns regarding the timeliness of remediation for customers wronged by issues coming out of the Royal Commission. ASIC told the committee that 'over \$3.5 billion is yet to be repaid to over 3.6 million customers', noting that 'at least \$3 billion of that figure is just for fees for no service remediation'.¹⁷

2.14 ASIC advised that it is updating its *Regulatory Guide 256: Client review and remediation conducted by advice licensees* (RG 256). It explained that RG 256 sets out the principles for good remediation 'but it doesn't go to timeliness'. ASIC told the committee that timeliness will be addressed in the new guide. It explained that:

...we think there are opportunities for the banks and other financial services firms to do a much better job on remediation, not just in terms of the timeliness but also setting things right, and sometimes erring on the side of generosity in setting things right, to get the money out more quickly.¹⁸

2.15 ASIC told the committee that 'there is a greater need for transparency' and that it will be consulting on further guidance on remediation going forward. It explained that 'part of that consultation will be trying to inject some greater transparency for the entities around the payments that are being made, the timetable, what's going to customers and what's actually going to paying for improving internal systems and paying consultants'.¹⁹

2.16 The committee asked what actions ASIC could take if the timeliness of remediation doesn't improve. ASIC advised the committee that it is 'limited in what we can do'. It explained that it will give guidance and is 'being very pragmatic with giving methodologies to speed things up'. ASIC also noted that it is 'getting a new directions power shortly', which can be used if it suspects a breach of section 912A of the *Corporations Act*

16 Mr Daniel Crennan QC, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 43.

17 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 44.

18 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 5 August 2020, p. 11.

19 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 44.

2001 (Corporations Act) in regard to entities acting fairly, honestly and efficiently.²⁰ However, ASIC told the committee that:

At the end of the day, it is a commercial call for the boards to get these payments out quickly or not. Perhaps if they don't have the systems in place, or if they've used distribution channels involving financial advisers where appropriate records have not been kept, they [may] need to err on the side of generosity and just pay out more than they know.²¹

Deferral of implementation of commitments

2.17 On 8 May 2020, the Federal Government announced a six-month deferral of the implementation of commitments associated with the Royal Commission as a result of the significant impacts of COVID-19. The announcement explained that:

The deferral will enable the financial services industry to focus their efforts on planning for the recovery and supporting their customers and their staff during this unprecedented time.

Under the updated timetable, those measures that the Government had indicated would be introduced into the Parliament by 30 June 2020, will now be introduced by December 2020. Similarly, those measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021.²²

2.18 ASIC announced that it would temporarily change its regulatory work and priorities to allow it and regulated entities to focus on the impact of COVID-19.²³ ASIC stated that it 'has delayed a number of activities not immediately necessary in light of these significantly changed circumstances, including consultations, regulatory reports and reviews'.²⁴

2.19 In June 2020, ASIC released a revised table of ongoing work, outlining the work it would do around the deferral.²⁵ ASIC told the committee that it

20 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 44.

21 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 44.

22 Treasury, 'Update on the implementation of the Banking, Superannuation and Financial Services Royal Commission', *Media Release*, 8 May 2020.

23 ASIC, *Changes to regulatory work and priorities in response to COVID-19*, <<https://asic.gov.au/regulatory-resources/find-a-document/regulatory-document-updates/changes-to-regulatory-work-and-priorities-in-response-to-covid-19/>>, accessed 27 August 2020.

24 ASIC, 'Details of changes to ASIC regulatory work and priorities in light of COVID-19', *Media Release 20-086MR*, 14 April 2020.

25 ASIC, 'ASIC's revised timetable of ongoing work', <<https://asic.gov.au/regulatory-resources/find-a-document/regulatory-document-updates/asics-revised-timetable-of-ongoing-work/>>, accessed 25 August 2020.

remains 'committed to ensuring the effective and timely implementation of this significant legislative reform to ensure the efficiency, competitiveness and fairness of the financial system'. However it 'really wanted businesses to be focusing on the needs of consumers in the here and now with COVID-19'.²⁶

Response to the COVID-19 pandemic

- 2.20 In March 2020, ASIC announced that it was recalibrating its regulatory efforts to focus on challenges arising as a result of the COVID-19 pandemic. ASIC stated that it had 'immediately suspended a number of near-term activities which are not time-critical' and 'until at least 30 September 2020, the other matters that ASIC will afford priority are where there is the risk of significant consumer harm, serious breaches of the law, risks to market integrity and time-critical matters'.²⁷
- 2.21 In June 2020, ASIC released an Interim Corporate Plan setting out its adjusted priorities in response to the challenges presented by the COVID-19 pandemic. The Interim Corporate Plan outlines five strategic priorities that will guide ASIC's work during this period:
- protecting consumers from harm at a time of heightened vulnerability;
 - maintaining financial system resilience and stability;
 - supporting Australian businesses to respond to the effects of COVID-19;
 - continuing to identify, disrupt and take enforcement action against the most harmful conduct; and
 - continuing to build its organisational capacity in challenging times.²⁸
- 2.22 ASIC stated that 'the priorities identified in this Corporate Plan enable us to focus on activities that directly address the needs of consumers and firms as they respond to COVID-19'. ASIC listed examples of new activities that 'flow from this plan', including:
- cross-ASIC working groups on scams, unlicensed advice and misleading advertising;

26 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 5 August 2020, p. 7.

27 ASIC, 'ASIC recalibrates its regulatory priorities to focus on COVID-19 challenges', *Media Release 20-070MR*, 23 March 2020.

28 ASIC, *ASIC Interim Corporate Plan 2020-21*, p. 2.

- expanding its markets supervision work to support fair and orderly operation of markets and to ensure investors are appropriately informed;
 - providing relief in relation to capital raising, shareholder meetings and reporting, and financial advice;
 - ensuring that there are measures in place to assist consumers who experience hardship, especially in relation to credit and insurance; and
 - facilitating access to effective advice when individuals are considering seeking early access to their superannuation.²⁹
- 2.23 ASIC told the committee that it has ‘responded rapidly and strategically to the challenges created by the pandemic, focusing on protecting vulnerable consumers, maintaining the integrity of markets and supporting businesses’. ASIC advised that its enforcement work continues, explaining that ‘we have not only prioritised our response to the pandemic and areas of egregious harm but also are continuing to work through a significant enforcement case load that relates to the royal commission’.³⁰
- 2.24 ASIC’s pandemic-related enforcement priorities aim to address:
- misconduct arising from behaviour seeking to exploit the pandemic environment, including predatory lending practices, mis-selling of unsuitable insurance or investment products and poor claims handling;
 - opportunistic conduct, such as scams, unlicensed conduct, and misleading and deceptive advertising;
 - failures to disclose materially negative information;
 - opportunistic and misleading market announcements made to the ASX; and
 - egregious governance failures within corporations, schemes and superannuation funds.³¹
- 2.25 ASIC advised that it has increased its surveillance of market announcements and statements, to ensure that adequate information is being provided, and of adjustments to the guidance that companies are providing to boards during this period ‘so that there wasn’t any question about the market being misinformed’.³²
- 2.26 ASIC told the committee that it also provided ‘additional time for companies to do their financial reporting and to conduct the final audit process’ and has been involved with Government regarding arrangements

29 ASIC, ‘ASIC’s Interim Corporate Plan for 2020-21’, *Media Release*, 11 June 2020.

30 Mr James Shipton, Chair, ASIC, *Transcript*, 5 August 2020, p. 6.

31 ASIC, *ASIC Enforcement Update: January to June 2020*, September 2020, p. 5.

32 Ms Cathie Armour, Commissioner, ASIC, *Transcript*, 23 October 2020, p. 42.

for holding Annual General Meetings remotely rather than in person, and has been 'surveilling how that has gone along'.³³

Notices and on-site supervisory work

- 2.27 In March 2020, ASIC announced that it would be suspending its on-site supervisory work, such as the Close and Continuous Monitoring Program and that, when issuing information-gathering notices, it would be 'mindful that many notice recipients may be facing significant disruption'.³⁴
- 2.28 ASIC confirmed that the number of notices issued has 'slowed down' during this period. It advised that ASIC had issued 2,511 notices in the five-month pre-COVID comparison period (October 2019 to February 2020) and 1,557 notices in the current five-month COVID period (March 2020 to July 2020). This represents a 38 per cent decline in the total number of notices issued in the COVID period compared to the immediate pre-COVID period.³⁵
- 2.29 ASIC told the committee that there was an increasing trend for notices throughout 2019 as ASIC 'focused on the accelerated enforcement outcomes priority in response to the Financial Services Royal Commission'. ASIC explained that Between May and July 2020 there was a 'modest across-the-board increase in the number of notices issued as ASIC and the regulated population adjust to operating within COVID restrictions'.³⁶
- 2.30 ASIC told the committee that it is exploring a number of strategies that 'are efficient and sensitive to the current economic environment such that we can continue to enforce the law, continue to investigate possible contraventions of the law, without overburdening the regulated communities'. For example, by issuing notices under section 912C of the Corporations Act, which directs a licensee to provide a written statement containing responses to questions from ASIC or other specified information about the financial services provided by the licensee.³⁷

33 Ms Cathie Armour, Commissioner, ASIC, *Transcript*, 23 October 2020, p. 42.

34 ASIC, 'ASIC recalibrates its regulatory priorities to focus on COVID-19 challenges', *Media Release 20-070MR*, 23 March 2020.

35 ASIC, *Response to question on notice*, ASIC03QON, p. 1.

36 ASIC, *Response to question on notice*, ASIC03QON, p. 1.

37 Mr Daniel Crennan, QC, Deputy Chair, ASIC, *Transcript*, 5 August 2020, p. 15.

Loan repayment deferrals

- 2.31 In March 2020, the Federal Government announced two economic support packages totalling \$189 billion to ‘keep Australians in work and businesses in business.’ The packages included support for households and regulatory protection and financial support for businesses to retain staff and stay in business.³⁸
- 2.32 After the announcement, the Australian Banking Association (ABA) encouraged businesses and individuals that were financially impacted by COVID-19 to contact their financial institutions. The ABA told customers that the assistance offered from banks could include:
- a deferral of scheduled loan repayments for home loan customers;
 - a six-month deferment of all loan repayments attached to a small business through the SME Guarantee scheme;
 - waiving of fees and charges;
 - interest free periods or no interest rate increase; and/or
 - debt consolidation to help make repayments more manageable.³⁹
- 2.33 As at 30 September 2020, APRA reported that \$179 billion of loans have been granted temporary repayment deferrals, which is approximately 6.7 per cent of total loans outstanding. It noted that housing loans make up the majority of total loans granted repayment deferrals, but that SME loans have a higher incidence of repayment deferral, with 10.8 per cent of SME loans subject to repayment deferral, compared with 7.4 per cent of housing loans.⁴⁰
- 2.34 APRA reported that exits from deferral continued to outweigh new entries for the third straight month in September, with \$66 billion of loans expiring or exiting deferral and \$17 billion of entries approved or extended. It noted that the pace of exits increased significantly over the month, with total exits increasing 169 per cent from \$24 billion in August. The majority of these loans have returned to a performing status.⁴¹

38 Prime Minister and Treasurer, ‘Supporting Australian workers and business’, *Media Release*, 22 March 2020.

39 Australian Banking Association, ‘Economic stimulus package will help keep economy strong’, *Media Release*, 12 March 2020; Australian Banking Association, ‘Second stimulus package will help support small business’, *Media Release*, 22 March 2020.

40 APRA, *Temporary loan repayment deferrals due to COVID-19, September 2020*, <<https://www.apra.gov.au/temporary-loan-repayment-deferrals-due-to-covid-19-september-2020>>, accessed 18 November 2020.

41 APRA, *Temporary loan repayment deferrals due to COVID-19, September 2020*, <<https://www.apra.gov.au/temporary-loan-repayment-deferrals-due-to-covid-19-september-2020>>, accessed 18 November 2020.

Protecting consumers

- 2.35 In April 2020, ASIC published guidance regarding retail lenders obligations and ASIC's expectations when assisting consumers who are experiencing financial difficulties due to COVID-19. The guidance listed five points that all lenders should consider following in their processes in order to 'respond to consumer financial difficulties fairly'.⁴²
- 2.36 ASIC also gave advice to the ABA, providing clarity on issues of hardship, responsible lending, and communication.⁴³ ASIC told the committee that, together with APRA, it is working closely with peak industry bodies and 'meeting daily with different lenders' to 'understand the extent of the borrowers that they have on their books, particularly those who are likely to face significant hardship'.⁴⁴
- 2.37 ASIC advised that it is 'not seeing any significant indications of widespread misconduct in relation to the treatment of customers who are subject to hardship arrangements'. However, ASIC noted that 'it's possibly too early to say'. ASIC explained that:
- A lot of those customers are the subject of loan-repayment deferrals from their lender, and therefore they haven't yet, if I can say this, suffered the full extent of what their potential loss may be. A number of those borrowers are also the recipients of the various federal and state government stimulus fiscal support measures, and so, again, it's probably too early to say whether the current regulatory settings are adequate.⁴⁵
- 2.38 ASIC told the committee that it believes that, at this stage, regulatory settings 'are responding well to the challenges that we are facing' but noted that this is 'possibly something that we should come back to and reconsider in another six months' time'.⁴⁶

After the deferral period ends

- 2.39 In August 2020, ASIC published guidance regarding ASIC's expectations of retail lenders when loan repayment deferrals end. The guidance emphasises the importance of keeping consumers informed and contacting consumers about the expiry of their deferral in a timely fashion, giving them reasonable time to consider their options. It also provides

42 ASIC, 'COVID-19 and financial hardship: retail lenders' obligations and ASIC's expectations', *Media Release*, 29 April 2020.

43 ASIC, 'ASIC responds to lenders' request for clarification on lending during the COVID-19 pandemic', *Media Release*, 29 April 2020.

44 Mr Sean Hughes, Commissioner, ASIC, *Transcript*, 5 August 2020, p. 16.

45 Mr Sean Hughes, Commissioner, ASIC, *Transcript*, 5 August 2020, p. 17.

46 Mr Sean Hughes, Commissioner, ASIC, *Transcript*, 5 August 2020, p. 17.

guidance regarding circumstances where a consumer cannot resume payments on their mortgage.⁴⁷

- 2.40 ASIC explained that, initially banks took a ‘holistic view across all of their portfolio’ and there were a ‘significant number of customers who took advantage, as was appropriate, of deferral arrangements’. ASIC advised that, recently, as deferrals have started to be wound back and the initial six-month deferral period is coming to an end, ‘banks are taking individualised approaches with borrowers to assess what their individual circumstances should be’.⁴⁸ ASIC explained that:

It would be fair to say that there is a strong preference – and this is one that we have encouraged as well – that, where borrowers can afford to repay their loan either in full or in part in terms of their usual repayments, they should do so. It is very much in their interest to resume repayments as quickly as possible. However, there are borrowers who may need some adjustment, for instance, to move to an interest-only loan or who may require a further period of deferral.⁴⁹

- 2.41 ASIC told the committee that it is ‘looking out beyond the pandemic, particularly to where the waves of potential insolvencies in the small business sectors may emerge into 2021 and 2022’. It explained that it is ‘very mindful of the impacts not only on families and small business but also on the insolvency profession with the volume of work that is going to be flowing in that direction’. ASIC advised that this is something it will be ‘keeping a very close eye on over the coming months and, it is fair to say, years’.⁵⁰

Early release of superannuation

- 2.42 In March 2020, the Australian Government announced an early release of superannuation scheme as part of its economic support package to ‘cushion the economic impact of the coronavirus and help build a bridge to recovery.’ Under the scheme, individuals in financial stress as a result of the COVID-19 pandemic were allowed to access up to \$10,000 of their superannuation in the 2019-20 financial year and a further \$10,000 in 2020-21.⁵¹

47 ASIC, ‘COVID-19 and financial hardship: ASIC’s expectations of retail lenders when loan repayment deferrals end’, *Media Release*, 13 August 2020.

48 Mr Sean Hughes, Commissioner, ASIC, *Transcript*, 23 October 2020, p. 41.

49 Mr Sean Hughes, Commissioner, ASIC, *Transcript*, 23 October 2020, p. 41.

50 Mr Sean Hughes, Commissioner, ASIC, *Transcript*, 5 August 2020, p. 16.

51 Prime Minister and Treasurer, ‘Supporting Australian workers and business’, *Media Release*, 22 March 2020.

- 2.43 As at 8 November 2020, APRA reported that 3.3 million initial applications and 1.4 million repeat applications for early release of superannuation had been received, totalling \$35 billion. The average payment is \$7,400 for initial applications and \$8,326 for repeat applications. APRA reported that 98 per cent of applications received by funds since inception had been paid.⁵²
- 2.44 ASIC advised that APRA and the Australian Taxation Office (ATO) are the principle data collection agencies for the early release of superannuation. ASIC told the committee that it is monitoring the communications that the superannuation funds are providing to their members, to ensure that they are 'fair and reasonable and that members are treated in an appropriate way when they are trying to take their money from the super funds'.⁵³
- 2.45 ASIC noted that its MoneySmart website also 'provides Australians with a very good guide as to what to think about, using calculators, the questions to ask and the issues to consider when they're considering early release'.⁵⁴

Scams

- 2.46 Shortly after the launch of the early release of superannuation scheme, the ACCC stated that it had received reports through Scamwatch that scammers were 'cold-calling people claiming to be from organisations that can help you get early access to your super'. The Australian Consumer and Competition Commission (ACCC) noted that, 'in most cases the scammers are seeking to obtain personal information, including information that will help them fraudulently access the victim's superannuation funds'.⁵⁵
- 2.47 ASIC confirmed that it is seeing a number of 'unsolicited contacts' offering to assist in accessing the early release of superannuation scheme for a fee. ASIC advised that these unsolicited contacts are often sent through 'texts, emails and social media' and even 'social media accounts impersonating government bodies'. It explained that the scammers are also seeking personal details such as bank accounts, superannuation funds and insurance.⁵⁶

52 APRA, 'COVID-19 Early Release Scheme – Issue 29', <<https://www.apra.gov.au/covid-19-early-release-scheme-issue-29>>, accessed 18 November 2020.

53 Ms Danielle Press, Commissioner, ASIC, *Transcript*, 5 August 2020, p. 17.

54 Mr James Shipton, Chair, ASIC, *Transcript*, 5 August 2020, p. 17; MoneySmart, *COVID-19 accessing your super*, <<https://moneysmart.gov.au/covid-19/accessing-your-super>>, accessed 28 August 2020.

55 ACCC, 'Scammers targeting superannuation in COVID-19 crisis', *Media Release*, 6 April 2020.

56 Mr Warren Day, Executive Director, ASIC, *Transcript*, 5 August 2020, p. 16.

- 2.48 ASIC told the committee that it has ‘proactively undertaken reviews of website material and social media posts to identify offers of assistance in lodging early release of superannuation applications’. It noted that it has identified two businesses that were charging fees varying from \$199 to \$299 for each transaction.⁵⁷
- 2.49 ASIC explained that it contacted these businesses to ‘express concerns over fees being charged for a free service offered to superannuation members and asked them to stop offering this service’. ASIC advised that ‘on both occasions, the providers agreed to remove material from their websites and stop offering to assist with early release superannuation applications for a fee’.⁵⁸
- 2.50 ASIC advised the committee that it may take ‘some time’ for this sort of behaviour to be reported to ASIC or the Australian Financial Complaints Authority (AFCA). ASIC explained that some people who may have paid fees to access superannuation might not yet realise that payment of fees were not necessary. As such ‘any approach to ASIC or the Australian Financial Complaints Authority by such a person is likely to be delayed’.⁵⁹

JobKeeper

- 2.51 In March 2020, the Federal Government introduced JobKeeper, a wage subsidy program to assist businesses and not-for-profits significantly impacted by the pandemic cover the costs of their employees’ wages to retain jobs and assist employees to continue to earn an income.⁶⁰ In July 2020, the Government announced that the payment would be extended to 28 March 2021, with some changes to the eligibility criteria and payment amounts.⁶¹
- 2.52 In July 2020, ASIC provided information to entities regarding focus areas for financial reporting in the COVID-19 environment for the year ending 30 June 2020. ASIC advised that it expects entities to appropriately account for each type of support and assistance, including JobKeeper, stating that:

Entities should appropriately account for each type of support and assistance from government, lenders, landlords and others. Both the financial report and OFR should prominently disclose significant amounts, the commencement date and expected

57 ASIC, *Response to question on notice*, ASIC04QON, p. 1.

58 ASIC, *Response to question on notice*, ASIC04QON, p. 1.

59 ASIC, *Response to question on notice*, ASIC04QON, p. 1.

60 Prime Minister, ‘\$130 billion JobKeeper payment to keep Australians in a job’, *Media Release*, 30 March 2020.

61 Australian Government, ‘Economic response to the Coronavirus: JobKeeper Payment’, <<https://treasury.gov.au/coronavirus/jobkeeper>>, accessed 19 November 2020.

duration of support or assistance. Examples include JobKeeper, land tax relief, loan deferrals and restructuring, and rent deferrals and waivers.⁶²

- 2.53 The committee noted that some entities appeared to be aggregating the JobKeeper payments they had received with similar support received from other jurisdictions. The committee asked whether ASIC considered this to be appropriate. ASIC told the committee that the accounting standards only require information to be separately disclosed if it is material. It explained that 'there is no specific requirement in the accounting standards to separately disclose the countries from which Government support is received'.⁶³
- 2.54 However, ASIC acknowledged that 'the separate amounts of support for each country could be material to investors, potential investors, lenders and creditors in the context of the overall financial report of a company where the support in a particular country is a large proportion of the company's revenue and the company's ongoing operations are dependent on that support'.⁶⁴
- 2.55 ASIC advised the committee that, if it identifies that a financial report is materially misstated – through its proactive surveillance of financial reports, complaints, or other intelligence – it 'will consider appropriate regulatory options to address the matter'.⁶⁵

Superannuation

Accuracy of advice regarding SMSFs

- 2.56 In its *Review of the ASIC Annual Report 2018*, the committee noted that concerns had been raised in the media⁶⁶ regarding the accuracy of advice⁶⁷ that ASIC had issued about Self-Managed Super Funds (SMSFs) on its MoneySmart website. In particular, the committee questioned ASIC's claims that:

62 ASIC, 'Focuses for financial reporting under COVID-19 conditions', *Media Release 20-157MR*, 7 July 2020.

63 ASIC, *Response to question in writing*, ASIC11QW, pp. 1-2.

64 ASIC, *Response to question in writing*, ASIC11QW, p. 2.

65 ASIC, *Response to question in writing*, ASIC11QW, p. 2.

66 James Kirby, 'Swashbuckling ASIC butchers SMSF advice', *The Australian*, 15 October 2019.

67 ASIC, *Self-managed super funds: Are they for you?*, <<https://download.asic.gov.au/media/5301438/self-managed-superannuation-funds-are-they-for-you.pdf>>, accessed 29 October 2019.

- generally, balances under \$500,000 have lower returns after expenses and tax compared to industry and retail super funds;
 - it takes over 100 hours a year to run a SMSF; and
 - the average cost of running a SMSF is \$13,900 per year.⁶⁸
- 2.57 In June 2020, the ATO published data listing average and median operating costs for SMSFs (Table 2.2).⁶⁹ The ATO data stated that the average operating cost of a SMSF in 2017-18 was \$6,152, with the median cost for a SMSFs with a balance of \$0-50,000 being as low as \$1,871.⁷⁰
- 2.58 The committee noted that there is a significant difference between the ATO's data regarding the average operating costs for a SMSF and the figure listed on ASIC's MoneySmart website. Some members of the committee expressed concern that this could mislead the public and were surprised that ASIC did not seem to acknowledge the impact, nor take responsibility for this error.

Table 2.2 Operating expenses – average and median

Operating expenses	2017-18	2016-17	2015-16	2014-15	2013-14
Average	\$6,152	\$5,978	\$6,219	\$5,518	\$5,301
Median	\$3,923	\$3,840	\$3,925	\$3,620	\$3,514

Source ATO, *Self-managed super funds: A statistical overview 2017-18*, Table 25: Expenses

- 2.59 ASIC acknowledged the importance of ensuring 'that the best available and most timely data is available and referred to' and assured the committee that it would 'triple-check' that the MoneySmart website is 'referring to the latest data available'.⁷¹
- 2.60 The committee noted that \$25,000 per year is the maximum contribution that an individual can make into their superannuation fund and that the amount listed on the MoneySmart website as the average operating cost for a SMSF was approximately half of this amount. The committee questioned ASIC on its processes in scrutinising data before publication.⁷²

68 House of Representatives Standing Committee on Economics, *Review of the Australian Securities and Investments Commission Annual Report 2018*, February 2020, pp. 16-17.

69 ATO, *Self-managed super funds: A statistical overview 2017-18*, <<https://www.ato.gov.au/Super/Self-managed-super-funds/In-detail/Statistics/Annual-reports/Self-managed-super-funds--A-statistical-overview-2017-18/>>, accessed 27 August 2020.

70 Australian Taxation Office, 'Self-managed super funds: a statistical overview 2017-18, Table 25: Expenses', <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/SMSF/Self-managed-super-funds--A-statistical-overview-2017-18/?anchor=Table25Expenses#Table25Expenses>>, accessed 30 November 2020.

71 Mr James Shipton, Chair, ASIC, *Transcript*, 5 August 2020, p. 7.

72 Mr James Shipton, Chair, ASIC, *Transcript*, 5 August 2020, p. 8.

2.61 ASIC advised that it 'applied the appropriate procedures at the appropriate time in relation to that data, which was coming from a very reputable brethren agency in the Commonwealth'.⁷³ ASIC reminded the committee that 'this was a pilot program to explore this utility' and that it 'wanted to be focused on moving forward'. It explained that:

Another learning from this experience was that this exercise did not actually turn out to be as meaningful as perhaps parties intended in the first place. That's why we have not pursued further pilots and further initiatives to this end. I must stress that this was a pilot exercise. This was meant to be a targeted exercise to determine whether or not this type of liaison would be beneficial to trustees of self-managed superannuation funds. We've learnt a lot from this exercise. We appreciate the fact that you are highlighting the absolute necessity that data that is relied on is up to date, verifiable and authoritative. We stand by our actions at that point in time. We also stand by our actions in recent times to make sure that we are referencing the most recent data available and that there is no confusion moving forward with the past statements and press releases.⁷⁴

2.62 The MoneySmart website now states that the average operating cost of running a SMSF in 2018 was \$6,152.⁷⁵

Potential for 'quasi insider trading' during market downturn

2.63 During March and April 2020, there was significant market volatility due to the economic downturn caused by the COVID-19 pandemic. Superannuation funds were impacted by this downturn not only in their holdings with listed assets such as shares in the ASX, but with their unlisted assets.

2.64 Unlisted assets are investments that are not traded through exchanges or central clearing agents and do not have readily available prices. They are investments in assets such as airports, toll roads, social infrastructure, utilities and assets held by private equity investors.⁷⁶ These investments can present valuation challenges due to factors such as multiple management layers; complex investment structures; lack of transaction

73 Mr James Shipton, Chair, ASIC, *Transcript*, 5 August 2020, p. 8.

74 Mr James Shipton, Chair, ASIC, *Transcript*, 5 August 2020, p. 8.

75 ASIC, MoneySmart, 'Self-managed super funds (SMSF): Understand if an SMSF is right for you', <<https://moneysmart.gov.au/how-super-works/self-managed-super-funds-smsf>>, accessed 25 November 2020.

76 S Bright, 'GFC puts a spotlight on unlisted asset valuations', *InFinance*, Vol. 124, Iss. 1, March 2010, p. 29.

data; and underlying assets that are opaque in nature or where undertaking frequent valuations is costly and/or time consuming.⁷⁷

- 2.65 Some members of the committee raised concerns regarding actions by executives and employees of superannuation funds during this downturn. The Chair outlined his concerns to ASIC:

Then there was a delayed period, in many cases, where super funds had unlisted assets for revaluation that enabled people to move money about from within funds based on knowledge or inside information to potentially profit. I asked a series of questions of superannuation funds, and this seems to me to be quasi-insider trading, if it does occur.⁷⁸

- 2.66 A number of responses to questions on notice received by the committee from superannuation funds were forwarded to ASIC and APRA for consideration.⁷⁹ ASIC advised that it will examine these responses and undertake investigations, if necessary, in accordance with its usual practices.⁸⁰

Superannuation advertising

- 2.67 Advertising by superannuation funds has come under scrutiny in recent years, including by the Royal Commission. A point of debate has been if advertising meets the 'sole purpose test' of the *Superannuation Industry Supervision Act 1993* (SIS Act), which requires trustees to act in the best interests of fund members.
- 2.68 Funds have argued that increasing the number of members is of benefit to all members, as it drives down costs and enables larger investment pools to improve returns.⁸¹ Advertising campaigns by superannuation funds were examined by the Royal Commission, but ultimately no findings were made against superannuation companies for breaches of law relating to advertising.⁸²
- 2.69 Prior to the Royal Commission, in 2015, BT Super was issued infringement notices by ASIC for its misleading use of Google AdWords (known as Google Ads since 2018). BT was found to have engaged in misleading

77 APRA, *Prudential Practice Guide SPG 531 Valuation*, November 2013, p. 5.

78 Mr Tim Wilson MP, Chair, *Transcript*, 23 October 2020, p. 32.

79 ASIC, *Response to question on notice*, ASIC28QON, pp. 1-2; APRA, *Response to question on notice*, APRA12QON, pp. 1-3.

80 ASIC, *Response to question on notice*, ASIC28QON, pp. 1-2.

81 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 2, February 2019, pp. 348-349.

82 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 2, February 2019, pp. 348-349.

advertising in relation to suggesting a relationship with Industry Super Australia and for representing that superannuation products issued by BT Super had greater returns than all industry funds for the previous five years. Neither of these assertions were true.⁸³

2.70 The Australian Government has recently announced changes to the regulatory framework of the superannuation sector in order to improve outcomes and increase transparency and accountability. The Your Future, Your Super package outlines amendments to legislation that will require trustees to act in members' best financial interests at all times and provide quantifiable evidence that their actions are in line with this edict.⁸⁴ These proposed changes could limit the ability of superannuation funds to advertise without providing evidence that it creates a benefit to members.

2.71 Some members of the committee expressed concerns around the potential for the use of Google Ads by superannuation companies to mislead the public, in a manner similar to the BT Super case. A number of responses to questions on notice from superannuation funds were forwarded to ASIC for its consideration.⁸⁵ ASIC advised the committee that, while the Google Ads provided do not appear to be misleading, it will examine these responses further and undertake investigations if necessary.⁸⁶

Audit of ASIC's financial statements

2.72 On 23 October 2020, the Treasurer announced that he had received correspondence from the Auditor-General advising that, during the 2019-20 audit of ASIC's financial statements, the ANAO identified payments made on behalf of ASIC's Chair and Deputy Chair that it considers 'may exceed the limits set in the Remuneration Determination made by the Remuneration Tribunal and that there were also identified instances where the Commonwealth Procurement Rules were not followed'.⁸⁷

2.73 The Treasurer noted the ANAO's recommendations to ASIC that:

83 ASIC, 'BT pays \$20,400 penalty for misleading statements', *Media Release*, 16 June 2015, <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2015-releases/15-149mr-bt-pays-20-400-penalty-for-misleading-statements/>>, accessed 30 November 2020.

84 The Treasury, *Your Future, Your Super*, <<https://treasury.gov.au/publication/p2020-super>>, accessed 30 November 2020.

85 ASIC, *Response to question on notice*, ASIC29QON, pp. 1-2.

86 ASIC, *Response to question on notice*, ASIC29QON, pp. 1-2.

87 The Hon Josh Frydenberg MP, Treasurer, 'Australian Securities and Investment Commission', *Media Release*, 23 October 2020.

- ASIC undertake a review of the processes supporting the approval of remuneration and benefits paid to Executive Office holders, including the trigger points for seeking advice should amounts outside of the Remuneration Determination be considered for approval; and
- a review be undertaken of the procurement processes around payments made for the taxation advice paid on behalf of the Chair to determine those internal controls that need to be either reinforced with relevant staff or redesigned to ensure effective implementation.⁸⁸

2.74 The Treasurer announced that ‘an independent review will be undertaken by Dr Vivienne Thom and is expected to be completed with the full cooperation of ASIC by the end of the year’.⁸⁹

Payments made on behalf of the Chair

2.75 The Auditor-General advised that, prior to the appointment of Mr James Shipton as Chair, ASIC held discussions with Treasury regarding relocation expense package options. These options included estimates for an initial tax briefing (\$3,000) and annual tax return submissions (\$5,000) for the successful applicant. ASIC approved an engagement letter from KPMG for the provision of taxation services to the incoming Chair with costings of \$4,050.⁹⁰

2.76 The Auditor-General explained that, following the agreed initial tax briefing provided by KPMG to the Chair in December 2017, ASIC received an email from KPMG requesting approval for the preparation of tax returns for the Chair for both 2017 and 2018 in Australia and the United States. The Auditor-General noted that the request ‘did not contain any cost estimates or other indications of costs to be incurred’ and that ‘this was approved by ASIC without costings or limits on the services to be provided’.⁹¹

2.77 The Auditor-General stated that ‘the Chair was advised by KPMG in September 2018 that its fees for taxation services would be approximately \$60,000-\$70,000’. The Auditor-General explained that ‘discussions with ASIC representatives confirmed a total of \$9,500 would be covered by

88 The Hon Josh Frydenberg MP, Treasurer, ‘Australian Securities and Investment Commission’, *Media Release*, 23 October 2020.

89 The Hon Josh Frydenberg MP, Treasurer, ‘Australian Securities and Investment Commission’, *Media Release*, 23 October 2020.

90 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

91 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

ASIC with any additional fees requiring a separate engagement with the Chair on an individual basis'. However, the Auditor-General noted that correspondence in October 2018 indicated that the:

...advice provided to the Chair by ASIC was that the full amount would be paid by ASIC given it fitted within the overall relocation limits discussed with Treasury and the services fitted within the definition of tax briefings and returns.⁹²

2.78 The Auditor-General advised that the 'final invoices issued in August 2019 totalled \$118,557 and were in excess of the approved procurements', noting that 'in addition to the invoiced amounts paid by ASIC, Fringe Benefits Tax of \$78,266 was paid by ASIC in relation to these benefits'.⁹³

2.79 The Auditor-General noted that taxation support services were rendered to the Chair as late as March 2019 and covered a range of services in addition to the agreed tax briefing and completion of Australian and United States tax returns, including the resolution of penalties due to late filing:

As well as the agreed tax briefing and completion of Australian and US tax returns, the KPMG invoices describe the services rendered as encompassing "tax advice on personal investments", "optimisation of the Australian taxation of foreign exchange gain or loss in foreign bank accounts" and "assistance in respect of resolution of Massachusetts State tax notices and penalties due to late filing of 2017 Massachusetts state tax return".⁹⁴

2.80 On 23 October 2020, Mr Shipton made a statement to the committee advising that he 'will voluntarily reimburse ASIC for taxation related expenses ASIC paid following my 2018 relocation from the United States'. He then announced that he would 'stand aside pending the outcome of the review'. Mr Shipton explained that:

I have just advised the Treasurer this afternoon that in the circumstances it is appropriate that I stand aside pending the outcome of the review. Whilst I believe I have acted properly in this matter, I hold myself to the highest possible standard. It is

92 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

93 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

94 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

very important that I act with integrity and honour. That means I need to act in the best interests of ASIC and its vital purpose to build a fair, honest and efficient financial system for all Australians.⁹⁵

Payments made on behalf of Deputy Chair Crennan

- 2.81 The Auditor-General advised that in 2018-19 and 2019-20 ASIC made regular accommodation payments of \$750 per week on behalf of the Deputy Chair, Mr Daniel Crennan QC, following a request by ASIC for the Deputy Chair to relocate from Melbourne to Sydney.⁹⁶ ASIC confirmed that the Deputy Chair's rental payments totalled 'just under \$70,000'.⁹⁷
- 2.82 The Auditor-General noted that 'these payments were over and above the total remuneration package per the Remuneration Determination that applies to the Deputy Chair'.⁹⁸
- 2.83 The Auditor-General explained that 'under the relevant Determination, the Remuneration Tribunal has determined that certain named office holders are eligible to be reimbursed for accommodation costs where the office holder has a principal place of residence in a locality other than the office locality'.⁹⁹ However, 'the Deputy Chair did not have a principal place of residence in a locality other than the office locality and is not listed as receiving such an allowance in the relevant Determination'.¹⁰⁰
- 2.84 The Auditor-General advised that the ANAO brought this matter to ASIC's attention in August 2019, recommending that 'ASIC seek advice from the Remuneration Tribunal on the classification of these payments and whether they fell within the Remuneration Tribunal Determination'. However, the Auditor-General noted that 'as at the end of September 2020 this had not occurred'.¹⁰¹

95 Mr James Shipton, Chair, ASIC, *Transcript*, 23 October 2020, p. 26.

96 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 28.

97 Ms Karen Chester, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 28.

98 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

99 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

100 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

101 Auditor-General for Australia, *Correspondence to the Treasurer, Hon Josh Frydenberg MP*, 22 October 2020, <<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-10/2020-10-23-attachment.pdf>> accessed 20 November 2020.

2.85 On 23 October 2020, ASIC told the committee that ‘the accommodation payments for Deputy Chair Crennan were ceased following his request and he offered and agreed to repay the accommodation payments made to him as a debt due to the Commonwealth’.¹⁰² The committee asked why Mr Crennan had not also stood aside. Mr Crennan explained that:

The correspondence between the Auditor-General and the letter to the Treasurer doesn't make any assertions about my conduct or my involvement in the process. The offer of the provision of this rental assistance is in the letter, and there are no assertions within that portion or any of the letter against me and any conduct by me.¹⁰³

2.86 However, on 26 October 2020, Senator Cormann confirmed at a Senate Estimates hearing that Mr Crennan had tendered his resignation.¹⁰⁴

ASIC's response

2.87 ASIC told the committee that it has ‘acknowledged the ANAO's findings and accepted all relevant recommendations, which include conducting an independent review of the issues raised in the ANAO report’. It also acknowledged that it should have taken action in response to the ANAO's recommendation regarding the payments made on behalf of Deputy Chair Crennan ‘more promptly’. ASIC stated that:

We note the Treasurer's announcement and will fully cooperate with that process. ASIC acknowledges the process supporting the approval of these relocation expenses were inadequate. Given the high standard that ASIC holds itself to, it is disappointing that such a situation has occurred. ASIC anticipates the independent review will assist it to make appropriate changes to key policies and processes.¹⁰⁵

2.88 ASIC advised that ‘in the interim’ it has implemented changes to procedures associated with the approval of expenses relating to geographical relocation for new statutory appointees ‘to ensure that there is commission oversight of those expenses and that the arrangements for new statutory appointees are clearly documented prior to them being made’.¹⁰⁶

102 Mr James Shipton, Chair, ASIC, *Transcript*, 23 October 2020, p. 26.

103 Mr Daniel Crennan, QC, Deputy Chair, ASIC, *Transcript*, 23 October 2020, p. 29.

104 Senator Cormann, *Senate Economics Legislation Committee Transcript*, 26 October 2020, p. 19.

105 Mr James Shipton, Chair, ASIC, *Transcript*, 23 October 2020, p. 26.

106 Mr James Shipton, Chair, ASIC, *Transcript*, 23 October 2020, p. 26.

Conclusion

- 2.89 The COVID-19 pandemic has caused unprecedented disruption to our lives. While the pandemic is primarily a public health issue, it has significantly impacted economies and financial systems around the world. It has led to the closure of our borders; the biggest economic downturn in close to a century; a large budget deficit; and historically low interest rates.
- 2.90 The Australian financial sector and its regulators responded quickly to the pandemic. Financial institutions provided support to Australian families and businesses as they worked to manage their mortgages and debts during a time when income is disrupted and the future is uncertain. Superannuation funds paid out billions of dollars, as affected individuals accessed their superannuation under the early release scheme.
- 2.91 The committee notes ASIC's timely response to the pandemic. ASIC quickly adapted to the challenges of the pandemic, adjusting its regulatory priorities to focus on protecting vulnerable consumers, maintaining the integrity of markets, and supporting businesses. In particular, the committee notes ASIC's prompt and ongoing release of guidance regarding retail lenders obligations and ASIC's expectations when assisting consumers who are experiencing financial difficulties due to COVID-19.
- 2.92 The committee notes ASIC's proactive and ongoing engagement with peak bodies, superannuation funds, and financial institutions throughout the various stages and changing circumstances of the pandemic. In particular, the committee notes the strong relationship and high level of cooperation and coordination that ASIC and APRA have displayed during this challenging period.
- 2.93 The committee notes ASIC's progress regarding the implementation of the Royal Commission's recommendations, acknowledging the disruption caused by the pandemic and the deferral of implementation of commitments associated with the Royal Commission. The committee also notes that ASIC has also continued its enforcement work during this challenging period.
- 2.94 However, ASIC's progress and its rapid response to the COVID-19 pandemic are overshadowed by the independent investigation into payments made by ASIC on behalf of two of ASIC's most senior officers, the Chair and Deputy Chair Crennan. The committee was shocked when the Chair announced that he would be stepping aside, pending the outcome of the investigation, at the committee's public hearing. Followed a few days later by Deputy Chair Crennan's resignation.

- 2.95 The committee will not comment on the substance of these matters, as the independent review is still underway at the time of writing. However, the committee is very disappointed that such a review is necessary. ASIC should be leading by example. It must be beyond reproach in its governance and accountability structures and processes.
- 2.96 The committee will closely follow the outcome of the independent review. It will continue to scrutinise ASIC's performance, particularly ASIC's ongoing response to the COVID-19 pandemic and its implementation of the Royal Commission's recommendations.

Mr Tim Wilson MP
Chair
3 December 2020



Appendix A – Hearings and witnesses

Public hearing

Wednesday, 5 August 2020 – Canberra

Australian Securities and Investments Commission

Mr James Shipton, Chair

Ms Karen Chester, Deputy Chair

Mr Daniel Crennan, Deputy Chair

Ms Cathie Armour, Commissioner

Mr Sean Hughes, Commissioner

Ms Danielle Press, Commissioner

Mr Warren Day, Executive Director, Assessment and Intelligence

Friday, 23 October 2020 – Canberra

Australian Securities and Investments Commission

Mr James Shipton, Chair

Ms Karen Chester, Deputy Chair

Mr Daniel Crennan QC, Deputy Chair

Ms Cathie Armour, Commissioner

Mr Sean Hughes, Commissioner

Ms Danielle Press, Commissioner

Mr Warren Day, Chief Operating Officer

Mr Greg Kirk, Executive Director, Strategy

Ms Rosanne Bell, Executive Director, Registry

Mr Greg Yanco, Executive Director, Markets

Ms Joanna Bird, Executive Director, Financial Services and Wealth

