

Roberts, Jamie

From: Delegate of the Auditor General Assurance Audit
<DelegateoftheAuditorGeneralAssuranceAudit@anao.gov.au>
Sent: Tuesday, 15 September 2020 5:56 PM
To: Tsr DLOs
Cc: Michael Bryant; Hodgson, Emily (ASIC - Protected)
Subject: Auditors Report for Australian Securities and Investments Commission for the year ended 30 June 2020 [SEC=OFFICIAL:Sensitive]
Attachments: SIGNED ASIC 2019-20 Audit Report.pdf; ASIC FS 2019-20 30 June 2020-signed-9-Sep-2020.pdf

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The Hon. Josh Frydenberg MP
Treasurer
By email: josh.frydenberg.mp@aph.gov.au

Dear Treasurer

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
FINANCIAL STATEMENTS 2019–20**

I am writing to advise that the audit of the financial statements of the Australian Securities and Investments Commission for the year ended 30 June 2020 has now been completed in accordance with section 43(1) of the *Public Governance, Performance and Accountability Act 2013*. I enclose for your information the auditor's report together with the financial statements to which it relates.

The auditor's report includes an opinion that the annual financial statements are in accordance with the *Public Governance, Performance and Accountability Act 2013*, including complying with Australian Accounting Standards and the *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015*; and presenting fairly the Australian Securities and Investments Commission's financial position as at year end and its financial performance and cash flows for the year.

The Auditor-General will be writing to you separately under section 26 of the *Auditor-General Act* (the Act) concerning payments made to Key Management Personnel (KMP). Whilst not impacting our audit opinion, under section 26 of the Act, the Auditor-General must bring to the attention of the responsible Minister any important matter that comes to the attention of the Auditor-General while conducting an audit. The ANAO is currently working with ASIC on KMP disclosures to be included in the annual report, and we will write to you once this process has concluded.

Yours sincerely



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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SYDNEY NSW 2001

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16 October 2020

The Hon Josh Frydenberg MP
Treasurer
PO Box 6022
Parliament House
CANBERRA ACT 2600

**JAMES R. F. SHIPTON
CHAIR**

By email: martin.codina@treasury.gov.au

Dear Treasurer,

DISCLOSURE PURSUANT TO SECTION 29 PGPA ACT

I refer to my letter of today notifying you pursuant to s19 of the *Public Governance, Performance and Accountability Act 2013* of ASIC's response to the draft ANAO management letter of 6 October 2020 (**ANAO Response**).

One of the concerns raised by ANAO was in respect of ASIC's payment of taxation support by KPMG provided to me on relocation from the US to Australia.

Section 29 of PGPA Act and Rule 13 of the *PGPA Rule 2014*, requires me to notify you of any "material personal interest that relates to the affairs" of ASIC. As this issue arises from payments made as part of my relocation, it may be exempt from disclosure pursuant to Rule 12(1) of the PGPA Rules. Nevertheless, I make this disclosure to ensure you are aware of my personal interest in the concerns raised by the ANAO and how with the agreement of my fellow Commissioners, I have sought to manage any potential conflicts.

Whilst I was invited and did provide input into the ANAO Response, I nevertheless recused myself from participating in the Commission's deliberations and decisions as regards the form and substance of the response. I then accepted the ANAO Response recommended by my fellow Commissioners without qualification. Accordingly, my approval, as required by me in my capacity as ASIC's Accountable Authority, was at the recommendation of the Commission.

I will keep you informed of any developments and should you have any questions, I would be happy to discuss with you the matters outlined in this letter.

Yours faithfully,

JAMES R. F. SHIPTON
CHAIR

cc: Dr Steven Kennedy PSM, Secretary, Treasury

Encl.



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Australian Securities &
Investments Commission

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16 October 2020

The Hon Josh Frydenberg M.P.
Treasurer
PO Box 6022
Parliament House
CANBERRA ACT 2600

By email: martin.codina@treasury.gov.au

Dear Treasurer,

ASIC FINANCIAL STATEMENTS 2019-20: ANAO DRAFT ASIC FINDINGS

I understand the ANAO wrote to you on 15 September 2020, following completion of the audit of the financial statements of ASIC for the year ended 30 June 2020. This correspondence foreshadowed that the Auditor General would be writing to you under section 26 of the *Auditor General Act* concerning payments made to ASIC Key Management Personnel.

On 6 October 2020, ANAO provided a draft management letter to ASIC. This letter outlines ANAO's concerns regarding:

- (a) ASIC's payment of taxation support by KPMG provided to me on my relocation from the US to Australia to take up the position of ASIC Chair; and
- (b) rental support provided by ASIC to Deputy Chair Crennan on relocation to Sydney from Melbourne.

ASIC's response to the concerns raised in ANAO's draft management letter, is **attached**. In particular, please note in the final paragraph of the response, ASIC has agreed to undertake an independent review so that it can fully address the concerns raised by ANAO.

Given ASIC's response to the ANAO, this potentially raises "significant issues that affect" ASIC. In accordance with s19 of the Public Governance, Performance and Accountability Act 2013, I write to notify you about the concerns raised by ANAO and ASIC's response.

I will keep you informed of developments and should you have any questions, I would be happy to discuss with you the matters reported in this letter.

Yours faithfully,

JAMES R. F. SHIPTON
CHAIR

cc: Dr Steven Kennedy PSM, Secretary, Treasury

Encl.

Response to ANAO

ASIC's response to each recommendation made in the ANAO's draft audit finding appears below. ASIC notes that it is difficult to take steps to fully address the matters and concerns raised in the ANAO's draft audit finding until the audit finding has been finalised, and a review has been scoped and concluded. However, an independent review will occur as a matter of priority. At the conclusion of the review ASIC will be in a position to assess what further action is required to address the concerns raised.

Recommendation: The ANAO recommends that ASIC seek a ruling from the Remuneration Tribunal as to whether the additional amounts paid to the Chair and Deputy Chair fall within the definition of Total Remuneration under the applicable Remuneration Determination.

ASIC's response relating to Deputy Chair Crennan:

Deputy Chair Crennan has offered and agreed to repay the regular accommodation payments made on his behalf in both 2018-19, 2019-20 and 2020-21, as a debt to the Commonwealth. In those circumstances, ASIC does not propose to seek a ruling from the Remuneration Tribunal in relation to those payments.

ASIC acknowledges that action in relation to this matter, first raised in the ANAO's 2018-19 Closing Report, should have taken place more promptly. In preparing to approach the Remuneration Tribunal in September 2020, ASIC obtained further and different legal advice about the accommodation payments. On becoming aware of the content of that advice and considering the concerns raised by the ANAO, the accommodation payments were ceased following a request from Deputy Chair Crennan and he offered and agreed to repay the accommodation payments made to him as a debt due to the Commonwealth.

ASIC's response relating to the Chair:

At the time of the Chair's appointment, clause 1.3 of the *Remuneration Tribunal (Remuneration and Allowances for Holders of Full-time Public Office) Determination 2017* relevantly excluded from the definition of 'Total Remuneration' 'reimbursement of expenses incurred on geographic relocation following appointment as an Office Holder, to be determined in accordance with agency policies and practices where approved by the employer'.

It was on the above basis that ASIC formed the view that the taxation advice services were relocation expenses incurred on relocation of the Chair to Australia, given he had not resided in Australia for a significant period of years. That view is supported by legal advice obtained by ASIC and provided to the ANAO.

ASIC acknowledges the processes supporting the approval of expenses paid in relation to the Chair's relocation were inadequate, with these arrangements to be a focus area for the independent review.

Considering the concerns expressed by the ANAO, ASIC's Chair will voluntarily reimburse ASIC for taxation related expenses ASIC paid following his 2018 relocation from the United States. The amount of the reimbursement is \$118,557 (inc GST). In those circumstances ASIC does not propose to seek a ruling from the Remuneration Tribunal in relation to those expenses.

Mr Shipton's additional response to the draft findings is set out in Annexure A to this response.

Recommendation: The ANAO recommends that 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

Recommendation: It is also recommended that 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.

ASIC's response:

ASIC agrees and will consult with the ANAO and the Treasury on the scope and appointment of a suitably independent person to undertake a review. In the interim, and pending the review, ASIC has implemented changes to procedures associated with approval of expenses relating to geographic relocation for statutory appointees to ensure that there is Commission oversight of those expenses and ensure that the arrangements for new statutory appointees are clearly documented prior to them being made.

Annexure A – Mr Shipton's additional response to the draft audit findings

Mr Shipton notes, that as part of his move to Australia to take up the position as Chair, he was offered relocation assistance. This included support as to tax matters. The available information includes: -

- a telephone meeting between himself and ASIC personnel on 3 November 2017; and
- letters from KPMG to ASIC dated 4 December 2017 and ASIC to KPMG of the same date (each which acknowledged the expected provision of Australian and US tax support).

Mr Shipton considers the statement in the draft findings that he requested other services, specifically the preparation of tax returns for both 2017 and 2018 in Australia and the United States, is incorrect. Mr Shipton notes the following:

- tax support had been offered to him previously and its nature and extent was determined by KPMG and ASIC; and
- KPMG consulted with Mr Shipton regarding his circumstances before KPMG suggested the services to be provided.

Mr Shipton also notes that he did not receive tax support from KPMG in relation to the 2016/17 Australian tax year.

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Auditor-General for Australia



22 October 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

I am writing to you under paragraph 26(1)(a) of the *Auditor-General Act 1997*, whereby I must bring to the attention of the responsible Minister any matter that comes to my attention while conducting an audit of annual financial statements which I consider of such importance that it should be brought to the responsible Minister's attention.

During the 2019-20 financial statements audit of the Australian Securities and Investments Commission (ASIC), the ANAO identified payments made on behalf of the ASIC Chair and one Deputy Chair that we consider may exceed the limits set in the Remuneration Determination made by the Remuneration Tribunal. In reviewing these payments made in relation to the Chair, the ANAO also identified instances where the Commonwealth Procurement Rules were not followed and payments were made on behalf of the Chair where appropriate governance mechanisms were lacking. These matters were not included in the ANAO's Independent Auditor's Report to you on the ASIC 2019-20 financial statements as they did not impact on the audit opinion.

I consider these as important matters to bring to your attention as they relate to the stewardship by the Accountable Authority of taxpayer resources, particularly with respect to payments made to the benefit of the Accountable Authority. Further, I formed a view during the course of the audit that in order to gain greater confidence that appropriate action would be taken, I should indicate that I would bring the matter to your attention.

Relevant Frameworks

The ASIC Chair and Deputy Chairs are covered by Remuneration Tribunal Determinations for full time public office holders. The relevant Determinations provide that the remuneration and benefits paid to office holders must not be supplemented. The Determinations outline payments that do not form part of the total remuneration package of office holders.

The Commonwealth Procurement Rules (CPRs) set out rules that officials of relevant entities must comply with when they procure goods and services. As a non-corporate Commonwealth entity, ASIC must comply with the CPRs. The core rule of the CPRs is achieving value for money which includes ensuring the efficient, effective, ethical and economic use of public resources.

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Payments made on behalf of Deputy Chair Crennan

In both 2018-19 and 2019-20 regular accommodation payments of \$750 per week were made by ASIC on behalf of Deputy Chair Crennan following a request by ASIC for the Deputy Chair to relocate from Melbourne to Sydney. These payments were over and above the total remuneration package per the Remuneration Determination that applies to the Deputy Chair.

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. 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.

The ANAO's 2018-19 Closing Report, issued in early August 2019, recommended that ASIC seek advice from the Remuneration Tribunal on the classification of these payments and whether they fell within the Remuneration Tribunal Determination. As at the end of September 2020 this had not occurred. Following the release of our draft finding to ASIC on this matter on 6 October 2020, ASIC communicated that the total amount of accommodation support provided would be repaid by the Deputy Chair as a debt to the Commonwealth.

Payments made on behalf of the Chair

Prior to the appointment of the current Chair to ASIC, ASIC held discussions with the Department of the Treasury on 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.

Following the agreed initial tax briefing provided by KPMG to the Chair on 22 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 (US). The request did not contain any cost estimates or other indications of costs to be incurred. This was approved by ASIC without costings or limits on the services to be provided.

The Chair was advised by KPMG in September 2018 that its fees for taxation services would be approximately \$60,000-\$70,000 and that discussions with ASIC representatives confirmed a total of \$9,500 would be covered by ASIC with any additional fees requiring a separate engagement with the Chair on an individual basis. Email correspondence provided by ASIC indicates that on 11 October 2018 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.

The procurement of taxation services from KPMG was documented in ASIC's procurement workflow system and approved as three \$25,000 procurements on 30 October 2018, ten months after the initial KPMG tax briefing. The final invoices issued in August 2019 totalled \$118,557 and were in excess of the approved procurements. The fee increases were described by KPMG as being due to the complexity of the tax affairs being managed. In addition to the invoiced amounts paid by ASIC, Fringe Benefits Tax of \$78,266 was paid by ASIC in relation to these benefits.

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

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resolution of Massachusetts State tax notices and penalties due to late filing of 2017 Massachusetts state tax return". Taxation support services were rendered to the Chair as late as March 2019.

The ANAO was unable to obtain any documentary evidence that a confirmation of the services provided occurred prior to payment by ASIC. ASIC asserts that discussions were held with the Chair to confirm that the amounts invoiced represented the services provided. No evidence was available to support that the approval of services to be provided on behalf of the Chair was subject to any additional advice or consideration prior to approval nor supported by a formalised policy on executive officer relocation costs and benefits. ASIC has stated that no advice was sought from the Remuneration Tribunal concerning the payment of additional benefits on behalf of the Chair.

Under the relevant Remuneration Tribunal Determinations, office holders may receive reimbursement of expenses incurred on geographic relocation following appointment in accordance with the relevant entity's policy and practices. Expenses for the preparation of components of tax returns and other advice received may have been required regardless of relocation and therefore fall within the definition of Total Remuneration in the relevant Determination. This would result in a breach of the limits on Total Remuneration set by the Determination.

In the context of the financial statements audit, the ANAO had requested that all relevant information regarding these transactions be provided and ASIC's Management Representation Letter signed by the Accountable Authority on 9 September 2020 stated that the ANAO "has been provided with access to all information, such as records and documentation and other matters, of which we are aware that is relevant to the preparation of the financial statements". A further issue of governance concern is that following the release of the ANAO's draft finding for comment by ASIC on 5 October 2020 and subsequent to the Management Representation Letter, additional records were provided by ASIC on 16 October 2020.

The ANAO has recommended to ASIC that:

- 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.

Following the release of the ANAO's draft finding for comment by ASIC on 5 October 2020, ASIC informed the ANAO that it will disclose in its annual report that the amounts paid for accommodation support for Deputy Chair Crennan and taxation advice for the Chair would be repaid in full by the respective officers. Repayment does not change the nature of the findings from the audit.

I understand that ASIC is progressing the implementation of a review and have engaged in conversations with Treasury in this regard.

Yours sincerely



Grant Hehir
Auditor-General



**THE HON JOSH FRYDENBERG MP
TREASURER**

Ref: MC20-023288

Mr Grant Hehir
Auditor-General
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Grant.Hehir@anao.gov.au

Dear Mr Hehir

Thank you for your correspondence under section 26 of the *Auditor General Act* concerning matters identified as part of the 2019-20 financial statements audit of the Australian Securities and Investments Commission (ASIC).

Given the matters you have raised relate to the Accountable Authority of ASIC, I have asked the Treasury to undertake an independent review into the findings. Dr Vivienne Thom will be appointed to undertake the review which I expect to be completed with the full cooperation of ASIC by the end of the year.

Following the review, Treasury will advise me on the findings of the review and any further course of action that may be appropriate.

I seek your assistance in providing briefings and relevant documentation to Dr Thom and relevant Treasury officials. Ms Roxanne Kelley, Deputy Secretary Corporate and Foreign Investment Group is the Executive contact for this matter within Treasury.

Thank you for raising this matter with me.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'J. Frydenberg'.

THE HON JOSH FRYDENBERG MP

23 / 10 /2020

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420



**THE HON JOSH FRYDENBERG MP
TREASURER**

Ref:

Mr James Shipton
Chair
Australian Securities and Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2001

james.shipton@asic.gov.au

Dear Mr Shipton

I refer to your letters to me dated 16 October 2020.

Subsequent to receiving your correspondence, on 22 October I received a letter from the Auditor-General outlining his concerns with the circumstances of payments made on your behalf and the underlying governance issues giving rise to that situation.

While I understand ASIC's desire to have the recommended independent review initiated by ASIC and that you have recused yourself from consideration of ASIC's response to the ANAO's audit, I believe it is more appropriate that the review be conducted under the supervision of the Treasury.

I am therefore writing to advise you that I have authorised the Secretary to the Treasury to undertake an independent review into the findings of the ANAO financial statements audit in relation to payments to key management personnel of ASIC.

The Secretary has appointed Dr Vivienne Thom to undertake this review.

I look forward to your and ASIC's full cooperation.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Josh Frydenberg'.

THE HON JOSH FRYDENBERG MP

23 / 10 / 2020



**THE HON JOSH FRYDENBERG MP
TREASURER**

Ref:

Mr Daniel Crennan, QC
Deputy Chair
Australian Securities and Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2001

daniel.crennan@asic.gov.au

Dear Mr Crennan

On 22 October I received a letter from the Auditor-General outlining his concerns with the circumstances of payments made on your behalf and the underlying governance issues giving rise to that situation.

I have authorised the Secretary to the Treasury to undertake an independent review into the findings of the ANAO financial statements audit in relation to payments to key management personnel of ASIC.

The Secretary has appointed Dr Vivienne Thom to undertake this review.

I look forward to your and ASIC's full cooperation.

Yours sincerely

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THE HON JOSH FRYDENBERG MP

23 / 10 / 2020