



ASIC
Australian Securities &
Investments Commission

Parliamentary Joint Committee on Corporations and Financial Services: Opening Statement - ASIC Chair James Shipton, 19 October 2018

Opening statement by James Shipton, Chair, Australian Securities and Investments Commission, Parliamentary Joint Committee on Corporations and Financial Services, 19 October 2018

Introduction

Thank you Chair.

Firstly, I want to commend the Royal Commission on its important work and acknowledge the seriousness of the observations made in its Interim Report, including those made of ASIC.

The Royal Commission has very effectively highlighted widespread misconduct, and conduct that does not meet community standards, across the finance sector. Importantly, **the human impacts and personal costs of this conduct** have been in clear focus.

The Royal Commission has also appropriately questioned and commented on the role of regulators in preventing or dealing with poor conduct. The Royal Commission has also made observations and criticisms about ASIC's approach to enforcement, especially in relation to court-based enforcement.

Whilst ASIC has *always* been committed, and dedicated, to preventing misconduct in the industry, we take these comments about our approach very seriously. We fully *accept* that we need to continue to make changes to our approach to enforcement to deliver more effective deterrence.

We have long recognised that the implications of misconduct in finance can have a devastating impact on individuals and families. The Royal Commission has reinforced that this conduct has a real and lasting impact across the community, including on more financially vulnerable consumers. The Royal Commission has also clearly reinforced that the financial industry has abandoned its core role that of being custodians of *other peoples' money*.

At the outset it is important to identify, as the Royal Commission also did, that the **root causes** of the matters raised by the Royal Commission ultimately are:

1. misconduct by financial institutions; and
2. failure of financial institutions to adhere to their legal obligations to ensure that their organisations, and the people who work within them, act *efficiently, honestly and fairly*.

In relation to the second word – *honestly* - one clear conclusion in the Interim Report is that the financial industry has been repeatedly "*dishonest*" in its dealings with customers. *Dishonest* with the community and *dishonest* with its regulators. This dishonesty must not stand.

And unfortunately, whilst we are hearing important acknowledgements from leaders of financial institutions about change, such change is not happening as quickly as it should.

ASIC is still experiencing slow and delayed responses from financial institutions and, in some cases, overly technical responses aimed at delay. Due process is important, but it must not be manipulated to disrupt the achievement of fair, appropriate and honest outcomes.

I have said before this Committee and elsewhere that **it is a professional obligation of financial institutions** to be timely, open and honest in their dealings with regulators.

If institutions lie, or are otherwise dishonest with us, *we will use every power available to us to punish that behaviour*. I am a firm believer in the importance and effectiveness of court-based enforcement tools. They are the foundation of any regulator.

It is important to highlight that ASIC does, and continues to, utilise enforcement tools. To this end, Chair I seek permission to table our latest enforcement and compensation outcomes.

My fellow Commissioners and I are committed to adopting reforms in our agency. We want to optimise the deployment of our enforcement and regulatory capabilities and maximise their impact.

To this end, we have already begun work at ASIC to enhance our decision-making structures and processes (especially in relation to enforcement). We are committed to ensuring that ASIC be as strategic as possible – that is, it makes the best decisions and ‘regulatory choices’ it can.

We have recently announced a review into our enforcement processes led by our new Deputy Chair, Daniel Crennan QC. Given the importance of this body of work, we have appointed Michael Wyles QC to assist Deputy Chair Crennan. With permission Chair, I would like to table the Terms of Reference of this internal review.

Any analysis of *court-based* enforcement needs to also consider *court* processes as well as timeliness, cost and likely success, especially in relation to remediation. These considerations will be dealt with in our formal response to the Royal Commission – a submission that I do not want to pre-empt.

We will, of course, continue to be informed and guided by the Royal Commission. It is very important to note that the Interim Report of the Royal Commission is an *interim* report.

Again, our work on enhancing what we do is well underway. We have embraced the recommendations of the 2015 Capability Review into ASIC, particularly regarding the need for improved strategic governance.

This new strategic governance approach has already identified two urgent priorities – namely:

1. Accelerating our **enforcement outcomes**; and
2. Introducing **new supervisory approaches** – particularly, tools that have not been fully utilised by ASIC previously.

I have said previously and say again today, that there is a demonstrable need for ASIC to immediately accelerate its interventions, supervision and enforcement in financial services and credit. This is critical to rebuilding the community’s trust in the financial sector.

There are clear messages coming from the Royal Commission, the Government, Parliament and the community about their **expectations** of financial institutions and also, of ASIC.

It is clear that ASIC is expected to utilise enforcement tools more often, particularly against larger financial institutions because, as the Interim Report highlights, “*important deterrents to misconduct are... missing*”. The missing market deterrents include meaningful competitive pressures, fear of failure or collapse of the institution and fear of failure of individual financial transactions. The absence of these deterrents means that there are limited market cleansing mechanisms to counter misconduct.

These are insightful and important observations. The Interim Report goes on to state that because these other market deterrents are absent “*only the regulator can mark and enforce those bounds*”. This highlights not just the important, but **unique**, role of Australia’s financial regulators. We have **additional responsibilities, and expectations**, because of the particular characteristics, structure and settings of Australia’s financial system, especially the absence of these market deterrents.

But expectations need to be balanced against reality. The *reality of how* ASIC is empowered and resourced as well as the legal and regulatory settings within which ASIC operates.

We are doing what we can to meet those expectations through the strategic and structural reforms mentioned just now.

In addition, there is an *external* piece to meeting these expectations - and that relates to ASIC's **powers, penalties and resourcing**.

In terms of **powers and penalties**, it is vital that the increased penalties and regulatory powers - product intervention powers, design and distribution obligations, as well as a directions power - pass the Parliament as soon as possible.

I say this as we are clearly **expected** to:

- Pursue higher and more meaningful penalties in court. This is what current draft legislation will give us. In addition, we will be able to seek disgorgement of profits. With both higher penalties and disgorgement, there will be an even greater deterrence impact from court outcomes.
- Intervene more proactively when financial products cause detriment. This is what the product intervention power will give us.
- Enforce the obligation that financial products need to be designed and distributed with the end consumer in mind (instead of the financial institution). This is what the design and distribution obligations will give us.
- A directions power would enable us to reform and remediate without negotiating with the wrongdoer.

While I also note the Royal Commission's comments about our regulatory approaches, alongside this we must discuss **ASIC's regulatory positioning as regards its size and resourcing**.

I want to be clear that this not about any previous budget decision, or about any one government. We are very respectful of the system of Government that sets our budget.

Instead this is about how ASIC has been designed over the arc of its history and how Australia's financial system has evolved over the years to have its own unique characteristics. Accordingly, with the introduction of a new industry funding regime (this financial year), **now** is the right time to ask whether ASIC **should** be resourced differently to meet the community's expectations and the unique challenges of Australia's financial system.

Now is the right time, and this is the right forum, before a Parliamentary Committee, to discuss *whether ASIC and its peers are "right sized"? Right sized in relation to the:*

- *new industry funding model;*
- *unique characteristics in Australia's financial system;*
- *size of Australia's financial markets;*
- *number of financial consumers in Australia;*
- *number of people engaged in financial services; and*
- *the clear expectations of the Australian community?*

This **question** is not a statement, nor a demand. It is instead a *question* aimed at starting an important policy conversation.

Such a question needs context. For me, my own experience as a regulator in Hong Kong, in a system that also has an industry funding model, is instructive. There, on an adjusted basis (in terms of financial services GDP and financial services population), Hong Kong's financial regulators are three times the size of Australia's.

Conclusion

In closing Chair, we hope to contribute to the important and constructive conversation around the expectations and performance of ASIC. To this end, we will continue to make changes at ASIC, particularly to improve our decision-making processes.

We want to put our organisation on a footing that makes the most of our enforcement and other powers. This process will be informed by the ongoing work of the Royal Commission and important Committees like this.

Chair, my fellow Commissioners and I would be happy to take your questions.

Last updated: 19/10/2018 12:00

ASIC enforcement outcomes

As at 30 September 2018

		Financial year to date ¹	2017-18	Since July 2011 ²
		1 Jul 2018 - 30 Sep 2018	1 Jul 2017 - 30 Jun 2018	1 Jul 2011 - 30 Sep 2018
Criminal actions	People convicted	5	22	170+
	Custodial sentences (including fully suspended)	2	13	120+
	Non-custodial sentences/fines	3	13	40+
Civil actions	Civil proceedings completed	-	30	140+
	Amount (\$) in civil penalties	-	\$42.2m	\$71.2m+
Administrative actions	People/companies removed or restricted from providing financial services or credit ³	29	133	860+
	People disqualified or removed from directing companies	12	50	400+
Infringement notices	Infringement notices issued	1	55	+380
	Amount (\$) in infringement notices paid	\$33,000	\$2m	\$12.2m+
Enforceable undertakings	Court enforceable undertakings secured	7	27	150+
Compensation	Amount (\$) in compensation and remediation for investors and consumers ⁴	\$3m	\$351.6m	\$1.82bn+
	Amount (\$) in community benefit fund payments	\$15.5m	\$48.1m	\$90.6m+

Table notes:

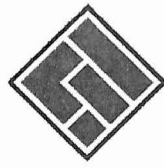
1. Current financial year figures are subject to change. This is due to appeals and delays in data capture.
2. Results since July 2011 have been rounded to significant figures.
3. Results do not include bannings that have not been served.
4. Compensation and remediation ordered, paid or agreed to be paid.

Compensation and community benefit fund payments

		Financial year to date ¹	2017-18	Since July 2011 ²
		1 Jul 2018 - 30 Sep 2018	1 Jul 2017 – 30 Jun 2018	1 Jul 2011 - 30 Sep 2018
Compensation	Amount (\$) in compensation and remediation for investors and consumers, by regulatory area ³ :	\$3m	\$351.6m	\$1.82bn+
	<i>Financial Services</i>	\$3m	\$276.2m	\$1.57bn+
	<i>Credit</i>	-	\$75.4m	\$253.7m+
	<i>Market Integrity</i>	-	-	\$3.6m
	<i>Other</i>	-	-	\$1.6m
Community benefit	Amount (\$) in community benefit fund payments, by regulatory area:	\$15.5m	\$48.1m	\$90.6m+
	<i>Financial Services</i>	-	\$7.1m	\$14.3m+
	<i>Credit</i>	-	\$700,000	\$1m
	<i>Market Integrity</i>	\$15.5m	\$40.2m	\$75.2m
	<i>Other</i>	-	\$200,000	\$200,000

Table notes:

1. Current financial year figures are subject to change. This is due to appeals and delays in data capture.
2. Results since July 2011 have been rounded to significant figures.
3. Compensation and remediation ordered, paid or agreed to be paid.



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Terms of Reference

Review of ASIC's Enforcement Policies, Processes and Decision-Making Procedures

Issue date 17 October 2018

Scope of the Review

1. This review will assess ASIC's enforcement policies, process and decision-making procedures (**Enforcement Policies**). It will include an analysis of how the Enforcement Policies can best align with ASIC's regulatory strategy, policies, processes and decision-making procedures more generally (**Review**).
2. This Review is forward-looking and is designed to identify what changes should be made to the Enforcement Policies aligning with internal and external expectations of ASIC and ensuring ASIC obtains enforcement outcomes that are necessary for a fair, strong and efficient financial system for all Australians.
3. This Review will include assessing regulatory, supervisory and investigatory policies, processes and decision-making procedures insofar as they relate to the Enforcement Policies.
4. This Review will particularly focus on policies, processes and decision-making procedures relevant to:
 - (a) Whether or not to enforce the law using criminal and civil proceedings or other regulatory options; and
 - (b) The effectiveness and timeliness of the conduct of litigation and of enforcement outcomes.
5. This Review will pay regard to and incorporate, to the extent necessary and if appropriate, other reviews undertaken by ASIC in the last 24 months which may relate to this Review's scope.

Terms of the Review

6. Review how matters are currently, in practice, referred to Enforcement and investigations teams and the Enforcement Committee.
7. Review how matters are currently, in practice, "accepted" by Enforcement teams, particularly where and when (and by whom) are key decisions being made in relation to accepting cases (and how and whether the relevant decisions support the effectiveness of ASIC's broader regulatory work and Commission's defined strategic aims and regulatory priorities).
8. Is there sufficient "strategic" (in terms of meeting the articulated regulatory goals/priorities of ASIC) and "tactical" (in terms of using the correct enforcement options) guidance and oversight of the Enforcement Policies?
9. Do the current Enforcement Policies need to be updated to take into account ASIC's strategic goals/positioning?
10. Review the role of commissioners and the Commission in these decisions. What strategic guidance and direction should be provided by the Commission throughout the process either directly by participation or through guidance and policy? How can we ensure that Commission can provide effective, strategic guidance throughout the process?

11. Is there sufficient guidance and direction in the Enforcement Policies (and/or from the Commission on an ongoing basis) on what action to take and which enforcement option(s) should be pursued in a matter?
12. Is there sufficient guidance in relation to the penalties or other enforcement outcomes that should be sought/pursued in a matter?
13. Review the current (and what should be the optimal) weighting, attention and priority given to the enforcement goals of:
 - (a) specific and general deterrence;
 - (b) punishment/punitive effect;
 - (c) remediation; and
 - (d) public denunciation.
14. Review whether ASIC's enforcement goals and their implementation pay sufficient regard to clarifying uncertain areas of the law, new laws or penalties. Does ASIC give appropriate weight to the importance of a test case in its decision-making procedures regarding litigation?
15. Review the manner in which the governance, timeliness and resourcing of investigations (as defined in s. 13 of the *ASIC Act*) are managed in light of ASIC's strategic goals.
16. Review external directives and guidance to determine whether there are restrictions or issues therein that constrain our own enforcement processes (and goals). In particular, review whether there are circumstances when it may be considered appropriate to seek a waiver, or to depart, from those guidelines and practices when it is in our regulatory (and/or public) interests to do so (including, such as when we wish to pursue a higher penalty/outcome that would otherwise be constrained by these guidelines).
17. Review the Enforcement Policies with a view to applying the 'common language' of the Commission in order to align the Enforcement Policies with other Commission policies and processes and ensure that structure is applied across all steps in the enforcement processes. Also ensure that decision-making procedures adopt, in particular, the taxonomy of 'threats and harms'.
18. Review how the Enforcement Policies will respond to ASIC's new powers and penalties such as those coming out of the ASIC Enforcement Review Taskforce (including the penalties legislation that was consulted on in Sept – Oct 2018) and the proposed product intervention power and design and distribution obligations.
19. Review how ASIC can rationalise and simplify its Enforcement Policies.
20. Review and consider reconfiguring pre-litigation strategies to better take into account ASIC's potential litigation and court-assisted outcomes.

21. **Review** and consider the interaction with regulated entities including banks and other large entities.
22. **Review** and consider any other relevant matters agreed by the Commission from time to time.

OTHER MATTERS

23. **Externals** (professional advisers including Senior Counsel) will be engaged to assist ASIC in the conduct of the Review.
24. **A** draft Review will be provided to the Commission of ASIC for comment on or before 14 December 2018 and the Commission will be regularly updated and consulted on progress of the Review.
25. **The** final Review will be provided to the Commission for approval on or before 10 January 2019.