



Thursday, 23 February 2023

Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee

Inquiry into the capacity and capability of ASIC to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct

Chartered Accountants Australia and New Zealand (CA ANZ) welcome the opportunity to provide further feedback to an assessment of the effectiveness and capability of the Australian Securities and Investment Commission (ASIC).

Our feedback reiterates the concerns raised in our submission to the Financial Regulator Assessment Authority (FRAA) on the overall effectiveness and capability of ASIC activities. The Financial Regulator Assessment Authority (FRAA) in its final report found that '*ASIC is generally effective and capable in the areas reviewed*'¹ the areas reviewed did not capture investigations and enforcement actions. Accordingly, we iterate our specific concerns that there is a lack of information available publicly on ASIC activities and an absence of time periods in relation to ASIC's investigation and enforcement actions.

In this submission, we focus on ASIC's enforcement actions and, in Appendix A, provide detailed feedback against the Committee's terms of reference and share our members' lived experiences.

As detailed in Appendix A, we recommend that:

- policy settings should allow for ASIC's regulated population to only report suspected egregious misconduct where there is, or is likely to be, sufficient evidence for ASIC to take action.
- Policy settings require ASIC to publish outcomes of all investigations across the same channels, irrespective of the outcome.
- following a director being banned, the remaining and incoming directors be required to make a solvency declaration that states the company is financially stable and able to continue operating responsibly.
- policy settings are amended so that investigations undertaken for the broader public benefit are funded by all taxpayers, not recovered solely from ASIC's regulated population.
- the income ASIC receives from penalties awarded as a result of enforcement action be offset against the costs of those enforcement actions and, where income exceeds costs, the excess returned to general appropriations.

¹ FRAA Final Report, July 2022, page 3

- policy settings to establish maximum time frames for each type of investigation and, where ASIC expects timeframes may be exceeded, ASIC to be required to show cause for an extension to that timeframe to an independent, objective body.

Review of ASIC

Whilst outside the scope of this inquiry, we note that ASIC has a very large remit, which seems to grow with each passing year and new product invention offered to consumers. We consider that it may be timely for the government to consider whether ASIC should be restructured to better handle this increasing remit.

Noting that ASIC's remit is driven by the *Corporations Act 2001*, we support continuing the review by the Australian Law Reform Commission to modernise and streamline the law.

Conclusion

As the detailed feedback in Appendix A demonstrates, we consider that ASIC is not able to apply its resources efficiently to undertake proportionate investigations and enforcement action and remove bad actors from the economy. For more information on CA ANZ please refer to Appendix B.

We would welcome further discussion on how ASIC may be supported to better execute its mandate. To arrange a discussion, please reach out to [REDACTED] on [REDACTED] or by email at [REDACTED].

Sincerely,

Simon Grant FCA
Group Executive, Advocacy & International

Karen McWilliams FCA
Business Reform Leader

Appendix A

Following is detailed feedback against the Committee's terms of reference which reflects the lived experience of our members. Many of our members are directors, small business owners and/or ASIC-regulated licence holders. Our members include registered company auditors, registered liquidators and holders of Australian Financial Services License (AFSL).

We have primarily relied on ASIC data published for the 2020-21 financial year as, for the first time, ASIC published actual costs by sector and sub-sector for this period.

ASIC actual enforcement costs 2020-21²

Sub Sector	Actual entities	Enforcement costs
Listed corporations	2,125	\$ 25,741,035
Registered Liquidators	664	\$ 820,715
Auditors of disclosing entities	123	\$ 1,375,576
Registered company auditors	2,657	\$ 654,968
Licensees providing personal advice to retail clients	2,933	\$ 10,806,266
Licensees providing personal advice to retail clients (no levy relief)	2,933	\$ 25,156,127

(b) the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;

Delivering an efficient market while deterring poor behaviour requires a regulator to act often and quickly against reports of suspected misconduct.

It is difficult for ASIC's regulated population to comment on ASIC's capability to deter poor behaviour under current policy settings as ASIC does not report outcomes, only outputs. As the FRAA recommended, '*metrics are required that look at the quality of the regulatory activities and outcomes delivered.*'³

Reporting alleged misconduct

We acknowledge that it is not reasonable for ASIC to investigate the thousands of reports of alleged misconduct it receives each financial year. Equally, some of these reports may add to the pool of actionable intelligence shared with other government agencies.

As noted by ASIC in its submission to the Parliamentary Joint Committee (PJC) inquiry into Corporate Insolvency in Australia (ASIC sub), policy settings require ASIC's regulated population to lodge reports of any, and all, suspected misconduct however immaterial. ASIC assesses these initial reports and determines if further investigation is required.

² Number of entities drawn from ASIC Industry Funding: Summary of 2020-21 actual levies and enforcement actual costs extracted from Appendix F – ASIC IFM data, Treasury consultation c2022-317130

³ FRAA Final Report, July 2022, paragraph 1.18

Of the 3,767 initial statutory reports ASIC received in 2021-22, just 66 (1.8%) progressed to ASIC specialist teams for further investigation. It would be questionable whether this reporting is an efficient use of the scarce resources of ASIC's regulated population and if such reports provide actionable intelligence that could be effective in deterring poor behaviour.

As individuals and organisations licenced by ASIC are highly regulated, we consider they should be trusted to identify and report only those matters that meet ASIC's requirement to have, or there is likely to be, sufficient evidence for ASIC to take action. As ASIC clearly states that it will only take action 'where there is sufficient evidence'⁴ it appears unnecessary that registered liquidators 'must report to ASIC if they **suspect**' misconduct. To only report where there is a likelihood of sufficient evidence would still result in hundreds of reports to ASIC each financial year and would increase the likelihood that the activity reported was actionable intelligence.

We recommend that policy settings should allow for ASIC's regulated population to only report suspected egregious misconduct where there is, or is likely to be, sufficient evidence for ASIC to take action.

Communication of enforcement outcomes

We consider that ASIC's publication of outcomes is biased to outcomes that favour ASIC, where misconduct is proven.

When a person is investigated and ASIC 'wins', ASIC publishes the outcome widely through a media release and on their website. Conversely, when the misconduct is not proven, ASIC does not make a media release and simply publishes the outcome on its website.

This is unfair on the person under investigation whose business reputation will have been tarnished by the fact of being under investigation. Equally, it is a missed opportunity to widely communicate what practice has been found to be acceptable. It is our understanding that the current approach will unfortunately also be used for the newly established Financial Sector Complaints Authority.

We recommend that policy settings require ASIC to publish outcomes of all investigations across the same channels, irrespective of the outcome.

(c) whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement

It is reasonable for the government, business and community to expect that, where misconduct is suspected and reported, the regulator investigates efficiently and takes swift action to penalise or remove bad actors, before more harm is caused.

Yet it can take years for ASIC, on receiving a report of suspected misconduct, to take enforcement action. For example, ASIC's media release of December 6, 2022, stated that Mr Rudolph Karel Jansen was disqualified from managing corporations for 5 years.

The ban refers to offences that occurred from January 2000 through to February 2018 at which point the initial report of suspected misconduct was lodged by a registered liquidator with ASIC. Until the banning order in 2022, Mr Rudolph Karel Jansen continued to run businesses unhindered.

⁴ ASIC, <https://asic.gov.au/about-asic/contact-us/complaints-about-companies-organisations-or-people/misconduct-within-a-company-when-an-insolvency-practitioner-has-been-appointed/>, accessed on 20 February 2023

Due to the current timeframes involved in dealing with suspected misconduct, directors can continue to benefit from their misconduct despite that misconduct having been identified and reported. It is critical ASIC review its internal processes to ensure it takes prompt action.

Equally, where a banning notice for a director is put into effect, it is reasonable to expect some form of review of the financial health of the business or businesses affected by the director's misconduct. As acknowledged in paragraph 5 of the ASIC sub, managing insolvency is vital to the corporate life cycle and can impact the level of economic activity in Australia.

Our members are aware of some instances where a banned director convinces a family member or an employee, to take up their directorship and the banned person continues to run the business as a shadow director. If these directors had an obligation to make a declaration in respect of the financial health of the business, it may convey the obligations of the role they are taking on.

We recommend that following a director being banned, the remaining and incoming directors be required to make a solvency declaration that states the company is financially stable and able to continue operating responsibly.

(d) the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes;

In assessing the effectiveness of ASIC's regulatory tools, we refer to ASIC's response to questions on notice from this Committee.⁵ In particular, the effectiveness of ASIC's information-gathering tools.

The extracts below, compare relevant data from Question 6 Table 1: Use of significant compulsory information-gathering powers and Question 7 Table 1: Number of criminal and civil actions commenced each year.

Coercive power	2021-22
s19 ASIC Act – Requirement to appear for examination	895
s30 ASIC Act – Notice to produce books about... a corporate or registered scheme	761
s33 ASIC Act – Notice to produce books in person's possession	1 930
s912C Corporations Act – Power to require information from an AFSL	431
Total of above	4 017
Outcomes	
Criminal actions commenced	52
Civil actions commenced	75
Total of above	127

⁵ ASIC – Answers to Question on Notice, Set 1 – Questions 1-7 (Senator Andrew Bragg),

Assessing 2021-22, from ASIC's 4017 uses of particular coercive powers, they commenced just 127 (just over 3 per cent) formal actions.

This conversion rate between ASIC's use of its coercive powers to gather information and the number of prosecutions commenced suggests that these tools are not effective in contributing to good market outcomes.

Funding of investigations

Of particular concern is that of the actions commenced, we do not know how many were to address significant harm as identified by a report of suspected misconduct and how many were for the public good.

ASIC's population utilise significant resources, time and money, to make their reports to ASIC. ASIC may ask licence holders to provide additional information or undertake further investigation and provide a supplementary report. ASIC can provide funding for further investigation through grants awarded from the Assetless Administration Fund (AAF). Yet our members report using this fund is a last resort as the application process takes significant time, has a low risk of success and, if awarded, funding can only be applied prospectively, not retrospectively to costs already incurred. Even though few applications are made, only approximately 30% of these applications are approved each year.

This can lead to ASIC's population reporting suspicious misconduct but, where they consider it is not material or the cost to investigate further is outside of their resources, decline to undertake further investigations.

Where ASIC has sought for more work to be undertaken for a matter they are investigating in the public interest, we consider it unreasonable that only ASIC's regulated population fund such actions. Instead, ASIC actions for the public benefit should be funded by the public, Australia's 14.7 million individual taxpayers or the 2.6 million businesses that pay tax. The costs of such actions should not be recovered solely from the, approximately, 82,000 entities and licenced professionals that make up ASIC's regulated population.

Currently, ASIC's regulated population pay multiple times for enforcement actions undertaken by ASIC. They pay fees for their licence, apply their resources to undertake investigations on behalf of ASIC, and then, through the annual cost recovery levy, pay ASIC's costs. Yet this population have no say in ASIC's activities and no visibility over the outcomes achieved.

Further, if a Court awards penalties as a result of such enforcement action, these penalties are paid into consolidated revenue. For example, in the financial year 2021-22 ASIC raised \$1,676 million for the Commonwealth in fees, charges and supervisory costs.⁶ This indicates ASIC could be self-funding and still contribute significantly to consolidated revenue.

We recommend that policy settings are amended so that investigations undertaken for the broader public benefit are funded by all taxpayers, not only those regulated by ASIC.

We also recommend that income ASIC receives from penalties awarded as a result of enforcement action be offset against the costs of those enforcement actions and, where income exceeds costs, the excess returned to general appropriations.

⁶ ASIC Annual Report 2021-22, 1.4 Financial Summary, page 25

(f) the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner;

Proportionate investigation

Once ASIC determines to progress to litigation, it can take nearly two years to reach a court decision. However, ASIC do not report the time invested prior to reaching the litigation stage, including the time a licence holder has spent to identify possible misconduct and the time ASIC has taken to complete its processes to determine if it will proceed to litigation.

With no public data available on the total time taken from an initial report of suspected misconduct to the completion of ASIC's actions, we can determine from ASIC's media releases that enforcement actions take ASIC years to investigate, such as in the example on page 4. In our members' experience, this is commonly around four years or more.

Further, ASIC's enforcement actions appear similar irrespective of the number of people impacted by the alleged misconduct or the quantum of the financial harm potentially caused. Without data to indicate otherwise, there does not appear to be any cost-benefit analysis undertaken by ASIC to ensure their enforcement actions are proportionate to the harm of the alleged misconduct.

We recommend policy settings to establish maximum time frames for each type of investigation and, where ASIC expects timeframes may be exceeded, ASIC to be required to show cause for an extension to that timeframe to an independent, objective body.

With no data provided by ASIC on the timeline from receiving an initial statutory report of suspected misconduct to taking enforcement action, it is not possible to comment if the allocation of resources progresses actions in a timely manner.

Similarly, no data is available to assess if ASIC complies with the *Legal Services Directions 2017 (Cth)*, Appendix B – the Commonwealth's obligation to act as a model litigant. These are that ASIC should keep costs of litigation to a minimum; should regularly re-assess the prospects of success; and should reconsider the most appropriate enforcement action as prospects of success change.

In the first instance, as noted above, we recommend the policy settings should be amended such that ASIC only receives reports of suspected egregious misconduct, hence reducing the number of reports they receive. ASIC should also utilise technology to interrogate reports received for key indicators of financial harm and assess the likelihood of sufficient evidence being available to take enforcement action.

We further recommend policy settings to establish maximum time frames for each type of investigation and, where ASIC expects timeframes may be exceeded, ASIC to be required to show cause for an extension to that timeframe to an independent, objective body.

Appendix B

About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 134,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

CA ANZ promotes the Chartered Accountant (CA) designation and high ethical standards, delivers world-class services and life-long education to members and advocates for the public good. We protect the reputation of the designation by ensuring members continue to comply with a code of ethics, backed by a robust discipline process. We also monitor Chartered Accountants who offer services directly to the public.

Our flagship CA Program, the pathway to becoming a Chartered Accountant, combines rigorous education with practical experience. Ongoing professional development helps members shape business decisions and remain relevant in a changing world.

We actively engage with governments, regulators and standard-setters on behalf of members and the profession to advocate in the public interest. Our thought leadership promotes prosperity in Australia and New Zealand.

Our support of the profession extends to affiliations with international accounting organisations.

We are a member of the International Federation of Accountants and are connected globally through Chartered Accountants Worldwide and the Global Accounting Alliance. Chartered Accountants Worldwide brings together members of 13 chartered accounting institutes to create a community of more than 1.8 million Chartered Accountants and students in more than 190 countries. CA ANZ is a founding member of the Global Accounting Alliance which is made up of 10 leading accounting bodies that together promote quality services, share information and collaborate on important international issues.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents more than 870,000 current and next generation accounting professionals across 179 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications.