

Chapter 4

ASIC's 2014–15 annual report

4.1 This chapter discusses the 2014–15 annual report of ASIC. Under Senate Standing Order 25(20),¹ annual reports of bodies established under the ASIC Act are subject to scrutiny by the Senate Economics Legislation Committee which noted the following in relation to ASIC:

- an eight percent increase in the revenue raised for the Commonwealth, by ASIC, through fees and charges;²
- a ten percent reduction in appropriation revenue which was correlated with the ten percent reduction in expenditure driven by a general reduction in staff and supplier expenditure;³
- the steps taken by ASIC in response to the Senate's inquiry into ASIC's performance including:
 - the establishment of an Office of the Whistleblower;
 - the redesign of ASIC's webpage to make it more user-friendly and accessible; and
 - the updating of its guidance on enforceable undertakings.⁴
- ASIC's outcomes for the year including:
 - the launch of the Financial Adviser's Register;
 - 321 funds management surveillances, including a review of risk management practices; and
 - 54 instances where potentially misleading or deceptive promotional material was withdrawn or amended.⁵

4.2 The Senate Economics Legislation Committee considered that ASIC met its reporting obligations and the annual report is apparently satisfactory, well-presented and comprehensive.⁶ Therefore, in conducting its review of the 2014–15 ASIC annual report, the committee will focus on the statutory requirements under the ASIC Act and other operational matters.

1 The Senate, *Standing Orders and other orders of the Senate*, August 2015, p. 30.

2 Senate Economics Legislation Committee, *Annual reports (No. 1 of 2016)*, March 2016, p. 31.

3 Senate Economics Legislation Committee, *Annual reports (No. 1 of 2016)*, March 2016, p. 32.

4 Senate Economics Legislation Committee, *Annual reports (No. 1 of 2016)*, March 2016, p. 33.

5 Senate Economics Legislation Committee, *Annual reports (No. 1 of 2016)*, March 2016, p. 33.

6 Senate Economics Legislation Committee, *Annual reports (No. 1 of 2016)*, March 2016, pp 33–34.

Statutory requirements

4.3 Statutory requirements for the ASIC annual report are set out in section 136 of the ASIC Act and Section 46 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) cover tabling, distribution and the contents of the annual report.

Tabling and distribution

4.4 The 2014–15 ASIC annual report was provided to the Minister on 15 October 2015, and tabled in the Senate and the House of Representatives on the next available sitting day, 9 November 2015. As a result, the legislative requirements as set out below were satisfied:

- Section 46(1), PGPA Act: After the end of each reporting period for a Commonwealth entity, the accountable authority of the entity must prepare and give an annual report to the entity's responsible Minister, for presentation to the Parliament, on the entity's activities during the period.; and
- Section 46(2), PGPA Act: The annual report must be given to the responsible Minister by: the 15th day of the fourth month after the end of the reporting period for the entity; or the end of any further period granted under subsection 34C(5) of the Acts Interpretation Act 1901.

4.5 Section 136(4) of the ASIC Act requires that 'the Minister must cause a copy of each annual report to be sent to the Attorney-General of each State and Territory as soon as practical after the Minister receives the report'. ASIC advised the committee that copies had been provided to the Attorney-General of each state and territory in line with this requirement.⁷

Contents of the annual report

4.6 In addition to the requirements for annual reports as approved by the Joint Committee of Public Accounts and Audit, ASIC is subject to statutory requirements for the contents of the ASIC annual report as set out in sections 136(1)(a–e) and 136(2A) of the ASIC Act. It should be noted that changes to section 136(1) and 136(2) of the ASIC Act were imposed by the *Public Governance and Resources Legislation Amendment Act (No. 1) 2015* which sought to align annual report requirements, where possible, with the PGPA Act.⁸ Table 4.1 lists where in the 2014–15 ASIC annual report the current requirements in the ASIC Act are met.

7 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

8 *Public Governance and Resources Legislation Amendment Act (No. 1) 2015*, Revised Explanatory Memorandum, p.13-14 of 25
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5402_ems_126da0a5-fac4-4fa7-989e-acfc994bec58/upload_pdf/500599.pdf;fileType=application%2Fpdf , (accessed 8 March 2016)

Table 4.1- Statutory requirements for the ASIC annual report

Section	Reporting requirement (ASIC Act)	2014–15 Annual Report
136(1)(a)	Exercise of ASIC's powers under Part 15 of the <i>Retirement Savings Accounts Act 1997</i> and under Part 29 of the <i>Superannuation Industry (Supervision) Act 1993</i>	Page 169
136(1)(b)	ASIC's monitoring and promotion of market integrity and consumer protection	Pages 28–31 Pages 34–63
136(1)(c)	In relation to ASIC's functions under subsection 11(14), and each agreement or arrangement entered into by ASIC under that subsection, information about the activities that ASIC has undertaken during the period in accordance with that agreement or arrangement	Page 169
136(1)(d)	Operation of the <i>Business Names Registration Act 2011</i>	Pages 64–68
136(1)(e) 136(2A)	Information relating to the exercise by ASIC, members of ASIC, or staff members, of prescribed information-gathering powers.	Pages 175–176

Operational matters identified in the annual report.***Enforcement***

4.7 In the annual report ASIC indicates that 631 enforcement outcomes were achieved in 2014–15, including criminal and civil litigation, administrative action and enforceable undertakings. This was an increase on the 596 enforcement outcomes in 2013–14.⁹ The annual report enforcement outcome data shows a notable increase in:

- the dollar value of fundraising where ASIC required additional disclosure¹⁰;
- the dollar value of civil penalties under Priority One;¹¹ and

9 ASIC, *Annual Report 2014–15*, p. 164; ASIC, *Annual Report 2013–14*, p. 158.

10 ASIC indicated that the growth in the dollar value of fundraisings is as a result of market factors as opposed to any deterioration of disclosure quality or changes to ASIC policy regarding disclosure. Additionally comparatively large deals requiring additional disclosure influenced the increase in the 2014–15 total e.g. MYOB Group Limited, Estia Health Limited and Perpetual Equity Investment Company Limited all conducted large fundraisings which required disclosure. These deals alone amounted to \$2.1 billion (of the 2014–15 total of \$10.6 billion). ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

11 ASIC, *Annual Report 2014–15*; ASIC has adopted three strategic priorities and has structured its annual report according to achievements in these three areas. These are as follows:

Priority 1 – Promote investor and financial consumer trust and confidence.

- the total number and dollar value of infringement notices issued.¹²
- 4.8 In contrast, the enforcement outcome data shows a notable decrease in:
- the percentage of civil litigations completed under Priority Two;¹³ and
 - the amount of compensation or remediation secured for investors and financial consumers.¹⁴
- 4.9 The annual report also notes that the number of investigations commenced and completed under Priority One have decreased whereas the number of investigations under Priority Two have increased.¹⁵
- 4.10 In 2013–14 it was noted that there was a decline in the number of illegal schemes that had been shut down, from 39 to zero. There was no data available in the 2014–15 annual report in relation to this trend but in recent correspondence ASIC has informed the committee that no illegal schemes were shut down in 2014–15.¹⁶
- 4.11 In 2014–15 ASIC completed its Evidence Management System (EMS) Ringtail project. The system enables ASIC to handle large amounts of electronic evidence and has reduced evidence processing times.¹⁷
- 4.12 ASIC has advised the committee that it is seeking to publish monthly enforcement statistics that will complement the more detailed six-monthly report that focuses on key themes that have been identified from the enforcement data for the preceding period.¹⁸

Priority 2 – Ensure fair, orderly, transparent and efficient markets.

Priority 3 – Provide efficient and accessible registration.

The increase in the value of penalties is largely attributable to the penalty awarded against Cash Store Pty Ltd – totalling \$18.975 million. This was the largest civil penalty obtained by ASIC. ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

- 12 In 2013–14, 20 infringement notices were issued to 12 entities. In 2014–1, 70 infringement notices were issued to 12 entities with one entity (BMW Australia Finance), alone, being issued with 36 infringement notices. ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016); ASIC, *Annual Report 2014–15*, pp. 6–9; 161–164; 167.
- 13 ASIC, *Annual Report 2014–15*; The significant decrease in the percentage of civil litigations which had been completed successfully during 2014–15 was largely due to the matter of Mariner Corporation Limited – see discussed of Mariner matter in this report and Appendix 2. ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).
- 14 ASIC, *Annual Report 2014–15*, pp 6–9, 161–164, 167.
- 15 ASIC, *Annual Report 2014–15*, pp 6–9.
- 16 ASIC, *Annual report 2013–14*, p. 7; *Committee Hansard*, 20 March 2015, pp 17–18; ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).
- 17 ASIC, *Annual Report 2014–15*, p. 43.
- 18 Mr Greg Tanzer, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 16 October 2015, p. 12; Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 16 October 2015, p. 12.

Mariner matter

4.13 The significant decrease in the percentage of civil litigations which had been completed successfully during 2014–15 (noted above), was largely due to the legal action taken by ASIC in the Federal Court (the court) against Mariner Corporation Limited (Mariner) in April 2014.¹⁹

4.14 This matter concerned an announcement by Mariner on 25 June 2012 that it was making a takeover bid for Austock Group Limited at a price of 10.5 cents per share.²⁰ At the time of the bid, however, Mariner did not have concluded financing arrangements in place. This was contrary to the 'objective' standards for 'funding arrangements for the cash component of consideration under a takeover' articulated in the Takeovers Panel's *Guidance Note 14: Funding Arrangements* (GN14).²¹

4.15 Following the Takeover Panel's declaration of 'unacceptable circumstances'²² ASIC took the matter to the Federal Court alleging that Mariner was reckless as to whether it could perform its obligations in relation to the bid because at the time the bid was announced it did not have the financial resources, or any pending funding that could finance the bid.²³ Consequently ASIC alleged that Mariner had contravened section 631(2)(b) of the *Corporations Act 2001* (Corporations Act).²⁴ In undertaking

19 *Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589*. Appendix 3 contains a summary by ASIC as to the background of the matter, the issues of construction raised by the matter and the possibilities for legislative reform in relation to s631(2) (b) of the *Corporations Act 2001*.

20 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

21 The importance of ensuring there is sufficient funding at the time a bidder makes a takeover bid is highlighted in the Takeovers Panel's *Guidance Note 14: Funding Arrangements* which indicates that the inadequacy of a bidder's funding arrangements may give rise to 'unacceptable circumstances'. The guidance note in place at the time of the takeover bid can be located via this link:

http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/superseded/014a.htm&pageID=&Year. This particular policy advice is generally supported by ASIC and utilised when regulating takeover transactions in Australia. This guidance note is now superseded by a revised policy implemented in November 2015, largely as a result of the outcome in this court matter. It can be located via the following link

http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/014.htm. ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

22 According to the Takeovers Panel's *Guidance Note 14: Funding Arrangements*, unacceptable circumstances may arise if a bidder does not have funding in place, or a reasonable basis to expect that it will have funding in place, to pay for all acceptances when its bid becomes unconditional.

23 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

24 CORPORATIONS ACT 2001 - SECT 631

(2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:

(a) the person knows the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or

this behaviour ASIC alleged that Mariner had also contravened s1041H (misleading and deceptive conduct) and section 180 (director's duty of care and diligence) of the *Corporations Act 2001*.²⁵

4.16 Prior to the Mariner matter section 631(2)(b) of the *Corporations Act 2001* had never been the subject of judicial consideration.²⁶ In deciding the Mariner matter the court opined on a number of aspects of the construction of section 631(2), notably:

- the test of whether a person is 'reckless', and whether this is a subjective or objective test; and
- the question of what is meant by a 'substantial proportion of the offers'.²⁷

4.17 In handing down its findings the court disagreed with ASIC's submission that section 631(2)(b) is an objective test.²⁸ It also found that the concept of 'substantial proportion of the offers' was unclear and took the approach of assuming in particular case that this meant 'no less than' 50% of the shares that are the subject of the offer.²⁹ The matter was resolved in the favour of Mariner on 19 June 2015, with Beach J summarising:

(a) The test for “reckless” under s 631(2)(b) is a subjective test. Applying that test, Mariner was not “reckless”.

(b) Alternatively, if the test for “reckless” under s 631(2)(b) is an objective test, Mariner was not “reckless”.

(c) Mariner did not engage in any conduct in contravention of s 1041H in relation to the price representation or the funding representation.

(d) Alternatively, if Mariner did engage in any misleading or deceptive conduct concerning the price representation, on no reasonable view would it be entitled to any relief. I express no view on whether relief would go if, alternatively, Mariner engaged in misleading or deceptive conduct concerning the funding representation.

(e) No director contravened s 180, whether or not Mariner contravened s 631(2)(b) or s 1041H.

(b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.

Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589

25 *Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589*

26 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

27 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016); *Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589*.

28 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016); *Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589 at [248,249]*.

29 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016); *Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589 at [312]*.

(f) Alternatively, even if Mr Olney-Fraser contravened s 180, neither Mr Christie nor Mr Fletcher contravened s 180 given their reasonable reliance upon the information provided to them by Mr Olney-Fraser and their ability to invoke s 189.³⁰

4.18 Following this finding, ASIC indicated a number of possibilities for legislative reform in relation to section 631(2)(b) of the *Corporations Act 2001*:

ASIC would generally support a review of s631(2) to consider amendments aligning the requirements of the provision with the broader regulatory policy settings discussed in GN 14. This would potentially include:

amending s631(2)(b) to require that a bidder have an objectively reasonable basis that it will be able to comply with its funding obligations under a bid; and

addressing the uncertainty arising from the reference in the provision to a 'substantial proportion of offers' by clarifying that funding is required to pay for all securities to which the proposed bid relates.³¹

4.19 ASIC also indicated that it may be 'appropriate' to reconsider whether section 631(2)(b) of the *Corporations Act 2001* should 'continue to require funding for only some, rather than all, of the securities the subject of the announced bid.'³² It also expressed concerns about the criminal operation of section 631(2), particularly in terms of its lack of 'harmony' with the *Criminal Code* and the high degree of uncertainty in terms of its operation when a defence under section 670 of the *Corporations Act 2001* is presented.³³

Recommendation 1

4.20 The committee recommends that the government consider the suggestions that ASIC has made in relation to reforms of section 631 of the Corporations Act.

Enforceable undertakings

4.21 Following a recommendation from the Senate Economics References Committee inquiry into the performance of ASIC,³⁴ the Australian National Audit Office (ANAO) conducted a performance audit of ASIC's use of Enforceable Undertakings (EU). The audit was undertaken during the reporting period and the report, issued on 2 June 2015, made two recommendations:

30 *Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589 at [5]*.

31 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

32 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

33 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

34 Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. xxviii.

Recommendation 1

To assess the effectiveness of enforceable undertakings as an appropriate regulatory tool and their contribution to ASIC achieving its compliance objectives, the ANAO recommends that ASIC:

- (a) develops appropriate performance measures to monitor the effectiveness of enforceable undertakings in addressing non-compliance, and regularly reports against these measures; and
- (b) periodically assesses, and reports on, the effectiveness of enforceable undertakings in contributing to improved levels of voluntary compliance.

Recommendation 2

To strengthen decision-making and support the transparency of, and quality assurance over enforceable undertakings, the ANAO recommends that ASIC:

- (a) reinforces to staff the need for key documents and decisions relating to enforceable undertakings to be appropriately recorded in accordance with ASIC policies and procedures; and
- (b) formalises the processes for obtaining enforceable undertaking approvals.³⁵

4.22 ASIC noted in its response to the ANAO report and in the 2014–15 annual report that it agreed with both recommendations and indicated that they would be implemented.³⁶

4.23 Following the release of the ANAO report the Parliamentary Joint Committee on Corporations and Financial Services expressed concerns in relation to ASIC being able to assess the effectiveness of EUs, particularly in terms of measuring them against Key Performance Indicators. The committee also had concerns about ASIC's ability to provide assurances that EUs were having the desired regulatory or compliance outcomes.³⁷

4.24 The committee notes that when compared to the 2013–14 annual report the 2014–15 annual report contains more information and commentary in relation to how ASIC monitors enforceable undertakings, and their effectiveness in terms of improved compliance, with a number of case studies documented to illustrate a variety of outcomes.³⁸ The committee also notes that the annual report includes information about the fact that in the reporting period ASIC:

35 ANAO, *Audit Summary - Administration of Enforceable Undertakings*, June 2015, p. 6; ASIC, *Annual Report 2014–15*, p. 170.

36 ANAO, *Audit Summary - Administration of Enforceable Undertakings*, June 2015, p. 6; ASIC, *Annual Report 2014–15*, p. 170.

37 *Committee Hansard*, 14 August 2015, pp 9–10, 21–22; *Committee Hansard*, 16 October 2015, pp 4–5; *Committee Hansard*, 19 November 2015, pp 16–17, 19–20.

38 ASIC, *Annual Report 2014-15*, pp 14, 46, 61.

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- had issued new public guidance in relation to enforceable undertakings to include information on independent experts and publicity for enforceable undertakings;
 - accepted 20 enforceable undertakings during the reporting period; and
 - had commenced public reporting on compliance with undertakings given on or after March 2015.³⁹

4.25 The committee considers that further improvement regarding the measurement, assessment, and reporting of EUs should be implemented and the committee will monitor the content regarding the use of EUs in future enforcement and annual reports.

Surveillance

4.26 The annual report indicates that the number of high-intensity surveillances completed by ASIC decreased during the reporting period. Across Priority One and Two, 1,016 high-intensity surveillances were conducted in 2014–15, down from 1,767 in 2013–14.⁴⁰ ASIC states in its annual report that a reduction in resources has reduced the level of random sampling-based surveillance and that alternatively a risk-based approach to targeted operations that have the greatest market impact is being implemented.⁴¹ The committee will continue to monitor the number of high-intensity surveillances and the allocation of resources for surveillance activities.

4.27 During the reporting period the annual report notes that ASIC's surveillance was proactive, risk-based surveillance focused on areas such as financial benchmarks, retail OTC derivative trading, fundraising disclosure, financial reporting, auditors and registered liquidators.⁴² In October 2014 ASIC set up a specialist wealth management project, utilising risk-based surveillance, to focus on the conduct and compliance of large financial advice firms with the aim of lifting advice standards.⁴³

4.28 Surveillance by ASIC also targeted retail life insurance advice with a review of such advice in October 2014 finding that 37% of life insurance advice did not comply with the required standards in the Corporations Act.⁴⁴ This review resulted in the industry commissioned Trowbridge Report in March 2015, and the Commonwealth Government was presented with what was described as an 'industry led reform package' in mid-2015.⁴⁵ Following further consultations, on 6 November 2015, the Minister for Small Business and Assistant Treasurer,

39 ASIC, *Annual Report 2014-15*, pp 6–9, 46.

40 ASIC, *Annual Report 2014–15*, pp 6, 8.

41 ASIC, *Annual Report 2014–15*, pp 36, 52.

42 ASIC, *Annual Report 2014–15*, p. 6, 8.

43 ASIC, *Annual Report 2014–15*, p. 37.

44 ASIC, *Annual Report 2014–15*, p 12, 37.

45 ASIC, *Annual Report 2014–15*, p 12, 37.

the Hon Kelly O'Dwyer, announced a package of reforms, which are scheduled to commence on 1 July 2016.⁴⁶

4.29 On 3 December 2015, the Government released draft legislative amendments to the *Corporations Act 2001* which would remove the current exemption in the Corporations Act from the ban on conflicted remuneration for benefits paid in relation to certain life risk insurance products. The amendments would give ASIC the power to:

make a legislative instrument to permit benefits in relation to life risk insurance products to be paid, provided certain requirements are met. These requirements relate to the quantum of allowable commissions and to 'clawback' arrangements, where a certain portion of the upfront commission is paid back to the life insurer by the financial adviser in the event that the life insurance policy is cancelled or the premium is reduced.⁴⁷

4.30 ASIC had begun processing feedback from life insurers, Australian financial services (AFS) licensees and their representatives, and consumers on proposals to implement and monitor the impact of the retail life insurance industry reforms, as contained in a consultation paper released in December 2015.⁴⁸ However, on 15 April 2016, the Bill lapsed due to the prorogation of the Parliament.⁴⁹

4.31 During 2014–15 ASIC continued to undertake surveillance on credit licensees and the banking, credit and insurance industry to ensure compliance with responsible lending obligations and to address the sale of inappropriate products to consumers. This included reviews and reports on payday lending, 'low doc' loans, interest only loans, home building and motor vehicle insurance and add-on insurance products.⁵⁰

4.32 In March 2015 ASIC reviewed the files of 13 payday lenders who are responsible for more than 75% of the payday loans in Australia. This review and its consequent report found that some lenders were not meeting responsible lending

46 The Hon. Kelly O'Dwyer, MP, Minister for Small Business and Assistant Treasurer, *Government announces significant improvements to life insurance industry*, Media Release, 6 November 2015, <http://kmo.ministers.treasury.gov.au/media-release/024-2015/> (accessed 8 March 2016).

47 *Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016*, Explanatory Memorandum, p. 3, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5611_ems_82e13b89-08d8-493e-88fa-6d8eef045ba6/upload_pdf/16010EM.pdf;fileType=application%2Fpdf (accessed 8 March 2016).

48 ASIC, *Consultation Paper 245: Retail life insurance advice reforms*, December 2015, <http://download.asic.gov.au/media/3490655/cp245-published-15-december-2015.pdf> (accessed 8 March 2015).

49 Parliamentary Business, Bills and Legislation, *Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5611 (accessed 27 April 2016).

50 ASIC, *Annual Report 2014-15*, pp 38–39.

obligations. A follow up investigation led to ASIC pursuing the lender and loan funder in the Federal Court who found there had been a systemic failure by both the lender and loan funder to comply with consumer lending laws and awarded a record \$19 million in penalties.⁵¹

4.33 In 2014–15 ASIC completed the implementation of the Market Analysis and Intelligence (MAI) system – the first of four deliverables of ASIC's Flexible Advanced Surveillance Technologies (FAST) program. The MAI system is a real-time market surveillance system that provides sophisticated data analytics to identify suspicious trading in real time and across markets. It also enables ASIC to interrogate very large data sets and increases the ability of ASIC to detect insider trading.⁵² The annual report states:

MAI helps us to adapt to increased message traffic, new technologies and trading techniques. It also helps us handle the increase in trading messages generated by high frequency trading.⁵³

International cooperation

4.34 ASIC has identified globalisation as an emerging issue with cross border activity and integration of international markets, reform of over the counter derivative markets and involvement in the International Organisation of Securities Commissions as key activities for ASIC in a more integrated, complex and competitive environment.⁵⁴

4.35 Cross-border regulatory issues were highlighted in the annual report with ASIC making 330 international cooperation requests and receiving 424 requests during the reporting period. To further facilitate these efforts in international regulation and enforcement, ASIC entered into six memoranda of understanding with various services and commissions in Korea, Gibraltar and the United States.⁵⁵

4.36 ASIC also noted the provision of technical assistance to the Department of the Treasury for the purposes of developing and negotiating the Asia Region Funds Passport. The Passport is being developed with the aim of providing a 'multilaterally agreed framework to facilitate the cross border marketing of managed funds across participating economies in the Asian region.'⁵⁶

51 ASIC, *Annual Report 2014–15*, p. 39; Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 20 March 2015, p. 2.

52 ASIC, *ASIC's next generation market surveillance system commences*, Media Release, 25 November 2013, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-316mr-asics-next-generation-market-surveillance-system-commences/> (accessed 4 April 2016)

53 ASIC, *Annual Report 2014-15*, p. 53.

54 ASIC, *Annual Report 2014-15*, pp 3, 43, 47, 62–63.

55 ASIC, *Annual Report 2014-15*, pp 20–21.

56 ASIC, *Annual Report 2014-15*, p. 47.

4.37 The committee notes the potential impact that increases in cross-border compliance, industry driven requests for assistance and requirements under international agreements could have on ASICs resources.⁵⁷ The committee will continue to monitor the capacity of ASIC to recover costs in these areas.

Financial advisers register

4.38 In March 2015 ASIC launched the Financial Advisers Register, which at the end of the reporting period had 22,000 financial advisers listed and had been searched more than 200,000 times.⁵⁸ The register:

...contains details of persons employed or authorised – directly or indirectly – by AFS licences to provide personal advice on 'relevant financial products' to retail clients.⁵⁹

4.39 The Financial Advisers Register was updated in May/June 2015 to also include information about the qualifications, training and professional memberships of financial advisers.

4.40 Following the implementation of the Financial Advisers Register the committee raised concerns about financial advisers who have been banned not appearing on the Financial Advisers Register.⁶⁰ This has led to questions by the committee about:

- the ability of ASIC to incorporate information from the banned and disqualified person's register in the Financial Advisers Register so as to facilitate having publicly accessible information about financial advisers in a single location;⁶¹ and
- the restrictions placed on ASIC, by the regulations for the Financial Advisers Register, in terms of their ability to capture retrospective data in relation to advisers who had ceased practising prior to 31 March 2015.⁶²

Recommendation 2

4.41 That the government consider strengthening the register by enabling the inclusion of retrospective data on banned and disqualified financial advisers on the Financial Advisers Register.

57 *Committee Hansard*, 20 March 2015, p. 21–24.

58 ASIC, *Annual Report 2014–15*, p. 68.

59 ASIC, *Annual Report 2014–15*, p. 68.

60 *Committee Hansard*, 16 October 2015, pp 2–5.

61 *Committee Hansard*, 16 October 2015, pp 2–5; 19 November 2015, pp 4–5.

62 *Committee Hansard*, 16 October 2015, pp 2–5; 19 November 2015, pp 4–5.

Other registers

4.42 The annual report notes that during the reporting period the government announced a competitive tender process to test the capacity of a private sector operator to upgrade and operate the ASIC registry.⁶³

4.43 During 2014–15 ASIC redesigned its website and continued to digitise its registry services. In its annual report ASIC noted this has provided a more contemporary service for customers with corresponding increases in:

- the online submission of registry lodgements;
- the online submission of lodgements to the companies register;
- the number of online searches of the ASIC register, up almost 10 million searches from 2013–14; and
- a significant increase in followers on social media channels such as ASIC Connect Facebook (up by 74%) and ASIC Connect Twitter (up by 47%).⁶⁴

4.44 The ASIC annual report indicates that the number of authorised financial markets operating in Australia increased from 40 in 2013–14 to 43 in 2014–15, a marginal increase compared to the doubling of the figures from 2012–13 to 2013–14.⁶⁵ The continued increase is in line with ASIC's indication in early 2015 that the increase is due to the increasing fragmentation of markets because of technology and the effect of Australian Pacific Exchange (APX) coming into the market in 2013–14.⁶⁶

4.45 The ASIC annual report notes that in 2014–15 there was a halving of the number of Self-Managed Super Fund (SMSF) auditor registrations, which reached a total of 123, down from 240 in 2013–14 and 7,194 in 2012–13.⁶⁷ The drop in registrations is indicative of the slow down expected once SMSF auditors had complied with the new mandatory registration requirements in the last half of 2013 but is still below the expected 200–300 registrations per year.⁶⁸ The committee will continue to monitor the trend in the number registrations.

63 ASIC, *Annual Report 2014–15*, p. 64.

64 ASIC, *Annual Report 2014–15*, p. 65.

65 ASIC, *Annual Report 2014–15*, p. 167.

66 Ms Cathie Armour, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 20 March 2015, p. 18; Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 20 March 2015, p. 18.

67 ASIC, *Annual Report 2014–15*, p. 68; *Annual report 2013–14*, p. 55.

68 Mr Greg Tanzer, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 20 March 2015, p. 20.

Culture and whistleblowing

4.46 In an effort to promote good conduct and shift the banking and financial sector culture in the right direction, the ASIC annual report indicates that the number of consultations with domestic stakeholders, under Priority Two – Fair, orderly, transparent and efficient markets, has increased, with the number of meetings with domestic stakeholders increasing to 876, up from 487 in 2013–14.⁶⁹

4.47 In response to recommendations from the Senate Economics References Committee inquiry into the performance of ASIC, during 2014–15 ASIC established an Office of the Whistleblower and adopted a centralised monitoring procedure for whistleblower complaints. The new office will 'monitor the handling of all whistleblower reports, manage staff development and training, and handle the relationship with whistleblowers on more complex matters.'⁷⁰

Education and financial literacy

4.48 ASIC released the National Financial Literacy Strategy 2014–17 in August 2014. As the annual report indicates the strategy sets out a national direction for financial literacy and provides a practical framework for action built around five strategic priorities:

1. Educate the next generation, particularly through the formal education system
2. Increase the use of free, impartial information, tools and resources
3. Provide quality targeted guidance and support
4. Strengthen coordination and effective partnerships
5. Improve research, measurement and evaluation.⁷¹

4.49 In line with the aim of providing education and tools to help the community with their financial decisions, the annual report notes that ASIC's MoneySmart website provides free, impartial and comprehensive investor and consumer information on money matters. During the reporting period there were 5.4 million unique visits to website, an increase of 15% from 2013–14. Follow-up research has also shown that 89% of users 'took action on their finances after visiting the site.'⁷²

4.50 ASIC's MoneySmart Teaching program also expanded with 3185 schools engaged during the reporting period compared with 396 for 2013–14.⁷³ Over 76,000 teaching resources for the program were also distributed.⁷⁴

69 ASIC, *Annual Report 2014–15*, p. 50; ASIC, *Annual report 2013–14*, p. 38.

70 ASIC, *Annual Report 2014–15*, p. 14.

71 ASIC, *Annual Report 2014–15*, p. 41.

72 ASIC, *Annual Report 2014–15*, pp 41, 161.

73 ASIC, *Annual Report 2014–15*, p. 6.

74 ASIC, *Annual Report 2014–15*, pp 42, 161.

4.51 During 2014–15 Australia was one of a select group of countries to contribute to the Organisation for Economic Cooperation and Development (OECD) handbook on the implementation of national strategies for financial education.⁷⁵

Regulatory guidance

4.52 A total of 22 new or revised regulatory guides were published by ASIC during the reporting period. These included guides on superannuation forecasts, responsible lending, digital disclosure, cyber resilience and the resignation, removal and replacement of company auditors.⁷⁶

4.53 Following feedback from an FRC survey of directors and financial reporting professionals on the financial literacy of company directors, conducted in 2012, ASIC launched a financial reporting quiz in December 2014 to help directors test their knowledge of financial reporting and to direct them to additional resources that may assist in improving their knowledge.⁷⁷ During the reporting period this quiz has been completed by more than 2000 directors and responses have been collected by a third party provider.⁷⁸ ASIC seeks to use this information to assist them and other organisations, such as the Australian Institute of Company Directors and the Institute of Public Accountants 'in considering ways to assist in educating directors in the future.'⁷⁹ The committee will monitor the outcomes of this initiative.

Professional, ethical and education standards in the financial services industry

4.54 Following a recommendation by the Senate Economics References inquiry into the performance of ASIC, the Parliamentary Joint Committee on Corporations and Financial Services resolved on 14 July 2014 to inquire into proposals to lift the professional, ethical and education standards in the financial services industry (standards inquiry).⁸⁰ ASIC provided a submission to this inquiry and notes in its annual report that it supported many of the report's recommendations.⁸¹

75 ASIC represents Australia in the Organisation for Economic Cooperation and Development (OECD); ASIC, *Annual Report 2014–15*, p. 43.

76 ASIC, *Annual Report 2014–15*, pp 6, 8, 57–58.

77 Financial Reporting Council, *FRC survey on Financial Literacy of Australian Directors*, September 2012, <http://www.frc.gov.au/files/2013/12/Paper-survey-financial-literacy-2013.pdf> (accessed 8 March 2016).

78 ASIC, *Annual Report 2014–15*, p. 58; ASIC, *Financial reporting quiz for directors*, <http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/directors-and-financial-reporting/financial-reporting-quiz-for-directors/> (accessed 8 March 2016); ASIC, answer to question on notice, 9 March 2016 (received 19 April 2016).

79 ASIC, *Answer to question on notice*, 9 March 2016 (received 19 April 2016).

80 Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. xxx1–xxxiii ; Parliamentary Joint Committee on the Corporations and Financial Services, *Inquiry into proposals to lift the professional and ethical and education standards in the financial services industry*, December 2014, p. 2; ASIC, *Annual Report 2014–15*, p. 13.

81 ASIC, *Annual Report 2014–15*, p. 13.

4.55 Following extensive consultations on the recommendations contained in the standards inquiry report the government decided to incorporate its response to the standards inquiry in its response to the Financial System Inquiry (FSI).⁸² At the time of preparing this report the government has agreed to develop legislation that supports a number of the report's recommendations, including the requirements for financial advisers to:

- hold a degree qualification;
- undertake a professional year;
- undertake ongoing professional development;
- pass a registration exam; and
- subscribe to a code of ethics.⁸³

4.56 It is of note that until these measures are implemented, financial product advisers will still be required to meet the minimum training standards as set out in RG146. At the time of preparing this report more than 2000 new financial advisers have been added to the register following completion of the training requirements.⁸⁴ In response to the committee's concerns about the adequacy of RG146, ASIC indicated that within the financial advice industry there is a recognition about changing standards of education and professionalism and many firms have already sought to have their advisers improve their qualifications.⁸⁵ ASIC also indicated that it will continue to undertake surveillance and provide feedback in relation to licensees' obligations to provide adequate training for their advisers.⁸⁶

4.57 The committee will continue to monitor the adequacy of current training requirements for financial advisers.

External dispute resolution

4.58 Following a recommendation by the Senate Economics References inquiry into the performance of ASIC, the annual report contains commentary on the work of the financial services and consumer credit external dispute resolution (EDR) schemes.⁸⁷ The 2014–15 annual report notes the significant issues the two EDR schemes, the Financial Ombudsman Service (FOS) and the Credit and Investments

82 The Government response to the FSI was released in October 2015.

83 Australian Government, *Improving Australia's Financial System: Government Response to the Financial System Inquiry*, October 2015, p. 21.

84 *Committee Hansard*, 16 October 2015, p. 10.

85 Ms Louise Macaulay, Senior Executive Leader, Financial Advisers, Australian Securities and Investments Commission, *Committee Hansard*, 19 November 2015, p. 5.

86 *Committee Hansard*, 19 November 2015, pp 5–7.

87 Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. xxiii-xxiv.

Ombudsman (CIO), have raised in their reports to ASIC and action taken by ASIC in relation to these issues.⁸⁸

4.59 During the reporting period the FOS and CIO reported on 93 definite systemic issues and 25 cases of serious misconduct. ASIC was able, where appropriate, to use information from these reports to inform new and current investigations.⁸⁹

4.60 During the reporting period the FOS implemented many of the recommendations from its 2013 independent review and engaged with ASIC in relation to changes to its terms of reference, many of which came into effect on 1 January 2015.⁹⁰

Deregulation

4.61 In line with the deregulation focus articulated in the government's Statement of Expectations, ASIC has continued to seek ways to reduce red tape and lower compliance costs. ASIC notes the following achievements in this area:

- reaching \$119.6 million in compliance savings for business which was in excess of the target set by the Government;
- the establishment of the Innovation hub;⁹¹
- the continuation of ASIC's Business Names Register;⁹² and
- the establishment of the Market Entity Compliance system.⁹³

Other emerging issues

4.62 In its annual report ASIC identified a number of issues that it sees as its key challenges in the long-term. In an environment of advancing technology, digital disruption and cyber resilience were highlighted as becoming increasingly important and complex. In response to these emerging issues ASIC has noted in its annual report the following developments during the 2014–15 reporting period:

- issuing guidance and information reports in relation to assisting the sector to understand emerging risks in an era of fast paced technological change;

88 ASIC, *Annual Report 2014–15*, pp 14, 58.

89 ASIC, *Annual Report 2014–15*, p. 58.

90 ASIC, *Annual Report 2014–15*, p. 48.

91 The Innovation Hub is an ASIC initiative for new financial technology businesses that are developing innovative financial products or services. Through the Innovation Hub eligible financial technology startup businesses can receive informal assistance to help them navigate ASIC's regulatory system; see <http://asic.gov.au/for-business/your-business/innovation-hub/>

92 The market entity compliance system (MECS) is an online regulatory compliance portal that provides market entities with tools and information to assist them in complying with a number of their regulatory obligations; see <http://asic.gov.au/online-services/register-for-online-access/market-entity-compliance-system/>

93 ASIC, *Annual Report 2014–15*, pp 12–13.

- the development of an Innovation Hub to help financial technology start-ups understand the regulatory system;
- the development of a Cyber Resilience Model to better understand how investment banks manage cyber resilience;
- the issuing of a cyber-resilience report to help financial markets and the financial system manage all aspect of a cyber-attack; and
- the establishment of a Digital Finance Advisory Committee to help ASIC monitor and understand developments in the digital sphere including digital platforms that enable crowd sourced funding and market place lending, digital currencies and 'blockchain technology'.⁹⁴

4.63 It is also of note that in the reporting period that ASIC continued to respond to emerging developments and opportunities such as:

- globalisation;
- complexity driven by financial innovation;
- structural change driven by superannuation;
- conduct risk and the balance between a free market-based system and investor and financial consumer protection;
- digital currencies;
- high frequency trading; and
- dark liquidity (dark pools).⁹⁵

Inquiries and reviews

4.64 The ANAO have noted that a key area of attention during 2015–16 will be the regulatory functions of Australian Prudential Regulation Authority (APRA), ASIC and the Australian Competition and Consumer Commission (ACCC).⁹⁶

4.65 ASIC noted in its annual report a number of areas that had been identified during the course of inquiries, reviews and hearing as in need of review and reform. These included:

- the need for an industry funding model;
- the need for a 'more flexible regulatory toolkit' which would include product intervention powers;
- the need for adequate penalties; and
- continued work towards lifting professional, ethical and education standards in the financial advice sector.

94 ASIC, *Annual Report 2014–15*

95 ASIC, *Annual Report 2014–15*, pp 2–3, 50–51.

96 ANAO, *Audit Work Program, July 2015*, p. 127.

4.66 The annual report forecasts that there will also be ongoing developments in these and other areas during 2015–16 as a result of recommendations and proposals that result from the completion of:

- ASIC's four-year corporate plan;
- the government response to the Financial System Inquiry (FSI); and
- the capability review into ASIC.⁹⁷

4.67 The Capability Review found that many of ASIC's regulatory capabilities are in line with global best practice. However, the review recommended additional measures to support ASIC in delivering its mandate and ensuring it is fit for the future. The Capability Review found there were aspects of strategy, governance, IT, data infrastructure, management information systems and ASIC's approach to stakeholder engagement that required improvement.⁹⁸

4.68 On 20 April 2016 the Commonwealth government released the ASIC Capability Review and the government response. The government also announced that five of the Capability Review recommendations would be implemented and that it expected ASIC to provide an implementation plan for the other 29 recommendations.⁹⁹ The committee welcomes and will monitor the implementation of the announcements including:

- a user pays industry funding model to deliver \$127m in additional funding;
- deepening the surveillance and enforcement capability of ASIC with a specific focus on investigating financial advice, responsible lending and life insurance;
- enhancing data analytics and surveillance capabilities as well as modernising data management systems;
- strengthening ASIC's powers;
- the appointment of an additional ASIC commissioner with experience in the prosecution of crimes in the financial services industry;
- bringing forward law reforms recommended by the Financial System Inquiry, including product intervention powers, product distribution obligations, strengthening consumer protection for electronic payments and a review of ASIC penalties and the enforcement regime.¹⁰⁰

97 ASIC, *Annual Report 2014–15*, p. 5.

98 Australian Government Factsheet, *Improving Consumer Outcomes in Financial Services*, 20 April 2016, p. 1.

99 Australian Government Factsheet, *Improving Consumer Outcomes in Financial Services*, 20 April 2016, p. 1.

100 Australian Government Factsheet, *Improving Consumer Outcomes in Financial Services*, 20 April 2016, p. 1; The Hon Scott Morrison MP, Treasurer, joint media release with the Hon Kelly O'Dwyer MP, Minister for Small Business, Assistant Treasurer, *Turnbull Government bolsters ASIC to protect Australian Consumers*, 20 April 2016.

Committee view

4.69 The committee notes that the recommendation it made in its examination of ASIC's 2012–13 annual report relating to the compliance index has been adopted in ASIC's 2014–15 annual report. The committee also notes that the recommendation it made in its examination of ASIC's 2012–13 annual report relating to the provision of more longitudinal data has been incorporated in ASIC's reporting on key outcomes in its 2014–15 annual report.

4.70 The committee notes that whilst the 2014–15 annual report does contain more information in relation to EUs than in previous years, it will continue to monitor ASIC's response to the ANAO audit recommendations and the information provided by ASIC on EUs in enforcement and annual reports.

4.71 The committee notes that the annual report confirms that ASIC has implemented or is working to implement many of the recommendations from the Senate Economics References Committee inquiry into the performance of ASIC and the Parliamentary Joint Committee on Corporations and Financial Services inquiry into proposals to lift professional, ethical and education standards in the financial services industry.

4.72 The committee considers that ASIC has fulfilled its annual reporting responsibilities during the 2014–15 financial year. The committee notes that ASIC is continuing to address significant changes to its mandate and the environment in which it operates as a result of global trends, emerging issues and recent reviews and inquiries. The committee will continue to use annual reports and other mechanisms to monitor ASIC's performance and ability to adapt appropriately.

4.73 The committee thanks ASIC for its contributions at hearings, responding to questions on notice, and the timely provision of information to the committee.

Senator David Fawcett
Chair