

# Chapter 3

## Overview of ASIC

3.1 This chapter aims to acquaint readers with the Australian Securities and Investments Commission (ASIC). ASIC is the corporate, markets, financial services and consumer credit regulator. It has existed as an independent Australian government statutory authority<sup>1</sup> since 1991, when the Australian Securities Commission, as it was then known, commenced operation.<sup>2</sup>

3.2 ASIC has general administration of the *Corporations Act 2001*, the principal legislation governing the affairs of companies in Australia. ASIC oversees company registration and notifications, and is tasked with seeking to ensure that companies, schemes, directors, company officers, auditors, insolvency practitioners and other market participants fulfil their legal obligations. ASIC licenses providers of financial services. It also licenses and regulates individuals and businesses that engage in consumer credit activities. In addition, ASIC's market regulation role makes it responsible for supervising financial market operators and participants, including real-time trading on Australia's domestic licensed markets.

3.3 These responsibilities mean that ASIC's work involves over two million companies, 5,000 Australian financial services (AFS) licensees, 5,800 credit providers, 4,800 registered company auditors, 680 registered liquidators, 4,150 registered managed investment schemes and 18 authorised financial markets.<sup>3</sup> Illustrating its broad remit, ASIC provided an overview of its activities and outcomes achieved. In the last three years to October 2013, ASIC:

- completed over 4,000 surveillances and 554 investigations with a broad range of regulatory outcomes;
- banned 131 individuals from providing financial services or credit services and 228 directors from managing a corporation;
- completed 73 civil and 79 criminal proceedings;
- entered into 56 enforceable undertakings with entities, as well as numerous other negotiated outcomes;
- cancelled, suspended or varied 72 AFS licences and credit licences;

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1 That is, an Australian government body established by legislation and empowered to perform its key functions independently of the government.

2 The Australian Securities Commission was renamed ASIC on 1 July 1998 when it became responsible for consumer protection in the areas of superannuation, insurance and deposit taking. The Australian Securities Commission's predecessor was the National Companies and Securities Commission (with functions also performed by state and territory agencies).

3 ASIC, *Annual Report 2012–13*, pp. 152.

- obtained over \$349 million in compensation for consumers;
- handled over two million telephone and 200,000 email queries;
- participated in over 1,500 stakeholder meetings;
- launched the MoneySmart consumer education website;
- implemented the new national business names register;
- granted relief (waivers) from the law to over 3,000 applicants to facilitate their business transactions; and
- handled nearly 40,000 complaints about misconduct.<sup>4</sup>

### **ASIC's statutory objectives and functions**

3.4 ASIC has functions under the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the Corporations Act and other legislation.<sup>5</sup> The ASIC Act requires that, in performing its functions and exercising its powers, ASIC must strive to:

- maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
- promote the confident and informed participation of investors and consumers in the financial system;
- administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements;
- receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it;
- ensure that information is available as soon as practicable for access by the public; and
- take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.<sup>6</sup>

3.5 In its main submission to the committee, ASIC provided the following overview of how it sees its role:

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4 ASIC, *Submission 45.2*, p. 9; and ASIC, correspondence dated 23 December 2013, p. 1.

5 Namely, the *Business Names Registration Act 2011*, *Business Names Registration (Transitional and Consequential Provisions) Act 2011*, *Insurance Contracts Act 1984*, *Superannuation (Resolution of Complaints) Act 1993*, *Superannuation Industry (Supervision) Act 1993*, *Retirement Savings Accounts Act 1997*, *Life Insurance Act 1995*, *National Consumer Credit Protection Act 2009* and the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

6 *Australian Securities and Investments Commission Act 2001*, s. 1(2).

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[ASIC] has a growing regulatory remit and operates in a global environment that is both complex and dynamic.

The forces of market-based financing, financial innovation-driven complexity and globalisation that are converging on our financial system create opportunities to fund economic growth; however, they also create risks.

Our challenge as a regulator is to respond quickly to the matters that require our attention, inform and educate investors and financial consumers so they can make confident and informed decisions, and ensure we have the capacity to effectively regulate financial markets, financial products and financial services providers, within the resources we have.<sup>7</sup>

3.6 When it was established in 1991, the main stated purpose of the Australian Securities Commission, as ASIC was then known, was 'to regulate companies and the securities and futures industries in Australia'.<sup>8</sup> ASIC's responsibilities have increased since then following various reforms pursued by successive governments, including as a result of intergovernmental agreements that resulted in the Commonwealth taking over certain responsibilities from the states and territories. In particular, ASIC gained significant new responsibilities between 2009 and 2012. However, as indicated by the following observation made in 2004 by ASIC's then acting chairman, ASIC has been required to operate in an environment of reform and change for a sustained period:

The background to all of these activities of ours is one of constant and continuous change. You have seen that the evolution of financial and corporate regulation in Australia over the last decade has been rapid and dramatic. Reform—legislative, common law, self-regulatory, industry-driven—seems to have been constant and will certainly not stop or really even pause in 2004. But that reform has been necessary, simply to try and keep pace (if indeed it has done that), with the growth and evolution of the markets in Australia that rely on effective regulation.<sup>9</sup>

3.7 A timeline of key legislative reforms and other developments that are relevant to ASIC's responsibilities is at Appendix 4.

## **Powers available to ASIC**

3.8 ASIC has the ability to register companies, businesses and managed investment schemes; grant AFS licences and Australian credit licences; register auditors, self-managed superannuation fund (SMSF) auditors and liquidators; grant relief from various legislative requirements; make rules aimed at ensuring the integrity

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7 ASIC, *Submission 45.2*, p. 6.

8 Explanatory Memorandum, Australian Securities Commission Bill 1988, p. 2.

9 Jeffrey Lucy AM, Acting Chairman, ASIC, Address to the Institute of Chartered Accountants in Australia Queensland 2004 CA Business Forum, Sanctuary Cove, Queensland, 13 March 2004, [www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAA\\_speech\\_130304.pdf/\\$file/ICAA\\_speech\\_130304.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAA_speech_130304.pdf/$file/ICAA_speech_130304.pdf) (accessed 5 September 2013), p. 2.

of financial markets; order the winding up of a company in certain circumstances; and impose a stop order if a product disclosure statement is defective. To assist it to carry out its functions, ASIC has been granted a variety of investigative and enforcement tools under the ASIC Act and the Corporations Act. These include the power to:

- conduct investigations into suspected contraventions of the ASIC Act and the Corporations Act (s. 13 of the ASIC Act);
- obtain a search warrant to investigate criminal offences (s. 3E of the *Crimes Act 1914*, pursuant to the general investigative power in s. 13 of the ASIC Act);<sup>10</sup>
- require persons to appear and answer questions under oath, and to give all reasonable assistance with an investigation (s. 19 of the ASIC Act);
- conduct hearings related to the performance or exercise of ASIC's functions or powers, including the power to summon witnesses to give evidence and produce documents (ss. 51 and 58 of the ASIC Act);<sup>11</sup>
- access telecommunications records (part 4-1 of the *Telecommunications (Interception and Access) Act 1979*) and make an application for a stored communications warrant (s. 110 of the *Telecommunications (Interception and Access) Act 1979*);
- inspect the books of a corporation (s. 29 of the ASIC Act), require the production of books relating to financial products, futures contracts and financial services (ss. 31, 32 and 32A of the ASIC Act); require the production by any person of books relating to the affairs of corporations and other regulated entities (s. 33 of the ASIC Act); and apply for a warrant to seize books not produced (ss. 35 and 36 of the ASIC Act);
- require a person to identify property of a corporation and explain how the corporation has kept account of that property (s. 39 of the ASIC Act);
- require a financial services business operator to disclose particulars relating to the acquisition or disposal of financial products (s. 41 of the ASIC Act) and require an officer of a corporation to disclose information relating to dealings with financial products (s. 43 of the ASIC Act);
- make orders in relation to securities, for example restraining persons from disposing or acquiring interests or exercising voting rights (ss. 72 and 73 of the ASIC Act);
- prosecute alleged offences against the corporations legislation<sup>12</sup> (s. 49 of the ASIC Act);

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10 ASIC, *ASIC's compulsory information-gathering powers*, Information Sheet 145, September 2011, p. 6.

11 During the hearing ASIC must observe the rules of natural justice. *Australian Securities and Investments Commission Act 2001*, s. 59(2)(c).

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- institute civil proceedings for the recovery of damages or property (s. 50 of the ASIC Act);
  - order that a person pay the expenses of an investigation that led to conviction or declaration of contravention (s. 91 of the ASIC Act);
  - apply to the court for enforcement of an undertaking given to ASIC (ss. 93A and 93AA of the ASIC Act);
  - disqualify a person from managing corporations for up to five years in defined circumstances (s. 206F of the Corporations Act);
  - apply for the enforcement of a licensed market's operating rules (s. 793C of the Corporations Act);
  - apply for orders freezing assets, appointing receivers, requiring the surrender of passports to the court and prohibiting a person from leaving Australia (s. 1323 of the Corporations Act);
  - apply for an injunction regarding contraventions or proposed contraventions of the Corporations Act (s. 1324 of the Corporations Act);
  - issue an infringement notice for alleged breaches of the provisions of the Australian Consumer Law that relate to financial products and services (s. 12GXA of the ASIC Act) or the continuous disclosure provisions (s. 1317DAC of the Corporations Act);
  - issue a notice requiring claims made regarding financial services to be substantiated (s. 12GY of the ASIC Act).

## **Governance and organisational structure**

3.9 ASIC is established under the ASIC Act. It comprises a chairperson, a deputy chairperson and between one and six other members (the commission).<sup>13</sup> ASIC's governance structure is considered in more detail in Chapter 26.

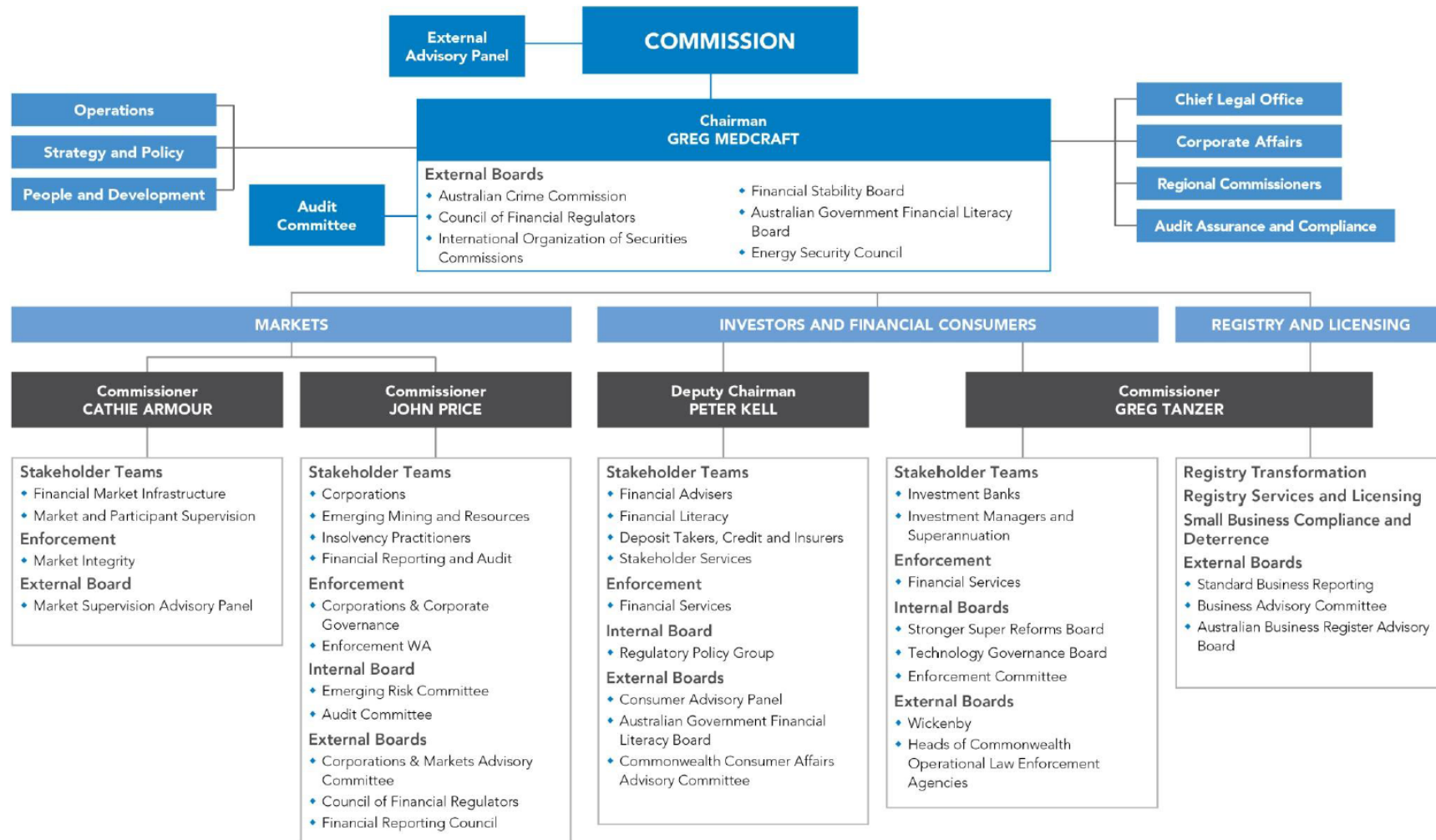
3.10 ASIC's overall organisational structure separates its operations into three broad 'clusters': markets; investors and financial consumers; and registry and licensing. Within these broad operations areas are multiple stakeholder and enforcement teams. ASIC's organisational structure is depicted at Figure 3.1.

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12 The corporations legislation consists of the Corporations Act, the ASIC Act and rules of court made or applied by specified courts, such as the Federal Court and state supreme courts. See *Corporations Act 2001*, s. 9.

13 Members of the commission are appointed by the Governor-General acting on the advice of the minister. The Commonwealth is also required to consult the Legislative and Governance Forum for Corporations (a council of COAG previously known as the Ministerial Council on Corporations) on the making of appointments to the commission. See Corporations Agreement 2002, as amended, 16 November 2005, subclause 601(1).

Figure 3.1: ASIC's corporate structure (as at October 2013)



Source: ASIC, *Submission 45.2*, p. 15.

## ASIC's resources

3.11 In 2012–13, ASIC received \$350 million in appropriation revenue and \$17 million from other sources. Its operating expenses were approximately \$411 million. ASIC employed 1,844 staff on a full-time equivalent (FTE) basis.<sup>14</sup>

3.12 At times, ASIC has been granted additional funding through the Budget process either as a result of new responsibilities it has been given or to supplement its operations. Some recent examples are listed below:

- The 2013–14 Budget included around \$10 million over the forward estimates in additional funding for ASIC's client contact centre (as a result of the national business names registration system); over-the-counter derivatives market supervision; the Superannuation Complaints Tribunal (SCT); and the tax agent licensing regime for financial advisers.<sup>15</sup>
- In the 2012–13 *Mid-Year Economic and Fiscal Outlook* (MYEFO), it was announced that ASIC would receive additional operating funding of \$20 million over two years to support its regulation and supervision of financial markets. An additional \$2.1 million relating to the administration of transferring unclaimed monies to ASIC was also announced.<sup>16</sup>
- In the 2012–13 Budget, an additional \$101.9 million over four years for ASIC's operational funding was announced. Also allocated was \$23.9 million to facilitate the implementation of the Future of Financial Advice (FOFA) reforms and \$43.7 million over four years to enhance ASIC's market surveillance system.<sup>17</sup>
- ASIC received an additional \$4.6 million over four years 'for licensing, compliance and deterrence activities in relation to [AFS] license holders dealing in carbon permits' in the 2011–12 MYEFO.<sup>18</sup>
- In the 2011–12 Budget, ASIC received \$28.8 million to supplement its operating activities.<sup>19</sup>
- In the 2010–11 Budget, an extra \$29.1 million was provided for the national business names register. An additional \$5.9 million over four years was also provided for the SCT.<sup>20</sup>

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14 ASIC, *Annual Report 2012–13*, p. 19.

15 Australian Government, *Portfolio Budget Statement: Treasury Portfolio*, 2013–14 Budget, p. 156.

16 Australian Government, *2012–13 Mid-Year Economic and Fiscal Outlook*, pp. 276–77.

17 Australian Government, *2012–13 Budget: Budget Paper No. 2*, pp. 277–78.

18 Australian Government, *2011–12 Mid-Year Economic and Fiscal Outlook*, pp. 287–88.

19 Australian Government, *2011–12 Budget: Budget Paper No. 2*, p. 318.

20 Australian Government, *2010–11 Budget: Budget Paper No. 2*, pp. 276 and 299.

3.13 However, ASIC has also been subject to the efficiency dividend applied to government departments and agencies.<sup>21</sup> ASIC's funding over the forward estimates was also reduced as part of the most recent Budget. The amount of funding provided to ASIC and the funding model utilised to determine its funding clearly will have a significant impact on the agency's performance. These issues are examined in more detail in Chapter 25.

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21 The efficiency dividend is an annual reduction in funding for Commonwealth departments and agencies that receive government appropriations. The efficiency dividend generally targets departmental appropriations rather than administered appropriations. Since the 2011–12 Budget, however, the efficiency dividend has been applied at the portfolio level rather than to each agency. N Horne, *The Commonwealth efficiency dividend: an overview*, Background Note, Australian Parliamentary Library, 13 December 2012, pp. 8–9, 38.