

**ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING,
SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY**

**SUBMISSIONS OF THE AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**

RESPONSE TO INTERIM REPORT

The Australian Securities and Investments Commission (ASIC) makes the following submissions in response to the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission), issued on 28 September 2018 (Interim Report).

INTRODUCTION

1. The Royal Commission has examined widespread misconduct and conduct that does not meet community standards across the finance sector. As the Royal Commission observes,¹ the missing market deterrents to misconduct by the largest financial institutions – meaningful competitive pressures, fear of collapse of the firm and fear of failure of individual financial transactions as the firms write the terms of the deal – place greater demands on the regulators. The Royal Commission has appropriately focused on the role of regulators in preventing or dealing with misconduct.
2. The human impacts and personal costs of financial sector misconduct have been clearly demonstrated. Their consequences are often greater than in other parts of the economy because of the devastating impact of significant monetary loss on individuals and families. The Royal Commission has highlighted that this conduct can have negative outcomes right across the community, especially the more financially vulnerable consumers.
3. ASIC agrees with the Royal Commission that the problematic conduct raises basic questions about culture and governance in financial institutions. The governance, leadership and culture of financial institutions have not worked to ensure good consumer outcomes – and too often appears to have incentivised poor behaviour and prioritised the interests of the financial institutions over consumers – while competitive and market forces have not had a sufficient moderating impact. ASIC highlights the importance of culture at both the individual firm level *and* across industry sectors, as many of the problems are cross-sectoral in nature.
4. A basic requirement of the financial system – the frontline obligation on financial services licensees to ensure that financial services are provided *efficiently, honestly and fairly* – has clearly not been observed on many occasions. This raises important questions about how to ensure that the boards and senior management of financial institutions

¹ Interim Report, Volume 1 (at p. 268–269).

observe this fundamental requirement and take greater responsibility for the conduct of their financial institution and the people within them.

5. The Royal Commission has identified the corrosive effect of widespread conflicts of interest. Conflicts of interest have been embedded in the financial system in ways that have manifestly harmed consumers and contributed to systemic market problems. This includes conflicts of interest in remuneration, in product design, and in business structures.
6. Many of these conflicts of interest have been, and still are, expressly permitted in the regulatory framework that governs the financial system. This *misalignment of interests* between financial institutions and consumers is at the heart of the problems that have been identified in the financial sector. ASIC agrees with the Royal Commission that a critical examination of the pervasive conflicts in the finance sector is warranted.²
7. The Royal Commission has made observations and criticisms about ASIC's approach to regulation, in particular the approach to court-based enforcement and initiating litigation. ASIC takes these comments very seriously. It accepts that it needs to make changes.

STRUCTURE OF THESE SUBMISSIONS

8. These submissions are organised under three broad headings: ASIC's role and approach to regulation; addressing conduct risk; and other policy matters – specific questions on industry sectors and laws.
9. In its response to counsel assisting's closing submissions for each of the consumer lending, financial advice, lending to small and medium enterprises, and lending to agriculture and remote communities rounds of hearing the subject of the Interim Report, ASIC made detailed submissions on variants of many of the policy questions now posed in the Interim Report on those topics. ASIC does not, in general, repeat them here.

ASIC'S ROLE AND APPROACH TO REGULATION

ASIC's role³

10. ASIC's statutory objectives are to facilitate and improve the performance of the financial system (including fair and efficient markets); promote the confident and informed participation of investors and consumers; administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; take whatever action it can take, and is necessary, to enforce and give effect to these laws; and conduct an efficient registry: s1(2) of the *Australian Securities and Investments Commission Act*

² The Trust Deficit and Corporate Australia. *Keynote address by James Shipton, Chair, Australian Securities and Investments Commission, Australian Council of Superannuation Investors Annual Conference (Sydney, Australia), 17 May 2018.* <https://download.asic.gov.au/media/4744026/james-shipton-speech-the-trust-deficit-and-corporate-australia-17-may-2018.pdf>.

³ Under this heading ASIC addresses the following question posed in the Interim Report, Volume 1 (at pgs 299, 399): **Is ASIC's remit too large?**

2001 (Cth) (ASIC Act). Following a recent amendment to the ASIC Act, ASIC must also consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system. ASIC also has the function of monitoring and promoting market integrity and consumer protection in the Australian financial system: s12A (2) of the ASIC Act.

11. The size of ASIC's remit across the corporate and financial sector was recently considered by the *Financial System Inquiry Final Report (FSI Report)*.⁴ While acknowledging that remit to be wide, particularly given its limitations of power and resources⁵ – the former of which have subsequently been reviewed and recommendations for change made⁶ – the *FSI Report* stated that the Inquiry was not persuaded of a strong case for a reduction of ASIC's functions.⁷
12. The transfer of parts of ASIC's regulatory remit to another agency or regulatory body would be a major legislative and practical change. It would also be unwarranted. There are significant benefits in having integrated consumer protection and market integrity functions and one regulator administering both positive conduct rules and licensing, as well as general consumer protection, within those areas.
13. In carrying out its remit, ASIC acts independently of government in the exercise of its functions and powers. Although independent, it operates as part of the executive arm of government and is accountable to Parliament. ASIC's role and statutory objectives, and how Government expects ASIC to fulfil and balance its role and objectives respectively, have been recently referred to in the Government's *Statement of Expectations – Australian Securities and Investments Commission*, April 2018 (ASIC Statement of Expectations).⁸
14. While ASIC cannot eliminate all risk in the financial system it is expected to reduce the likelihood of consumers suffering losses through misconduct by corporations and financial services or credit licensees.⁹ It is expected to take a risk-based approach to identifying and addressing misconduct, and that includes ensuring that action it takes is appropriately targeted and proportionate.¹⁰ It is expected to use its full regulatory toolkit but direct a substantial proportion of its resources to surveillance and enforcement.¹¹

⁴ Exhibit 2.1.24, November 2014, *FSI Report*, p. 235.

⁵ Ibid 236.

⁶ Australian Government, *ASIC Enforcement Review Taskforce Report (December 2017)*, Executive Summary, xi to xiii.

⁷ Save and except ASIC's registry function, which ASIC notes is to be transferred. As of 30 September 2018, there were 203 staff in ASIC's registry team with 25 staff from other functional areas within ASIC also providing registry support.

⁸ The ASIC Statement of Expectations is available at www.asic.gov.au/about-asic/what-we-do/our-role/statements-of-expectations-and-intent/statement-of-expectations-australian-securities-and-investments-commission-april-2018/

⁹ ASIC Statement of Expectations, [7].

¹⁰ Ibid [9].

¹¹ Ibid [7]-[8].

15. The Government recognises that ASIC must balance several objectives aimed at both facilitating markets while promoting trust and confidence in the financial system. This may require decisions to be made as to approach and balance that are difficult and require ‘trade-offs’.¹²
16. ASIC is expected to have an ‘open and sound working relationship with supervised entities and to ensure that industry participants are encouraged to communicate considered and candid views to ASIC’.¹³
17. These matters, and others (such as obligations under the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act)), inform ASIC’s regulatory approach, priorities and practices.

ASIC’s regulatory approach and its enforcement priorities and practices¹⁴

ASIC’s regulatory approach, the Interim Report’s principal criticism of it and ASIC’s response – A summary

18. The aim of regulation is to modify behaviour, with respect to agreed norms, in order to preserve the benefits of the underlying enterprise or activity to the community, including consumers.¹⁵ That requires identification, diagnosis, prioritisation and then finding solutions to threats, harms and behaviours.
19. In its evidence before, and in submissions to, the Royal Commission to date, ASIC has set out the strategic regulation theory underpinning its general approach to regulation and enforcement within its areas of responsibility.¹⁶
20. That theory, responsive regulation, is commonly identified with the work of Professor Ian Ayres and John Braithwaite. A central feature of this theory is the escalating ‘enforcement pyramid’. Because it is not possible to eliminate all risk of misconduct, the enforcement pyramid is employed to promote voluntary compliance. Responsive regulation is generally accepted as an appropriate basis to apply to regulators with resource limitations and responsibilities, not limited to simply enforcing the laws.
21. ASIC is also influenced by the regulatory approach described by Professor Sparrow from the Harvard Kennedy School of Government.¹⁷ That approach is to identify the most

¹² Ibid [12]–[13].

¹³ Ibid [31].

¹⁴ Under this heading ASIC principally addresses the following questions posed in the Interim Report, Volume 1 (at p. 299–300): **Are ASIC’s enforcement practices satisfactory? If not, how should they be changed? Should ASIC’s enforcement priorities change? In particular, if there is a reasonable prospect of proving contravention, should ASIC institute proceedings unless it determines that it is in the public interest not to do so?** Where ASIC addresses other questions in doing so, that is noted.

¹⁵ C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (2015), p. 161.

¹⁶ ASIC’s Round 2 Submissions at [105]–[122].

¹⁷ His approach is set out in two books: *The Regulatory Craft: Controlling risks, solving problems and managing compliance*, Brookings Institution Press 2000 and *The Character of Harms: Operational challenges in control*, Cambridge University Press 2008.

important problems or greatest harms that threaten the regulatory landscape for which the regulator is responsible. Solutions for any particular problem include a traditional enforcement response, but extend to supervisory engagement, behavioural techniques, outreach, education campaigns, working with industry and other solutions.

22. Risk-based regulation, the regulatory pyramid and Sparrow's problems and harms-based approach are all efforts to establish for regulators an 'expert' risk-based approach which uses different regulatory tools based on which is best adapted to the particular problem they are seeking to resolve. The aim is a 'regulatory stance' or strategy which is both enduring and adaptive to the changing circumstances the regulator faces over time. Sparrow refers to this as the 'regulatory craft'.
23. The enforcement pyramid model of sanctions of escalating severity has been found to be a sound foundation for enabling a regulator to address corporate misconduct – particularly by larger financial institutions.¹⁸
24. ASIC perceives the Interim Report's central criticism of its regulatory approach to identified actual or potential misconduct, and then enforcement practice, to be as follows: ASIC's starting point with potential or actual contraveners is too often either persuasion and education or negotiation and settlement. It too rarely or too slowly moves away from either, even in the face of unsatisfactory responses or outcomes, and cedes some level of control over consequences to the contraveners themselves in so doing. Given that the Braithwaite model's effectiveness to regulate behaviour – particularly here to prevent potential misconduct – relies on agile movement up the enforcement pyramid or the real threat of the same, then ASIC does not optimise the model and accordingly does not adequately deter or punish misconduct or modify behaviours giving rise to that misconduct.
25. ASIC accepts that it must alter its enforcement priorities and practices within the financial sector – and particularly for larger financial institutions – to be more agile in initiating and prosecuting court action, and in many instances even commencing with it. ASIC acknowledges that for larger financial institutions it should deploy enforcement tools towards the apex of the enforcement pyramid more frequently, particularly criminal and civil court actions. Strategic regulation can only work where the regulator evidences a clear willingness to employ severe sanctions to punish those who commit serious or repeated violations.¹⁹
26. As Professor Braithwaite himself has explained, it is not possible however for any regulatory agency all of the time to 'operate near the peak of the enforcement pyramid'

¹⁸ Senate Economics References Committee Report *Performance of the Australian Securities and Investments Commission* June 2014 at [17.50].

– if punishment were adopted on every occasion, this would be unaffordable, unworkable and counterproductive.²⁰ This must especially be so for an agency that oversees an exceptionally large number of corporations and corporate actors.²¹

ASIC's enforcement

27. ASIC is conducting a review and analysis of its enforcement policies, processes and decision-making procedures (Internal Enforcement Review), including its use of court action and the types of penalties sought, to assist it to effect this, with an emphasis on enforcement activities that will best sharpen financial institutions' focus on conduct risk. This review is expected to be completed by the end of 2018.²² The Internal Enforcement 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.
28. Pending the outcome of the Internal Enforcement Review, ASIC has introduced a number of interim measures (and more will occur in light of the changes referred to above) (Interim Enforcement Measures). The Interim Enforcement Measures are primarily designed to ensure that the Chair of ASIC's Enforcement Committee reviews all decisions to proceed other than by way of litigation. That review will be conducted with the sponsoring Commissioner. For example, the Interim Enforcement Measures require the Chair of ASIC's Enforcement Committee to be informed of and approve any decision not to commence proceedings²³ or any decision to proceed by way of an enforceable undertaking.²⁴ Enforcement teams must also provide a weekly status report on litigation to the Chair of ASIC's Enforcement Committee.²⁵
29. ASIC will also:

²⁰ John Braithwaite, *Responsive Business Regulatory Institutions* in CAJ Coady and CJG Sampford (eds) *Business, Ethics and the Law* (1993) 83, 88-89; Michelle Welsh "Civil Penalties and Responsive Regulation: The Gap between Theory and Practice" 33 MULR 908, 915.

²¹ It is to be noted that ASIC, *Fit for the Future: A capability review of the Australian Securities and Investments Commission*, 4 December 2015, 11 expressed a concern at that time that ASIC's articulation of its role, especially by the leadership, showed *too heavy* an emphasis on enforcement, described as a reactive tool.

²² Terms of Reference – Review of ASIC's Enforcement Policies, Processes and Decision-Making Procedures approved by the Commissioners on 17 October 2018.

²³ Interim Enforcement Measure Nos 1 and 2.

²⁴ Interim Enforcement Measure Nos 3 and 4.

²⁵ Interim Enforcement Measure No 5.

- a. *Accelerate its enforcement activities and its capacity to pursue actions for serious misconduct through greater use of external expertise and resources, and carry out enhanced supervision of financial and corporate actors.*²⁶
- b. *Move more quickly to, and accordingly conduct more, civil and criminal court actions against larger financial institutions.*
- c. *Ask the question ‘Why not litigate?’, including in a case where there is a need to clarify the meaning and effect of the laws that ASIC administers, particularly to support interpretations that may have a significant impact on deterring misconduct.*

Legislation changes

30. The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* (the Penalties Bill) was introduced to Parliament on 24 October 2018. The Bill provides for higher civil penalties and higher criminal penalties for contraventions of the *Corporations Act 2001* (Corporations Act) and associated Acts.
31. Most notably, the Penalties Bill introduces civil penalties for contraventions of s912A of the Corporations Act.²⁷ It introduces new maximum civil penalties as follows:
 - a. for individuals, the greater of 5,000 penalty units (\$1.05 million) and three times the benefit obtained or detriment avoided; and
 - b. for corporations, the greater of 50,000 penalty units (\$10.5 million), three times the benefit obtained or detriment avoided and 10% annual turnover (with a cap of 1 million penalty units, currently \$210 million).²⁸
32. The Bill also introduces a disgorgement remedy, which allows the Court to make a ‘relinquishment order’ requiring the contravenor to pay the Commonwealth an amount equal to the benefit derived or detriment avoided because of the contravention.²⁹
33. Section 912A contains the core obligations owed by each financial services licensee, including the obligation to:
 - a. do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (s912A(1)(a));
 - b. have in place adequate arrangements for the management of conflicts of interests (s912A(1)(aa)); and
 - c. ensure that its representatives comply with the financial services laws (s912A(1)(ca)).

²⁶ ASIC Corporate Plan 2018–22, *Focus 2018–19*, p. 11.

²⁷ Schedule 1 Part 1 items 76 and 116 of the Penalties Bill.

²⁸ Item 117 of the Penalties Bill.

²⁹ Schedule 1 Part 1 item 117 of the Penalties Bill.

34. The systemic failures by the banks and other participants in the financial services industry to comply with s912A have been identified. Dishonesty is a central theme.
35. The Penalties Bill introduces civil penalties for contraventions of s912D.³⁰ The Bill also increases the penalty for breaches of s912D(1B) to two years imprisonment.³¹ The Government has agreed in principle to amend s912D such that it requires an objective rather than subjective test.
36. The Bill also introduces a new s12GBCA of the ASIC Act and provides for the following pecuniary penalties:
- a. for individuals, the greater of 5,000 penalty units (\$1.05 million) and three times the benefit obtained or detriment avoided; and
 - b. for corporations, the greater of 50,000 penalty units (\$10.5 million), three times the benefit obtained or detriment avoided and 10% annual turnover (with a cap of 1 million penalty units, currently \$210 million).³²
37. These reforms will arm ASIC with enhanced tools to bring financial institutions to account for breaches of s912A. The potential penalties are severe and they will be sought by ASIC.
38. The consequences of any failure to report breaches or potential breaches of s912A within ten days under s912D(1B) are severe and will be sought by ASIC.

Cultural change

39. The transformative amendment to s912A and an increased focus by ASIC on pursuing litigation, particularly against larger financial institutions, should force significant cultural change in the financial services industry.
40. In addition, in circumstances where large institutions have failed to perform their 'first line' of compliance function,³³ ASIC will put pressure on them to change their culture by implementing, in parallel, a new and more intensive supervisory approach. ASIC will regularly conduct onsite supervision in major financial institutions and superannuation entities to closely monitor their governance and compliance processes and culture, using thematic engagements. In addition, work will be undertaken to look at governance practices within financial institutions.

³⁰ Schedule 1 Part 1 items 77 and 116 of the Penalties Bill.

³¹ Item 140 of the Penalties Bill substitutes a new Schedule 3 into the Act.

³² Schedule 2 Part 1 of the Penalties Bill at item 8.

³³ As required under s912A.

41. ASIC recognises that its enforcement priorities must change to emphasise more heavily deterrence and public denunciation in its use of various regulatory tools (inside and, where applicable, outside court³⁴) as mechanisms by which to change behaviours.
42. That is so, even though there is unfortunately currently a dearth of knowledge and research as to what *effectively* deters misconduct across the range of corporate actors and, in particular, the financial sector itself.³⁵ ASIC is sponsoring further research into the deterrent effect of different kinds of enforcement action in financial services to assist it to better target different forms of enforcement action towards the most effective deterrence.³⁶

As to enforcement priorities, if there is a reasonable prospect of proving contravention, should ASIC institute proceedings unless it determines that it is in the public interest not to do so?

43. This question and indeed statements made in respect of ASIC's regulatory responses within chapter 8 of the Interim Report place primacy on what is referred to as the 'deterrence strategy' and to a proposed enforcement posture that *first* requires an answer to the simple question: *why not litigate?*
44. That is, the proper starting point of enforcing compliance with the law is litigation and the proper starting point for the consequences of a contravention is the type of consequence that is determined by a court. It is only if it is contrary to the public interest that litigation should not be pursued.
45. ASIC accepts that the proper starting point is for it to ask the question: *why not litigate?* ASIC recognises that in response to each and every contravention of the law it must turn its mind to whether court enforcement tools should be deployed. In deciding whether to commence litigation ASIC should satisfy itself of two things: (1) that there is sufficient evidence to prosecute the case; and (2) it is evident from the facts of the case, and all of the surrounding circumstances, that the prosecution would be in the public interest. Such an approach is consistent with the *Prosecution Policy of the Commonwealth*.³⁷ The

³⁴ Where the Interim Report uses the language 'general deterrence' and 'public denunciation' we understand the Report to mean, by definition, deterrence and denunciation administered by the court. While ASIC considers general deterrence through court action is critical, in our enforcement policies and practice we use the language deterrence and think of public denunciation in a broader sense.

³⁵ Most research on deterrence focuses on crimes against the person or property not financial services or regulated industries. Even for sanctions at the apex of the enforcement pyramid, empirical findings are mixed with any reported deterrence effects highly contextual. Research on general deterrence by the Fair Work Ombudsman (FWO) found that firms tend to have better awareness of targeted campaigns than litigation, although better awareness of litigation than enforceable undertakings. Targeted campaigns were run by the FWO to educate and audit businesses in particular localities and industries. The FWO wrote to businesses to advise them of the campaign and engaging with industry associations. The researchers stated businesses' awareness possibly reflected the way regulatory actions were promoted by the FWO. Hardy, T. and Howe, J., *Creating Ripples, Making Waves: Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman*. 39 Sydney L. Rev. 471 (2017) 471.

³⁶ An example of this is pilot research by the Centre for Law Markets and Regulation at UNSW, engaged by ASIC: Nehme, Anderson, Dixon, Kingsford-Smith *General Deterrence Effects of Enforceable Undertakings on Financial Services and Credit Providers* (August 2018).

³⁷ <https://www.cdpp.gov.au/publications/prosecution-policy-commonwealth>

Internal Enforcement Review will identify the circumstances that will better inform ASIC's decision to litigate.

46. ASIC like all regulators makes challenging real-time choices. This is certainly apparent in the financial sector where it faces widespread misconduct. There are also difficult choices about the balance between enforcement against individuals and financial institutions (including how to enforce) and other work across industry sectors to address market-wide failures through reviews, exposure of problems, persuasion and advocacy for reform.
47. A decision to commence litigation is a strategic decision that involves weighing up often competing choices: a decision in respect of enforcement and giving effect to laws, to be weighed by reference to benefits and detriments, available resources and necessary priorities, not only in the immediate context of the conduct and prospective action in question but in the context of wider strategic and regulatory imperatives and the utility of alternatives. As well as opportunity costs, the ASIC Chair's statutory duty to promote proper management of public resources and the financial sustainability of ASIC under s15 of the PGPA Act bears on a decision to pursue major litigation (both in terms of the costs of conducting the litigation and the liability to adverse costs if ASIC is unsuccessful).
48. Public interest factors must sometimes be militated against commencing proceedings. Litigation can be:
 - a. **expensive and resource intensive**, particularly in its preparation and also in ultimate outcome (including exposure to costs orders – potentially in the tens of millions – if unsuccessful);
 - b. **time consuming** in preparation and conduct:
 - i. for civil cases commenced by ASIC the average time between filing proceedings and a decision date is 16.2 months;³⁸
 - ii. in certain areas, such as directors' duties, the average duration of civil matters from the first detected contravention to the final judgment in a superior court is 6.9 years;³⁹ and
 - iii. for criminal cases, the average time from ASIC referral to the Commonwealth Director of Public Prosecutions (CDPP) to charges being laid is 9.7 months;⁴⁰

³⁸ Source: ASIC operational data from 2011–12 to 2017–18.

³⁹ Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40 *Melbourne University Law Review*, p. 905 and 937.

⁴⁰ Source: ASIC operational data from 2011–12 to 2017–18.

The timeliness of an enforcement outcome and the proximity to misconduct has an impact on its general deterrence and public denunciation effect. A review of funding for the CDPP and courts as well as a review of court process and procedure would assist;

- c. **uncertain in outcome, and if a contravention is found, in the *level of penalty actually imposed by the court that is often well below the statutory maximum.*** As to the latter, while the Penalties Bill will introduce significant change, including civil penalties of three times the benefit obtained,⁴¹ that form of penalty:
- i. is not presently available (and with no present prospect of such a penalty, ASIC's ability to take profit or loss into account when taking enforcement action outside court or negotiating outcomes is diminished); and
 - ii. even if available, having regard to actual court outcomes within the existing civil penalty regime, practice suggests it is unlikely to be imposed by a court or, where imposed, may not result in pecuniary penalties near the possible statutory maximum. As an example, in the context of civil penalties for contravention of directors' duties, analysis suggests that the median civil penalty imposed by courts for single contraventions is only 12.5% of the statutory maximum;⁴² and
- d. **limited in scope.**
- i. a court will only decide the controversy before it. That controversy may have narrow factual or even legal application. It may even have minimal direct relevance to future conduct across the regulated community; and
 - ii. unfair contract term declarations are a particular example of a possible narrow form of litigation – subtle variations in terms or even circumstance may render the application of clear judicial decision and principle set out in one case inapplicable to even closely related forms of contract.
49. None of that is to suggest a reticence or aversion towards litigating or an attitude that unduly sidelines or minimises its importance. However, other available enforcement or regulatory actions to address misconduct, all of which are also permitted and enabled by powers afforded to ASIC and use of which remains expected to be appropriately targeted and proportionate,⁴³ *may* on some occasions be a more effective regulatory tool.

⁴¹ ASIC Enforcement Review Taskforce Report, Recommendation 40.

⁴² In the context of director's duties, see Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) *40 Melbourne University Law Review* 905, 961 and 966.

⁴³ Australian Government, *Statement of Expectations - Australian Securities and Investments Commission April 2018* [7]-[9].

ASIC's enforcement record

50. ASIC will change its enforcement priorities and practices but it should be noted that it regularly takes criminal and civil court action to regulate behaviour and minimise harm in application of the approach set out in Information Sheet 151 *ASIC's approach to enforcement*. It does not, and will not, attempt, as a starting point, to avoid taking enforcement action or attempt to settle *all* matters by agreement.
51. ASIC is an active Commonwealth litigator, even after excluding the summary offences prosecuted by ASIC's Small Business Compliance and Deterrence Team.⁴⁴ Table 1 sets out a comparison between the number of cases concluded by ASIC, the Australian Competition and Consumer Commission (ACCC), the Fair Work Ombudsman (FWO) and the Australian Taxation Office (ATO) in 2015–16 and 2016–17.

Table 1 Litigation concluded 2015-16 to 2016-17⁴⁵

Regulator	2016-17 (cases)	2015-16 (cases)
ASIC	51	45
ACCC	21	30
FWO	52	28
ATO	141	151

52. As set out in Table 2, in recent years ASIC has referred more criminal briefs to the CDPP's Commercial, Financial and Corruption Practice Group than other Commonwealth law enforcement agencies and state and territory police.

Table 2 Referrals to the CDPP's Commercial, Financial and Corruption Practice Group 2015-16 to 2017-18⁴⁶

Regulator	2017-18 (% referrals)	2016-17 (% referrals)	2015-16 (% referrals)
ASIC	64%	49%	61%

⁴⁴ The work of ASIC's Small Business Compliance and Deterrence team includes undertaking high volume prosecutions in relation to various strict liability offences in the Corporations Act. This work is undertaken by 12 staff within the SBC&D team. The SBC&D's full staffing costs comprise less than 1% of ASIC's budget.

⁴⁵ This has been compiled by ASIC's own review of public data. See ACCC Annual Report 2015-16 and Annual Report 2016-17. ASIC Annual Report 2015-16 and Annual Report 2016-17. ATO Annual Report 2016-17. FWO Annual Report 2016-17 and Annual Report 2015-16.

⁴⁶ Commonwealth Director of Public Prosecutions (CDPP) Annual Report 2016–17, Annual Report 2015–16 and Annual Report 2017-18.

AFP	17%	41%	16%
ACCC	14%	3%	7%

53. As Mr Mullaly stated in evidence, between 1 January 2008 and 30 May 2018 ASIC:⁴⁷

- a. commenced 1,865 investigations involving 3,493 enforcement actions;
- b. commenced 1,102 proceedings (238 criminal, 277 civil and 587 administrative);
- c. issued 370 infringement notices; and
- d. accepted 194 enforceable undertakings.

These enforcement outcomes do not include outcomes from ASIC's Small Business Compliance and Deterrence Team.

54. The data in Table 3 below shows that since July 2011 ASIC has litigated matters (through civil and criminal proceedings) twice as much as it has accepted enforceable undertakings.

Table 3 ASIC Enforcement Outcomes – as at 30 June 2018

		1 Jul-17 to 30 Jun-18	1 Jul-11 to 30 Jun-18*
Criminal actions	People convicted	22	160+
	Custodial sentences (including fully suspended)	13	90+
	Non-custodial sentences/fines	13	70+
Civil actions	Civil proceedings completed	29	140+
	Amount (\$) in civil penalties	\$42.2m	\$71.2m+
Administrative actions	People/companies removed or restricted from providing financial services or credit [#]	133	830+
	People disqualified or removed from directing companies	50	390+
Infringement notices	Infringement notices issued	55	370+

⁴⁷ Witness statement of Tim Mullaly (ASIC) Exhibit 3.171, 9-10.

		1 Jul–17 to 30 Jun–18	1 Jul–11 to 30 Jun–18*
	Amount (\$) in infringement notices paid	\$2m	\$12.05m+
Enforceable undertakings	Court enforceable undertakings secured	27	150+
Compensation	Amount (\$) in compensation and remediation for investors and consumers [^]	\$351.6m	\$1.82b+
	Amount (\$) in community benefit fund payments	\$48.1m	\$75.1m+

Source: ASIC operational data.

* Results since July 2011 (which accords with ASIC's first Enforcement Outcomes Report) have been rounded to significant figures.

Results do not include bannings that have not been served.

[^] Compensation/remediation ordered paid or agreed to be paid.

55. Attached at Annexure A are graphs comparing the number of enforceable undertakings ASIC has accepted compared with other Commonwealth and State regulators over the last 10 years.⁴⁸ These graphs show that ASIC has accepted similar levels of enforceable undertakings when compared with other regulators in Australia.
56. In relation to Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group Limited, National Australia Bank Limited, Bank of Queensland Limited and Suncorp-Metway Limited (or their related entities), ASIC obtained in excess of \$700 million of compensation, remediation or return of funds to investors.⁴⁹ This amount will increase as payments continue to be made.
57. The Interim Report cites academic research to the effect that, when action taken by ASIC's Small Business Compliance and Deterrence Team is excluded, the enforcement result is different.⁵⁰ That is, between 1 July 2011 and 30 June 2016, 48% of all enforcement outcomes were administrative outcomes; 20% were enforceable undertakings and other negotiated outcomes; 18% were criminal outcomes; 12% were civil outcomes and 1% were public warning notices.⁵¹
58. Further, the Royal Commission emphasises that in the last 10 years ASIC commenced only 10 civil proceedings against major banks, but issued 45 infringement notices, and accepted 13 enforceable undertakings,⁵² the latter being 'heavily negotiated'.

⁴⁸ Dr Marina Nehme (2018) 'Comparative research into the use of enforceable undertakings'. A report commissioned for ASIC by Dr Nehme, Senior Lecturer at UNSW Law.

⁴⁹ Witness statement of Tim Mullaly (ASIC) Exhibit 3.171, 10.

⁵⁰ Interim Report, Volume 1 at p. 272.

⁵¹ Ian Ramsay and Miranda Webster (2017) 'ASIC Enforcement Outcomes: Trends and Analysis', (2017) 35(5) *Company and Securities Law Journal*, p. 289 and 301.

⁵² Exhibit 3.171, Witness statement of Timothy Mullaly, 30 May 2018, 12–13 [33], 14 [36].

59. Several things can be said about those figures.
60. First, the figures do reflect utilisation of all the various enforcement tools made available to ASIC by legislation.
61. Second, the enforcement figures do not support the proposition that ASIC presently avoids compulsory enforcement action and attempts to settle *all* matters by agreement, whether in respect of major banks or otherwise.
62. Third, it is important that whatever adjustments are made to priorities and practices, enforcement actions remain flexible and capable of 'recalibration' with other tools. Even if more serious contraventions are to be pursued through the courts, ASIC needs the ability to take other steps to modify behaviour, including some form of negotiated outcome.

Remediation

63. In ASIC's view pursuing compensation remains important in the retail financial sector when compared with other parts of the economy because consumers may suffer substantial and indeed life changing monetary loss as a result of misconduct. In practice, the costs of paying and administering the payment of remediation may be a more meaningful outcome where penalties are modest. Compensation may also be considered where there is a need to restore significant consumer losses.
64. ASIC accepts that some of the case studies covered in the Royal Commission evidenced situations where ASIC prioritised remediation and did not adequately explore how it might have achieved both remediation and penalties through the courts. In other case studies, we note that the breach of the law available was a s912A breach for which there is currently no pecuniary penalty. ASIC has in fact sometimes used enforceable undertakings as a means of creating an enforceable remediation agreement in the *absence* of an express statutory power to order remediation – that is, by moral suasion. ASIC recognises that it needs to focus on seeking both penalties through the courts and compensation.
65. The new proposed directions power will play a role in facilitating this shift in focus. It will enhance ASIC's ability to efficiently regulate remediation measures, providing ASIC with more capacity to focus on penalties for the misconduct. ASIC will also look to seek compensation orders through the courts.

Resources, powers and regulatory settings

ASIC's resources

66. Alteration and implementation of priorities at a strategic level, practices at a tactical level and decisions at an operational level are all affected by the availability and best application of finite financial and human resources.

67. In 2016–17, ASIC’s actual total budgeted resources were \$402.393 million. In 2017–18, its actual total budgeted resources were \$431.969 million. In 2018–19, its total budgeted resources are \$380.434 million. The 2020–21 forward estimate-based total budgeted resources figure is substantially *lower* at \$349.509 million.⁵³
68. A step change in regulatory priority and practice towards criminal and civil court action on a wide range of fronts will likely necessitate a permanent increase in resources provided to ASIC.
69. A central question is: what level of funding and resources best enables a re-balancing of priorities, alteration of practices and implementation of decisions weighted more heavily towards litigation-based enforcement or a ‘deterrence strategy’, taking into account the real resource impacts and real resourcing risks of that those approaches?
70. **First**, while ASIC staff numbers and budget have increased only modestly since 1991 (FTEs 1,492 then and 1,698 now) there have been frequent increases in mandate. As noted by Treasury in its policy submission to the Royal Commission,⁵⁴ ‘ASIC’s annual appropriations (in real terms) and staffing levels are broadly the same as they were a decade ago’,⁵⁵ whereas ‘Over the past twenty years the remit of ASIC has expanded considerably’.⁵⁶
71. **Second**, ASIC is not exempt from the annual efficiency dividend that reduces budgets each year in anticipation of efficiencies being found (although it is industry funded) and a significant amount of ASIC’s funding is non-core funding (provided for specific projects).⁵⁷ The 2014 *Financial System Inquiry* found that funding for regulators should have a high degree of stability and certainty and total funding should be proportionate to the task.⁵⁸ In 2014 the ASIC Capability Review found that only 15% of external stakeholders considered ASIC was adequately funded to do its job.⁵⁹ Professor Ramsay found that only 8.55% of governance professionals surveyed agreed ASIC has sufficient funding and other resources to counter corporate and financial wrongdoing effectively.⁶⁰

⁵³ Ibid. See also *Treasury Portfolio Budget Statements 2018-19*, p. 158 (Table 3.1 line items ‘Revenue from Government’ and ‘total own source revenue’) and 161 (Table 3.5 line item ‘Total new capital appropriations’), in each case row ‘2020–21 Forward estimate’.

⁵⁴ Financial Services Royal Commission, Background paper 24, *Submission on key policy issues*, Treasury, 13 July 2018.

⁵⁵ Ibid 29 [117], p. 32.

⁵⁶ Ibid, [86], p.22.

⁵⁷ The International Monetary Fund panel assessing Australia’s financial system in 2012 observed that: ‘ASIC is hampered in its ability to fully carry out proactive supervision because of the lack of budgetary resources. A significant amount of ASIC’s funding is non-core funding earmarked for specific projects, and the share of non-core funding has been increasing in the last few years’. (See International Monetary Fund, *Australia: Financial System Stability Assessment*, IMF Country Report No. 12/303, November 2012, p. 25).

⁵⁸ Financial System Inquiry, Final Report, November 2014 at p. 246–247.

⁵⁹ Commonwealth of Australia, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, p. 8.

⁶⁰ Gilligan, Godwin, Hedges, Ramsay *Penalties regimes to counter corporate misconduct in Australia: views of governance professionals* (2017), p. 9.

72. **Third**, when compared with conduct regulators in other jurisdictions, ASIC appears to be relatively under-resourced. For example, ASIC has looked at the funding and staff levels of equivalent conduct regulators in Hong Kong Special Administrative Region (HK SAR), including the Securities and Futures Commission.
73. If the registry function is excluded, in 2017–18 ASIC’s total budgeted resources were \$336 million with 1,514 FTE positions.⁶¹ The comparable regulators in HK SAR⁶² together had estimated annual total operating expenses of AUD505 million and staff of 2,203 for conduct regulation in 2016–17.⁶³
74. Comparing the size of the regulatory task:
- a. Australia has close to *three* times the number of financial services and insurance (FS&I) industry employees per conduct regulator employee compared to HK SAR;
 - b. Australia has over *four* times as many financial consumers (people over 18) per conduct regulator employee compared to HK SAR;
 - c. GDP per conduct regulator employee is *six* times larger in Australia compared to HK SAR; and
 - d. ASIC employees oversee close to *three* times more in gross value added from the FS&I industry compared to HK SAR conduct regulator employees.
75. As the foregoing shows, ASIC would be assisted by an increase in resources, particularly permanent or core increases⁶⁴ to funding as opposed to increments of short-term project-based funding.

ASIC’s power to disrupt and prevent misconduct: The importance of currently proposed reform to ASIC’s powers and available penalties

76. ASIC has discussed in some detail in previous submissions to the Royal Commission the importance of the reforms to its powers and the penalties proposed in the *ASIC Enforcement Review Taskforce Report*.
77. The recommendations within that report – from increased maximum civil penalties, civil penalties and increased criminal penalties attaching to s912D, civil penalties attaching to certain general conduct obligations (including the s912A(1)(a) obligation upon financial

⁶¹ ASIC, Annual Report 2017-18, yet to be published. Registry figures include operation costs and capital expenditure - ASIC internal data.

⁶² Securities and Futures Commission, Hong Kong Monetary Authority, Mandatory Provident Fund Schemes Authority, Insurance Authority, Financial Reporting Council

⁶³ Note: The Hong Kong Monetary Authority and the Insurance Authority staff figures include some staff who undertake prudential supervision in the banking and insurance sectors. All figures are from the respective regulators’ annual reports. Exchange rate data from the [Reserve Bank of Australia](#), AUD1 = HKD5.996, and is the average exchange rate over the 2017 calendar year.

⁶⁴ A practical effect of reliance on non-core (short term project-based funding) is that, ASIC, in competing for new employees, cannot offer permanent positions.

services licensees to ensure that financial services covered by their licence are provided efficiently, honestly and fairly) and enhanced powers of direction to financial services licensees – would on implementation enable and promote an altered enforcement approach.

78. Equally, proposed new product intervention powers and new design and distribution obligations are critical. ASIC refers to its Round 4 Submission, and the instance of funeral expenses products, for examples of conduct where those powers and obligations would have a significant regulatory effect.⁶⁵

ASIC's power to disrupt and prevent misconduct⁶⁶

79. ASIC considers that the following further powers or extensions of existing proposals would directly assist it to address potential and actual misconduct in the financial services and credit sectors:

- a. **extending the application of the Banking Executive Accountability Regime** reforms to, or the creation of duties or expectations similar to those contemplated in those reforms across financial services and credit businesses;
- b. **introducing a rule-making power**, cast in similar terms to APRA's rule making power, to make standards in relation to prudential matters under s11AF of the *Banking Act 1959* (Cth). Precedent exists overseas – the UK Financial Conduct Authority for example has a broad statutory power to make such rules as appear necessary or expedient for the purpose of advancing one or more of its operational objectives.⁶⁷ Such a power would build flexibility into the regulatory regime, allowing the setting of standards of conduct in response to the changing regulatory environment or new regulatory issues. The power could be linked to ASIC's statutory objectives and ASIC should be required to consult on draft rules and ensure the benefits were weighed against the costs. Rules would be subject to review by Parliament;^{68,69}
- c. **extending design and distribution obligations** to credit products regulated under the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act) (such as

⁶⁵ ASIC's Round 4 Submissions, at [33], [37]–[42].

⁶⁶ Under this heading ASIC addresses the following question posed at Volume 1, p. 340 of the Interim Report: **If the recommendations of the Enforcement Review are implemented, will ASIC have enough and appropriate regulatory tools?** As set out under this heading, ASIC would be assisted by further powers as noted.

⁶⁷ *Financial Services and Markets Act 2000* (UK) s 137A.

⁶⁸ An alternative may be to provide ASIC with targeted rule making powers limited to a segment of the financial services industry or to a particular function.

⁶⁹ Recent law reforms have placed more reliance on an ability for ASIC to make rules, for example reforms to life insurance remuneration. A product intervention power would provide flexibility in responding to market failures, although it is not a standard setting power and its focus is on financial products. ASIC currently has class exemption and modification powers, but the focus of these is relief or waivers.

payday loans, and credit cards) and to promoters of self-managed superannuation funds;

- d. **extending design and distribution obligations and product intervention powers to products regulated only under the ASIC Act** (for example, funeral expenses policies, some extended warranties, short-term credit exempted from the national credit laws and buy now pay later arrangements); and
- e. **expressly permitting ASIC, when applying the product intervention power, to require training of staff focused on poor practices in relation to the particular product involved;**⁷⁰ and
- f. **removing the exemption from general licensee obligations to have adequate resources to provide financial services and carry out supervision and have adequate risk management systems for bodies regulated by APRA:** s912A(1)(d) and (h), (4), (5). These exemptions do not presently take into account the fact that APRA's focus is on prudential matters not conduct. The exemption should still apply to the requirement to have adequate financial resources.

Regulatory architecture

- 80. ASIC supports the twin peaks model. The advantage of this model is a clear focus on conduct, market integrity and consumer protection by ASIC and prudential stability by APRA. Detaching parts of ASIC's regulatory remit and providing them to a third agency would not cure issues of coordination, duplication or gaps. Nor would it address the issue of what is the appropriate level of funding for the remit detached and the level of policing of the remit the public expects. It may also create additional risks concerning clarity of roles and overall accountability for financial regulation. For a standalone regulator, for example, of superannuation – the issue may be exacerbated as it could not rely on economies of scale or existing infrastructure and systems.
- 81. It is well recognised that the more complex and long term features of financial services and products warrant additional positive obligations on industry participants compared to other markets. Minimum financial capacity for licensees, mandatory disclosure and dispute resolution requirements, 'suitability' type rules (e.g. responsible lending), prohibitions against certain types of remuneration – these are examples of requirements designed to ensure higher levels of consumer protection. These positive obligations exist in addition to 'generic' prohibitions against misconduct (e.g. misleading or deceptive conduct), that may be the only protection in relatively less complex retail markets. ASIC will sometimes use these positive provisions and generic powers in the same regulatory action.

⁷⁰ The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017* (Cth) proposed to expressly restrict this – see proposed s 1022C(6)(a): 'A product intervention order cannot (a) require that a person satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person by or under this Act.'

82. In relation to the idea of transferring consumer protection matters in connection with financial products and services to the ACCC, there are synergies and benefits in ASIC as an integrated regulator:
- a. administering and policing:
 - i. the financial services and credit licensing regime;
 - ii. detailed, positive conduct and consumer protection rules in the Corporations Act, the Insurance Contracts Act and the NCCP Act, including oversight of external dispute resolution;
 - iii. the general consumer protection laws in the ASIC Act; and
 - b. administering both consumer protection and market integrity functions. This was originally recognised by the 1997 Financial System Inquiry.⁷¹
83. It would be difficult to sever these functions. As noted above, most of the consumer and investor protection rules that ASIC administers are not located in the ASIC Act, but in the more detailed regulatory regimes governing financial services and credit. These positive regimes have been developed to address the more complex market failures that typically arise in the finance sector. If positive conduct rules and licensing regimes were detached from ASIC and given say to the ACCC (which does not administer a licensing regime or other positive conduct rules like ASIC's), it would need to develop (or acquire from ASIC) new expertise.
84. Finally we note that registry functions are to be transferred to the Australian Business Register administered by the ATO under the Government's registry modernisation initiative. ASIC has advocated and worked on registry separation since before the 2014 Financial System Inquiry, to sharpen its focus on the regulatory business.

Oversight and review of ASIC's performance⁷²

85. ASIC would encourage formalised review of its performance against its mandate. Given the challenges in measuring or assessing the effectiveness of regulatory outcomes and the time needed for strategic regulatory decisions to bear fruit, reviews on say a three-year cycle may allow deeper analysis. ASIC considers that the experience of end users of the financial system, including consumers of financial services, should be an important focus of any such assessment process. ASIC also recommends a review and rationalisation of other accountability measures overall before introducing a new measure. One option for an external oversight mechanism would be to expand the role of the Council of Financial Regulators so that it performs a peer review function.

⁷¹ Financial System Inquiry, *Final Report* (November 2014) Chapter 5, Regulatory System, page 235.

⁷² Under this heading ASIC addresses the following question posed at Volume 1, p. 339 of the Interim Report: **Should there be annual reviews of the regulators' performance against their mandates?**

86. As the *Financial System Inquiry Report* noted, Australia's financial regulators operate within complex accountability frameworks, albeit narrowly, rather than broadly based ones.⁷³ ASIC is subject to a range of transparency and accountability measures. ASIC executives and commission members regularly appear before the Parliamentary Joint Committee on Corporations and Financial Services and the Senate and House of Representatives Standing Committees on Economics. ASIC will work with the chairs of these Committees to ensure ASIC's oversight appearances are more effective.
87. Public reporting of strategic priorities and performance includes ASIC's Portfolio Budget Statement, Corporate Plan and Annual Report. In addition, ASIC is required to report under the Regulator Performance Framework which focuses on regulatory burdens on industry.⁷⁴ The Financial Sector Advisory Council advises Government on the performance of the financial system regulators. A focus is engagement with and facilitation of business.⁷⁵

Regulatory complexity⁷⁶

88. ASIC agrees the present regulatory regime is complex and in parts overly detailed. It contains a mix of 'generic' obligations and detailed sector-specific rules. This adds substantial levels of risk and complexity to court litigation, including in criminal matters where questions about fault elements arise.
89. Regulatory complexity can incentivise poor conduct by providing greater ability to 'game' the rules and operate 'at the margin' to facilitate financial performance.
90. Some additional regulatory requirements are likely to be necessary in relation to financial services compared to other sectors of the economy. This is widely recognised both in Australia and other jurisdictions. Consumers find it more difficult to assess the quality and value of financial services compared to other products. Many financial services are long term, intangible and complex, so that their quality or otherwise may not be apparent for some time (i.e. they are 'credence' goods). It may be difficult therefore to radically reduce complexity in financial services policy.
91. The amounts of money at stake with many financial products also mean that market failure, misconduct or 'poor but legal conduct' can have catastrophic implications for

⁷³ Exhibit 2.1.24, November 2014, *Financial System Inquiry Final Report*, 241. Examples of narrow accountability given by the FSI were Australian National Audit Office performance audits and Office of Best Practice Regulation reviews Regulation Impact Statements (RISs) on proposed regulatory changes as well as courts and quasi-judicial bodies reviewing specific decisions.

⁷⁴ For example, the Regulator Performance Framework states: 'A full suite of regulatory tools is appropriately utilised to ensure compliance. Where possible, regulators consider the use of positive incentives, cooperation from industry groups, and other means to encourage compliance. Any enforcement action undertaken is within the constraints of the authorising legislation and penalties are proportionate to both the seriousness of the breach and the risk being managed'. *Regulator Performance Framework*, Commonwealth of Australia (October 2014), page 15

⁷⁵ The FSAC is currently suspended. Treasury consultation *Views on regulators* 4 September 2017.

⁷⁶ Under this heading ASIC addresses the following question posed at Volume 1, p. 339 of the Interim Report: **Is the regulatory regime too complex? Should there be radical simplification of the regulatory regime?**

consumers and their families. This means that a reliance solely on simpler prohibitions against misconduct, while a key feature of the regime, may not always prevent significant consumer losses so that additional positive requirements are necessary. This may include clearer ‘bright lines’ (e.g. prohibitions of certain products or remuneration).

92. Given this, the question is whether the additional regulatory requirements are a necessary feature of an effective regime, or whether aspects of the regime’s complexity in fact confuse, complicate and inhibit better consumer outcomes. ASIC’s view is that there are some significant elements of the financial services regime that could be simplified with corresponding improvements in regulatory effectiveness and consumer benefits.
93. A key source of regulatory complexity comes from a combination of permissive behavioural laws (e.g. laws that have allowed a very wide range of conflicted remuneration and place no restrictions on what products can be marketed to retail customers) on the one hand and prescriptive disclosure requirements and risk management requirements on the other. This combination has in effect been the underlying principle of financial regulation following the Wallis review. A light touch on allowed products and conduct but a heavy hand on disclosure may allow a wide range of potentially problematic conduct and business structures as long as they are ‘disclosed’ and/or the subject of risk management requirements.
94. However, the disclosure rules are lengthy and often burdensome to meet and the documents are difficult for consumers to understand. Disclosure that ultimately does not prevent the underlying problematic conduct or *truly* forewarn consumers, particularly vulnerable consumers, of conduct that may fall below general community or their own expectations, is of limited assistance in preventing harm.
95. ASIC highlighted some of the flaws in this disclosure focused approach in its submissions to the Financial System Inquiry. One of the outcomes has been a commitment by Government to introduce ‘design and distribution’ obligations.
96. In many cases, the most effective way to achieve regulatory simplicity would be to simply prohibit certain types of conflicts or conduct (e.g. the prohibition on selling financial products door to door), rather than to require burdensome disclosure and risk management rules that can be uncertain or very costly in their application.
97. A second source of complexity is the lack of clarity or inappropriate allocation of responsibility for misconduct in different parts of the law: for example, the manner in which responsibility of a financial services licensee for breach by financial planners of best interests obligations may differ depending on whether the planner is directly employed or acts as or under an authorised representative.
98. A third source of complexity is the fragmented and unwieldy nature of Chapter 7 of the Corporations Act, originally conceived to be principles-based and to regulate all financial services consistently. This complexity is caused by layers of sector and product specific detail and exemptions, regulations and legislative instruments and the need to fix or

clarify the legislation over time. An example is the definition of ‘retail client’, a key concept. To fully understand the definition, 24 regulations need to be considered.

99. A significant amount of this complexity also arises from successful efforts by different industry sectors to introduce exemptions, carve-outs or other qualifications or compromises into the legislative regime. There is a multitude of such ‘special arrangements’ in the regime – a few examples include grandfathering of conflicted remuneration under FOFA or the exemptions enjoyed by the insurance industry from various parts of the consumer protection regime in financial services. In other cases, having initially supported a principles-based approach, industry seeks and is provided certainty through the legislative establishment of ‘safe harbours’ which set out steps they can take to ensure compliance. In this way complexity is added and substantive consumer outcome focused obligations can be reduced to process requirements.
100. Complexity is not and never will be an excuse for misconduct, and this is particularly so for large, sophisticated and well-resourced financial institutions. It does however weaken the basic infrastructure for the regulation of financial institutions and complicates their compliance and ASIC’s supervision and enforcement. It also adds costs to business and may deter new entrants to the market.

ADDRESSING CONDUCT RISK

ASIC’s approach to conduct risk

101. ASIC agrees with the observation in the Interim Report (p. 309), informed by the APRA Prudential Inquiry into CBA, that there has been a focus on management of financial risk at the cost of conduct risk and prioritising fair outcomes for customers. We also agree that preventing improper conduct and promoting desirable conduct is a central task of boards and management at every level (Interim Report, p.144). We consider management has been blind to the issue of conflicts of interest and failed to implement the systems and controls necessary to manage them.
102. Changes to our enforcement approach to emphasise court action will sharpen financial institutions’ focus on conduct risk because it will increase the costs, including the reputational costs, of engaging in misconduct.

Conduct risk through reporting: Identifying systemic problems that do not or may not contravene the law, but are below community standards, and generating change

103. ASIC has over time used a broad range of regulatory tools to identify, expose and seek to address the widespread misconduct that has occurred in the financial system.
104. As evidenced by the range of matters examined in the hearings of the Royal Commission that had previously been identified and reported on by ASIC, ASIC has been broadly effective in identifying the areas of systemic and widespread problems even having regard to failures or deficiencies in breach reporting noted in the Interim Report.

105. While again acknowledging the re-prioritisation of court and deterrence-based enforcement action, ASIC wishes to emphasise the effective role that those other tools have played in appropriate cases and consider ways to make them more effective in addressing problems in future.
106. Those tools can be particularly useful in relation to conduct which is both widespread and potentially harmful but arguably not illegal – that is, in the words of the Royal Commission’s terms of reference, ‘below community standards’. Not even a general obligation to be ‘honest, efficient and fair’ will always clearly allow for legal consequence for such matters.
107. For example, through a series of reports ASIC has uncovered widespread problems in the sale of add-on insurance and denounced the conduct involved. Despite the absence of a clear legal remedy for the global problem, ASIC’s exposure of the issues and engagement with industry have resulted in remediation being offered of approximately \$122 million,⁷⁷ and ASIC is now seeing wholesale changes in industry practice.
108. Those other tools can also be useful in exposing structural issues driving adverse consumer outcomes that go well beyond individual misconduct. Thus ASIC’s report on mortgage broker remuneration⁷⁸ and the analytical work which underlay it exposed the fact that commission and ownership structures were driving significant differences in the home mortgages that consumers were ending up with which turned not on objective need but on whom they dealt with. This has also generated a process for change in the industry. Similarly, over an extended period ASIC’s work undertaking shadow shopping of the quality of financial advice exposed the overall low standard of advice⁷⁹ and the commission-driven conflicts of interest which underpinned it and provided a significant plank in the case for the resulting FOFA reforms.
109. ASIC has also strategically engaged with industry in efforts to improve practice across a sector through self-regulatory initiatives. In the right circumstances these can promote standards of conduct which go beyond what is legally required, but are very important to, indeed expected by, consumers.
110. ASIC considers that this work, especially when complemented by strong enforcement action, is an important feature of ASIC’s role and can greatly contribute to advancing consumer protection and better consumer outcomes through:
- a. exposing and denouncing conduct below community standards;

⁷⁷ Some consumers have the choice of taking a refund and cancelling the policy or continuing cover and getting no refund.

⁷⁸ ASIC Report 516 *Review of mortgage broker remuneration* (March 2017)
<https://download.asic.gov.au/media/4213629/rep516-published-16-3-2017-1.pdf>

⁷⁹ ASIC Report 279: *Shadow Shopping study of retirement advice* (March 2012)
<https://download.asic.gov.au/media/1343876/rep279-published-27-March-2012.pdf>

- b. driving improved practices across a sector or market;
 - c. identifying the need for and advancing the case for law reform;
 - d. supporting self-regulatory initiatives;
 - e. (in the future) supporting ASIC's use of the proposed product intervention power; and
 - f. providing information and guidance for consumers and those who work with them, and for the development of professional standards.
111. As well as strengthening its approach to enforcement, ASIC is also considering measures to strengthen its use of these other tools and in particular to do so in a way that increases the force of the denunciation of misconduct and thus increases the reputational costs of engaging in such conduct. For example, whereas historically ASIC in publishing reports addressing problems in conduct across a sector, ASIC has generally aggregated data and refrained from naming individual institutions or revealing which institution has the most significant problems. In contrast, in publishing its recent report on industry failures in relation to meeting the breach reporting requirements,⁸⁰ ASIC named the institutions involved and provided data on their respective performance across a range of measures.
112. In addition, ASIC considers that publishing data on consumer complaints broken down by firm and product type can enhance market discipline and help consumers make more informed choices about which financial service or credit provider they wish to deal with. Having a large number of consumer complaints is a powerful indicator, albeit lagging, of financial institutions that may provide standards of service and treatment below market average.
113. The Consumer Financial Protection Bureau in the United States has published this type of information for a number of years and it may be particularly useful in Australia given its high market concentrations. ASIC advocated for the power to do this and the Government has provided that power in the recent legislation establishing AFCA. ASIC has begun work on the process to implement this type of reporting on a standardised basis.
114. In a similar vein, ASIC has been working with APRA to collect and publish granular data on life insurance claims and disputes at an industry and institution level.⁸¹ Such data will assist consumers to identify good and poor performers, drive informed consumer decision making and so, competition. ASIC is looking at further ways it can make data available to consumers about how products and product providers work in practice with

⁸⁰ ASIC Report 594 *Review of selected financial services groups' compliance with the breach reporting obligation*

⁸¹ <https://www.apra.gov.au/media-centre/media-releases/apra-and-asic-empower-consumers-new-reporting-standard-life-insurance>.

the hope that this will enhance consumer outcomes, reward good practice and put a cost on poor conduct and treatment of customers.

Incorporating culture into supervision

115. ASIC has also been working on incorporating culture into its supervision. An example is its recent report on compliance with breach reporting,⁸² which found that aspects of large financial groups' culture did not support their compliance with breach reporting. ASIC looked at how breaches are detected, escalated and managed within each organisation reviewed. In some cases ASIC found limited and inconsistent oversight by and accountability of senior management across key stages in breach reporting. ASIC found that within some financial groups a significant minority of staff was uncomfortable raising concerns or risks. We also found that delays in remediation of consumers were inconsistent with publicly stated values and internal policies and procedures.

Industry codes⁸³

116. As an example of an industry code, the Australian Banking Association's Code of Banking Practice (in its latest version, the Banking Code of Practice) has been reasonably effective over an extended period of time in contractually committing banks to standards that go beyond what the law might require. As the Interim Report notes,⁸⁴ significant instances of conduct identified are criticised because the relevant bank did not comply with the Code as it stood at the relevant time.

117. The process of engagement with ASIC on voluntary codes improves them. In the lead-up to the most recent redrafting resulting in the 2019 Banking Code of Practice, ASIC worked closely with industry and wider stakeholders to require that the amended terms of that code advanced the requirements and purpose of the extension of unfair contract terms to small business.

118. The Royal Commission notes that the enforcement of norms within a code, such as those in the 2019 Banking Code of Practice, should not be left to borrowers (or more commonly FOS and in the future AFCA in applying its terms to particular disputes).⁸⁵ Further, if there is systemic failure to apply code rules, a regulator should be in a position to enforce those provisions.

⁸² ASIC Report 594 *Review of selected financial services groups' compliance with the breach reporting obligation*.

⁸³ Under this heading ASIC addresses the following question posed at Volume 1, pg 340 of the Interim Report: **Should industry codes relating to the provision of financial services, such as the 2019 Banking Code of Practice, be recognised and applied by legislation like Part IVB of the Competition and Consumer Act 2010 (Cth)?**

⁸⁴ Interim Report, Volume 1, p. 291.

⁸⁵ Interim Report, Volume 1, p. 292.

119. A voluntary code will ordinarily be administered by a compliance body. Approved codes, such as the 2019 Banking Code of Practice, must meet criteria,⁸⁶ and ASIC can revoke approval.⁸⁷ ASIC will monitor approved codes and receive periodic reports from not only the code administrator but also other stakeholders.⁸⁸ Failure to comply with codes may be enforceable by a regulator in other ways – for example, by actions for misleading and deceptive conduct – if an organisation represents that it complies with a code (whether ASIC approved or not) when it does not.⁸⁹
120. A key risk of making codes directly enforceable by regulators on a provision-by-provision basis is a reduction in industry willingness to commit to measures which go beyond strict legal requirements, which has been one of the primary rationales for and successes of such industry self-regulatory measures.
121. ASIC is expected to identify opportunities to collaborate with the private sector in regulating and monitoring particular industries where collaboration (including co-regulation, quasi-regulation or self-regulation) can deliver *better* regulatory outcomes.⁹⁰ Properly implemented and monitored, a voluntary code with expansive terms is one of those opportunities.

Conflicted remuneration

122. Conflicted remuneration leads to consumer harms entrenched across a wide range of retail financial services – for example, because of ‘reverse competition’ for distribution networks and first mover problems.
123. Conflicted remuneration in financial services should be prohibited or removed as a general policy. (In some cases, transitional arrangements will need to be considered in the implementation of such a change.)
124. If there are evidence-based arguments that the removal of conflicted remuneration would generate costs associated with competition or consumer access that clearly outweigh the benefits of reduced consumer harms, then these particular cases *could* warrant limited exceptions to this rule. This should require ongoing public monitoring and gathering of data on the impacts of conflicts to test whether any exemption should be retained.

OTHER POLICY MATTERS: SPECIFIC QUESTIONS ON INDUSTRY SECTORS AND LAWS

⁸⁶ For example, Regulatory Guide 183 *Approval of financial services sector codes of conduct*.

⁸⁷ Section 1101A(4) *Corporations Act 2001* (Cth) and Regulatory Guide 183 at 183.142-147.

⁸⁸ Regulatory Guide 183 at 183.141.

⁸⁹ *Ibid* RG183.148-149.

⁹⁰ Australian Government, *Statement of Expectations - Australian Securities and Investments Commission April 2018*, [34].

125. In this section, ASIC answers certain questions raised in the Interim Report on which it has either not made previous comment in written submissions to the Royal Commission or upon which it wishes to add further comment.

Credit

*Mortgage broker conflicted remuneration and best interests duty*⁹¹

126. The risks of poor outcomes from the payment of mortgage broker commissions could be mitigated by a combination of broker-specific responsible lending obligations (which would be in addition to existing responsible lending obligations for lenders), restrictions on, or a complete prohibition of conflicted remuneration, and a best interests duty. These changes are complementary rather than alternatives – for example, ASIC considers the risks created by conflicted remuneration for brokers cannot fully be addressed by directing the broker to manage the conflict between their interest in the remuneration and a best interests duty.

127. The introduction of these specific obligations would:

- a. seek to better align incentives with the interests of the consumer;
- b. clarify the differences in the role of brokers from that of lenders in a way that better matches consumers' belief or expectation that brokers are acting for the consumer and not the lender; and
- c. ensure that brokers provide value to the consumer through the loans they arrange (in the language of the Royal Commission Interim Report, that they do not just 'sell bank loans').

128. The additional obligations for brokers could drive brokers to use similar technology to that used by loan comparison websites to enable the sifting of loans. These obligations would require brokers to:

- a. find the most suitable loan among those that they reasonably consider;
- b. mandate additional specific inquiries that the broker must make to identify the most suitable loan (e.g. whether the consumer is seeking a home loan that they can pay off as quickly as possible); and
- c. make a written assessment that documents the reasons for selecting one product over others and give the consumer the written assessment at the time of recommendation.

⁹¹ Under this heading ASIC addresses the following question posed at Volume 1, pg 342 of the Interim Report: **Should intermediaries be subject to rules generally similar to the conflicted remuneration prohibitions applying to the provision of financial advice?**

129. As noted in our submission following the Round One hearings, lenders have already started to voluntarily remove some types of conflicted remuneration that are more likely to contribute to poor consumer outcomes (e.g. volume-based commissions). ASIC considers that it is too early to determine whether these changes to remuneration go far enough, and whether a complete prohibition on conflicted remuneration is necessary.
130. ASIC supports the introduction of a best interests duty for brokers. ASIC's view is the content of this duty should be expressed as a broad statement of principle, such as an obligation 'to act in the best interests of the consumer in the selection and arranging of loans' (i.e. it would have a broad application similar to the statutory obligation to act efficiently, honestly and fairly and act as a guiding principle for the conduct of the broker across all their dealings with consumers).
131. The best interests duty could be included in the ASIC Act, giving it application beyond regulated credit activities, as it complements, but is not an alternative to, the enhanced responsible lending obligations. This would have the following advantages:
- a. It would apply to all brokers and to brokers operating across both regulated and unregulated lending.
 - b. It would mandate a requirement to act in a way that is consistent with borrower belief or expectation of the role of the broker (as identified by the Royal Commission) that the broker is acting for the consumer and not the lender.
 - c. It can deliver benefits to small business borrowers, without the risk of an adverse impact on credit pricing or availability (given that placing additional obligations on brokers will not affect the practices of lenders).

Disclosure of conflicted remuneration

132. ASIC considers that disclosure alone is not an effective means of overcoming consumers' misconceptions about the capacity in which a broker is acting. And there is now clear evidence that disclosure is a poor tool to address harms arising from conflicts of interest in remuneration. If the Royal Commission recommends any changes to disclosure about an intermediary's remuneration, this should be designed to maximise their impact on consumer choice, both as to the broker they use and the loan recommended to them. In practice, this is likely to mean earlier disclosure based on estimates of the likely commission.

Remote and Indigenous consumers

Sale of banking products to consumers on Centrelink payments

133. ASIC is aware of and has frequently acted against the mis-selling of products to vulnerable consumers, which can include those on incomes that primarily comprise Centrelink payments.

134. ASIC is also aware that some Indigenous consumers have a limited understanding about how informal overdrafts work, which has led to those customers being charged significant fees. Specifically, some Aboriginal and Torres Strait Islander people consider that, if they are able to withdraw money from their bank account, it means they must have sufficient money in their account.
135. Financial institutions need to ensure they comply with their obligation to provide financial services efficiently, honestly and fairly, ensure their customers (including vulnerable consumers) understand the features of the financial product and service they are acquiring, and ensure their product and service meet the needs of the consumer.
136. Ahead of the enactment of the product design and distribution obligations and ASIC's product intervention power, any financial institution looking to promote financial products and services to vulnerable consumers should have in place controls to identify the appropriate target market for those products, as well as controls on the nature of marketing of those products.
137. ASIC considers that the application of the 90% arrangements under the Code of Operation,⁹² which provides overdrawn customers with protected payments to withdraw up to 90% of their Centrelink payment, should not be at the discretion of the bank – it should be compulsory.

Sale of funeral-related financial products

138. The current regulatory framework in respect of funeral expenses products is not adequate.
139. There are two amendments to the current regulatory framework that should be made:
- a. a funeral expenses policy should be a financial product covered by the financial services licensing and conduct regime of the Corporations Act. That is, the exclusion effected by regulation 7.1.07D of the Corporation Regulations 2001 should be removed; and
 - b. subject to (a) above, a funeral expenses policy should also be covered by the design and distribution obligations and product intervention power.

Last Resort Compensation Scheme (LRCS)⁹³

140. Debate and consideration of the merits of an LRCS in the Australian financial system are not new. The lack of an LRCS is the missing link in the retail compensation framework. Unpaid determinations undermine consumer confidence in the dispute resolution system.

⁹² <https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/code-operation>

⁹³ Under this heading ASIC addresses the following question posed at Volume 1, pg 344 of the Interim Report: **Should there be a mechanism for compensation of last resort?**

141. Currently, professional indemnity (PI) insurance, and some limited sector-specific arrangements for compensation for fraud or theft, are relied upon to respond to consumer claims where self-insurance is inadequate.
142. ASIC has publicly commented on the inherent limitations of PI insurance as a compensation mechanism and has raised concerns about uncompensated consumer losses in Government inquiries and reviews, including the 2014 (Murray) Financial System Inquiry.⁹⁴ There were 193 unpaid determinations worth \$16.48 million (as at 30 September 2018).⁹⁵
143. ASIC's view is that an LRCS is not intended to replace PI insurance – it should complement it. That is, PI insurance must remain the 'first line of defence' so that any scheme is truly a 'last resort' for uncompensated loss. In addition, an LRCS should help 'level the playing field' between large and small financial institutions by reassuring consumers that they will be paid if they are awarded a compensation order against a smaller financial institution. This is important since the changes in the wealth management sector may see more services provided by non-APRA regulated entities, which could increase the incidence of uncompensated losses in the future.

Australian Financial Complaints Authority (AFCA)

144. Consumer and small business access to fair, timely and effective dispute resolution is an essential part of the financial services consumer protection framework. External dispute resolution (EDR) provides a free and independent forum for complaints to be heard and for compensation to be awarded for direct financial loss.
145. The EDR sector is presently undergoing substantial structural reform. The consolidation and re-shaping of the sector through the establishment of AFCA (which commences operations on 1 November 2018) will ensure that consumers have access to a well-resourced scheme without some of the gaps in membership or coverage that were a feature of the previous framework.
146. AFCA will be a 'one-stop shop' for all financial services, credit and superannuation complaints with an estimated 38,000 financial services member firms. It will start with significantly higher monetary limits and compensation caps for financial service and credit complaints, including complaints from small businesses and primary producers.

⁹⁴ See for example, *Financial System Inquiry: Submission by the Australian Securities and Investments Commission*, April 2014, pp. 186 – 187. *Financial System Inquiry interim report: Submission by the Australian Securities and Investments Commission*, August 2014, pp.47-49; *Senate inquiry into the scrutiny of financial advice: Submission by the Australian Securities and Investments Commission*, December 2014.

⁹⁵ Verbal update provided on statistics in FOS Circular, Issue 34 (August 2018) <https://www.fos.org.au/fos-circular-34-home/fos-news/unpaid-determinations-update/> by FOS Company Secretary (Nicolas Crowhurst) on 18 October 2018.

147. AFCA has some important features which will support fair and effective outcomes for consumers and financial firms. These include:
- a. timely reports about serious misconduct and systemic issues to ASIC, APRA and the ATO;
 - b. regular independent reviews and the publication of written decisions on its website;
 - c. an independent assessor that can review complaints about its level of service.
148. The existence of a single scheme with oversight of all financial firms that deal with consumers, including superannuation trustees, means that AFCA will be able to look across the conduct of the entire financial sector and identify emerging issues and harms arising from individual complaints.
149. AFCA will also be able to:
- a. identify opportunities for improving industry codes of practice and for improving standards within individual firms and across industry sectors;
 - b. identify gaps in the law and contribute to the development of financial services policy and law reform; and
 - c. play an important role in the regulatory framework through its reporting to financial services regulators.
150. Further, as AFCA (like predecessor schemes) will provide a range of ‘ancillary services’ to its members, it will be able to support efforts to improve conduct and industry practice – for example, by engaging with members on how the scheme will interpret or apply the law and principles of fairness to different types of disputes.
151. ASIC considers the establishment of AFCA provides the right foundation on which to now build an LRCS. We note that AFCA (similar to its predecessor schemes) will operate within jurisdictional limits which act to confine potential claims and the monetary limits of those claims. This means that for consumers and small businesses that have claims that fall outside the EDR limits, they will still need to take private legal action to obtain compensation. Accordingly, we think consumer protection would be further enhanced by the creation of an LRCS.

AFCA’s approach to compensation

152. AFCA will be able to compensate the complainant for *direct financial loss*; punitive, exemplary or aggravated damages cannot be awarded. There is however some limited scope for compensation for non-financial loss. In practice, this will not always be the same as putting the borrower back in the position they would be in if the loan had not been made. It is worth noting that this has been a long-standing feature of EDR schemes.

153. An AFCA decision maker determines the most appropriate remedy on a case-by-case basis. For credit-related complaints, an AFCA decision maker may decide that the firm needs to undertake a course of action to resolve a complaint, including ‘the forgiveness or variation of a debt’.

Banking Executive Accountability Regime (BEAR)

154. ASIC strongly supports greater executive accountability for poor conduct throughout retail financial services and credit businesses. There is strong community demand for such accountability, which is not met by BEAR’s present scope.
155. In its current form, the BEAR is administered by APRA only and is limited to poor conduct or behaviour that is of a systemic and prudential nature and is limited to directors and executives in authorised deposit-taking institutions (ADIs).
156. As the Royal Commission has highlighted, there may be instances of misconduct involving significant consumer losses, egregious behaviour and failures of management which would otherwise not meet the ‘systemic and prudential’ test necessary to trigger the BEAR.
157. While the ASIC Enforcement Review taskforce recommended ASIC be able to ban people from management if they are not fit and proper or adequately qualified, ASIC’s view is that it also needs to be able to ban officers and senior managers of financial services or credit licensees who fail to take reasonable steps to ensure compliance with the law by the people they are managing.
158. To that end, ASIC supports expanding the BEAR so that it is administered by ASIC in relation to conduct as well as APRA in relation to prudential issues. A similar model is the UK Senior Manager and Certification Regime overseen by the UK Financial Conduct Authority and Prudential Regulation Authority. An expansion of the existing BEAR to cover conduct would:
- a. impose an obligation on managers within financial services or credit licensees to take reasonable steps within the scope of their management roles to ensure compliance with financial services and credit laws;
 - b. require larger financial services and credit licensees to map key responsibilities;
 - c. give ASIC the power to:
 - i. disqualify managers for serious breaches of their reasonable steps obligation;
 - ii. seek civil penalties if a financial services or credit licensee breaches BEAR obligations.
159. Extending the operation of the BEAR would advance ASIC’s capacity to hold executives and financial institutions to account if they fail to take reasonable steps to ensure

compliance with the law, especially when that failure results in serious or widespread detriment to consumers.

160. ASIC is aware that an extension of BEAR in this way would result in the regime being jointly administered by APRA and ASIC. A similar model is the United Kingdom's (UK's) Senior Managers Regime which has a number of similarities with the BEAR and is overseen by the UK Financial Conduct Authority and Prudential Regulation Authority.⁹⁶
161. ASIC's support for the extension of the BEAR is consistent with the Economics Legislation Committee report on the BEAR (2017), which stated:

Consumer protections are just as important as prudential matters in establishing and maintaining community trust in the financial sector. While the BEAR is a welcome and important start, the committee believes that, in time, heightened accountability obligations should be extended to non-ADI firms in the financial sector and also to matters that affect consumer outcomes (as has been done in the United Kingdom).⁹⁷

Funding of consumer organisations

162. Another reform that would improve consumer outcomes, including by assisting regulators, is ensuring that independent consumer organisations and financial counsellors are adequately funded to meet growing demand and to play their important role in the financial system.
163. Properly resourced and independent consumer and advocacy services in financial services provide critical assistance to many consumers, but these organisations experience more demand than they can meet. Additional funding would also assist regulatory action through:
- a. identifying and demanding action on misconduct and conduct that is below community standards;
 - b. assisting in the prioritisation of issues that require regulatory attention;
 - c. urging regulators to take action and raising public alarm where they do not act or act too slowly; and
 - d. providing a balancing consumer voice in policy and other debates.

⁹⁶ See for example, Australian Government, *Banking Executive Accountability Regime: Consultation Paper*, July 2017, pp. 16 and 17. Available at https://static.treasury.gov.au/uploads/sites/1/2017/08/c2017-t200667-BEAR_cp.pdf

⁹⁷ Report of the Senate Economics Legislation Committee into the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* [2.88]. Available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/BEAR_Bill_2017/Report/c02

Dated: 2 November 2018

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Annexure A

Figure 1: Use of EU by Federal Regulators as Compared with ASIC

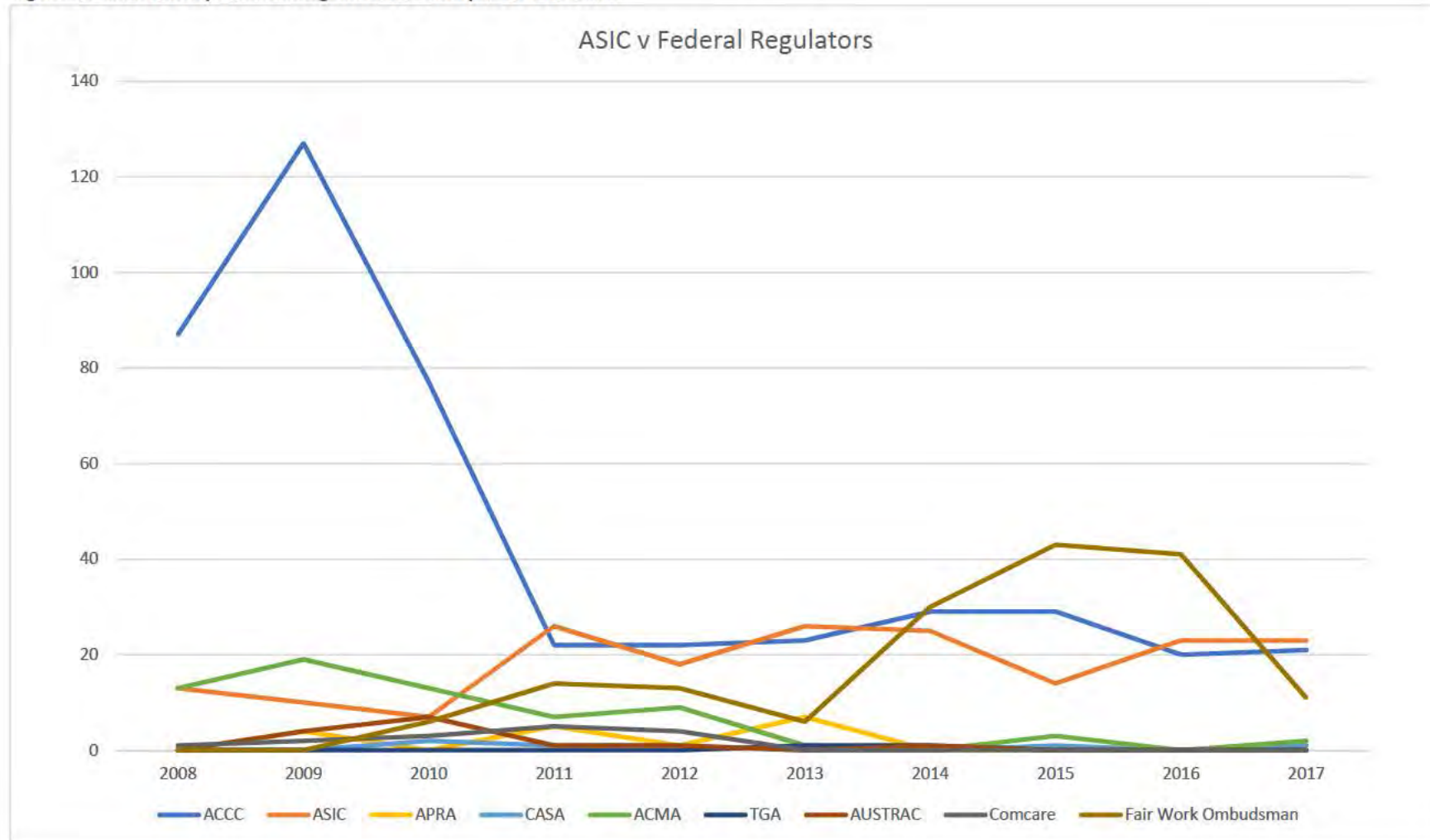


Figure 2: Use of EU by State Regulators as Compared with ASIC

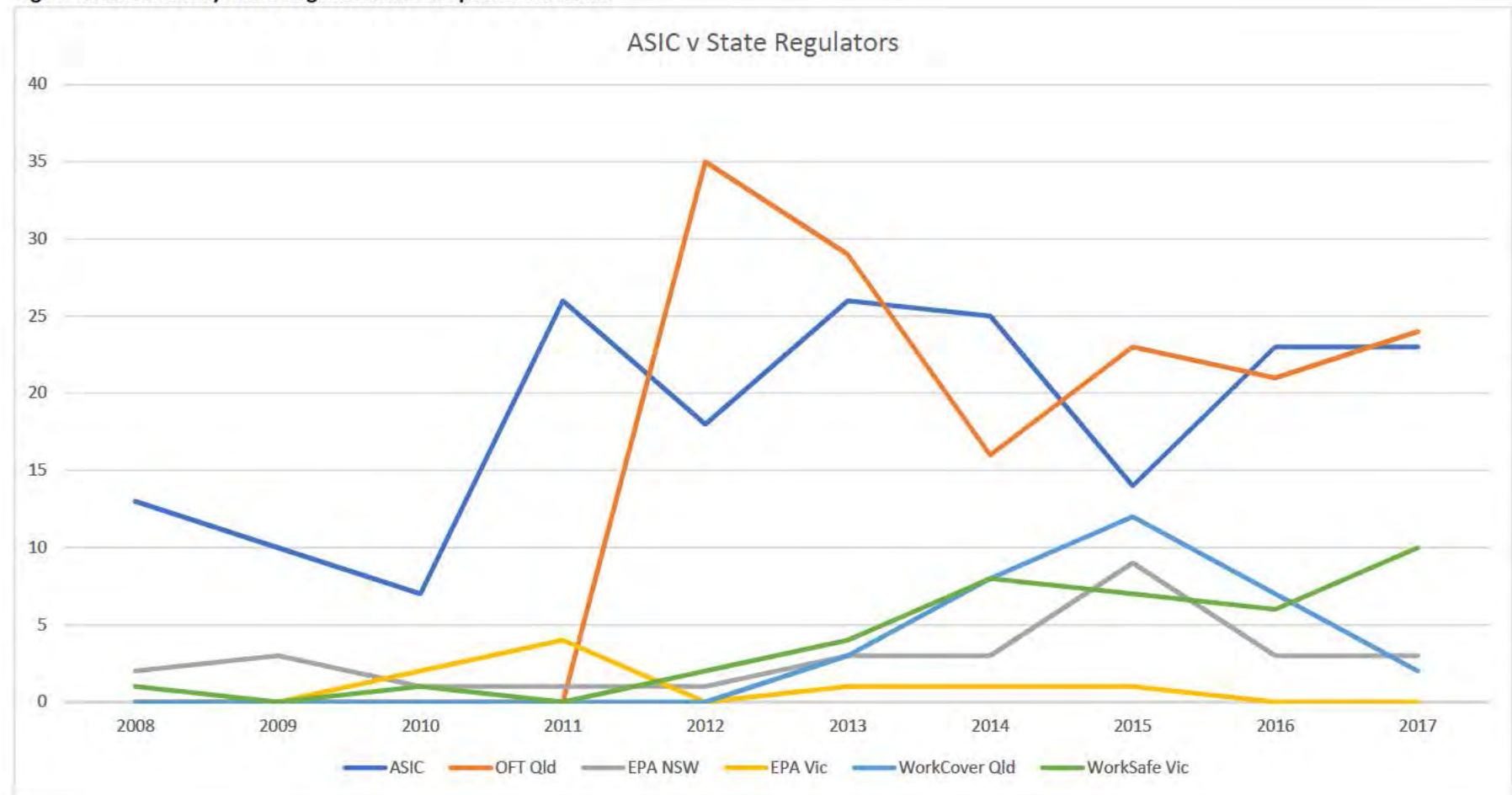


Figure 3: Demography of Promisors Entering into an EU per Federal Regulator

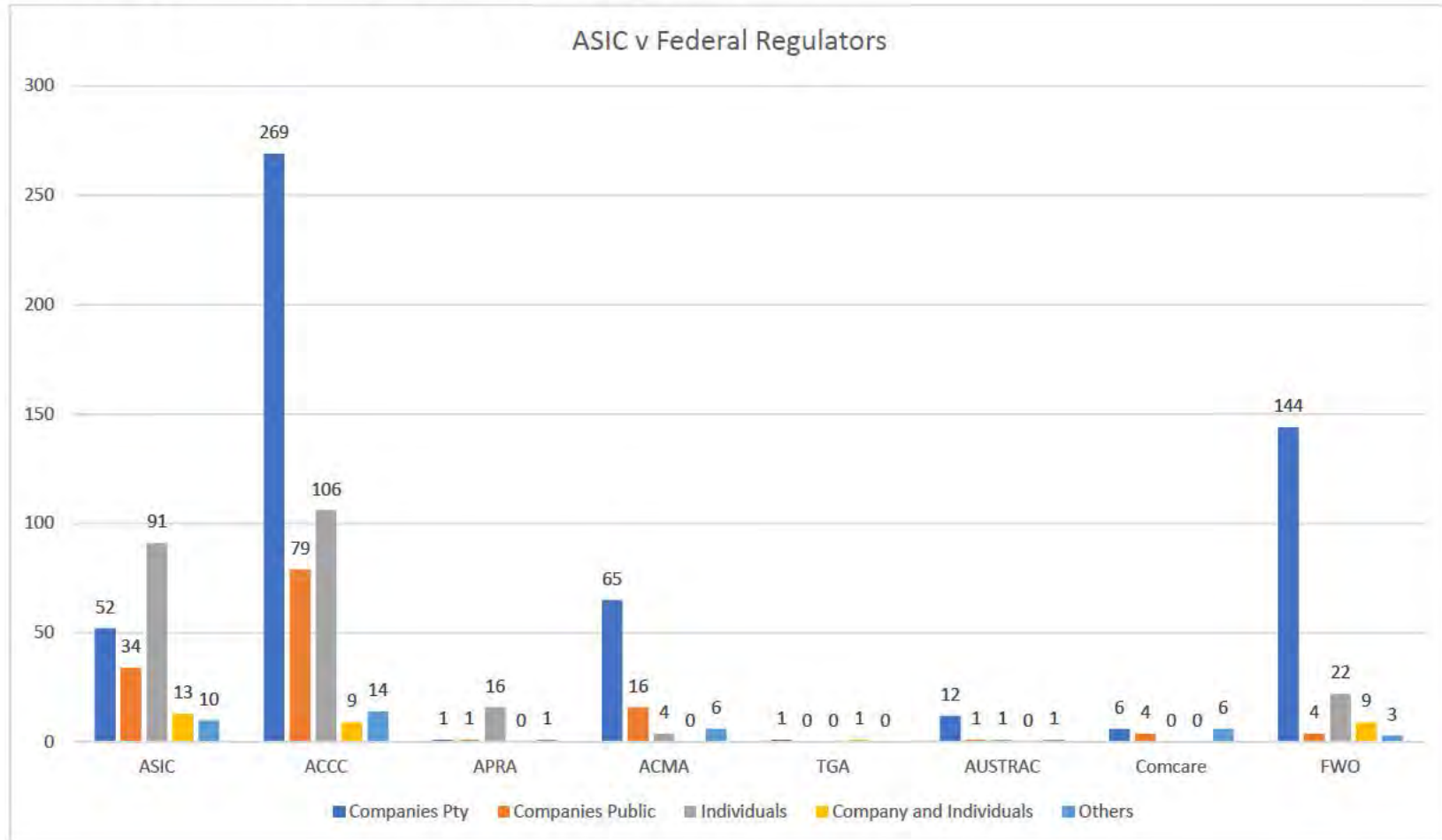


Table 1: Timeliness of ASIC's Enforcement outcomes

The following tables provide a breakdown of the long-term median for criminal, civil and administrative actions completed between 1 July 2011 and 30 June 2018.

ASIC measures the length of its criminal investigations from the date we commence an investigation to the date they are referred to the Commonwealth Director of Public Prosecutions (CDPP). ASIC measures the length of civil and administrative investigations from the date the matters are first drawn to its attention to the date proceedings are filed or matters are referred to an ASIC delegate or the Companies Auditors Disciplinary Board (CADB).

The average time taken to achieve criminal, civil and administrative decisions is measured from the date the investigation phase is finalised and is impacted by matters that are subject to an appeal of the decision. Also, the time involved in achieving enforcement outcomes can be affected by many factors (including complex matters being contested by defendants).

Criminal actions	Long-term median
Median months to complete an investigation	15
Median months to a criminal court decision	24.5

Civil actions	Long-term median
Median months to complete an investigation	9.6
Median months to a civil court decision	7.6

Administrative actions	Long-term median
Median months to complete an investigation	10.8
Median months to an administrative decision	3.4

Financial services and credit banning actions ⁹⁸	Long-term median
Median months to complete an investigation	11.8
Median months to an administrative decision	3.2

⁹⁸ Relates only to actions where a banning order or licence cancellation/suspension in relation to financial services or credit was sought.