INSTITUTE OF PUBLIC ACCOUNTANTS®

# Submission to the Senate Standing Committees on Economics on capacity and capability of ASIC on investigation and enforcement

February 2023

28 February 2023

The Chair
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Lodged online

Dear Madam

**Capacity and capability of ASIC to undertake investigation and enforcement action arising from alleged misconduct**

The Institute of Public Accountants (IPA) welcomes the opportunity to provide comments on the capacity and capability of ASIC to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct.

The IPA is one of the three professional accounting bodies in Australia, representing over 50,000 members and students in Australia and in over 100 countries. Approximately three-quarters of the IPA's members work in or are advisers to small business and small to medium enterprises.

Whilst the ongoing scrutiny of ASIC over a series of reviews, Royal Commission and inquiries is welcome, there is also a need to ensure that genuine progress is made in considering and implementing recommendations. For instance, the December 2015 Panel Report — *Fit for the Future: A Capability Review of ASIC* offered 34 recommendations to improve the efficiency and effectiveness of ASIC across a range of its operations, to a global best practice level. Since then the IPA, like so many other stakeholders, has been involved in consultation on ASIC's KPI metrics, an assessment of its performance against these KPIs, the Cost Recovery Implementation Statement (CRIS), the Financial Regulator Assessment Authority (FRAA) review, Prime Minister & Cabinet's regulator performance assessment, 'Hayne Royal Commission', Australian Law Reform Commission (ALRC) reviews and so on.

It would be a useful starting point to undertake a stocktake and assessment of each successive set of recommendations, insofar as they are relevant to the terms of reference of this Inquiry.

Our comments below are applicable to some of the terms of reference as noted.

Please don't hesitate to contact Vicki Stylianou (vicki.stylianou@publicaccountants.org.au) if you require further information or have queries.

Yours faithfully

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## IPA comments against terms of reference

### Term of reference C: whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement

Based on the ASIC Corporate Plan 2022-26, released in August 2022, and various consultations, the IPA believes that ASIC is attempting to address some of the concerns expressed by government, business and the community, and is in the process of implementing recommendations that have arisen from the numerous inquiries and reviews noted above. Given that this process is underway, and the benefits have yet to be realized, our expectation is that ASIC's regulatory action and enforcement may significantly improve in the future.

However, government, business and the community cannot be expected to wait for ASIC to evolve into the corporate regulator that it should always have been. The reference in the Corporate Plan to achieving milestones by 2030 causes concern as this is a considerable amount of time to be waiting for ASIC to become the corporate regulator we need now in 2023.

In the meantime, other reforms such as Modernising Business Registers, director identification number initiative, breach reporting by financial services entities, and other reforms across regulated entities, should make ASIC's work in investigation and enforcement more streamlined. On the other hand, we note that the Financial Services and Credit Panel (emerging from the Hayne Royal Commission) does not seem to have commenced its operations or has had a very slow start.

In particular, we note the following excerpts from ASIC's Corporate Plan 2022-26:

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*Over the next four years, we will strengthen our capabilities to ensure we can continue to perform our work in an efficient and effective manner. In July 2022, we finalised our digital strategy. The strategy outlines how we will deliver on our vision to become a leading digitally enabled, data-informed regulator by 2030. It also sets out principles that will support the achievement of that vision as well as a high-level roadmap of initiatives we will undertake over the next five years.*

and

*…use data analytics, artificial intelligence and machine-learning technologies to more quickly and accurately identify harms in our environment.*

and

*We do not currently have the powers to collect granular recurrent data across all financial services and credit sectors that we regulate. …The availability of recurrent data will enhance our ability to make evidence-based observations and proactively identify potential consumer harms.*

We note that ASIC is working with other regulators such as APRA and also with AFCA on recurrent data collection and with Treasury to consider law reform to aid its data collection powers. The IPA believes that a proactive corporate regulator should be ahead of these issues, especially given the reliance on data collection which drives decision-making for all of our organisations, including government agencies.

Investigation and enforcement rely on technology and data management, and our expectation is that ASIC should make good use of these. There are already indications of ASIC's capability with respect to the use of technology to improve its operations. For instance, ASIC has been promoting regulatory technology (regtech) and its adoption. Therefore, we would expect to see ASIC leading the way in the use of regtech in its own regulatory activities, with a resulting decrease in costs over time. We note that ASIC has also promoted 'suptech' (supervisory technology), including being involved with the Innovation Hub and the regulatory sandbox. All of this should translate to reduced costs and reduced fees and charges on regulated entities, with improved investigation and enforcement.

We note that the 2015 Capability Review makes recommendation 33:

…that *ASIC should invest in the development and application of big data 'reg-tech' analytics, through identifying specific applications for regulatory data analytics and building required staff skills/capabilities.*

And recommendation 34 states:

*…that ASIC, in conjunction with the Council of Financial Regulators (CFR), to develop a forward work program to design and implement open data policies and data analytic collaboration.*

**Data management:**

We appreciate that progress is being made, however, we have yet to see any benefits and despite requesting more details, this has not been forthcoming. Whilst some data is shared with stakeholders, it falls short of an open data policy.

However, this is true of government across the board. The IPA Deakin University SME Research Centre faces constant constraints caused by the lack of accessibility to data for the purpose of academic research and in the public interest. The obstacles and time involved in accessing BLADE were wasteful when compared to data accessibility in countries such as the US. We are hopeful that the current Government will implement a genuine open data policy.

**The IPA recommends**: that ASIC's strategy to become the corporate regulator that government, business and the community expect (and need) by 2030 should be accelerated, with a clear timeline for the strategy to be implemented within say the next couple of years. Given the rapid pace of technological change the IPA firmly believes that any timeline longer than 12-24 months will not meet community and business expectations. The cost of acceleration will be outweighed by improved enforcement and increased market confidence.

## Term of reference F: the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner

With respect to funding, we note on page 22 of the Corporate Plan that ASIC has total available funding of $446 million in 2022–23, down 11% from the previous year. Departmental operating appropriation for 2022–23 is $414 million, down 2% mainly due to the termination of funding for the non-ongoing components of enforcement measures.

A significant proportion of ASIC's resources are allocated to enforcement, supervision and surveillance activities, with enforcement accounting for 56.2% of the budget and supervision and surveillance being 28.8% of the budget (total 85%), in 2022-23.

Under the Industry Funding Model (IFM), regulatory costs are recovered from the industry sectors being regulated. This captures many IPA members who hold ASIC statutory registrations (Registered Liquidators, Registered Company Auditors (RCAs), SMSF Auditors, holders of limited and full

Australian Financial Services Licenses, Authorised Representatives and credit providers). The CRIS sets out how resources are allocated. A review of the IFM was announced in September 2022, and consultation has since closed. The review was the culmination of an extensive period of advocacy by many stakeholders who were extremely concerned about the inadequacies of the IFM.

Given that 83% of ASIC's operating costs are subject to the IFM, then it is imperative that ASIC operate as efficiently and effectively as possible. Regulated entities should not be treated as some type of 'slush fund' where we have seen increases in levies of 160% over 2-3 years and other huge increases (with some smaller reductions).

As the IPA has stated in many other submissions, more transparency and accountability are needed from ASIC to properly assess the allocation of funds against its functions, especially supervision and enforcement which make up the bulk of the costs.

From our knowledge and understanding derived from the fact that approximately three-quarters of the IPA's members work in or advise small business, we believe that many of these smaller entities are less complex and present a lower (systemic) risk. We note that they do not appear to receive much supervision, surveillance, or enforcement. Accordingly, the low level of regulatory activity given to this sector, does not justify the level of fees and charges levied upon them, and needs to be addressed as soon as possible. We have explored this in greater detail in other submissions and consultations.

The *Effectiveness and Capability Review of the Australian Securities and Investments Commission* by the FRAA released in July 2022 described the current funding arrangements but made no useful analysis or recommendations as to the use or application of the funds.

**The IPA recommends:** that the IFM review by Treasury should be completed without delay.

### Term of Reference G: opportunities to reduce duplicative regulation

Some of the entities subject to ASIC's fees and levies are also regulated by other agencies including the Australian Taxation Office, Tax Practitioners Board, Financial Reporting Council (FRC) and in the case of professional accountants, by the professional accounting bodies enforcing the Accounting Professional and Ethical Standards Board (APESB) Code of Ethics and other professional standards. There is also the additional layer of reporting to the Professional Standards Councils with all of the professional accounting bodies (including IPA) having a Professional Standards Scheme. The IPA has mandatory reporting requirements to each of these regulators and standard setters.

The cumulative regulatory impact should be considered when assessing the level of risk and applicable supervision, surveillance and enforcement activity.

For instance, RCAs are subject to a rigorous quality assurance audit every three years by their respective professional accounting body, which is reported annually to the FRC and to the APESB. There is also mandatory Continuing Professional Development and a complaints, investigations and disciplinary process in place. Even though the professional accounting bodies do not have the same legislative enforcement powers as ASIC, the objectives of regulating, improving behaviour and culture, increasing professionalism (including integrity and competence) and serving the public interest are all the same. This is essentially a co-regulatory model which we believe should be given due weight. Instead, our members are subject to overlapping and at times conflicting requirements, creating additional compliance costs. In many cases this cannot be passed on to clients and consumers and is simply detrimental to the economy.

**The IPA recommends:** that the cumulative (and overlapping) regulatory burden should be genuinely assessed in every impact statement and impact analysis relating to legislation, regulation and legislative instruments. In this regard, genuine consultation with relevant stakeholders is a necessity and should not be treated as a tick box exercise.

## Term of reference H: any other related matters

### Metrics for measuring regulatory action and enforcement

All businesses and government agencies need valid and agreed metrics, including ASIC. It is interesting therefore to note the following statements from ASIC's latest Corporate Plan.

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*We will continue to refine our impact assessment methodology to measure the impact of our interventions. However, there are currently no widely accepted metrics and benchmarks that enable consistent, data-informed assessments to be made of regulatory and enforcement performance.*

The description of outcomes, outputs and evidence on pages 27 and 28 seem reasonable though basic.

This appears to be supported by the 2022 FRAA report which states on page 10:

***Measuring the effectiveness and capability of financial regulators***

*There are no settled metrics to assess regulatory effectiveness and capability and there are substantial complexities in comparing regulators. The lack of globally accepted metrics reflects the difficulty of the task. That said, individual metrics can assist in the ongoing management of a regulator and help senior management with the difficult trade-offs that are a central part of their role.*

*Developing a framework of indicators and metrics to measure effectiveness and capability.*

*There are several frameworks for the measurement of regulatory and financial system performance from international bodies such as the Organisation for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and the Basel Committee on Banking Supervision. However, these frameworks do not provide a clear basis for assessing the effectiveness or capability of regulators.*

The FRAA report finds that,

*ASIC is generally effective and capable in the areas reviewed, although there are important opportunities to enhance its performance.*

and

*Notwithstanding areas of improvement, it is well recognised that Australia has a world leading financial system to which ASIC's contribution is crucial.*

However, it is difficult to reconcile these statements with the recommendations on page 3 of the FRAA report which should be specifically noted:

***Recommendations***

- *ASIC requires a substantial uplift in its data and technology capability, which will involve cultural change.*
- *ASIC should have a stronger focus across the organisation on enhancing the quality of its engagement with stakeholders.*
- *ASIC should enhance its ability to measure its own effectiveness and capability and communicate the outcomes of such assessment transparently, both internally and externally.*
- *ASIC should continue to broaden its mix of skill sets to ensure it can meet the current and future needs of the organisation.*

**The IPA recommends:** that the Government should implement the FRAA recommendations FFafter a reasonable period of consultation with relevant stakeholders.

**Assessment framework for capability reviews**

More specifically, in responding to the FRAA assessment key questions, the IPA referred to the 2015 Capability Review. The Government stated at the time that 'The Report presents findings and practical, forward-looking recommendations framed to ensure ASIC has the right governance and leadership, strategy and delivery capabilities to meet its objectives and regulatory challenges today and in the future'.

The 2015 Capability Review and the 2022 FRAA assessment report applied a similar framework to assess matters relating to governance, organisational structure, leadership talent, culture, strategy development, strategic communications, resource allocation, workforce management, regulatory toolkit, stakeholder engagement and management, and data infrastructure.

Even though over seven years have passed since the 2015 review, we believe that some identified 'material gaps' still exist, including ASIC's lack of accountability and transparency; lack of internal efficiency which has led to increased industry levies; inadequacies in stakeholder management (quantity over quality); and lack of adequate use of technology. In 2023, we find ourselves asking the same questions and making the same recommendations.

**The IPA recommends:** that the Government consider and build on the work of previous reviews and inquiries.

**ALRC – useful findings**

The ALRC *Review of the Legislative Framework for Corporations and Financial Services Regulation* resulting from the 'Hayne Royal Commission' has made useful findings and recommendations which the IPA believes can assist this Inquiry. The first interim report was released in November 2021, the second in September 2022, the third is due in August 2023 with the final consolidated report due in November 2023. On page 12 of the summary report of the first interim report, it states:

*The Panel identified three exogenous factors (those outside of ASIC's control) that will impact on ASIC's ability both to respond to the recommendations made in this Report, and on its ongoing and future ability to fulfil its mandate efficiently and effectively. These are [inter alia]:*

> *Legislative and regulatory complexity: the increasing complexity of the regulatory regime that ASIC is expected to administer, and in particular the application of the Corporations Act, is a source of significant regulatory burden, constrains ASIC's ability to advance regulatory mutual recognition internationally and imposes material costs on the real economy, particularly in relation to Australia's competitiveness in attracting productive capital investment to fund future economic growth and employment.*

The IPA contends that the fact that ASIC presides over what the ALRC has described as 'impenetrable' legislation and regulation and given that it has the most extensive set of responsibilities of any corporate regulator in the world, then its enforcement capability as well as its strategy, decision-making, day-to-day functions, and operations, are all under considerable constraint. We note that these factors have led some highly regarded domestic and international commentators (ALRC/ Melbourne University Law School) to allude to a blurring of the 'twin peaks' model of financial regulation.

**The IPA recommends:** that the Government give timely and due consideration to the findings and recommendations of the ALRC review pertaining to the *Corporations Act 2001* and the performance of ASIC.