



Australian Government

Fit for the future

A capability review of the Australian Securities and Investments Commission

A Report to Government

December 2015

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Australian Government
ASIC Capability Review

4 December 2015

The Hon Kelly O'Dwyer MP
Minister for Small Business and
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Dear Minister

Capability Review of the Australian Securities and Investments Commission (ASIC)

In accordance with the Terms of Reference, we are pleased to present the Panel's Report — *Fit for the Future: A Capability Review of ASIC*.

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.

Implementation of the recommendations will ensure ASIC is best placed to deal with a rapidly changing external environment and promote enhanced industry, consumer, investor and community confidence in ASIC.

In our deliberations and in making our recommendations, the Panel has drawn heavily on the experience, expertise and insights of stakeholders garnered through submissions, consultation meetings and surveys we commissioned. The Report has also drawn upon evidentiary material collected by PricewaterhouseCoopers (PwC). The PwC evidence report was one of several key inputs to the Panel's deliberations.

The Report's 34 recommendations complement each other, implementing them will require the Government, the Parliament and ASIC working together in a mutual commitment. Those relating to governance and leadership are enduring and therefore matter most.

While we have benefited from the insights of many interested parties, the views expressed in this Report however are entirely our own, and we commend its recommendations to you.

Yours sincerely

SIGNED

Karen Chester
Chair

SIGNED

Mark Gray
Member

SIGNED

David Galbally AM QC
Member

A future practice of regulatory craftsmanship

The current accumulation of pressures on regulators, coupled with the rich experience of recent regulatory experiments and innovations, presents a very special opportunity: to define, or substantially refine, the professional craft of regulatory practice and to design administrative and organisational arrangements to support a new regulatory craftsmanship.

Malcolm Sparrow

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FOREWORD

On 24 July 2015, the then Assistant Treasurer, the Hon. Josh Frydenberg MP, announced a review to consider the capabilities of the Australian Securities and Investments Commission (ASIC).

The Capability Review forms part of the Government's response to the Financial System Inquiry (FSI) which recommended periodic reviews of the capabilities of financial and prudential regulators, commencing with a review of ASIC in 2015 to ensure it has the skills and culture to carry out its role effectively.

Findings of the Capability Review will also provide information to assist the Government's consideration of the FSI recommendation for ASIC's regulatory activities to be funded by industry.

The Review was led by an Expert Panel, chaired by Ms Karen Chester with Mr Mark Gray and Mr David Galbally AM QC as members, and supported by a team of public and private sector personnel.

Terms of Reference

The Review was required to consider how ASIC uses its current resources and powers to deliver its statutory objectives and assess ASIC's ability to perform as a capable and transparent regulator. The Capability Review was asked to examine, and make recommendations on how efficiently and effectively ASIC operates to achieve its strategic objectives, including:

- identification and analysis of immediate and forward-looking priorities or risks;
- resource prioritisation and responsiveness to emerging issues, including:
 - how ASIC allocates its current resources among its regulatory tools, such as supervision, surveillance, education, policy, enforcement and litigation; and
 - how ASIC allocates its current resources across its regulated population.
- the skills, capabilities and culture of the Commission and its staff, including in respect of internal review and improvement mechanisms; and
- organisational governance and accountability arrangements.

The Capability Review was asked to have regard to how comparable international regulators operate and relevant legislation, including the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

In assessing ASIC's approach to its statutory objectives, the review could provide observations, but not make recommendations on ASIC's regulatory framework or powers.

The Expert Panel was asked to provide a report to Government by the end of 2015.

Consultation

The Expert Panel consulted extensively with ASIC, private sector businesses regulated by ASIC, peak bodies, regional and consumer representatives and other stakeholders.

The Capability Review has been informed by a review of ASIC's current processes, consultation with the senior leadership of ASIC, its staff, other public sector agencies who interact with ASIC, a spectrum of private sector businesses and licensees regulated by ASIC, peak bodies, regional and consumer representatives, professional firms (legal and accounting) which have regular dealings with ASIC, and members of the judiciary. It has also been informed by an analysis of the approaches and capabilities of comparable foreign regulators in major markets such as the United States, United Kingdom, Europe, Canada, Asia (including Hong Kong, Singapore, Malaysia) and New Zealand.

Expert Panel

Ms Karen Chester (Chair)

Ms Karen Chester is a Commissioner with the Productivity Commission. Ms Chester was previously a Partner in Mercer's global investment business, held senior executive positions with Access Capital Advisers and was the Chief Executive Officer of its corporate predecessor, Access Economics. Before her move to the private sector, Ms Chester held senior roles in the Australian public service.

Mr David Galbally AM QC

Mr David Galbally AM QC is a partner at Madgwicks Lawyers. Mr Galbally has extensive experience in commercial litigation and dispute resolution, including matters relating to corporate governance, human rights, privacy and superannuation regulation. He was appointed as Queen's Counsel in 1996. In 2013, he was appointed to the Order of Australia in the General Division for significant service to the community, particularly through leadership in health organisations and the provision of pro bono legal services.

Mr Mark Gray

Mr Mark Gray has held Chief Executive positions with the Queensland Treasury, the Queensland Competition Authority and the Queensland Commission of Audit. Mr Gray has also held senior executive positions with the Macquarie Group and BDO and is an Adjunct Professor of Economics at the University of Queensland.

Acknowledgments

The Panel would like to thank ASIC staff, senior executive leaders, the Chairman, Deputy Chairman and other Commissioners for their assistance and engagement in the Review.

The Panel would also like to thank everyone who gave generously of their time and insights by participating in the Panel's stakeholder roundtables, one-on-one interviews, meetings, surveys, and went to the effort of preparing submissions.

Chairs and members of ASIC's external committees and panels also gave generously of their time and allowed the Panel to attend and observe their meetings during the course of our review. The Panel also benefited from the considered observations of members of Australian superior and appellate courts.

The Panel would also particularly like to thank:

- Jacob Hook (Oliver Wyman) and Jeff Carmichael (Promontory Financial Group) for generously sharing their insights and expertise on regulatory best practice in Australia and internationally; and
- Maile Carnegie for insights and access to recent innovative research by Google (Project Oxygen) on the characteristics of high performance teams.

These contributions provided the Panel with crucial insights into the issues it was asked to consider.

The Panel wishes especially to acknowledge the assistance of PricewaterhouseCoopers (in particular Hugh Harley, Nicole Salimbeni, Iain Chalmers, Jenn Whittaker, Kirsty Forrest and Blake Woodward) for identifying, collating and preparing evidentiary material for the Review.

Finally, the Panel also wishes to acknowledge the support provided by members of the Treasury Secretariat and Treasury officials: Rupert Jolley, Percy Bell, Camille Blackburn, Kylie Bourke, Andrew Craston, Shellie Davis, Fiona Deegan, Alex Le, Kate Mills, Scott Mischke, Trevor Rose, Jessica Stone and Callie Voulgaris.

EXECUTIVE SUMMARY

Overview

The Australian Government has commissioned an independent review to consider the capabilities of the Australian Securities and Investments Commission (ASIC). The Review is a forward-looking, whole-of-agency exercise that assesses ASIC’s ability to meet its current and future objectives and challenges. It is not a performance review.

In undertaking the Review, the Panel consulted extensively with businesses regulated by ASIC, peak bodies, regional and consumer representatives, regulators and other stakeholders, as well as ASIC staff and leadership. The methodology of the Review involved extensive consultation, including stakeholder interviews, surveys of ASIC staff and stakeholders (the regulated population, business, consumers, and practitioners), discussions with peer domestic and international regulators, and assessment of public and internal ASIC documentation and data.

Overall assessment

To examine and assess ASIC’s capabilities, the Panel adopted a well-established and contemporary Capability Review framework focusing on the key elements of Governance and Leadership, Strategy and Delivery. Figure 1, provides an overview of the elements of the capability framework adopted as the basis of this review. Importantly, the framework has been refined by the Panel to reflect the capability requirements for conduct and security regulators (that is, what the Panel would expect a model regulator to look like).

Figure 1: Capability Review Assessment Framework



The Review has assessed ASIC across each element of the framework. This has involved a transparent and comprehensive fact and evidence-based approach. The Panel has drawn on the resulting fact-base and used its judgement to make observations and recommendations.

In order to ensure that the Review provides a set of useful recommendations for ASIC, the focus has been on areas for improvement. Accordingly, the discussion is relatively more focused on a forward looking identification and assessment of current shortcomings, while acknowledging but not elaborating on relative areas of strength. The Panel has been mindful of this tendency, and has sought to identify and acknowledge recent areas of improvement and where ASIC's capabilities are best practice or sound. That said, it is incumbent in undertaking the review that greater detail be afforded areas for improvement and the accompanying practical recommendations for action to address them.

Overall, and based on the Panel's extensive discussion with other regulators and experts who have reviewed those peer regulators over time, the Panel has found that the effectiveness and efficiency of ASIC's capabilities vary widely across the range of areas assessed:

- A few of the regulatory capabilities, such as real-time market supervision and consumer education, are in line with or at the forefront of global best practice.
- There are some areas where ASIC's approach is similar to the practices of peer regulators, and while these capabilities show some opportunities for improvement, appear broadly appropriate for current and future needs. Most elements of ASIC's regulatory toolkit (for example, surveillance, education, and policy guidance) fall into this category.
- A few capabilities are in line with those of most other regulators, but still behind where they will need to be to ensure that ASIC is fit for the future. The key areas here are application of 'big data' analytics to regulatory activities, building capabilities to respond to the challenges posed by technological and business model innovation in the financial sector, and in partnership with the Government, improving the use of ASIC's external accountability infrastructure.
- Finally, there are a number of areas where ASIC's capabilities show material gaps to what the Panel considers to be good practice, and where improvement is required without delay. These include ASIC's governance model and leadership related processes, its IT, data infrastructure and management information systems (MIS), for measurement and reporting of internal efficiency in management dashboards, and its approach to stakeholder management.

To ensure ASIC is fit for today and fit the future, ASIC and the Government must collectively address the gaps identified above, especially those in the latter two categories.

Common themes identified

The Panel has observed five key themes in its assessment of ASIC. These themes cut across the main elements of the capability framework (governance and leadership, strategy, and delivery), and draw together many of the observations highlighted throughout the Report. The themes are:

1. sound governance architecture, not well used;
2. the 'expectations gap' — much greater than expected;
3. opportunity to reorient for greater external focus;
4. cultural shift needed to become less reactive and more strategic and confident;
5. 'future-proofing' and forward-looking approaches needed.

The Panel also observed some external constraints for which action needs to be undertaken.

Sound governance architecture, not well used

In a number of areas, the Panel observed that ASIC's 'governance architecture' (the setup of its key governance elements and processes) is sound and well designed, but for a variety of reasons has been used in a way that does not produce the best possible results.

A key example is ASIC's internal governance arrangements. While legislation requires that the Commission be comprised of three to eight statutory appointees, it provides only general guidance as to the roles that the Commissioners are to perform. Under current arrangements, Commissioners have both an executive (management) role and a non-executive (governance) role. In their executive roles, Commissioners have responsibility for a particular line of business, with direct reporting lines from Senior Executive Leaders (SELs) to individual Commissioners, and are involved in the management of day-to-day operations. In their non-executive roles, Commissioners provide strategic oversight across the organisation, ensure internal accountability and make decisions (including strategic and material regulatory ones) on a collective basis.

The current model has a number of strengths (for example, close alignment between operational and strategic decision making). However, the model also results in a number of key challenges and tensions, with the risk that it erodes the strength of internal accountability, and that it may leave insufficient bandwidth for Commissioners to focus on important strategic issues and external engagement.

The Panel believes that a dual governance and executive line management role inherently undermines accountability. Despite best efforts, individuals responsible for particular executive functions are unlikely to be consistently able to detach themselves from their concerns as an executive, to take a fully independent and organisation-wide perspective when acting in their governance role, to hold the executive team (including themselves) to account.

The conclusion that ASIC's Commissioners have insufficient 'strategic bandwidth' is supported by interviews and discussions with the Panel, together with the Panel's own observations and a time-use survey and analysis conducted by PwC. After having reviewed PwC's analysis and an advance draft of the Panel's Report, ASIC provided supplementary time-use data, which could not be reconciled with the information originally provided to PwC and presented a picture of greater time spent on strategic matters.

Regardless of the interpretation of the time-use evidence, the Panel is of the view that its findings stand given other sources of evidence (observations, internal and external discussions, survey data) and challenges around ensuring strong internal accountability under the current structure. As a result, the Panel considers that the existing model is unsustainable, given the magnitude of the challenges ASIC is likely to face in the foreseeable future.

The combined non-executive and executive role is unlike the models employed by large corporations and many other conduct regulators internationally, where Commissioners or Board members do not have direct responsibility for a line of business and are not directly accountable for and immersed in day-to-day operations. It also has significant in-practice differences to the models deployed by the Australian Prudential Regulatory Authority (APRA) and also the Australian Competition and Consumer Commission (ACCC), including the latter delegating to a Chief Operating Officer (CoO), despite operating under similar legal frameworks to ASIC. The Panel therefore concludes that the concerning aspects of ASIC's governance model are not dictated by its 'structural architecture', but rather by the way the model is interpreted and applied by its leadership.

Similarly, ASIC has a broad range of external accountability mechanisms, including ministerial oversight, parliamentary oversight and inquiries, performance reporting and the Statement of Expectations (SoE) and Statement of Intent (Sol) documents. However, these are not being effectively used to provide an assessment of ASIC's strategic choices and effective delivery over time.

The Panel recognises that Parliament has an important role to play in investigating material regulator performance issues, including those that give rise to concerns of the public, and in ensuring that ASIC is identifying and addressing in a timely and effective manner significant risk issues that may result in material harm or potential harm. However, the Panel considers that, on balance, parliamentary oversight has tended to become overly issue driven and reactive, at the expense of a more strategic long term oversight function and comprehensive accountability. This view was shared by most stakeholders consulted and emerged as a common theme in stakeholder feedback during the review's consultation.

Additionally, the SoE and Sol are not being fully leveraged to ensure broad public understanding of what should be expected of ASIC, and what are the limitations of its mandate, particularly in relation to protection from harm. Overall, the Panel considers the external governance architecture to be comprehensive, sound and simply requiring better and more disciplined use.

As a third example, while a well-established strategic planning process exists that the Panel would consider to be sound 'governance architecture', there is insufficient focus on planning the delivery of the strategy. This is evident in the Corporate Plan which, while providing a thorough discussion of ASIC's objectives and priorities, does little to describe how these goals will be achieved. This is an essential prerequisite to accountability. It is also manifest in ASIC not having contemporary Management Information Systems (MIS) to facilitate efficiency measurement and management dashboard reporting or an established program of continuous business efficiency review and improvement. The absence of these systems precluded the Panel's assessment as to whether ASIC is efficient, appropriately funded and comprehensively reducing red tape.

The insufficient focus on delivery in the strategy is also partially driven by the combined executive and non-executive governance structure. A body that merges a whole of organisation strategic function, with individual executive responsibility, will be less easily able to require its individual members to detail and account for their plans than a non-executive board would be able to in relation to the executives reporting to it.

The Panel believes this can be readily addressed without changing the structure or needing an external Board.

The 'expectations gap' — much greater than expected

In a number of areas, the Panel identified and noted a misalignment between the understandings or perceptions of external stakeholders and those of the ASIC leadership (Commissioners and SELs). This misalignment can be referred to as an 'expectations gap', relating to both perceptions of ASIC's performance and what ASIC can and cannot do. It is to be expected that there will be some expectations gap — both because of an inherent 'negativity bias' by stakeholders in relation to a regulator, but also to some extent because of a 'positivity bias' on the part of leadership. However, for many reasons, the expectations gap was much greater than expected.

In surveys conducted as part of this review, there was close alignment (less than a 15 percentage point difference) on a number of the survey questions, and in some instances the views of external stakeholders were more positive than those of ASIC leadership, for example in the timeliness and cost of licensing and registration. These results are included in Figure 2, below.

Figure 2: The expectations gap — areas of alignment¹

| | External organisational stakeholders | Gap (% pts) | ASIC SELs and Commissioners |
|--|--------------------------------------|-------------|-----------------------------|
| ASIC deters individuals or organisations from engaging in misconduct | 41% | 14% | 55% |
| Staff have the authority to act | 49% | 14% | 63% |
| Financial markets operate transparently | 67% | 14% | 81% |
| ASIC acts quickly to investigate potential breaches of the law | 23% | 14% | 37% |
| ASIC provides effective surveillance | 42% | 13% | 55% |
| ASIC ensures companies have financial reports that can be relied upon | 58% | 10% | 68% |
| ASIC staff have necessary skills | 46% | 9% | 55% |
| The Australian public is well informed about financial matters | 21% | -3% | 18% |
| ASIC is sufficiently resourced to do its job | 15% | -4% | 11% |
| Licensing and registration – process takes a reasonable length of time | 48% | -14% | 34% |
| Licensing and registration – costs are reasonable | 64% | -14% | 50% |

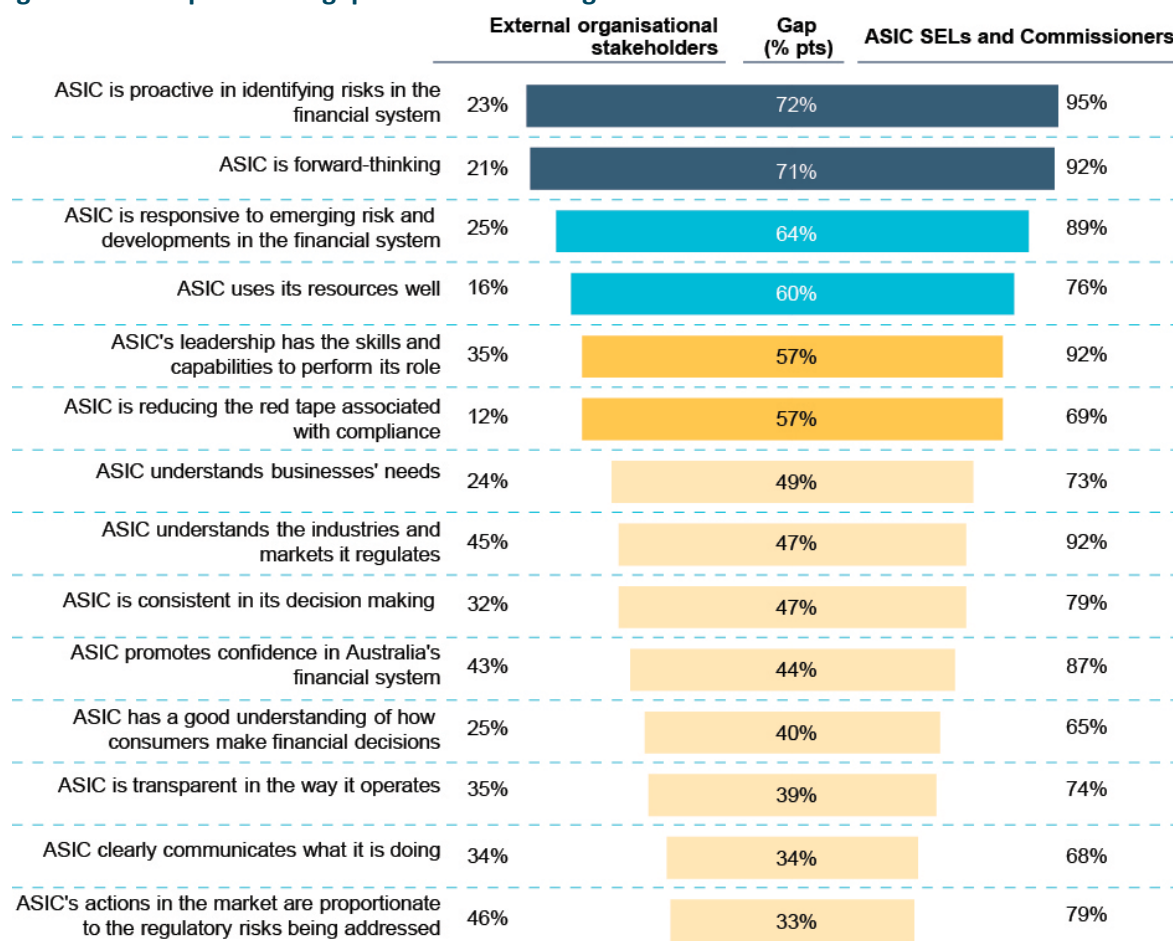
Key:

- Percentage point difference between internal stakeholder rating and external stakeholder rating (where internal views are more positive)
- Percentage point difference between external stakeholder rating and internal stakeholder rating (where external views are more positive)

However, the Panel also identified a larger number of areas of significant misalignment (where ASIC leadership’s survey results were more than 50 percentage points disparate to external stakeholder results) illustrated in Figure 3. The Panel observes the most significant expectations gaps occurs in relation to the extent to which ASIC is outward looking, proactive and forward thinking, and is responsive to emerging risks and developments. Stakeholders also expressed more negative views than ASIC leadership about its use of resources, and its success in cutting red tape (see Chapter 2 for further discussion).

¹ Susan Bell Research 2015, *ASIC Capability Review: Comparing the views of ASIC’s leadership team with the views of external stakeholders*, in Appendix E of *Evidence Report — Volume 3*, pages 64-91.

Figure 3: The expectations gap — areas of misalignment²



It is also evident that many external stakeholders are not fully aware of the limits of what ASIC can and should do. This is demonstrated in the tendency for public reaction and criticism against ASIC where there is a market failure or losses occasioned by normal commercial or investment risks, even where it is not reasonable to expect ASIC to have prevented that outcome.

The expectations gap may not necessarily be indicative in itself of ASIC's performance, as it is based upon subjective judgement and not all stakeholders are fully informed or impartial. It may also indicate that ASIC has not been successful in communicating its achievements to the public, or that it has not fully grasped what is expected of it. For example, ASIC has been making progress on reducing red-tape, and is able to identify a number of specific examples where this has been successful, resulting in a total saving of around \$470m. However, feedback suggests that this progress has fallen short of expectations and that ASIC may not be placing sufficient focus on the areas that impose the biggest regulatory burden (see Chapter 2 for further discussion).

The gap is much greater, however, than the anticipated disparity and warrants immediate attention to improve clarity over ASIC's mandate, ensure strategic responses are appropriate and to improve performance reporting. This imperative to act would be elevated if a proposed move to a user pays funding model is adopted by the Government.

² Susan Bell Research 2015, *ASIC Capability Review: Comparing the views of ASIC's leadership team with the views of external stakeholders*, in Appendix E of *Evidence Report — Volume 3*, pages 64-91.

The expectations gap also provides valuable indication of areas where ASIC either needs to improve its capabilities or where it needs to improve the effectiveness of its communication about its activities and the results. The Panel has therefore used the expectations gap as an important guide to its focus areas during this Review. In particular, the Panel investigated drivers of the expectations gap and identified a number of these in ASIC's external accountability arrangements, strategy development and communication processes.

Opportunity to reorient for greater external focus

Across the various areas of governance and leadership, strategy, and delivery the Panel found that the organisation had an inward-looking orientation to its culture and practices.

For example, based on evidence prepared by ASIC and PwC, the Panel concludes that ASIC's leadership spends insufficient time engaging with the market³ and tends to be overly focused on internal challenges and operations. The PwC time use analysis suggests ASIC Commissioners spend 26 per cent of their time on external engagement⁴ (including engagement with international stakeholders), while evidence provided by ASIC suggests Commissioners spend on average 24 per cent of their time on the same.⁵ Excluding the Chairman, whose International Organization of Securities Commissions (IOSCO) role entails a significant time commitment, the average comes down to 21 per cent.⁶ The Panel views a best practice time allocation to external engagement for the senior leadership of a regulator as 40 per cent or more, based on observations of other agencies. The Panel believes that ASIC's governance arrangements contribute to this inward orientation for its leaders and that change is required to reorient them 'upward and outward' rather than 'downward and inward'.

The Panel also found that ASIC can do more to leverage a wider variety of perspectives to support the identification of emerging risks and trends to inform the selection of its strategic priorities. For example, while ASIC currently has an extensive set of external expert panels, the Panel has concluded that these are not currently being fully leveraged in the strategic planning process. Similarly, numerous stakeholders indicated that they do not feel ASIC is consulting them sufficiently as a means of proactively identifying emerging risks and priorities and tailoring regulatory solutions.

ASIC also has scope to be more outward looking in its interactions with regulated entities. Touch-points with the regulated population are driven primarily by ASIC's internal organisation model and the priorities of the individual teams within it, rather than the needs of stakeholders. Many of the larger and more complex regulated entities find ASIC's engagement with them uncoordinated and thus more burdensome than it needs to be. The Panel believes that a revised stakeholder management model would support greater outward orientation and more effective engagement with external counterparties.

3 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 20. ASIC Commissioners spend an average of 21 per cent of their time on meeting/engagement activities with external stakeholders.

4 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, *ibid*.

5 Analysis conducted by ASIC based on review of Commissioners' diaries and reflection on activities between September and November 2015. Given some Commissioners' leave and travel arrangements during this time, note that analysis was conducted to reflect a one month long period when they were present in the office. Analysis assumes a 9 hour day and 22 working days a month.

6 *Ibid*.

Cultural shift needed to become less reactive and more strategic and confident

Importantly, stakeholder feedback and survey data indicates that ASIC staff are motivated, hard-working and professional. However, there is a stakeholder perception, supported by the Panel's observations, that ASIC has a tendency to be reactive in the way it uses the regulatory tools at its disposal and is often excessively issue driven (that is, responding to high profile events) rather than more consistently strategic in its focus.

The way in which current external governance arrangements are applied is a major driver of this tendency. Analysis of the public record of interactions between ASIC and its oversight bodies such as the Parliamentary Joint Committee on Corporations and Financial Services show that these are overwhelmingly focused on topical issues (financial planning scandals for example), rather than on discussion of ASIC's longer term strategic plans and progress in delivering on these. The SoE and Sol documents also lack strategic depth and represent a missed opportunity to inject a more proactive element into ASIC's external governance process.

In the Panel's opinion, this heavily issue driven oversight is highly likely to contribute towards a reactive culture at ASIC. However, the Panel acknowledges that reactive cultures appear to exist broadly across the public sector. The Review of Whole-of-Government Internal Regulation found that risk aversion was a dominant aspect of institutional culture across the public sector. Of the 18 capability reviews of departments and agencies conducted between August 2012 and July 2014, 13 identified significant levels of risk aversion and centralised decision-making at senior levels.⁷

The Government and ASIC have a joint responsibility to recalibrate the reactive focus of ASIC's oversight to include a greater emphasis on holding the regulator accountable for delivery on a sound, forward-looking strategy. This change should result over time in a shift in ASIC's culture to greater proactivity and further promote staff morale.

It is ultimately the responsibility of ASIC leadership to set the culture and tone and to drive top-down messaging to ensure consistency across the organisation. Commissioners therefore need to articulate the required cultural changes in the organisation and ensure that these filter through into everything they do — here ASIC should look to be a role model in embracing the types of cultural improvement and maintenance programs that it is increasingly requiring of regulated entities.

Furthermore, ASIC's articulation of its role, especially by the leadership, shows too heavy an emphasis on enforcement, which is often a reactive tool. This is also reflected in ASIC's resource allocation to the enforcement function far exceeding that of peer regulators. This enforcement emphasis in communications and resourcing risks prioritising strategic focus and staff orientation too much towards this single aspect of the regulatory toolkit. While enforcement is a critical element of ASIC's toolkit, especially in terms of its deterrence impact and overall credibility of the regulator, in the Panel's view, a better balanced approach emphasising the full scope and use of ASIC's regulatory toolkit would be more appropriate for a modern and dynamic conduct regulator.

7 Burgess, V 2015 (November 18), 'Risk aversion still chokes up the public service', *Australian Financial Review*.

‘Future-proofing’ and forward-looking approaches needed

ASIC has done much to improve its capabilities over the last four to five years. It has recognised many of the gaps and issues identified in this Review and has launched a number of relevant initiatives, especially in the IT and data infrastructure area. In the Panel’s view, such change programs need to be developed and rolled-out with ASIC’s future as well as current needs in mind. Indeed, acceleration of these programs is likely to be necessary for ASIC to keep pace with the rate of change in the markets, products and services which it regulates.

Effective investment is essential for ‘future proofing’ ASIC’s ability to meet future demands. This includes identifying the capabilities that are important now and in the next three to five years and ensuring ASIC has the required infrastructure to support closing these gaps.

Across the various aspects of this Review, it was not consistently apparent to the Panel that ASIC does take such a forward looking view in relation to its capability development efforts. For example, efforts to improve forward looking workforce planning only began in early 2014 and are not fully developed or embedded. This is currently being conducted with the assistance of an external service provider and do not cover support functions or forward-looking Commission level skills gap assessments.

Another example is the IT component of the OneASIC program (FAST2), which, while closing existing gaps, will likely still leave ASIC lagging compared to peer regulators when it is implemented. ASIC’s planning around how it will use its upgraded infrastructure to support ‘big data’ driven regulatory analytics also appears relatively nascent. It has initiated a process of working through these questions and assigned responsibility for charting a course for the use of data and analytics to the Strategic Intelligence Unit. This is an important step but its work in this area appears to be behind that of leading peer regulators and is not sufficiently advanced to credibly form the basis of a ‘future-proofed’ IT infrastructure plan in terms of specifying the data infrastructure needs of future analytics applications.

This issue was a focus of PwC’s expert assessment of ASIC’s IT programs. While PwC’s report was purely a factual evidence collection exercise and did not include observations and judgement, the PwC expert conducting the IT assessment has reviewed the Panel’s findings and agrees with the Panel’s conclusions.

External constraints

The Panel also 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:

- 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.

- Perceived funding constraints: Like most government agencies, ASIC has experienced some funding instability and inflexibility in recent years, due to Government savings measures. There is also a perception of underfunding (although it is not clear whether this perception is well founded). The Panel notes that ASIC's real funding has increased from \$260m to \$312m since 2004-05 (excludes own-source income), largely reflecting the expansion of its functions over this period. Whatever the perceived funding constraints, it is incumbent upon ASIC to use its funds efficiently and effectively to deliver value for money for its funders and stakeholders. This will require ASIC developing and implementing contemporary MIS to measure and report internal efficiency metrics.
- Regulator cooperation: the potential limitations imposed through insufficient coordination and forward looking collaboration between peer regulator agencies. ASIC's Eight Point Plan indicates that ASIC is willing to enhance the degree of cooperation with other regulators and agencies.

Recommendations: thirty four actions identified

The Panel has approached this Review with the over-arching objective of ensuring that ASIC is 'Fit for the Future'. In doing so, the Panel has identified what action is needed without delay to ensure ASIC is entirely fit for purpose today. There are a number of changes that are needed to ensure that ASIC is sufficiently well governed, skilled, agile and responsive to meet the challenges of the future, both those that are already becoming apparent, as well as those that as yet remain unknown.

The Panel views ASIC leadership and the Government as ultimately and collectively responsible for the issues identified by the Review. As such, a mutual commitment to considering and implementing the Panel's recommendations will be needed. The Panel has identified a range of practical and action oriented recommendations to support ASIC in executing its mandate more effectively.

Thirty four recommendations have been identified across the different elements of the capability framework (that is, Governance and Leadership, Strategy and Delivery). Implementing the Report's 34 recommendations will require the collective action of the Government, the Parliament and ASIC. All of these recommendations are consistent with the IOSCO Principles of Securities Regulation,⁸ especially those relating to internal governance.

To deliver the change required, ASIC will need to begin implementing these recommendations immediately following the announcement of Government decisions on this Report. Most can be implemented within 12-24 months. Appendix A provides further implementation details of the Panel's recommended work-plan for change at ASIC.

While the Panel consider all 34 recommendations to be complementary and important, those relating to Governance and Leadership are the most critical and enduring and therefore matter most. In particular, recommendations relating to internal governance and leadership talent management will enable ASIC to effectively and efficiently execute its mandate while continuing to focus on strategic issues and external engagement. The Panel views these recommendations as essential prerequisites to securing the intended outcomes from the other recommendations. These recommendations are therefore important enablers for achieving broader change.

8 IOSCO 2010, *Objectives and Principles of Securities Regulation*.

Firstly, the Panel recommends that ASIC realign its internal governance structure to achieve a clear separation of the non-executive (governance) and executive line management roles. This will improve internal accountability mechanisms, and increase bandwidth for strategic decision making and external engagement and communications. The primary focus of the Commissioners becomes setting the strategy of the organisation and supervising overall delivery and performance against the strategy, along with making, and taking ultimate responsibility, for key regulatory decisions.

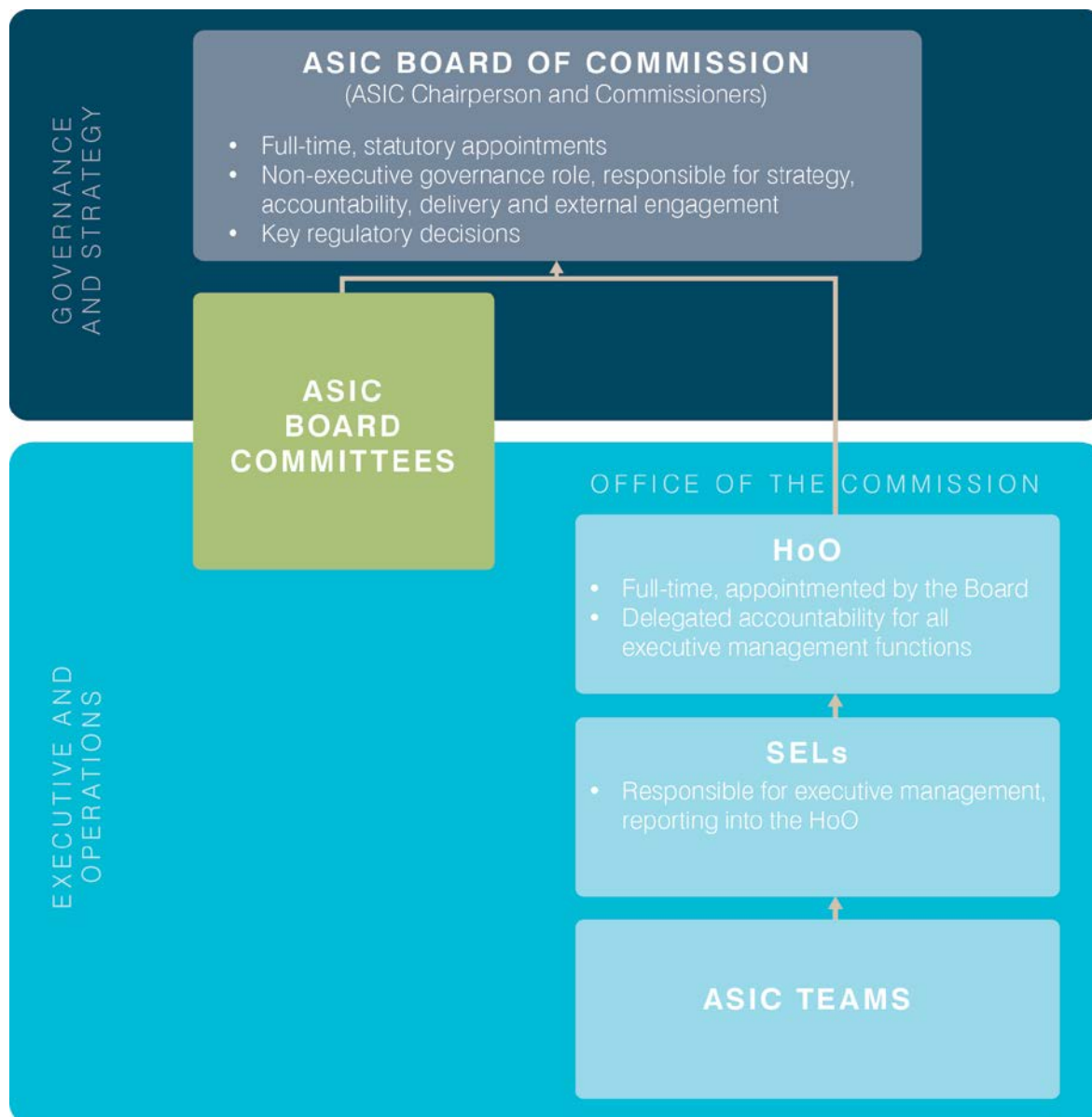
The recommended model elevates the existing Commissioner roles to a full-time non-executive internal 'Board of the Commission' (not an external board), similar to the internal governance model of the ACCC.

In this proposed model, operational decision making and execution for operational matters is delegated to the Senior Executive Level (SEL) level, reporting directly into a new Head of Office of ASIC (HoO) role. The HoO will be selected by the Chairperson and Board of Commission and is delegated executive responsibility from the Chairperson. The Chairperson will retain ultimate accountability, and thus the model is consistent with legislative requirements.

The role of the HoO will be to lead the day-to-day operational management of the organisation and to relieve the Chairperson and Commissioners of these additional and operational responsibilities. SELs will either report directly into the HoO or via group leaders. Clear lines of accountability, a revised delegation framework, and likely a revised Commission sub-committee structure will all be required to ensure that the right issues are being elevated to the Commission.

A well-developed governance and oversight framework will ensure that the HoO does not become a 'bottleneck' on decision-making and is elevating key issues while addressing operational matters below the Commission level. As is the case in other regulators and many large organisations with external Boards, there will still be regular direct contact between the full-time Commissioners and SELs on strategic and important operational matters, both during Commission meetings to which relevant SELs would be invited, and more informally on a daily basis. However, the important difference would be the elimination of direct reporting from particular SELs to individual Commissioners, and hence the establishment of clear lines of accountability for executive line management functions.

Figure 4: Key features of the proposed internal governance structure



In the Panel's view, there are a number of significant benefits which make the proposed internal governance model superior to the current arrangements:

- The Commission and executive have separate and distinct roles, ensuring clearer lines of accountability and oversight, thereby enhancing overall accountability and efficiency at both levels.
- Primary focus of the Commissioners is on setting the strategy of the organisation, supervising overall delivery and performance against the strategy and making strategic and material regulatory decisions from a whole of entity perspective.
- Commissioners have a full-time focus across the whole organisation (rather than devoting part of their time to specific cluster responsibilities).
- Commissioners are separated from operational decision making and execution activities, thus avoiding potential conflicted interests and ensuring whole of entity objectivity.

- Commissioners can be more focused on managing ‘upwards and outwards’, that is managing external relationships with the Government and other external stakeholders, rather than being focused ‘inwards and downwards’, that is managing internal operations and relationships.
- The Commission has the organisational flexibility to allocate the oversight of particular components of the strategy to a subset of the Commissioners.
- The proposed model does not require legislative change for implementation.

The proposed model is consistent with the recommendations of the Uhrig Report on regulator governance in Australia, in that the Panel is not recommending creation of a Board of external, part-time directors for ASIC. Indeed, the role of the ASIC Commissioners will extend materially beyond the role of a non-executive director at a listed corporation. Under the new approach, ASIC’s Commissioners will still be full-time and intimately involved in major regulatory decisions of strategic significance, for example approving policy recommendations and major enforcement decisions that are systemically important or high profile.

Furthermore as full-time Commissioners, there will be no risk of conflicts of interest driven by other roles, and no detachment from the business, as can occur with an external Board. There will be close interaction with ASIC senior executives on a daily basis, but Commissioners will have greater bandwidth to drive strategy, direction, culture and stakeholder management more effectively. This will allow the Commissioners to become genuine leaders rather than managers.

The Panel considers that there is a substantial agenda of strategic issues to be addressed by the Commission over the next three years, and that this will require their full-time attention, undistracted by direct involvement in managing day-to-day operational issues. These strategic issues cover the implementation of the internal governance changes; strategy setting; capabilities improvement; cultural transformation; change management and effective external stakeholder engagement.

The Panel acknowledges that the choice on the appropriate internal governance model for ASIC is ultimately a matter of judgement but current arrangements blur accountability. Therefore, the Panel has concluded that true accountability for ASIC will remain elusive in the absence of the proposed changes to its internal governance arrangements.

Secondly, the Panel recommends that Chairperson, Deputy Chairperson and Commissioner recruitment be based on a contemporary, competitive and merit based assessment process. This is important to ensure public confidence in the suitability of the Commission, and therefore ASIC more broadly.

Thirdly, the Panel recommends that the Government and ASIC commit to fostering a more strategic long term oversight function. This will include enhancements to the existing Sol and SoE infrastructure, more regular ongoing discussions between the Chairperson and the relevant Ministers, and a new commitment that the responsible Minister provide an Annual Ministerial Statement in Parliament to report on ASIC’s overall effectiveness and performance. The Panel views the proposed enhanced standards as also providing a potential and helpful benchmark model for the Government’s interactions with other independent statutory agencies and regulators.

The Panel views the Review’s observations, findings and recommendations as broadly aligned with and a practical extension of the FSI. Consistent with past reviews, the Panel does not see the need for an external Board but has sought to advance and develop a more effective approach to internal and external governance.

The Panel considers that the proposed changes to internal and external governance practices offer potential for significant improvement in ASIC’s capabilities without the need for any architectural change. The recommendations broadly align with other reviews conducted into the Financial System and ASIC. The Panel endorses the Government’s position not to proceed with the establishment of a Financial Regulator Assessment Board (FRAB) — there is no need for ‘another regulator to regulate the regulators’.

Further to the recommendations relating to governance and leadership, the Panel makes a number of recommendations on strategy and delivery — especially relating to strategic development and communications, resource allocation, workforce planning, organisation structure, the regulatory tool kit, and stakeholder and data management. Many of these recommendations are designed to better leverage both ASIC’s internal resources, as well as external capabilities currently under-utilised.

Of particular significance, the Panel considers that there are significant potential widespread risks in the current licensing and registration system which fall short of desired standards and warrant the close attention of both the Government and ASIC. Accordingly, the Panel recommends greater use of co-regulation models by ASIC collaborating with relevant industry associations to lift professional standards and ensure a more robust and effective licensing and registration system.

Table 1 summarises the key observations and recommendations across each element of the capability framework. Each of these observations and recommendations will be discussed in the following chapters.

Table 1: Key observations and recommendations

| Characteristic | Key observations | Recommendations |
|--|--|--|
| Governance and Leadership (Chapter 2) | | |
| External governance (Section 2.1) | <p>While the design of the external governance and accountability architecture is appropriate, it is being applied in a manner which is unnecessarily reactive and issue driven, and is not providing broad long term strategic oversight and thereby accountability for ASIC.</p> <p>The SoE is infrequently updated and does not clearly or transparently establish strategic priorities as understood by the Government. As a result, there is an opportunity to update the SoE to ensure better alignment and mutual understanding. There is a significant ‘expectations gap’ between the internal and external perceptions of ASIC’s performance, which must be managed by both the Government and ASIC, including through the SoE and Sol.</p> <p>ASIC is addressing its performance reporting under the PGPA Act, although this activity remains at an early stage and will need ongoing development (as recognised by ASIC in the articulation of its Corporate Plan).</p> | <p>Recommendation 1: The Minister and ASIC to implement a more effective strategic long term oversight function, underpinned by a mutual commitment to a more pro-active regular ongoing dialogue. As steps to achieving this:</p> <ul style="list-style-type: none"> – The Minister to provide an Annual Ministerial Statement in Parliament, in conjunction with tabling of ASIC’s Annual Report on the degree to which ASIC meets the expectations of the SoE and is performing in the achievement of its mandate. – The Government and ASIC to enhance the SoE and Sol to clearly and regularly communicate expectations (to be reviewed annually), and to ensure mutual understanding and support ASIC in managing stakeholder expectations. <p>Recommendation 2: ASIC to continue to refine the performance reporting framework, including consolidating performance reporting (to ensure consistency between reporting frameworks), aligning internal performance metrics, improving the use of performance narrative, and identifying opportunities for more sophisticated analytics, particularly in relation to outcomes measures.</p> |
| Internal governance (Section 2.2) | <p>ASIC’s non-executive and executive management responsibilities are combined, unlike separated (split or hybrid) models used at large corporations and many other international and domestic regulators.</p> <p>While the Panel understands the evolution of the current model and strengths and shortcomings of various alternatives, on balance it believes the current structure is unsustainable if optimal outcomes are to be achieved. In particular, it leaves insufficient bandwidth for the Commissioners to focus on strategic matters, external engagement and communication and does not provide sufficient internal oversight and accountability.</p> | <p>Recommendation 3: ASIC to realign internal governance arrangements by elevating the current Commission role to that of a full time non-executive function (not an external board), with a commensurate strategic and accountability focus free from executive line management responsibilities.</p> <p>Recommendation 4: ASIC to establish a new role of Head of Office (HoO), with delegated responsibility and accountability for executive line management functions.</p> <p>Recommendation 5: SELs to be delegated executive line management functions, reporting to the HoO.</p> |

| Characteristic | Key observations | Recommendations |
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| Leadership talent (Section 2.3) | <p>The Panel considers that the Commission’s strategic and oversight responsibility, coupled with its external engagement role, as meriting the full time focus of the Commissioners.</p> <p>Merit based selection procedures exist but have not always been closely or fully followed by Governments in appointments of the Chairperson and Commissioners.</p> <p>While the collective capabilities of the ASIC Commission receive positive feedback from stakeholders and staff, there are acknowledged skill gaps in relation to some capabilities that will be required of the Commission (for example, data analytics, change management).</p> <p>There is not currently a formal or structured forward looking assessment to identify current or future Commission-level capability gaps on an ongoing basis.</p> <p>There is no formal assessment of Commission effectiveness and individual performance review for Commissioners. The Panel is of the view that even for statutory appointments a formal performance review would deliver better outcomes and accountability.</p> | <p>Recommendation 6: Government to revisit this structure in three years, to review the size of the Commission and whether the roles of the Commissioners need to continue to be full-time.</p> <p>Recommendation 7: The Government to apply a contemporary best practice merit based recruitment process to ensure fully transparent and robust appointments of the Chairperson, Deputy Chairperson and other Commissioners.</p> <p>Recommendation 8: ASIC to implement a periodic forward looking skills gap assessment of the Commission to identify and inform future recruitment needs.</p> <p>Recommendation 9: ASIC to implement a Commission effectiveness review to assess performance on an ongoing basis.</p> <p>Recommendation 10: ASIC to develop a formal individual performance review process for the Commissioners, led by the Chairperson.</p> <p>Recommendation 11: The Minister to assess the effectiveness and performance of the Commission, to be discussed with the Chairperson on an annual basis.</p> |
| Culture (Section 2.4) | <p>ASIC’s culture is shaped by its stated values of Accountability, Professionalism and Teamwork, and is also a result of its origins and history.</p> <p>On balance, the Panel considers ASIC’s internal culture to be more defensive, inward looking, risk averse and reactive than is desirable for a conduct regulator.</p> <p>While the Panel acknowledges that this is a broad and general observation, and there is some evidence of variability in culture within ASIC (although this is difficult to quantify), the Panel considers it to be the responsibility of leadership to set the culture and tone and to drive top-down messaging to ensure consistency.</p> | <p>Recommendation 12: ASIC to initiate a review of ASIC’s organisational culture and as part of that review assess the merit of implementing Google’s Project Oxygen team based assessment program to inform development of Commission strategy for high performance team culture.</p> |

| Characteristic | Key observations | Recommendations |
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| Strategy (Chapter 3) | <p>Strategy development (Section 3.1)</p> <p>ASIC has a well-established strategy setting process involving both bottom-up and top-down elements. However there is some variability in the quality of the bottom-up plans.</p> <p>ASIC’s 2015 Corporate Plan is built around a sound strategic framework and represents a major step forward in the articulation of its strategy, although there is scope for greater clarity of language.</p> <p>While ASIC has an established Emerging Risk Assessment process to inform its strategy development, this is not as well developed or resourced as similar functions in international peer regulators, and external inputs are not being sufficiently utilised in this process.</p> <p>While the identified strategic priorities (referred to by ASIC as focus areas) in the Corporate Plan are broadly comprehensive, and well aligned to international regulatory and market trends, the Panel does see a number of potential gaps related to high-priority issues in the local market context (for example, the ageing population and evolving retirement financing needs). Notably, the Corporate Plan document (as well as the underlying, non-public Business Unit Plans) is essentially silent on delivery for some important strategic priorities, including in relation to possible registry separation — not articulating how ASIC will execute on the plan over the short and medium-term.</p> <p>The Corporate Plan is not contributing as much as it could to ensuring accountability for ASIC’s strategy execution because of the limited delivery detail (for example in the delivery of its deregulatory agenda), as well as a lack of alignment across:</p> <ul style="list-style-type: none"> – focus area specific performance indicators in the Plan; – performance indicators in the (non-Public) Business Unit Plans; – organisation-wide performance indicators in the Plan. | <p>Recommendation 13: ASIC to substantially improve the intended approach for delivery of the Corporate Plan in both the public document itself and the underlying Business Unit Plans. This should include greater specification of intended actions as well as timing, resourcing and organisational implications.</p> <p>Recommendation 14: ASIC to improve the selection of performance indicators to ensure that the measures associated with the Key Activities for each Focus Area are:</p> <ul style="list-style-type: none"> (i) reflective of the activities and their desired outcomes; and (ii) aligned to the internal performance indicators captured in the relevant Business Unit Plans, and to ASIC’s enterprise-wide performance indicators. <p>Recommendation 15: ASIC to review and introduce a more outcomes focused and dynamic use of advisory panels to ensure these forums input more directly into strategy development, and introduce a broader public consultation element into the strategy setting process.</p> |
| Strategic communication (Section 3.2) | <p>ASIC’s communication of its mandate and strategic priorities to stakeholders does not clearly highlight its expectations about the impacts and limitations of its activities, nor does it provide clear guidance on how the strategy will be delivered.</p> | <p>Recommendation 16: ASIC to further clarify and emphasise its expectations and risk tolerances (what the regulator will and will not be doing) and actively advertise and promote the strategy broadly (see Chapter 2 for further recommendations related to the Sol).</p> |

| Characteristic | Key observations | Recommendations |
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| | <p>More broadly, while ASIC has a Communications Policy, it does not have a clearly-articulated strategic approach to its communications. As a result, communication does not always have a clear purpose and is at times reactive in nature (for example, focusing on responding to media and public scrutiny). ASIC could more effectively communicate what it does and why it does it, in a way that better manages the expectations gap.</p> <p>ASIC leadership’s public articulation of its role places too heavy an emphasis on enforcement and risks driving strategic focus and staff orientation too much towards this single aspect of the regulator’s toolkit.</p> | <p>Recommendation 17: ASIC to ensure the strategic framework used in developing the Corporate Plan is used consistently throughout the communications.</p> <p>Recommendation 18: ASIC to develop a comprehensive communications strategy that places greater emphasis on communication of the organisation’s strategic priorities.</p> <p>Recommendation 19: ASIC to rebalance its public and internal communications about its role as an enforcement agency.</p> |
| <p>Resource allocation (Section 3.3)</p> | <p>ASIC’s resource planning is not sufficiently flexible or responsive to changing strategic priorities.</p> <p>ASIC’s resource allocation to enforcement is significantly greater than peer regulators.</p> | <p>Recommendation 20: ASIC to ensure the top-down allocation of resources are deployed across the organisation based on the strategic priorities.</p> |
| <p>Delivery (Chapter 4)</p> | | |
| <p>Workforce capabilities and management (Section 4.1)</p> | <p>Some ASIC staff lack sufficient professional confidence in their roles to credibly challenge regulated entities and develop and defend independent judgements</p> <p>The workforce also faces gaps in relation to a number of critical skill sets that will become increasingly important in the future (for example, big data, digital disruption, and behavioural economics).</p> <p>The existing secondment program is not being fully leveraged to close these gaps.</p> <p>ASIC has only relatively recently begun to develop a documented forward looking approach to organisation-wide workforce planning and has engaged external consultants to assist in developing a methodology. This process remains embryonic and has not been extended to Commission level skills gaps assessment. It is also unclear the extent to which forward-looking processes are being developed to address requirements for support functions.</p> <p><i>Public Service Act 1999</i> (PSA) requirements may limit ASICs ability to flexibly respond to identified gaps.</p> | <p>Recommendation 21: ASIC to increase the scale and diversity of the secondment and exchange program.</p> <p>Recommendation 22: ASIC to improve workforce planning to include a more forward looking, strategy informed, top-down view (progressing and internalising work to date).</p> <p>Recommendation 23: ASIC to refresh its career value proposition to help attract and retain staff and support future secondment, by clearly articulating and tailoring messaging, and identifying strategies to deliver on this message (that is, to ‘make it real’).</p> <p>Recommendation 24: Government to remove ASIC from the PSA as a matter of priority, to support more effective recruitment and retention strategies.</p> |

| Characteristic | Key observations | Recommendations |
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| Organisation structure (Section 4.2) | <p>ASIC's organisation structure is distinct from many peer regulators, being organised around stakeholder groups rather than by functional teams.</p> <p>The Panel understands the genesis and recognises the relative strengths and shortcomings of ASIC's current stakeholder based organisation structure model.</p> <p>ASIC is currently making progress on addressing concerns on existing silos through OneASIC and cluster specific initiatives, but could still do more to allow its people to work more flexibly across silos, to enhance cooperation, and to address risk concentrations in the most efficient and effective way.</p> <p>Additionally, the choice of a more expensive organisation model than the traditional model creates an imperative for an ongoing focus on efficiency and cost control at ASIC.</p> | <p>Recommendation 25: ASIC to launch a pilot project to assess the suitability of dedicated project based teams to improve flexibility across units and reduce the impact of silos.</p> <p>Recommendation 26: ASIC to implement a regular review of internal business processes and systems, supported by improvements in MIS, to drive operational efficiency and reduce the cost burden on regulated entities.</p> |
| Regulatory tool kit (Section 4.3) | <p>ASIC has acted on prior reviews to improve the use and management of enforceable undertakings and has addressed many of the previously identified short-comings.</p> <p>ASIC has initiated several 'lessons learned' reviews across enforcement cases, although informed stakeholder feedback indicates this is yet to translate to material improvement.</p> <p>ASIC's approach to litigation sometimes lags recent progress made by other Australian regulators. For example, pleadings can be dense, complicated and lacking in focus.</p> <p>There is a perception that ASIC's selection of cases for litigation can be risk averse (tending to prefer cases with a higher probability of success, rather than selecting cases that have strong merits, but also allow ASIC to test the veracity of the law).</p> <p>ASIC's approach to collaborative partnerships (for example, co-regulation) is relatively limited and could be better leveraged to produce more robust regulatory outcomes and deliver better value for money in resource use.</p> <p>ASIC publishes a wide range of guidance material, and is generally proactive in its guidance approach. However in select cases, policy development and decisions lack sufficient evidencing. Further, some stakeholders feel that there is insufficient consultation during the consultation process for policy guidance development.</p> | <p>Recommendation 27: ASIC to enhance enforcement effectiveness through developing a more targeted risk based approach to litigation for cases that are strategically important, and prosecutes through more focused pleadings and strategic appointment of senior counsel.</p> <p>Recommendation 28: ASIC to proactively develop opportunities to enhance the use of co-regulation for relevant groups of the regulated population where this will deliver superior regulatory outcomes, including through strengthened licensing and registration regimes.</p> |

| Characteristic | Key observations | Recommendations |
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| | <p>There is an expectations gap as to the extent and rigour of merit assessment and analysis conducted in licensing and registration and therefore the extent of assurance provided to consumers and investors by these processes. The current choices around language and communication do not appear to be informed by behavioural economics (for example, the perception that ‘licensing’ requires ASIC to conduct due diligence to evaluate the merits of a prospective licensee).</p> <p>ASIC has taken positive steps to enhance surveillance processes in the past year, and there is further room to expand the scope of tools being used. The Panel commends the quality of ASIC’s supervision, with investments in real time monitoring capabilities representing global best practice and delivering positive outcomes.</p> <p>Educational tools are well used, and ASIC leads international best practice in advancing broad consumer financial literacy. However, future initiatives and focus may need to be more targeted and informed by Consumer Advisory Panel (CAP) priorities and there remains potential to further leverage not-for-profits.</p> | |
| <p>Stakeholder management (Section 4.4)</p> | <p>While ASIC engages with regulated entities through a variety of touch points, this can be uncoordinated (particularly between stakeholder and enforcement teams and for more complex and diverse entities). Some stakeholders express dissatisfaction with the policy consultation process, particularly with regard to response time, engagement style and proportionate focus across various types of external stakeholders.</p> <p>External panels are not being fully leveraged and there is some inconsistency in perceived impact on strategy development. Additionally, there does not seem to be a systematic review or active and regular management of panels once created (that is, there is an element of ‘set and forget’ in their structure and purpose).</p> | <p>Recommendation 29: ASIC to develop and implement a formal tiered stakeholder relationship model based on entity nature, scope, risk and complexity.</p> <p>Recommendation 30: ASIC to recalibrate advisory panel setup to ensure more systematic value add for example, through a larger pool of experts that can be called upon to advise on various issues as needed based on issue-specific needs and expertise gaps, coupled with regular performance assessment and enhanced internal responsibility to act on recommendations.</p> |
| <p>Data management (Section 4.5)</p> | <p>ASIC has identified a number of weaknesses in the existing data infrastructure, including fragmented databases, a reliance on legacy applications, and challenges in search functionality.</p> | <p>Recommendation 31: ASIC to execute its FAST 2 transformation program, ‘future-proofing’ design and expanding scope as required.</p> <p>Recommendation 32: ASIC to launch new programs of work to close additional identified gaps for example, to enhance the ability to measure and report for MIS.</p> |

| Characteristic | Key observations | Recommendations |
|----------------|---|--|
| | <ul style="list-style-type: none"> • ASIC has initiated a major IT transformation program to address identified issues in workflow applications and business processes (FAST 2), although the Panel has some concerns particularly as to whether or not these projects have been 'future proofed' and the extent to which the program will 'still leave ASIC with additional investment required'.⁹ • Additionally, the programs may not go far enough to address the full scope of infrastructure weaknesses, particularly around the sophistication of MIS (efficiency reporting and management dashboards) and performance measurement capabilities. • There is further potential for ASIC to collaborate with other regulators in data sharing and data analytics and championing open data policies. • Like most other regulators, ASIC is aware of the potential for data and advanced analytics to support its regulatory activities, but is only at the early stages of implementing these capabilities. | <ul style="list-style-type: none"> • Recommendation 33: ASIC to 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. • Recommendation 34: 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. |

9 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 87.

Report roadmap

The report is structured across five key chapters:

1. *Chapter 1: Context and approach* — provides an overview of the objectives and methodology of the Review, an overview of ASIC and a discussion around the external environmental factors impacting ASIC's future capability requirements and strategic focus areas.
2. *Chapter 2: Governance and leadership matter most* — provides an assessment of the key findings and recommendations across four aspects of governance and leadership that matter most in setting the future direction of ASIC — external governance, internal governance, leadership talent and culture.
3. *Chapter 3: Strategy — critical for a shared focus and understanding of what matters* — provides an assessment of the key findings and recommendations across three aspects related to ASIC's strategy capabilities — strategy development, strategic communication, and resource allocation.
4. *Chapter 4: Delivery to be enhanced with 'future-proofing' design* — provides an assessment of the key findings and recommendations across five aspects of delivery — workforce management, organisation structure, regulatory toolkit, stakeholder management, and data management.
5. *Chapter 5: External constraints that impede ability to execute* — discusses exogenous factors (outside of ASIC's control) that will impact 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.

In addition, the Report has five Appendices:

1. *Appendix A:* Provides a detailed implementation plan for proposed recommendations.
2. *Appendix B:* Provides an illustrative benchmark Statement of Expectations.
3. *Appendix C:* Glossary of terms used throughout the report.
4. *Appendix D:* A list of external organisations and individual stakeholders consulted with over the course of the Review.
5. *Appendix E:* A copy of ASIC's formal response to the Capability Review (provided to the Panel post completion of the Report).

CHAPTER 1: CONTEXT AND APPROACH

1.1. Review objectives and approach

In June 2015, the Government announced a review to consider the capabilities of ASIC to ensure it has the skills and culture to carry out its role effectively. The Review is in response to a recommendation made by the Financial System Inquiry (FSI) that there should be periodic, independent reviews of the performance and capability of regulators, starting with ASIC.

The Review was undertaken in parallel to Government industry consultation on a potential industry funding model for ASIC, as recommended by the FSI. In addition, a separate process is being undertaken to ‘market test the capacity of a private sector operator to upgrade and operate the ASIC registry’.¹⁰

The Review is a forward-looking, whole-of-agency exercise that assesses ASIC’s ability to meet future objectives and challenges. It is not a performance review. This Review adopts a robust capability assessment methodology (outlined below) which focuses on ASIC’s governance and leadership, strategy and delivery capabilities. It assesses ASIC’s governance and internal management strengths and weaknesses.

This Review follows a number of other significant reviews into the Australian financial system (for example, the Wallis Inquiry and FSI), and recent Inquiries by the Senate Economics References Committee (for example, 2010 and 2013) into the performance of ASIC.

- The 1996 Wallis Inquiry established the overarching framework for Australian financial services regulatory architecture. The current ‘twin peaks’ model was established comprising the Australian Prudential Regulation Authority (APRA) for prudential supervision and ASIC for corporate conduct regulation and financial system licensing.
- The 2014 FSI made a number of recommendations about the regulatory environment with specific recommendations relating to ASIC’s legislative mandate. The Government has accepted wholly or in principle the recommendations of the FSI, with the exception of the recommendation to establish a new Financial Reporting Advisory Board (FRAB). The Panel notes that some of the recommendations would change ASIC’s legislative framework and powers and has had regard to those in formulating its recommendations.
- The 2010 and 2014 Senate Committee reviews of ASIC performance in two areas of ASIC’s activities. The first in 2010 focused on ‘the conduct of the insolvency profession in Australia and the adequacy of efforts to monitor, regulate and discipline misconduct’. The second was held in 2014 to review ASIC’s efficacy in regulating consumer credit and financial advice.

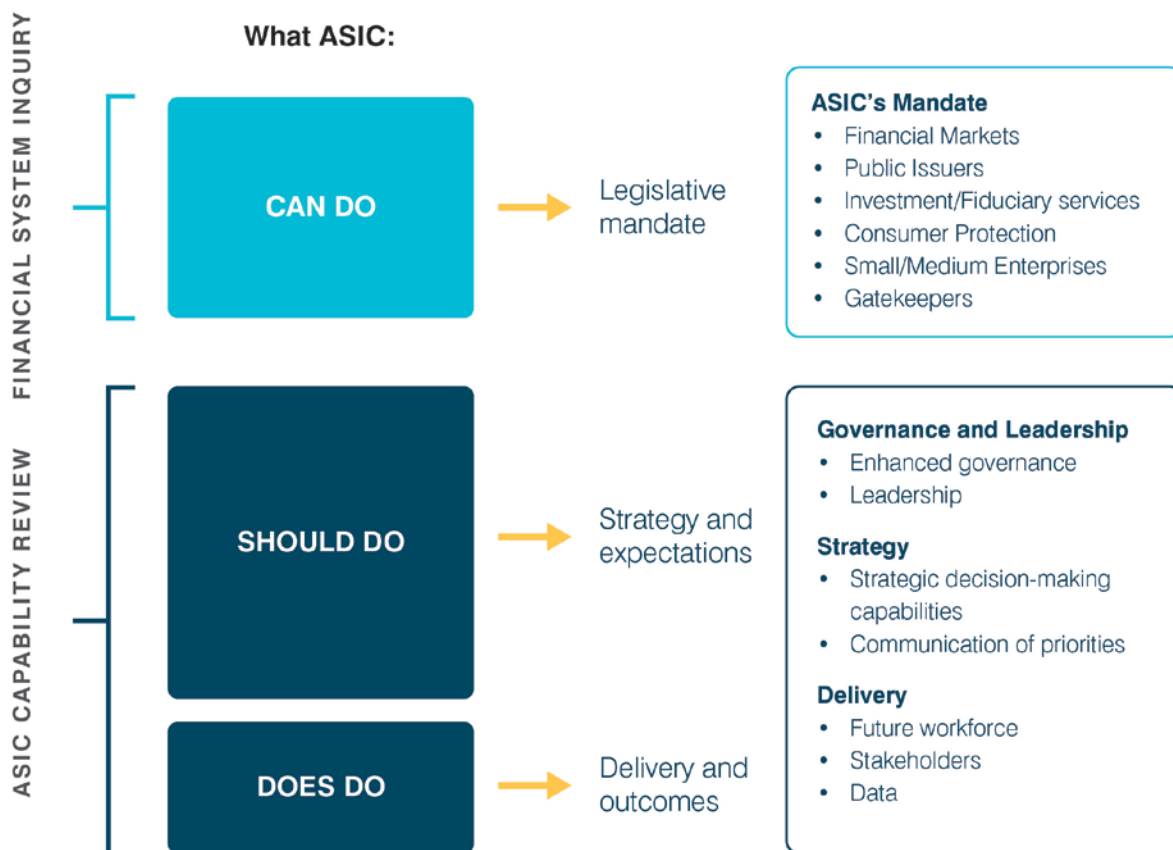
More broadly, this Review aligns with a Government drive for greater transparency and accountability of public agencies — especially regulators. Various initiatives including stronger transparency and accountability requirements under the *Public Governance, Performance and Accountability Act 2013* (PGPA) have been recently introduced and are in the process of being implemented.

¹⁰ Australian Government Department of Finance 2015, *ASIC Registry — FAQs*, viewed 3 December 2015, <<http://www.finance.gov.au/procurement/scoping-studies/asic-faqs/>>.

The Panel undertook an extensive and targeted consultation program involving internal, external and international evidence gathering, assessment and consultation. These inputs were used to develop a comprehensive fact and evidence base, albeit some subjective in nature, to inform the Panel’s findings and recommendations. However, many of the observations made in this Report have also drawn upon the Panel’s judgement in areas where the evidence base is limited, incomplete or ambiguous.

Whereas the FSI assessed what ASIC can do under its regulatory framework and powers, this Review examines ASIC’s interpretation and application of these powers, its use of administrative discretion, and whether and how it should change its practices. This has entailed a comprehensive assessment of what ASIC should do, and what ASIC does do. Figure 5 provides an overview of the scope of the Review and how it relates to other inquiries.

Figure 5: Scope Comparison of the FSI and Capability Review



The Review was led by an independent Expert Panel and supported by a secretariat, consisting of private sector consultants and public sector personnel from the Treasury. PricewaterhouseCoopers (PwC) was engaged to perform research and analysis, provide support to the Expert Panel, and prepare an evidence report on the capabilities of ASIC (which should be read as an adjunct to the Panel’s Report).

Capability reviews are regularly undertaken by the Australian Public Service Commission (APSC). These reviews are conducted on key public service agencies to identify opportunities to raise institutional capabilities of the agency and the public service as a whole. This more comprehensive Capability Review of ASIC differs in three key respects:

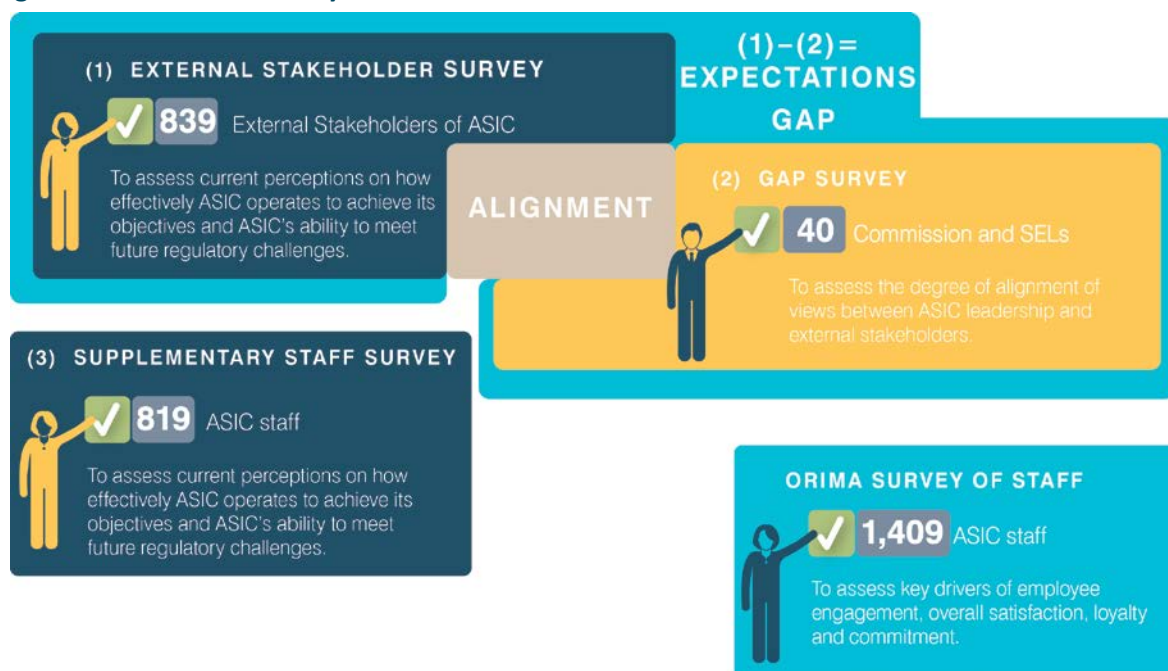
1. Use of an independent panel of external experts reporting to the Government rather than the agency itself.
2. Publicly announced and transparent Terms of Reference and process to maximise the opportunity for all interested parties to have an opportunity to provide input.
3. Extensive stakeholder engagement both with ASIC itself with a wide range of external stakeholders.

In assessing ASIC’s capabilities, the Panel and supporting team engaged extensively and received input from a variety of sources, including:

- the general public in response to advertisements placed in national newspapers;
- a sample of ASIC’s internal staff and stakeholder population by conducting three surveys commissioned by the Panel. An additional staff survey commissioned by ASIC earlier in 2015 prior to the commencement of the Review (Orima survey) was also analysed by the Panel.

Figure 6 provides an overview of the surveys conducted with a description of the purpose and target population.

Figure 6: Overview of surveys conducted



- Meetings with industry and consumer stakeholder groups, international and domestic regulators, academics and other persons identified in the course of consultation as having potentially unique and valuable insights (including former ASIC Commissioners and staff).
- A series of roundtable meetings of stakeholders allowing ‘deeper dives’ on certain thematic issues of specific interest to the Panel.

- Observations by the Panel of the operation of most of ASIC’s external panels and committees and a full Commission meeting.
- A large volume of ASIC’s public and external strategy and business management documents including a key document ‘*Improving ASIC’s capabilities without additional funding — people, powers, process and technology.*’ This document addresses eight themes. Three of the eight themes relate to matters which are dealt with in the Government’s response to the Financial Services Inquiry (FSI), released in October 2015 (specifically, funding requirements, ASIC’s response to the FSI recommendations, and the registry separation). A fourth theme is currently under consideration by the Treasury (instituting a tiered delegation framework for market licensing). The remaining four themes relate and are considered in this Review:
 1. people management processes;
 2. technology enhancements (including improvements to capture, share and use data);
 3. cooperation with other government agencies; and
 4. industry cooperation and engagement.

Figure 7 provides an overview of the consultation framework and resultant evidence base.

Figure 7: Overview of the consultation framework and evidence base



1.2. Overview of ASIC

ASIC is the Australian corporate, markets, financial services and consumer credit regulator. It has existed as an independent Australian government statutory authority since 1991, when the Australian Securities Commission (ASC), as it was then known, commenced operation.

The ASC replaced the National Companies and Securities Commission (NCSC) in 1991 which amalgamated the previous functions of the respective Corporate Affairs Commissions of the States. In various forms, there has been a corporate regulator in Australia for some 50-60 years.

ASIC's purpose is to contribute to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers.

The agency is constituted under the *Australian Securities and Investments Commission Act 2001* (ASIC Act), and has offices in all states and territories. Figure 8 provides an overview of ASIC's history from 2001 to today.

Figure 8: Overview of ASIC's history



| | |
|-------------|--|
| 2001 | The <i>Corporations Act 2001</i> and <i>ASIC Act 2001</i> are enacted. David Knott is Chairman. Australian financial services licensing introduced. |
| 2002 | ASIC assumes responsibility for financial services conduct and disclosure, including for securities, banking, insurance and superannuation. ASIC assumes limited responsibility for credit regulation under the ASIC Act with respect to: <ul style="list-style-type: none">• unconscionable conduct;• misleading or deceptive conduct; and• undue harassment and coercion. |
| 2003 | |
| 2004 | Full transition into the new Financial Services Reform regulatory system. ASIC's oversight of auditors is enhanced. Jeffrey Lucy is appointed Chairman. |
| 2005 | Superannuation 'Choice of Fund' reforms introduced. |
| 2006 | The Australian Securities Exchange (ASX) merges with the Sydney Futures Exchange. |
| 2007 | Global Financial Crisis begins. Tony D'Aloisio is appointed Chairman. |
| 2008 | The Productivity Commission recommends the Commonwealth take over responsibility for credit regulation. A number of corporate collapses occur in the midst of the Global Financial Crisis, including Opes Prime, Chartwell Enterprises and Storm Financial. ASIC is restructured in response to the 2008 Strategic Review. |
| 2009 | Corporations Act modified to improve investor confidence in relation to listed corporations and their financial reports. Government commits to G20 over-the-counter derivative market reforms. |
| 2010 | ASIC becomes the national regulator for consumer credit and finance broking, including responsibility for licensing, conduct and disclosure. ASIC assumes responsibility for market supervision from the ASX. |
| 2011 | ASIC assumes responsibility for the National Business Names Register. ASIC duties in regulating consumer credit margin lending providers take full effect. Market competition reforms take effect. Greg Medcraft is appointed Chairman. |
| 2012 | Some elements of Future of Financial Advice come into force on 1 July. ASIC builds the self-managed super fund auditor register as part of the Stronger Super reforms and takes an increased role in strengthening super governance. ASIC assumes responsibility for regulating emissions units. The National Business Names Register is launched. |
| 2013 | ASIC given rule-making powers for over-the-counter derivative products. Mandatory compliance with some Future of Financial Advice elements from 1 July. Senate Economics References Committee announces an inquiry into the performance of ASIC. |
| 2014 | Senate releases its report into the performance of ASIC. Financial System Inquiry interim and final reports are released. |
| 2015 | Government releases the Harper Review into competition policy. ASIC subject of a Capability Review. |

Governance and organisation structure

The Commission that leads ASIC is comprised of a Chairperson, a Deputy Chairperson and between one and six other full-time members. Currently there are five Commissioners. The Commission meets on a weekly basis, although more frequently if required, to make decisions and provide input about matters related to ASIC's regulatory functions and powers, and to ensure that ASIC's statutory objectives are being met.

ASIC's overall organisation structure separates its operations into three broad 'clusters': Markets; Investors and Financial Consumers; and Registry. Within these broad areas of operation, there are multiple stakeholder and enforcement teams. Specific Commissioners are allocated executive responsibility for groups of ASIC's stakeholder and enforcement teams. Given Commissioners are also responsible for overseeing organisation-wide operations, day-to-day management functions are delegated to Senior Executive Leaders (SELs). SELs manage teams and exercise various powers and functions delegated to them by the Commission.

A number of internal and external committees and bodies assist the Commission to carry out its functions. Internal governance forums are tasked with ensuring effective risk management practices as well as supporting development and delivery of ASIC's strategic objectives. There are eight internal governance forums. These are: the ASIC Commission; Audit Committee; Risk Committee; Regulatory Policy Group; Enforcement Policy Group; Enforcement Committee; Emerging Risk Committee; and Technology Governance Board.

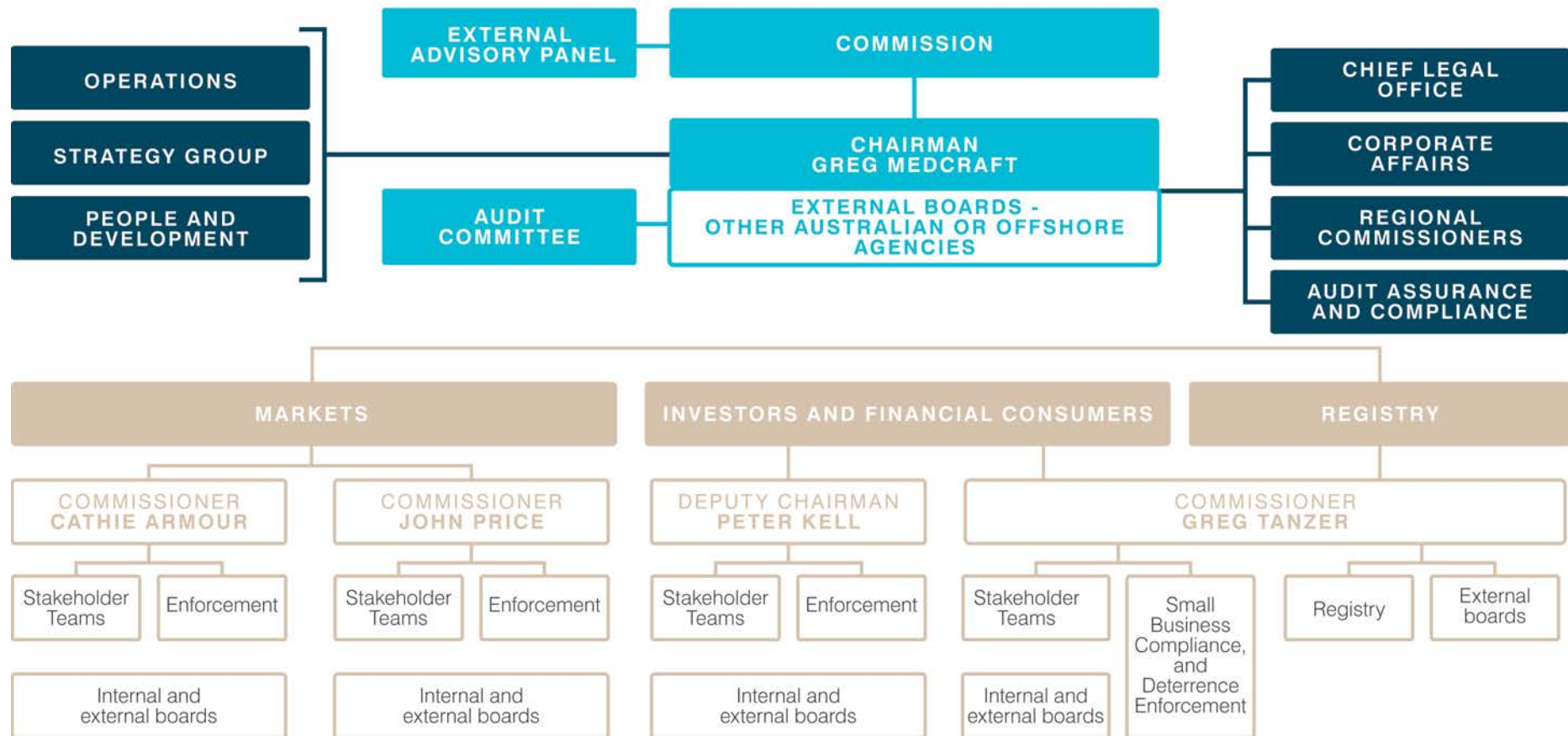
External committees and panels assist ASIC in gaining a deeper understanding of developments and systemic risks within the regulated and unregulated industries operating within the financial system. The key external bodies include: the External Advisory Panel; Consumer Advisory Panel; Director Advisory Panel; Market Supervision Advisory Panel; Registry and Licensing Business Advisory Panel; and the Australian Government Financial Literacy Board. ASIC has also recently established a Digital Finance Advisory Committee in August 2015 with members from a cross-section of the FinTech community to help inform how it focuses its efforts in this area. As part of this ASIC has developed an online hub with tailored content for FinTech businesses that are developing innovative financial products or services.

In addition, there is a Market Disciplinary Panel responsible for disciplinary action against participant and market operators for alleged breaches of the market integrity rules. Finally, the Takeovers Panel is the primary forum for resolving disputes about a takeover bid until the bid period has ended. The Panel was established in 1991 and was originally known as the Corporations and Securities Panel. It was established originally under section 171¹¹ of the ASIC Act, but operates separately to ASIC and its members are nominated by the Treasurer.

Figure 9 provides an overview of ASIC's organisation structure.

11 Section 171 has since been repealed but the Panel continues to exist by virtue of section 261 of the ASIC Act.

Figure 9: ASIC organisation structure as at 30 June 2015



Scope and breadth of mandate

ASIC's mandate is extensive, and is not fully replicated by any other conduct regulator globally. It broadly covers three areas:

1. financial markets, financial services and corporate regulation;
2. business and company registration;
3. credit and insolvency practitioners.

ASIC's powers and responsibilities in the first area are broadly consistent with those financial conduct regulators in other jurisdictions, although most peers do not have the extent of ASIC's coverage. Some regulators are moving closer to the ASIC model; for example, the United Kingdom Financial Conduct Authority (FCA) is now taking over responsibility for consumer credit.

ASIC's responsibilities in the second area (registry) are unique compared to conduct regulators overseas and are out of the direct scope for this Review. However, the Panel notes that this Review assesses capabilities and internal processes across the entire organisation, including some that sit within the registry function.

ASIC's mandate is broad, having grown considerably over the last two decades, generally in response to major reform processes and reviews. The Wallis Inquiry recommended having investor and consumer protection within the one agency, especially given the growing inter-linkages between different financial products and services. In addition, other policy reforms have led to the expansion of ASIC's mandate for example, the move of consumer credit from a fragmented, state-based regulatory system to ASIC as a single national regulator.

Figure 10 provides an overview of the breadth of ASIC's mandate.

Figure 10: Breadth of ASIC mandate¹²



12 Commonwealth of Australia 2014, *Financial System Inquiry; Interim Report*, Canberra, page 3-123. This is an updated version of the figure found in the FSI Interim Report.

Funding profile

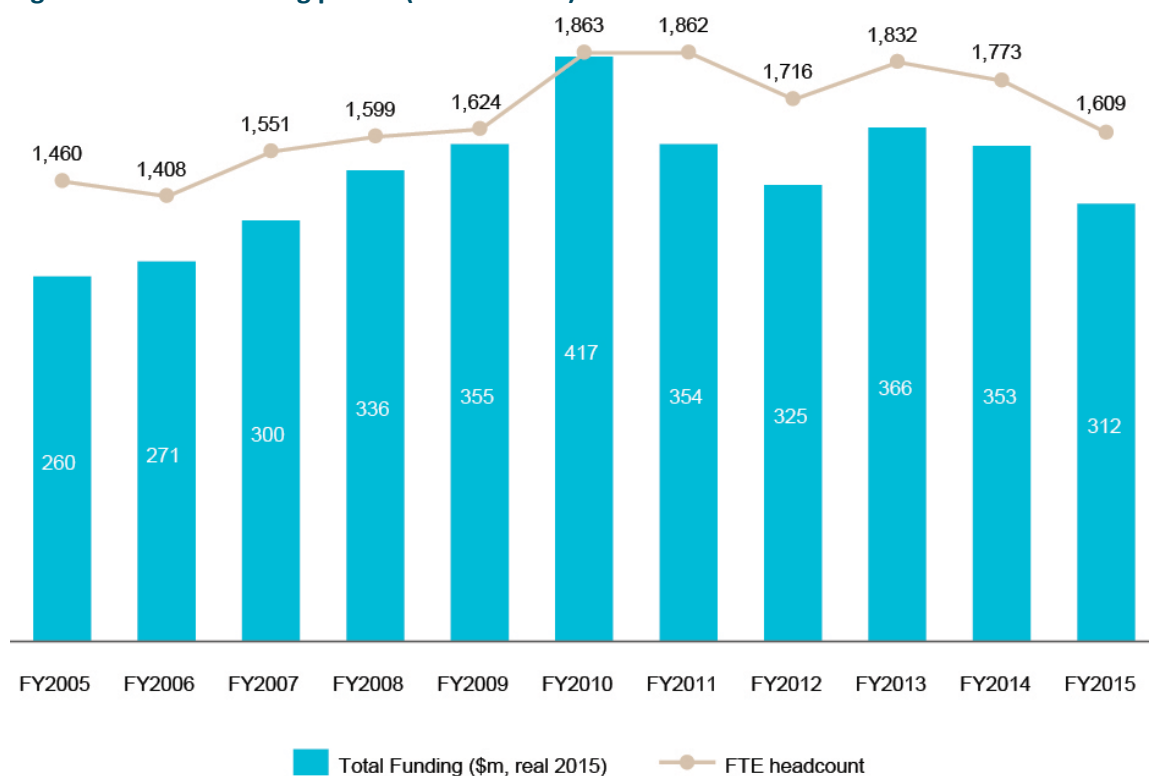
In 2014-15, ASIC received \$312 million in appropriation revenue from the Government and \$5 million of 'own-source income' (that is, from rendering of services, royalties and other income). Its total operating expenses were approximately \$313 million (that is, staff and supplier expenses). ASIC employed 1,609 staff on a full-time equivalent (FTE) basis.

ASIC's funding regime is similar to most other government agencies. Each year, the Government publishes funding for the next four financial years in the Budget. ASIC's core operational funding is based on the previous year's budget adjusted for an 'efficiency dividend' or other Government determined changes, most recently savings measures. The Commission is responsible for allocating the budget across the organisation based on ASIC's view of the market's long term challenges and consequential strategic priorities.

In addition to core operational funding, ASIC may apply for New Policy Proposal (NPP) funding for new projects or to finance mandate changes. The preparation and negotiation process for funding changes begins in mid-September of each year and can take up to six months for approval.

Figure 11 below shows ASIC's funding profile over the past 11 years, adjusted for the impact of inflation.

Figure 11: ASIC's funding profile (in real terms) and FTE headcount



1.3. Changing external environment

There are a number of external environmental factors impacting ASIC's future capability requirements and strategic focus areas. In particular, the Panel identified a number of key themes for the Australian capital markets that will likely require a response by the regulator over the medium term. The Panel acknowledges that a number of these have already been well documented in other reports (for example, FSI) and the academic literature.

Table 2 provides an overview of external factors likely to impact ASIC’s future capability requirements. This is not intended to be an exhaustive list, nor a comprehensive analysis of these factors. Rather, it is intended to be indicative of the scope and complexity of emerging issues which ASIC will need to address.

Table 2: Schema of key external factors

| Factors | Example | Implications |
|---|--|---|
| Continued rise of and reliance on data and technology | <ul style="list-style-type: none"> • The increase in data and predictive analytics enables providers to ‘know’ a lot more about the market behaviour of individuals than previously. • Increased digitisation of data on decentralised networks will change the way market participants transact, communicate, bank, manage assets, etc. | <ul style="list-style-type: none"> • Flexibility of regulations (or framework) required to keep up with new developments and increased costs of supervision/surveillance. • New forms of risks to regulate and supervise (for example, financial market disruptions caused by algorithmic errors). • Increase in regulatory data/sophisticated data analytics which should increase ASICs surveillance capabilities. |
| Market structural change | <ul style="list-style-type: none"> • Increasing complexity of financial products being sold, with a sophisticated range of options. • Disintermediation has become increasingly important in financial markets, largely as a result of the increasing use of new channels to raise capital from non-traditional sources, rather than from traditional sources. | <ul style="list-style-type: none"> • Flexibility around the levels of conduct and consumer protection required and ability to adapt regulation to new business models. • Improvement of systemic risk capabilities required. |
| Continued globalisation of financial markets | <ul style="list-style-type: none"> • Greater integration of and competition between capital markets. | <ul style="list-style-type: none"> • On-going cross-border regulatory co-ordination and action required. • Need to strengthen trust through better enforcement and supervision on a supra-national basis. |
| Demographics and growing need for retirement solutions | <ul style="list-style-type: none"> • Demographic ageing and societal change driving need for longer term investment based saving. • Policy and customer needs around superannuation and asset decumulation during retirement likely to evolve. | <ul style="list-style-type: none"> • Increased focus on targeted investor education and protection. • New policy framework development requirements. |
| Greater expectations on regulators | <ul style="list-style-type: none"> • Greater expectations on regulators post-GFC in areas such as conduct, investor protection, systemic risk and managing non-traditional market participants. • A number of issues post-GFC have been high-profile, requiring regulators to manage expectations more carefully. | <ul style="list-style-type: none"> • Improvement of systemic risk capabilities required; also expect a shift to greater conduct focus which requires additional skills from traditional securities and markets regulation. • Increased importance of effective communications, especially regarding expectations. |

All of these changes (and many others not canvassed by the Panel or not yet apparent) suggest a more complex, dynamic and challenging regulatory environment for our financial services and corporate regulator. ASIC will have a greater need for agility in responding to global adjustments and enhanced cooperation with other conduct and corporate regulators globally. The changes suggest that regulatory decision making will need to be better informed, more evidence and analytically based, more strategic and ultimately more transparent to provide confidence ASIC is applying its limited resources to issues of highest priority in an efficient and effective way.

The Panel’s recommendations are designed to ensure that ASIC has the appropriate capabilities to meet its objectives and future regulatory challenges for a forward time frame of the next 3-5 years and beyond.

1.4. Capability Review: A tailored assessment framework

To examine and assess ASIC’s capabilities, the Panel adopted a Capability Review framework focusing on the key dimensions of Governance and Leadership, Strategy and Delivery. These dimensions are well established in management literature as the fundamental drivers of organisation performance and capability.

Figure 12 provides an overview of the elements of the capability framework considered as part of this review.

Figure 12: Capability Review framework



The framework used reflects the high level architecture of the contemporary Australian Public Service Commission (PSC) capability framework. However, the framework has been refined to reflect the capability requirements for conduct and security regulators.

In particular, the capability assessment framework was informed by:

- the established literature on what are the characteristics of a model regulator;
- the Australian Government’s regulator performance framework;
- the Productivity Commission’s organisational performance framework;
- PwC Capability Review methods;
- the Panel’s views on key regulatory capability requirements.

For each dimension across the assessment framework, the Panel has provided a description and indication of what constitutes ‘best practice’. The assessment criteria for each dimension have informed the Panel’s assessment of ASIC.

Table 3 provides a description of each dimension and assessment criteria.

Table 3: A tailored assessment framework

| Characteristic | Dimensions | Description | Assessment criteria |
|----------------------------------|----------------------|--|--|
| Governance and Leadership | External governance | <ul style="list-style-type: none"> The statutory framework under which the regulator operates, as well as the Government oversight regime imposed upon the regulator to hold it accountable for fulfilment of its mandate, including requirements for external performance reporting. | <ul style="list-style-type: none"> External oversight focuses on long term strategic direction, and is not overly issue driven. The Government’s expectations of performance are clearly understood (including priorities and limitations) and regularly updated. Performance reporting enables external assessment of whether strategic objectives are being met efficiently and effectively. |
| | Internal governance | <ul style="list-style-type: none"> The organisation structure of the governance and executive management roles to ensure strategic leadership, effective decision making and accountability. | <ul style="list-style-type: none"> The internal governance structure provides the leadership with the right structures for the right decisions. The structure needs to afford sufficient time to focus on strategic matters, external engagement and communication as well as provide sufficient internal oversight and accountability. |
| | Leadership talent | <ul style="list-style-type: none"> The composition and capabilities process of the Commission and its recruitment process. | <ul style="list-style-type: none"> Leaders have the right skills and capabilities to perform their roles today and into the future. Leaders have a formal performance management process. There is an ongoing assessment of future leadership talent requirements. |
| | Culture | <ul style="list-style-type: none"> The expression of values and behaviours throughout the organisation. | <ul style="list-style-type: none"> The leadership behaviours drive the desired culture and promote successful implementation of the strategy day-to-day. The internal culture is one of professional confidence — proactive, outward oriented, and willing to manage risks effectively to achieve strategic objectives. |
| Strategy Management | Strategy development | <ul style="list-style-type: none"> The process by which the regulator prioritises and sets its strategy. | <ul style="list-style-type: none"> The strategy is developed through a collaborative, analytic and evidence-based, forward-looking approach. The strategy and mechanism of delivery is aligned vertically through the organisation and horizontally across business units. The regulator thinks strategically, identifies key strategic priorities that are linked to its enduring strategic objectives as well as key thematic issues. The regulator is balanced in the way it uses various tools at its disposal to meet its objectives. |

| Characteristic | Dimensions | Description | Assessment criteria |
|-----------------|---------------------------------------|--|--|
| | Strategic communication | <ul style="list-style-type: none"> The methods used to communicate the strategy to internal and external stakeholders, as well as the regulators broader communications strategy. | <ul style="list-style-type: none"> The regulator has a communication framework that clearly articulates the strategy comprising enduring objectives, strategic priorities, targets and performance of the regulator in a timely, structured and informed manner. The strategy is communicated and understood within the regulator and externally. |
| | Resource allocation | <ul style="list-style-type: none"> The process by which the regulator decides how resources are allocated across the organisation. | <ul style="list-style-type: none"> The regulator has access to, and manages effectively over time, the right skills, knowledge and experience to efficiently and effectively apply the full suite of its competencies to achieve its strategic objectives. |
| Delivery | Workforce capabilities and management | <ul style="list-style-type: none"> The workforce capabilities and ongoing workforce planning. Workforce performance management. | <ul style="list-style-type: none"> The workforce has the required skills, competencies and capabilities for today and the future. There is a regular and comprehensive forward looking workforce planning process in place to identify gaps. The regulator has a transparent performance management system to ensure accountability and linked to the performance of the regulator as a whole and its strategic priorities. |
| | Organisation structure | <ul style="list-style-type: none"> The impact of the organisation structure on the regulators effectiveness and efficiency. | <ul style="list-style-type: none"> The regulatory structure promotes delivery of effective outcomes. The regulator has an organisation structure that promotes efficient use of resources, distribution of information, delivers reliable decision making, has clear accountabilities and effective delegations, promotes the efficient discharge of its strategy and business plans, and provides sufficient flexibility to respond to changes in its external environment. |
| | Regulatory tool kit | <ul style="list-style-type: none"> The tools that support the market-facing teams in day-to-day operations, including opportunities for cooperation with industry. Coordination with other regulators. | <ul style="list-style-type: none"> The regulator applies and adapts its regulatory tools and business processes to maximise the impact and reduce the regulatory burden of its activities in achieving its stated objectives and outcome targets. The regulator leverages collaborative relationships to improve regulatory outcomes. |
| | Stakeholder engagement and management | <ul style="list-style-type: none"> The way in which the regulator engages with stakeholders, including the regulated population and the broader community, in the use of its regulatory tools. | <ul style="list-style-type: none"> The regulator engages with regulated entities through a variety of touch points (both formal and informal). The regulator engages stakeholders during the consultation process in a productive two-way exchange of information and views. |

| Characteristic | Dimensions | Description | Assessment criteria |
|----------------|------------|--|---|
| | | <ul style="list-style-type: none"> The way in which the regulator captures, shares and uses data. | <ul style="list-style-type: none"> External expertise is fully leveraged through advisory panels. The regulator ensures market participants are informed of regulatory initiatives/developments (where required) and understand its strategy. The regulator's IT infrastructure ensures that data is captured and stored efficiently. Data is easily accessible and usable, both internally and externally, to inform action and decision making as well as inform accountability and improve efficiency. The regulator takes a forward looking approach to developing data analytics capabilities to better understand and regulate markets and services. |

CHAPTER 2: GOVERNANCE AND LEADERSHIP MATTER MOST

This Chapter addresses key findings and recommendations across four aspects of leadership and governance:

- *External governance*: oversight and accountability at the ministerial and parliamentary level, together with media and public scrutiny, including requirements for external performance reporting;
- *Internal governance*: the organisation structure and the responsibilities of senior leadership to ensure strategic guidance and direction and provide internal checks and balances within an organisation;
- *Leadership talent*: the skills and capabilities of Commissioners, together with the processes that exist to ensure ongoing and future Commissioner suitability;
- *Culture*: the traits, characteristics and behaviours that define how staff at all levels conduct themselves internally and externally, and accordingly how the organisation’s behaviour is viewed by those with whom it interacts.

A well-functioning governance and leadership structure ensures that ASIC Commissioners focus on strategically important issues and have the expertise and focus to plan and implement strategic initiatives. Effective governance arrangements also promote better accountability by ensuring oversight of regulatory delivery and performance, and whole-of-entity objectivity in decision making.

Strong governance models rely on having an organisation structure which allows the leadership team to effectively and efficiently drive the strategic direction and outcomes while also managing public and stakeholder expectations. This requires a strong sense of shared values and culture that are disseminated throughout the organisation. Finally, ministerial and parliamentary oversight provides checks and balances on regulatory powers and outcomes.

Key observations and recommendations are included below.

Table 4: Key observations and recommendations

| | Observations |
|----------------------------|--|
| External governance | <p>While the design of the external governance and accountability architecture is appropriate, it is being applied in a manner which is unnecessarily reactive and issue driven, and is not providing broad long term strategic oversight and thereby accountability for ASIC.</p> <p>The SoE is infrequently updated and does not clearly or transparently establish strategic priorities as understood by the Government. As a result, there is an opportunity to update and enhance the SoE to ensure better alignment and mutual understanding. There is a significant ‘expectations gap’ between the internal and external perceptions of ASIC’s performance, which must be managed by both the Government and ASIC, including through the SoE and Sol.</p> <p>ASIC is addressing its performance reporting under the PGPA Act, although this activity remains at an early stage and will need ongoing development (as recognised by ASIC in the articulation of its Corporate Plan).</p> |

Observations

Internal governance

ASIC's non-executive and executive line management responsibilities are combined, unlike separated (split or hybrid) models used at large corporations and many other international and domestic regulators.

While the Panel understands the evolution of the current model and strengths and shortcomings of various alternatives, on balance it believes the current structure is unsustainable if optimal outcomes are to be achieved. In particular, it leaves insufficient bandwidth for the Commissioners to focus on strategic matters, external engagement and communication and does not provide sufficient internal oversight and accountability.

The Panel considers that the Commission's strategic and oversight responsibility, coupled with its external engagement role, as meriting the full time focus of the Commissioners.

Leadership talent

Merit based selection procedures exist but have not always been closely or fully followed by Governments in appointments of the Chairperson and Commissioners.

While the collective capabilities of the ASIC Commission receive positive feedback from stakeholders and staff, there are acknowledged skill gaps in relation to some capabilities that will be required of the Commission (for example, data analytics, change management).

There is not currently a formal and structured forward looking assessment to identify current or future Commission-level capability gaps on an ongoing basis.

There is no formal assessment of Commission effectiveness and individual performance review for Commissioners. The Panel is of the view that even for statutory appointments a formal performance review would deliver better outcomes and accountability.

Culture

ASIC's culture is shaped by its stated values of Accountability, Professionalism and Teamwork, and is also a result of its origins and history.

On balance, the Panel considers ASIC's internal culture to be more defensive, inward looking, risk averse and reactive than is desirable for a conduct regulator.

While the Panel acknowledges that this is a broad and general observation, and there is some evidence of variability in culture within ASIC (although this is difficult to quantify), the Panel considers it to be the responsibility of leadership to set the culture and tone and to drive top-down messaging to ensure consistency.

Recommendations

External governance

Recommendation 1: The Minister and ASIC to implement a more effective strategic long term oversight function, underpinned by a mutual commitment to a more pro-active regular ongoing dialogue. As steps to achieving this:

- The Minister to provide an Annual Ministerial Statement in Parliament, in conjunction with tabling of ASIC's Annual Report on the degree to which ASIC meets the expectations of the SoE and is performing in the achievement of its mandate.
- The Government and ASIC to enhance the SoE and Sol to clearly and regularly communicate expectations (to be reviewed annually) and to ensure mutual understanding and support ASIC in managing stakeholder expectations.

Recommendation 2: ASIC to continue to refine the performance reporting framework, including consolidating performance reporting (to ensure consistency between reporting frameworks), aligning internal performance metrics, improving the use of performance narrative, and identifying opportunities for more sophisticated analytics, particularly in relation to outcomes measures.

Recommendations

| | |
|----------------------------|--|
| Internal governance | <p>Recommendation 3: ASIC to realign internal governance arrangements by elevating the current Commission role to that of a full time non-executive function (not an external board), with a commensurate strategic focus and external accountability free from executive line management responsibilities.</p> <p>Recommendation 4: ASIC to establish a new role of Head of Office (HoO), with delegated responsibility and accountability for executive line management functions.</p> <p>Recommendation 5: SELs to be delegated executive line management functions, reporting to the HoO.</p> <p>Recommendation 6: Government to revisit this structure in approximately 3 years, to review the size of the Commission and whether the roles of the Commissioners need to continue to be full-time.</p> |
| Leadership talent | <p>Recommendation 7: The Government to apply a contemporary best practice merit based recruitment process to ensure fully transparent and robust appointments of the Chairperson, Deputy Chairperson and other Commissioners.</p> <p>Recommendation 8: ASIC to implement a periodic forward looking skills gap assessment of the Commission to identify and inform future recruitment needs.</p> <p>Recommendation 9: ASIC to implement a Commission effectiveness review to assess performance on an ongoing basis.</p> <p>Recommendation 10: ASIC to develop a formal individual performance review process for the Commissioners, led by the Chairperson.</p> <p>Recommendation 11: The Minister to assess the effectiveness and performance of the Commission, to be discussed with the Chairperson on an annual basis.</p> |
| Culture | <p>Recommendation 12: ASIC to initiate a review of ASIC's organisational culture and as part of that review assess the merit of implementing Google's Project Oxygen team based assessment program to inform development of Commission strategy for high performance team culture.</p> |

2.1. External governance — governance architecture needs to be used better

ASIC's external governance framework comprises broad but periodic oversight at the ministerial and parliamentary level, together with media and public scrutiny. This includes:

- The statutory framework under which ASIC operates, laid out in the ASIC Act.
- The SoE,¹³ which sets out government expectations of ASIC and is periodically updated and issued by the Minister. ASIC is required to formally respond with an Sol,¹⁴ which sets out how it will respond to the Government's expectations.
- Ministerial oversight through the responsible Minister(s).

13 Statement of Expectations available on the ASIC website, viewed 26 November 2015, <<http://asic.gov.au/about-asic/what-we-do/our-role/statements-of-expectations-and-intent/statement-of-expectations-april-2014/>>.

14 Statement of Intent available on the ASIC website, viewed 26 November 2015, <<http://asic.gov.au/about-asic/what-we-do/our-role/statements-of-expectations-and-intent/statement-of-intent-july-2014/>>.

- Appearances before parliamentary committees on a regular and an ad-hoc basis to explain actions and decisions for example, the Senate Economics Legislation Committee ('Senate Estimates', which examines all Treasury portfolio agencies and reviews the annual reports of these agencies) and the Parliamentary Joint Committee on Corporations and Financial Services ((PJC), which enquires into the activities of ASIC and the operation of the corporations legislation, and reviews the annual reports of bodies established under the ASIC Act).

External performance reporting as established under the PGPA Act (requires an increased focus on outcomes, qualitative performance assessment and performance narrative) and the Regulator Performance Framework (RPF) (a set of six outcomes based performance indicators covering reducing regulatory burden, communications, risk-based and proportionate approaches, efficient and coordinated monitoring, transparency, and continuous improvement, which all Commonwealth regulators must report against):

- annual Portfolio Budget Statements that inform the Senate and Parliament of proposed resource allocation;
- periodic performance audits by the Auditor General;
- administrative review of decision making by Administrative Appeals Tribunal;
- parliamentary scrutiny of legislative instruments under the *Legislative Instruments Act 2003*.

This external governance framework is similar in structure to other key Australian regulators and statutory agencies (for example, APRA, ACCC and ATO).

The Panel's observations and subsequent recommendations focus on three important aspects of this governance framework:

- the nature of interactions between ASIC and the Government;
- the use of the SoE and Sol to increase mutual understanding over expectations to ensure ASIC has transparent guidance for internal planning processes and to reduce and proactively manage the 'expectations gap';
- the extent to which the existing performance reporting framework allows an effective assessment of ASIC's performance.

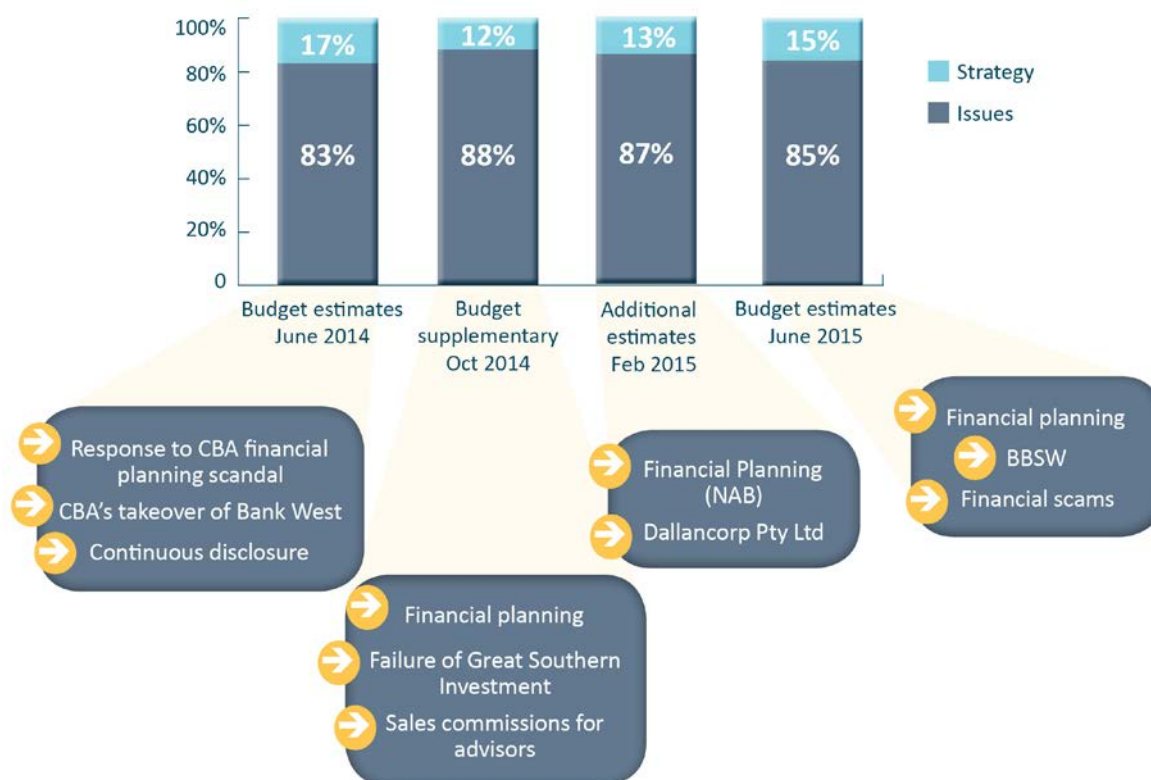
Government oversight

External oversight by the Minister and Parliament should be predominantly proactive (rather than reactive to the emergence of issues such as performance lapses), comprehensive (providing oversight of the organisation as a whole over time), and ongoing (occurring at regular and frequent intervals), together with more in-depth, issue-based analysis as needed.

By contrast, the Panel found that ministerial and parliamentary oversight of ASIC has tended over time to become more reactive and issue based. This is consistent with an observation of the FSI, which noted that 'parliamentary scrutiny tends to be episodic and focus on particular issues or decisions'.¹⁵ Analysis of Senate estimates and supplementary documents indicates that 85 per cent of discussions in recent years have related to specific issues, rather than to broader strategic topics (see Figure 13 below).

15 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, Canberra, page 241.

Figure 13: Comparison of strategic and issue based estimates discussion¹⁶



The Panel recognises that Parliament has an important role to play in investigating material regulator performance issues, including those that give rise to concerns of the public, and in ensuring that ASIC is identifying and addressing in a timely and effective manner significant risk issues that may result in material harm or potential harm. However, the Panel is of the view that, on balance, parliamentary oversight has tended to become overly issue driven and reactive and at the expense of a more strategic long term oversight function and comprehensive accountability. This view was shared by most stakeholders and emerged as a common theme in stakeholder feedback during the consultation process.

The Panel is therefore of the view that, on balance, there is insufficient external consideration of the suitability of ASIC's long term strategic direction and performance over time. The tendency to focus on issues, particularly on high profile enforcement actions (for example, financial advice and planning scandals, take-overs), can also reinforce the occasionally adversarial nature of interactions between the regulator and parliamentary committees and a perception that ASIC is overly focused on enforcement. The Senate Estimates session held on 22 October 2014 is one example of a particularly adversarial interaction.

16 Treasury analysis of publicly available publications — pages dedicated to discussion of strategic questions (incl. Capability Review, user-pays funding, registry sale) vs. issues (for example, HSBC financial advice, CBA financial planning, BBSW).

In response to the identified shortcomings in ASIC's external governance, the Panel has considered whether alternative accountability structures, such as a FRAB as proposed by the FSI would assist in providing better oversight.¹⁷ While the FRAB would have subjected regulators (including ASIC) to more intensive scrutiny, the Panel supports the Government's view that a further institutional layer is not required given that the existing infrastructure is broadly appropriate, albeit not being well used. In short, the Panel considered there was no compelling case for a 'regulator to regulate the regulators', with the attendant additional cost burdens involved for the regulated population.

The Panel also supports the Government's indication that it will reconstitute the Financial Sector Advisory Council (FSAC) in an advisory role. While the design features of this body are still being finalised, the FSAC's Terms of Reference will include providing advice to the Government on the performance of financial regulators, which will complement, rather than replace, existing accountability measures.

The Panel believes that the external governance architecture is largely appropriate, and believes that the tendency toward issues-driven and reactive oversight is a result more of the framework's use and interpretation rather than any weakness in its design. As such, the existing framework needs to be better used to fully realise its accountability potential.

Achieving this outcome will require a mutual and concerted commitment by the Minister, Parliament and Treasury, as well as from ASIC, to ensuring more effective oversight functions which involve a balanced and ongoing appraisal of ASIC's strategic direction and ongoing performance as assessed against ASIC's strategy and performance metrics (both informed by obligations in the SoE). This requires:

- enhancements to the SoE to ensure clearer and more regular guidance on long term strategic expectations of the Government (discussed in more detail later in this Chapter), together with a subsequent refresh of the Sol;
- more regular and ongoing discussions between the Minister and the Chairperson of ASIC, including explicit discussions of Commissioner performance (discussed further later in this Chapter);
- a Ministerial statement in Parliament by the Minister when tabling the ASIC annual report reflecting on the extent to which ASIC has fulfilled the SoE.

The Panel views this as a potential, helpful benchmark model for the Government's interactions with other independent statutory agencies and regulators.

Statements of Expectation and Intent — a missed opportunity

The Minister's SoE outlines the Government's current expectations about the role and responsibilities of ASIC, its relationship with the Government, issues of transparency and accountability, and operational matters. This Statement, and ASIC's response, the Sol, are released publicly.

17 For further information on the FRAB, please see the *Financial System Inquiry Final Report*, pages 239 to 245.

As noted above, ministerial and parliamentary scrutiny of ASIC has tended to become overly issues-driven in nature. In this context, the Panel observes that the SoE currently provides insufficient clarity as to where ASIC is expected to focus its efforts and what trade-offs are reasonable in fulfilling its mandate. The Panel observes:

- A lack of discussion of emerging risks by the Government, which means there is insufficient guidance to ASIC on its strategic focus.
- Infrequent updates to the SoE (with the latest version being released in 2014, and the previous version having been released in 2007). This can result in a possible misalignment between current economic and market realities and stated Government priorities.
- Insufficient recognition of increasing expectations as to the issues and challenges ASIC is required to address (described as the additional 'To Dos' in Chapter 1, see Figure 5) and of the increasing complexity of the legislative environment (also discussed in Chapter 5).
- Limited guidance as to how the Government expects ASIC to balance the various components of its mandate.
- Limited discussion on the Government's risk tolerance or its explicit expectations as to the limits of ASIC's abilities to prevent harm and wrong-doing.
- Limited acknowledgement of the 'expectations gap' with regard to what ASIC can achieve and what it cannot (see Box A).
- Limited guidance around expected interaction between ASIC and other regulators, including opportunities for cooperation, such as on data sharing achieved via the CFR.

Similar findings were also made by the FSI, which observed that 'regulators currently receive little guidance about how they should balance the different objectives of their respective mandates'.¹⁸ In the case of ASIC, this is exacerbated by the sheer breadth of its mandate, compared with both other regulators in Australia, as well as peer regulators internationally.

The expectations gap – a case of mind the gap

As implied by its name, the SoE is intended to set certain government expectations of ASIC. As a public document, it also drives stakeholder and community expectations as to the role and activities of ASIC.

Where there is a misalignment between the understanding or perceptions of external stakeholders (members of the regulated population, industry bodies, the public) and internal stakeholders (ASIC Commissioners and staff), this can be referred to as an 'expectations gap'. There are two distinct types of expectations gap:

- A divergence between how well ASIC thinks it has performed compared to how external stakeholders assess ASIC's performance.
- A misunderstanding in what the public think ASIC can do, compared to what it actually can do legislatively, that is, ASIC's mandate.

18 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, Canberra, page 242.

Box A: The expectations gap

Identifying the expectations gap

As part of this review, the Panel commissioned surveys of external organisational stakeholders and ASIC leadership (SELs and Commissioners) in order to compare internal and external perspectives across ASIC's performance, efficacy, capabilities, resourcing, priorities and regulatory tools, interactions, as well as broader perceptions of the financial system. The survey design relied on both ASIC's own stakeholder survey, and the UK FCA Practitioner survey.¹⁹

Given the nature of this survey, the Panel anticipated that there would be some expectations gap — both because of an inherent 'negativity bias' by stakeholders in relation to a regulator, but also to some extent because of a 'positivity bias' on the part of the leadership. However, for many issues, the expectations gap was much greater than expected.

The Panel viewed areas where there was less than a 15 percentage point difference in survey response represented an alignment of views.

Figure 14: The expectations gap — areas of alignment²⁰

| | External organisational stakeholders | Gap (% pts) | ASIC SELs and Commissioners |
|--|--------------------------------------|-------------|-----------------------------|
| ASIC deters individuals or organisations from engaging in misconduct | 41% | 14% | 55% |
| Staff have the authority to act | 49% | 14% | 63% |
| Financial markets operate transparently | 67% | 14% | 81% |
| ASIC acts quickly to investigate potential breaches of the law | 23% | 14% | 37% |
| ASIC provides effective surveillance | 42% | 13% | 55% |
| ASIC ensures companies have financial reports that can be relied upon | 58% | 10% | 68% |
| ASIC staff have necessary skills | 46% | 9% | 55% |
| The Australian public is well informed about financial matters | 21% | -3% | 18% |
| ASIC is sufficiently resourced to do its job | 15% | -4% | 11% |
| Licensing and registration – process takes a reasonable length of time | 48% | -14% | 34% |
| Licensing and registration – costs are reasonable | 64% | -14% | 50% |

Key:

- Percentage point difference between internal stakeholder rating and external stakeholder rating (where internal views are more positive)
- Percentage point difference between external stakeholder rating and internal stakeholder rating (where external views are more positive)

19 FCA 2015, FCA Practitioner Panel Survey 2015, viewed 3 December 2015, <<http://www.fcapractitionerpanelsurvey.co.uk/downloads/FCA%20PP%20Survey%20-%20Questionnaire.pdf>>.

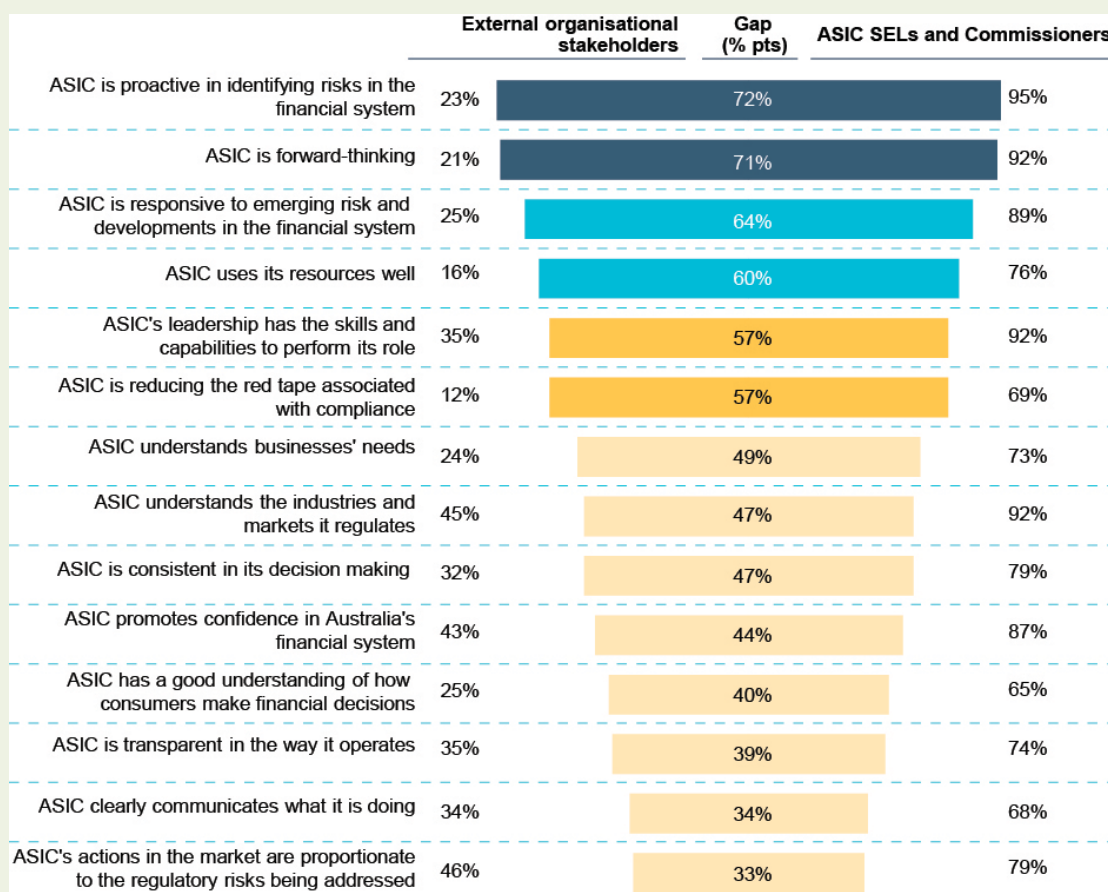
20 Susan Bell Research 2015, *ASIC Capability Review: Comparing the views of ASIC's leadership team with the views of external stakeholders*, in Appendix E of *Evidence Report — Volume 3*, pages 71 to 72.

The results of these surveys indicated broad agreement across a number of questions. Both ASIC leadership, as well as external stakeholders, agreed on the prioritisation of ASIC’s focus, stating that ‘detecting and prosecuting unlawful conduct’ and ‘setting rules, standards and expectations for corporate and financial markets’ should be two of ASIC’s top priorities.²¹

Beyond questions of prioritisation, there was close alignment (less than a 15 percentage point difference between internal and external results) on a number of additional survey questions. In some instances the views of external stakeholders were more positive than those of ASIC leadership, for example with regard to timeliness and cost of licensing and registration. These results are included in Figure 14, above.

However, the Panel also identified a larger number of areas of significant misalignment (where internal stakeholder survey results were more than 50 percentage points higher than external results), illustrated in Figure 15. The most significant areas of disagreement were in the extent to which ASIC is forward looking, proactive and responsive to emerging risks and developments in the financial system. External stakeholders also expressed more negative views than ASIC with regard to its use of resources and the extent to which ASIC is reducing red tape associated with compliance.

Figure 15: The expectations gap — areas of misalignment²²



21 Susan Bell Research 2015, *ASIC Capability Review: Comparing the views of ASIC’s leadership team with the views of external stakeholders*, in Appendix E of Evidence Report — Volume 3, page 82. 34 per cent of SELs and Commissioners and 24 per cent of external stakeholders agree ‘detecting and prosecuting unlawful conduct’ should be ASIC’s number one priority; 24 per cent of SELs and Commissioners and 25 per cent of external stakeholders agree ‘setting rules, standards and expectations for corporate and financial markets’ should be the number one priority.

22 Susan Bell Research 2015, *ASIC Capability Review: Comparing the views of ASIC’s leadership team with the views of external stakeholders*, in Appendix E of Evidence Report — Volume 3, page 69; excellent/good rating.

The expectations gap is not necessarily indicative in itself of ASIC's performance, and there may be several reasons for these differences in perception. For example:

- ASIC may not have communicated its goals and achievements effectively to external stakeholders.
- Internal and external stakeholders may have different standards against which they assess performance.
- ASIC staff may have been overly optimistic in self assessing the organisation's performance, or external stakeholders may be overly negative in their assessment due to past dealing with ASIC.
- External stakeholders might not understand the limits of ASIC's mandate.

As an example of a manifestation of an expectations gap, ASIC has been making progress on reducing red-tape, and is able to identify a number of specific examples where this has been successful, resulting in a total saving of around \$470m. However, feedback suggests that this progress has fallen short of external expectations and that ASIC may not be placing sufficient focus on the areas that currently impose the biggest regulatory burden. This is in contrast to other agencies, such as the ATO, where stakeholder perceptions of red-tape reductions are broadly positive. The Panel notes that the ATO's deregulatory program is founded on an overarching strategy and a structured process of reducing regulatory burden across all of its business processes. The ATO's program is also well resourced and well received by stakeholders.

It is evident that many external stakeholders are not fully aware of the limits of what ASIC can and should do. This is demonstrated in the tendency for public reaction and criticism against ASIC where there is a market failure or losses occasioned by normal commercial, and investment risks, even where it is not reasonable to expect ASIC to have prevented that outcome. This is also manifest in much of the more recent parliamentary committee oversight.

Addressing the expectations gap

While some expectations gap is inevitable, the Panel finds the current expectations gap substantial and requiring immediate attention of the Commission and the Government. The Panel views this to be a mutual obligation.

Moreover, the imperative to address this expectations gap will increase if a proposed move to a user pays funding model is adopted by the Government. If regulated entities are required to contribute to the costs of their oversight, they will have a heightened expectation around transparency in reporting and about the effective and efficient use of their funding. There is also a risk they will be quick to judge market failures as a failure of ASIC if they have made a direct financial contribution to the maintenance of a strong financial system and are not fully aware of the limits of ASIC's mandate.

Closing this disparity on expectations of ASIC's role and performance can be achieved by ensuring:

- ASIC's mandate and expectations are well understood;
- ASIC's strategic responses to the mandate and expectations are well informed and appropriate;
- Performance is reported in a meaningful way.

As an additional perspective, it is informative to compare the results of external stakeholder surveys for ASIC with those of the FCA. In conducting this comparison, the Panel found that the results are mixed, with ASIC outperforming the FCA in some instances, and underperforming in others. For example, the FCA is perceived as being more forward looking and effective than ASIC.²³ On the other hand, external stakeholders believe ASIC staff have a stronger skill set vis-à-vis the FCA.²⁴ It is important to note that the survey methodologies (questions, sample groups) used for each survey are different, and that the regulators are also at different stages in their own lifecycles. Nevertheless, the Panel views this comparison as further evidence of the need to address key gaps.

Box A also highlights the importance of ensuring ASIC’s mandate and expectations are well understood in order to reduce the expectations gap with regard to what ASIC can and cannot do. This provides an additional imperative to enhance the SoE and Sol, through clearly stating the Government’s expectations and acknowledged limitations, and providing a clear plan on how ASIC intends to meet those requirements. Enhancements to the SoE will also ensure that the Government provides sufficient guidance and resourcing to the priorities for ASIC to pursue, given the extensive nature and ever growing ‘To Do’s’ of its mandate.

The Panel welcomes the Government’s commitment as a response to the FSI, to provide clearer guidance in a revised SoE in the first half of 2016.

Table 5 below provides an indication of the key changes that the Panel considers could potentially be incorporated in a revised SoE. At a minimum the SoE must discuss ASIC’s role, priorities, the Government’s regulatory outcomes risk tolerance, expected interactions with the Government, Minister and Treasury, interactions with other regulators and transparency and accountability. This has been further extended in Appendix B which contains a full form illustrative SoE. These examples are intended for benchmark purposes only, and should not be interpreted as recommended wording. The Panel acknowledges that the SoE needs to be carefully drafted so as to transparently express the Government’s aspirations while not undermining the independence of ASIC.

Table 5: Illustrative SoE enhancements

| Component | Example wording |
|--|---|
| Acknowledgement of any trade-offs in pursuing mandate with available tools | <p>‘ASIC operates with limited resources and the Government therefore recognises that the pursuit of an objective or use of a particular tool may come at the expense of others. ASIC should explicitly acknowledge and explain any required trade-offs, and should clearly state how it plans to allocate resources, prioritising those actions that are most directly aligned with its three regulatory objectives, given ASIC’s assessment of the current risk environment.</p> <p>Further, ASIC should develop appropriate MIS to undergo internal efficiency reviews every two years to ensure that resources are being deployed in the most efficient way possible. The government expects the next review to occur in 2016.’</p> |

23 FCA 2015, *FCA Practitioner Panel Survey 2015*, viewed 3 December 2015, <<http://www.fcapractitionerpanelsurvey.co.uk/downloads/FCA%20PP%20Survey%20-%20Questionnaire.pdf>>. 21 per cent of ASIC’s external stakeholders agreed that ASIC is forward looking, compared to 44 per cent of FCA stakeholders that agreed; 58 per cent believed the FCA was an effective regulator and only 43 per cent of external stakeholders believed ASIC’s current performance was excellent/good.

24 FCA 2015, *FCA Practitioner Panel Survey 2015*, viewed 3 December 2015, <<http://www.fcapractitionerpanelsurvey.co.uk/downloads/FCA%20PP%20Survey%20-%20Questionnaire.pdf>>. 44 per cent believed ASIC staff have the necessary skills for their role, compared with 32 per cent strongly believing that the FCA have appropriately qualified staff with the necessary skills.

| Component | Example wording |
|---|---|
| Acknowledgement of the expectations gap, that is ASIC's capabilities to effect change and know limitations | <p>'There are limits to ASIC's mandate which may not be fully understood by the public, resulting in an expectations gap (that is, the misalignment between external and internal perceptions of ASIC's performance, capabilities and mandate). Educating the public of ASIC's role and limits is a mutual obligation of ASIC and the Government. This Statement of Expectations, combined with the Statement of Intent that ASIC is required to produce in response, goes some way to addressing this misalignment, by clearly describing the expectations the Government has for ASIC (in the Statement of Expectations), and outlining how ASIC will respond to each of the requirements (in the Statement of Intent).'</p> |
| Explicit identification of the expansion of ASIC's mandate, functions or activities | <p>'ASIC's mandate is subject to change over time as the regulatory needs of the Australian economy and markets change. ASIC must ensure that it develops strategies and the necessary internal capabilities to address any expansion of its mandate. The Government, in turn, has an obligation to articulate the additional resourcing to be provided for new functions.'</p> |
| Statement of the Government's regulatory outcomes risk appetite | <p>'However, the government recognises that ASIC cannot, nor should it seek to, eliminate all risk in the financial system. ASIC's role does not involve preventing all risk in the market, or in ensuring compensation where there is a loss. Rather, ASIC's role is to reduce the level of risk through surveillance, supervision and guidance, and, where wrong-doing does occur, enforcement. Its role also involves reducing the 'misalignment' of expectations through education, in order to address circumstances where investors or financial consumers think they are bearing lower risk than the actual risk of the product or strategy.'</p> |
| Acknowledgement of the impact of economic and market conditions | <p>'In particular, the Government has identified a number of economic and market trends that should impact how ASIC deploys its resources over the coming year. These include:</p> <ul style="list-style-type: none"> • The current low yield environment: Where interest rates and asset yields are low, some investors may be attracted to high yield schemes in order to achieve a level of desired returns. In some instances, these investors may not be fully aware of the risks involved in extending risk appetite to achieve higher returns. As such, ASIC should deploy resources to investor education focused on risk-return trade off issues. It should also focus on supervision of market participants promoting higher yield products in order to identify possible misconduct. • [Any other matters as identified by Government] |
| Identification of key risks to which ASIC should respond, along with a description of how this is expected to develop over the year | <p>'The Government expects ASIC to take a forward looking approach to managing key risks that will shape financial markets in the next 3-5 years. Along with undertaking its own analysis of key risks, the Government expects ASIC to develop strategies that address:</p> <ul style="list-style-type: none"> • Corporate culture, with a focus on business integrity and treating customers fairly. The Government expects ASIC, following appropriate analysis and consultation, to conduct targeted supervision of high risk entities to review their conduct policies, and to assess the alignment of incentive structures and risk management as a proactive approach to identifying possible misconduct. • [Any other matters as identified by Government] |

| Component | Example wording |
|--|---|
| Description of expected relationships with agencies and peer regulators | ‘Further, ASIC is also expected to work together with the Council of Financial Regulators (CFR) and the International Organisation of Securities Commissions (IOSCO) to further develop and maintain relationships with financial regulators domestically and globally. Commissioners should identify opportunities to participate in the leadership of these organisations in order to further contribute to the regulatory agenda and the global integration of Australia’s capital markets.’ |
| Description of priority areas for cooperating in the coming 1 to 3 years | ‘The Government recognises the importance of open data and expects ASIC to take an active role in promoting and developing an approach to more open government data sharing across financial regulators together with the CFR. ASIC should assist the Government in identifying the requirements of a coordinated data policy as well as legislative restrictions that need to be removed.’ |

The SoE will be reviewed annually to determine whether an update is required. Triggers that indicate that a change may be required include any changes in ASIC’s mandate, a substantial change in Government priorities (for example where there is a change in Government) and a significant change in macro-economic and market conditions. If no change is to be made, this needs to be communicated, as soon as possible.

The Panel views this approach as consistent with the IOSCO Principles of Securities Regulation in that it respects the operational independence of the regulator whilst ensuring that the Government’s priorities are being met. Further, it avoids the risk that Government assumes a directive stance that is not clearly or transparently communicated to ASIC and the public more broadly.²⁵

ASIC will be required to update its Sol to directly respond to each of the Government’s articulated expectations, acknowledging what is required and identifying a plan for how it will meet those expectations. In order to drive accountability to execute that plan, each expectation must be aligned to specific performance measurements (see Chapter 3 for a broader discussion on these linkages). A description of what the Panel would expect to see in response to each component of the revised SoE is included in Table 6 below.

Table 6: Illustrative requirements of the Sol

| SoE component | Requirements of the Sol |
|-------------------|--|
| ASIC’s role | <ul style="list-style-type: none"> • Acknowledgement of its mandate, including any changes to this mandate over the past year • Explanation of any trade-offs, and how resources will be allocated accordingly • Explanation of how ASIC will manage the expectations gap • Comment on the adequacy of resourcing and Government funding |
| Risk tolerance | <ul style="list-style-type: none"> • Recognition of external factors impacting ASIC’s ability to achieve its mandate • Acknowledgment of the Government’s risk appetite • Description of how ASIC will adapt to changes in economic and market conditions |
| ASIC’s priorities | <ul style="list-style-type: none"> • Description of ASIC’s strategic priorities which reflect the most significant risks and drivers of risk to ASIC’s enduring objectives over the next 3 years |

25 IOSCO 2010, *Objectives and Principles of Securities Regulation*.

| SoE component | Requirements of the Sol |
|-------------------------------|---|
| ASIC's priorities (continued) | <ul style="list-style-type: none"> • Description of how ASIC proposes to allocate its resources, and manage its workforce and organisation capabilities to meet these requirements • Establishment of a clear linkage between the SoE and the strategy outlined in the Corporate Plan • Clear statement that an action plan and metrics to assess performance are included in the Corporate Plan • Explanation of how the priorities stated by the Government in the SoE align with ASIC's own priorities • Acknowledgement of the Government's priorities and a description of how ASIC will contribute to them |

More detailed and informative use of these existing accountability tools will not only help address the expectations gap by clarifying what ASIC can and cannot do, but also anchor discussions with the Government. The SoE and Sol will be prepared on the basis of ongoing strategic dialogue between the Minister and the ASIC Chairperson, including on matters of prioritisation and potential changes to (and consequential resourcing of) ASIC's mandate. It will also be used to promote more targeted use of other existing external governance mechanisms.

The Panel views the annual preparation of the SoE and Sol as requiring greater pro-active engagement between the Minister, Treasury and the ASIC Chairperson.

The Panel believes that these recommendations for enhanced SoEs and SolS, including scope and frequency, provide a potential helpful benchmark for other independent statutory agencies and regulators.

Performance reporting

Performance reporting is another key component of ensuring external (and internal) accountability, and managing the expectations gap. Performance measures should be chosen that allow external stakeholders to make an assessment of whether and how ASIC has achieved its strategic objectives. This will help to ensure objective and information assessment of performance to hold ASIC to account.

Figure 16 below outlines the levels at which performance can be assessed according to Harvard academic and regulatory consultant, Malcolm Sparrow. Tier 1 measures assess whether or not the regulator has been able to achieve its strategic objectives. In ASIC's case, these would be measures directly assessing the extent to which it has, for example, improved trust and confidence in the financial system. This is inherently difficult, as it is challenging to prove causality (did ASIC's actions alone improve trust and confidence) and to measure prevention (what would have been the outcome if ASIC had done nothing).²⁶ No global regulator has yet achieved a best practice approach to measuring tier 1 performance.

26 Sparrow, M 2000, *The Regulatory Craft*, Brookings Institution Press, Washington DC.

Figure 16: Malcolm Sparrow's tiered performance reporting framework²⁷



ASIC leadership understands the importance of a well-developed performance measurement and reporting framework, and has invested time to develop improved tools, as reflected in the 2015-2019 Corporate Plan. For example, in the past year, ASIC has produced two frameworks for external reporting, firstly to provide evidence metrics as part of the RPF, and then to develop outcomes based metrics for the PGPA Act.²⁸

27 Adapted from: Sparrow, M 2000, *The Regulatory Craft*, Brookings Institution Press, Washington DC.

28 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 38.

The Panel recognises that the performance measurement framework included in the Corporate Plan is a step in the right direction that will enhance the ability of external parties to assess the extent to which ASIC achieves its objectives. In particular, it commends:

- The explicit recognition of the importance of including outcome based metrics to assess perceived and actual behaviours demonstrating trust and confidence in the financial system (as one of ASIC’s enduring mandate objectives).
- The use of the stakeholder survey as direct evidence of perceptions and any specific areas of material disparity between internal and external performance assessment. This will ensure enhanced focus on managing the expectations gap and act as a catalyst to review and recalibrate the stakeholder engagement model and avoid a ‘set and forget’ approach to stakeholder management (see Chapter 4 for further discussion on external panels).
- The assessment of performance across multiple tiers, although recognising that measurement of tier 1 should continue to improve (see Table 7 below). The commitment to continually improving the framework with time.

Table 7: ASIC’s updated performance reporting framework

| Tier | ASIC’s measurement approach (2015-19 Corporate plan) | Panel assessment |
|---|---|---|
| Tier 1 Effects, impacts and outcomes | <ul style="list-style-type: none"> • Stakeholder survey responses. | <ul style="list-style-type: none"> • Stakeholder surveys are not a direct measure of performance against strategic objectives. • Will require careful nuancing and discussion to overcome concerns around potential bias in survey results. |
| Tier 2 Behavioural outcomes | <ul style="list-style-type: none"> • Case studies and tailored initiative impact assessments to demonstrate how specific pieces of work have influenced behaviours. • Percentage of misconduct reports resolved resulting in changes to systems, processes or procedures, or corrective disclosures made. | <ul style="list-style-type: none"> • Not able to fully assess use of case studies as these have not been incorporated in performance reporting in prior years. |
| Tier 3 Agency activities and outputs | <ul style="list-style-type: none"> • Number of surveillance completed. • Percentage of successful criminal and civil litigation. • Number of financial literacy resourced produced and delivered. • Number of new or revised regulated guides published. | <ul style="list-style-type: none"> • As expected, and consistent with peer regulators. • Narrative important here for appropriate interpretation. |
| Tier 4 Resource efficiency | <ul style="list-style-type: none"> • No explicit metrics. | <ul style="list-style-type: none"> • These metrics would become more important if a user pays funding model is adopted. |

However, this activity remains in an early stage and will need ongoing development. More specifically ASIC should focus on:

- Consolidating performance reporting: Performance metrics are currently scattered across multiple external reports, with several main sources of performance information published for public consumption.²⁹ Most of these sources are not accompanied by a detailed performance narrative, or an assessment of gaps in performance or delivery against stated priorities. This makes it challenging for stakeholders to make a judgment as to the degree to which ASIC is performing against its objectives, priorities and expectations.³⁰
- Enhancing the use of performance narrative: In the absence of specific measures at the tier 1 level, it is important that ASIC develop a narrative to demonstrate how its actions have contributed to achieving its strategic objectives. Moreover, greater reliance on tier 3 metrics requires greater use of accompanying narrative to avoid the potential for perverse risk incentives (a high litigation success rate could suggest risk averse case selection), and outputs (number of financial literacy tools) misconstrued as effective outcomes.
- Internal alignment: Measurements used for external reporting should also be used for internal performance measurement (see Chapter 3 for further discussion).
- Increasing use of sophisticated data analytics to enhance measurement: ASIC has identified social media, data analytics and greater use of sector specific metric targets as areas of future development.³¹
- Looking to peer performance measurement frameworks to identify scope for further improvement. For example:
 - the SEC (USA) uses a mix of performance indicators and related indicators, with the latter used to provide context rather than an assessment of performance;
 - the CFTC (USA) sets targets for upcoming years and over the medium-term using annual results as a baseline to assist in setting targets for future years;
 - the FCA (UK) uses market cleanliness statistics (movements in share prices around takeover announcements), but accompanied with a narrative.

29 These include the Annual Report, the Regulator Performance Framework, market surveillance reports, licensing reports, enforcement reports.

30 The Panel recognises that this fragmentation is partially driven by the need to comply with multiple government reporting obligations.

31 ASIC 2015, *ASIC's Corporate Plan 2015-16 to 2018-19*, Sydney, page 27.

External governance: recommendations summary

Recommendation 1: The Minister and ASIC to implement a more effective strategic long term oversight function, underpinned by a mutual commitment to a more pro-active regular ongoing dialogue. As steps to achieving this:

- The Minister to provide an Annual Ministerial Statement in Parliament, in conjunction with tabling of ASIC’s Annual Report on the degree to which ASIC meets the expectations of the SoE and is performing in the achievement of its mandate.
- The Government and ASIC to enhance the SoE and Sol to clearly and regularly communicate expectations (to be reviewed annually) and to ensure mutual understanding and support ASIC in managing stakeholder expectations.

Recommendation 2: ASIC to continue to refine the performance reporting framework, including consolidating performance reporting (to ensure consistency between reporting frameworks), aligning internal performance metrics, improving the use of performance narrative, and identifying opportunities for more sophisticated analytics, particularly in relation to outcomes measures.

Internal governance includes the organisation structure and the responsibilities of senior leadership to ensure strategic guidance and provide internal checks and balances within an organisation. Additionally, good internal governance ensures decisions are being made at the right level to ensure efficient use of senior leadership and to maximise staff empowerment with a framework of strong accountability.

ASIC’s Commission is comprised of five full time Commissioners (including the Chairman and Deputy Chairman). As currently interpreted by the Commission itself, the Commissioners all have dual roles:

- **Non-executive governance roles:** As statutory appointments, the Commissioners have ultimate decision-making authority as to strategic oversight and direction of the organisation (that is, a traditional Board role). In this role, they sit in on internal committees, all external panels and have ultimate responsibility for ASIC’s Corporate Plan, and strategic and material regulatory decisions.
- **Executive management roles:** In addition, the Commissioners perform day-to-day executive line management functions in relation to business activities of ASIC. In this role, they lead groups of business lines (‘clusters’) with direct reporting lines from SELs to individual Commissioners, and make decisions on operational matters.

This design is not fully a result of legislative requirements, with the law stating only that the Commission must be comprised of three to eight full time statutory appointees, with a Chairperson holding complete executive responsibility. In other words, the delegation of executive responsibilities for parts of the organisation (the clusters) by the Chairperson to individual Commissioners is an arrangement that was deliberately chosen by the former Chairperson and upheld by the current Chairperson.

The model differs from that employed by large corporations and many other regulators (for example, FMA), where Commissioners or Directors do not have direct responsibility for a line of business and are not directly involved in day-to-day operations. The Panel also notes that this model is different from that of domestic regulators such as the ACCC and APRA where Commissioners and Members do not spend a majority or material allocation of their time on operational matters, and indeed, the ACCC delegates such functions to a CoO.

The combined executive line management and non-executive (governance) role has a number of strengths, including:

- Closer alignment between strategic and operational decision making.
- Direct accountability to the Minister for high priority operational and regulatory matters.

The structure of the current model is also partially supported by two reviews which emphasise the importance of an executive board but these warrant nuanced interpretation and translation to ASIC's current internal governance model:

- *Review of the governance practices of statutory authorities and office holders 2003* (Uhrig report):³² As part of a broader review of structures for good governance, this review recommended that 'boards should be used only when they have full power to act'.³³ Where Ministers play a key role in determination of policy, or where the board would lack the power to appoint and remove the CEO then the report finds delegation to an executive group most practical.
- *The Failure of HIH Insurance, 2003*:³⁴ As a result of the HIH Royal Commission, APRA was established with a model similar to ASIC: that is an executive group board comprising a CEO and 2-3 executive commissioners. As part of that review, Justice Owen stated that: 'APRA's governance structures are not optimal for an organisation of its type. It has a board that is in some respect similar to the boards of commercial entities. I do not think this is necessary. Control — and with it responsibility — should rest with a small full-time executive'. However, it should be noted that this recommendation for APRA was accompanied by many others and there is no explicit attribution (despite public suggestion otherwise) that APRA's previous governance model contributed to the quality of oversight.

The model also results however, in a number of challenges and tensions, with the risk that it can erode the strength of internal accountability, and that it may leave insufficient time for Commissioners to focus on strategic decision making, holding executives accountable for delivery, external engagement and strategic communications.

The Panel believes that a dual governance and executive line management role inherently undermines accountability. Despite best efforts, individuals responsible for particular executive functions are unlikely to be consistently able to detach themselves from their concerns as an executive to take a fully independent and organisation-wide perspective when acting in their governance role to hold the executive team (including themselves) to account.

Because ASIC's governance and executive layers are merged, there is no separation between development and advocacy for business initiatives (by the executive) and impartial consideration of the strategic merits of those proposals (by the governance group). This may make it difficult for the Commissioners to take a completely non-biased and strategic approach to decision making, as they may tend to be swayed by the perspectives of their executive roles, particularly in the endorsement of proposals they have been involved in.

32 Commonwealth of Australia 2003, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, viewed 27 November 2015, <<http://www.finance.gov.au/sites/default/files/Uhrig-Report.pdf>>.

33 Commonwealth of Australia 2005, *The Uhrig Review and the future of statutory authorities*, viewed 27 November 2015, <<http://www.aph.gov.au/binaries/library/pubs/rn/2004-05/05rn50.pdf>>.

34 Commonwealth of Australia 2003, *The HIH Royal Commission*, viewed 27 November 2015, <<http://pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/finalreport/index.htm>>.

Additionally, there is a risk that a Commissioner involved in a particular operational area will dominate discussion on that topic and influence decisions as other Commissioners may defer to him/her because of their relevant expertise. Commissioners may therefore feel less comfortable and confident in questioning the suggestions and decisions of their peers and may be less likely to demand clear articulation of delivery plans and challenge these when detail is lacking. This ultimately erodes internal accountability mechanisms, as there is no impartial body objectively assessing performance progress against tangible delivery plans (see Chapter 3 for further detail).

The Panel is also of the view that the volume and urgency or time sensitivity of operational matters distracts the Commission away from focusing on higher priority strategic questions and challenges, strategy development and organisation capacity and capability needs. There is likely to be a natural tendency for people in blended executive and governance roles to prioritise some of the more immediate issues and short term challenges compared with long term strategic requirements.

While structures exist to minimise Commissioner involvement in operational matters, these are not always operating as designed. Namely, the Panel observed a number of challenges with the delegation framework:

- Employment delegations are only permitted to ASIC staff employed under the PSA (see Chapter 3). As an increasing number of senior staff are not being employed under the PSA, this frustrates the decision making process, creating inefficiency and putting pressure on those who can be delegated functions and powers.³⁵
- The delegation matrix does not always reflect how decisions are made. Commission and staff discussions highlighted that decisions were generally made at more senior levels than suggested in the delegations (with the exception of the finance delegations).

These factors compound to put additional pressure on the Commission to be unnecessarily immersed in operational matters. Further evidence of insufficient bandwidth for strategic decision making includes:

- Panel discussions with ASIC Commissioners and staff, review of meeting minutes and attendance at committee and Commission meetings.
- Insufficient time spent engaging with the market. For example, ASIC Commissioners spend an average of 26 per cent of their time on meetings and engagement activities with external stakeholders³⁶ which again is materially less than that of other domestic regulators (see also the discussion on culture in this Chapter). This corresponds with ASIC's own time use analysis, which indicates that Commissioners spend around 24 per cent of their time on external engagement. Excluding the Chairperson, whose IOSCO role entails a significant time commitment, the average comes down to 21 per cent.³⁷ The Panel views a best practice time allocation to external engagement for the senior leadership of a regulator as 40 per cent or more, based on observations of other agencies.

35 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 11.

36 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 20.

37 Analysis conducted by ASIC based on review of Commissioners' diaries and reflection on activities between September and November 2015. Given some Commissioners' leave and travel arrangements during this time, note that analysis was conducted to reflect a one month long period when they were present in the office. Analysis assumes a 9 hour day and 22 working days a month.

- Time use analysis conducted as part of the PwC evidentiary review, indicating that 58-77 per cent of Commissioner time is spent on operational and administrative matters (the executive line management role), leaving only 23-42 per cent for strategic initiatives and external engagement (the strategic oversight role).³⁸ By contrast, the Panel would expect to see less than 20 per cent of time being spent on operational and administrative matters and which notably aligns more closely to that of other domestic regulators.

After having reviewed PwC's analysis and the Panel's draft Report, ASIC provided its own time-use analysis conducted on the basis of a review of Commissioners' diaries and reflection on activities over a one-month period in the office between September and November 2015. The results suggest that ASIC Commissioners spend around 59 per cent of their time on strategic matters and activities.³⁹ However, the Panel has a number of concerns with this analysis:

- The data underlying the supplementary analysis cannot be reconciled with the data originally provided to PwC.
- A number of examples defined by ASIC as strategic appear to the Panel to be more executive and operational, for example updates to staff and internal presentations.
- An average of 7 per cent of time was spent on 'internal accountability', which includes weekly Commission meetings and fortnightly one-on-ones with key reports. Based on its observation of one of the Commission meetings and assessment of minutes of other meetings, the Panel finds that substantive time is devoted in these discussions to matters that it considers largely operational.
- The analysis was conducted over the course of this Review, when the Commissioners were required to substantively engage with the review process, which would likely require more strategic focus compared to business as usual. This is accounted for under 'change management' which accounted for an average of 6 per cent of Commissioner time spent.
- The analysis was received late in the Panel's report drafting process, and hence could not be fully tested and verified.

Regardless of the interpretation of the supplementary time analysis evidence, the Panel is of the view that its findings stand given other sources of evidence (observations, internal and external discussions, survey data) and challenges around ensuring strong internal accountability under the current structure.

The Panel does recognise the many strategic exercises that are being led by the Commission, including the funding model review, One ASIC project, and the Registry Separation project. It also acknowledges the importance of Commission involvement in high priority regulatory decisions (for example, policy issues and landmark enforcement discussions). However, it appears that operational matters require a disproportionate degree of input, commensurately reducing the capacity of senior leadership for long term strategic thinking, delivery oversight, accountability, and external stakeholder engagement and management.

38 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 20.

39 Assuming a 9 hour day and 22 working days a month.

The Panel considered a range of internal governance models applied by regulators in Australia and overseas. These models can be compared based on whether there is a low or high degree of separation between the governance and executive roles.

- Low degree of separation:
 - Commissioners also have an executive role with responsibility for a particular line of business.
 - There are formal reporting lines directly to individual Commissioners.
 - Commissioners are all full time and internal.
- High degree of separation:
 - Commissioners are responsible for collective decision making only.
 - All reporting lines go directly to a Chairperson, CEO or other role with delegated responsibilities.
 - The Commission may comprise part time external members and full time internal members.

The positioning of other regulators against these characteristics is demonstrated in Figure 17 below, with a brief summary of each regulator’s governance model included in Table 8.

Figure 17: Regulator governance models
DEGREE OF GOVERNANCE AND EXECUTIVE SEPARATION



Another important consideration is the role of the Chairperson as CEO or non-executive. For ASIC, it is mandated that the Chairperson must hold executive responsibilities. As such, there can only be delegation to a CoO or quasi-CEO. This is consistent with the Uhrig Report, which highlighted the importance of the Chair being able to appoint the CEO, and also the World Bank’s report on the Governance of Securities regulators, which notes that ‘if the CEO is appointed by another authority then he or she would have a separate status and may consider there to be a mandate to implement the agenda of the person who was responsible for their appointment, rather than the Board. This would undermine the accountability of the Board.’⁴⁰

40 The World Bank 2014, Governance of Securities Regulators: A Framework, Financial and Private Sector Development, Capital Markets Practice, Washington DC, page 9.

The Panel acknowledges that there is no ideal model for structuring internal governance for a regulator such as ASIC. However, on balance, the Panel recommends that ASIC realign its structure to achieve clear separation of the non-executive (governance) and executive (management) roles. In the view of the Panel, despite some benefits, the current model is unsustainable, as it confuses responsibilities and blurs accountabilities, and will ultimately lead to sub-optimal outcomes, especially given the strategic challenges and tasks for the Commission over the next few years (outlined in more detail in subsequent paragraphs).

Table 8: Regulator internal governance structure examples⁴¹

| Regulator | Description |
|-----------------|---|
| APRA | <ul style="list-style-type: none"> Executive Board, although most operational activities delegated Chair acting as CEO |
| ACCC | <ul style="list-style-type: none"> Chair, two Deputy Chairs and four full time Executive Commissioners Four Associate non-executive Commissioners Executive functions delegated to a CoO |
| BAFIN (Germany) | <ul style="list-style-type: none"> Two tier structure Part time supervisory board comprising members of Ministry of Finance, Economics and Justice, members of parliament, and representatives from credit institutions, insurers and asset management companies Chairman and CEO are separate roles Full time executive board with full delegation for day-to-day management |
| FCA (UK) | <ul style="list-style-type: none"> Board comprising a non-executive Chair, CEO, the Bank of England Deputy Governor for prudential regulation, six additional non-executive directors, one additional executive director A separate executive committee with two members also sitting on the Board (CEO and Director of Strategy and Competition) All reporting lines go through the CEO |
| FMA (NZ) | <ul style="list-style-type: none"> Board comprising a non-executive chairman and eight additional non-executive directors Separate executive team |
| MAS (Singapore) | <ul style="list-style-type: none"> Board of Directors comprising a Chair, Managing Director and eight additional non-executive directors Separate management team, with one member (the MD) sitting on the Board |
| SEBI (India) | <ul style="list-style-type: none"> Eight member board (including the Chairman), with four full time roles Chairman is also the CEO Full time members have responsibilities for a number of specific functions, which are in turn each led by an executive director |
| SEC (USA) | <ul style="list-style-type: none"> Four non-executive Commissioners and a Chair (who is effectively the CEO), all full time All business units report into Chair Separate management team comprising an Office of the Executive Director, Office of the Chief Operating Officer and divisional directors |
| SFC (Hong Kong) | <ul style="list-style-type: none"> Board comprising a non-executive Chair, the CEO, seven additional non-executive directors and four additional (full time) executive directors Chairman and CEO are separate roles |

41 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 13; The World Bank 2014, *Governance of Securities Regulators: A Framework*, Financial and Private Sector Development, Capital Markets Practice, Washington DC, pages 7 to 8; and other regulator websites.

| Regulator | Description |
|--------------|--|
| OSC (Canada) | <ul style="list-style-type: none"> • Separate 10 member executive committee (four members sitting on the Board), reporting into the CEO • Commission of 9-16 members, with two full time roles (Chair and Vice Chairs) • Chair is effectively the CEO • One part-time Member elected by other part-time members to act as Lead Director • All executive functions report into an Executive Director/CAO, who then reports to the Chair. |

The recommended model retains the full time Commissioner role, and effectively elevates the Commission to a full-time non-executive ‘Board of the Commission’ where it can fully focus on improved internal accountability, strategic decision making and external engagement and communication. It also empowers the SELs to take responsibility for decision making and execution of operational matters. This model does not imply a major structural change, and does not have any legislative implications.

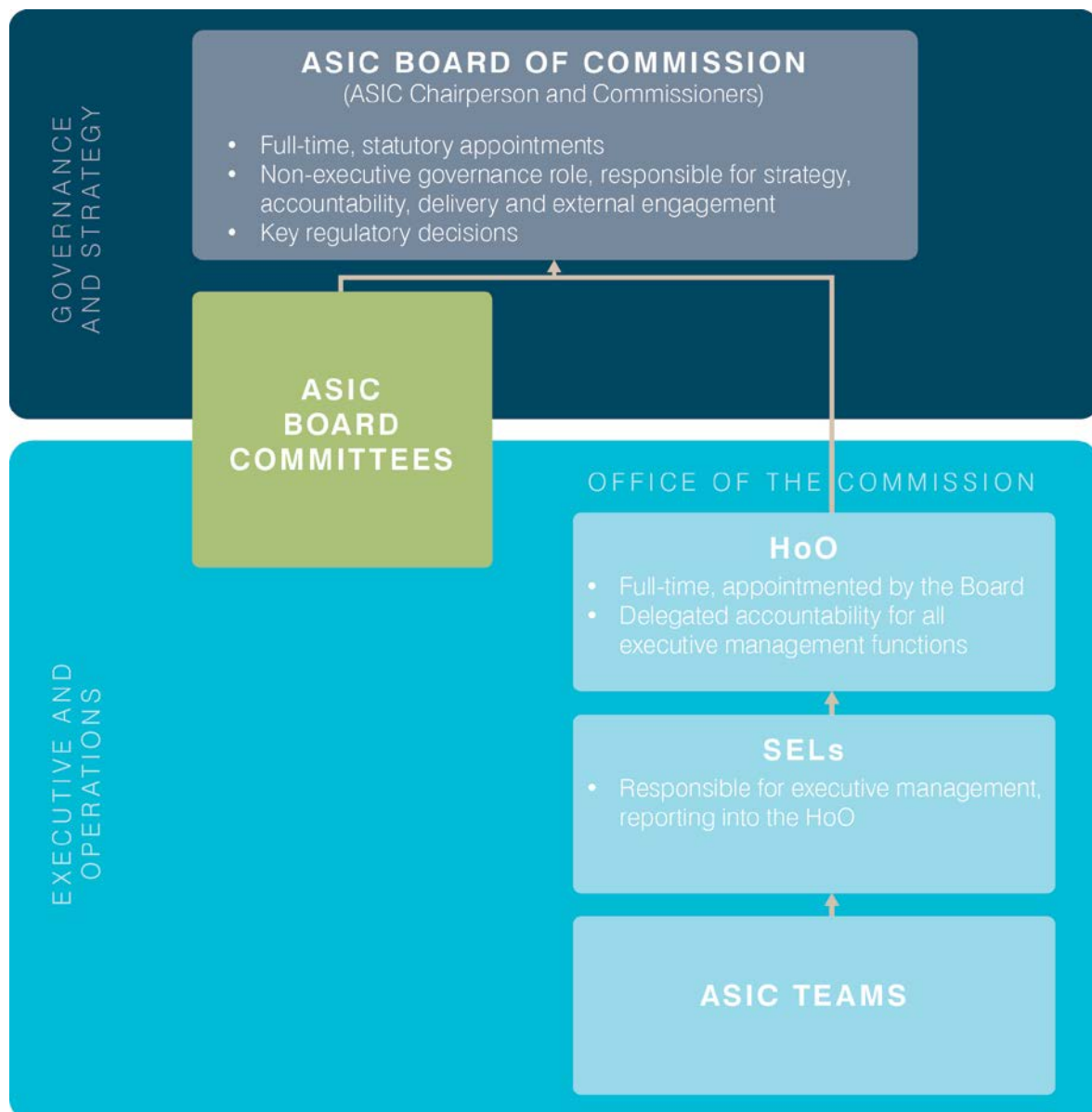
The key features of the recommended model are:

- Elevation of the existing Commission to a non-executive board function (a Board of the Commission), with a conventional oversight and accountability role similar to that of a listed company board, coupled with an external engagement role. The Commission would continue to comprise five full time Commissioners, for at least the next two to three years. This would not be an external board and the Panel is not proposing any change to Commissioner terms of appointment.
- The role of the ASIC Commissioners will extend materially beyond the role of a non-executive director at a listed corporation. Under the new approach, ASIC’s Commissioners will still be full-time and intimately involved in major regulatory decisions of strategic significance, for example approving policy recommendations and major enforcement decisions that are systemically important or high profile. Furthermore as full-time roles, there will be no risk of conflicts of interest driven by other roles, and no detachment from the business, as can occur with an external Board. There will be close interaction with ASIC senior executives on a daily basis, but Commissioners will have greater bandwidth to drive strategy, direction, culture and stakeholder management more effectively. This will allow the Commissioners to become genuine leaders rather than managers.
- Establishment of a new role of a ‘Head of the Office’ (HoO) of ASIC, with delegated responsibility for executive line management functions. This position would be a non-statutory role appointed by the Commission. As such, the recommendation is consistent with the Uhrig report in that it gives power to the Chairperson and Commission Board to appoint and remove the HoO. Furthermore, the Chairperson will maintain executive authority, in accordance with ASIC legislation.

- The role of the HoO will be to lead the day-to-day operational management of the organisation and to relieve the Chairperson and Commissioners of these additional and operational responsibilities. SELs will either report directly into the HoO or via group leaders. Clear lines of accountability, a revised delegation framework, and likely a revised Commission sub-committee structure will all be required to ensure that the right issues are being elevated to the Commission. A well-developed governance and oversight framework will ensure that the HoO does not become a 'bottleneck' on decision-making and is elevating key issues while addressing operational matters below the Commission level. As is the case in other regulators and many large organisations with external Boards, there will still be regular direct contact between the full-time Commissioners and SELs on strategic and important operational matters, both during Commission meetings to which relevant SELs would be invited, and more informally on a daily basis. However, the important difference would be the elimination of direct reporting from particular SELs to individual Commissioners, and hence clear lines of accountability for executive line management functions.

The key features of the model are illustrated below.

Figure 18: Key features of the proposed internal governance structure



In the Panel's view, there are a number of significant benefits which make the proposed internal governance model superior to the current arrangements:

- The Commission and executive have separate and distinct roles, ensuring clearer lines of accountability and oversight, thereby enhancing overall accountability and efficiency at both levels
- Primary focus of the Commissioners is on setting the strategy of the organisation and supervising overall delivery and performance against the strategy.
- Commissioners have a full-time focus across the whole organisation (rather than devoting part of their time to one specific cluster).
- Commissioners are separated from operational decision making and execution activities with consequential unconflicted interests and whole-of-entity objectivity
- Commissioners can be more focused on managing 'upwards and outwards', that is managing external relationships with the Government and other external stakeholders, rather than being focused 'inwards and downwards', that is managing internal operations and relationships.
- The Commission has the organisational flexibility to allocate the oversight of particular components of the strategy to a subset of the Commissioners.
- The proposed model does not require legislative change for implementation.

ASIC should also take the realignment of the internal organisation structure as an opportunity to revisit the Committee structure, including the current coverage of risk management matters. In doing so, ASIC should establish alignment between, and strategic oversight of, risk management as it relates to external, regulatory risks and internal organisational and operational risks. These two streams should be linked through the delivery component of the Corporate Plan and subject to regular management reporting to the Commission Board through the relevant Board sub-committees. This is not happening at present.

Once relieved of executive line management responsibilities, the Panel considers that the revised strategic role for Commissioners would enable them to devote increased attention and priority to significant responsibilities critical to the future direction of ASIC. These have been identified by the Panel and cover a range of areas detailed further in the remainder of this report and can be summarised across seven categories, as follows:

- Internal accountability:
 - driving accountability through critically and impartially assessing business initiatives and projects presented to the Commission;
 - driving the performance management process to ensure operational staff are being fully held to account.
- Strategy setting:
 - ongoing oversight of the corporate planning process, including signing off on business plans and monitoring effective delivery of those plans (see Chapter 3);
 - overseeing the development of a more strategic and forward looking IT plan, which includes assessment of future required analytic capabilities and developing an open data policy and forward work program with the CFR (see Chapter 4);
 - reviewing ASIC's organisation structure to ensure alignment with strategy (see Chapter 4).

- Capabilities improvement:
 - developing and piloting temporary project teams (focused on particular risk issues) as part of enhancing organisational and resourcing flexibility (see Chapter 4);
 - conducting an effectiveness review of external panels and internal committees;
 - developing a new tiered approach to Stakeholder Management, and recalibrating the organisation structure of Stakeholder teams appropriately (see Chapter 4);
 - proactively identifying opportunities for co-regulation, and working with relevant bodies to implement (see Chapter 4);
 - conducting a review of internal MIS to support current and future performance reporting and efficiency measurement (see Chapter 4);
 - enhancing the secondment, exchange and partnership program (see Chapter 4).
- Cultural transformation:
 - driving a culture of outward facing professional confidence and high performance teams (see section 4 of this Chapter);
 - refining internal communication methods to drive organisation wide alignment.
- Change management:
 - overseeing the implementation of an industry funding model, should the Government decide to proceed with this course of action;
 - risk management and implementation of registry separation, if a government decision is made to adopt this proposed course of action.
- External engagement:
 - ongoing engagement with senior level stakeholders, including members of the regulated population, in order to understand emerging risks and priorities and to make ASIC's priorities clear to those stakeholders;
 - clarifying ASIC's role as a regulator to the public and working with Government to proactively manage the expectations gap (see Chapter 3).
- Key regulatory decision making: signing off on strategically significant enforcement actions and policy related decisions.

Given the quantity and complexity of strategic issues for the Commission to address over the next 2-3 years, the Panel considers that the Commission role should continue to be full time for at least that period. Beyond that timeframe, and once these issues have been satisfactorily addressed, it would be appropriate for the Government to review the size of the Commission and whether the roles of the Commissioners need to continue to be full-time.

The Panel acknowledges that the decision on the appropriate internal governance model for ASIC is not clear-cut and is ultimately a matter of judgement. However, the Panel has concluded that true accountability for ASIC will remain elusive in the absence of the proposed changes to its internal governance arrangements.

Internal governance: recommendations summary

Recommendation 3: ASIC to realign internal governance arrangements by elevating the current Commission role to that of a full time non-executive function (not an external board), with a commensurate strategic and accountability focus free from executive line management responsibilities.

Recommendation 4: ASIC to establish a new role of Head of Office (HoO), with delegated responsibility and accountability for executive line management functions.

Recommendation 5: SELs to be delegated executive line management functions, reporting to the HoO.

Recommendation 6: Government to revisit this structure in three years, to review the size of the Commission and whether the roles of the Commissioners need to continue to be full-time.

2.2. Leadership talent — best practice recruitment and effectiveness assessment needed

The role of ASIC Commissioners is broad, challenging, high profile and subject to close public scrutiny. As a result, it is critical to the performance of ASIC that it is led by those with the best available capabilities to develop and deliver on ASIC's regulatory objectives.

In considering leadership talent, the Panel has considered the:

- recruitment process for Commissioners;
- composition and capabilities of the current Commission and required skills sets;
- individual performance review process.

Commissioner recruitment

The Chairperson and Commissioners are statutory appointments by the Governor General on nomination of the Minister, for a period determined by the Minister (up to five years) with Cabinet approval.⁴² While there are no separate appointment guidelines for ASIC Chairpersons and Commissioners, both are subject to the Public Service Commission's (PSC) guidelines on *Merit and transparency: Merit-based selection of APS agency heads and APS statutory office holders*.⁴³

The selection of ASIC's leadership should be supported by an independent, transparent and consistent appointment process that reflects contemporary best practice. The PSC's guidelines set out requirements for ensuring merit based appointments. These include public advertisement of the position and the production of a report recommending shortlisted candidates to the Minister. This process also has the benefit of having embedded controls to ensure the appointment is consistent with ASIC's status as a regulator independent of the Government.

42 Subsection 9(2) ASIC Act. For other requirements see <<http://download.asic.gov.au/media/1327328/Commission--Purpose-Governance-and-Practices--March-2012.pdf>> (viewed 20 October 2015).

43 Australian Public Service Commission 2012, *Merit and Transparency*, viewed 27 November 2015, <http://www.apsc.gov.au/__data/assets/pdf_file/0010/51967/Merit-and-transparency.pdf>.

The PSC guidelines provide some flexibility on how to select office holders. They recognise that some circumstances may arise where it is not appropriate or possible to advertise a vacancy and/or conduct a full selection process. In such cases, the Minister must request the Prime Minister's approval to fill a position without conducting a full selection process. Such approval does not provide relief from the underlying obligation that the process be merit based.

Selection criteria are broad under the ASIC Act, with no guidance as to the skills and capabilities required for Commissioners as members of the Commission and as cluster leaders. There is no documented process for managing the selection of Commissioners. However, the process for managing reappointment of Commissioners is documented.

In assessing Commissioner recruitment, the Panel has reviewed the process only, and makes no assessment of the outcome of that process (such as the suitability of the appointees). Broadly, the appointment process used in recent years has not always met the Panel's expectations of good process (as described below). The need for a contemporary best practice and transparent merit selection process is further elevated by the potential move towards an industry funding model for ASIC, which would place an even higher requirement for external transparency in ASIC's efficiency and effectiveness.

The Panel's recommendations seek to enhance the recruitment process to ensure the suitability of the Commission to address future requirements, whilst ensuring transparency and meritocracy.

The Panel recommends that the recruitment process should apply a contemporary best practice merit based recruitment process to ensure transparent and robust appointments of Commissioners and the Chairperson as a priority. This should comprise:

- Public advertising of Commissioner positions.
- A forward looking capability 'skills-gap' review to identify future requirements (for example, compared with the skills mix and composition of the Commission at the time) and to inform the recruitment process. This should occur on average every two years, and account for the calendar of Commissioner appointments.
- Use of an international executive search firm to undertake searches for Chairperson and Commissioner positions (informed by the skills-gap assessment).
- Candidate interviews to prepare a shortlist to submit to the Minister, conducted by a high level selection panel (comprising the Secretary to the Treasury, Head of a peer agency, an independent representative able to represent the perspectives of consumers and investors, and in the case of Commissioner appointments, the ASIC Chairperson). The use of an independent representative is becoming emerging contemporary best practice, including locally by the NSW State Government for senior appointments.
- Recommendation of a candidate from the shortlist by the Minister for consideration by Cabinet.
- The process would apply to all appointments, including reappointments.

These recommendations are consistent with the World Bank's report on the governance of securities regulators.⁴⁴

44 The World Bank 2014, *Governance of Securities Regulators: A Framework*, Financial and Private Sector Development, Capital Markets Practice, Washington DC, pages 18 to 19.

While these requirements add time and cost to the process, they are needed to ensure that the recruitment process leads to the Commission being comprised of the best possible candidates, with the best combination and diversity of skills and experience. This will ensure the right leadership and provide the public and Government with confidence in the suitability of the Commission, and therefore in ASIC more broadly.

Commission effectiveness and skill set

Ensuring trust and confidence in the financial system, requires that ASIC has the right leaders with not only the right technical skills but, importantly, the right values. To be effective, ASIC's leadership needs to have the capabilities and leadership and management style that enable it to be both forward looking and proactive.

The high level profiles of the current Commission are summarised in Table 9 below.

Table 9: Composition of the Commission⁴⁵

| | |
|--------------------------------|--|
| Professional experience | <ul style="list-style-type: none"> Of the five Commissioners, three had previously worked at ASIC, with one Commissioner appointed directly into the Commission from a role on the ASIC staff and two returning to ASIC after periods working elsewhere. External work experience across investment banking, other regulators/government bodies, legal counsel roles, and not-for profit sector. |
| Education | Broad mix of educational backgrounds across commerce, economics, arts and law (including litigation experience) |
| Gender | One female, four males |

Stakeholder feedback on the Commission is broadly positive, albeit mixed:

- The Orima 2015 ASIC staff survey found that 67 per cent of staff are satisfied with the overall effectiveness of the Commission (26 per cent neutral).⁴⁶
- 81 per cent of staff agreed in the Orima survey that Commission leadership is of high quality.⁴⁷
- Staff interviews indicated that ASIC leaders are perceived as having the required expertise.
- Industry stakeholders, particularly those in the larger financial institutions, provided positive feedback on the market knowledge and capabilities of the Commission overall. However, it was clear that not all members have equally broad public profiles, suggesting more scope for time spent on stakeholder engagement, which in the Panel's judgement reinforces the case for recommendation 3.
- However, there is variability in the degree to which the regulated population perceives the leadership of ASIC, with only 34 per cent agreeing that 'ASIC's leadership has the skills and capability to perform its role'.⁴⁸

45 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 2*, Sydney, page 29.

46 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of *Evidence Report — Volume 3*, page 34. In comparison to 42 per cent in 2010.

47 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of *Evidence Report — Volume 3*, page 34.

48 28 per cent midpoint, 19 per cent disagree, 19 per cent don't know; source: Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of *Evidence Report — Volume 3*, page 105.

The Panel shares the view of the ASIC Chairman that the current skillsets of the Commission will need to be expanded going forward to meet both the emerging and the dynamic challenges ASIC will face. In a context of structural change (as discussed in Chapter 1), the Commission of the future will require greater capabilities and expertise in areas such as innovative forms of regulation, big data, digital disruption, financial disintermediation, sophisticated change management, litigation and strategic legal thinking.

Ongoing identification of these requirements ought to be achieved through a periodic external capability assessment of the Commission's capacity to fulfil its leadership responsibilities in the future. This in turn would inform skills gaps and requirements for future Commission recruitment process. This is distinct from individual performance reviews (discussed later in this section) in that it is forward looking, and conducted at a whole-of-Commission level.

The Panel therefore recommends that ASIC implement a regular and formal forward looking 'skills-gaps' assessment led by the Chairperson and drawing on external expertise to facilitate the identification of Commission level capability weaknesses which impede ASIC's ability to ensure trust and confidence in the market. This would be distinct from current processes that are not systematic, structured or well evidenced.

Similar to workforce planning throughout the rest of the organisation (see Chapter 4), this process could include a benchmarking of skills against a set of required criteria aligned to identified priorities under the strategic outlook. Identified gaps should be used to inform the recruitment process (discussed above).

Commissioner performance assessment

There is currently no formal individual performance-management process for Commissioners. While the PwC report notes that this is normal practice for statutory office holders under the traditional Westminster convention,⁴⁹ the current arrangement is delivering sub-optimal outcomes.

- Reduces the accountability of Commissioners to the Chairperson, particularly in the absence of Chairperson responsibility for Commissioner selection rewards and incentives.
- Impedes the personal development of Commissioners in full time roles by not providing them timely and targeted feedback on their performance and development needs.

The Panel considers that implementing individual performance reviews would not be inconsistent with the Westminster system, but would be an improvement on the way it is implemented in Australia today in line with contemporary management best practice. Individual performance management of the Commissioners should be the responsibility of the Chairperson.

The Panel recommends that the Chairperson establish a formal performance review cycle for all Commissioners, which are linked to the external accountability processes. Performance metrics should be chosen that are clearly aligned to those in the Corporate Plan, to ensure organisation wide alignment and pursuit of key strategic goals. Objectives should be discussed at the start of the year and reflected upon in the end of year assessment. Performance reviews should also be informed by the implementation of a Commission effectiveness review led by the Chairperson with the assistance of an external expert. In formalising the process, the results of these discussions would carry a greater deal of importance than would otherwise be the case. Additionally, the Chairperson should work with the Commissioners to ensure they are achieving their own personal development objectives.

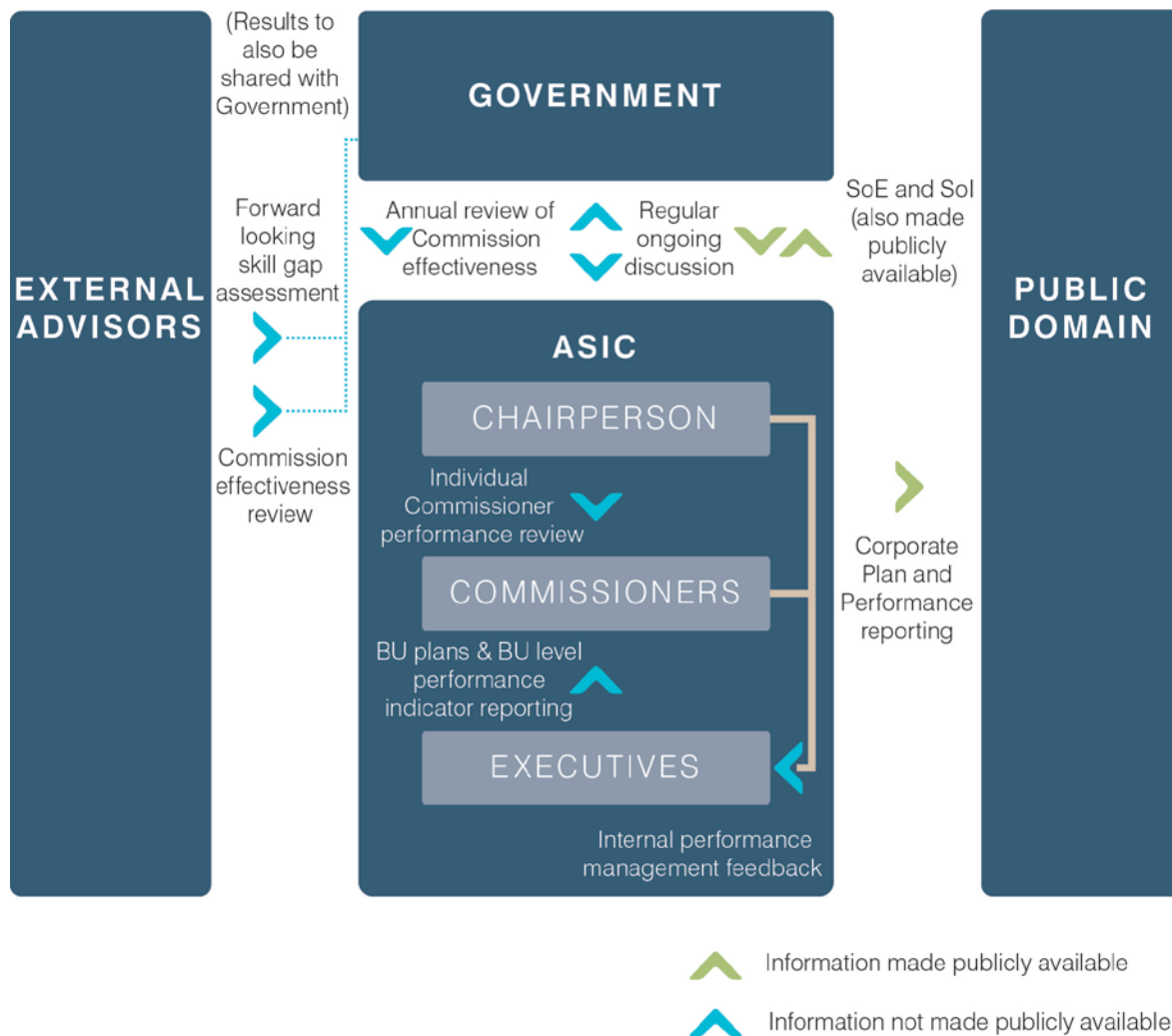
49 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 18.

In addition, the Panel recommends that the Minister assess the overall effectiveness and performance of the Commission, and discuss this annually with the Chairperson.

This discussion would also involve the Chairperson providing an update on the performance of the other Commissioners and the outcome of the external Commission skills gap and effectiveness review. This should form part of the process leading to the development of the proposed annual Ministerial Statement on ASIC's performance.

The recommendations discussed across sections 2.1, 2.3 and 2.3 are all aligned in ensuring strong governance and leadership at ASIC. The key components of the proposed framework are presented in Figure 19 below. As illustrated, ASIC is held accountable to the public through the SoE and Sol, together with the Corporate Plan and performance reporting, which all are made publicly available. External advisers provide perspectives on Commission performance and identify future skills gaps. This informs both the merit based selection of Commissioners as well as individual performance reviews. The Government and the Chairperson have regular ongoing discussions, together with an annual review of Chairperson effectiveness. Internal strategies are aligned through business unit level plans and performance reporting, and feedback through internal performance management. The framework is thus reinforcing to ensure strategic alignment and internal and external accountability.

Figure 19: The proposed leadership and governance framework



Leadership talent: recommendations summary

Recommendation 7: The Government to apply a contemporary best practice merit based recruitment process to ensure transparent and robust appointments of the Chairperson, Deputy Chairperson and other Commissioners.

Recommendation 8: ASIC to implement a periodic forward looking skills gap assessment of the Commission to identify and inform future recruitment needs.

Recommendation 9: ASIC to implement a Commission effectiveness review to assess performance on an ongoing basis.

Recommendation 10: ASIC to develop a formal individual performance review process for the Commissioners, led by the Chairperson.

Recommendation 11: The Minister to assess the effectiveness and performance of the Commission, to be discussed with the Chairperson an annual basis.

2.3. Culture — need for outward focus and professional confidence

Culture has become a contemporary catchphrase and a focus of attention in financial services regulation recently. In culture as it relates to regulators, it is important to distinguish two distinct aspects:

- the expectations of the culture of regulated entities, as assessed by regulators;
- the expectations of the culture of the regulators.

US regulators and the FCA have been leading the development of regulatory standards around culture over the last 3-4 years. These standards have largely emerged as an outcome of the GFC and numerous high profile misconduct cases, and therefore focus on business integrity and treating customers fairly. Conduct and market regulators in Asia Pacific have only begun a concerted focus on culture more recently. ASIC is making progress in this area, and is in the early stages of developing its programme of work.

Assessment of a regulator's own culture should be on whether that culture contributes to good regulatory outcomes. A regulator should look to promote a culture that rewards collaboration, innovation, risk and evidence based strategic thinking and proactive approaches to decision making. A modern day conduct regulator needs a professionally confident staff and high performance teams.

Given that the tone for culture is set from the top, the Commission has an important role to play in defining and disseminating the right behaviours and culture of ASIC. The Panel's findings and recommendations (outlined above) on ASIC leadership talent should equally contribute to addressing any cultural issues of variability or misalignment.

Culture is difficult to identify and measure, but it is an important part of the way an organisation behaves and operates, and is viewed by stakeholders. In aggregate, culture is the outcome of the many other factors considered in this Report, including ASIC's mandate, history, governance and organisation structures, leadership, and workforce management practices.

ASIC's culture has been partly shaped by its regulatory origins as the ASC and NCSC and, prior to amalgamation, the State Corporate Affairs Commissions. These were largely enforcement and 'police-like' in culture as distinct from the culture of a conduct regulator with enforcement powers like ASIC is today. Also, the transfer of market surveillance functions from the ASX in 2010 introduced a new, outward and more market-oriented dimension to the culture of ASIC.

ASIC's values of Accountability, Professionalism and Teamwork are clearly documented on its website and reinforced in formal mechanisms (for example, staff performance agreements), and results of the staff survey suggest strong top down communication of organisation-wide values.⁵⁰ However, the Panel has reservations about the degree to which staff are able to display these values, given constraints on agility and innovation imposed by bureaucracy and related insights of recent innovative research on what is needed for high performance teams.

The Panel observed that ASIC staff morale is generally strong. In particular, staff have high levels of professionalism and dedication. The Orima staff survey found high levels of agreement across a number of motivation related questions. For example:

- 97 per cent of respondents are willing to put in the extra effort to get a task or project completed.
- 83 per cent of respondents indicated that they are motivated to do the best possible work that they can.
- 60 per cent of staff feel they are valued for their contribution (23 per cent neutral).
- 78 per cent of staff are satisfied with their job.⁵¹

Interview feedback and the Panel's broader observations suggest that external stakeholders also perceive ASIC staff as dedicated and hard working.

However, the Panel has identified from the respective streams of evidence gathering that ASIC's culture is variable and can tend to be overly defensive, inward looking, risk averse and reactive. These behaviours are manifest in various observations made elsewhere across this report.

- **Defensive:** ASIC can be quick to reject and challenge criticism, with limited acknowledgment of weakness. ASIC is able to identify a number of specific examples where it has adapted its processes in response to parliamentary inquiries.⁵² However the Panel's interactions with ASIC during the period of this review, as well as observations and feedback from a number of sources, suggest that ASIC can be more defensive than desirable in its approach to responding to challenges and critical assessments from the public, industry and/or Government inquiries. Further, the Panel notes that ASIC leadership has a tendency to rely upon perceived funding inadequacies as an explanation for insufficient progress or areas of ineffective performance. As outlined in Chapter 5, it is not clear that this is necessarily the case.

50 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of *Evidence Report — Volume 3*, page 36.

51 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of *Evidence Report — Volume 3*, page 48.

52 For example: improving the transparency of the outcomes of enforceable undertakings; instituting an avenue for stakeholder to make complaints about ASIC; introducing an Office of the Whistleblower and updating its approach to whistleblowers.

- **Inward looking:** ASIC has a tendency to be overly focused on internal challenges and operations. As discussed in section 2.2, Commissioners spend only 23-45 per cent of their time on strategic initiatives and external engagement.⁵³ The Panel also found that ASIC does not sufficiently leverage external stakeholder perspectives to support the strategy setting process (see Chapter 3 for further discussion and Box A on the expectations gap). Stakeholders indicated that they do not feel ASIC is using them as a means of proactively identifying emerging risks and priorities and tailoring regulatory solutions.
- **Risk averse:** ASIC can tend to lack confidence in its regulatory approach, which is an important component of professional confidence (discussed in Chapter 4). For example, there appears to be limited risk appetite to pursue litigation to test the veracity of the law and where there is a material chance of loss.
- **Reactive:** ASIC can lack a sufficiently forward looking approach and tends to be reactive to emerging issues.⁵⁴ For example, as highlighted in section 2.1, there is a significant expectations gap regarding the extent to which ASIC is responsive to emerging risks and developments.

Assessing the prevalence of these characteristics is a matter of degree and judgement. The Panel's judgement was informed by strong and consistent feedback from multiple sources, including consultation with informed members of the regulated population, other peer regulators, surveys, roundtable discussions, and the Panel's own observations of ASIC meetings and discussions.

The Panel acknowledges that these characteristics vary between individuals and across different parts of the organisation. The Panel also acknowledges that other regulators and many government agencies in Australia and abroad also share some or all of these traits. The Review of Whole-of-Government Internal Regulation found that risk aversion was a dominant aspect of institutional culture across the public sector. Of the 18 capability reviews of departments and agencies conducted between August 2012 and July 2014, 13 identified significant levels of risk aversion and centralised decision-making at senior levels.⁵⁵

The Panel's judgement has been informed by feedback from many of the more than 150 stakeholder interviews across the spectrum of stakeholder types, roundtable discussions, assessment of survey data, the Panel's own observations and findings from previous reviews around specific issues and failures. This suggests that issues with the culture are likely wide reaching across the organisation, and indicate a need for action by ASIC's leadership.

Possible causes of these culture issues include:

- the practices of ASIC's external governance oversight, including the tendency of parliamentary oversight to be somewhat adversarial in nature;
- the current internal governance arrangements, which tend to blur responsibility and accountability and limit the empowerment of staff and SELs;
- the individual and collective leadership styles of the current and former Commissioners;
- reactions to prior enquiries and reviews into ASIC's performance, which set the tone for future interactions.

53 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 20.

54 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 69.

55 Burgess, V 2015 (November 18), 'Risk aversion still chokes up the public service', *Australian Financial Review*.

As noted at the start of this section, another aspect of culture relates to the expectations of regulators about the culture of regulated entities. This is especially relevant, as ASIC (along with APRA) recently initiated an assessment of the culture of regulated entities as part of its regulatory priorities.

What regulators expect from regulated entities in relation to culture is also a relevant reference point for consideration of ASIC's approach to organisational culture. Clearly, the cultural problems regulators are concerned with in parts of the financial sector (for example, excessive risk-taking or a lack of business ethics) are different from the cultural issues the Panel has observed at ASIC. However, the efforts that regulators expect financial firms to make to improve and maintain their cultures do provide some salient lessons for ASIC with regards to its own culture.

ASIC and other regulators are increasingly requiring that Boards and management of regulated entities consciously think about the appropriateness of their firms' culture and the outcomes that it produces. Where culture is found to have shortcomings, firms are expected to identify the required changes to their culture and then:

- adapt the tone and messaging from the top of the house to reflect the desired changes in corporate values and culture;
- consistently articulate these down through every aspect of the firm's documented policies and practices through to actions;
- reflect the desired changes in the performance management infrastructure (for example, incentives, promotions, training).

Given what ASIC expects from its regulated entities, it is critical that ASIC itself is a role model and that its approach to organisational culture is a clear reflection of what it today expects from regulated entities. However, the Panel found no evidence that ASIC's leadership has taken steps towards putting a cultural change program in place to address concerns around professional confidence and the possible underlying causes described above. For example, the ASIC Cultural Values Assessment program and subsequent roll-out of ASIC's Values and Behaviours program was developed in order to:

- improve customer orientation;
- ensure performance and achievement focus ;
- drive continuous improvement, strategic and transformational qualities in culture.

While the resulting articulation of values, performance management training and leadership programs are certainly a positive outcome, they do not address the concerns raised by the Panel or seek to remedy the underlying drivers. Indeed, it is not evident that the Commission has acknowledged the full extent of cultural challenges the Panel has observed and intends to act on them.

As a result, one of the primary challenges for ASIC's leadership is how to re-align the organisation's values and behaviours, and thereby culture, to better reflect its own desired outcomes, as this is what ASIC currently expects its regulated entities to do.

The Panel anticipates that the culture will be significantly improved as a result of other recommendations in this report being actioned, particularly around organisation of senior leadership and improvement of the strategic planning process. In particular, improved external and internal governance arrangements will provide better aligned incentives for ASIC to become a more outward-looking and pro-active, less defensive regulator.

During the course of this review, the Panel learned of innovative and leading edge organisational research by Google culminating in the development of an applied method for assessing and developing high performance teams within an organisation. The research, underpinned by rigorous and extensive quantitative and survey analysis, found that the essential prerequisite or distinguishing characteristic of high performance teams is a team culture of psychological safety.

Culture: recommendations summary

Recommendation 12: ASIC to initiate a review of ASIC's organisational culture and as part of that review assess the merit of implementing Google's Project Oxygen team based assessment program to inform development of Commission strategy for high performance team culture.

CHAPTER 3: STRATEGY – CRITICAL FOR A SHARED FOCUS AND UNDERSTANDING OF WHAT MATTERS

This Chapter addresses findings and recommendations across three key topics related to ASIC’s strategy capabilities:

- *Strategy development*: the process by which ASIC prioritises and sets its strategy, and the results of this strategy as articulated in its Corporate Plan.
- *Strategic communication*: the methods used to communicate the strategy to internal and external stakeholders, as well as ASIC’s broader communications strategy.
- *Resource allocation*: the process by which ASIC decides how resources are allocated across the organisation to align with and execute on strategic priorities.

Strong strategy capabilities are important for a regulator for a range of reasons, including:

- Systemically allowing for identification and prioritisation of a clear and transparent set of strategic objectives that respond to current and emerging risks and market trends, within the context of a broad statutory mandate.
- Providing a basis for accountability in relation to strategy execution.
- Providing guidance for tactical and operational decision-making throughout the organisation.
- Ensuring a shared understanding across the organisation and with external stakeholders around what the regulator will and will not be doing, and hence helping manage any gaps in expectations.
- Aligning the deployment of resources to the most strategically important uses.

The Panel has made a number of observations and recommendations relating to ASIC’s strategic management processes. These are summarised in Table 10 below.

Table 10: Key observations and recommendations

| | Observations |
|-----------------------------|---|
| Strategy development | <p>ASIC has a well-established strategy setting process involving both bottom-up and top-down elements. However there is some variability in the quality of the bottom-up plans.</p> <p>ASIC’s 2015 Corporate Plan is built around a sound strategic framework and represents a major step forward in the articulation of its strategy, although there is some scope for greater clarity of language.</p> <p>While ASIC has an established Emerging Risk Assessment process to inform its strategy development, this is not as well developed or resourced as similar functions in international peer regulators, and external inputs are not being sufficiently utilised in this process.</p> <p>While the identified strategic priorities (referred to by ASIC as focus areas) in the Corporate Plan are broadly comprehensive, and well aligned to international regulatory and market trends, the Panel does see a number of potential gaps related to high-priority issues in the local market context (for example, the ageing population and evolving retirement financing needs).</p> <p>Notably, the Corporate Plan document (as well as the underlying, non-public Business Unit plans) is silent on delivery for some important strategic priorities, including in relation to possible registry separation — not articulating how ASIC will execute on the plan over the short and medium-term.</p> |

Observations

The Corporate Plan is not contributing as much as it could to ensuring accountability for ASIC's strategy execution because of the limited delivery detail (for example in the delivery of its deregulatory agenda), as well as a lack of alignment across:

- Focus area specific performance indicators in the Plan
 - Performance indicators in the (non-Public) Business Unit Plans
 - Organisation-wide performance indicators in the Plan.
-

Strategic communication

ASIC's communication of its mandate and strategic priorities to stakeholders does not clearly highlight its expectations about the impacts and limitations of its activities, nor does it provide clear guidance on how the strategy will be delivered.

More broadly, while ASIC has a Communications Policy, it does not have a clearly-articulated strategic approach to its communications. As a result, communication does not always have a clear purpose and is at times reactive in nature (for example, focusing on responding to media and public scrutiny). ASIC could more effectively communicate what it does and why it does it, in a way that better manages the expectations gap.

ASIC leadership's public articulation of its role places too heavy an emphasis on enforcement, and risks driving strategic focus and staff orientation too much towards this single aspect of the regulator's toolkit.

Resource allocation

ASIC's resource planning is not sufficiently flexible or responsive to changing strategic priorities.

ASIC's resource allocation to enforcement is significantly greater than peer regulators.

Recommendations

Strategy development

Recommendation 13: ASIC to substantially improve the intended approach for delivery of the Corporate Plan in both the public document itself and the underlying Business Unit Plans. This should include greater specification of intended actions as well as timing, resourcing and organisational implications.

Recommendation 14: ASIC to improve the selection of performance indicators to ensure that the measures associated with the Key Activities for each Focus Area are:

- reflective of the activities and their desired outcomes; and
- aligned to the internal performance indicators captured in the relevant Business Unit Plans, and to ASIC's enterprise-wide performance indicators.

Recommendation 15: ASIC to review and introduce a more outcomes focused and dynamic use of advisory panels to ensure these forums input more directly into strategy development, and introduce a broader public consultation element into the strategy setting process.

Strategic communication

Recommendation 16: ASIC to further clarify and emphasise its expectations and risk tolerances (what the regulator will and will not be doing) and actively advertise and promote the strategy broadly (see Chapter 2 for further recommendations related to the Sol).

Recommendation 17: ASIC to ensure the strategic framework used in developing the Corporate Plan is used consistently throughout the communications.

Recommendation 18: ASIC to develop a comprehensive communications strategy that places greater emphasis on communication of the organisation's strategic priorities.

Recommendation 19: ASIC to rebalance its public and internal communications about its role as an enforcement agency.

Resource allocation

Recommendation 20: ASIC to ensure the top-down allocation of resources are deployed across the organisation based on the strategic priorities.

3.1. Strategy development — strong process and framework, but delivery and variability to be addressed

ASIC develops its strategy through a series of formalised annual planning activities. The process involves both top-down and bottom-up elements, reflecting the decentralised nature of ASIC's organisation structure.

The results of these exercises are captured in a variety of internal and external strategy documents, including:

- Internal planning and goal-setting documents for each of the Stakeholder Groups and other key teams, known as the Business Unit Plans.
- ASIC's Sol (discussed in the context of external governance in Chapter 2).
- An annual flagship public strategy document. In 2015, this was *ASIC's Corporate Plan 2015-16 to 2018-19* (the Corporate Plan), which supersedes and expands upon the Strategic Outlook document that was issued in 2014. The Corporate Plan includes coverage of:
 - ASIC's enduring mandate objectives (described as 'Strategic Objectives' in the language of the Plan);
 - identification of key environmental trends (described as 'Challenges' in the language of the Plan) and emerging risks to the objectives;
 - focus areas for the year based on these trends and risks;
 - activities to be conducted in each focus area;
 - performance indicators for the organisation as a whole and for specific focus areas.

The outputs of the strategy development work are also used as in input to ASIC's annual resource allocation and budgeting exercise.

Strategy setting process

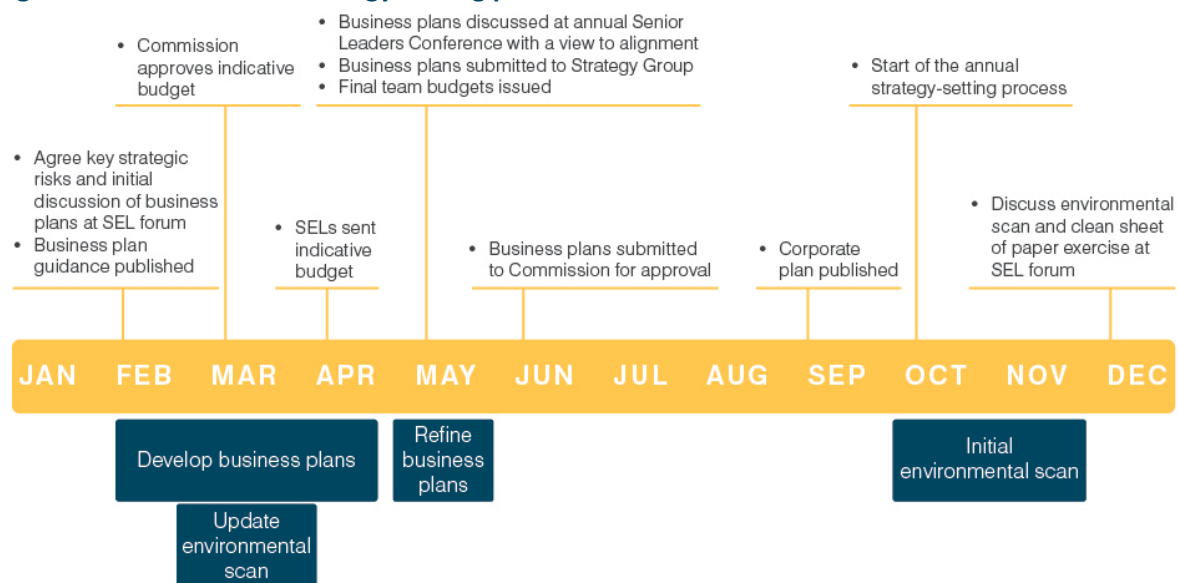
Both the top-down and bottom-up strategy setting processes are well established across the organisation, although ASIC acknowledges that these processes continue to evolve and improve each year. Further, there is also horizontal alignment achieved through Commission involvement. Figure 20 and Figure 21 outline the annual strategy-setting process as it currently stands.⁵⁶

56 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 25.

Figure 20: ASIC's annual strategy-setting process⁵⁷



Figure 21: ASIC's annual strategy-setting process calendar⁵⁸



The bottom-up elements of the process are driven by each cluster/team across ASIC. This process is led by each SEL, with input from their team as required. The business plans are discussed at Commissioner/SEL forums throughout the year, reviewed by the Strategy Policy team to ensure they align to strategic objectives and risks and are finally submitted to the Commissioners for approval.⁵⁹

57 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 26.

58 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 27.

59 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 29.

The core elements of the top-down process occur following the finalisation of the cluster/team business plans. The process draws on the results of the bottom-up prioritisation analysis as well as other inputs including an SEL ‘clean sheet of paper’ exercise, environmental scans and external panels/stakeholder engagement.⁶⁰

The Panel agrees with ASIC’s assessment that its approach to setting key strategic priorities is ‘decentralised’ and ‘mixes strategy and operational considerations’ in line with its relatively decentralised organisation structure.⁶¹ In principle, the Panel appreciates the strengths of this approach for an organisation with as diverse a mandate as ASIC.

However, in practice, such a process can contribute to a lack of alignment across business units. Indeed, PwC found that ASIC’s Business Unit Plans vary in quality across clusters/teams.⁶² In particular, it was noted by PwC that ‘the level of detail is inconsistent, and because [the plans] align to the strategic objectives and long-term challenges, which are high level and not specific, it is difficult to determine whether the activities drive towards intended outcomes’.⁶³

The Panel views the issue of Business Unit Plan quality variability as a result of insufficient focus on detailing delivery plans in the strategy process, and as a potential indicator of a lack of accountability for delivery on behalf of plan ‘owners’. Both of these topics are discussed further below.

Corporate plan framework

The table below summarises the key messages of the 2015-16 to 2018-19 Corporate Plan.⁶⁴

Table 11: Summary of ASIC’s Corporate Plan 2015-16 to 2018-19

| Plan element | Key points |
|--|--|
| Strategic priorities (Enduring mandate objectives) | <ul style="list-style-type: none"> • Promoting investor and financial consumer trust and confidence • Ensuring fair, orderly, transparent and efficient markets • Providing efficient and accessible registration |
| Challenges (Trends and risks) | <ul style="list-style-type: none"> • Balancing a free market system with investor protection <ul style="list-style-type: none"> – Global and Australian economic trends – Culture and conduct – Consumer sentiment, decision making, and financial literacy – Efficient markets • Digital disruption <ul style="list-style-type: none"> – Financial services – Financial markets • Structural change <ul style="list-style-type: none"> – Funds management, superannuation, and retirement income – Financial advice • Financial innovation-driven complexity <ul style="list-style-type: none"> – Product complexity – Market complexity • Globalisation |

60 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 27.

61 ASIC response document — Strategy Setting.

62 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 29.

63 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 29.

64 ASIC 2015, *ASIC’s Corporate Plan 2015-16 to 2018-19*, Sydney.

| Plan element | Key points |
|--|---|
| 2015-16 Focus areas (Strategic priorities) | <ul style="list-style-type: none"> • Gatekeeper conduct covering: <ul style="list-style-type: none"> – Responsible entities – Lenders – Markets – Directors, auditors and insolvency practitioners • Cyber attacks • Poor financial advice • Misalignment of retail product design and distribution with consumer understanding • Impacts of globalisation driven fragmentation across businesses, services, and transactions |
| Actions | <ul style="list-style-type: none"> • Key activities identified for each focus area with the regulatory tools to be used organised into a Detect, Understand, and Respond framework |
| Performance indicators | <ul style="list-style-type: none"> • Specific output and outcome metrics identified in relation to most key activities • Commission wide performance evaluation framework including survey based sectorial outcomes and ASIC activity measures |

Overall, the Panel finds the framework by which the Plan is organised is soundly designed, and comprehensive. It represents a major step forward in the sophistication and rigour of strategic planning represented in the previous Strategic Outlook document. For example, the Corporate Plan also provides readers with information around how ASIC will evaluate its performance.

The Panel does note, though, that some of the language used to describe the different elements of the framework appears idiosyncratic and may be confusing to some readers. For example, the use of the term ‘Strategic Priorities’ to describe what in reality are its enduring mandate objectives.⁶⁵ This is likely confusing to many readers given that strategic priorities are generally understood to be the top priorities for an organisation at a given point in time as a means of achieving its enduring objectives. The Panel finds the term ‘Enduring Mandate Strategic Objectives’ more useful and accurate in this context.

There are several other examples of potentially confusing language in the framework. For the purposes of the following discussion, the Panel uses the language it finds accurate and in line with mainstream strategic planning practices, but also notes for clarity the terminology used by ASIC.

The Panel also notes that while the Plan’s title indicates that it is a four year plan, the content is substantially that of an annual plan, with a relatively superficial overlay of priorities over a four-year time horizon. In particular, the Corporate Plan puts almost all of its focus on 2015-16 priorities. The references to 2018-19 are limited and lacking in detail and there is no discussion of the period between 2015-16 and 2018-19. This represents an opportunity for ASIC to more effectively make next year’s Corporate Plan a genuine long-term plan, although doing this successfully may require some refinement of parts of the strategy development process to develop longer term views and plans.

⁶⁵ ASIC 2015, *ASIC’s Corporate Plan 2015-16 to 2018-19*, Sydney, page 2.

Trend and risk identification process

The Corporate Plan and the broader strategy development process both require evidence-based assessment of key environmental trends (referred to by ASIC in the Corporate Plan as Challenges) and risks. This is necessary to identify where the enduring objectives of the regulator may be at risk over the near to medium term and to identify strategic responses to these risks.

PwC's review found that ASIC's strategy setting process relies on a range of inputs including:

- environmental scans (identification of trends that highlight current and potential areas of concern for ASIC);
- outcomes of regulatory actions, including surveillance;
- trends observed in misconduct reporting;
- external panels/stakeholder engagement (informally).⁶⁶

As a result, the process draws upon input from across the organisation as well as from external parties (for example, market data providers). However, there is no formal channel through which external stakeholder feedback is recognised and incorporated into the process.⁶⁷ PwC's evidence report concludes that external stakeholders, including the regulated population, industry groups and academics, believe they should be consulted and leveraged more effectively during the risk identification and strategy development process.⁶⁸ The Panel concurs.

Of particular concern is the view (articulated to the Panel both by ASIC staff and some of its external panel members) that the inputs of ASIC's external panels are not captured and fed into the risk identification process in a structured and systematic way.⁶⁹ ASIC does not have a formal channel to feed advisory panel discussions back into the strategy-setting process.⁷⁰ In addition, not all panel meetings are minuted.⁷¹ This represents a lost opportunity to incorporate valuable insight given the diversity and depth of market and consumer experience of the membership of ASIC's various advisory panels.

The Panel believes that a successful strategy-setting process relies on ASIC leveraging a range of internal and external perspectives to accurately identify the most important market trends and risks. Currently, ASIC does not appear to be as effective in leveraging external inputs into this process as it could be. The Panel therefore recommends that ASIC increase its efforts in this area. Specifically this would include:

- Introducing a more outcomes focused and dynamic use of ASIC's external panels to ensure these forums input more directly into strategy development. In so doing, ASIC should evaluate and implement similar structures and processes used by other regulators on how to best achieve this. For example, the ACCC leverages subject matter committees (for example, Enforcement Committee), which help the Commission in its decision-making process.⁷² (See section 4 for further details on panel management and related recommendations)

66 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 27.

67 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 10.

68 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 28 to 29.

69 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 28 to 29.

70 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 10.

71 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 28.

72 ACCC 2015, ACCC decision making processes and committees, Canberra, viewed 26 November 2015, <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/decision-making-processes>>.

- Introducing a broader public consultation element into ASIC’s annual strategy setting process, as recently proposed by ASIC following receipt of PwC’s evidentiary findings around stakeholder desire to provide more input in this area. In so doing, ASIC should evaluate models adopted by other regulators to assist it in achieving this. For example, the Panel has been informed that the ACCC conducts an annual stakeholder forum where they discuss and obtain input on enforcement priorities for the following year.

Objectives and focus areas

The Panel believes that ASIC’s current enduring strategic objectives (summarised in Table 11, and referred to by ASIC as ‘Strategic Priorities’) align with its mandate and purpose as set out in the ASIC Act and that its articulation of these objectives are sound and appropriate expressions of the enduring aspects of its mandate.

The Panel has also assessed ASIC’s strategic priorities (summarised in Table 11, and referred to in the Corporate Plan as ‘Focus Areas’). The priorities are broadly comprehensive and are well aligned to international regulatory and market trends. For example, the focus on digital disruption is clearly warranted by ongoing market developments and is similar to the emphasis being placed on FinTech innovation and its regulatory implications by regulators globally.⁷³ Culture in financial services is another area where ASIC’s current focus is in line with that of many peer regulators.⁷⁴

However, the Panel also notes that the majority of the focus areas are reflective of themes being discussed in international markets and there are potential gaps relating to a number of priority themes relevant for the domestic market. In particular, the Panel observes that there is limited forward looking focus on Australia-specific risks. For example, there is limited discussion in the Plan of Australia’s looming issues around ageing population, decumulation in superannuation and savings, and the increasing focus on retirement income streams and unlocking the value of the family home in retirement.⁷⁵ The Plan makes only superficial references to the importance of sound financial advice and the challenges of funds management integration where there is an ageing population. There is no acknowledgement of the types of products that will be required in the future, and how ASIC will need to respond to outline required standards and to adapt its approach to regulating market participants and products. This is a significant emerging risk for domestic financial regulators as Government policy arguably lags the demographic shift to post retirement.

There is also a notable lack of detail in relation to the possible registry separation project. Possible registry separation is mentioned at a high level in the Corporate Plan, which notes that ‘in May 2015, the Government announced a competitive tender process to test the market on the capacity of a private sector operator to upgrade and operate the ASIC registry. This work is underway and we are providing support to the Government.’⁷⁶ While a government decision has yet to be made on this issue, ASIC has undertaken detailed analysis of policy and implementation options. However, this is accorded very limited attention in the Corporate Plan, and there is no detail provided as to the anticipated implications of the sale (if it progresses), including concerns around data access, government funding and resource allocation. Given its significance as a transformative change and risk management priority for ASIC, this lack of detail is a notable omission in the Plan.

73 For example, for the UK FCA, see: FCA 2015, *Business Plan 2015-16*, London, pages 30 to 31.

74 For example, for the NZ FMA, see: FMA 2015, *Strategic Outlook 2015*, Auckland, page 4.

75 ASIC 2015, *ASIC’s Corporate Plan 2015-16 to 2018-19*, Sydney, page 8.

76 ASIC 2015, *ASIC’s Corporate Plan 2015-16 to 2018-19*, Sydney, page 26.

Activities

ASIC's Corporate Plan contains discussion of specific activities it intends to undertake in relation to particular strategic focus areas. The activities identified in the Plan appear appropriate to the Panel and aligned to the focus areas. However, the Panel notes that the Plan, and ASIC's other internal and external strategy documentation is largely silent on the question of delivery. There is very little specification or detailing of how ASIC will deliver on its strategy beyond the articulation of the activities. Key information that is missing includes:

- specifics on the wrong-doings to be addressed and the ways in which ASIC will detect and react to them;
- detailing of the key stakeholder groups that it will need to engage with;
- specification (in the internal documentation) of manpower requirements and key resource assignments;
- medium-term organisation resourcing and capabilities implications;
- indication of milestones on the path to success.

For example, ASIC has highlighted deregulation and cutting red tape as a strategic priority in relation to each of its enduring objectives. ASIC has indicated that five employees⁷⁷ within the Strategic Policy team have, as an element of their workload, responsibility for overseeing deregulation initiatives. ASIC estimates that the time spent by these employees equates to approximately 45 per cent of a full-time load, across the levels.⁷⁸ However, there is no substantial information contained within the Corporate Plan or other external document that outlines ASIC's approach to delivering on its deregulation objective.

In contrast the equivalent documents of the ACCC and UK FCA clearly set out practical actions that they will take to enact their overarching strategic objectives. For example, the UK FCA outlines seven practical actions, such as agreeing a common 'house view' of each of the markets and key sectors the FCA regulates.⁷⁹ Further, the ACCC also provides specific examples of actions and outcomes that can provide stakeholders with a fuller understanding of how it plans to achieve its strategic objectives.⁸⁰

Box B — The FCA's House Views⁸¹

The FCA has developed an organisation-wide process ('House Views') to ensure consistent development, execution and communication of its strategy.

The process brings together the intelligence collected across the organisation as well as external perspectives and data to form a house view of each of the markets and sectors regulated. This then informs:

- risk prioritisation;
- risk-based strategic and proactive engagement;
- flexible, focused resource use;
- regulatory outcomes.

77 This headcount figure does not identify those who work on the initiatives within other teams across ASIC.

78 ASIC internal data.

79 FCA 2015, *Business Plan 2015-16*, London, page 36.

80 ACCC and AER (Australian Energy Regulator) 2015, *Corporate Plan 2015-16*, Sydney, page 8.

81 FCA 2015, *Business Plan 2015-16*, London, page 36.

The process is important as it gives the regulator the ability to:

- integrate data, information and intelligence about what is happening in the market for example, product launches and changes, whistleblowing, market intelligence and consumer sentiment;
- bring together multiple perspectives within the market;
- look across markets and make comparisons to support prioritisation decisions;
- externally communicate how it is addressing its strategic priorities (see section 3.2 below).

The Panel views the absence of detail on delivery matters in ASIC's strategic plans as a significant concern. Clearly the lack of such plans will make execution more challenging. More importantly, the absence of specific commitments around delivery can have the effect of undermining the accountability of those responsible for executing the plan, which can affect leadership performance as well as having a negative effect on organisation culture.

The Panel's judgement is that the limited emphasis on delivery is partly attributable to ASIC's internal governance model. As discussed in Chapter 2, the dual governance-executive role of the Commissioners makes it challenging for the Commission as a whole to require consistent action-oriented detailing of business units and cluster plans of its individual members. It would appear in ASIC's governance model that such matters are left to the individual Commissioners to address at a management level.

The Panel therefore believes that its recommendations on Internal Governance in Chapter 2 will help create an environment at ASIC that is more conducive to the development of disciplines around delivery detail in the strategic-planning process. However, governance change by itself is unlikely to improve delivery planning in the short term, so the Panel also recommends that ASIC substantially improve intended approach for delivery of the Corporate Plan in both the public document itself and the underlying Business Unit Plans. This should include greater specification of intended actions as well as resourcing and organisational implications.

Performance indicators

Performance management, including the enterprise-wide performance reporting framework put forward in the Corporate Plan is discussed in detail in Chapter 2. In addition to the points made in that Chapter, the Panel also observes a lack of alignment between the identified activities and the performance indicators within the Corporate Plan.⁸² The Panel also observed that the performance indicators identified in the Corporate Plan do not always align with those in the Business Unit Plans. For example, some Business Plans indicate that a 'success measure' is the number of cases referred to enforcement. However, this measure does not give an indication of how strong the case is and/or if successful enforcement was ultimately obtained.⁸³

The lack of alignment between indicators suggests that the performance measurement and management framework is likely to undermine the usefulness of the indicators in driving performance and to further erode the accountability of staff for their success or failure in delivering on the plan.

82 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 38.

83 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 38.

The Panel therefore recommends that ASIC further improves the selection of performance indicators to ensure that the measures associated with the Key Activities for each strategic priority (Focus Area) are:

- reflective of the activities and their desired outcomes;
- aligned to the internal performance indicators captured in the relevant Business Unit Plans, and to ASIC's enterprise-wide performance indicators.

(Refer to Chapter 2 for further discussion on performance measurement recommendations)

Strategy development: recommendations summary

Recommendation 13: ASIC to substantially improve the intended approach for delivery of the Corporate Plan in both the public document itself and the underlying Business Unit Plans. This should include greater specification of intended actions as well as timing, resourcing and organisational implications.

Recommendation 14: ASIC to improve the selection of performance indicators to ensure that the measures associated with the Key Activities for each Focus Area are:

- (i) reflective of the activities and their desired outcomes; and
- (ii) aligned to the internal performance indicators captured in the relevant Business Unit Plans, and to ASIC's enterprise-wide performance indicators.

Recommendation 15: ASIC to review and introduce a more outcomes focused and dynamic use of advisory panels to ensure these forums input more directly into strategy development, and introduce a broader public consultation element into the strategy setting process.

3.2. Strategic communication — a whole of agency strategy needed

Strategic communication encompasses communication of ASIC's strategy to stakeholders (communication of the strategy) as well as ASIC's strategy for communication more broadly (communications strategy). These topics are addressed in turn below.

ASIC has a high public profile, and attracts significant public scrutiny, including relative to other domestic regulators. It interacts with the market via a number of channels. For example, the communication of ASIC's strategy and key focus areas are documented in the Statements of Expectations and Intent, Strategic Framework, Corporate Plan and the Annual Report. ASIC also communicates with industry (particularly industry bodies and large stakeholders) at team and cluster level about priority project and strategy-related issues. Key communications channels include:

- media releases (over 350 released per year);
- broadcast interviews (over 80 conducted per year);
- face-to-face meetings with journalists (12 interviews conducted per month);
- twitter (nearly 9000 followers);
- YouTube videos (over 350 released to date);
- the ASIC website (over 1.5 million visitors each month);
- information sheets (200 released to date), Regulatory guides (50 released to date);
- enforcement reports (eight released to date);
- speeches (39 published to date).

Communication of the strategy

ASIC's ability to effectively communicate its strategy is important to ensure it aligns stakeholder expectations on the extent of its powers, scope and mandate. The Panel observes that market participants do not appear to sufficiently understand ASIC's strategy. This is despite ASIC having a Corporate Plan and Annual Report which endeavour to provide readers this information.

Market participant confusion with regards ASIC's strategy was observed by the Panel in discussions with stakeholders, stakeholder survey responses, and submissions to both the FSI and Senate Inquiry during 2014.⁸⁴ In particular, submissions to those two inquiries often criticised ASIC for failures that occurred (for example, Storm Financial and Commonwealth Financial Planning).⁸⁵

Such critiques often appear to assume that ASIC can be expected to prevent all such failures. This suggests that some market participants have unrealistic expectations with regard to ASIC's priorities, powers and oversight responsibilities. The Panel believes that this stems in part from issues with ASIC's approach to communicating its strategy, coupled with external governance shortfalls articulated in Chapter 2.

The Panel observed five key drivers which contribute to market participants not sufficiently understanding ASIC's strategy, priorities, and realistically achievable goals:

- There is very little specification or detailing of how ASIC will deliver on its strategy beyond the articulation of the activities within the Corporate Plan and Business Plans. The Panel recognises that ASIC is essentially silent on delivery which can lead to confusion around what it will do to execute its strategy (see section 3.1). Further, while most staff report that they have a clear understanding of the strategy (76 per cent of staff), only 40 per cent are able to clearly articulate the strategy to others.⁸⁶
- There is variability across public communication documents discussing ASIC's strategy. This suggests there has been no overarching strategic framework that ASIC has been seeking to communicate. However, the Panel acknowledges that the recently released Corporate Plan has a clear framework that ASIC may now be able to adapt to ensure consistency of messages in future.
- The terminology used to describe the strategy in key documents can also be unclear (see section 3.1). Some of the language used to describe the different elements of the strategy framework appear idiosyncratic and may be confusing to some readers.
- There is minimal discussion within the Corporate Plan and Annual Report regarding limitations of ASIC's activities. This can further exacerbate the unrealistic expectations of some stakeholders regarding what ASIC can achieve in the market.

84 For survey-based results, see Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, Appendix F in PwC 2015, *ASIC Capability Review: Evidence Report — Volume 3*, pages 71 to 72.

85 For example, see Chapters 8-10 of Commonwealth of Australia 2014, *Senate Economics References Committee Inquiry: Performance of the Australian Securities and Investments Commission*, Canberra.

86 *ASIC Capability Review: Survey overview working pack*, in Appendix D of Evidence Report — Volume 3, page 42.

- ASIC has made efforts to promote its recently released Corporate Plan, providing it directly to around 200 stakeholders, referencing it in speeches and making it available on the ASIC website. However, contemporary stakeholder feedback suggested a low degree of awareness of the Plan and its key messages, which indicates that communication may not have been effective or sufficient.⁸⁷ Broader discussion of the Corporate Plan would help maximise the return on the investment that ASIC has put into developing this document.

The Panel believes that communication with the stakeholders needs to be clear, targeted and effective. To ensure ASIC communicates its strategy effectively, the Panel recommends:

- ASIC improve its approach to delivery of the Corporate Plan (see section 3.1 above);
- ASIC develop and implement a plan for consistent communication of the corporate strategy across communication channels using clear language and consistent frameworks;
- ASIC increase the emphasis on what it can and cannot do in achieving its strategic priorities in its strategy communications, especially to better manage expectations as to the protections provided to consumers and investors.

Communications strategy

PwC evaluated ASIC's overall communications strategy (covering all of its public communications, above and beyond its corporate strategy) to understand how the organisation seeks to maximise the effectiveness of its communications.

ASIC's External Communications Policy provides valuable guidance on the development and distribution of communications. However, the focus of this document is predominantly process related (for example, licensing, disclosure and cross-border business activities).⁸⁸

PwC concluded that ASIC does not have a comprehensive communications strategy or framework.⁸⁹ In particular, the following gaps were identified with the communications strategy:

- it does not set out with clear specification the types of communication needed for different stakeholder groups;
- it does not provide guidance on how to prioritise stakeholder groups based on their information needs;
- it does not provide guidance on the right communications tools for achieving specific strategic goals.

In practice, the Panel considers ASIC's public communications approach to be somewhat reactive and event driven. Although ASIC is a frequent public communicator on topical issues (most recently for example on robo-advice compliance),⁹⁰ it is difficult to discern a clear pattern of strategic messaging underlying these communications. As such, ASIC would benefit from development and application of a more strategic communications policy.

87 Feedback from stakeholders in meetings with Panel.

88 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 33.

89 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 33 to 34.

90 ASIC 2015, *ASIC releases second licensing activity report and announces licensing liaison meetings*, ASIC media release 15-268, 24 September.

ASIC's communications strategy needs to provide greater clarity on the communication priorities for different stakeholder groups (including specifics on the messages that need to be delivered), ideal media-mix and frequency of communications, as well as guidance on matters of tone, language, and level of technical detail. In particular, the Panel recommends that the communications strategy:

- clearly describe how communications can help deliver ASIC's strategic objectives;
- specify the key messages ASIC wants to be delivering over time across its various communications;
- discuss the key principles of communication that underpin the communications strategy;
- provide a detailed description of the communications needs and preferences of ASIC's main stakeholder groups;
- provide a breakdown of each overarching strategic message into tailored messages for each of the stakeholder groups;
- for each stakeholder group identified, indicate the most appropriate channels for communicating with them;
- indicate the key communications activities, budget, and resources allocated to delivering the communications strategy.

Communication emphasis

ASIC's articulation of its role, by its leadership and in its public documents, shows too heavy an emphasis on enforcement. Over the last 2-3 years, ASIC leadership has been consistently and publicly using language that portrays the organisation as an 'enforcement agency'. For example, the 2015-2016 Corporate Plan notes:

*ASIC is a law enforcement agency. A big part of what we do is holding gatekeepers to account — we identify and deal with those who break the law.*⁹¹

The Panel recognises that having a strong enforcement capability is central to being an effective markets and conduct regulator, and in providing a strong deterrent signal. However, ASIC's role is not limited to enforcing the law. The Panel notes that other regulatory tools also support ASIC in achieving its enduring strategic objectives including surveillance, stakeholder engagement, policy advice, licensing and education.

This heavy enforcement emphasis in communications risks prioritising strategic focus and staff orientation too much towards this single aspect of the regulatory toolkit. Further, this can affect the way ASIC is perceived by stakeholders and can create a more adversarial tone in the way ASIC and its stakeholders interact.⁹² Finally, the emphasis on enforcement in communications can distort public expectations of ASIC and lead to expectations that enforcement tools will be used as its primary or only regulatory approach.

91 ASIC 2015, *ASIC's Corporate Plan 2015-16 to 2018-19*, Sydney, page 5.

92 The PwC Evidence Report notes that in external interviews and roundtables with the regulated population, there was a perception that ASIC had shifted towards enforcement actions of a high profile nature, resulting in public perceptions that ASIC is reactive in its approach. Interviewees further stated that this is acting as a barrier to building more collaborative relationships with the regulated population and is in some instances discouraging the self-reporting of issues or concerns (PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 69).

The Panel therefore recommends that ASIC rebalance its public and internal communications about its purpose to increase the emphasis on its role as a conduct regulator, highlighting that it uses a range of regulatory tools including enforcement. This will require ASIC to actively promote all the regulatory tools it uses to execute its objectives.

Strategic communication: recommendations summary

Recommendation 16: ASIC to further clarify and emphasise its expectations and risk tolerances (what the regulator will and will not be doing) and actively advertise and promote the strategy broadly (see Chapter 2 for further recommendations related to the Sol).

Recommendation 17: ASIC to ensure the strategic framework used in developing the Corporate Plan is used consistently throughout the communications.

Recommendation 18: ASIC to develop a comprehensive communications strategy that places greater emphasis on communication of the organisation's strategic priorities.

Recommendation 19: ASIC to rebalance its public and internal communications about its role as an enforcement agency.

3.3. Resource allocation — greater flexibility and linkage to strategic priorities needed

Once the key risks are identified, allocating regulatory resources to best achieve desired regulatory outcomes is the next key component of overall strategy. If allocation is done well, it helps the regulator deliver its objectives in the most efficient and effective manner.

Figure 22 shows the proportion of ASIC's 2014-15 budget allocated to achieving each of its three enduring strategic objectives, and Figure 23 shows the proportion of this budget allocated to each of the tools used to achieve these objectives — engagement, surveillance, policy advice, guidance, education and enforcement, as well as its registry responsibilities. Notably, some 38 per cent of ASIC's resources are allocated to the enforcement function which is significantly greater than domestic and international peer regulators.

Figure 22: Proportion of ASIC’s 2014-15 actual OPEX allocated to achieving each enduring objective⁹³

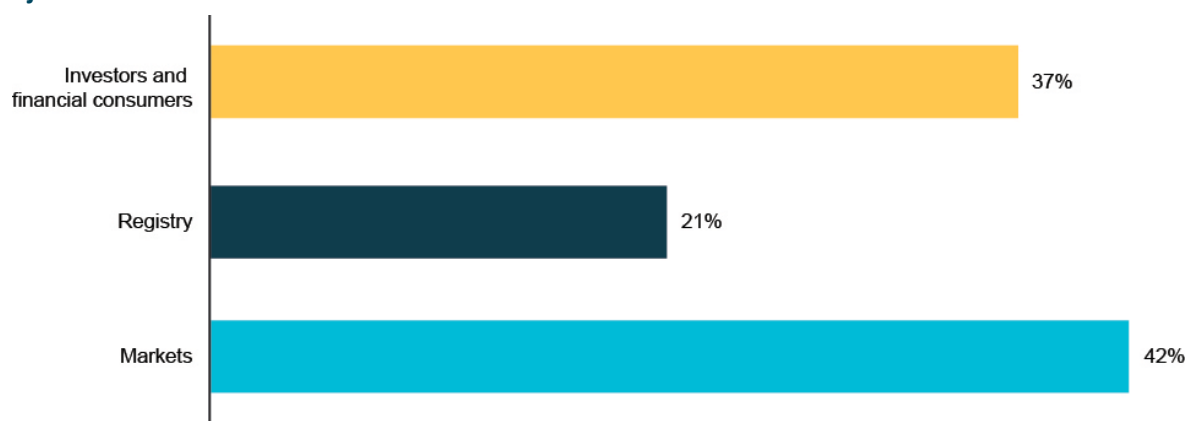
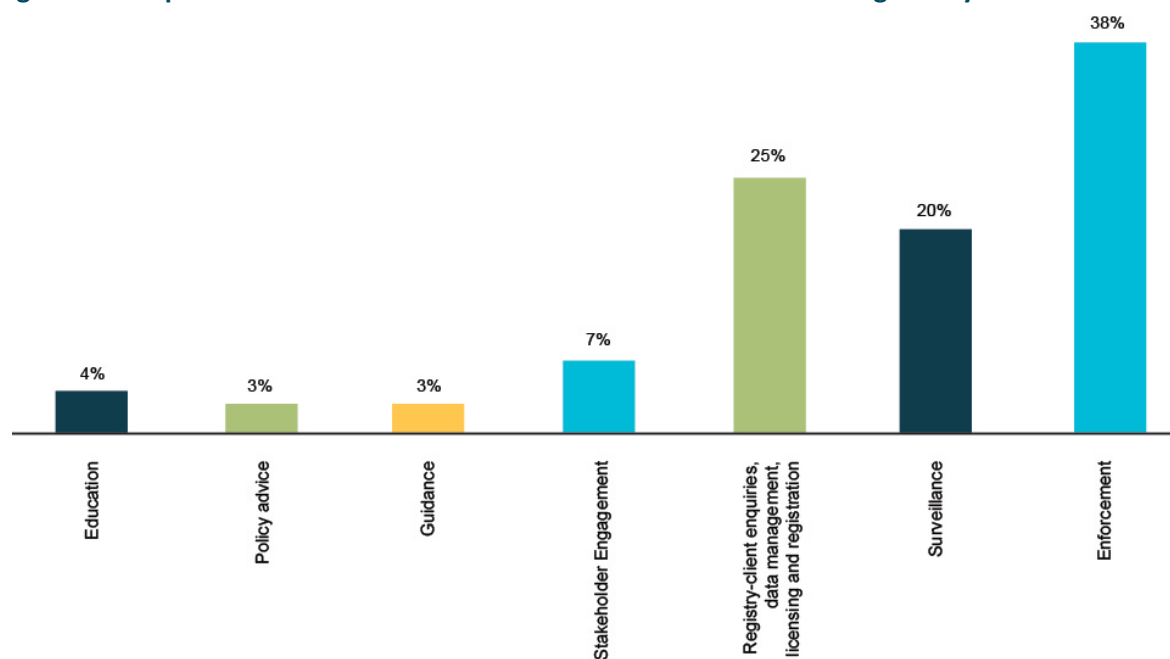


Figure 23: Proportion of ASIC’s 2014-15 actual OPEX allocated to each regulatory tool⁹⁴



ASIC was unable to provide data on the extent resources have moved across teams and silos over time. Such information should be used as a management tool in monitoring the efficient and effective allocation of its resources.

The Panel views resource allocation as a critical part of the strategic management process. Effective resource allocation ensures that an organisation’s resources are aligned to its strategic priorities and that scarce resources are put to the most valuable use they can be in the context of the organisation’s goals.

93 Based on ASIC internal data.

94 ASIC 2015, *Annual Report 2014-15*, Sydney, page 11.

The Commission determines budget allocation across ASIC (see Chapter 5 for discussion on the resource requirements and funding). The allocation of resources is discussed through a set of formal and informal meetings (including discussions with the respective teams based on the materials provided as part of the business planning process).⁹⁵

The Panel notes that ASIC has a formal and structured process for resource allocation. However, the Panel is concerned about the flexibility of resource allocation across ASIC's four clusters and the stakeholder teams within them in practice and the degree of linkage to ASIC's strategic priorities.

Assessment of resource allocation across the different stakeholder teams and functional activities of ASIC over time proved intractable. ASIC's MIS (efficiency measurement and reporting) are such that the Panel was unable to make an informed, evidence-based assessment. As such, the Panel was left to form an impression (based on PwC staff interviews, coupled with ASIC's response to recent Budget savings measures) that relative resourcing levels have remained comparatively static, despite evolution and change in strategic priorities during the period.

The Panel notes that ASIC's response to recent government budget savings measures provides further evidence of insufficient linkage between strategy and resource allocation. Core funding reduced by 15 per cent from 2013-14 to 2014-15.⁹⁶ At the same time, average FTEs reduced by 10 per cent.⁹⁷ The Panel has formed a view that the process for determining resource reductions across clusters did not adequately consider the trade-offs of ASIC's strategic priorities across the clusters. Within clusters, ASIC indicated that resource cuts were skewed based on strategic priorities. However, the Panel was unable to analyse the movements of resources within each cluster, so could not verify this position. While the Panel appreciates that there are some advantages to consistent application of top-down budget reductions across clusters (for example, ease and perceived equity), it concludes that this decision represents a missed opportunity to preserve and enhance the linkage between strategy and top-down resource allocation.

The Panel concludes that in practice, resource allocation at ASIC appears to be largely determined within business units, with limited reallocation between teams, driven by top-down strategic priorities.⁹⁸ The Panel also believes that ASIC's governance model and the lack of separation between governance and executive responsibilities may be contributing to this.

If an industry funding model is to be introduced for ASIC, this would require a greater degree of transparency and accountability (and associated supporting MIS) in relation to the efficiency and effectiveness of resource use. This in turn would increase the pressure on ASIC to demonstrate that it is able to dynamically allocate its resources in line with strategic priorities.

The Panel considers that implementation of the internal governance arrangements recommended in Chapter 2 would assist in improving the linkage between strategy and resource allocation at ASIC. In addition, the Panel recommends the following specific changes:

- ASIC to ensure that it has a transparent, flexible and dynamic approach to resource allocation across the organisation. This would entail more assertively challenging the status quo resourcing levels across the organisation and being willing to make significant changes and reallocations where merited.

95 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 72.

96 ASIC internal data.

97 ASIC 2015, *Annual Report 2014-15*, Sydney, page 167 and ASIC 2014, *Annual Report 2013-14*, Sydney, page 160.

98 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 72.

- ASIC respond to future core funding adjustments more strategically in future by prioritising these impacts across teams in light of strategic priorities and de-prioritising activities non-critical to achieving their strategic priorities.
- ASIC challenge activity requests by Government that do not fit clearly within its mandate, supported by proposed changes to the SoE and Sol in Chapter 2.

Implementation of the above recommendations will ensure ASIC's resources are focused on agreed strategic priorities. In addition, as strategic priorities change overtime ASIC is able to dynamically adjust its resourcing across teams/clusters.

Resource allocation: recommendations summary

Recommendation 20: ASIC to ensure the top-down allocation of resources are deployed across the organisation based on the strategic priorities.

CHAPTER 4: DELIVERY TO BE ENHANCED WITH ‘FUTURE-PROOFING’ DESIGN

This Chapter addresses key findings and recommendations across five aspects of delivery:

- *Workforce management*: workforce capabilities and ongoing workforce planning to ensure ASIC has the right skills and resources to address the challenges of the future.
- *Organisation structure*: the defining features of organisation design, (excluding the setup of executive and governance roles, which are discussed in Chapter 2) and the impact these have on efficiency and effectiveness.
- *Regulatory tool kit*: the tools that support the market-facing teams in day-to-day operations in order to monitor, detect, understand and respond to possible harm and wrongdoing.
- *Stakeholder management*: the way in which ASIC engages with stakeholders, including the regulated population, in the use of its regulatory tools.
- *Data infrastructure*: the way in which ASIC captures, shares and uses data in support of the achievement of its enduring objectives and strategic priorities.

The components of delivery addressed in this Chapter provide ASIC smarter leverage in the context of its increasing responsibilities and ongoing funding constraints. They collectively enable ASIC to make better use of its workforce, data, technology, tools and relationships with external stakeholders to spot emerging patterns or risks quickly, and devise the right solutions. Additionally, a focus on delivery enables the regulator to take a forward looking approach to ensuring it has the workforce skills, organisation capabilities, tools and systems to address challenges today and in the future.

Key observations and recommendations are summarised in Table 12 below.

Table 12: Key observations and recommendations

| | Observations |
|--|---|
| Workforce capabilities and management | <p>Some ASIC staff lack sufficient professional confidence in their roles to credibly challenge regulated entities and develop and defend independent judgements.</p> <p>The workforce also faces gaps in relation to a number of critical skill sets that will become increasingly important in the future (for example, big data, digital disruption, behavioural economics).</p> <p>The existing secondment program is not being fully leveraged to close these gaps.</p> <p>ASIC has only relatively recently begun to develop a documented forward looking approach to organisation-wide workforce planning and has engaged external consultants to assist in developing a methodology. This process lacks maturity and has not yet been extended to Commission level skills gap assessment. It is also unclear the extent to which forward-looking processes are being developed to address requirements for support functions.</p> <p>PSA requirements may limit ASICs ability to flexibly respond to identified gaps.</p> |
| Organisation structure | <p>ASIC’s organisation structure is distinct from many peer regulators, being organised around stakeholder groups rather than by functional teams.</p> <p>The Panel understands the genesis and recognises the relative strengths and shortcomings of ASIC’s current stakeholder based organisation structure model.</p> |

Observations

ASIC is currently making progress on addressing concerns on existing silos through OneASIC and cluster specific initiatives, but could still do more to allow its people to work more flexibly across silos, to enhance cooperation, and to address risk concentrations in the most efficient and effective way.

Additionally, the choice of a more expensive organisation model than the traditional model creates an imperative for an ongoing focus on efficiency and cost control at ASIC.

Regulatory tool kit

ASIC has acted on prior reviews to improve the use and management of enforceable undertakings and has addressed many of the previously identified shortcomings.

ASIC has initiated several 'lessons learned' reviews across enforcement cases, although informed stakeholder feedback indicates this is yet to translate to material improvement.

ASIC's approach to litigation sometimes lags recent progress made by other Australian regulators. For example, pleadings can be dense, complicated and lacking in focus.

There is a perception that ASIC's selection of cases for litigation can be risk averse (tending to prefer cases with a higher probability of success, rather than selecting cases that have strong merits, but also allow ASIC to test the veracity of the law).

ASIC's approach to collaborative partnerships (for example, co-regulation) is relatively limited and could be better leveraged to product more robust regulatory outcomes and deliver better value for money in resource use.

ASIC uses a wide range of guidance material, and is generally proactive in its guidance approach. However in select cases, policy development and decisions lack sufficient evidencing. Further, some stakeholders feel that there is insufficient consultation during the consultation process for policy guidance development.

There may be an expectations gap as to the extent and rigour of merit assessment and analysis conducted in licensing and registration. The current choices around language and communication do not appear to be informed by behavioural economics (for example, the perception that 'licensing' requires ASIC to conduct due diligence to evaluate the merits of a prospective licensee).

ASIC has taken positive steps to enhance surveillance processes in the past year, and there is further room to expand the scope of tools being used.

The Panel commends the quality of ASIC's supervision, with investments in real time monitoring capabilities representing global best practice and delivering positive outcomes.

Educational tools are well used, and ASIC does lead international best practice in advancing broad consumer financial literacy. However, future initiatives and focus may need to be more targeted and informed by Consumer Advisory Panel (CAP) priorities and there remains potential to further leverage non-for-profits.

Stakeholder management

While ASIC engages with regulated entities through a variety of touch points, this can be uncoordinated (particularly between stakeholder and enforcement teams and for more complex and diverse entities).

Some stakeholders express dissatisfaction with the policy consultation process, particularly with regard to response time, engagement style and proportionate focus across various types of external stakeholders.

External panels are not being fully leveraged and there is some inconsistency in perceived impact on strategy development. Additionally, there does not seem to be a systematic review or active and regular management of panels once created (that is, there is an element of 'set and forget' in their structure and purpose).

Observations

| | |
|------------------------|---|
| Data management | <p>ASIC has identified a number of weaknesses in the existing data infrastructure, including fragmented databases, a reliance on legacy applications, and challenges in search functionality.</p> <p>ASIC has initiated a major IT transformation program to address identified issues in workflow applications and business processes (FAST 2), although the Panel has some concerns particularly as to whether or not these projects have been 'future proofed' and the extent to which the program will 'still leave ASIC with additional investment required'.⁹⁹</p> <p>Additionally, the programs may not go far enough to address the full scope of infrastructure weaknesses, particularly around the sophistication of MIS (efficiency reporting and management dashboards) and performance measurement capabilities.</p> <p>There is further potential for ASIC to collaborate with other regulators in data sharing and data analytics and championing open data policies.</p> <p>Like most other regulators, ASIC is aware of the potential for data and advanced analytics to support its regulatory activities, but is only at the early stages of implementing these capabilities.</p> |
|------------------------|---|

Recommendations

| | |
|--|---|
| Workforce capabilities and management | <p>Recommendation 21: ASIC to increase the scale and diversity of the secondment and exchange program.</p> <p>Recommendation 22: ASIC to improve workforce planning to include a more forward looking, strategy informed, top-down view (progressing and internalising work to date).</p> <p>Recommendation 23: ASIC to refresh its career value proposition to help attract and retain staff and support future secondment, by clearly articulating and tailoring messaging, and identifying strategies to deliver on this message (that is, to 'make it real').</p> <p>Recommendation 24: Government to remove ASIC from the PSA as a matter of priority, to support more effective recruitment and retention strategies.</p> |
| Organisation structure | <p>Recommendation 25: ASIC to launch a pilot project to assess the suitability of dedicated project based teams to improve flexibility across units and reduce the impact of silos.</p> <p>Recommendation 26: ASIC to implement a regular review of internal business processes and systems, supported by improvements in MIS to drive operational efficiency and reduce the cost burden on regulated entities.</p> |
| Regulatory tool kit | <p>Recommendation 27: ASIC to enhance enforcement effectiveness through developing a more targeted risk based approach to litigation for cases that are strategically important, and prosecutes through more focused pleadings and strategic appointment of senior counsel.</p> <p>Recommendation 28: ASIC to proactively develop opportunities to enhance the use of co-regulation for relevant groups of the regulated population where this will deliver superior regulatory outcomes, including through strengthened licensing and registration regimes.</p> |
| Stakeholder management | <p>Recommendation 29: ASIC to develop and implement a formal tiered stakeholder relationship model based on entity nature, scope, risk and complexity.</p> <p>Recommendation 30: ASIC to recalibrate advisory panel setup to ensure more systematic value add for example, through a larger pool of experts that can be called upon to advise on various issues as needed based on issue-specific needs and expertise gaps, coupled with regular performance assessment and enhanced internal responsibility to act on recommendations.</p> |

⁹⁹ PwC 2015, *ASIC Capability Review: Evidence Report – Volume 1, Sydney*, page 87

Recommendations

| | |
|------------------------|---|
| Data management | <p>Recommendation 31: ASIC to execute its FAST 2 transformation program, 'future-proofing' design and expanding scope as required.</p> <p>Recommendation 32: ASIC to launch new programs of work to close additional identified gaps for example, to enhance the ability to measure and report for MIS.</p> <p>Recommendation 33: ASIC to 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.</p> <p>Recommendation 34: 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.</p> |
|------------------------|---|

4.1. Workforce capabilities and management — work in progress but whole of agency lens needed

Over 2014-15, ASIC had an average of 1,609 permanent staff (FTE) working across seven locations. These employees come from a broad range of backgrounds, with a mix of private and public sector experience.¹⁰⁰

In reviewing ASIC's workforce capabilities and management, the Panel distinguishes between assessments of:

- Current skills and capabilities, particularly with regard to professional confidence and skill gaps.
- Learning and Development (L&D) programs, specifically secondments and exchanges, in closing identified gaps.
- ASIC's approach to forward looking workforce planning.
- Impediments created by the PSA.

100 ASIC 2015, *Annual Report 2014-15*, Sydney, page 166.

Skills and capability assessment

The composition of ASIC's workforce is partly diverse, with a narrow mix of educational and workplace experiences. The figures below summarise educational and work experiences of staff at the SES and EL 1 and EL2 levels within the stakeholder, enforcement and legal functions.¹⁰¹

Figure 24: Professional qualifications (1st degree)¹⁰²

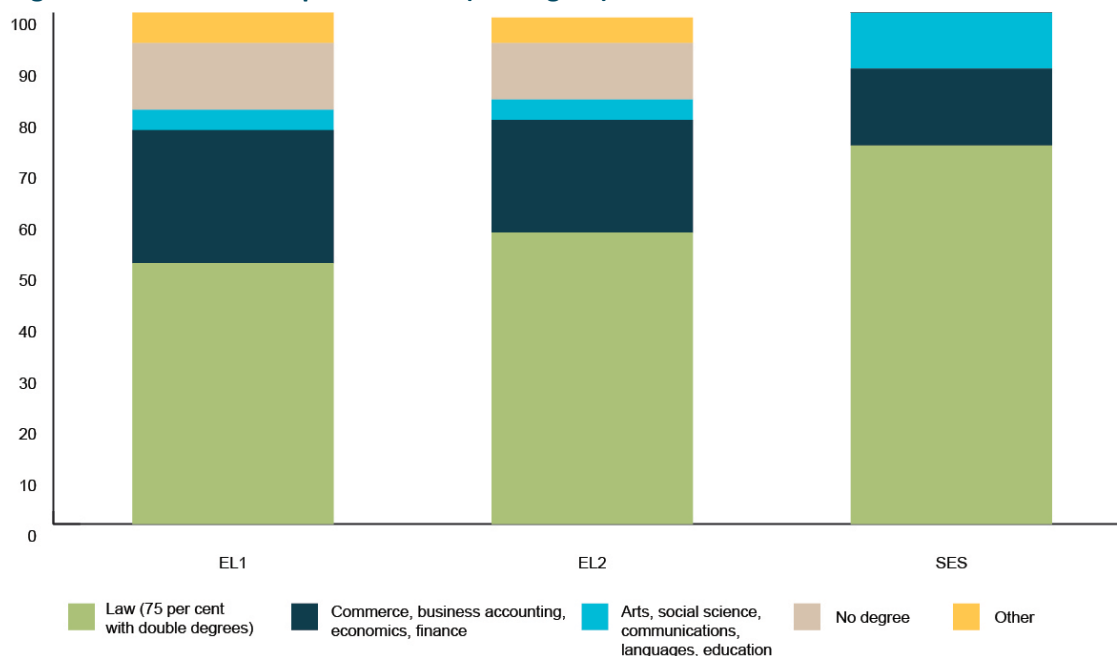
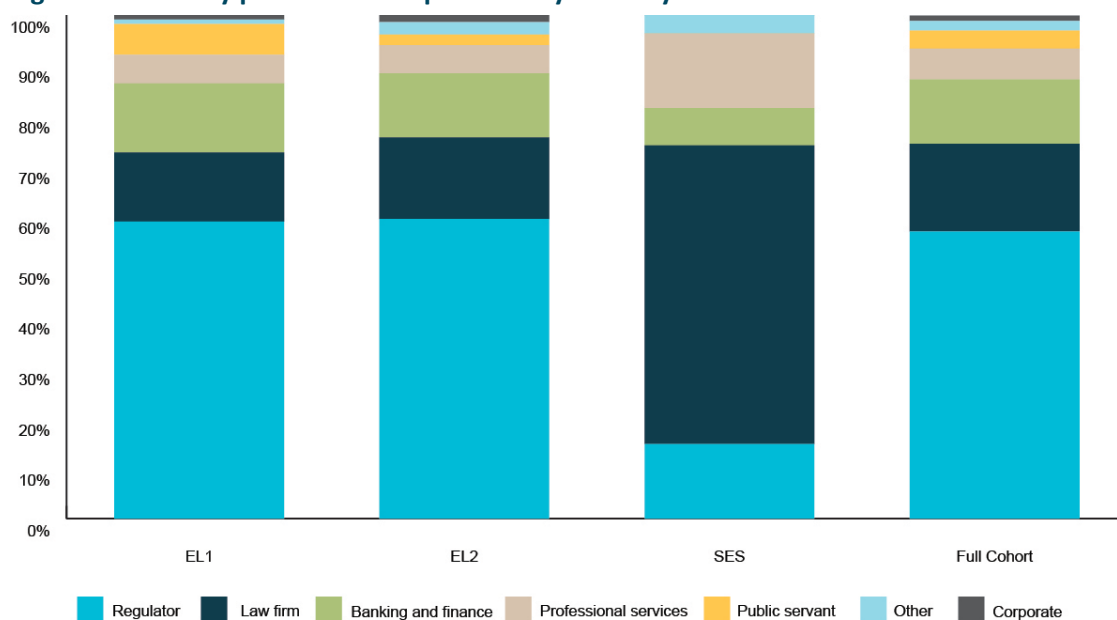


Figure 25: Primary professional experience by industry¹⁰³

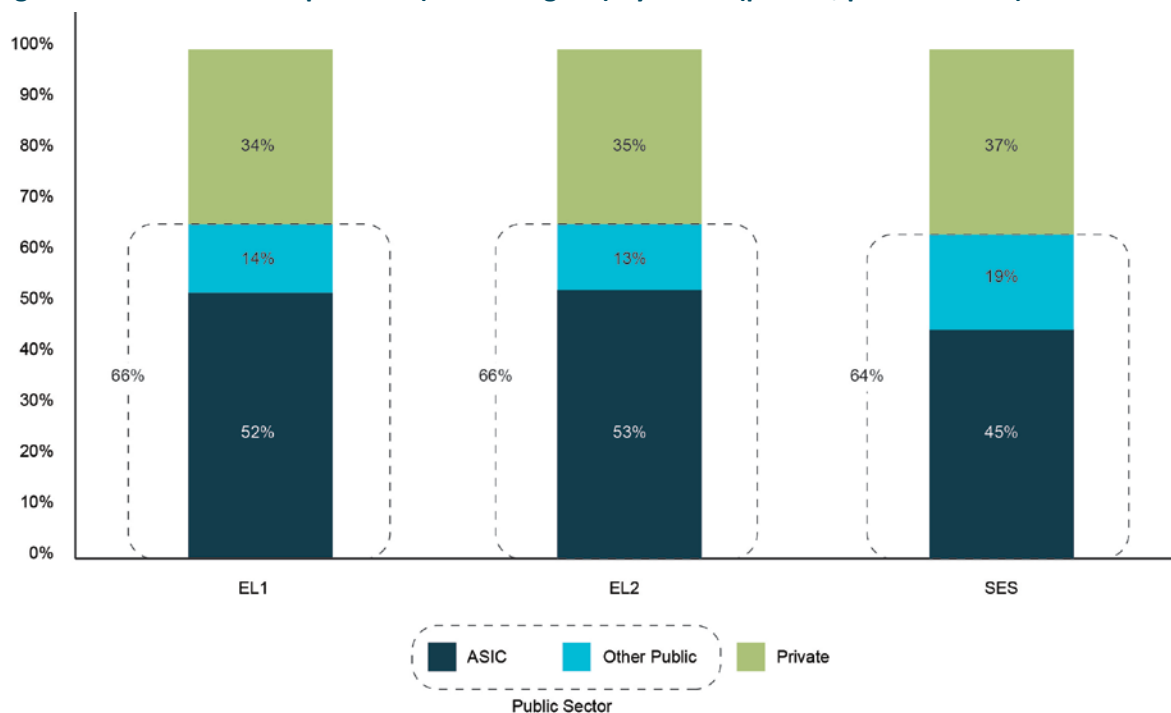


101 ASIC internal data.

102 ASIC internal data. Note: around 75 per cent of law degrees are double degrees.

103 ASIC internal data. Primary professional experience identifies where the person has spent the most time professionally. It does not take into account the range or diversity of all professional experiences.

Figure 26: Professional experience (of working life) by sector (private, public or ASIC)¹⁰⁴



Analysis of workforce composition indicates that, on balance, there may be too great a concentration of legal expertise, both in terms of university qualifications and industry experience. Across the entire regulatory cohort, approximately a third of working life has been spent in the private sector, although this is dominated by experience in law firms (40 per cent of primary professional experience, excluding regulatory experience). The need for a refresh of ASIC’s skills-mix is further reinforced by the results of an analysis of current skill expertise against future-oriented capabilities conducted within MIG.¹⁰⁵

This exercise identified a number of areas where ASIC needs to build expertise to meet future challenges. These include behavioural economics, technological adeptness and stakeholder management, together with adapting to emerging global regulatory issues, cyber-crime and technological innovation. Further evidence was provided during SEL leadership interviews and roundtables, which highlighted gaps in data analysis, industry specific and project specific knowledge and project management experience.¹⁰⁶

In addition, the Panel also notes a need to enhance capabilities to assess the impact of emerging trends on ASIC’s activities in a forward looking and innovative way. For example, there is currently a gap in the ability of ASIC staff to fully assess the implications of digital disruption, including new market entrants, business models and technology, on the way in which ASIC should administer policy.¹⁰⁷ It may be possible to expand the scope of the Innovation Hub as a way to develop these skills.

104 ASIC internal data.

105 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 2*, Sydney, page 30.

106 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 57.

107 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 56 to 58.

Analysis should be conducted in order to identify emerging risks and to better understand market benefits, such that ASIC can adapt its approach to promote business innovation whilst mitigating risk. In this instance, for example, graduated frameworks may be needed so as not to impose burdensome requirements on new entrants. The Panel is of the view that the existing capabilities of the ASIC workforce are not well suited to this type of analysis.

Alongside identified skill gaps, the Panel has also identified that some ASIC staff lack professional confidence in their roles. The Panel defines professional confidence as the collective belief of staff in their own capabilities and ‘team safety’. Embodied in this definition is the capability and confidence of staff to challenge and debate views, both internally within ASIC and with regulated entities; to take a questioning and sceptical view in their discussions; to form and defend independent judgements; and to listen and respond to different points of view without lapsing into defensiveness, or defaulting automatically to ‘black letter’ interpretation of law. In assessing professional confidence, the Panel has considered four criteria.

- Individual competency: Most staff are confident that they have the skills and capabilities required to fulfil their roles. For example, in the PwC supplementary staff survey, 69 per cent of staff agreed they have the right skills and capabilities to perform their role¹⁰⁸ and in the Orima survey 75 per cent agree that their job gave them the opportunity to work on the things they do best.¹⁰⁹ However, by contrast, only 44 per cent of the regulated population and 58 per cent of related stakeholders agree that ASIC staff/managers that they interact with have the necessary skills for the role.¹¹⁰
- Team competency: Many staff expressed some doubt over their colleagues’ capabilities, with only 42 per cent of respondents in the PwC supplementary staff survey agreeing that their team is made up of people with the right skills and capabilities.¹¹¹
- Decision making processes and empowerment: Some ASIC staff are uncomfortable in stating or defending a point of view externally due to inconsistency in decision making. Furthermore, only 48 per cent of staff surveyed agreed that ASIC is consistent in its decision making.¹¹² Internal and external stakeholders also feel that lower level ASIC staff may not be sufficiently empowered to make decisions. For example, in the Susan Bell Research Survey only 47 per cent of the regulated population agreed that the ASIC staff and managers they interact with have the authority to act.¹¹³
- Team safety: In interviews and roundtables with staff, it also emerged that some staff members do not feel they are rewarded or encouraged to challenge internal decisions by more senior staff.

108 18 per cent neutral, 12 per cent disagree (PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of Evidence Report — Volume 3, page 49).

109 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of Evidence Report — Volume 3.

110 Regulated population: 28 per cent midpoint, 15 per cent disagree; related stakeholders: 21 per cent midpoint, 16 per cent disagree (Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of Evidence Report — Volume 3).

111 23 per cent neutral, 34 per cent disagree (PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of Evidence Report — Volume 3).

112 26 per cent neutral, 17 per cent disagree (PwC ASIC staff survey: PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of Evidence Report — Volume 3).

113 29 per cent midpoint, 10 per cent disagree, 14 per cent don’t know (Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of Evidence Report — Volume 3).

Without professional confidence, a regulator will find it difficult to simultaneously probe and challenge regulated entities on the right topics with the right questions, while maintaining productive working relationships with them.

The Panel acknowledges that these statements assessing skill, capability and confidence are based on a generalisation of the capabilities of ASIC's workforce, and that there is likely significant variability both within and across teams. However, while it is difficult to assess the extent to which these issues are embedded and widespread across the organisation, it is clear that there are some gaps that ASIC should be seeking to address.

Additionally, the Panel notes that the median tenure of SES level employees is 15.5 years.¹¹⁴ EL2 median tenure is nine years and EL1 median tenure is eight years.¹¹⁵ As a result ASIC's workforce has, on balance, significant experience and stability. However, there are also a number of potential negative consequences:

- Senior staff may become too removed from the regulated population and external stakeholders.
- There may be a lower degree of employee motivation, due to stagnation in career opportunities for advancement. For example, only 47 per cent of staff agree that they have the opportunity to progress career goals within ASIC.¹¹⁶
- Limitations on the ability to promote EL2 staff to SES level (see Chapter 5 for a discussion on the influence of the PSA), with increased risk that EL1 and EL2 staff then leave to seek advancement elsewhere.
- Staff may be less likely to identify areas of inefficiency and suggest ways that processes could be conducted more efficiently than may be the case in an environment with higher turnover.

Addressing this lack of professional confidence, identified skill gaps and challenges will largely be addressed by specific recommendations around secondments, workforce planning and requirements under the Public Service Act, discussed in subsequent sub-sections.

Additionally, ASIC could consider making committee meetings open to all staff to listen to in real time, such as is done at the ACCC. The exception, of course, would be where a matter being discussed is confidential or highly sensitive. This would improve transparency, and assist staff understand how decisions are being made to improve their professional confidence when representing the views of ASIC to external stakeholders.

Secondments and exchanges

ASIC has a formal performance management cycle, including annual assessment against individual performance plans, midpoint review discussions, self-assessment and ongoing one-on-one feedback. It also has a number of programs for skill development in place, including secondments (for example, to other regulators in Australia and globally, other public agencies, investment banks, law firms, and investment banks), external learning courses, technical/job-specific training, Communities of Practice and a Regulator Network.¹¹⁷

114 ASIC internal data.

115 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 53.

116 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of *Evidence Report — Volume 3*, page 48. 28 per cent neutral/not-sure/NA, 25 per cent disagree.

117 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 54 to 55.

The Panel considers that the existing secondment and exchange program is not being fully deployed to address identified capability gaps. More specifically, secondments are mostly policy and legally focused, with limited placement to close gaps in areas such as data analytics, behavioural economics and industry knowledge. For example, of 45 outbound secondments, only seven are to the private sector, split between professional services firms and an investment bank. Additionally, only one secondment involves an SEL level staff member, suggesting insufficient use to address gaps at mid to senior levels.¹¹⁸

The Panel also notes that secondment programs are used more extensively by foreign regulators. For example, while ASIC's total secondments and exchanges represent around four per cent of its staff, the Financial Conduct Authority's (FCA's) secondments and exchanges represent 9 per cent of FCA's staff.¹¹⁹ The Panel therefore suggests increasing the scale and diversity of the secondment and exchange program.

The set of available secondments should be enhanced in alignment with identified areas for skill development, such as data analytics, and industry expertise. ASIC should also set targets for the number of staff participating in these programs at all levels. In the longer term, the program should be expanded at the senior executive levels to help ensure that senior management remain up to date with industry best practice and are able to relate to the issues of the regulated population and related stakeholders.

The Panel is confident that potential conflict issues can be effectively managed, as has been demonstrated by other regulators. Expansion of the secondment program should also deliver positive outcomes with regard to professional confidence. ASIC should ensure that it clearly defines the secondment value proposition and communicates this across relevant employee groups. It should also ensure that it has partnership programs in place with relevant industry companies, law firms, analytics companies and other regulators.

Workforce planning

While each team in ASIC has a succession plan and there is a defined process and detailed document which outlines ASIC's current workforce, this does not yet incorporate a developed and embedded documented workforce planning process to identify skill gaps given requirements over the next three to five years and a plan to address these gaps.¹²⁰

However, ASIC has recognised this issue, and has engaged an external service provider to assist in developing a more strategic approach to workforce planning, looking at where ASIC needs to be in three to five years to meet future needs. This project is currently being conducted across the MIG, Regulatory and Registry businesses. However, it does not extend to support functions or a Commission level skills-gap assessment. ASIC has suggested (but not documented) that workforce planning for the balance of staff is being conducted by separate third parties or internally.

The key outcomes of the project are to:

- identify the capabilities that are important now and in the next three to five years;
- enhance workforce planning, recruitment and talent practices to close identified gaps;
- enable the identification of appropriate development opportunities to meet skill requirements.

118 ASIC internal data.

119 FCA and ASIC data.

120 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 51.

While this engagement is producing a better understanding of capability gaps and strategic planning, this work should be extended to the support functions and fully embedded and internalised into ASIC processes to ensure ongoing future use without reliance on external consultants. This will facilitate a more coordinated, integrated top-down resource allocation approach, addressing strategic needs with regard to capability gaps.

As part of planning to be able to close identified gaps, ASIC should also invest in developing an improved employee value proposition. This should involve:

- Clearly articulating the benefits of working at ASIC and tailoring this message by level. For example, by comparison, at the entry level, the FCA targets young finance graduates who are interested in obtaining a good baseline overview of UK markets, and learning skills that are valued by the private sector.
- Developing clear messaging around the type of people ASIC wants to attract.
- Identifying how to make the appeal 'real', for example through critical review of exit interviews, reviewing the performance management process and adapting learning and development programs.

Public Service Act employment

ASIC staff can be employed through the PSA, the ASIC Act and using Individual Flexibility Arrangements (IFAs):

- *PSA*: Primary form of employment for ASIC's staff. Employment contracts under the PSA are subject to terms and conditions agreed in Enterprise Agreements (EAs). The Act also contains a set of regulations regarding recruitment.
- *ASIC Act*: ASIC can also hire staff under subsection 120(3) of the ASIC Act, which may provide more competitive remuneration and more flexibility in employment contracts. As of 30 June 2015 ASIC has 67 people employed under this Act, of which 22 were at the SES level.¹²¹
- *IFAs*: enables variation of an EA's terms and conditions for example, remuneration, allowances, leave. Use of IFAs is relatively uncommon and there are currently only 27 instances of IFAs in use outside SES level.¹²²

Operating under the PSA has a number of implications for ASIC:¹²³

- A cap on the number of SES to 25. Currently ASIC employs 45 staff at the SES level, of whom 23 are employed under the PSA with the remaining 22 employed under the ASIC Act (the latter are not counted towards the cap). The 23 appointed under the ASIC Act do not have Human Resource delegations and functions outlined under subsection 78(7) of the PSA and related regulations, directions and rules.
- A remuneration cap for SES who are employed under the PSA.
- Salary increases, terms and conditions for all non-SES staff are subject to government's Workplace Bargaining policy.
- The Government's Workplace Bargaining policy does not allow ASIC to lift salary bands to meet the market.

121 ASIC internal data.

122 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 52.

123 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 52.

- Recruitment and management of on-going and non-ongoing staff appointments subject to Commissioner regulations. ASIC was subject to the PSA 18 month ‘interim recruitment arrangements’ from November 2013 to June 2015.

Salary restrictions are a particular impediment at the EL1 and EL2 levels, as ASIC is unable to compete with the remuneration packages from peer agencies (APRA and RBA) and private industry. For example, Table 13 compares non-executive salaries at ASIC and APRA for roughly equivalent roles, and while the roles do not perfectly align, demonstrates that salaries are relatively less attractive at ASIC.

Table 13: Non SEL salary comparison between ASIC and APRA (2013)¹²⁴

| ASIC | | APRA | |
|---------------|---------------------|---|--------------------|
| ASIC 4 | \$75,225—\$84,318 | Level 2 lower/upper | \$58,200—\$97,000 |
| EL 1 | \$98,583—\$114,032 | Level 3 lower/upper | \$84,400—\$140,600 |
| EL 2 | \$111,677—\$156,488 | Level 3 lower/upper, Level 4 lower | \$84,400—\$199,900 |

In comparison to the non-executive levels, ASIC reports that it competes on a different proposition at the SES level, with applicants generally expressing an interest in becoming a ‘regulator’ as opposed to being attracted by a salary package. ASIC’s SES remuneration packages are also relatively competitive with industry.¹²⁵

Being subject to the PSA negatively impacts ASIC in that it:

- impacts ASIC’s ability to attract and retain suitably qualified employees who may be attracted elsewhere by better remuneration packages;
- slows down and impedes the ability to promote internally, particularly from EL2 to SES level;
- limits opportunities for career advancement, therefore contributing to employee attrition;
- has an operational effectiveness consequences, with many SES level staff employed under the ASIC Act and therefore having no formal delegations powers. This also places additional pressure on those staff employed under the PSA Act;
- increases reliance on IFAs which affect efficiency given the additional complexity of managing these arrangements;
- increases the frequency with which ASIC must go to the market to advertise roles, increasing cost.

To provide more flexibility during recruitment, and to enhance the attractiveness of ASIC within the job market, the Panel recommends that ASIC be removed from the PSA. Importantly, this would enable ASIC to provide remuneration packages that are more in line with the peer regulators (for example, APRA) and will also provide more flexibility.

The Panel views removal from the PSA as an important factor in its ability to successfully recruit a HoO. This will allow ASIC to compete for talent and to ensure the HoO has the necessary powers of delegation.

124 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 53.

125 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 52.

The panel notes that APRA and the RBA are not bound by the PSA and that there is no clear rationale as to why some agencies are included in the PSA and some are not, other than historical context.¹²⁶ For example, the RBA was formed in 1959 as a result of removing the central banking functions from the Commonwealth Bank. The bank was not subject to the PSA and, as such, the RBA retained this exclusion. The Panel therefore views the application of the PSA to ASIC to be an idiosyncratic historical legacy that should be removed without delay.

Workforce capabilities and management: recommendations summary

Recommendation 21: ASIC to increase the scale and diversity of the secondment and exchange program.

Recommendation 22: ASIC to improve workforce planning to include a more forward looking, strategy informed, top-down view (progressing and internalising work to date).

Recommendation 23: ASIC to refresh its career value proposition to help attract and retain staff and support future secondment, by clearly articulating and tailoring messaging, and identifying strategies to deliver on this message (that is, to ‘make it real’).

Recommendation 24: Government to remove ASIC from the PSA as a matter of priority, to support more effective recruitment and retention strategies.

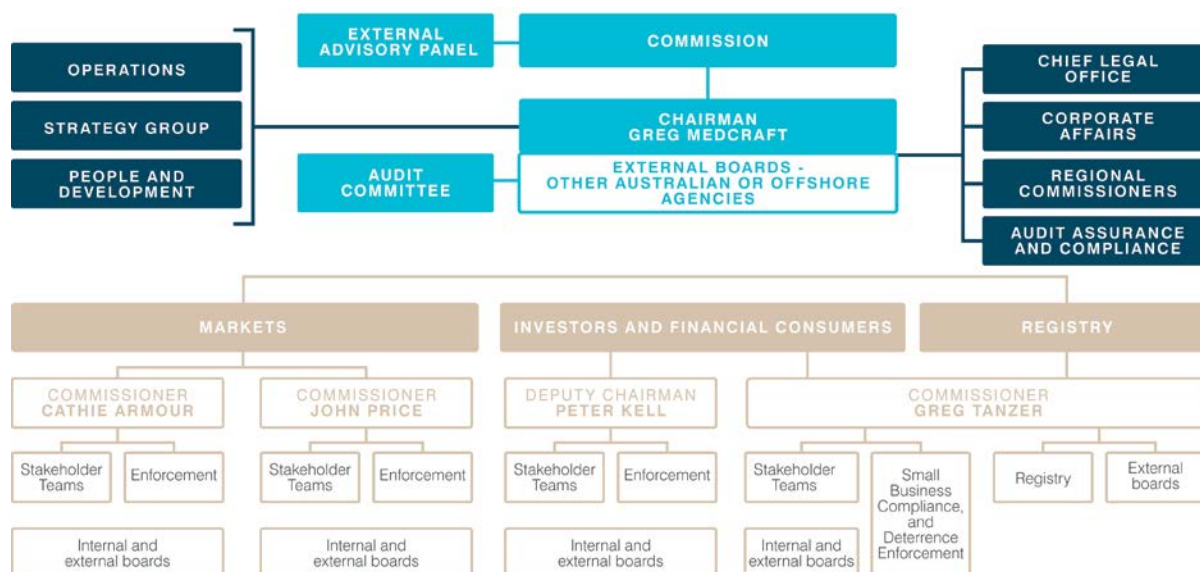
4.2. Organisation structure — opportunities to address some weaknesses

ASIC’s organisation structure comprises eleven stakeholder teams (focusing on surveillance, supervision, policy guidance, licensing, and engagement for various groups of stakeholders), five enforcement teams and a Small Business Compliance and Deterrence team, spread across four groups within three clusters (Markets, Investors and Financial Consumers, and Registry, the latter of which the government is considering selling).¹²⁷

126 Commonwealth of Australia 2014, *Financial System Inquiry: Final Report*, Canberra, page 248.

127 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 44.

Figure 27: Overview of ASIC's organisation structure



This stakeholder orientated organisation structure evolved from a 2008 McKinsey strategic review and was intended to break down silos that existed between the former four directorates (enforcement, consumer protection, compliance and regulation). It was also intended to position teams closer to market sectors, provide clearer points of contact for stakeholders and clearer team objectives, and to move the organisation to a flatter structure with smaller teams to enable more staff recognition and visibility. This organisation structure is distinct from many peer regulators, as it is organised around stakeholder groups rather than by functional teams.¹²⁸

The Market Integrity Group (MIG, formed following the transfer of responsibility for the supervision of real time trading from ASX to ASIC in 2010), has a different structure and has consolidated the three market focused stakeholder teams (Financial Market Infrastructure, Market and Participant Supervision, and Investment Banks) and the Market Integrity Enforcement team. The Stakeholder and Enforcement teams within MIG are strongly aligned in their approaches and collaborate on resourcing and KPIs. Additionally, two hybrid teams have been established (the Markets Misconduct Enforcement Team and Participant Misconduct Enforcement team) with staff having both enforcement and surveillance skills. The Small Business Compliance and Deterrence team is also vertically integrated.¹²⁹

The Panel recognises that there are conflicting views on ASIC's stakeholder model for organisation structure, particularly around the extent to which it breaks down or creates silos. Some internal and external stakeholders suggest that the 2008 change has been successful in creating a more collaborative and efficient model, and facilitates more flexible resourcing, including resource sharing within clusters.¹³⁰ However, some stakeholders suggest that the change has created new and more numerous silos, with a flatter structure resulting in a duplication of activities across teams.¹³¹ For example, enforcement activities are split across the Markets and the Investors and Financial Consumers cluster. This duplication excludes support activities, which are consolidated in a single area and provide services across the regulatory business.

128 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 45.

129 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 46.

130 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 45.

131 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 45.

Other noted benefits of the current model include:

- superior communication outcomes, with clearer touch-points for regulated entities based on industry focus;
- a higher degree of industry expertise, delivering more targeted outcomes and improved staff development outcomes;
- facilitation of resource sharing within clusters, as silos are smaller and relatively weaker than in a purely functional model.

Limitations include:

- a lower degree of knowledge and information sharing across teams, which is also expressed in stakeholder feedback regarding handoffs between surveillance and enforcement (see discussion on stakeholder management in this Chapter);
- increased likelihood of misalignment of business plans (see Chapter 3 for a discussion on the strategic planning process);
- duplication of activities, requiring additional resources and increasing costs (it is a more expensive organisation model than a traditional functional model);
- reduced resource allocation flexibility across clusters.

The Panel recognises that there is no ‘ideal’ organisation structure, and that judgements need to be made about the relative merits of different structures. It is not the role of the Panel to make recommendations about an appropriate organisation structure. This is properly the prerogative of management. However, in the context of the changes to internal governance structures recommended in Chapter 2, the Commission may wish to consider whether consequent refinements to the organisation structure may be warranted, especially to ensure clarity of responsibility and accountability in relation to executive management functions.

ASIC is making progress in addressing concerns over silos. For example, the OneASIC project is streamlining processes between teams, including transition and handover points for work, documents and data.¹³² Additionally, the Corporations Cluster is engaged in ‘Project Unity’ which involves:¹³³

- sharing of responsibility for surveillance, enquiries, investigation and disruption work across the cluster;
- development of greater understanding by the enforcement teams of stakeholder team projects, aiming for more targeted and timelier outcomes;
- engagement and collaboration of enforcement staff with stakeholder teams from initial enquiries through to completion of any enforcement activity.

The Panel considers that ASIC should continue to identify ways to organise itself more flexibly to be able to work across silos to address key risk concentrations in the most efficient and effective way possible. For example, ASIC currently does not employ temporary project teams around key risk concentrations. Implementing such flexible structures could assist in improving collaboration across the organisation.

132 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 66 to 67.

133 ASIC response to PwC’s *Evidence Report*.

As such, the Panel recommends that ASIC launch a pilot project to test the ability of temporary dedicated project teams to better respond to strategic priority areas. These ‘hit’ teams would comprise permanent resources drawn from across the organisation based on required skills and expertise on a full time basis to address specific issues or risks over a defined time-period. As the prevalence of that issue or risk diminishes, resources can be allocated elsewhere.¹³⁴ ASIC should set targets of the percentage of resources that are fungible across the organisation in order to ensure sufficient flexibility and to embed ‘hit’ teams into resource planning. This is a systematic and structured approach, in contrast to existing project teams and taskforces which are largely part-time.¹³⁵

Specific project-based teams would also help ASIC work across silos based on strategic focus areas, enhancing cooperation and ensuring organisation wide priorities are allocated the necessary resources across clusters and teams. Referring back to an identified skill gap in analysing the impact of digital disruption (see section 4.1), the Panel suggests that a project team on this topic would be a good choice to pilot the program.

Finally, the Panel notes that ASIC’s choice of a more expensive organisation model (given duplication of activities across stakeholder groups) than the traditional model, creates an imperative for an ongoing focus on efficiency and cost control. Only 54 per cent of ASIC staff agree that ASIC continuously improves internal operations.¹³⁶ ASIC should therefore ensure it has a regular procedure in place for reviewing the efficiency of its internal business processes. This will help to identify areas where the organisation structure is creating inefficiencies and possible work-arounds.

The Panel understands that a review of internal processes will be occurring in the near future, but there seems to be a limited understanding of exactly how this review will operate, particularly in relation to where it will obtain the necessary data to conduct analysis on efficiency. As such, improvements in data infrastructure and MIS will be an important enabler. Ongoing improvements in internal business processes ensure that limited resources are used more efficiently, and also assist in reducing the regulatory burden on industry.

More broadly, ASIC should also aim to conduct a full and thorough organisational review within the next three years. This review should draw on external expertise, and could be conducted together with the review of organisational culture (see recommendation 12).

Organisation structure: recommendations summary

Recommendation 25: ASIC to launch a pilot project to assess the suitability of dedicated project based teams to improve flexibility across units and reduce the impact of silos.

Recommendation 26: ASIC to implement a regular review of internal business processes and systems, supported by improvements in MIS to drive operational efficiency and reduce the cost burden on regulated entities.

134 See also Sparrow, M 2000, *The Regulatory Craft*, Brookings Institution Press, Washington DC.

135 For example, the Innovation Hub (no dedicated staff), the Promotional Materials Group (no dedicated staff), the SMSF taskforce (no dedicated staff, meets for 1.5 hours quarterly), the Roboadvice taskforce (meets for 1.5 hours monthly).

136 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of *Evidence Report — Volume 3*, page 44. 26 per cent neutral, 18 per cent disagree.

4.3. Regulatory tool kit — best practice in some and potential for improvement in others

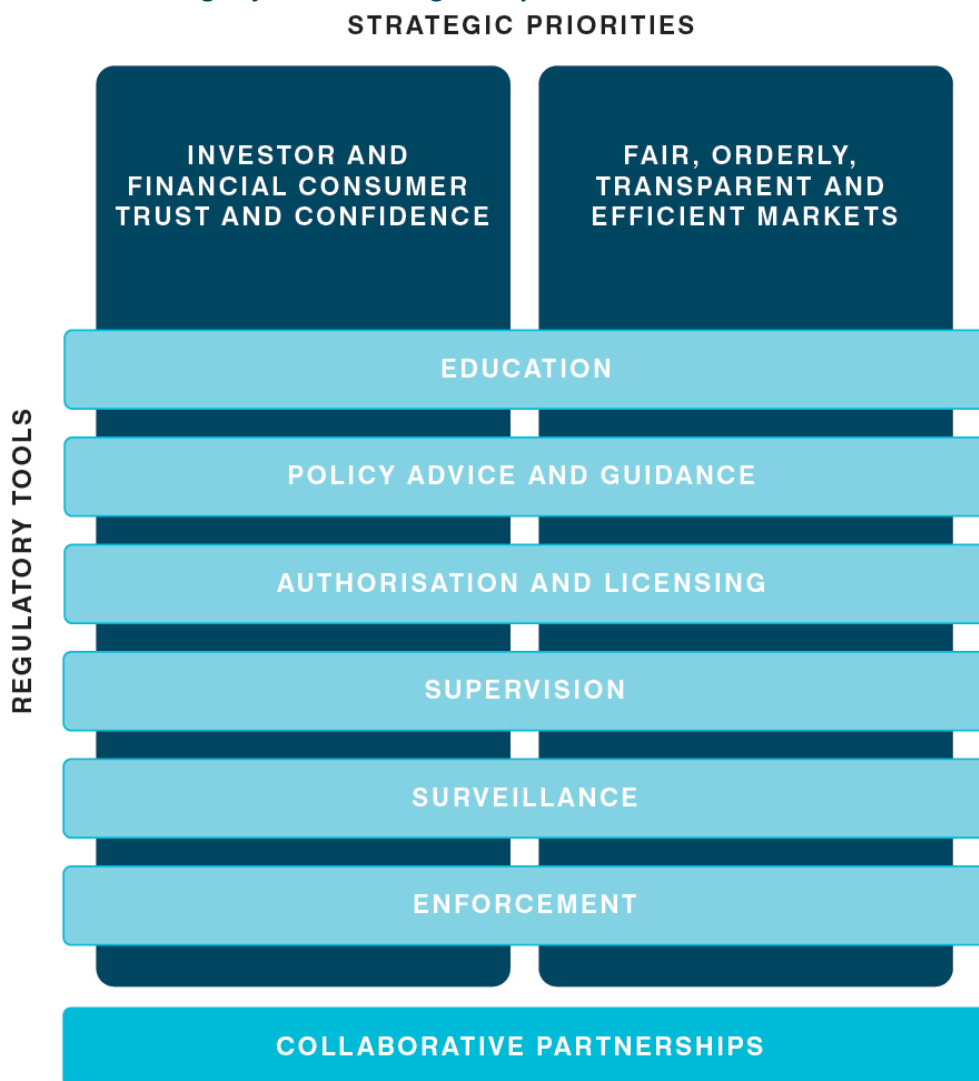
ASIC's regulatory toolkit comprises:

- **Education:** Development and delivery of education tools, including MoneySmart and other measures to promote improved financial literacy.
- **Policy development, advice and guidance:** Development of policies outlining market rules (based on legislative mandate) and assistance to stakeholders to interpret legislation for example, through information sheets, regulatory guides and reports. This function is intended to improve compliance and reduce the need for subsequent surveillance and enforcement activity, as well as to ensure high quality policy.
- **Authorisation and licensing:** Licensing of market operators, financial institutions and financial market participants (includes granting, suspending and cancelling licenses).
- **Supervision:**¹³⁷ The continuous process of detection of possible harm/wrong-doing based on analysis of real-time trading on Australia's domestic markets and Australian Financial Service License holders against market integrity rules. This activity is primarily managed by the Market and Participant supervision team within MIG.
- **Surveillance:** Activities to detect possible harm/wrong-doing either on a reactive or proactive basis. This is a discrete and non-continuous process (in contrast to supervision), and is the primary tool used by the stakeholder teams.
- **Enforcement:** The responses to identified wrongdoing and harm, including administrative action, enforceable undertakings, civil and criminal prosecution.
- **Collaborative partnerships:** Such partnerships can act to better leverage the skills and expertise of the private sector in close co-operation with the regulator. Limited budgets and resources also necessitate a more creative approach by some regulators in pursuing collaborative partnerships for example, co-regulation, quasi-regulation and self-regulation (see Box C). This can assist in easing the resource burden on the regulator, and can ultimately deliver better outcomes for the regulated population.

This toolkit is illustrated below in Figure 28.

137 Note that the choice of language at ASIC is distinct from that at other regulators, many of which use 'surveillance' to describe the process of continuous analysis of market activities. The PwC Evidence report lists these ASIC definitions (PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 64).

Figure 28: ASIC's enduring objectives and regulatory toolkit¹³⁸



ASIC's least intrusive tools — education and guidance — are also generally its most proactive and cost effective. Education and guidance enable ASIC to signal its expectations for behaviour of the regulated population. These tools utilise considerably less resources and give more certainty of outcome than an enforcement process. Done effectively, a proactive approach promotes desirable conduct and pre-empts and prevents behaviour that might later require a more intrusive and reactive response.

At the other end of the spectrum, ASIC has a range of enforcement actions — administrative, civil or criminal. Enforcement actions signal the serious consequences of misconduct, and although directed at the individual level can act as a general deterrent of future misconduct if delivered in a timely way.

As an outcome of this review, the Panel has identified a number of opportunities for improvement across the set of regulatory tools. However, those related to enforcement are the most significant, and are therefore the focus of the Panel's recommendations.

¹³⁸ Excluding registry functions.

Education

ASIC's educational tools are aimed at enhancing financial literacy amongst consumers and investors.¹³⁹ Available material and programs, including MoneySmart and school education programs are widespread and have garnered a significant amount of interest amongst consumers and investors, with over five million visitors to the MoneySmart website in 2014-15.¹⁴⁰

While the overall financial literacy strategy is comprehensive and 'world best', the Panel notes an opportunity to be more targeted in how educational resources are deployed in the future. This is supported by feedback from consumer advocacy groups, which suggest that ASIC's balance between general support and targeted intervention for the most vulnerable groups should shift going forward. For example, older Australians are not explicitly targeted in any substantive sense by ASIC led initiatives in the current strategy. A narrower view on the most vulnerable may be a more efficient and effective use of ASIC's resources.

In deploying financial literacy resources in a more targeted and tailored way, ASIC should also look to further partner with not-for-profits and other agencies to deliver outcomes. This has been recognised by ASIC in its Financial Literacy Strategy, which states that a key priority is to 'strengthen coordination and effective partnerships'. For example, bespoke targeted programs are currently being run by not-for-profits in the area of Indigenous financial literacy, and would benefit from additional support from ASIC. While ASIC is aware of these activities and references them in its financial literacy strategy, there is currently no partnership arrangement. Common feedback from stakeholder groups suggested that, going forward, ASIC should also ensure that priorities and delivery mechanisms, which are presently guided by the Financial Literacy Board, are also informed by the insights and expertise of the Consumer Advisory Panel (CAP).

Policy development, advice and guidance

ASIC produces a wide range of guidance material to assist the regulated population in understanding laws and policies. For example, guidance may be developed where new legislation is passed, stakeholders indicate there is uncertainty about how an existing law applies, there is a general low degree of compliance or ASIC wants to communicate a specific message.¹⁴¹ The World Bank states that the consultation process should allow sufficient time for consideration, development of discussion papers to facilitate discussion, publication of drafts for comment, together with a cost and impact assessment, and a response to comments received.¹⁴²

While the majority of stakeholders agree that guidance material is generally produced proactively (66 per cent of the regulated population and 72 per cent of related stakeholders with assessment of fair, good or excellent),¹⁴³ the Panel received feedback from external stakeholders that there was often insufficient consultation, despite an average time for consultation of longer than eight weeks over the past two years. ASIC is of the view that consultation periods are sufficient, which indicates an expectations gap between internal and external perceptions.

139 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 69.

140 ASIC 2015, *Annual Report 2014-15*, Sydney, page 6.

141 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 65.

142 The World Bank 2014, *Governance of Securities Regulators: A Framework*, Financial and Private Sector Development, Capital Markets Practice, Washington DC.

143 Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of Evidence Report — Volume 3, page 114.

In some cases, insufficient consultation results in policy guidance that can be impractical, require modification once implemented, or shows a lack of understanding of key issues (see section 4 in this Chapter for further discussion on ASIC's engagement with stakeholders for policy consultation). The Panel notes however, that there may be other reasons for modification, for example driven by implementation complications that could not have been reasonably foreseen during the consultation process.

Further, the Panel observed some inconsistency in how strategic policy decisions are made. For example, rules established with regard to Dark Pools and High Frequency Trading (HFT) demonstrated a sound process of issue identification, analysis, consultation and assessment prior to issuing the rules.

On the other hand, there was no documented research undertaken by ASIC with regard to the 2008 short selling ban, and ASIC failed to proactively consult with peer regulators overseas who also implemented similar bans. In this instance, ASIC implemented a ban on naked shorts in all stocks and some covered shorts on Friday 19 September 2008. Following the initial ban, the policy was then amended the following Monday (22 September) in order to ban all short selling, bringing ASIC's approach into line with that being undertaken by offshore regulators.¹⁴⁴

Section 4 of this Chapter outlines the Panel's view that a more outward oriented Commission should assist in improving the quality of policy development, advice and guidance, through ensuring Commissioners have sufficient time to meet with external stakeholders.

Authorisation and licensing

While members of the regulated population are broadly positive on ASIC's performance in providing efficient registration and licensing, the Panel believes that the general public may not fully understand what ASIC does and does not do as part of this function.

More specifically, 48 per cent of the regulated population rates ASIC's performance in meeting its objective for efficient registration and licensing as good or excellent, 32 per cent rate it as fair and 11 per cent rate it as poor or very poor.¹⁴⁵

However, the Panel is concerned that, in ASIC's 'licensing' of an intermediary, there may be an expectations gap as to the extent and rigour of merit assessment and analysis conducted. ASIC advises that it currently conducts a partial due diligence, and reviews matters such as organisational competences and resources, as well as capacity to comply with the financial services laws at the time of licensing.

However, the Panel is concerned as to whether this analysis meets the level of rigour expected by investors, who may be assuming a full merit-based assessment. In particular, there is a strong and not unreasonable presumption on the part of consumers and investors, that the issuing of a license is an endorsement of the worthiness of a licensee to hold that license. Discussions with informed stakeholders suggest this is a potential emerging risk area, that should be reviewed by ASIC and the Government (if any legislative change is needed). This potential confusion also extends to 'registration' of a Managed Investment Scheme. This misinterpretation of ASIC's role, which was identified through the Panel's stakeholder consultation and roundtables, is a contributor to the expectations gap discussed in Chapter 2.

144 ASIC 2008, *Covered short selling not permitted*, ASIC media release 08-205, 21 September.

145 Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of Evidence Report — Volume 3, page 103.

ASIC has also separately raised concerns with regard to its ability to protect investors. For example during the 2009 Inquiry into Financial Products and Services in Australia by the PJC, ASIC highlighted a number of issues including the 'low' threshold for entry into the licensing regime compared to the 'relatively high' threshold for cancelling a license. ASIC also indicated difficulties in trying to assess whether an applicant will comply with obligations and meet license conditions before they have commenced business. This has been amended, in part, by the FOFA reforms, which allow ASIC to refuse to issue (or cancel or suspend) a license where ASIC feels that the licensee is likely to contravene their obligations (as opposed to ASIC needing to be confident that they will). As a response to the FSI the Government has also agreed to develop legislation to enable ASIC to consider a broader range of factors in determining whether an applicant satisfies the 'fit and proper' test to be granted an AFSL and credit license.

The Panel considers that there are significant potential widespread risks in the current licensing system which fall short of desired standards and warrant the close attention of both the Government and ASIC. As a result, the Panel considers that the current approach to due diligence of potential licensees needs to be strengthened. In particular, measures should be taken to increase the current 'low' threshold for entry into the licensing and registration system, for example by increasing requirements relating to professional qualifications, standards and experience. In the view of the Panel, ASIC should seek to apply such additional requirements to the greatest extent possible within the scope of its existing powers, although some reinforcement of these powers may be necessary through legislative amendment.

These enhancements to the licensing and registration system provide an ideal opportunity for ASIC to expand its use of co-regulation models by collaborating with relevant industry associations to lift professional standards and ensure a more robust and effective regime. It is envisaged that such a co-regulation model could be funded on a full cost recovery basis as part of the licensing process. Moreover, the co-regulation model could also be used in conjunction with the Government's announced response to the FSI to strengthen ASIC's powers to ban individuals from managing financial firms and to consider strengthening ASIC's enforcement tools in relation to the financial services and credit licensing regimes.

ASIC must be continuously vigilant on managing expectations and should invest to ensure that investors and consumers have a full understanding of the types of analysis it conducts when undertaking partial due diligence. The Panel sees opportunities to apply ASIC's emerging behavioural economics capabilities to ensure that language choice reinforces the correct public perceptions.

Supervision

ASIC has invested in new technologies and systems which have delivered enhanced supervisory capabilities. This includes the Markets Analysis and Intelligence surveillance system which enables real time surveillance and the interrogation and analysis of large data sets. The PwC evidence report notes that this system has been referred to by internal and external stakeholders as best practice.¹⁴⁶ The Panel's consultation with stakeholders confirms this view is shared by market participants and the relevant regulated population cohort.

146 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 65.

These advances have reduced the time taken to conduct searches in trading activities and to commence a formal investigation after identifying misconduct, which has halved since before 2010 (from three months to six weeks). Additionally there has been a 23 per cent reduction in the time from when ASIC first becomes aware of potential misconduct to that matter being handed over to the Director of Public Prosecutions.¹⁴⁷

Stakeholders are broadly satisfied with ASIC's market supervision, with 51 per cent of stakeholders rating it as excellent or good, 32 per cent as fair and 10 per cent as poor or very poor.¹⁴⁸

Surveillance

ASIC has taken a number of steps to enhance surveillance processes since the 2014 Senate Inquiry, although there is still scope to drive consistency across teams and to expand the range of tools being used (particularly for proactive surveillance).¹⁴⁹

Enhancements since the Senate Inquiry include the development of the Risk-Based Surveillance Guide (first issued in February 2015) and a central repository of surveillance-related information. However, while the Guide includes overarching principles for performing surveillance, application varies across teams, and there is no obligation to use the guide or follow its approach, resulting in inconsistent approaches to surveillance. While the Panel acknowledges that the approach to surveillances must be tailored, it is important that a consistent set of principles be applied to ensure external stakeholders view ASIC's decision making process as consistent across teams.

Additionally, there is further scope to enhance the range of tools being used by ASIC. For example, some peer regulators locate teams at significant regulated entities to conduct real time supervision and perform entity specific reviews of key policies and processes.¹⁵⁰

ASIC should also look to enhance its relative focus on proactive thematic investigations. For example, a number of stakeholders expressed a view that simple financial analysis across ASIC data should have been able to identify in advance some historical risk issues such as Storm Financial.

Enforcement

The Panel commends ASIC's recent work to enhance transparency through publishing Enforcement Reports, in addressing concerns on the use of Enforceable Undertakings (EUs) and in initiating 'lessons learned' reviews. However, there are a number of residual weaknesses in ASIC's current approach to litigation.

Transparency in enforcement outcomes is an important part of managing perceptions and achieving deterrence. As such, the Panel supports the introduction of ASIC's Enforcement Reports, although notes they are limited in that they report based on publicly announced actions which are not comprehensive. Therefore, there may also be a significant number of actions that are not reported upon.

147 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 64 to 65.

148 Susan Bell Research 2015, *Evidence Report — Volume 1*, Sydney, page 65.

149 Commonwealth of Australia 2014, *Senate Economics References Committee Inquiry: Performance of the Australian Securities and Investments Commission*, Canberra.

150 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 64.

Additionally, in response to the recommendations made as part of the Senate Inquiry in 2014, ASIC has taken a number of steps to address concerns raised about the transparency, monitoring and use of EUs. For example, it has incorporated the outcomes of enforceable undertakings on the register and has begun to publish summaries of expert reports that are produced in connection with enforceable undertakings. Additional enhancements include:¹⁵¹

- the development of a set of guidelines for independent experts appointed under an EU;
- regularly negotiating independent monitoring of EUs;
- including further information in annual reports;
- changes in relation to drafting, implementation and monitoring of EUs.

ASIC has also accepted recommendations proposed by the Australian National Audit Office following its review of ASIC's administration of EUs in June 2015 to address concerns about record keeping and measuring effectiveness.¹⁵²

In the past ASIC has conducted ad-hoc legal reviews and hindsight reviews of major cases. Since 2013, some parts of ASIC have formalised this process and introduced 'lessons learned' reviews to identify ways to continually improve performance. These are generally conducted internally as a workshop and contain an overview of the specific project/case, and a discussion of what was done well, what could have been improved, and agreement on a list of recommendations for future projects.¹⁵³ Findings are reported to the Enforcement Committee. However, informed stakeholder feedback indicates that this is yet to translate to material improvement in ASIC's approach to enforcement.

In general, based on pertinent stakeholder feedback, the Panel understands that litigation practices of peer regulators (such as the ACCC, ATO), following recent concerted improvement, display the following features:

- focused pleadings;
- early identification and narrowing of matters in issue;
- targeted evidence, including expert evidence and willingness to use expert conclaves;
- willingness to engage and work collaboratively with opposing parties, to progress cases to trial and resolve potential interlocutory matters by consent as far as possible, without resort to court rulings;
- willingness to explore early private resolution of interlocutory issues and cases generally;
- willingness to enter into arrangements with opposing parties to expedite trial processes;
- cases that are conducted in accordance with best practice approaches to litigation.

151 ASIC 2015, *Enforceable Undertakings*, RG 100, Sydney.

152 Australian National Audit Office 2015, *Administration of Enforceable Undertakings*, ANAO Report No. 38 2014-15, Canberra.

153 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 63.

While views regarding ASIC's approach to litigation are not universal, some informed external stakeholders interviewed by the Panel expressed concern that ASIC's approach to litigation is lagging against some of the above features, relative to peer regulators, and that this gap is widening in some instances. This is also broadly in line with the views expressed by the High Court in the 2012 *Fortescue Case*.¹⁵⁴

To enhance the use of enforcement as a regulatory tool, the Panel recommends that ASIC:

- develop a targeted approach to litigation, pushing risk appetite to pursue cases that are strategically important, particularly in testing the veracity of the law pursuing conduct. While ASIC is able to cite a number of specific examples¹⁵⁵ where they have pursued strategically important cases, it is the view of a number of informed stakeholders consulted by the panel that ASIC is not doing enough in this area, or as much as peer regulators;
- enhance pleading tactics, by developing cases with more focused pleadings;
- ensure that workforce planning provides for the right skills and capabilities in litigation (see section 1 of this Chapter for a discussion of work force capabilities);
- ensure selection of senior counsel is not swayed by 'rack rates' as opposed to overall cost effectiveness;
- use litigation as a way of communicating key messages to the regulated population to have the desired deterrence effect. The ACCC does this effectively through targeted stakeholder consultation in establishing annual priorities and a concerted and strategic communications program delivered by the ACCC Chair and Commissioners. There is a persistent perception (including among informed stakeholders) that this is not being pursued by ASIC to the fullest extent possible and that the current strategy is not having the desired effect.

ASIC should also consider formalising the use of Skilled Person Reviews as an extension of the enforcement toolkit. This tool is currently employed by the FCA and allows it to commission reviews by external consultants to obtain an understanding of aspects of a regulated entities activities that cause the regulator concern or where further analysis is warranted.

154 See High Court of Australia 2012, *Fortescue Metals Group Ltd v Australian Securities and Investments Commission*, HCA 39.

155 For example: ASIC v GE Capital Finance (first civil penalty proceeding by ASIC under Part 2, Division 2 of the ASIC Act); action against Park Trent (testing whether a recommendation that a person invest in a non-financial product via an SMSF constituted financial product advice); action against the directors of APCH (testing whether the right to have a scheme administered in accordance with its existing constitution is a member's right); Wellington Capital (challenged a responsible entity's use of its power to make distributions); Mintabie litigation (testing the boundaries of unconscionable conduct provision); Cash store litigation (testing how responsible lending obligations operate in practice).

Collaborative partnerships

Box C: Collaborative partnerships with industry

The *Australian Government Guide to Regulation* describes three ‘lighter touch’ regulation alternatives.¹⁵⁶

- **Co-regulation** is where the industry develops and administers its own regulatory arrangement and government provides the underpinning legislation to enforce it. Such legislation can set out mandatory standards, but may provide for enforcement through a code overseen by industry.
- **Quasi-regulation** is where regulatory rules or arrangements are not a part of explicit government regulation, but nevertheless seek to influence behaviour. An example is industry codes of practice developed with government involvement.
- **Self-regulation** consists of industry-written rules and codes of conduct enforced by the industry itself.

Criteria for when they are most appropriate include:

- industry can identify risks, has the means to control most of them, and has a strong incentive to do so;
- industry and regulator incentives are mostly aligned;
- there is a low risk of regulatory capture;
- the market is competitive;
- the potential consequences of market failure are low — that is, the risk is neither systematic nor catastrophic.

The effectiveness of these alternatives depends on their integration into the overall regulatory framework with vigorous and active accountability mechanisms.¹⁵⁷ This requires industry engagement integrated into ASIC’s risk framework, with two-way information flows to inform the optimal use of ASIC and industry sanctions.

Currently, ASIC is engaged in a limited number of collaborative partnerships (see description in Box C above). The Panel notes some partnerships existing prior to ASIC taking over responsibility for the relevant area, such as:

- The Takeovers Panel was established in its current form under the ASIC Act (but based on its predecessor the Corporations and Securities Panel), and has powers under the Corporations Act.¹⁵⁸
- Some External Dispute Resolutions (EDR) schemes developed prior to ASIC assuming responsibility for consumer protection in 1998. Since then, ASIC has provided input to develop and rationalise EDR.
- Insurance and banking codes of practice.

156 Office of Best Practice Regulation 2014, *The Australian Government Guide to Regulation*, Canberra, page 28.

157 Segal, J (previous Deputy Chairperson of ASIC) 2001, *Institutional Self-regulation: What should be the role of the regulator?*, address to the National Institute for Governance Twilight Seminar, 8 November, Canberra.

158 The Takeovers Panel is the primary forum for determining on the applications of bidders, target companies or affected parties whether corporate takeover bids are occurring in a competitive and informed market, bidder identities and intentions are fully disclosed and shareholders have equality of information about the bids. The Panel has a full time Executive of four employees and may also have up to two secondees. ASIC can make applications to the Takeovers Panel to refer matters as required. ASIC may intervene in Panel proceedings commenced by other applicants.

In other circumstances, ASIC has played a key role in developing more collaborative relationships:

- The Markets Disciplinary Panel, which draws on some elements of disciplinary arrangement in place with the ASX prior to 2010, but also has incorporated elements that were not present in the ASX predecessor.¹⁵⁹
- The ePayment Code, which was recently developed in partnership with the RBA, ACCC and industry.

Quasi-regulation conducted by industry bodies includes:

- The ARITA Code of Professional Practice, which establishes a standard for professional conduct in the insolvency profession
- Audit surveillances and report writing by the Chartered Accountants Australia and New Zealand (CA ANZ) and CPA Australia, which are considered by ASIC.

The Panel appreciates that there are mixed views around co-regulation and other forms of quasi-regulation and self-regulation, and that these arrangements are not always appropriate. For example, there is generally less reliance on these forms of regulation in the case of exchanges, given the need to ensure neutrality of the regulator where there is exchange competition and to manage conflicts of interest.

That being said, the Panel has formed the view based on consistent stakeholder feedback and its own assessment that there remains scope to expand use of collaborative partnerships (co-regulation, quasi-regulation, and self-regulation) to more effectively leverage private sector expertise to achieve better regulatory outcomes. For example, as discussed earlier in this Chapter, there may be scope to use co-regulation to enhance the effectiveness of the licensing regime. Increasing the use of these arrangements would assist ASIC to lower the cost to the regulated population, and would also deliver more effective and efficient outcomes in some cases.

Entities for which this may be appropriate include auditors and insolvency practitioners, although the choice should ultimately be informed by a thorough assessment of the relevant industry associations, and the extent to which they are able to monitor, review and discipline market participants.

The appropriate type of arrangement will be dependent on the target industries, but could be modelled on the Takeover Panel and the Markets Disciplinary Panel (with suitable modifications). The credibility of these Panels is derived in large part by the fact that industry participants are being judged by peers, who have relevant market knowledge and expertise.

Industry bodies could also be established as licensing agents under the supervision of ASIC. This latter case would be similar to the independent industry funded body to be established to set industry standards for financial planners, as part of the Government's response to the FSI (although in this case the body would be under the supervision of ASIC, rather than being independent).

The Panel recognises that confidence around the efficacy of associations will be a major consideration in pursuing this recommendation, but suggests that ASIC begin to work toward this as a desired longer-term position. For example, the Panel notes the opportunity for co-regulation to evolve to more rigorous merit based licensing processes based on full cost recovery. This would address community misperceptions as to the nature of the current licensing processes of ASIC.

159 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 10.

Regulatory toolkit: recommendations summary

Recommendation 27: ASIC to enhance enforcement effectiveness through developing a more targeted risk based approach to litigation for cases that are strategically important, and prosecutes through more focused pleadings and strategic appointment of senior counsel.

Recommendation 28: ASIC to proactively develop opportunities to enhance the use of co-regulation for selected groups of the regulated population where this will deliver superior regulatory outcomes, including through strengthened licensing and registration regimes.

4.4. Stakeholder management — a tiered strategy needed and scope for better leverage

In assessing stakeholder management, the Panel distinguishes between:

- engagement and relationship management of regulated entities, through formal engagements (for example, warning or no action letters and formal notices) and meetings;
- the consultation process for policy and guidance material development (with industry, investors and financial consumers, and other government departments and agencies);
- engagement with external advisory panels; and
- engagement with other regulators (domestic and international).

Relationship management of regulated entities

Regulated entities express frustration over a perceived lack of coordination across teams within ASIC. In particular, the Panel identified that handovers between the Stakeholder and Enforcement teams were a consistent theme in this feedback. Referral to the enforcement team occurs when the surveillance team identifies a significant contravention of the law and concludes that enforcement will result in a significant impact (based on a formal triage process). The Panel identified a number of challenges with the way stakeholder relationships are managed through this process. For example:¹⁶⁰

- Stakeholders report that they are often not made aware that a matter has moved from surveillance to enforcement until contacted by the enforcement team for documentation and information.
- Stakeholders expressed a sentiment of ‘starting again’ when a matter is moved to enforcement.
- In some instances, data requests are duplicated (resulting in unnecessary cost burdens both for ASIC and affected entities), and the Enforcement team does not always attempt to source documents internally.
- The quality of communication and engagement may vary across teams dealing with the same stakeholders, and this can involve inconsistent or ‘mixed’ signals as to the approach being adopted by ASIC.

¹⁶⁰ PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 66 to 67.

It is worth noting that stakeholders have identified that these challenges are less present in MIG, where there is perceived to be a stronger relationship between Stakeholder and Enforcement teams.¹⁶¹

Additionally, large diversified entities may have touch points across multiple stakeholder teams and some stakeholders expressed concern about the additional burden this creates where there are a number of matters underway at any one time.¹⁶² While there are examples of stakeholder teams within ASIC that have relationship managers allocated to key regulated entities or stakeholders (for example, MIG and some stakeholder teams in Investors and Financial Consumers), there is not currently a formal or consistent approach to this across the organisation and remains contained within existing silos.

To address concerns around often uncoordinated interactions, the Panel recommends ASIC introduce a formal tiered stakeholder relationship model. This is supported by the findings of the Susan Bell Research Survey, which found 'building a relationship management model' in the top three suggested focus areas for ASIC.¹⁶³

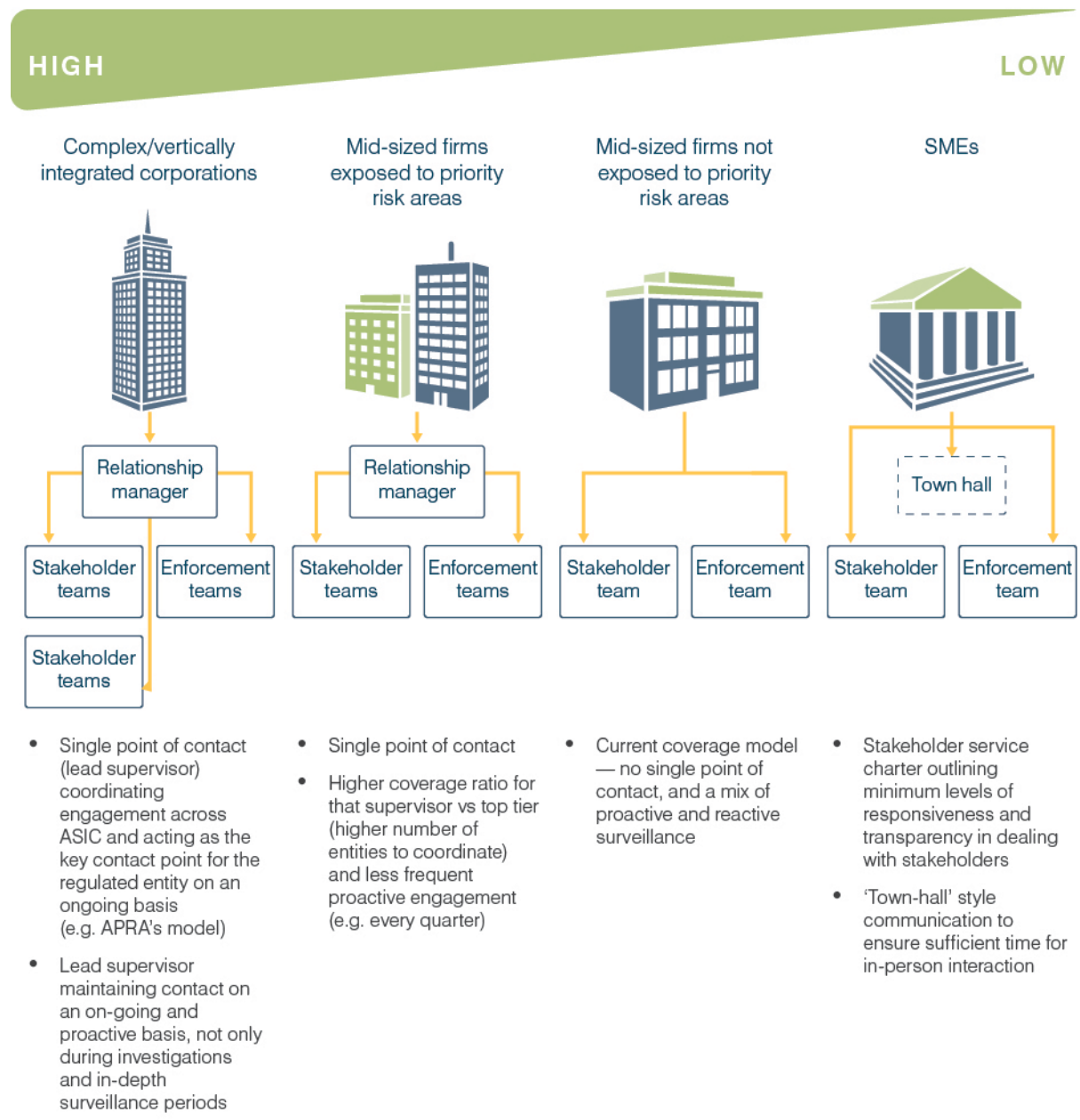
The model should allow scope for differential levels of engagement based on the nature, scope, and complexity of the regulated entities. Risk tiering should also be used as a key input into designing the relationship model to ensure resources are deployed to the areas of highest priority. An example structure is laid out below in Figure 29. In this example, it should be noted that coverage for mid-sized firms would vary over time depending on whether or not they are exposed to what ASIC considers to be key risk concentrations at that point in time.

161 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 47.

162 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 66 to 67.

163 Susan Bell Research 2015, *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of Evidence Report — Volume 3, page 107.

Figure 29: Stakeholder relationships: tiered coverage model
ENTITY SIZE, COMPLEXITY, RISK



Consultation process

The Panel also observed an expectations gap with regard to the quality of consultation in policy guidance, with 97 per cent of ASIC leadership rating ASIC as good or excellent on its willingness to consult with industry on policy guidance compared to 33 per cent of the regulated population.¹⁶⁴

Interviews and roundtable discussions highlight key shortcomings in the process including:

- External stakeholder perceptions that response times are too short, and provide insufficient opportunity for industry to fully consider all issues. This is despite an average consultation period of over eight weeks in the past two years.
- A perception that ASIC sometimes disregards the outcomes of the consultation process. However, the Panel acknowledges that ASIC will not be able to, and should not seek to, act on all suggestions received during consultation.
- Limited use of smaller roundtable style meetings with groups of stakeholder with common interests.
- A perceived disproportionate focus on feedback from larger stakeholders (industry funds, banks, insurance companies).
- The tendency to sometimes come across as demanding, rather than consultative.
- Insufficient and ineffective use of external panels, and a lack of documented evidence of how input is incorporated.

While the quality of policy guidance is generally high, there are some cases where sub-optimal policy outcomes (policies that are impractical require modification once implemented or show a lack of understanding of key issues) could have been avoided if consultation was more extensive. For example, in the case of the ‘bad apples’ and ‘culture’ projects (focus on identifying ‘rogue’ financial planners and improving financial firm culture and conduct respectively), the Panel received consistent feedback from external stakeholders that ASIC failed to provide sufficient upfront detail on project scope and objectives. As a result stakeholders were not able to provide input on suggested ways to approach the issue or to help shape information requests to be as efficient as possible.

Moving to a more outward oriented model will require the implementation of recommendation 5, such as the elevation of the Commission to a non-executive role, to enable focus on strategy, accountability and external engagement (see Chapter 2 for further discussion). In becoming more externally aware, the Panel expects that the Commissioners and organisation will engage more frequently and rigorously with stakeholders to improve policy outcomes.

164 Susan Bell Research 2015 *ASIC Capability Review: External stakeholder survey — final report*, in Appendix F of Evidence Report, page 74.

In response to the statement ‘ASIC is sufficiently resourced to do its job’ — External stakeholder results: 37 per cent excellent/good, 31 per cent fair, 18 per cent poor/very poor, 14 per cent don’t know; Internal stakeholders results: 97 per cent excellent/good; 3 per cent don’t know.

External advisory panels

ASIC relies on a number of external advisory panels, described in Chapter 1 and Commissioners provided positive feedback on the value they see from these panels. It is broadly accepted that the Consumer Advisory Panel and MSAP are functioning well.¹⁶⁵ Additionally, several cases of panel impact were brought to the Panel's attention, including the role of the Director Advisory Panel in assisting ASIC in finalising its approach in respect of proxy advisors.

However, the Panel is not fully confident that ASIC is currently obtaining the maximum value of advisory panels. While ASIC was able to demonstrate through a number of examples the impact that panels can have, interviews did not indicate a consistent view of how panels are being used to deliver impact. Further there was little documentation demonstrating exactly how panel views were included in the strategy planning processes. Additionally, the Panel notes that there is limited active management of external panels, and there is limited formal responsibility within ASIC to ensure panel recommendations are acted upon. Further, ASIC does not formally assess the performance of panels once they are established.¹⁶⁶

As such, the Panel recommends making a number of changes to calibrate the way external panels are structured and used. This includes reviewing:

- Membership renewal and targeting to ensure members have the necessary skills to advise on future challenges.
- Structure, with the possibility to move to a more nimble model based on a larger pool of relationships that can be drawn on in combination as required — a true panel model as opposed to the current standing committee style which can result in a 'set and forget' approach.
- Forward agenda, to ensure panels focus on key strategic questions.
- Minutes, in order to increase the likelihood that the results of panel discussions will feed into strategic decision making.
- Ongoing effectiveness of the model and outcomes by the Commission.
- Assigning formal responsibility to internal ASIC staff to act upon panel recommendations.

See also discussion in Chapter 3 on the role of external panels in the strategy setting process.

Domestic and international regulators

ASIC coordinates with both domestic and international regulators, including through the CFR and the International Organisation of Securities Commissions (IOSCO). This can take the form of cross-regulator taskforces, such as the Serious Financial Crimes Taskforce and Project Wickenby, or through any bilateral interaction.

The Panel has identified a number of areas where coordination with domestic regulators (for example, APRA) could be enhanced. In particular:

- enhanced data sharing (discussed further in section 5 of this Chapter);
- improving the role of the CFR in coordination (see Chapter 5);

165 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 10.

166 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 10.

- coordination of stakeholder management (where appropriate) to minimise the regulatory burden. For example, regulators can coordinate information requests and work together to ensure there is no contradiction in their policies and rules.

ASIC's current Chairman is also the current head of IOSCO. This has had a number of positive outcomes for Australia, including raising the country's profile, ensuring that the international regulatory agenda takes account of Australian issues, and in helping to move Australia's capital markets toward greater global integration. The importance of this role further increases the imperative to reduce the operational burden of the combined executive and governance roles (discussed in Chapter 2), in order to allow sufficient time for strategic and accountability work. The Panel recommends that Commissioners continue to seek out similar opportunities for integrated regulators leadership in the future.

Stakeholder management: recommendations summary

Recommendation 29: ASIC to develop and implement a formal tiered stakeholder relationship model based on entity nature, scope, risk and complexity.

Recommendation 30: ASIC to recalibrate advisory panel setup to ensure more systematic value add for example, through a larger pool of experts that can be called upon to advise on various issues as needed based on issue-specific needs and expertise gaps, coupled with regular performance assessment and enhanced internal responsibility to act on recommendations.

4.5. Data infrastructure — work underway but a long way to go

ASIC's capacity to understand the behaviour of regulated entities and to detect potential harms greatly depends on the quality of its IT infrastructure and data, the efficacy of its data tools and the expertise of staff. ASIC has already heavily invested into upgraded IT and data infrastructure to address identified weaknesses, although additional work will be required to close the gap to best practice.

Identified data infrastructure weaknesses

In assessing the quality of data infrastructure, the Panel has considered three components:

- data management: the quality of the data environment, including how it is captured and stored (that is, data architecture);
- data usability: the extent to which the data can be easily accessed and used in analysis, by both ASIC staff and the public (under the requirements of the ASIC Act);
- data use: the way in which data is used (via analysis) to drive decision making.

Challenges faced as a result of the current data infrastructure were a theme in the staff survey, interviews and roundtable discussions. For example, only 62 per cent of staff agree it is easy to locate required information (20 per cent neutral, 18 per cent disagree).¹⁶⁷ Identified weaknesses in current infrastructure span across each of the three components considered by the Panel.¹⁶⁸ The majority of these issues have been recognised by ASIC and improvements are underway.

- Data management:
 - reliance on legacy infrastructure for example, IBM 3090 mainframe applications and 100+ Lotus Notes applications, no integrated operating platform;
 - differences in data collection and recording practices across the organisation, which evolved differently based on the easiest way of capturing that data. For example, taxonomies used across teams differ;
 - limited data digitisation;
 - data architecture being built and maintained ‘in house’, where there could be a possibility to outsource for improved and lower cost outcomes.
- Data usability:
 - inefficiencies in data search functionality across multiple siloed data bases;
 - difficulties in obtaining a whole-of-ASIC view about an entity or individual;
 - skills gaps, including business analyst capability, data specialists;
 - whole classes of data made available as PDF only, limiting how they can be used (for example, can be used to verify firm is listed, but needs to be manually processed before it can be used for analytical purposes);
 - : This has also been impacted by funding constraints and the non-digital form of data specifications under current legislation. As such, legislative change may be required to enable ASIC to obtain data in the required format.
 - limited progress on using data to measure operational efficiency of internal processes;
 - lagging progress on open data, although this is consistent with slow Government-wide progress in developing a coordinated data policy and removing legislative restrictions.
- Data use:
 - Lack of progress on big data capabilities compared with peers. While ASIC has begun to address the required infrastructure to support analytics in the future, it has not defined how it plans to use ‘reg-tech’ capabilities or how it will develop the capabilities to complete this analysis internally. In contrast, regulators such as the SEC and FCA are more progressed for example, the SEC is developing a National Exam Analytics Tool to access and systematically analyse massive amounts of trading data from firms in a short time for examination/supervision purposes.
 - MIS for internal management (management dashboard reporting) and the ability to measure internal efficiency. This has limited the ability of the Panel to make a full assessment of ASIC’s capabilities, including the efficient and effective use of resources.
 - There is no Chief Data Officer to lead data-driven transformation.

Further, the Panel notes that total IT investment across ASIC has decreased 11.7 per cent in the past three years, with the largest proportion of spend directed to business as usual and supporting legacy infrastructure.¹⁶⁹

167 PwC 2015, *ASIC Capability Review: Survey overview working pack*, in Appendix D of Evidence Report — Volume 3, page 52.

168 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 85 to 88.

169 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 86.

Existing transformation projects

ASIC's senior management understands that ASIC needs to develop better IT systems and improve its analytical capabilities, and acknowledges this in the 2015-2019 Corporate Plan. As such, work to address some of these concerns has already begun, and there are currently three key initiatives driving the transformation of the Regulatory business:¹⁷⁰

- The FAST Program (Flexible Advanced Surveillance Technologies): a four year, industry funded program established in 2012. This program includes the implementation of a new Integrated Market Surveillance System (to replace the legacy SMARTs system), a regulatory compliance portal, enhanced investigation analytics capabilities, and delivery of end to end management and supervision of workflows across the Market Participants team.
- The Regulatory BOM (Business Operating Model) Commission paper: a strategic blueprint defining current state, drivers of change and target state, and a transformation strategy for the Regulatory Business. This program was led by two external expert consultants and was also independently reviewed by another external service provider. The results of this paper were used to inform the FAST 2 program development.
- The IT component of the OneASIC program (FAST 2): a business led program to address issues identified in the Regulatory BOM project. The IT component will address issues around data search functionality (including PDFs), delivering a common language and standardised data fields, a new search tool and common workflows.

However, the Panel has some concerns, particularly in regard to the FAST 2 project:

- ASIC was not able to provide documents outlining the business case for the investment. The Panel therefore feels unable to make a fully informed assessment as to the scope and likely impact of the changes and is not sure how extensively these were considered.
- Participants in roundtables, interviews and in the staff survey indicated that the IT strategy is still catching up on historical under-investment in infrastructure. Therefore the Panel is concerned that the plans may not be 'future proofed' (that is, it may not provide adaptability for future requirements), and will deliver a system that is relevant for today, but might be behind contemporary peer practice. As noted in the PwC evidentiary report, 'this will still leave ASIC with additional investment required to ensure they are a leading international regulator where data and technology are fully harnessed'.¹⁷¹
- As stated in the PwC evidentiary report, 'ASIC seems to have been slower to recognise the importance of data analytics and innovation than organisations such as the ATO and RBA but is now trying to catch up. These regulators' investment in better data management and analytics is ahead of ASIC's by a number of years.'¹⁷² This sentiment was echoed in external roundtable discussion on technology and big data. At present, existing programs appear to be focused on closing an existing gap, rather than moving directly to best practice. Acceleration of these programs is likely to be necessary for ASIC to keep pace with the rate of change in markets, products and services in which it regulates.¹⁷³
- The program needs to be complemented by improved reporting to ensure that necessary MIS can be produced, for example to measure and report on internal efficiency metrics.

170 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, pages 84 to 86.

171 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 87.

172 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 87.

173 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 1*, Sydney, page 84.

- The program has been designed around existing processes, which may not be efficient and raises potential issues of retrofitting in the near term if business processes are structurally changed.

Overall, the Panel concludes that while the program will close existing gaps, it will likely still leave ASIC lagging compared to peer regulators when it is implemented. This issue was a focus area of PwC's expert assessment of ASIC's IT programs. While PwC's report was purely a factual evidence collection exercise and did not include observations and judgement, the PwC expert conducting the IT assessment has reviewed this section of the Panel's report and agrees with the Panel's conclusions.

Further requirements

Further improvements in ASIC's smart use of data may emerge to address these issues through ASIC's data analyst network. This group of 75 staff from across business and IT has the aim of increasing knowledge and capability in areas of understanding power of data and driving further enhancement of data analysis capability.

It is also worth noting that some stakeholders have raised concerns over data accessibility under the potential sale of the registry business and that these were not identified or addressed in the ASIC Corporate Plan. The Panel suggests that ASIC address these data access and other risks in sale planning and execution.

ASIC should continue with existing transformation programs to address legacy system issues. However, further work will be required to close additional gaps. For example, enhancing MIS to include efficiency statistics that can be used to inform decision making.

A separate body of work will also be required to drive data management and analytics across ASIC. Addressing the underlying data management infrastructure is an important first step in developing big data capabilities. While these projects are ongoing, ASIC should look to understand exactly how it plans to use 'reg-tech' analytics to extract meaningful insights from improved data. For example, it should conduct a scan of peer regulators to identify how big data is being used elsewhere. ASIC can then conduct a gap assessment against current capabilities to identify additional requirements for investment. ASIC should also look to build or acquire the relevant expertise to run big data analytics programs. Secondment of data analytics specialists or leading peers could be a solution to build from within (see section 1 in this Chapter).

ASIC should also take an active role in promoting more open government data sharing across financial regulators, through the CFR. ASIC has vast amounts of valuable data and limited legal limitations on sharing information with, and receiving information from other regulators. Given internal resourcing constraints, ASIC would directly benefit from the private sector and academics undertaking more extensive research and analysis on ASIC data sets. Given that they provide new perspectives, they could provide alternative insights on developments, and would also be able to improve the quality of the data through curating and advising on anomalies or limitations in the data made available.

The Panel acknowledges that upgrading the data infrastructure will be expensive, and will likely require additional government funding.

Data infrastructure: recommendations summary

Recommendation 31: ASIC to execute its FAST 2 transformation program, 'future-proofing' design and expanding scope as required.

Recommendation 32: ASIC to launch new programs of work to close additional identified gaps for example, to enhance the ability to measure and report for MIS.

Recommendation 33: ASIC to 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.

Recommendation 34: 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.

CHAPTER 5: EXTERNAL CONSTRAINTS THAT IMPEDE ABILITY TO EXECUTE

This Chapter discusses 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.

The Panel sees three high level constraints:

- *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*.
- *Perceived funding constraints*: funding instability and inflexibility, together with perceived underfunding (although it is not clear that this is a real constraint).
- *Cooperation with other regulators*: the potential limitations imposed through insufficient coordination and forward looking collaboration with peer agencies.

In previous chapters, the Panel made a series of recommendations that are specific to ASIC. It is not within the Terms of Reference of the Review to make recommendations where these would have wider ranging implications (beyond ASIC), and as such this Chapter contains a series of observations. The Panel considers that the corresponding actions identified below provide the Minister with further considerations to incorporate as part of an evolving future program of economic and policy reform.

5.1. Legislative and regulatory complexity

Over time ASIC's mandate has increased with the enactment of new legislation and amendments to existing acts. Today, ASIC is responsible for administering eleven pieces of legislation, and the relevant regulations made under them. These include:¹⁷⁴

- *Australian Securities and Investments Commission Act 2001*;
- *Corporations Act 2001*;
- *Business Names Registration Act 2011*;
- *Business Names Registration (Transitional and Consequential Provisions) Act 2011*;
- *Insurance Contracts Act 1984*;
- *Superannuation (Resolution of Complaints) Act 1993*;
- *Superannuation Industry (Supervision) Act 1993*;
- *Retirement Savings Accounts Act 1997*;
- *Life Insurance Act 1995*;
- *National Consumer Credit Protection Act 2009*;
- *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

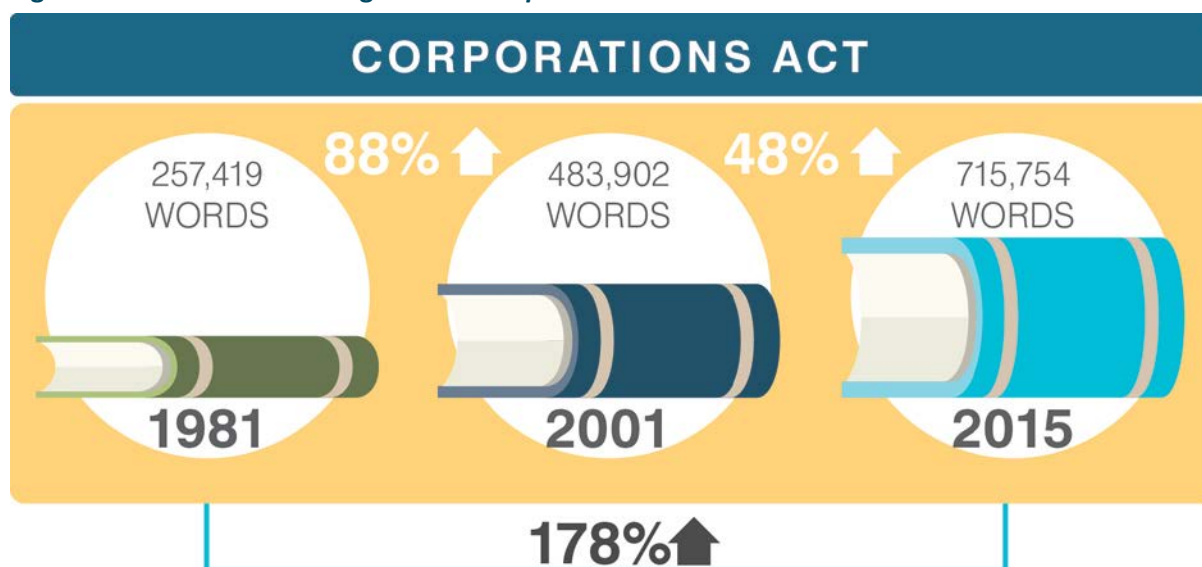
174 PwC 2015, *ASIC Capability Review: Evidence Report — Volume 2*, Sydney, page 1.

In particular, the Panel notes that the burden of administering the *Corporations Act* has increased significantly as a result of numerous amendments unmatched by any legislative reform:

- total length of the Act has increased by 178 per cent since 1981;
- the number of words in the Act has almost increased by 50 per cent from 2001 to 2015 (from 483,902 in 2001 to 715,754 in the most recent 2015 printed version);
- Chapter 7 of the Corporations Act, *Financial Services and Markets* is the longest Chapter of 380 pages and the regulations that provide more detail of the law for that chapter are an additional 304 pages.¹⁷⁵

Figure 30 shows the increase in the length of the *Corporations Act* over 1981 to 2015.

Figure 30: Increase in the length of the *Corporations Act*



This sentiment is also shared by numerous members of the judiciary who note that ‘every significant amendment to the corporations legislation ... has added substantially to complexity’ such that it is now ‘inescapably complex’.¹⁷⁶ Along with the noted increase in complexity has come a decrease in clarity, which requires additional guidance from the regulator.

While there is no measure available for the cost of this complexity, a number of consequences for ASIC have emerged:

- ASIC needs to provide guidance about how it intends to administer the law. As of July 2015 ASIC has published 253 Regulatory Guides and 209 Information Sheets.¹⁷⁷

175 Chia, H X and Ramsay, I 2015, ‘Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)’, *Company and Securities Law Journal*, Thomson Reuters, vol. 33, no. 6, page 391

176 The quotes relate to Austin J of the Supreme Court of New South Wales and High Court Justice Michael Kirby, respectively.
Ibid, page 391.

177 ASIC 2015, ACCC decision making processes and committees, Canberra. Viewed 30 November 2015 — <<http://asic.gov.au/regulatory-resources/>>.

- ASIC assists industry in reducing the impact of complex legislation by exercising its power to grant relief to individuals or a class of persons from unintended consequences of the law or where the cost of compliance clearly outweighs regulatory benefit. This power has been used on more than 20,000 occasions since 2004, with an additional 10,000 applications submitted, but not successful.¹⁷⁸
- Dependency on legal expertise in carrying out its functions — perhaps a factor explaining the relatively large proportion of employees with legal qualifications and experience (see Chapter 4).¹⁷⁹

While legislative complexity is a burden and an impediment to ASIC, it also impacts those subject to it (that is, the regulated population). Impacts for the financial system include contributing to costs of compliance and a disincentive for international business being attracted into Australia. The FSI noted that Australia’s international rankings for ease of doing business are lower than would otherwise be because of regulatory burden.¹⁸⁰

The legislative complexity of the *Corporations Act* also poses a significant impediment to ASIC pursuing and securing mutual regulatory recognition with other international jurisdictions. ASIC’s work in pursuing mutual recognition is and should remain a regulatory priority. To the extent that this legislative reform inertia remains an impediment to mutual recognition, it negatively impacts ASIC’s ability to effectively pursue mutual recognition and to promote efficient capital flows to fund the real economy. It also forms a sizeable bedrock of regulatory cost for business in Australia.

Submissions to this Review and other recent inquiries note that ‘reform fatigue’ prevents industry from lobbying for a wholesale rewrite of the *Corporations Act*. Some elements of the Act, however, are recognised as being particularly problematic. Those include Chapters of the Act reliant on large numbers of regulations and class orders to give the provisions effect and operation, like Chapter 7 (financial products and services).¹⁸¹

Rationalising and streamlining this legislation could be reviewed as part of the Government’s commitment to reducing regulatory red tape. This would both reduce the cost of compliance for regulated entities, and free up ASIC resources to focus on a wider range of regulatory tools, including education.

Collectively there is a clear twin policy imperative for pursuing legislative reform of the Corporations law — to both simplify and contemporise the law. The first is the significant and ongoing regulatory cost burden imposed on business in Australia. The second is the real impediment to mutual regulatory recognition with international jurisdictions with which Australian companies trade and from which all important incoming capital flows to Australia originate.

178 Chia, H X and Ramsay, I 2015, ‘Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)’, *Company and Securities Law Journal*, Thomson Reuters, vol. 33, no. 6, page 397.

179 Ibid, page 392.

180 Commonwealth of Australia 2014, *Financial System Inquiry: Final Report*, Canberra, page 260.

181 Chia, H X and Ramsay, I 2015, ‘Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)’, *Company and Securities Law Journal*, Thomson Reuters, vol. 33, no. 6, pages 397, 398 and 403.

See, for example the Law Council of Australia’s public submission to the Senate Economic References Committee Inquiry into the Performance of ASIC (Law Council of Australia 2013, Submission to the Senate Economic References Committee Inquiry into the Performance of the Australian Securities and Investments Commission).

5.2. Funding limitations

There is a general and widespread belief that ASIC is underfunded. For example, 43 per cent of external stakeholders and 76 per cent of SELs and Commissioners believe that ASIC is not currently sufficiently resourced to do its job.¹⁸² Further, 89 per cent of SELs and Commissioners and 56 per cent of external stakeholders feel that ASIC needs more resources in the future industry funded model.¹⁸³

It is clear that ASIC has experienced difficulties in adjusting to a lower level of funding resulting from government savings measures imposed since a high point in funding in 2009-10 (see Figure 31 below). However, it does not necessarily follow that ASIC is ‘under-funded’, as this involves an assessment as to what is the right level of funding, given the scope and nature of its mandate and whether the funding is being used efficiently. Such an assessment is currently not achievable given a lack of available MIS to measure efficiency.

Over the period of 2005 to 2015 ASIC has been subject to an efficiency dividend of 1 per cent to 2.5 per cent annually, coupled with one-off cuts of 2 per cent (from 2007-08 to 2011-12) to 2.5 per cent (from 2012-13 to 2013-15). On a nominal basis, the cumulative impact of the efficiency dividend 2014-15 was around \$25m of around \$103m since 2004-05. The efficiency dividend has been applied to most agencies that receive direct funding from the Government, except for nine agencies with full or partial exemption.¹⁸⁴ ASIC was also subject to an additional 10 per cent budget cut in 2015, which was applied to core and NPP funding (excluding capex and market supervision) on top of an efficiency dividend of 5 per cent (2.5 per cent annual and 2.5 per cent one-off).

Since 2004-05, ASIC’s core operational funding has decreased around 12 per cent. However, there has also been considerable expansion in ASIC’s mandate, which has been funded through approximately 60 new expense measures (New Policy Proposal — NPP funding) many of which are ongoing. This is a substantial number of NPPs for a government agency over this period of time. NPP funding for ASIC currently comprises around 19 per cent of total funding. In sum, ASIC’s real funding has increased from \$260m to \$312m since 2004-05 (excludes own-source income).

182 Susan Bell Research 2015, *ASIC Capability Review: ASIC leadership and stakeholder comparison survey*, in Appendix E of *Evidence Report — Volume 3*, page 72.

In response to the statement ‘ASIC is sufficiently resourced to do its job’ — External organisational stakeholders: 15 per cent agree, 21 per cent midpoint, 43 per cent disagree, 20 per cent don’t know; SELs and Commissioners: 11 per cent agree, 13 per cent midpoint, 76 per cent disagree and 0 per cent don’t know.

183 Susan Bell Research 2015, *ASIC Capability Review: ASIC leadership and stakeholder comparison survey*, in Appendix E of *Evidence Report — Volume 3*, page 83.

In response to the statement ‘The Government currently funds ASIC. If in the future industry funded ASIC’ — External organisation stakeholders: 56 per cent believe ‘ASIC needs more resources’, 4 per cent believe ‘ASIC needs fewer resources’, 29 per cent believe ‘ASIC’s resources should remain about the same’, 11 per cent ‘I don’t know’; SELs and Commissioners: 89 per cent believe ‘ASIC needs more resources’, 0 per cent believe ‘ASIC needs fewer resources’, 11 per cent believe ‘ASIC’s resources should remain about the same’, 0 per cent ‘I don’t know’.

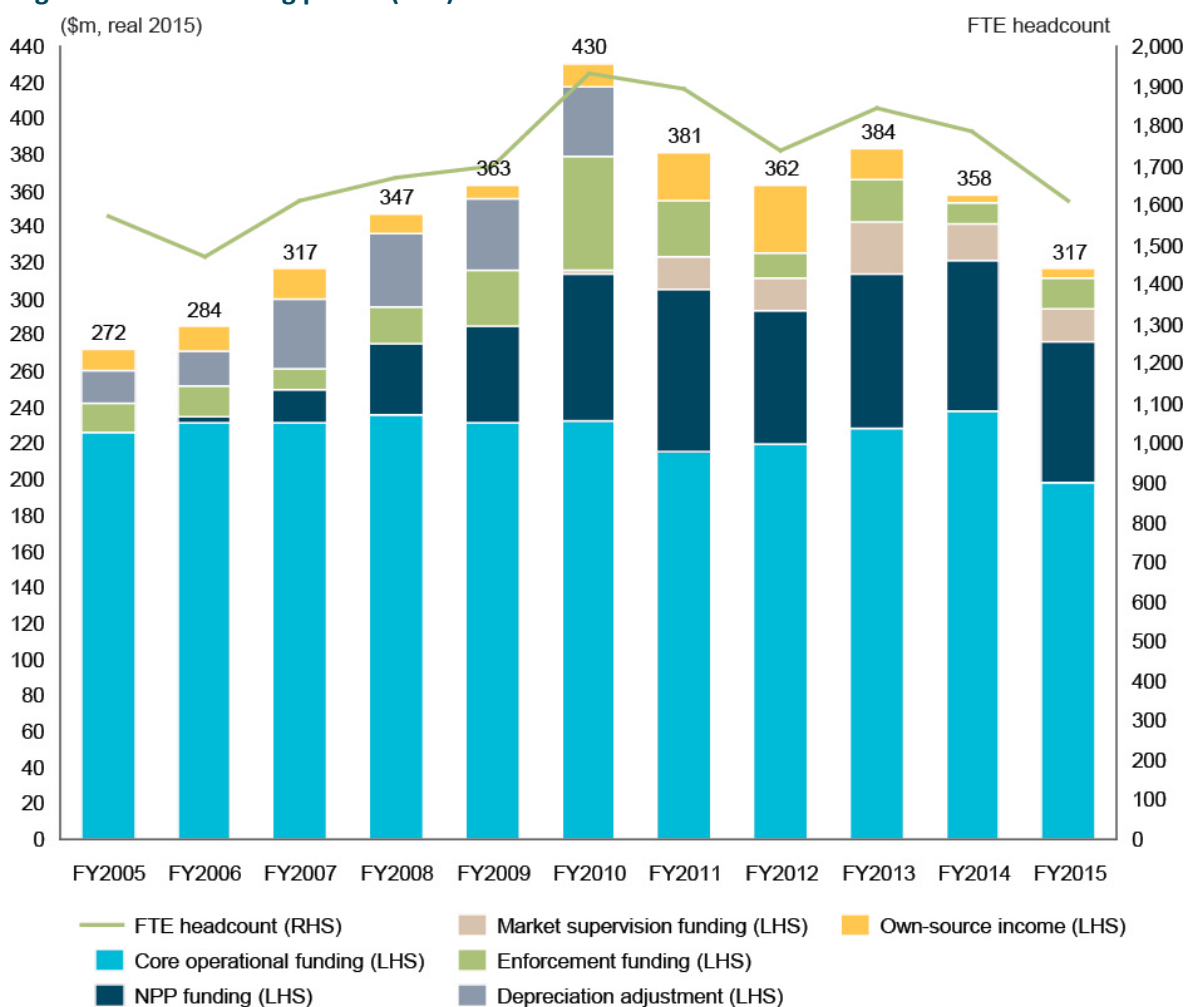
184 Horne, N 2012, ‘The Commonwealth Efficiency Dividend: an overview’, pages 8 to 9.

Three agencies have a full exemption, including the ABC, SBS and Safe Work Australia. Six agencies have a partial exemption, including the CSIRO, AIMS, Australian Council for the Arts, the Australian Customs and Border Protection Service, the Australian Nuclear Science and Technology Organisation, and the Department of Defence.

NPP funding is managed separately for four years, or until funding is stable, and is then considered a part of ‘core’ funding (unless specifically allocated to a temporary activity). Of a total of \$856.5m NPP funding, 68 per cent of this is ongoing, meaning that it has been, or can be, rolled into the base. The GFC Funding and Carbon Licensing NPPs are the only NPP themes to have been completely terminated since 2005 (in 2012 and 2015 respectively). The high proportion of ongoing NPP funding allows ASIC some flexibility after the initial four year period is completed.

The Panel thus concludes that ASIC’s funding situation is not dissimilar to other agencies and regulators, who have also been subject to efficiency dividends and can apply for NPP funding. In real terms, ASIC’s funding has increased with the expansion of its mandate. The Panel supports the FSI recommendation to move to a three year funding model to increase stability and certainty, and to facilitate longer term strategic planning and resourcing decision making. This is also consistent with ASIC’s proposal in its Eight Point Plan. However, this should be made contingent on ASIC’s development of MIS to allow future Government and industry assessment of ASIC’s funding adequacy and operational efficiency and effectiveness. This will ensure the appropriate checks and balances on resource use, whilst still enabling ASIC to have operational control of its budget and provide greater incentives for ASIC to ensure value for money, whilst still giving ASIC greater flexibility and discretion in the use of its resources.

Figure 31: ASIC funding profile (real) FY2005 to FY2015¹⁸⁵



185 ASIC internal data.

5.3. Regulator cooperation

Cooperation between regulators can deliver enhanced regulatory outcomes, through encouraging information exchange, sharing best practice knowledge and reducing the regulatory burden on members of the regulated population.

The Panel believes that ASIC is currently constrained by a lack of sufficient attention by the CFR in driving coordination between domestic regulators. The CFR's objective is to provide a high-level forum for cooperation and collaboration among its members to improve the efficiency and effectiveness of financial regulation. It has achieved this objective in providing a flexible and low-cost approach to coordination, and a forum for dialogue between members.¹⁸⁶

However, submissions made to the FSI indicated some concern about the CFR's membership, transparency and accountability, and called for its role to be strengthened.¹⁸⁷ As such, the Inquiry considered three options including formalising its role within statute, increasing membership and increasing reporting. However, no changes were recommended, due to concerns about potentially overlapping responsibilities.

The Panel sees three key areas where enhanced collective leadership from the CFR could lead to improvements in regulatory outcomes for ASIC. These suggestions do not require any change to the scope, membership or reporting requirements of the CFR:

- Leading efforts to promote open government data to facilitate information sharing across domestic regulators (as discussed in Chapter 4) and data access for academics and industry. This should include discussing identified legislative limitations (for example, on accessing evidential material obtained by the Australia Federal Police under its search warrant powers) with the Government for further consideration.
- Ensuring increased coordination between domestic regulators to reduce the regulatory burden on members of the regulated population caused through overlapping areas of responsibility such as disclosure, lending and culture.
- Developing a forward work program to identify common long term strategic goals and a mutually agreed plan to deliver upon them.

Additionally, further extending data collaboration with peer conduct regulators overseas would both facilitate more efficient capital flows and ensure more effective and timely responses to global threats to the stability of financial markets (such as cyber security).

Consistent with the Panel's Terms of Reference, the Panel has provided these observations without specific recommendations. However, without action, they act as an impediment to ASIC effectively performing its role today and into the future. Importantly, lack of action will act as a constraint to the efficient flow of capital investment into Australia to underpin a higher level of economic growth and prosperity.

186 Commonwealth of Australia 2014, *Financial System Inquiry: Interim Report*, Canberra, pages 3-117 to 3-119.

187 Commonwealth of Australia 2014, *Financial System Inquiry: Interim Report*, Canberra, pages 3-118 to 3-120.

APPENDIX A: IMPLEMENTATION PLAN FOR PROPOSED RECOMMENDATIONS

Table 14: Report Recommendations: Proposed Implementation Plan

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|---|---|---|--|
| <p>1. The Minister and ASIC to implement a more effective strategic long term oversight function, underpinned by a mutual commitment to a more pro-active regular ongoing dialogue. As steps to achieving this:</p> <ul style="list-style-type: none"> ▪ The Minister to provide an Annual Ministerial Statement in Parliament, in conjunction with tabling of ASIC’s Annual Report on the degree to which ASIC meets the expectations of the SoE and is performing in the achievement of its mandate. ▪ The Government and ASIC to enhance the SoE and Sol to clearly and regularly communicate expectations (to be reviewed annually), and to ensure mutual understanding and support ASIC in managing stakeholder expectations. | <ul style="list-style-type: none"> • Minister and Chairperson to conduct regular ongoing discussions throughout the year • Minister annual statement to Parliament to coincide with tabling of Annual Report in Parliament • Government to review/ update SoE annually | <p>Minister; Treasury, ASIC Chairperson</p> | <ul style="list-style-type: none"> • Commence immediately¹⁸⁸ |

188 Implementation timeframe based on Government decisions on the Review being made in the first half of 2016. If timing of Government decisions is different, then the implementation timetable would need to be amended accordingly.

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|---|-----------------------|---|
| <p>2. ASIC to continue to refine the performance reporting framework, including consolidating performance reporting (to ensure consistency between reporting frameworks), aligning internal performance metrics, improving the use of performance narrative, and identifying opportunities for more sophisticated analytics, particularly in relation to outcomes measures</p> | <ul style="list-style-type: none"> • Incorporate further refined and updated performance indicators into the 2016 Corporate Plan and report against them in the Annual Report • Review annually to coincide with Corporate Plan preparation | ASIC | <ul style="list-style-type: none"> • Commence immediately |
| Internal governance | | | |
| <p>3. ASIC to realign internal governance arrangements by elevating the current Commission role to that of a full time non-executive function (not an external board), with a commensurate strategic and accountability focus free from executive line management responsibilities.</p> | <ul style="list-style-type: none"> • Publicly state intention to realign role of the Commission • Clarify role and responsibilities of Commissioners and Board committees and associated delegations under the new governance structure | ASIC | <ul style="list-style-type: none"> • Commence immediately |
| <p>4. ASIC to establish a new role of Head of Office (HoO), with delegated responsibility and accountability for executive line management functions.</p> | <ul style="list-style-type: none"> • Publicly state intention to establish new HoO role • Document role and responsibilities of the HoO and related delegations from the Chairperson • Undertake best practice recruitment process and appoint HoO | ASIC | <ul style="list-style-type: none"> • Commence immediately; to be formalised by end 2016 (incl. appointment of new HoO) |
| <p>5. SELs to be delegated executive line management functions, reporting to the HoO.</p> | <ul style="list-style-type: none"> • Determine role, responsibilities and delegations of the SELs overseeing business lines and clusters (if current organisation structure is maintained, see recommendation 12) • Appoint SELs to oversee business lines and clusters | ASIC | <ul style="list-style-type: none"> • Commence immediately; new delegations to be formalised by end 2016 |

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|---|---|--|
| 6. Government to revisit this structure in three years, to review the size of the Commission and whether the roles of the Commissioners need to continue to be full-time. | <ul style="list-style-type: none"> Undertake one-off review of new governance structure, with external expertise involvement and ASIC Chairperson input | Government (drawing on independent external expertise as necessary) ASIC Chairperson input | <ul style="list-style-type: none"> Undertake within 3 years |
| Leadership talent | | | |
| 7. The Government to apply a contemporary best practice merit based recruitment process to ensure transparent and robust appointments of the Chairperson, Deputy Chairperson and other Commissioners. | <ul style="list-style-type: none"> Develop a documented contemporary best practice recruitment process for Commissioner selection Identify an international executive search firm as needed to undertake search for position Establish a high level Government panel as needed to identify short-listed candidates Apply recruitment process upon appointment of a Commissioner (as required) | Minister, Treasury | <ul style="list-style-type: none"> Commence immediately documentation of process¹⁸⁹ Apply recruitment process (as required) |
| 8. ASIC to implement a periodic forward looking skills gap assessment of the Commission to identify and inform future recruitment needs. | <ul style="list-style-type: none"> Develop process for conducting review Identify external consultants to assist Chairperson in conducting review Review to be conducted biennially to align with Corporate Plan process | ASIC Chairperson (drawing on external expertise) | <ul style="list-style-type: none"> Commence immediately; with completion to align with Corporate Plan process |

¹⁸⁹ Implementation timeframe based on Government decisions on the Review being made in the first half of 2016. If timing of Government decisions is different, then the implementation timetable would need to be amended accordingly.

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|---|--|--|
| 9. ASIC to implement a Commission effectiveness review to assess performance on an ongoing basis. | <ul style="list-style-type: none"> Identify external advisers to assist Chairperson in conducting review Review to be conducted annually to align with Corporate Plan process and as input to annual effectiveness review of ASIC by the Minister | ASIC Chairperson (drawing on external expertise) | <ul style="list-style-type: none"> Commence immediately with completion to align with Corporate Plan process and Minister's annual effectiveness review |
| 10. ASIC to develop a formal individual performance review process for the Commissioners, led by the Chairperson. | <ul style="list-style-type: none"> Conduct formal performance review annually; Initially pilot review process until formal review cycle can commence in 2016-2017 | ASIC Chairperson | <ul style="list-style-type: none"> Commence pilot immediately |
| 11. The Minister to assess the effectiveness and performance of the Commission on an annual basis | <ul style="list-style-type: none"> Identify external consultants to assist Minister in conducting Chairperson review (if required) Performance review conducted annually to coincide with tabling of Annual Report and ASIC effectiveness statement in Parliament | Minister | <ul style="list-style-type: none"> Commence immediate with completion by July each year¹⁹⁰ |
| Culture | | | |
| 12. ASIC to initiate a review of its organisational culture and as part of that review assess the merit of implementing Google's Project Oxygen team based assessment program to inform development of Commission strategy for high performance team culture. | <ul style="list-style-type: none"> Conduct review of ASIC's organisational culture with external expertise as required; re-evaluate within 2 years | ASIC Commission | <ul style="list-style-type: none"> Commence immediately; to be completed by end of July 2016 |

¹⁹⁰ Implementation timeframe based on Government decisions on the Review being made in the first half of 2016. If timing of Government decisions is different, then the implementation timetable would need to be amended accordingly.

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|---|---|-----------------------|---|
| Strategy development | | | |
| 13. ASIC to substantially improve the intended approach for delivery of the Corporate Plan in both the public document itself and the underlying Business Unit Plans. This should include greater specification of intended actions as well as timing, resourcing and organisational implications. | <ul style="list-style-type: none"> Adjust strategy-setting process to ensure Business Unit Plans focus on detailing delivery plans in the strategy process Evaluate outcomes annually as part of strategy-setting process | ASIC | <ul style="list-style-type: none"> Commence immediately; to be completed in time for internal 2016-17 budget cycle |
| 14. ASIC to improve the selection of performance indicators to ensure that the measures associated with the Key Activities for each Focus Area are: (i) reflective of the activities and their desired outcomes; and (ii) aligned to the internal performance indicators captured in the relevant Business Unit Plans, and to ASIC's enterprise-wide performance indicators. | <ul style="list-style-type: none"> Evaluate performance indicators annually as part of strategy-setting process, including international benchmarking and external expertise as required; Incorporate updated performance indicators into the annual Corporate Plan to report against in Annual Report External consultation as required | ASIC | <ul style="list-style-type: none"> Commence immediately; to align with Corporate plan development |
| 15. ASIC to review and introduce a more outcomes focused and dynamic use of advisory panels to ensure these forums input more directly into strategy development, and introduce a broader public consultation element into the strategy setting process. | <ul style="list-style-type: none"> Develop and implement a structured process to incorporate external panel views into the risk identification process; reviewed annually as part of the strategy-setting process Ensure alignment with recommendation 30 External consultation as required | ASIC | <ul style="list-style-type: none"> Commence immediately, with completion by July 2016 |
| 16. ASIC to further clarify and emphasise its expectations and risk tolerances (what the regulator will and will not be doing) and actively advertise and promote the strategy broadly (see Chapter 2 for further recommendations related to the Sol). | <ul style="list-style-type: none"> Identify limitations of ASIC's activities and incorporate explicitly in the Corporate Plan, Annual Report and Sol; Review annually as part of strategy-setting process Promote and communicate the Corporate Plan extensively through multiple channels and forms of engagement (on-going requirement) | ASIC | <ul style="list-style-type: none"> Implement immediately; limitations to be incorporated in 2016 Corporate Plan |

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|--|-----------------------|---|
| Strategic communication | | | |
| 17. ASIC to ensure the strategic framework used in developing the Corporate Plan is used consistently throughout the communications. | <ul style="list-style-type: none"> Conduct a review to assess the extent of variability and inconsistency in language across communication documents Review annually as part of strategy-setting and communication of the strategy processes | ASIC | <ul style="list-style-type: none"> Commence immediately; to be incorporated in strategy communication documents |
| 18. ASIC to develop a comprehensive communications strategy that places greater emphasis on communication of the organisation's strategic priorities. | <ul style="list-style-type: none"> Develop a communications plan to promote and explain ASIC's strategic objectives; annual process to coincide with Corporate Plan Develop the key principles of communication that underpin the communications strategy; review annually as part of strategy-setting process | ASIC | <ul style="list-style-type: none"> Commence immediately; to be completed prior to the release of the 2016 Corporate Plan |
| 19. ASIC to rebalance its public and internal communications about its role as an enforcement agency. | <ul style="list-style-type: none"> Utilise communication channels to best promote ASIC's role to internal and external stakeholders; reviewed annually as part of strategy-setting process Leadership to actively promote all the regulatory tools ASIC uses to execute its objectives (on-going requirement) | ASIC | <ul style="list-style-type: none"> Commence immediately |
| Resource allocation | | | |
| 20. ASIC to ensure the top-down allocation of resources are deployed across the organisation based on the strategic priorities. | <ul style="list-style-type: none"> Identify areas where resourcing changes and reallocations are warranted Review annually against identified strategic priorities | ASIC | <ul style="list-style-type: none"> Commence immediately where possible; review resource allocation in 2016 planning |

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|---|-----------------------|---|
| Workforce capabilities and management | | | |
| 21. ASIC to increase the scale and diversity of the secondment and exchange program. | <ul style="list-style-type: none"> Identify skill-gaps across ASIC (extend work to date with external consultants; to be conducted as part of the strategy-setting process in future years) Develop comprehensive and ongoing secondment and exchange program opportunities to assist in closing skill-gap Form partnership programs with relevant industry companies, law firms, analytics companies and other (domestic and international) regulators Set targets for the number of staff participating in these programs at all levels Review steps annually as part of strategy-setting process External consultation as required | ASIC | <ul style="list-style-type: none"> Commence immediately |
| 22. ASIC to improve workforce planning to include a more forward looking, strategy informed, top-down view (progressing and internalising work to date). | <ul style="list-style-type: none"> Expand the current workforce planning process (being conducted with external consultants) across the organisation (including supporting functions) Determine internal owners of this process Conduct an annual internal review of process | ASIC | <ul style="list-style-type: none"> Commence immediately; to complete organisation wide assessment by June 2016 |
| 23. ASIC to refresh its career value proposition to help attract and retain staff and support future secondment, by clearly articulating and tailoring messaging, and identifying strategies to deliver on this message (that is, to 'make it real'). | <ul style="list-style-type: none"> Launch an HR project to refresh the career value proposition including with stakeholder and external expertise involvement as required; review career value proposition every 2-3 years Identify internal change requirements to realise that proposition, for example improvements to L&D programs, updates to role descriptions, and execute External consultation as required | ASIC | <ul style="list-style-type: none"> Commence immediately; project to be completed by June 2016 |

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|--|----------------------------|---|
| 24. ASIC to refresh its career value proposition to help attract and retain staff and support future secondment, by clearly articulating and tailoring messaging, and identifying strategies to deliver on this message (that is, to ‘make it real’). | <ul style="list-style-type: none"> • Launch an HR project to refresh the career value proposition including with stakeholder and external expertise involvement as required; review career value proposition every 2-3 years • Identify internal change requirements to realise that proposition, for example improvements to L&D programs, updates to role descriptions, and execute • External consultation as required | ASIC | <ul style="list-style-type: none"> • Commence immediately; project to be completed by June 2016 |
| 25. Government to remove ASIC from the PSA as a matter of priority, to support more effective recruitment and retention strategies. | <ul style="list-style-type: none"> • Conduct one-off impact assessment • Consult on legal implications of removing ASIC from the PSA • Begin transition process | Government with ASIC input | <ul style="list-style-type: none"> • Commence immediately; to be removed from the PSA Act by end of 2016¹⁹¹ |
| <i>Organisation structure</i> | | | |
| 26. ASIC to launch a pilot project to assess the suitability of dedicated project based teams to improve flexibility across units and reduce the impact of silos. | <ul style="list-style-type: none"> • Launch one-off pilot to test the ability of cross cluster temporary project teams to better respond to strategic priority areas • Review success of the pilot by early 2017 and assess need for creation of specific project-team function in organisation structure and resourcing allocation | ASIC | <ul style="list-style-type: none"> • Commence pilot ‘project-team’ structure immediately; to be completed by end of 2016 |

¹⁹¹ Implementation timeframe based on Government decisions on the Review being made in the first half of 2016. If timing of Government decisions is different, then the implementation timetable would need to be amended accordingly.

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|--|--|-----------------------|--|
| 27. ASIC to implement a regular review of internal business processes and systems, supported by improvements in MIS to drive operational efficiency and reduce the cost burden on regulated entities. | <ul style="list-style-type: none"> • Detail how the process will be conducted (including scope, specific focus areas and data requirements) and to be reviewed by Audit Committee • Identify resources to conduct the review (such as internal or external) • Review of internal processes to occur every 2 years including through internal audit drawing on external expertise as required | ASIC | <ul style="list-style-type: none"> • Commence immediately; Initial assessment to be completed by June 2016 |
| Regulatory tool kit | | | |
| 28. ASIC to enhance enforcement effectiveness through developing a more targeted risk based approach to litigation for cases that are strategically important, and prosecutes through more focused pleadings and strategic appointment of senior counsel. | <ul style="list-style-type: none"> • Develop strategic litigation process (including setting targets); to be reviewed annually by the Enforcement Committee • Identify gaps to meet defined targets, and establish approach to reduce gap; to be reviewed annually by the Enforcement Committee • Incorporate key messages from litigation outcomes into communications through alignment with the strategic communications strategy (on-going requirement) | ASIC | <ul style="list-style-type: none"> • Commence immediately |
| 29. ASIC to proactively develop opportunities to enhance the use of co-regulation for selected groups of the regulated population where this will deliver superior regulatory outcomes, including through strengthened licensing and registration regimes | <ul style="list-style-type: none"> • Assess opportunities and develop plans for co-regulation in conjunction with relevant industry groups • Provide time for consultation with external stakeholders • Conduct initial assessment of industry associations to assess suitability for partnering in co-regulation models including with stakeholder consultation and external expertise input as required • External consultation as required | ASIC | <ul style="list-style-type: none"> • Commence immediately. Opportunities to be developed over time, and regularly re-assessed (includes ~3 month consultation period) |

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|---|--|-----------------------|--|
| Stakeholder management | | | |
| 30. ASIC to develop and implement a formal tiered stakeholder relationship model based on entity nature, scope, risk and complexity. | <ul style="list-style-type: none"> Identify and group stakeholders based on entity nature/scope/risk/complexity; review stakeholder grouping annually based on risk concentrations at that point in time Provide time for consultation with external stakeholders Realign stakeholder coverage and engagement strategies in accordance with the new model (including recruitment if required); review efficacy of the new model in the next ASIC stakeholder survey Public documentation and communication of new stakeholder model External consultation as required | ASIC | <ul style="list-style-type: none"> Commence immediately; to be implemented by Q2 2017 (includes ~3 month consultation period) |
| 31. ASIC to recalibrate advisory panel setup to ensure more systematic value add for example, through a larger pool of experts that can be called upon to advise on various issues as needed based on issue-specific needs and expertise gaps, coupled with regular performance assessment and enhanced internal responsibility to act on recommendations. | <ul style="list-style-type: none"> Conduct review of external panel structure and charters Evaluate similar structures and processes used by other regulators on how best to leverage external panels Review effectiveness of panels and their setup every 2 years Align with recommendation 15 | ASIC | <ul style="list-style-type: none"> Commence review of the external panels immediately; to be conducted by June 2016 Implement proposed changes by end of 2016 |
| 32. ASIC to execute its FAST 2 transformation program, 'future-proofing' design and expanding scope as required. | <ul style="list-style-type: none"> Leverage external experts to ensure ASIC is delivering a system that is moving towards 'best practice' Expand existing investment programs to ensure system design is 'future proofed' (where required) with external expertise as required Conduct review of each step as part of annual IT strategy development | ASIC | <ul style="list-style-type: none"> Commence immediately; expand existing investment programs (where required); timelines to be adjusted based on original business case |

| <i>Recommendation</i> | <i>Implementation arrangements</i> | <i>Responsibility</i> | <i>Implementation timeframe</i> |
|---|---|-----------------------|---|
| Data management | | | |
| 33. ASIC to launch new programs of work to close additional identified gaps for example, to enhance the ability to measure and report for MIS. | <ul style="list-style-type: none"> • Initiate review to identify additional infrastructure gaps and whether additional programs of work are required • For new programs of work, develop a project wide stakeholder analysis which assesses both change impact and risks • Leverage external experts on development and implementation of the program • Implement new programs (as required) • Conduct review of each step as part of annual IT strategy development • MIS improvement program and efficacy to be reviewed by Audit Committee | ASIC | <ul style="list-style-type: none"> • Commence immediately • Implement new programs (as required); timelines based on business plan |
| 34. ASIC to 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. | <ul style="list-style-type: none"> • Conduct scan of peer regulators to identify how big data and analytics is being used elsewhere • Conduct a gap assessment and develop plan for closing these gaps • Implement new analytics platforms to assist regulatory response • Conduct review of each step as part of annual IT strategy development • External consultation as required | ASIC | <ul style="list-style-type: none"> • Commence immediately; identify short-list of solutions by June 2016 • Implement new programs (as required); timelines based on business plan |
| 35. 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. | <ul style="list-style-type: none"> • Form CFR working group to investigate open data sharing • Develop and implement solutions (including open and other data policies and analytics) to improve data sharing and present to the relevant Minister • Implement policies • External consultation as required | ASIC, CFA, Treasury | <ul style="list-style-type: none"> • Commence immediately; to be finalised within one year |

Figure 32: Governance and Leadership — proposed implementation timelines

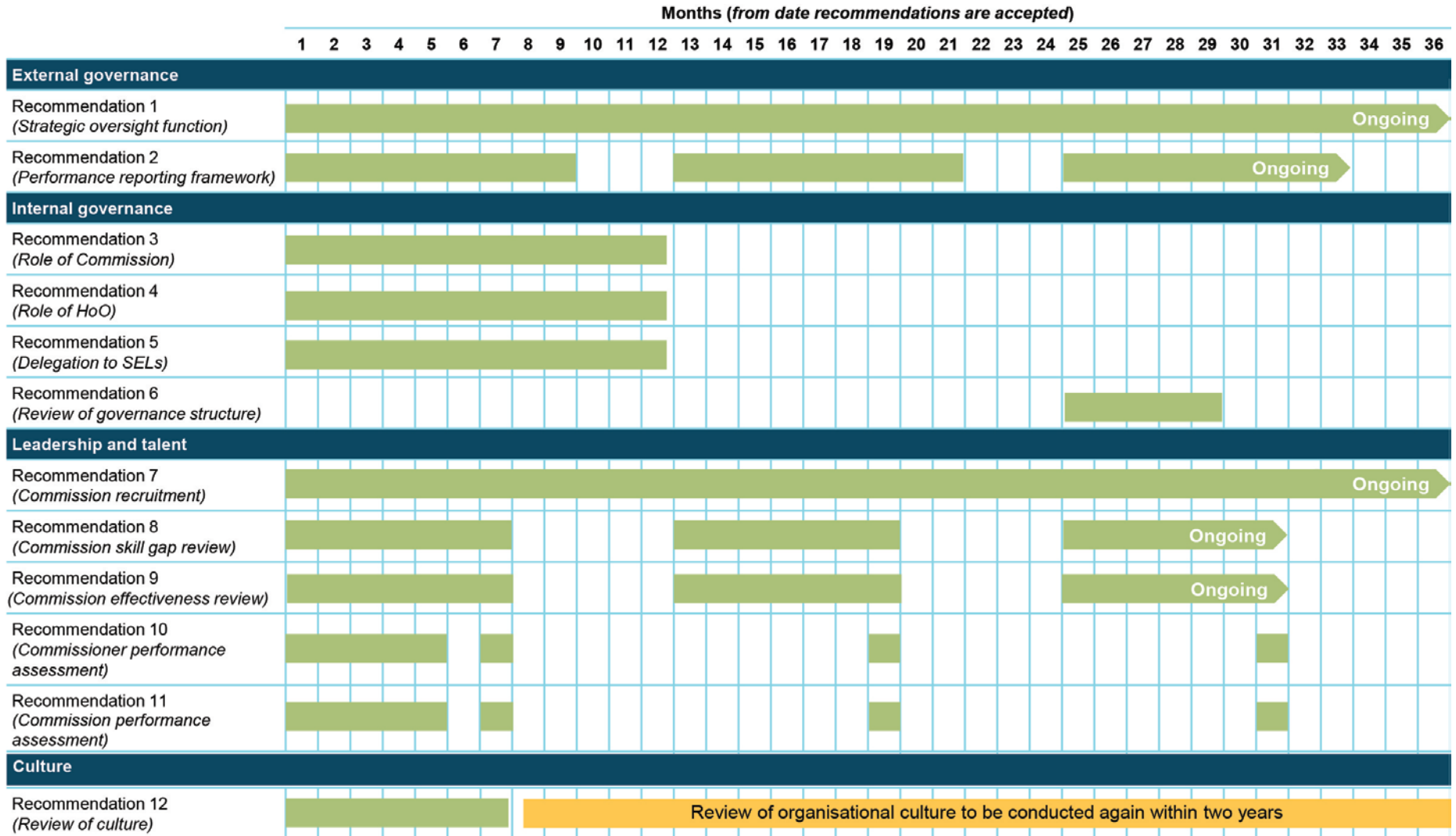


Figure 33: Strategy — proposed implementation timelines

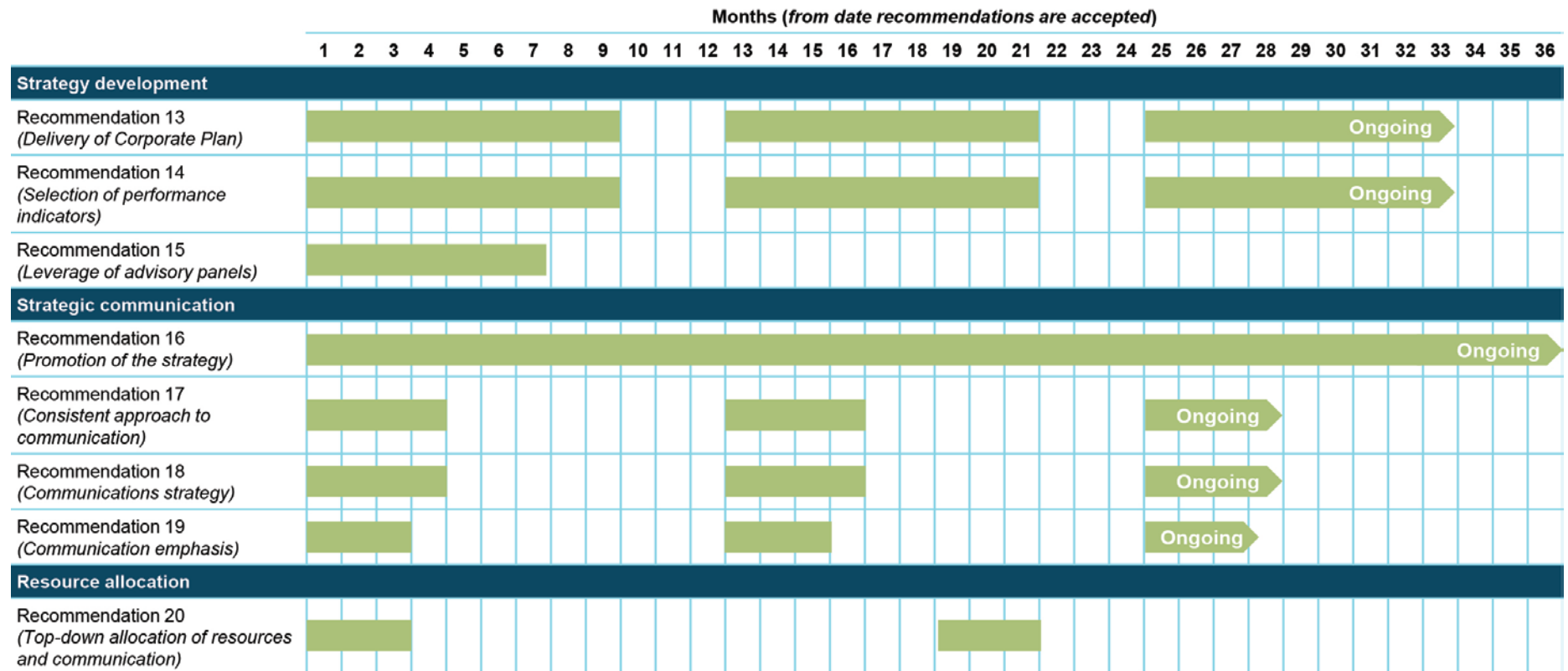


Figure 34: Delivery — proposed implementation timelines (1 of 2)

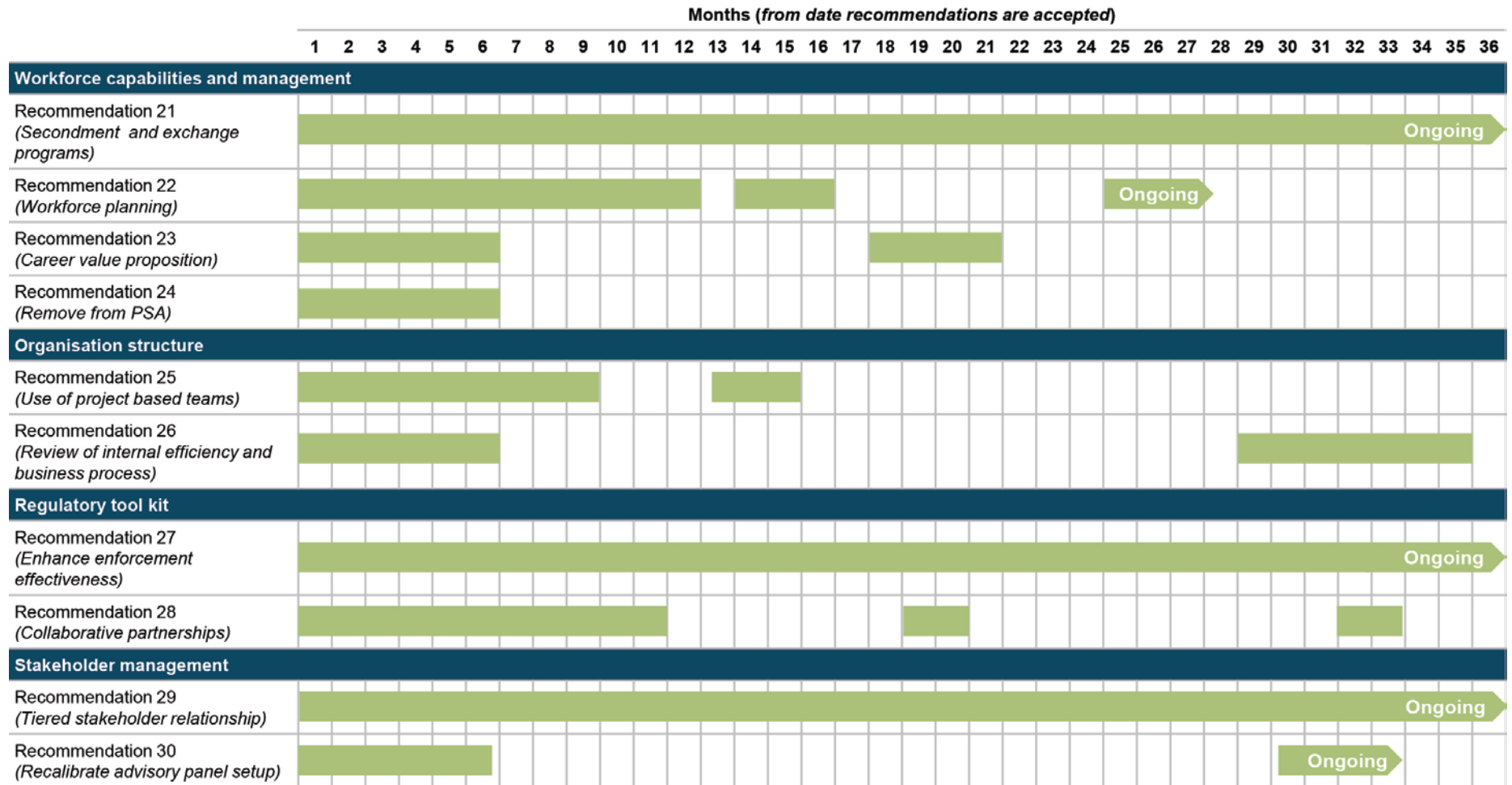
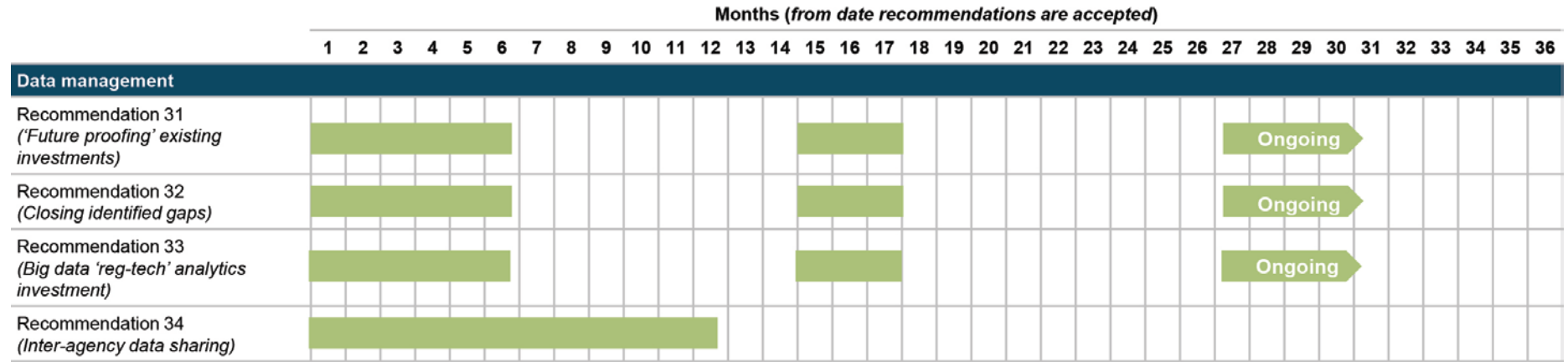


Figure 35: Delivery — proposed implementation timelines (2 of 2)



APPENDIX B: ILLUSTRATIVE STATEMENT OF EXPECTATIONS

The Panel welcomes the Government’s commitment, in its response of 20 October 2015, to the FSI, to provide clearer guidance to ASIC in a revised Statement of Expectations (SoE) in the first half of 2016. To assist in this process, an indicative example SoE follows to provide guidance on the Panel’s assessment of what such a revised SoE should incorporate. This includes illustrative wording (in the right hand column of the page) along with a brief description of what should be included as part of the text (in the left hand column). This should be read together with the discussion in Chapter 2, which identifies the proposed elements comprising an enhanced SoE.

The Panel acknowledges that the SoE needs to be carefully drafted so as to transparently express the Government’s aspirations whilst not undermining the independence of ASIC. The example here is for illustrative purposes, and is therefore not reflective of the Government’s views, but rather the Panel’s thoughts on what the Government may wish to include in a revised SoE. The Panel views the topics covered, degree of granularity and structure as providing a helpful benchmark model for ASIC’s SoE and the future SoEs to be drafted for other government agencies and regulators.

ASIC will be required to produce an updated Statement of Intent (SoI) to respond to the enhanced SoE, and the Panel has provided related guidance in Chapter 2.

Table 15: Illustrative schema – enhanced SoE

| Description | Illustrative wording |
|--|--|
| <i>Introductory statement</i> | This Statement outlines the Government’s expectations about the roles, responsibilities and priorities of the Australian Securities and Investments Commission (ASIC), its relationship with the Government and other agencies and regulators, issues of transparency and accountability, and its obligations to consumers and investors. ASIC is expected to reply to this Statement with its own Statement of Intent, the key components of which would then be incorporated into ASIC’s Corporate Plan. |
| ASIC’s role | |
| <i>Description of ASIC’s mandate</i> | ASIC plays a key role in achieving a sound and effective financial and corporate regulatory framework. Its objectives are to maintain, facilitate and improve the performance of the financial system (including fair and efficient markets), promote the confident and informed participation of investors and consumers, and conduct an efficient registry. |
| <i>Description of the scope of that mandate, such as the entities that ASIC regulates</i> | <p>ASIC is a consumer credit, markets and financial services regulator. As such, it is expected to license and regulate:</p> <ul style="list-style-type: none"> • People and businesses engaging in consumer credit activities (banks, credit unions, finance companies, and mortgage and finance brokers). • Financial markets and participants (including for licensed equity, derivatives and futures markets). • Financial services businesses (including businesses dealing in superannuation, managed funds, shares and securities, derivatives and insurance). |

| | |
|---|---|
| <p>Description of available regulatory tools</p> | <p>ASIC has a range of regulatory tools at its disposal, including education, policy guidance, licensing, supervision, surveillance and enforcement. This includes ongoing systemic risk monitoring on a continual basis, alongside proactive and reactive non-continuous supervision. The Government expects that ASIC will apply risk and evidence based guidance to identify the way that it selects and deploys these tools to effectively and efficiently achieve its regulatory objectives.</p> |
| <p>Acknowledgment of any trade-offs in pursuing mandate with available tools</p> | <p>ASIC operates with limited resources and the Government therefore recognises that the pursuit of an objective or use of a particular tool may come at the expense of others. ASIC should explicitly acknowledge and explain any required trade-offs, and should clearly state how it plans to allocate resources, prioritising those actions that are most directly aligned with its three regulatory objectives, given ASIC's assessment of the current risk environment.</p> <p>Further, ASIC should develop appropriate MIS to undergo internal efficiency reviews every two years to ensure that resources are being deployed in the most efficient way possible. The government expects the next review to occur in 2016.</p> <p>ASIC is a market conduct regulator with a range of regulatory tools, including but not limited to enforcement. While ASIC should continue to direct the majority of its resources to surveillance, supervision and enforcement, the Government expects ASIC to proportionately increase the share of education and policy guidance in order to ensure it is taking a proactive approach to managing conduct.</p> |
| <p>Policies and preferences of the Government that might dictate how ASIC delivers on its mandate</p> | <p>In delivering on its mandate, the Government has a preference for ASIC to:</p> <ul style="list-style-type: none"> • Use a principles based approach to regulation that identifies the desired outcomes rather than prescribing how to achieve them. • Adopt a risk based approach to compliance obligations, engagement and enforcement, allowing for proportionate approaches suited to the size, nature, complexity and risk of regulated entities. • Ensure consistency with overseas regulatory approaches where appropriate. |
| <p>Acknowledgement of the expectations gap, that is ASIC's capabilities to effect change and known limitations on this ability</p> | <p>There are limits to ASIC's remit which may not be fully understood by the public, resulting in an expectations gap (that is, the misalignment between external and internal perceptions of ASIC's performance, capabilities and mandate). Educating the public of ASIC's role and limits is a mutual obligation of ASIC and the Government. This Statement of Expectations, combined with the Statement of Intent that ASIC is required to produce in response, goes some way to addressing this misalignment, by clearly describing the expectations the Government has for ASIC (in the Statement of Expectations), and outlining how ASIC will respond to each of the requirements (in the Statement of Intent).</p> |

In addition, the Government encourages ASIC to focus on addressing misaligned perceptions on a number of key areas over the coming year:

- Ensuring that the way in which ASIC positions its activities and tools does not result in a misconception of the extent and limits of that activity. In doing so, ASIC should ensure it aligns language choice with learnings from behavioural economics. For example, there may be a misunderstanding among some investors as to the extent to which ASIC conducts due diligence analysis (rather than just compliance checking) when licensing an intermediary. This may also extend to confusion as to the extent to which ASIC vets public issuances (as opposed to simply requiring the disclosure of certain information).
- Ensuring that it clearly describes its approach to policy consultation, including the methodology used to select stakeholders for consultation and how it uses the output of the consultation process in formulating policies and guidance. This will address stakeholder concerns and thus help to ensure that they are willing to contribute to the consultation process. Participation of stakeholders in this process is an important part of achieving optimal regulatory outcomes.

Explicit identification of the expansion of ASIC's mandate, functions or activities

ASIC's mandate is subject to change over time as the regulatory needs of the Australian economy and markets change. ASIC must ensure that it develops strategies and the necessary internal capabilities to address any expansion of its mandate. The Government, in turn, has an obligation to articulate the additional resourcing to be provided for new functions.

In the coming year, ASIC should ensure that it develops clear strategies with regard to the registering of financial advisors, for which it assumed responsibility in 2015. In administering this role, the Government expects that ASIC will ensure registry is cost effective, timely and easy.

Risk tolerance

Recognition of the external factors which impact ASIC's ability to achieve its mandate

There are a number of factors that influence the extent to which ASIC is able to achieve its mandate. These include:

- The regulatory framework that establishes its mandate and powers (including the statutory and legislative framework).
- Resource availability, that is, government funding.
- The extent to which the use of regulatory tools identifies and deters misconduct.
- The level of misconduct actually occurring.

ASIC is able to influence these factors through:

- Making the Government aware of any significant impediments imposed by the statutory and legislative framework, and identifying these constraints in ASIC's Statement of Intent and Corporate Plan.
 - Ensuring it operates as efficiently as possible.
 - Continually improving the way in which it uses the regulatory tools at its disposal.
 - Using those tools to deter misconduct.
-

It is expected that ASIC commits to reducing the overall level of risk through these actions on an ongoing basis, and communicates how it is achieving this through external reporting mechanisms.

Statement of Government's risk appetite

However, the government recognises that ASIC cannot, nor should it seek to, eliminate all risk in the financial system. ASIC's role does not involve preventing all risk in the market, or in ensuring compensation where there is a loss. Rather, ASIC's role is to reduce the level of risk through surveillance, supervision and guidance, and, where wrong-doing does occur, enforcement. Its role also involves reducing the 'misalignment' of expectations through education, in order to address circumstances where investors or financial consumers think they are bearing lower risk than the actual risk of the product or strategy.

The level of risk will vary by industry group, as will the degree to which this is misaligned with investor and consumer perceptions of risk. For example, the Government notes that investors and consumers may not be fully aware of the risks of investing in a managed fund.

ASIC should ensure that its resource allocation reflects risk concentrations and potential harms across industries. In order to identify emerging risk concentrations as rapidly as possible, ASIC should also ensure it deploys proactive supervision appropriately.

Acknowledgement of the impact of economic and market conditions

The level of risk will also depend on general economic and market conditions, which lie outside of the control of ASIC. ASIC must therefore ensure that it considers and documents how the external environment will impact its regulatory focus, and communicate this clearly to internal and external stakeholders. The Government expects it will adjust its regulatory approach accordingly, in particular, by increasing resource dedication to education and supervision of specific parts of the regulatory population where it identifies increasing risk concentrations. ASIC must also ensure that it fulfils its responsibilities for ongoing systemic risk monitoring on a continual basis.

In particular, the Government has identified a number of economic and market trends that should impact how ASIC deploys its resources over the coming year. These include:

- The current low yield environment: Where interest rates and asset yields are low, some investors may be attracted to high yield schemes in order to achieve a level of desired returns. In some instances, these investors may not be fully aware of the risks involved in extending risk appetite to achieve higher returns. As such, ASIC should deploy resources to investor education focused on risk-return trade off issues. It should also focus on supervision of market participants promoting higher yield products in order to identify possible misconduct.
 - The recent elevated housing market: Where there is a significant increase in asset prices, many first-time or newer investors may be attracted to the market, where they perceive a strong probability of high returns. There is a risk that some investors will pursue investment strategies involving highly leveraged purchase of real estate assets at inflated prices. ASIC should therefore increase the use of education focused on housing investment schemes, and also surveillance of intermediaries operating within the housing sector.
-

ASIC's priorities

Identification of key risks to which ASIC should respond

The Government expects ASIC to take a forward looking approach to managing key risks that will shape financial markets in the next 3-5 years. Along with undertaking its own analysis of key risks, the Government expects ASIC to develop strategies that address:

- Corporate culture, with a focus on business integrity and treating customers fairly. The Government expects ASIC, following appropriate analysis and consultation, to conduct targeted supervision of high risk entities to review their conduct policies, and to assess the alignment of incentive structures and risk management as a proactive approach to identifying possible misconduct.
- The need for a more innovative approach to regulation in an environment of digital disruption and financial disintermediation. We therefore expect ASIC to identify ways in which the use of regulatory tools can best be managed going forward, including where the scope of regulatory tools may need to be increased.
- Demographics and the growing need for retirement solutions. The Government expects ASIC to assess the risks of asset decumulation and to develop a new policy framework that supports the population's needs around superannuation.

ASIC must clearly document and communicate the key risks it is seeking to address, why these have been identified as priority areas, an action plan and metrics against which performance can be assessed. This should be incorporated into the Corporate Plan.

Alignment with Government priorities

Alongside these priority areas, ASIC is also expected to take into account the Government's broader policy framework and agenda, and to provide support where required.

The Government is committed to reducing red tape and compliance costs for business and the community as a critical step towards improving Australia's productivity and economic growth. The Government acknowledges the role ASIC has to play in implementing the Government's de-regulation agenda. This will include ASIC:

- Developing guidance material with a view to assisting companies reduce compliance costs.
 - Enhancing regulatory impact analysis in accordance with new standards (Regulatory Impact Analysis).
 - Assessing internal practices and business processes to identify areas of inefficiency, especially unnecessary cost burdens on regulated entities, and acting accordingly to address them.
 - Reviewing existing guidance material and rules to identify where a principles based approach would be more appropriate, and adapting this material as required.
 - Identifying specific opportunities for deregulation including through targeted consultation with regulated population.
-

Further, the Government will be releasing a number of legislative amendments in the coming year, for example on the regulatory framework for managed investment schemes. The Government expects ASIC to revise existing guidance material as soon as possible following these amendments.

Additionally, given the findings of the Harper Competition review and the Productivity Commission's report *Business Set-up, Transfer and Closure*, the Government expects ASIC to develop and document new arrangements for registering emerging business models (particularly those related to digital technology) in order to facilitate selective exemptions, for a fixed period, where regulatory requirements would otherwise deter business entry and competition.

Interactions with the Government, Minister and Treasury

Statement of independence

It is imperative that ASIC act independently and objectively in performing its functions and exercising its powers as set out in the ASIC Act. Nevertheless, the Government expects that ASIC take into account the Government's broad policy framework in performing its role and meeting its responsibilities. Additionally, ASIC should also consider the outcomes or recommendations of relevant Government established panels, reviews or inquiries, and consult with the Government on matters that would have significant implications for the market or regulated population.

Description of expected interactions with the responsible Minister

ASIC must provide Treasury portfolio Ministers with accurate and timely advice on significant issues, such as matters which the Government will be required to discuss in Parliament, important operational or budgetary issues and decisions regarding the appropriate action for it to take following substantial problems or disruption in the market.

The Chairperson of ASIC and the Minister must meet regularly and on an ongoing basis. Additionally, there should also be a formal year end discussion on both the effectiveness of the Commission and the overall performance of ASIC and the Chairperson's performance more specifically.

When tabling the ASIC Annual Report, the Minister will provide an Annual Ministerial Statement to the Parliament on ASIC's overall performance, especially on the degree to which ASIC meets the expectations of this Statement of Expectations and is performing in the achievement of its mandate. The Minister will also undertake to ensure that ASIC is sufficiently resourced to achieve its mandate, within the context of the Government's fiscal and budgetary policies.

Description of expected interactions with Treasury

The Government expects that Treasury and ASIC will maintain a close relationship. ASIC must:

- Provide the Secretary to Treasury with a copy of all information, briefings, press releases and correspondence provided to the Minister.
 - Keep the Secretary to the Treasury appropriately informed of significant high level meetings between ASIC and Government Ministers and other key policy figures.
 - Advise Treasury about changes to legislation that, in ASIC's opinion would assist in improving the regulatory framework and minimising compliance costs for business and the Community.
-

Treasury will take into account the views and experience of ASIC when considering and advising on changes to financial and corporate policy and legislation to facilitate consistency between the objectives of legislation and its practical implementation.

Interactions with other regulators

Description of the expected relationships with agencies and peer regulators

The Government expects that ASIC will maintain robust, effective and collaborative working partnerships with other Commonwealth and State and Territory agencies (APRA, the ACCC, the ATO, ACC, AUSTRAC and the AFP), as well as ASIC's counterpart regulators in overseas jurisdictions, to ensure the proper functioning of Australia's regulatory framework.

Further, ASIC is also expected to work together with the Council of Financial Regulators (CFR) and the International Organisation of Securities Commissions (IOSCO) to further develop and maintain relationships with financial regulators domestically and globally. Commissioners should identify opportunities to participate in the leadership of these organisations in order to further contribute to the regulatory agenda and the global integration of Australia's capital markets.

ASIC should also avoid duplication of the supervisory activities of other regulators, and should consider whether outcomes could be achieved by using existing regulation administered by another regulator, or other collaborative arrangements in order to ensure an integrated regulatory framework and reduce compliance costs for regulated entities.

Description of the expected use of collaborative partnerships

The Government also expects ASIC to identify opportunities to collaborate with the private sector for regulation and monitoring of particular industries where collaborative partnerships (including co-regulation, quasi-regulation or self-regulation) can deliver better regulatory outcomes, including lower costs and more effective and efficient regulation.

For example, ASIC should assess whether regulation for liquidators, auditors and insolvency practitioners could be conducted together with the relevant industry associations, based on an assessment of the extent to which these associations are able to monitor, review and discipline market participants.

Description of priority areas for cooperation in the coming 1-3 years

The Government recognises the importance of open data and expects ASIC to take an active role in promoting and developing an approach to more open government data sharing across financial regulators together with the CFR. ASIC should assist the Government in identifying the requirements of a coordinated data policy as well as legislative restrictions that need to be removed.

Transparency and accountability

Description of external accountability mechanisms

ASIC is accountable to the Parliament, and ultimately to the public, through the Treasury Ministers, the Parliamentary Committee process and the tabling of its annual report. ASIC will be required to appear before parliamentary committees, including Senate Estimates and the Parliamentary Joint Committee on Corporations and Financial Services (JPC), as requested to explain actions and decisions. These reviews will focus predominately on ASIC's longer term strategic focus, rather than being overly issues-based, although there will be occasions when specific issues require scrutiny and close examination.

Guidance on external reporting requirements

ASIC is also required to provide regular external communications on key decisions and regulatory outcomes. These should be made publicly available as soon as possible, and should clearly demonstrate how these decisions and outcomes align with ASIC's strategic priorities.

The Government has recently developed a new whole of government performance management framework under the PGPA Act, and expects ASIC to be compliant with these requirements. Accordingly, ASIC must integrate these performance metrics into the Corporate Plan and subsequently report on outcomes against each metric in the Annual Report. The Government will assess ASIC's performance against these indicators as part of its oversight function in determining whether ASIC is successfully achieving its objectives and mandate.

Guidance on interactions with members of the regulated population

The Government expects ASIC to have an open and sound working relationship with the entities that it supervises. It is important that industry participants are encouraged to communicate considered and candid views to ASIC in order to enhance the regulatory framework and outcomes, and minimise compliance costs. ASIC must ensure that its interactions with stakeholders are conducted as efficiently and effectively as possible to minimise the regulatory burden on the regulated population.

Conclusion

The Government's vision is for ASIC to be a high performing and responsive agency that sets world's best practice standards in conduct regulation and administers a principles based regulatory framework in a way that provides stability, trust and confidence in the financial system, is efficient and effective, and that balances the objectives of ASIC's statutory objectives set out in the ASIC Act, while minimising compliance costs for business and the community.

APPENDIX C: GLOSSARY

| Term | Definition |
|-------------------------------|---|
| 2008 McKinsey Review | A review of ASIC functions conducted by the external consulting firm, McKinsey & Company. |
| AAT | Administrative Appeals Tribunal — conducts independent merits reviews of administrative decisions made under Commonwealth laws. |
| ABS | Australian Bureau of Statistics — the Australian Government’s statistical agency. |
| ACCC | Australian Competition and Consumer Commission — Australian statutory authority that enforces the <i>Competition and Consumer Act 2010</i> and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure. |
| Advisory panels | The external panels that advise ASIC (such as the External Advisory Panel, Consumer Advisory Panel, and Director Advisory Panel). |
| AFMA | Australian Financial Markets Association — an industry body representing participants in Australian financial markets. |
| AFSL | Australian Financial Services Licence |
| AML | anti-money laundering |
| APRA | Australian Prudential Regulation Authority — the prudential regulator of the Australian financial services industry that oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance companies, friendly societies, and most members of the superannuation industry. |
| APS | Australian Public Service |
| APSC | Australian Public Service Commission |
| ASC | Australian Securities Commission — forerunner to ASIC. |
| ASIC | Australian Securities and Investments Commission |
| ASIC Act | Australian Securities and Investments Commission Act 2001 |
| ASIC Leadership Survey | Survey conducted of ASIC Commissioners and Senior Management by PwC and collated by Susan Bell Research for the Panel. |
| ASIC Survey of Staff | Annual employee engagement survey conducted of ASIC staff by ORIMA Research for ASIC. |
| ASX | Australian Securities Exchange |
| ATO | Australian Taxation Office |
| BaFin | Federal Financial Supervisory Authority — the organisation responsible for regulation of capital markets and financial services in Germany. |
| BaU | Business as usual |
| CAP | ASIC’s (external) Consumer Advisory Panel — see Advisory panels. |
| CFR | Council of Financial Regulators — the coordinating body for Australia’s main financial regulatory agencies RBA, APRA, ASIC and Treasury. |
| Cluster | The term used by ASIC to describe its organisational structure. There are three clusters: Markets, Investors and Financial Consumers, and Registry. |

| Term | Definition |
|---|--|
| the Commission | The body that heads up ASIC. It consists of five Commissioners, including the Chairperson. |
| Corporations Act 2001 | The principal legislation regulating companies and financial products and services in Australia. |
| Corporations Agreement 2002 (as amended) | Confers the powers for regulating corporations from the states to ASIC. |
| DAP | ASIC's (external) Director Advisory Panel — see Advisory panels. |
| Dark pool | A private forum for trading securities. |
| DPP | Director of Public Prosecutions — the Office of the Commonwealth Director of Public Prosecutions is an independent prosecution service established by Parliament to prosecute alleged offences against Commonwealth law. |
| EAP | External Advisory Panel |
| EL1, EL2 | Executive Level 1, Executive Level 2 (internal leadership staff levels at ASIC). |
| Evidence Report | ASIC Capability Review Evidence Report in three volumes prepared by PwC for the Panel. |
| External stakeholder survey | Survey conducted of External Stakeholders of ASIC by Susan Bell Research for the Panel. |
| FAST Program | Flexible Advanced Surveillance Technologies — an ASIC project (2012-16) to improve capabilities in the identification, analysis and investigation of financial market integrity. |
| FCA | Financial Conduct Authority — the organisation responsible for regulation of capital markets and financial services in the United Kingdom. |
| FMA | Financial Markets Authority — the organisation responsible for regulation of capital markets and financial services in New Zealand. |
| financial markets | A generic term for markets in which financial instruments are traded. The four main financial markets trade in foreign exchange, fixed interest or bonds, shares or equities, and derivatives. |
| financial market infrastructure | The channels through which financial transactions are cleared, settled and recorded, including payments systems and trading platforms. |
| FSAC | Financial Sector Advisory Council — Australian non-statutory body comprising financial market participants that provides advice to the Government on financial sector policy. |
| FSI | Financial System Inquiry (also known as the Murray Inquiry) — the Government's 2014 inquiry into Australia's financial system. |
| FRAB | Financial Regulator Assessment Board. FSI recommendation 27 was that the Government create FRAB to advise Government annually on how financial regulators, including ASIC, have implemented their mandates. In its response to the FSI, Government declined to adopt this recommendation but decided to reconstitute FSAC. |
| GFC | Global financial crisis |
| internal governance forums | Fora tasked with ensuring effective risk management practices as well as supporting development and delivery of ASIC's strategic objectives. |

| Term | Definition |
|---|--|
| IOSCO | International Organisation of Securities Commissions |
| MAS | Monetary Authority of Singapore — the organisation responsible for regulation of capital markets and financial services in Singapore. |
| MDP | ASIC's (external) Market Disciplinary Panel — see Advisory panels. |
| MIG | ASIC's Market Integrity Group (internal). It comprises three market focused stakeholder teams (Financial Market Infrastructure, Market and Participant Supervision, and Investment Banks) and the Market Integrity Enforcement team. |
| MIS | Management information systems, for internal management (management dashboard reporting) and the ability to measure internal efficiency. |
| MoU | Memorandum of Understanding |
| MSAP | ASIC's (external) Market Supervision Advisory Panel — see Advisory panels. |
| OBPR | Office of Best Practice Regulation — part of the Department of Prime Minister and Cabinet which administers the Australian Government's requirements for regulatory impact analysis. |
| OSC | Ontario Securities Commission — the organisation responsible for regulation of capital markets and financial services in Ontario, Canada. |
| OTC | over-the-counter trading |
| Productivity Commission | The Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role is to help governments make better policies in the long term interest of the Australian community. |
| Parliamentary Joint Committee on Corporations and Financial Services | The Parliamentary Committee that monitors and reviews the Activities of ASIC and the operation of the corporations legislation. |
| PGPA Act | Public Governance, Performance and Accountability Act 2013 |
| PSA | Public Service Act 1999 — legislative framework for recruitment, remuneration and performance requirements of civil servants at the Commonwealth Government level. |
| PwC | PricewaterhouseCoopers |
| RBA | Reserve Bank of Australia — Australia's central bank. |
| SEC | Securities and Exchange Commission — the organisation responsible for regulation of capital markets and financial services in the United States. |
| SEBI | Securities and Exchange Board of India — the organisation responsible for regulation of capital markets and financial services in India. |
| SEL | Senior Executive Leader — senior staff level in ASIC. |
| Senate Inquiry | The 2014 inquiry by the Senate Economics References Committee into the performance of ASIC. |
| SES | Senior Executive Services — level in the Australian Public Service. |
| SFC | Securities and Futures Commission — the organisation responsible for regulation of capital markets and financial services in Hong Kong. |

| Term | Definition |
|-----------------------------------|--|
| SoE | Statement of Expectations |
| Sol | Statement of Intent |
| Supplementary Staff Survey | Survey conducted of ASIC Staff by PwC for the Panel. |
| Uhrig Report | Review of the Corporate Governance of Statutory Authorities and Office Holders, 2003; a report commissioned by the Australian Government |

APPENDIX D: STAKEHOLDER ENGAGEMENT

The following is a list of external organisations and individual stakeholders consulted with over the course of the Review.

| | |
|--|---|
| Allens/Linklaters | AUSTRAC |
| AMP | Baker & McKenzie |
| Anderson, Colin | Bank of Queensland |
| ANZ | Baxt AO, Robert |
| Applebee, Geoffrey | Bendigo and Adelaide Bank |
| Ashurst | Business Council of Australia |
| Asia Pacific Stock Exchange | Capital Markets Cooperative Research Centre |
| Association of Financial Advisers | Carnegie, Maile |
| Association of Independently Owned Financial Professionals | Centre for International Finance and Regulation |
| Association of Superannuation Funds of Australia | Centrepoint Alliance |
| Atanaskovic Hartnell | Chartered Accountants Australia & NZ |
| Atchison Consultants | Chi X Australia |
| Australian Bankers' Association | CHOICE |
| Australian Competition and Consumer Commission | Cilento, Melinda |
| Australian Federal Police | City Wealth |
| Australian Financial Markets Association | Clayton Utz |
| Australian Institute of Company Directors | Clifford Chance |
| Australian Institute of Superannuation Trustees | Comerton Forde, Carole |
| Australian Private Equity & Venture Capital Association | Comino, Vicky |
| Australian Prudential Regulation Authority | Commonwealth Bank of Australia |
| Australian Restructuring Insolvency and Turnaround Association | Commonwealth Director of Public Prosecutions |
| Australian Securities Exchange | Commonwealth Ombudsman |
| Australian Shareholders Association | Community & Public Sector Union |
| Australian Taxation Office | Company Auditors and Liquidators Disciplinary Board |
| | Consumer Action Law Centre |

| | |
|--|---|
| Corrs Chambers Westgarth | J.P. Morgan |
| Council on the Ageing | Johnson AO, Mark |
| Customer Owned Banking Association | Johnson Winter & Slattery |
| Davis, Kevin | Johnston OAM, Byram |
| DLA Piper | Jones, Kingsley |
| Ernst & Young | King & Wood Mallesons |
| Finance Industry Delegation | Kingsford Smith, Dimity |
| Financial Conduct Authority | Lazorne Group Pty Ltd |
| Financial Counselling Australia | Legal Aid NSW |
| Financial Ombudsman Service | Lifestyle Wealth Partners |
| Financial Planning Association of Australia | Mack, Jenni |
| Financial Rights Legal Centre | Macquarie Bank |
| Financial Services Council | Mason, Rosalind |
| Gilbert + Tobin | Members of the Australian Superior and Appellate Courts |
| Gonski AC, David | Minter Ellison |
| Good Shepherd Microfinance | Monetary Authority of Singapore |
| Google | Mortgage & Finance Association of Australia |
| Governance Institute | Murray AO, David |
| Hartnell, Tony | Murray, Michael |
| Henry Davis York | National Australia Bank |
| Herbert Smith Freehills | National Insurance Brokers Association |
| Hu, Henry | National Seniors Australia |
| Hughes, Sean | Northern Territory Police Force |
| HWL Ebsworth | Oliver Wyman |
| Independent Pricing and Regulatory Tribunal of New South Wales | On Market BookBuilds |
| Industry Super Australia | Ontario Securities Commission |
| Insurance Council of Australia | Petre, Clare |
| International Organisation of Securities Commissions | Piper Alderman |

PricewaterhouseCoopers

Promontory Financial Group Australasia

Property Council of Australia

Ramsay, Ian

Regional Institute of Australia

Reserve Bank of Australia

Segal AM, Jillian

SIRCA

Slater and Gordon

SocietyOne

Sparrow, Malcolm

Stockbrokers Association of Australia

Suncorp

Takeovers Panel

Taylor, Stephen

UBS

UniSuper

Westpac

APPENDIX E: ASIC'S RESPONSE TO THE PANEL'S REPORT TO GOVERNMENT

4 December 2015

Karen Chester
Mark Gray
David Galbally AM QC

By email

Dear Karen, Mark and David

We are pleased to attach ASIC's response to the capability review report to Government.

ASIC welcomes the final report of the capability review Expert Panel. ASIC is always looking to improve as a regulator and to develop our capabilities. The need for this is heightened by the pace of change in technology, the availability and use of data, and the growing complexity and globalisation of financial markets.

The capabilities we need to continue to develop to meet future challenges include:

- our ability to identify and assess significant developments and emerging risks in financial markets;
- our ability to respond strategically to market risks and problems, in a timely and effective manner; and
- our ability to facilitate legitimate business, especially in an environment of rapidly changing technology.

These capabilities require a sound strategic approach, a high quality workforce and a flexible and effective regulatory toolkit. These go to the heart of how ASIC can position itself as an effective regulator for the future.

We have considered the Panel's report and recommendations in the light of our objectives to further develop these capabilities. We share the Panel's views on many of the key issues confronting regulatory agencies. We support most of the recommendations, many of which are consistent with ASIC's own thinking about improving our capability. Our response sets out the areas where our thinking is aligned with the report and areas where our views diverge.

We look forward to working with Government as it considers the report and the way forward in strengthening ASIC's capabilities to face our future challenges.

Yours sincerely



GREG MEDCRAFT



ASIC

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1. Introduction

ASIC welcomes the final report of the capability review Expert Panel. This review has provided us with the opportunity to consider the capabilities we need for the future.

This review arose out of the recommendation of the Financial System Inquiry (FSI) that all financial regulators undergo periodic reviews to ensure they remain fit for purpose and have the capabilities to address future regulatory challenges. We welcomed this recommendation.

The review has been broad ranging, and makes many significant recommendations across the full range of ASIC's structure and activities. This response has necessarily been prepared in a constrained timeframe. Given the strategic significance of some of the proposals ASIC will need to consider a number of them in greater depth, including their resourcing implications.

ASIC actively engaged with the review Panel and its secretariat throughout the review period. We acknowledge the considerable work that has gone into producing the report. We would particularly like to thank the Chair of the review, Ms Karen Chester and panel members, Mr David Galbally AM QC and Mr Mark Gray, as well as the Treasury and PwC staff who supported them.

2. ASIC's capabilities and future regulatory challenges

ASIC is always looking to improve as a regulator and to develop our capabilities. The need for this is heightened by the pace of change in technology, the availability and use of data, and the growing complexity and globalisation of financial markets.

The PwC evidence report to the review finds that a consistent theme is 'the extent of change within ASIC in recent years, reflecting changes in market environment and emerging risks, funding reductions, and strategic initiatives driven by the Commission'.

The capabilities we need to continue to develop to meet our future challenges include our abilities:

- to identify and assess significant developments and emerging risks in financial markets;
- to respond strategically to market risks and problems, in a timely and effective manner; and
- to facilitate legitimate business, especially in an environment of rapidly changing technology.

These capabilities require a sound strategic approach, a high quality workforce and a flexible and effective regulatory toolkit. They go to the heart of how ASIC can be a more effective regulator.

We have considered the Panel's report and recommendations in the light of our objective to further develop these capabilities. That is, we have considered whether the recommendations and observations contribute in a significant way to helping ASIC become a more effective financial regulator.

We achieve many important outcomes for consumers and investors, including well over \$550 million in compensation since 2011, significant criminal outcomes in areas from insider trading to loan fraud, and over 500,000 unique visits per month to our MoneySmart website. The critical question is, how can we improve our capabilities to deliver more of these results into the future?

We have also considered how the report impacts on fundamental principles such as regulator independence, the importance of which was highlighted in the final report of the FSI.

3. The Panel’s findings and recommendations that we support

We share the Panel’s views on many of the key issues confronting regulatory agencies and we support most of its recommendations. Many recommendations are consistent with ASIC’s own thinking about improving capability. The recommendations represent important areas of focus to improve ASIC’s capacity over time.

This includes:

- refining our approach on the very difficult issue of performance measurement and reporting;
- continuing our work to improve and strengthen our internal culture, and our existing focus on workforce planning and staff capability development; and
- implementing the OneASIC project that is central to improving our regulatory processes and efficiency, our use of data and our ability to measure and report on our activities.

The review process highlighted a number of areas of strength for ASIC. For example, the report finds our work in market supervision and consumer education is in line with, or at the forefront of, global best practice. We welcome the finding that most elements of ASIC’s regulatory practice toolkit—including our surveillance, education, and policy guidance—are similar in approach to practices of our peer regulators and broadly appropriate for current and future needs. The findings about ASIC’s strengths are testament to the hard work and dedication of ASIC’s committed and professional staff. The review highlighted the strength in our workforce and leadership.

The report makes important recommendations for drawing on a wider group of stakeholders in ASIC’s corporate planning process, to identify strategic and emerging risks and develop plans to address them—both through our various external advisory panels, and through direct consultation. We recognise the importance of communication in helping stakeholders understand our priorities and what we can and cannot do. This is an important part of our overall transparency and accountability.

We welcome the Panel’s finding that ASIC has done much to improve its capabilities over the last four to five years, has recognised many of the gaps and issues identified by the Panel, and has launched a number of relevant initiatives, especially in the IT and data infrastructure areas. These are also outlined in more detail in PwC’s evidence report.

Our comments on each of the recommendations are summarised in the attachment to this response.

3.1 ASIC’s proposals to the Capability Review

The review has provided an occasion to outline our significant capability-building initiatives, as well as the issues we feel need to be addressed to best position ASIC to achieve our strategic objectives going forward. A number of the recommendations go to actions ASIC already has underway. A number are also consistent with ASIC’s own eight-point plan to improve our capabilities within our current funding, based around enhancing our people, powers, processes and technologies. We were pleased to have the opportunity to raise the proposals in the plan with the Panel.

The eight areas in ASIC’s plan are:

- **Budget:** Improving ASIC’s flexibility and agility in shifting our allocation of resources, and engaging in long term planning. The Panel has supported ASIC having greater long-term certainty over funding.

- **People:** Overcoming current limitations imposed by the requirement to employ staff under the Public Service Act. The Panel has recommended ASIC be removed from coverage by the Public Service Act (Recommendation 24).
- **Process and technology:** Undertaking regulatory transformation projects across ASIC which aim to transform and streamline the way that we capture, share and use information.
- **FSI:** Implementing key recommendations including an industry funding model, product design and distribution obligations and product intervention powers, and a review of ASIC’s enforcement toolkit.
- **Market licensing:** Implementing a more flexible, tiered market licensing arrangement.
- **Cooperation with other government agencies:** Leveraging from each other’s resources and capabilities, including through intelligence gathering and sharing. This aligns with the Panel’s findings that financial regulators could find more such opportunities to improve their cooperation, particularly around information sharing.
- **Co-operation with industry:** Including considering the establishment of a Financial Services Disciplinary Panel, as an industry peer review body to provide a more effective mechanism for addressing misconduct in the financial services industry. This accords with the Panel’s recommendation that ASIC proactively develop opportunities to enhance the use of co-regulation for selected groups of the regulated population where this will develop superior regulatory outcomes, including in the financial services area (Recommendation 28).
- **Registry separation:** Allowing ASIC to focus on its core regulatory business.

3.2 Leadership

ASIC strongly agrees with the Panel that leadership is fundamental to organisational effectiveness. It is an area of significant focus for ASIC, and we agree that this needs continual focus going forward.

In relation to ASIC’s leadership, both internal and external feedback is strong. The PwC report noted that ‘external stakeholders view the current capability of leadership positively’.

ASIC’s Orima staff survey also shows that, over the last five years there has been a large and sustained improvement in the results for Commission leadership: see Table

Table 16: ASIC’s Orima staff survey results: Commission leadership

| Orima staff survey—time series results—ASIC Commission | Improvement in result from 2010–15 | 2015 result (% strongly agree or agree) |
|--|---|--|
| Commission focus on results and outcomes | +17 | 78 |
| Commission leadership of the highest quality | +30 | 75 |
| Commission have clear priorities , vision and direction for the future | +28 | 72 |
| ASIC is well managed | +30 | 69 |
| Overall, how satisfied are you with Commission? | +25 | 67 |
| Communication between the Commission and employees is effective | +22 | 58 |
| The Commission listen and consider the views and opinions of employees | +26 | 55 |

A key finding in the PwC report about ASIC’s Commission was:

The current Commission is a mix of internal and external appointments creating a balance between continuity and fresh ideas. The staff interviews presented a positive view of the current Commission describing it as the most stable Commission in recent tenures. The improved level of diversity of thought in recent years was also a theme from staff interviews and roundtable discussions.

In the 2015 State of the Service Census, ASIC rated higher when compared to other Australian Public Service (APS) and APS regulatory agencies on every question related to senior leadership: see Table 17.

Table 17: 2015 State of the Service Census: Comparison of ASIC results with APS results — senior leadership

| | Percentage point outperformance compared to APS overall results | Percentage point outperformance compared to regulatory agencies | ASIC (% strongly agree or agree) |
|---|---|---|--|
| Q E21a: In my agency, the senior leadership is of a high quality | +18 | +9 | 70 ¹⁹² |
| Q E21b: In my agency, the most senior leaders are sufficiently visible (for example, can be seen in action) | +17 | +4 | 66 ¹⁹³ |

3.3 Workforce planning

We agree with Recommendation 24 to continue our Workforce planning practices. We will have implemented all the outcomes from the 2014–15 project in the first half of 2016. We believe we are well placed amongst our domestic and international peers in this work. The project is being led by regulatory Senior Executives with our People and Development team. The 2015 State of the Service census also showed us to be one of the top two large agencies in the area of building capability and developing people.

4. Findings that ASIC does not support

ASIC very much accepts that there are areas where we can and should address deficiencies in our operations and activities. Reviews such as the present one, play a valuable role in helping to identify areas for improvement, as many of report’s recommendations demonstrate.

However, if we are to most effectively work on our capabilities for the future, including prioritising key tasks, it is essential that existing problems be accurately characterised, and that there is an accurate identification of their scale. The risk is that findings that are inaccurate or based on misperception could result in recommendations that do not improve our capabilities or result in misallocation of resources to address issues or meet benchmarks for ASIC’s performance that are unrealistic or inappropriate.

192 20% neutral, 10% disagree.

193 17% neutral, 16% disagree.

The report outlines the capability assessment framework used by the review, and the sources of data and evidence reviewed. While we agree that the framework is broadly appropriate for a review of this kind, we have some concerns over the methodology through which some of the findings in the report were derived. For example, in a forward-looking review, some examples that have been selected to illustrate particular gaps in ASIC's capabilities are many years old, and do not reflect ASIC's current practices and Commission, such as criticisms around the decision by the previous Commission to impose a temporary ban on short selling in 2008. Additionally, the selection and presentation of data in some cases, including presenting some survey responses as a single data point (for example, simply citing a percentage of respondents that agreed or disagreed with a proposition, without setting out the, in some instances very high, numbers who were neutral or provided a 'don't know' response).

Five findings where we have particular concerns are:

- findings around expectations gaps;
- findings around Commissioners' split between strategic and operational focus;
- findings about ASIC's culture;
- findings about ASIC's efforts on deregulation; and
- futureproofing.

4.1 Expectations gaps

The report places much reliance on the idea that the 'expectations gap' for ASIC is much bigger than would be expected. This is an important issue, and ASIC recognises the need to understand the key dimensions of this gap. However, the report finds the gap is larger than expected in the absence of an objective benchmark for how great the expectations gap for a regulator should properly be. We are unaware of any such benchmark for regulators.

It is important to understand the context for discussions of an 'expectations gap'. There will inevitably be such a gap and a level of discontent in the regulated population for any market regulator. This is particularly relevant given the prominence of 'regulatory capture' as one of the key explanations for regulatory failure in the GFC. Ultimately it is not a regulator's role to be popular. Not surprisingly, comparing a survey of stakeholder views—including those against whom the regulator has taken enforcement and other action—with those of an internal survey of staff or leaders is likely to reveal gaps in views.

The report's manner of presenting the gap also tends to exaggerate its scale. Including the proportion of neutral or 'don't know' responses, which from stakeholders are generally high and in some cases exceed 50 per cent of total responses, would reveal that the position is far less clear cut than presented.

As acknowledged in the report, some part of the gap is constituted by the gap in stakeholders understanding of ASIC's role and powers rather than different perceptions of how well ASIC is fulfilling that role and exercising those powers.

This is particularly evident on some measures. For example, on the measure, ‘ASIC’s performance in helping the public become more financially literate is good/excellent’ the gap as presented in the report¹⁹⁴ is high at 58 per cent and the stakeholder score is low at 29 per cent. However, this is an area in which the report elsewhere concludes ASIC is at the forefront of global best practice. Further, 72 per cent of external financial literacy specialists rate ASIC as good or excellent.

Thus, the expectations gap will not in all cases be a reliable means of targeting resources at where capabilities most need improvement.

4.2 Commissioners’ strategic versus operational activities

Leadership in any complex organisation such as ASIC will inevitably involve both strategic and operational considerations—in many cases matters will involve both these considerations.

Adequate focus on strategic issues is rightly highlighted by the Panel. However, we do not accept the report’s presentation of the Commissioners’ allocation of time across these activities.

Firstly, we disagree that a binary distinction can be made—in absolute terms—between strategic and operational matters. Most matters at Commission level involve both strategic and operational elements. Secondly, the report places a great deal of emphasis on PwC’s analysis of Commissioner responses to a survey question on the use of their time, particularly on how much time is spent on strategic matters. Although PwC’s analysis of the results of that question evolved over time, resulting in the addition of a margin for error of 19 per cent, we consider the methodology used remains flawed. The methodological problems are exacerbated by the use of the result to compare ASIC with other regulators in terms of time spent on strategy, when no equivalent analysis has been done.

In fact, a detailed and methodical review of Commissioners’ diaries indicates that just over 70 per cent of Commissioners’ time is spent on strategic matters.

4.3 ASIC’s culture

We agree with the report that culture is critical to the performance of any organisation, including regulatory agencies, and we support the view that building a robust culture is a key task for all parts of the organisation. Our values—Accountability, Professionalism and Teamwork—are well understood across the organisation.

Culture is an important aspect of capability but it is complex. Care and accuracy is needed in identifying and understanding cultural issues so that work on improving culture can be effective and sustainable. The report acknowledges and describes the culture program we have undertaken.

We accept that we should look to improve our culture. However we do not agree with the report’s characterisation of ASIC’s culture and do not consider it provides a useful basis for improving capability. The report makes negative findings about our culture—that it is defensive, inward looking, risk averse, and reactive—without presenting meaningful evidence to justify this.

A difficulty in responding to a finding that we are defensive or reactive is that this may reflect poorly on ASIC whether we respond to it or not. If we challenge such a finding, this can invite criticism that such a response only confirms the finding. If we stay silent, we effectively agree with it. However, we are willing to acknowledge and learn from criticism.

194 Figure 8.

As the report itself states, the ASIC Capability Review is not the first process to examine how ASIC operates as a regulator, and we have learned constructively from all of them. We have instituted significant changes to practices and policies in many areas of ASIC’s work as a result of such reviews—to provide just a few examples: implementing a substantially upgraded policy around the management of whistleblowers, making major changes to how we approach and report on enforceable undertakings, and revamping ASIC’s approach to complaints about our decisions or actions.

In 2011 we undertook a culture diagnostic, which identifies the underlying values and beliefs in the organisation.¹⁹⁵ The diagnostic showed a culture with a strong achievement and teamwork orientation, but also one that, at times, is cautious and bureaucratic in approach. Based on the results of this exercise, we implemented a number of initiatives and changes to build on our strengths and manage the areas needing improvement. A second diagnostic was conducted in 2014, which showed improvement in the areas we targeted.

The PwC Evidentiary Report made findings about the strength of ASIC values (Accountability, Professionalism and Teamwork) and ‘how they are modelled by leadership as having a unifying effect on our culture’.¹⁹⁶

In relation to ‘professional confidence’ and ‘team safety’ referred to in the Panel’s report, our emphasis on psychological wellbeing is demonstrated by the psychological wellbeing program delivered to 300 ASIC people leaders in 2013–14. At the most fundamental level, this, together with our early intervention strategy has resulted in ASIC having the lowest workers compensation claim incident rate of all agencies insured by Comcare.¹⁹⁷ This is particularly important given the difficult and challenging work undertaken by regulators. A range of other ‘organisational health’ indicators such as turnover, absenteeism, performance and exit interview trends are monitored. These indicators are all stable and benchmark well against other agencies.

In terms of feeling confident to ‘speak up’ we pay particular attention to questions in the State of Service Census relating to, ‘feeling encouraged to speak up’, ‘admitting mistakes’ and ‘identifying problems’ and ‘access to effective learning and development’. Table 18 shows how our results compare to the APS overall and to other regulatory agencies.

195 The Barretts Cultural Values Assessment (CVA) tool was used. The tool looks at individual and organisational beliefs and practices and is internationally recognised as an effective cultural diagnostic tool. It has been used by large Australian financial services organisations.

196 PwC Evidentiary Report, Key findings.

197 Comcare comparative claims data, 2015.

Table 18: 2015 State of the Service Census: ASIC results versus APS—culture-related questions

| | Percentage point outperformance | | |
|--|---------------------------------|---------------------|----------------------------------|
| | APS Overall | Regulatory Agencies | ASIC (% strongly agree or agree) |
| P68c: Do senior leaders (that is, the SES) in your agency act in accordance with the APS Values? | +10 | +2 | 79 |
| P67d: When senior leaders in my agency identify a problem they take responsibility for it | +14 | +7 | 62 |
| P67e: People in my agency are encouraged to speak up when they identify a serious policy or delivery risk | +8 | +6 | 71 |
| P67f: In my agency, people are expected to admit mistakes and learn from them | +2 | +3 | 60 |
| F22k: My workplace provides access to effective learning and development (for example, formal training, learning on the job, e-learning, secondments) | +14 | +12 | 75 |

4.4 Deregulation

We agree with the Panel that an ability to identify and deliver on deregulation is an important capability of any regulator that seeks to facilitate the activities of compliant businesses.

However, the report’s finding that ASIC has failed to articulate its approach to delivering on its deregulation objective is not supported by the facts. In fact, ASIC has articulated this in detail in Report 391 *ASIC’s deregulatory initiatives* (REP 391), and through a number of other communications, including speeches made by our Commissioners. Since 2013, our deregulatory work has resulted in \$470 million in annual compliance cost savings, *or more than 10 per cent of all savings across the Government*. This remains a major area of focus for ASIC.

4.5 Future proofing

We accept that looking to the future is a key consideration when implementing IT changes. However, we do not agree with the report’s findings that we are not ‘future-proofing’ our technology.

We have chosen a well-recognised IT platform supported by external consultants, technology research and industry consultants like Gartner. While no one technology can ever be guaranteed, we looked closely at the best platform for our regulatory business requirements and conducted proofs-of-concepts before deciding on a Microsoft platform.

We are continuing to move our regulatory business onto a (predominantly) Microsoft platform (which other agencies of similar size are using), so that it is easier and cheaper to make products work together, to support them and to move to cloud offerings (when appropriate protected cloud offerings are available).

5. Recommendations ASIC does not support

ASIC supports the vast majority of the Panel’s recommendations. However there are a small number where we do not think they will assist us to be more effective as a regulator.

5.1 ASIC's approach to enforcement

The report recommends that we rebalance our public and internal communications about our role as an enforcement agency and states that enforcement is often a reactive tool. The Panel relies on evidence gathered through its external stakeholder engagement process, that stakeholders interviewed from the regulated population, the peak industry and professional bodies, and academics believe ASIC focuses too heavily on enforcement (see the PwC evidence report for further details).

In our view, we have the right balance between enforcement and non-enforcement tools, and, moreover, many of our regulatory strategies involve a mix of those tools. In the case of enforcement it is important for community trust and confidence that we communicate our important enforcement role and our enforcement outcomes ('justice must be seen to be done'). We often use multiple, non-enforcement tools where it is likely to achieve an effective result to address a market problem we have detected. However, it is also the expectation of the Government and the community alike that ASIC will, when it is appropriate to do so, enforce the law.

Credible deterrence is underpinned by strong public messaging about enforcement. According to IOSCO's recent report,¹⁹⁸ *'public messaging can deter misconduct when would-be wrongdoers know that regulators will publicise enforcement outcomes and sanctions imposed against individuals and entities'*. Our law enforcement capability is strongly influenced by our ability to effectively communicate a robust approach in this area.

We agree with IOSCO's findings. We think that these findings accord with the expectations of the public, the Government and the Parliament. Notably, the report's survey evidence, in contrast to the stakeholder engagement process, found that 28 per cent of the regulated population thinks ASIC places too little emphasis on enforcement with 39 per cent thinking the current balance is right, while 37 per cent of related stakeholders think ASIC places too little emphasis on enforcement with 45 per cent thinking the current balance is right.¹⁹⁹

For these reasons, we will not be rebalancing our emphasis on enforcement in our public communications.

5.2 Internal Governance

The Panel's report suggests that ASIC has an internal governance architecture that is sound and well designed, but for a variety of reasons has been used in a way that does not produce the best possible results.

ASIC's current internal governance model with Commissioners having both governance and operational responsibilities is not highly dissimilar to many other comparable regulators. For example, other comparable Australian regulators have Commissioners or other leaders who have clearly-specified specialist roles relating to particular aspects of the regulator's mandate and are involved in day-to-day operational matters, in addition to their overall governance responsibilities.

¹⁹⁸ *Credible Deterrence in the Enforcement of Securities Regulation*.

¹⁹⁹ PwC Evidence Report, Volume 3.

There are strengths and weaknesses in any structure. While the Panel's recommendations around ASIC's internal governance structures are aimed at ensuring good internal checks and balances:

- we are concerned that some of the problems the report identifies as requiring this change in internal structure are misconstrued; and
- to the extent that there are issues in ASIC's current structure that could be addressed through change, the new model recommended by the report will not ultimately serve to improve our capability.

We have commented above on the report's findings about Commissioners' use of time, and the split in their focus between strategic and operational matters. We also have some concerns about the model proposed to address the problems that have been identified, and that this could undermine ASIC's capability, rather than enhance it:

- On the creation of the Head of Office role, it is unclear how such a role would work effectively and improve capabilities and accountability in an organisation of ASIC's size and complex mandate. It risks establishing a single point of failure, including through a very broad responsibility and heavy workload, as well as adding an additional layer of management. Despite being presented as a relatively simple internal change in the report, we note that it may also involve a second additional layer of management, in a series of 'group leader' positions. The changes involved have not been costed.
- While the report still contemplates that Commission would be involved in 'making strategic and material regulatory decisions from a whole of entity perspective', this neither recognises that the number of such decisions for a regulator like ASIC is very large, nor the fact that such decisions cannot be made by engaging with issues at a superficial level or on an irregular basis—they require a depth of operational understanding to complement a strategic perspective.
- Commissioners who are engaged in this way can see the strategic perspective within operational issues—like our response to financial advice and planning scandals, which the report dismisses as a 'topical issue', when, as recognised by the FSI, it is a major structural issue of central importance to consumers and their retirement savings.
- Overall, the report does not clearly identify how the new model is likely to improve ASIC's internal accountability.

We think that there is value—both for industry engagement and for staff accountability—in having Commissioners who take a strategic view, but also understand the operations of the organisation. A key aspect in our current structure is that the Commission needs to work as a team, relying on each member, as equal partners sharing responsibility for collective outcomes.

Our structure came out of a detailed examination of the issues by McKinsey during the 2008 ASIC Strategic Review. It is designed to achieve benefits of having stakeholder teams that are outwardly focused, that stay close to the markets they regulate, and have clear objectives. It is designed so that the Commissioners who oversee those areas have a deep understanding of the issues involved. Consistent with ASIC's broad, diverse mandate, this means a less centralised approach than is implicit in some of the report's recommendations; however, we generally consider it has worked well. Underlying some of the report's recommendations is a fundamental philosophical difference of opinion about the degree of centralised control that is appropriate in a regulator with a broad mandate like ASIC.

To be effective, the Commission role will always need to involve some element of involvement in operations; however, it is important to get the right balance between strategic and operational focus in leadership.

6. Other recommendations: Accountability and independence

ASIC is an independent government entity. International principles of securities regulation emphasise the need for regulators like ASIC to be both accountable and operationally independent in the exercise of their functions and powers.²⁰⁰

The Panel has made a number of recommendations aimed at ensuring ASIC is held to high standards of accountability and we support this aim. While some recommendations are primarily for the Government to consider, ASIC supports measures designed to ensure effective government oversight of our operations. For example, ASIC already has a productive relationship with Government and would always be willing to increase that level of engagement.

The challenges in balancing independence and accountability were recognised in the FSI Final Report:

Strong, independent and accountable financial regulators are crucial to the efficient, stable and fair operation of the financial system. Independence is important to ensure supervisory effectiveness, maintain Australia's reputation as a safe and attractive investment environment, and meet relevant international standards.

*To this end, independence should be maximised to the greatest extent possible, together with clear and robust accountability mechanisms that provide appropriate checks and balances.*²⁰¹

There are implications for independence implicit in some Panel recommendations around our organisational structure and ministerial assessment of the Commission's performance. There is a need to keep independence in mind in any implementation of those recommendations.

The report has made some findings about the nature of the Parliamentary oversight process. Parliamentary oversight is a fundamental aspect of a Westminster system, and the Parliamentary process ASIC participates in reflects community expectations about how regulators should be held to account. The report characterises some matters that Parliamentary Committees have focused on, such as financial planning scandals, as 'topical'. ASIC considers the problems in financial planning as a clear example of how intertwined operational and strategic matters can be, and as entirely appropriate for close Commission involvement and for close Parliamentary scrutiny.

7. Additional areas for capability improvement not addressed in the review

As well as the recommendations in the report, ASIC has identified areas where we believe our capabilities can be improved that have not been covered in detail in the review. Some of these are in our Eight Point Plan set out in Section 3.1.

200 IOSCO Principles and Objectives of Securities Regulation, Principle 2.

201 See: <http://fsi.gov.au/publications/interim-report/07-regulatory-architecture/independence-accountability/>.

Two areas in particular are key to ASIC's capacity to effectively regulate in a complex and changing environment.

- Firstly, ASIC's regulatory and enforcement toolkit needs to be broader and more flexible so that ASIC can meet the challenge of increasing complexity and change in financial markets. This issue was acknowledged in the FSI's final report. The report's focus does not cover the recognised limitations in ASIC's toolkit that reduce our flexibility to address emerging issues and improve market outcomes. For example, there are substantial deficiencies in breach reporting obligations that substantially undermine the objective of requiring market participants to report misconduct within their own firms. There are also significant inconsistencies in ASIC's penalty regime. There is little discussion of how product intervention powers, supported by new product design and distribution obligations for product issuers and distributors, could enhance outcomes.
- A second area is the issue of the information that ASIC formally requires from market and industry participants. While this is more comprehensive in some parts of ASIC's jurisdiction, in the financial services area in particular it is limited in compared to many peer regulators. This inhibits ASIC's ability to track market developments and utilise data to help understand emerging risks and set priorities.

We highlight these issues as we believe they have the potential to improve ASIC's ability to ensure better market outcomes for consumers and investors as well as market participants.

8. Implementation

The report includes an implementation plan with actions and timing against each recommendation. This represents a more detailed approach than capability reviews of other Australian agencies. We welcome the effort that the Panel has put into considering the issues around implementation.

We have not had sufficient time to properly consider the implementation implications of all the recommendations at this point. Given other important priorities on ASIC's agenda, including major government policy initiatives, we will need to carefully consider how we can best prioritise the various proposals.

As we have set out in this response, we are already implementing or working on several of the actions proposed in the review. In other cases, we will need to consider the issue further, in order to fully understand the problem identified, consult with stakeholders and develop the best solution based on that understanding. In others, while we support the recommendation (as set out in the attachment to this response), we do not necessarily consider that the stated implementation approach is the best way to achieve the recommended outcome. For example, the use of external consultants may not be necessary in each case where it has been suggested.

9. Conclusion

We reiterate our welcome of the review as an opportunity to improve as a regulator and consider the capabilities that we will need into the future.

We have accepted and endorsed the great majority of the Panel's recommendations, and appreciate the findings and observations that accompany them.

There remain a small number issues for further consideration or where ASIC has not supported the Panel's ultimate recommendation. These relate primarily to the Panel's recommendations on ASIC's internal governance arrangements and our approach to communicating our enforcement work. We have also noted the need to maintain the right balance between independence and accountability in any new external governance arrangements.

We thank the Panel and its secretariat again for all of the work that has gone into the ASIC capability review and its final report.

Attachment: Panel recommendations—ASIC response

| Subject | Panel recommendation | ASIC response |
|---------------------|--|--|
| External governance | <p>Recommendation 1: The Minister and ASIC to implement a more effective strategic long term oversight function, underpinned by a mutual commitment to a more proactive regular ongoing dialogue. As steps to achieving this:</p> <p>The Minister to provide an Annual Ministerial Statement in Parliament, in conjunction with tabling of ASIC’s Annual Report on the degree to which ASIC meets the expectations of the SoE and is performing in the achievement of its mandate.</p> <p>The Government and ASIC to enhance the SoE and Sol to clearly and regularly communicate expectations (to be reviewed annually), and to ensure mutual understanding and support ASIC in managing stakeholder expectations.</p> | <p>While in part a matter for government, ASIC supports this recommendation. ASIC notes that this may have implications for the oversight of similar government agencies and would best be integrated with existing performance measurement and reporting frameworks.</p> |
| | <p>Recommendation 2: ASIC to continue to refine the performance reporting framework, including consolidating performance reporting (to ensure consistency between reporting frameworks), aligning internal performance metrics, improving the use of performance narrative, and identifying the opportunities for more sophisticated analytics.</p> | <p>ASIC supports this recommendation, as it reflects work that we are currently undertaking.</p> <p>We welcome consolidation of the requirements for regulator performance reporting. However, any changes may have implications for similar government agencies.</p> |
| Internal Governance | <p>Recommendation 3: ASIC to realign internal governance arrangements by elevating the current Commission role to that of a full time non-executive function (not an external board), with a commensurate strategic and accountability focus, free from executive management responsibilities.</p> | <p>ASIC does not support these recommendations</p> <p>The recommendations would not, in our view, enhance ASIC’s capabilities or strengthen accountability, as:</p> <p>they would add an additional layer of management;</p> <p>they would lengthen the accountability chain; and</p> <p>Commission would ultimately need to remain responsible for operational and strategic risks.</p> |
| | <p>Recommendation 4: ASIC to establish a new Head of Office (HoO), with ultimate responsibility and accountability to the Commission for all executive management functions.</p> | <p>These recommendations represent a significant change to our organisational structure and consequently, our operation.</p> |
| | <p>Recommendation 5: SELs to be delegated executive functions, reporting to the HoO.</p> | <p>Our current structure reflects the requirements under the ASIC Act and the detailed analysis done in 2008 McKinsey Review of ASIC.</p> |
| | <p>Recommendation 6: ASIC to review this structure in ~3 years to review the size of the Commission and whether the roles of the Commissioners need to continue to be full time.</p> | |
| Leadership talent | <p>Recommendation 7: The Government to apply a contemporary best practice merit based recruitment process to ensure transparent and fair appointments of the Chair, Deputy Chair and other Commissioners.</p> | <p>This is a matter for Government. ASIC supports this recommendation and notes that all current Commissioners have been appointed on merit.</p> |
| | <p>Recommendation 8: ASIC to implement a periodic forward looking skills gap assessment of the Commission to identify and inform future recruitment needs.</p> | <p>ASIC supports this recommendation, as it reflects ASIC’s current practice.</p> |
| | <p>Recommendation 9: ASIC to implement a Commission effectiveness review to assess performance on an ongoing basis.</p> | <p>ASIC supports this recommendation.</p> |
| | <p>Recommendation 10: ASIC to develop a formal individual performance review process for the Commissioners, led by the Chair.</p> | <p>ASIC supports this recommendation. We welcome processes that facilitate the professional development of Commissioners and the Chair. We also regard it as important that any review process enable the Commissioners to provide performance feedback to the Chair.</p> |
| | <p>Recommendation 11: The Minister to assess the effectiveness and performance of the Commission, to be discussed with the Chair on an annual basis.</p> | <p>This is a matter for Government.</p> <p>We support processes which facilitate the professional development of the Commission, while preserving our independence.</p> |

| Subject | Panel recommendation | ASIC response |
|-------------------------|--|--|
| Culture | Recommendation 12: ASIC to initiate a review of ASIC’s organisational culture and as part of that review assess the merit of implementing Google’s Project Oxygen team based assessment program to inform development of Commission strategy for high performance team culture. | ASIC supports this recommendation, as it reflects work that we have already undertaken. We will continue to monitor our culture using the most appropriate tools. |
| Strategic development | Recommendation 13: ASIC to substantially improve the intended approach for the delivery of the Corporate Plan in both the public document itself and the underlying Business Unit Plans. This should include greater specification of intended actions as well as timing, resourcing and organisational implications. | ASIC supports this recommendation in principle and will give further consideration to how greater specificity around intended actions can be most effectively conveyed. Information on the timing, resourcing and organisational implications of ASIC actions is currently contained in team business plans and individual project plans, which are not publicly available While inclusion of all the relevant information in the Corporate Plan would compromise its readability, we will consider a multi-layered approach, through links from the Corporate Plan to relevant parts of those underlying plans. |
| | Recommendation 14: ASIC to improve the selection of performance indicators to ensure that the measures associated with the Key Activities for each Focus Area are: (i) reflective of the activities and their desired outcomes; and (ii) aligned to the internal performance indicators captured in the relevant Business Unit Plans, and to ASIC’s enterprise-wide performance indicators. | ASIC supports this recommendation, as it reflects work that we are currently undertaking. |
| | Recommendation 15: ASIC to review and introduce a more outcomes focused and dynamic use of advisory panels to ensure these forums input more directly into strategic management, and introduce a broader public consultation elements into the strategy setting process. | ASIC supports the recommendation for broader consultation on elements of the strategy-setting process. It reflects work that ASIC is already undertaking. We think that our advisory panels are working well and will carefully consider measures to further improve their effectiveness. |
| Strategic communication | Recommendation 16: ASIC to further clarify and emphasise its expectations and risk tolerances (what the regulator will and will not be doing) and actively advertise and promote the strategy broadly (see Chapter 2 for further recommendations related to the Sol). | ASIC supports this recommendation. ASIC will continue to help stakeholders understand ASIC’s role and current focus. However, experience worldwide suggests that some expectation gap will remain. |
| | Recommendation 17: ASIC to ensure the strategic framework used in developing the Corporate Plan is used consistently throughout the communications. | ASIC supports this recommendation. |
| | Recommendation 18: ASIC to develop a comprehensive communications strategy that places greater emphasis on communication of the organisation’s strategic priorities. | ASIC supports this recommendation. |
| | Recommendation 19: ASIC to rebalance its public and internal communications about its role as an enforcement agency. | ASIC does not support this recommendation. There is a clear government and public expectation that ASIC will enforce the law, and clearly and transparently communicate how it is doing this. |
| Resource allocation | Recommendation 20: ASIC to ensure the top-down allocation of resources are deployed across the organisation based on strategic priorities. | ASIC supports this recommendation, as it reflects ASIC’s current practice. |

| Subject | Panel recommendation | ASIC response |
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| Workforce capabilities and management | Recommendation 21: ASIC to increase the scale and diversity of the secondment and exchange program. | ASIC supports this recommendation. In implementing this recommendation, there will be a need to carefully manage actual and perceived conflicts of interest. |
| | Recommendation 22: ASIC to improve workforce planning to include a more forward looking, strategy informed, top-down view (progressing and internalizing work to date) | ASIC supports this recommendation, as it reflects work that ASIC is undertaking through our workplace capability project. |
| | Recommendation 23: ASIC to refresh its career value proposition to help attract and retain staff and support future secondment, by clearly articulating and tailoring messaging, and identifying strategies to deliver on this message (that is, to ‘make it real’) | ASIC supports this recommendation. A refresh of our current Employment Value Proposition is part of the Workforce Capability Project plan. |
| | Recommendation 24: Government to remove ASIC from the PSA as a matter of priority, to support more effective recruitment and retention strategies. | This is a matter for government. ASIC supports this recommendation. |
| Organisation structure | Recommendation 25: ASIC to launch a pilot project to assess the suitability of dedicated project based teams to improve flexibility across units and reduce the impact of silos. | ASIC supports this recommendation, as it reflects ASIC’s current practice. ASIC regularly uses project based teams to meet particular risks or achieve particular initiatives. |
| | Recommendation 26: ASIC to implement a regular review of internal business processes and systems, supported by improvements in MIS to drive operational efficiency and reduce the cost burden on regulated entities. | ASIC supports this recommendation. This recommendation has resourcing implications. ASIC notes that current projects (eg One ASIC) will also improve efficiency and business processes. |
| Regulatory toolkit | Recommendation 27: ASIC to enhance enforcement effectiveness through developing a more targeted risk based approach to litigation for cases that are strategically important, and prosecutes through more focussed pleadings and strategic appointment of senior counsel. | ASIC supports this recommendation, as it reflects ASIC’s current practice. ASIC’s Enforcement teams have a strong commitment to continual improvement through its ‘lessons learned’ reviews. We have a strong record in bringing successful enforcement actions. |
| | Recommendation 28: ASIC to proactively develop opportunities to enhance the use of co-regulation for selected groups of the regulated population where this will deliver superior regulatory outcomes, including through strengthened licensing and registration regimes. | ASIC supports this recommendation. ASIC already pursues, and has developed co-regulatory approaches, where this is justified by the nature of the industry involved and the risks posed. ASIC is currently considering the establishment of a Financial Services Disciplinary Panel, as an industry peer review body to provide a more effective mechanism for addressing misconduct in the financial services industry. The Panel could potentially be empowered to issue infringement notices and impose administrative sanctions. |
| Stakeholder management | Recommendation 29: ASIC to develop and implement a formal tiered stakeholder relationship model based on entity nature, scope, risk and complexity | ASIC will consider the Panel’s recommendation and will consult with stakeholders to understand the issues and best model to address any deficiencies identified. |
| | Recommendation 30: ASIC to recalibrate advisory panel setup to ensure more systematic value add eg through a larger pool of experts that can be called upon to advise on various issues as needed based on issue-specific needs and expertise gaps, coupled with regular performance assessment and enhanced internal responsibility to act on recommendations. | ASIC supports measures to even further improve the effectiveness of our advisory panels and will consider the Panel’s recommendation. ASIC has committed to formalising the process for distributing panel input throughout ASIC. |

| Subject | Panel recommendation | ASIC response |
|-----------------|--|---|
| Data management | Recommendation 31: ASIC to execute its OneASIC (FAST 2) infrastructure overhaul program, 'future-proofing' design and expanding scope as required. | ASIC supports this recommendation. ASIC will deliver the first phase of the OneASIC program at the end of 2016. Further work on the OneASIC program is dependent on funding. |
| | Recommendation 32: ASIC to launch new programs of work to close additional identified gaps, for example, to enhance the ability to measure and report for MIS. | ASIC supports this recommendation. ASIC will further consider the availability of management information required for internal management and the capacity to measure internal efficiency. The timing for the commencement and delivery of this work would be subject to available funding and resources. |
| | Recommendation 33: ASIC to 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. | ASIC supports this recommendation. ASIC will develop a funding proposal to invest in the further development and application of big data 'reg-tech' analytics and building on our current skills/capabilities. We will do so after assessing the use of 'reg-tech' data analytics by peer regulators during 2016 and considering any gaps in the context of ASIC's current data analytics applications. |
| | Recommendation 34: ASIC, in conjunction with the CFR, to develop a forward work program to design and implement open data policies and data analytic collaboration. | ASIC will raise this recommendation for consideration by members of the CFR. |