REGULATING THE REGULATORS: ACCOUNTABILITY OF AUSTRALIAN REGULATORS

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[This article examines the accountability of Australian regulators, focusing on the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority. It defines what is meant by accountability and what regulators should be accountable for. The challenges involved in holding regulators to account are also explored. Against this background, the article reviews the mechanisms used to ensure accountability of regulators, ranging from the traditional and transparent legal mechanisms, such as judicial review, to the administrative and comparatively unrecognised mechanisms, such as tied funding. The article concludes that in spite of frequent calls for increased accountability, the case for change is not overwhelming. Australian regulators are subject to a comprehensive array of accountability mechanisms. However, improvements can be made, in particular to find a better balance between accountability on the one hand and the independence, expertise and efficiency of regulators on the other.]

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I INTRODUCTION

There are frequent calls for regulators to be more accountable. Such calls are a mainstay of media and political debate.[1] They are also common in the academic literature.[2] However, those calling for increased accountability do not necessarily articulate what they mean by accountability and why, in light of that definition, the existing accountability mechanisms are inadequate. Further, they may not explain exactly what additional accountability mechanisms they would impose, why those additional mechanisms would not merely duplicate existing accountability mechanisms and how additional mechanisms would address the challenges involved in holding regulators to account.

This article examines these issues in relation to Australian federal regulators, focusing on the two key financial market regulators: the Australian Securities and Investments Commission ('ASIC') and the Australian Prudential Regulation Authority ('APRA'). This article explores:

- the meaning of 'accountability';
- why regulators should be accountable;
- what regulators should be accountable for;
- the challenges involved in holding regulators to account;
- the existing accountability mechanisms for Australian regulators; and
- whether changes in accountability mechanisms are required.

1 See, eg, David Bushby, 'Holding APRA to Account', *Money Management* (online), 11 August 2011 <http://www.moneymanagement.com.au/opinion/financial-services/archive/holding-apra-to-account>; Henry Ergas, 'Regulate the Regulators', *The Australian* (Sydney), 15 April 2011, 12. See also Chris Berg, *The Growth of Australia's Regulatory State — Ideology, Accountability and the Mega-Regulators* (Institute of Public Affairs, 2008); John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Commonwealth of Australia, 2003) 52–5 ('*Uhrig Report*'). As early as 1937, the President's Committee on Administrative Management (commonly known as the Brownlow Commission) in the United States warned about regulatory commissions being unaccountable: Martin Lodge and Lindsay Stirton, 'Accountability in the Regulatory State' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 349, 353.

2 See, eg, Margaret Hyland, 'Is ASIC Sufficiently Accountable for Its Administrative Decisions? A Question of Review' (2010) 28 *Company and Securities Law Journal* 32; Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 1999) 286–7 n 2. Colin Scott points out that public lawyers almost universally regard accountability mechanisms as inadequate: Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38, 42.

II What Is Accountability?

Definitions of 'accountability' generally focus on the idea of giving account of one's actions to some other person or body.[3] Under these definitions, a regulator is accountable if it is required to explain or justify its actions to another person or body.

However, at least some advocates for the increased accountability of regulators probably want more than explanation and justification. They want a *response* to the regulator's explanation or justification which goes above and beyond the non-binding recommendations or negative publicity that may (ordinarily) follow from the regulator's explanation and justification. That response may be to reverse the regulator's decision if it does not meet the required standard. Alternatively, it may be to impose some sort of penalty, such as removal from office in much the same way that directors may be removed from office (or not re-elected) if their performance does not meet the standard required by the company's members. The penalty imposed may even be some form of civil or criminal sanction in much the same way that directors of a company may be liable if they fail to meet the standard of care of a reasonable director[4] or fail to act for a proper purpose in the interests of the company.[5]

In this article, accountability mechanisms that merely require regulators to explain and justify their actions are described as 'weak' accountability mechanisms, and those that involve some sort of response (if the regulator does not meet the required performance standard) are labelled 'strong' accountability mechanisms.

III Why Should Regulators Be Accountable?

Regulators are agents; they act on behalf of the government and, ultimately, on behalf of the public.[6] In acting on the government and public's behalf they exercise fairly extraordinary powers. Regulators exercise governmental or public powers because they: make laws or regulations;[7] compel public and governmental compliance with their demands;[8] and impose penalties.[9] Further, they receive a substantial amount of public money.[10]

3 See, eg, Susan Butler (ed), *Macquarie Dictionary* (5th ed, 2009) 11.

4 *Corporations Act 2001* (Cth) s 180.

5 Ibid ss 181, 184.

6 Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, 2004) 111.

7 For example, APRA makes prudential standards that have the force of law: see, eg, *Banking Act 1959* (Cth) s 11AF. ASIC can modify, or exempt parties from complying with, provisions of the *Corporations Act 2001* (Cth): see, eg, *Corporations Act 2001* (Cth) s 926A.

8 For example, under *Australian Securities and Investments Commission Act 2001* (Cth) s 19, ASIC can require a person to give to ASIC all reasonable assistance in connection with an investigation and to appear for an examination on oath before a specified staff member. ASIC may also inspect books without charge: s 29. ASIC can also require the production of books and documents: ss 30, 31–3.

9 For example, ASIC may make banning orders that prohibit persons from participation in the financial services industry: *Corporations Act 2001* (Cth) ss 920A–920C.

10 For example, ASIC is largely funded by allocation in the federal budget. However, its market supervision costs are recovered from industry participants: see *Corporations (Fees) Regulations*

Agents should be accountable to their principals for the manner in which they exercise the powers and discretions given to them, and for the way in which they expend the principal's resources. Therefore, regulators should be accountable to the government and, ultimately, to the public.

Accountability is linked to legitimacy.[11] In democracies we tend to believe that the legitimacy of governmental or public power principally derives from accountability to the electorate.[12] Regulators exercise government or public powers and yet they are not directly elected; they do not have democratic legitimacy. Therefore, we need to find other ways to make regulators accountable to the public and, consequently, legitimate.

IV WHAT SHOULD REGULATORS BE ACCOUNTABLE FOR?

As stated above, regulators should be accountable for the way in which they exercise their powers and discretions and for the way in which they expend resources. That is, they should be accountable for everything they do. Ogus talks of three types of accountability: financial accountability, procedural accountability and substantive accountability.[13] In relation to the first type of accountability, regulators should satisfy high standards of financial management because they are spending public money. In relation to the second, regulators' procedures should be fair and impartial and comply with administrative law principles because they are exercising public power.[14] Finally, regulators should be accountable for their substantive decisions. They should be accountable for the policies and regulations they make and their administration of the regulatory regime, which includes, for example, the way they conduct licensing processes, the approvals they give, and the way they maintain public records and registers. They should be responsible for their compliance and enforcement decisions. Perhaps most importantly, regulators should be responsible for the overall management of their regulatory regime, that is, the priorities they set and how they allocate their resources. All these substantive decisions should achieve the public interest goals of the regulatory regime that the regulator administers.

2001 (Cth). APRA is largely funded by levies, which are imposed on the industries it regulates: see *Australian Prudential Regulation Authority Act 1998* (Cth) s 50; *Financial Institutions Supervisory Levies Collection Act 1998* (Cth).

11 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 221. According to Freeman, legitimacy is defined as 'when the public accepts decisions without having to be coerced': Jody Freeman, 'Private Parties, Public Functions and the Real Democracy Problem in New Administrative Law?' in David Dyzenhaus (ed), *Recrafting the Rule of Law — The Limits of Legal Order* (Hart Publishing, 1999) 331, 331.

12 Berg, above n 1, 58.

13 Ogus, above n 6, 111.

14 Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* (2008) 12.

V What Are the Challenges?

There are two significant challenges facing those who wish to call regulators to account, especially those who wish to impose strong accountability mechanisms.

First, for regulators at least, accountability is not an absolute good. It has diminishing and, eventually, negative returns because in general it undermines other desirable attributes of a regulator, namely, independence, expertise and efficiency.

Secondly, the accountability of regulators is hampered by the difficulty of effectively measuring and assessing their performance. It is very difficult to hold someone to account if you cannot actually determine when they have performed well and when they have performed badly.

A *Trade-Off between Accountability and Independence, Expertise and Efficiency*

Governments create independent regulatory bodies primarily to ensure that decisions are made by those with expertise[15] and independence.[16] Governments have decided that it is in the public interest if certain decisions are made by those who possess specialist expertise. The complex and technical nature of the modern world means that no one group is in a position to develop the expertise to successfully govern all aspects of society. Parliamentarians, as a group, are unlikely to develop the expertise necessary, for example, to determine the appropriate capital adequacy and liquidity standards for Australian authorised deposit-taking institutions[17] one day and to determine whether to authorise the operation of a nuclear facility[18] the next.

Arguably, groups of public servants within government departments could develop this expertise and provide advice to their Ministers. However, governments have also decided that the public interest will be better served if certain regulatory and administrative decisions are made by people who are separated from the political process.[19] Such persons do not have to appeal to populism or appease vocal lobby groups to ensure re-election or reappointment. They have the luxury of taking a long-term and expert view of the public interest, whereas

[15] In his 1938 book *The Administrative Process*, James Landis (one of the inaugural Commissioners of the United States Securities Exchange Commission) justified the creation of regulators substantially on the basis of expertise, arguing that the technical nature of their tasks meant specialisation and expertise were necessary: James M Landis, *The Administrative Process* (Yale University Press, 1938), discussed in Thomas K McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D Brandeis, James M Landis, Alfred E Khan* (Belknap Press, 1984) 213. See also Ogus, above n 6, 105.

[16] Ogus, above n 6, 105–6; Baldwin and Cave, above n 2, 70. For another reason why governments create government bodies, see text accompanying below n 21. Regulators also allow the combination of different functions (eg regulation-making and enforcement) in a way that is not often possible in other institutions: Baldwin and Cave, above n 2, 70.

[17] This is the responsibility of APRA: see *Australian Prudential Regulation Authority Act 1998* (Cth) s 9.

[18] This is the responsibility of the Australian Radiation Protection and Nuclear Safety Authority (‘ARPANSA’): see *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth).

[19] Lodge and Stirton, above n 1, 350.

the electoral cycle means that politicians, and those directly answerable to them such as government departments, have strong incentives to take a short-term view.

Therefore, the very purpose of regulators (that is, to act with expertise and independence) is undermined when they are held to account, especially using strong accountability mechanisms that lead to responses imposed by those who do not possess the same level of expertise and independence as the regulators. This is the accountability dilemma:

> Particular institutions may be designated as regulators because their expertise and independence from political influence maximize the prospects of their fulfilling public interest goals. Those prospects are reduced if their judgments may be overridden by other bodies which do not combine the same degree of expertise and political independence.[20]

Cynics may also add an additional reason — beyond the reasons of expertise and independence — for the creation of regulators. Governments and Parliaments may create regulators out of a desire to distance themselves from potentially unpopular decisions.[21] For example, from a political perspective, it is preferable for an independent body to decide to raise interest rates. Of course, if this is the reason for the creation of a regulator neither the government nor the Parliament will have an interest in ensuring strong accountability mechanisms; the imposition of a strong accountability mechanism will involve some assumption of responsibility for assessing and, perhaps, changing the decision of the regulator. So even from the cynic's perspective there is a trade-off between accountability and the raison d'être of the regulator.

Another trade-off is between accountability and efficiency. Accountability may significantly undermine efficiency. For example, every minute regulators spend explaining or justifying themselves to another party, such as a parliamentary committee, is a minute that the regulator is not performing its core functions. Consultation with stakeholders slows down a regulator's response to regulatory issues,[22] as do requirements to produce and publish regulatory impact analyses.[23]

This is not an argument that regulators should not be required to explain and justify their actions, and consult or conduct regulatory impact analyses. In fact, the regulator's knowledge that it may be called on to explain and justify its actions creates strong incentives to ensure that its actions are, in fact, explicable and justifiable. Likewise, consultation and regulatory impact analysis generally lead to improved regulatory decision-making.[24] So in this way, appropriate accountability mechanisms will significantly improve regulators' performance of their core functions.

[20] Ogus, above n 6, 117. See also ibid.
[21] Berg, above n 1, 58.
[22] Lodge and Stirton, above n 1, 365.
[23] Consultation and regulatory impact analysis requirements are discussed below in Parts VI(B)(3) and VI(C)(3).
[24] This observation is based on the author's experience working in the regulatory policy area at ASIC from 2001 to 2009.

Nevertheless, it must be acknowledged that accountability involves trade-offs — regulators are distracted from their core functions, their responses slow down and, as stated above, their expertise and independence is undermined. Accountability, therefore, has to be balanced against efficiency, expertise and independence. We must understand the costs of accountability and accept that the gains from accountability will eventually be offset by losses. Baldwin and Cave summarise the challenge facing those who are devising accountability mechanisms as follows:

> it would be a mistake to assume that any improvement in accountability that can be devised will always be in the public interest. As is usually the case in regulation, trade-offs are at issue. The abilities of regulators to develop and apply their expertise, to operate efficiently in pursuit of their mandate, and to function in a transparent and accessible manner, may all be prejudiced by ill-judged moves to increase accountability. Where, for instance, review procedures allow other institutions (be they ministers, courts, or specialist review bodies) to second-guess regulators, there may be a holding to account but there may also be: decisions by officials who are less expert than the specialist regulators being reviewed; duplications and confusion of policy; delays in processes; and the removal of real decision-making power to bodies less transparent and accessible in their operations than those under review.[25]

Therefore, those devising accountability mechanisms must find an uneasy balance between accountability and these other desirable attributes.

B *Difficulty of Measuring and Assessing Regulatory Performance*

Another significant challenge confronting those calling for increased accountability of regulators stems from the difficulty of measuring and assessing substantive regulatory performance. Given the complex nature of many regulatory mandates, it is notoriously difficult to set meaningful performance measures or standards for regulators and to actually measure their substantive, as opposed to procedural or financial, performance.[26]

ASIC, for example, has a statutory mandate that involves both business facilitation and consumer protection.[27] Accordingly, it is constantly required to balance somewhat inconsistent goals. It also has an incredibly broad area of responsibility. It regulates corporations, consumer credit, financial markets and financial services. This brings with it responsibility for 1.84 million companies,[28] 4883 Australian financial services licensees, 17 licensed financial markets, 5 licensed clearing and settlement facilities, 5114 company auditors, 669 registered liquidators, 4270 registered managed investment schemes and 6081 credit

[25] Baldwin and Cave, above n 2, 313.

[26] Jon Stern, 'The Evaluation of Regulatory Agencies' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 223; Malcolm K Sparrow, *The Regulatory Craft: Controlling Risk, Solving Problems, and Managing Compliance* (Brookings Institution, 2000) 113–17.

[27] *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2).

[28] Of which 2200 are listed entities (including registered schemes and foreign companies): ASIC, *Annual Report 2010–11* (2011) 10.

licensees.[29] Amongst these areas of responsibility, ASIC must decide what regulatory activities it considers most important and allocate resources accordingly. It would be unrealistic to expect it to supervise each and every one of these entities, to prevent every breach of the law by these entities or to even respond to every breach of the law of which it becomes aware. In this environment, where the regulator has to make judgment calls about what it can achieve with its limited resources, it is difficult to measure performance.

It is possible to count things such as the number of enforcement actions concluded per year, the percentage of successful enforcement actions, and the average number of days taken to process a licence application. ASIC, in fact, does all of these things in its annual report.[30] However, all of these performance measures are ambiguous. Does a record number of enforcement actions mean that ASIC has been particularly effective or does it mean that ASIC has failed to create a compliant regulated population by educating and persuading that population before resorting to enforcement action?[31] Does a high percentage of successful enforcement actions mean that ASIC is a successful litigant, making the best use of its limited enforcement budget, or does it mean that ASIC is targeting only easy cases and letting the more complex cases go? Does speed in dealing with licence applications indicate that ASIC is efficient or does it indicate that ASIC's licensing process is not rigorous? Another measure used by ASIC[32] and other regulators[33] is satisfaction of key stakeholders measured by way of surveys. However, this too is a highly ambiguous and problematic measure. Is an industry stakeholder's satisfaction with the performance of ASIC a sign that ASIC is doing a good job or that ASIC has been completely captured by the industry stakeholder and is doing its bidding? Given ASIC's mandate to facilitate business and to protect consumers, how should one balance industry satisfaction against consumer satisfaction?

No-one has very good answers to any of these questions; no-one can confidently assess ASIC's performance. The same analysis can be conducted in relation to the activities of all regulators with complex mandates. Essentially, no-one has come up with the perfect key performance indicators ('KPIs') for these regulators. This is a significant impediment to effective accountability. Strong accountability mechanisms, in particular, require measuring the quality of a regulator's performance; there can be no response if the regulator fails to meet

29 Ibid 80.

30 Ibid 46, 80. ASIC also reports on the percentage of licence applications and variations that it processes within 28 days of receipt of a complete application or variation: at 46.

31 See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35–8, which sets out the enforcement pyramid.

32 ASIC last conducted a stakeholder survey, which surveyed ASIC's performance during the global financial crisis, in 2010. The previous stakeholder survey, which considered ASIC's operations including what it did well and where it needed to improve, was conducted in 2008. For the results of these surveys, see ASIC, *ASIC Stakeholder Surveys* (12 October 2010) <http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+stakeholder+survey?openDocument>.

33 Sparrow, above n 26, 118. APRA released its latest stakeholder survey on 29 July 2011: APRA, 'APRA Releases Results of Second Stakeholder Survey' (Media Release, No 11.11, 29 July 2011).

the required standard unless that standard is known and unless one can measure whether that standard has been met. Even weak accountability mechanisms are not particularly meaningful if those receiving the justification or explanation cannot discriminate between convincing and unconvincing justifications or explanations.

VI WHAT ARE THE EXISTING ACCOUNTABILITY MECHANISMS?

Against this background, this Part analyses the existing accountability mechanisms for Australian regulators, concentrating on those for ASIC and APRA. There is, in fact, a broad array of accountability mechanisms and, for ease of exposition, these mechanisms are grouped by reference to the body to which the regulator is accountable.

A *Courts and Tribunals*

1 *Administrative Law*

Australian regulators are accountable to courts and tribunals as part of the administrative law regime. In general, persons with standing can challenge the lawfulness of regulators' decisions by way of judicial or administrative law review in the courts.[34] Decisions can only be reviewed on the basis of ultra vires or lack of procedural fairness.[35] Further, the outcome of a successful review will generally be that the decision is remitted to the regulator to be made according to law.[36] However, there is a stronger form of administrative law accountability available through independent tribunals such as the Administrative Appeals Tribunal ('AAT').[37] A person whose interests are affected by a regulator's decision[38] can seek merits review of the decision through the AAT.[39] In this review the AAT stands in the place of the regulator and remakes the decision.[40] Merits review through the AAT is only available where the legislation under which the regulator's decision is made provides a right of review to the AAT. The

[34] Note that there are limitations on administrative law review. For example, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) a decision can only be reviewed if it is made under an enactment: see s 3 (definitions of 'decision to which this Act applies' and 'enactment').

[35] See ibid ss 5–7. See, eg, *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561, which considered ibid s 5(1)(a) and the principles applicable in deciding whether procedural fairness had been accorded to a party affected by a decision.

[36] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16. See, eg, *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561, where the initial decision of the Council was set aside and remitted for reconsideration and determination.

[37] There are also specialist federal tribunals, such as the Takeovers Panel (which has the power to review decisions of ASIC regarding whether to grant exemptions or modifications to chs 6 or 6C of the *Corporations Act 2001* (Cth) during the life of a takeover: *Corporations Act 2001* (Cth) s 656A), the Social Security Appeals Tribunal and the Refugee Review Tribunal. There are also tribunals at the state level, such as the New South Wales Administrative Decisions Tribunal.

[38] *Administrative Appeals Tribunal Act 1975* (Cth) s 27.

[39] See, eg, *Re McCann and Australian Securities and Investments Commission* (1999) 55 ALD 545, where the applicant sought review of a decision of an officer of ASIC to refuse an application for registration as an official liquidator.

[40] *Administrative Appeals Tribunal Act 1975* (Cth) s 43.

bulk of the decisions made by ASIC and APRA are subject to merits review by the AAT.[41] Under s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) a person affected by a decision also has a right to apply for a written statement of the reasons for the decision.

Administrative law accountability is strong accountability in that it involves a response to the regulator's failure to meet the required standards. However, judicial challenges on the basis of ultra vires or lack of procedural fairness are at the weaker end of the range of responses as the decision is simply remitted to the regulator to be made in accordance with law. The plaintiff is likely to feel it has had a pyrrhic victory if the regulator makes the same decision, but according to law, the second time around. Review of decisions by a court on these bases is, on the other hand, not vulnerable to attack on the basis of lack of expertise. Judicial officers can be assumed to be experts on the requirements of procedural fairness and natural justice. Moreover, there is generally no difficulty measuring whether the regulator has actually complied with the standards of procedural fairness and natural justice.

The AAT delivers a stronger response; it can remake the impugned decision. However, the AAT is slightly more vulnerable to criticism on the basis of the comparative expertise of the decision-maker. The AAT tries to deal with this criticism by the creation of panels of experts. However, these panels may not have the same degree of expertise in the subject matter of the decision under review as the regulator. Further, the AAT adjudicates the individual matter brought before it and will often have difficulty putting that individual matter into the broader decision-making and policy context. A regulator makes individual decisions about, for example, refusing a licence or banning an individual in the broad context of the market and that regulator's work in relation to that market. An individual decision will not just be designed to have an impact on the behaviour of the individual who it directly affects; it will also be designed to have a broader impact on the market. There is room to question whether the AAT is able to understand and take into account this broader context. There is, in fact, room to debate whether it should. The short point, however, is that if the AAT is not able to do this, its decisions might undermine the regulator's attempt to achieve its broader regulatory mandate.

Finally, it should be acknowledged that administrative law review will undermine efficiency. Decisions that are supposed to be made quickly, such as decisions banning an individual from participating in a particular industry in order to protect the general public, will inevitably be delayed by the review process.[42] Moreover, both the individual seeking review and the regulator will be compelled to expend resources in the review process.

[41] See *Corporations Act 2001* (Cth) ss 1317A–1317C; *Banking Act 1959* (Cth) ss 51A–51D; *Insurance Act 1973* (Cth) s 63; *Superannuation Industry (Supervision) Act 1993* (Cth) s 344(8).

[42] For example, on 29 August 2008 ASIC banned Shaun Bruce Bond from providing financial services. The banning order was stayed on 27 October 2008 when Bond sought review by the AAT. On 23 January 2009 the AAT set aside ASIC's banning order: *Re Bond and Australian Securities and Investments Commission* [2009] AATA 50 (23 January 2009). ASIC appealed to the Federal Court which, on 30 July 2010, set aside the AAT's decision and ordered that the

2 *Civil and Criminal Liability*

Civil or criminal liability can create a strong form of accountability. It can ensure a penalty or remedy is imposed if behaviour falls short of a legal standard. For example, as stated above, directors of a company may be liable if they fail to meet the standard of care of a reasonable director or fail to act for a proper purpose in the interests of the company.[43]

Regulatory officers can be held criminally liable for misuse of public funds. The *Financial Management and Accountability Act 1997* (Cth), which applies to both ASIC and APRA, imposes on an 'official'[44] criminal penalties of up to seven years' imprisonment for improper use or handling of public money or property and other related offences, as well as liability for lost amounts.[45]

At common law, actions of regulatory officers in performance of their regulatory functions can give rise to liability in tort.[46] The tort of misfeasance in public office applies particularly to public officers.[47] While the exact scope of the tort is still uncertain,[48] it appears that it will be made out where the plaintiff suffers damage because of acts or omissions of a public officer that are beyond power,[49] and the public officer:

- intended to harm the plaintiff and acted with the ulterior or improper purpose of harming the plaintiff; or
- knew he or she was acting beyond power and that there was a foreseeable risk of harm to the plaintiff.[50]

matter be remitted to the AAT for determination according to law: *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2010) 187 FCR 334. Bond's application to the AAT was finalised by dismissal on 1 September 2010, more than 2 years after ASIC's original banning order: see ASIC, *Registers of Banned and Disqualified Persons* (2010) <http://www.asic.gov.au/asic/asic.nsf/byheadline/Disqualified+and+Banned+Registers>.

43 See above nn 4–5.

44 Liability is imposed on an 'official', that is, a person who is in or part of an agency covered by the Act. 'Agency' refers to a department of state, a parliamentary department, and a prescribed agency: *Financial Management and Accountability Act 1997* (Cth) s 5 (definitions of 'official' and 'agency'). Government Ministers are also covered by the Act.

45 Ibid ss 10–16 (collection, custody of public money), 26 (drawing rights required for payment of public money), 40–3 (control and management of public property), 60 (misuse of Commonwealth credit card).

46 See, eg, *Northern Territory v Mengel* (1995) 185 CLR 307, 348 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), 358 (Brennan J).

47 Ibid 355 (Brennan J). See also R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 4th ed, 2009) 706–8. For a discussion on the tort of misfeasance in public office, see Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1.

48 *Northern Territory v Mengel* (1995) 185 CLR 307, 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); *Sanders v Snell* (1998) 196 CLR 329, 346 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

49 This includes acts that are invalid because of a failure to afford natural justice: *Sanders v Snell* (1998) 196 CLR 329, 346–50 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

50 *Northern Territory v Mengel* (1995) 185 CLR 307, 345–7 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); *Sanders v Snell [No 2]* (2003) 130 FCR 149, 177–8 (Black CJ, French and von Doussa JJ). The requirement that the officer have an ulterior purpose of harming the plaintiff or, to use other words, that he or she act with 'targeted malice' is not expressly stated by the High Court in *Mengel* or *Sanders v Snell* (1998) 196 CLR 329 but it is necessary for the reasons set out by the Federal Court in *Sanders v Snell [No 2]* (2003) 130 FCR 149. See also *Bourgoin SA v*

Liability may also arise if the public officer was reckless as to whether he or she had power to act and there was a foreseeable risk of harm.[51] Although this is a high threshold for a plaintiff, the action is occasionally made out and exemplary damages may be awarded.[52]

However, compared to most, regulatory officers are insulated from civil liability. In general, they have statutory immunity from liability for damages for an act or omission in performance of their functions, except in cases of bad faith.[53] Regulators' qualified immunity from civil liability supports their independent and fearless pursuit of their regulatory mandate[54] and, to a lesser extent, efficiency. As stated by Harlan J of the United States Supreme Court:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[55]

In other words, accountability yields to independence and efficiency.

B *Parliament*

1 *Parliamentary Committees*

In Australia, regulators are accountable to Parliament through the parliamentary committee system. The parliamentary committee system allows parliamentarians to question regulators (and other members of the executive government) directly about the broad range of their activities. Questions can be about anything, including financial management, staffing, the making of regulation or policy, administration of the law (such as licensing) and enforcement policy.[56]

Ministry of Agriculture, Fisheries and Food [1986] 1 QB 716, 776 (Oliver LJ), where the term 'targeted malice' was coined.

51 *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). For the position in the United Kingdom, New Zealand and Canada, see Balkin and Davis, above n 47, 708–9.

52 *Rowan v Cornwall [No 5]* (2002) 82 SASR 152, affd (2004) 90 SASR 269. In another case, and without admission of liability, the federal government settled an action brought by Pan Pharmaceuticals and its former Chief Executive in relation to the Therapeutic Goods Administration's actions against Pan Pharmaceuticals for $50 million plus legal costs: Therapeutic Goods Administration (Cth), 'Commonwealth Government Settlement with Pan Pharmaceuticals and Its Former Chief Executive' (Media Statement, 14 August 2008). But see the cases in which the action was unsuccessful: *Northern Territory v Mengel* (1995) 185 CLR 307; *Martin v Tasmania Development and Resources* (1999) 163 ALR 79; *Sanders v Snell [No 2]* (2003) 130 FCR 149.

53 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 246; *Australian Prudential Regulation Authority Act 1998* (Cth) s 58.

54 *Northern Territory v Mengel* (1995) 185 CLR 307, 358 (Brennan J); *Sanders v Snell* (1998) 196 CLR 329, 344 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

55 *Barr v Matteo*, 360 US 564, 571 (Harlan J for Harlan, Frankfurter, Clark and Whittaker JJ) (1959).

56 Although in practice specific questions about individual enforcement and compliance actions may be 'batted away' by the regulator on the basis that the regulator does not want to prejudice its enforcement action: see, eg, Evidence to Parliamentary Joint Committee on Corporations and

Parliamentary committees are generally specialised, and this allows them to look at matters in detail and be directed and informed in their scrutiny. ASIC appears before Senate Estimates but also has its own parliamentary committee that is responsible for oversight of its activities: the Parliamentary Joint Committee on Corporations and Financial Services.[57] This Committee holds inquiries into specific policy matters relevant to ASIC's jurisdiction, such as the 2009 Inquiry into Financial Products and Services in Australia,[58] which led to the Future of Financial Advice Reforms.[59] It also holds oversight hearings about ASIC's performance in general, and examines ASIC's annual report. It then reports to both Houses of Parliament on the results of its inquiries. In 2009–10, ASIC appeared before parliamentary committees on 11 occasions, and the Parliamentary Joint Committee on Corporations and Financial Services tabled three statutory oversight reports in relation to ASIC.[60] This process inevitably consumes considerable resources of ASIC's senior management.

A regulator's knowledge that its actions will be subject to intense and public scrutiny through the parliamentary committee system provides incentives to ensure that its actions are justifiable and explicable. Additionally, parliamentary scrutiny is one of the few mechanisms that examines whether the regulator is achieving its statutory mandate as a whole. Parliamentary committees can question regulators on priority setting and resource allocation, rather than just ensuring accountability for individual decisions and acts.

However, these parliamentary reporting requirements are weak accountability mechanisms; they may lead to important information being made public,[61] but they do not lead to a response other than political pressure or non-binding recommendations. Further, although parliamentary committees tend to be specialised, and therefore able to develop a certain level of expertise, they are rarely able to develop the same level of expertise as the regulator itself. Finally, of course, excessive accountability to Parliament and responsiveness to parlia-

Financial Services, Parliament of Australia, Canberra, 24 June 2009, 2–3 (Tony D'Aloisio, ASIC Chairman).

57 The duties of the Parliamentary Joint Committee on Corporations and Financial Services are set out in *Australian Securities and Investments Commission Act 2001* (Cth) s 243.

58 The findings of this inquiry were documented in Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009).

59 Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law, 'Overhaul of Financial Advice' (Media Release, No 36, 26 April 2010).

60 ASIC, *A Year of Achievement — ASIC Annual Report 09–10* (2010) 71. In financial year 2010–11, ASIC appeared before the Parliamentary Joint Committee on Corporations and Financial Services' oversight hearings on three occasions and the Committee tabled three oversight reports: see Parliamentary Joint Committee on Corporations and Financial Services, *Oversight of ASIC* (2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/asic/index.htm>. In addition, during this period ASIC appeared before Senate Estimates on three occasions: Senate Standing Committees on Economics, *Additional Estimates 2008–09* (2009) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/estimates/add_0809/index.htm>.

61 For example, following questioning in a parliamentary committee it was revealed that ASIC had used its coercive, information-gathering powers 18 625 times in a three year period: James Eyers, 'ASIC Slated over 18,625 Ultimatums', *The Australian Financial Review* (Sydney), 13 October 2010, 1.

mentary pressure may undermine the independence of regulators and their efficiency. Ogus summarises the situation neatly:

> Accountability to Parliament may force disclosure of information which would not otherwise be available, and may facilitate public debate, but it is not clear that it provides a good medium for ensuring that regulators satisfy the three criteria which we have identified [(financial accountability, procedural accountability and substantive accountability)] … Politicians rarely have the time and expertise to absorb the data and make detailed judgments on the financial management of regulatory bodies. They may provide a valuable, generalized overview of procedural fairness, but investigation of particular grievances normally requires a specialist institution. Nor are they well placed to monitor adherence to public interest goals, since they are vulnerable to the influence of private interest lobbying. More generally, increased parliamentary scrutiny may encourage greater governmental interference, which itself may attempt to capture short-term political gains.[62]

2 *Annual Reports*

Accountability to Parliament is reinforced by the requirement that regulators' annual reports be tabled in Parliament. Both ASIC and APRA are required to report annually to Parliament and legislation sets out mandatory content for those reports.[63]

Annual reports are, however, a very weak accountability mechanism. They lead to disclosure of significant information about the regulator's activities. However, apart from the audited financial reports, the information cannot be described as impartial. Understandably, a regulator's annual report tends to present the story from the regulator's perspective. In spite of mandatory content requirements, the regulator has considerable scope to decide what it wants to explain and justify in its annual report. It should also be noted that the production of annual reports invariably involves considerable resources.

3 Legislative Instruments Act 2003 *(Cth)*

Many regulators make legally binding rules or regulations. Most of these rules or regulations will be 'legislative instruments'[64] and therefore subject to parliamentary scrutiny under the *Legislative Instruments Act 2003* (Cth). The Act requires that, except in limited circumstances, before making legislative instruments the regulator should conduct consultations that it considers appropriate and reasonably practicable.[65] It also provides for parliamentary scrutiny of

[62] Ogus, above n 6, 113.
[63] *Australian Securities and Investments Commission Act 2001* (Cth) s 136; *Australian Prudential Regulation Authority Act 1998* (Cth) s 59.
[64] 'Legislative instrument' is defined in *Legislative Instruments Act 2003* (Cth) ss 5–9. In essence, a legislative instrument is an instrument in writing that is made in the exercise of a power delegated by Parliament and is of legislative character (ie determines the law or alters the content of the law, rather than applies the law in a particular case, and has the effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right).
[65] Ibid ss 17–18.

legislative instruments.[66] Legislative instruments, and their explanatory statements, are tabled in both Houses of Parliament.[67] Either House can pass a resolution disallowing the instrument (the 'disallowance power').[68] The disallowance power is not used frequently: in 2010 there were two disallowances, in 2009 there were eight and in 2008 there were five.[69] None of these disallowances related to legislative instruments made by ASIC or APRA.

This strong accountability mechanism is vulnerable to the criticism that it undermines the independence and expertise of the regulators' regulation-making. However, the history of its use shows that it is not overused or abused. Further, the fact that it is limited to the most 'parliamentary' of the regulator's roles — regulation-making — means that it is an acceptable incursion into the independence of the regulator. Moreover, the process is designed so as to not unnecessarily undermine efficiency. Legislative instruments are valid until disallowed and the disallowance must occur within a set timeframe. The instrument must be tabled before both Houses of Parliament within six parliamentary sitting days of the instrument's registration.[70] The motion to disallow must be given within 15 sitting days of the tabling and the fate of the instrument is then determined within a further 15 sitting days.[71]

C *Executive Government and Government Agencies*

1 *Ministerial Direction*

Regulators are generally[72] accountable to the executive government through a Minister.[73] In fact, the relevant Minister can often give a direction to the regula-

[66] Under s 46B of the *Acts Interpretation Act 1901* (Cth), certain non-legislative instruments are also subject to disallowance under the *Legislative Instruments Act 2003* (Cth). They will be subject to disallowance if they are expressly declared by the enabling provision under which they are made to be disallowable instruments for the purposes of s 46B.

[67] *Legislative Instruments Act 2003* (Cth) ss 38–9.

[68] Ibid s 42. The consequence of a disallowance resolution is that the legislative instrument in question ceases to have effect.

[69] The legislative instruments that were disallowed include: *Export Inspection (Establishment Registration Charges) Amendment Regulations (No 1) 2009* (Cth); *Export Inspection (Quantity Charge) Amendment Regulations (No 1) 2009* (Cth); Minister for Health and Ageing (Cth), *Health Insurance (Cataract Surgery) Determination 2009*, 29 October 2009; Minister for Health and Ageing (Cth), *Health Insurance (Dental Services) Amendment and Repeal Determination 2008*, 13 March 2008; Minister for Education (Cth), *Amendment No 2 to the Commonwealth Grant Scheme Guidelines No 1*, 23 February 2008; Minister for Health and Ageing (Cth), *Amendment Determination under Subsections 85AB(1) and 85AC(1) of the National Health Act 1953*, PB 2/2010, 19 January 2010; Minister for Infrastructure, Transport, Regional Development and Local Government (Cth), *Road User Charge Determination 2008 (No 1)*, 11 March 2008; Department of Environment, Water, Heritage and the Arts (Cth), *Threat Abatement Plan for Disease in Natural Ecosystems Caused by Phytophthora Cinnamomi* (2009); *Workplace Relations (Registration and Accountability of Organisations) Amendment Regulations (No 1) 2007* (Cth); *Workplace Relations Amendment Regulations (No 4) 2007* (Cth).

[70] *Legislative Instruments Act 2003* (Cth) s 38.

[71] Ibid s 42.

[72] The Auditor-General, however, is directly accountable to Parliament: see *Auditor-General Act 1997* (Cth) s 8.

[73] Ministerial responsibilities are allocated in the *Administrative Arrangements Order* made by the Governor-General, on advice from the Federal Executive Council. The reporting relationship

tor (the 'directions power').[74] For example, the Minister has the power to give a direction in writing to ASIC or APRA 'about policies [they] should pursue, or priorities [they] should follow'.[75] The Minister, however, cannot give a direction about a particular case.[76] But the Minister can direct that a particular matter be investigated by ASIC.[77] A direction (other than a direction that ASIC must investigate a particular case) must be published in the *Gazette* and laid before both Houses of Parliament.[78] If the direction affects the rights or legitimate expectations of an individual, the Minister must give procedural fairness to that individual.[79]

The International Monetary Fund commented negatively on this directions power in its 2006 report *Financial Sector Assessment* on Australia.[80] It is an extremely strong accountability mechanism, which potentially severely impinges on the regulator's expertise and, in particular, independence from the political process. The giving of a direction to a regulator puts the regulator firmly in the political process. On one view this accountability mechanism is so strong it is very rarely used.[81] On this view, the directions power, and its limited use, are evidence of the uneasy, but positive, balance between accountability and independence that is achieved in practice. The power to give directions ensures accountability to government, but the value placed on the independence of regulators means that it would be politically unacceptable to use the power except in the most extraordinary of cases.[82]

between the regulator and the Minister is reinforced by provisions such as: *Financial Management and Accountability Act 1997* (Cth) s 44A (which provides that the head of an agency covered by the Act, such as ASIC and APRA, must give the Minister responsible for that agency 'such reports, documents and information in relation to the operations of the Agency as that Minister requires' and must give the Finance Minister 'such reports, documents and information in relation to the financial affairs of the Agency as that Minister requires'); *Australian Securities and Investments Commission Act 2001* (Cth) s 136 (which requires ASIC to provide an annual report, covering certain matters, to its responsible Minister); *Australian Prudential Regulation Authority Act 1998* (Cth) s 59 (which requires APRA to provide an annual report, covering certain matters, to its responsible Minister). See generally *Uhrig Report*, above n 1, 33–4.

74 *Uhrig Report*, above n 1, 38, 62, 108–9.

75 *Australian Securities and Investments Commission Act 2001* (Cth) s 12(1); *Australian Prudential Regulation Authority Act 1998* (Cth) s 12(1).

76 *Australian Securities and Investments Commission Act 2001* (Cth) s 12(3); *Australian Prudential Regulation Authority Act 1998* (Cth) s 12(3).

77 *Australian Securities and Investments Commission Act 2001* (Cth) s 14.

78 Ibid s 12(5).

79 *Sanders v Snell* (1998) 196 CLR 329, 347–8 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

80 International Monetary Fund, *Australia: Financial Sector Assessment Program — Detailed Assessment of Observance of Standards and Codes* (2006) 41, 85, 125.

81 In September 1992 the Attorney-General gave a direction to ASIC's predecessor body, the Australian Securities Commission, to require increased cooperative arrangements between the Director of Public Prosecutions and the Australian Securities Commission: ASIC, *Annual Report — Regulating in a Time of Growth 2006–07* (2007) 37. No other direction appears to have been given to ASIC or APRA.

82 Both the Statement of Expectations ('SOE') from the Treasurer to ASIC's Chairman and the SOE from the Treasurer to APRA's Chairman state that the Minister would only use the directions power in 'rare and exceptional circumstances': Letter from Peter Costello, Treasurer (Cth) to Jeffrey Lucy, ASIC Chairman, 20 February 2007, 5 <http://www.asic.gov.au/asic/asic.nsf/byheadline/Statement+of+expectations+and+statement+of+intent?openDocument>; Letter from Peter Costello, Treasurer (Cth) to John Laker, APRA Chairman, 20 February 2007, 5

Having said this, it is possible that behind the scenes the directions power could lead to significant actual ministerial interference in the regulatory process. The mere threat of a direction could encourage a regulator to follow the wishes of the Minister because few regulators would want to be on the receiving end of a direction. In fact, s 12 of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 12 of the *Australian Prudential Regulation Authority Act 1998* (Cth) seem to facilitate such intentional or unintentional ministerial influence. They provide that before giving a direction, the Minister must notify ASIC or APRA that he or she is 'considering giving the direction'.[83] It is impossible to know how often this has been done or how often a Minister has more informally indicated that he or she is inclined to give a direction if something does not happen. We do know that there are situations in which the Minister has informally requested that ASIC does certain work.[84] This may suggest that the uneasy balance is slightly off-kilter and in practice there is too much accountability to the executive government and too little independence from it.

2 *Statement of Expectations and Statement of Intent*

Another mechanism designed to enhance accountability to the Minister is the ministerial Statement of Expectations ('SOE') and the regulator's Statement of Intent ('SOI'). The Australian SOE and SOI owe their birth to the 2003 report by John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* ('*Uhrig Report*').[85] Recognising Ministers' reluctance to use the directions power,[86] Uhrig recommended that Ministers should communicate government's expectations of statutory authorities, such as regulators, in a public, written SOE.[87] According to Uhrig, this would ensure that 'individuals responsible for the performance of statutory authorities clearly understand the expectations of government including the outcomes for which they would be held accountable.'[88] Uhrig did recognise the need for the SOE to be carefully drafted so as not to undermine the independence of the statutory authority.[89] Uhrig recommended that the statutory authority respond to the SOE in a public, written SOI, which outlines how the authority will meet the government's

<http://www.apra.gov.au/AboutAPRA/Documents/Statement-of-Expectations-from-Treasurer-20-Feb-07.pdf>.

83 *Australian Securities and Investments Commission Act 2001* (Cth) s 12(2); *Australian Prudential Regulation Authority Act 1998* (Cth) s 12(2). The provisions also state that the Chairmen of ASIC or APRA respectively should be given 'an adequate opportunity to discuss with the Minister the need for the proposed direction'.

84 For example, in 2008 the Minister for Superannuation and Corporate Law asked ASIC to facilitate the use of forecasts of superannuation end benefits: Nick Sherry, Minister for Superannuation and Corporate Law, 'The Government's Priorities in Superannuation and Financial Services' (Speech delivered at the Institute of Actuaries Financial Services Forum 2008, Melbourne, 19 May 2008).

85 See *Uhrig Report*, above n 1.

86 Ibid 38.

87 Ibid 59–61.

88 Ibid 60.

89 Ibid.

expectations and that identifies KPIs against which the authority's performance can be measured.

In practice, in Australia the SOE and SOI mechanism has enhanced neither transparency nor accountability. For example, on 20 February 2007, Treasurer Costello provided SOEs to the Chairmen of both ASIC and APRA.[90] The APRA Chairman provided a SOI in response on 18 May 2007[91] and the ASIC Chairman provided a SOI in response on 27 June 2007.[92] Neither APRA's nor ASIC's SOI actually contained KPIs. Both regulators expressed an intention to develop new KPIs but also noted the difficulty of devising meaningful measures. The SOEs and SOIs are still available on the websites of the respective regulators[93] but appear to have little, if any, ongoing relevance. Given their vague and platitudinous content, they are certainly unlikely to provide any concrete guidance on the government's expectations or on how the regulators intend to give effect to the government's expectations. Uhrig stated that the SOE and SOI should be reviewed at least annually and more regularly if circumstances, such as the appointment of a new Minister or head of department, required.[94] A measure of the lack of relevance of these SOEs and SOIs is the fact that they have not been updated since their original issue in spite of a change in government and a number of changes in Minister.[95]

3 *Regulatory Impact Analysis and the Office of Best Practice Regulation*

The regulatory impact analysis ('RIA') requirements imposed by the executive government on government departments and agencies, such as regulators, create a form of accountability in relation to regulation-making. RIA is 'the process of examining the likely impacts of a proposed regulation and a range of alternative options which could meet the government's policy objectives.'[96] There are different RIA requirements for federal government regulatory proposals[97] and

90 Letter from Peter Costello, Treasurer (Cth) to Jeffrey Lucy, ASIC Chairman, 20 February 2007 <http://www.asic.gov.au/asic/asic.nsf/byheadline/Statement+of+expectations+and+statement+of+intent?openDocument>; Letter from Peter Costello, Treasurer (Cth) to John Laker, APRA Chairman, 20 February 2007 <http://www.apra.gov.au/AboutAPRA/Documents/Statement-of-Expectations-from-Treasurer-20-Feb-07.pdf>.

91 Letter from John Laker, APRA Chairman to Peter Costello, Treasurer (Cth), 18 May 2007 <http://www.apra.gov.au/AboutAPRA/Documents/Ltr-to-Treasurer-Statement-of-Intent.pdf>.

92 Letter from Jeffrey Lucy, ASIC Chairman to Peter Costello, Treasurer (Cth), 27 June 2007, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Statement+of+expectations+and+statement+of+intent?openDocument>.

93 See above nn 90–92.

94 *Uhrig Report*, above n 1, 60.

95 Agencies other than ASIC and APRA have more up-to-date SOEs and SOIs. For example, ARPANSA's most recent SOE is dated 22 November 2011 and the SOI is dated 29 April 2010: Letter from Catherine King, Parliamentary Secretary for Health and Ageing to Carl-Magnus Larsson, ARPANSA Chief Executive Officer, 22 November 2011 <http://www.arpansa.gov.au/AboutUs/Corporate/expect.cfm>; Letter from Carl-Magnus Larsson, ARPANSA Chief Executive Officer to Catherine King, Parliamentary Secretary for Health and Ageing, 20 February 2012 <http://www.arpansa.gov.au/AboutUs/Corporate/expect.cfm>. However, the content of these documents is just as vague and platitudinous as the ASIC and APRA SOI and SOE.

96 Australian Government, *Best Practice Regulation Handbook* (2010) 7 [2.1] ('*Best Practice Regulation Handbook*').

97 Ibid 7–20 [2.1]–[2.39].

Council of Australian Government ('COAG') regulatory proposals.[98] There are also different RIA requirements at state and territory level.[99] This section outlines the federal government requirements that apply to ASIC and APRA.

The federal government requirements are administered by the Office of Best Practice Regulation ('OBPR'), which is a division of the Department of Finance and Deregulation. While these requirements apply to regulation-making activities only, regulation is defined broadly as '[a]ny "rule" endorsed by government where there is an expectation of compliance.'[100] The key component of the RIA requirements is the obligation to prepare a Regulatory Impact Statement ('RIS'). A RIS is a document that 'formalises and provides evidence of the key steps taken during the development of the … [regulation and] the costs and benefits of each option'[101] available to address the particular regulatory problem. A RIS is required for all decisions made by the government and its agencies that are likely to have a regulatory impact (positive or negative) on business or the not-for-profit sector, unless that impact is of a minor or machinery nature[102] and does not substantially alter existing arrangements.

The process of developing a RIS has four stages:[103]

1 *Notifying the OBPR* — Once an agency makes a decision that regulation may be necessary, it is required to inform the OBPR. The OBPR will decide, based on information provided by the agency, whether a RIS is required.

2 *Preparing the RIS* — If a RIS is required, it is prepared by the agency. The OBPR does not mandate a format for the RIS but states that generally it should set out:

- 'the problem or issues that give rise to the need for action';
- 'the desired objectives';
- 'a range of options (regulatory and non-regulatory, as applicable) that may constitute feasible means for achieving the desired objectives';
- 'an assessment of the impact (costs, benefits and, where relevant, levels of risk) of a range of feasible options for consumers, business, government and the community';
- 'a consultation statement';

98 See COAG, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (2007).

99 For details about the RIA requirements at the state level, see Office of Best Practice Regulation, *Best Practice Regulation Report 2009–10* (2010) 68–87 ('*Best Practice Regulation Report 2009–10*').

100 *Best Practice Regulation Handbook*, above n 96, 9 [2.10].

101 Ibid 7 [2.3].

102 For a definition of a minor or machinery change, see ibid 10 [2.14]:

> 'Minor' changes refer to those changes that do not substantially alter the existing regulatory arrangements for businesses or not-for-profit organisations, such as where there would be a very small initial one-off cost to business and no ongoing costs. 'Machinery' changes refer to consequential changes in regulation that are required as a result of a substantive regulatory decision, and for which there is limited discretion available to the decision maker.

103 Ibid 10–20 [2.16]–[2.39].

- 'a conclusion and recommended option'; and
- 'a strategy to implement and review the preferred option.'[104]

The RIS requirements are scalable: the more significant the impacts of the regulatory proposal the more detailed the analysis in the RIS must be. The RIS must be certified by the relevant agency head or deputy head. The adequacy of the RIS is then assessed by the OBPR. The regulatory agency must also prepare a one page summary of the RIS, which must be approved by the OBPR as a fair, balanced and accurate summary of the RIS.[105]

3 *The decision-making stage* — The RIS, the OBPR's assessment of the adequacy of the RIS and the one-page summary of the RIS are then presented to the decision-maker prior to the decision being made. The RIS is supposed to assist the decision-maker reach an informed decision.

4 *Publication* — The RIS then has to be published on a central online public register of all RISs and, where appropriate, as an attachment to the explanatory memorandum or explanatory statement. This is where the process breaks down. The RIS approved by the OBPR will recommend an option. However, the decision-maker is presumably entitled to prefer an alternative option. If that were not the case the actual regulatory decision would be made by those preparing the RIS and the decision-maker would be a rubber stamp. However, if the decision-maker does not follow the option approved in the RIS, the publication of the RIS would be highly embarrassing to the agency.[106] There is a significant tension between the RIS's use as a decision-making tool and its use as a transparency measure which documents, explains and justifies the regulatory decision. The attempt to use the document to achieve both ends means that neither may be achieved. In practice, there is a temptation to ensure that the RIS actually documents the decision already endorsed by the decision-maker. If that is not achieved, and the decision-maker reaches a decision that is inconsistent with the approved RIS, generally the RIS is subsequently amended with the approval of the OBPR. The OBPR's *Best Practice Regulation Handbook* does not clearly acknowledge this. It does, however, note that:

> 2.38 There is scope for RISs to be modified after the decision maker's consideration but prior to publication:
>
> - where a draft RIS refers to commercial-in-confidence or national security information, or

[104] Ibid 14 [2.24]. If a regulatory proposal restricts competition, the RIS must also demonstrate that the preferred option generates a net benefit to the community as a whole and that the only way to achieve the relevant objective is to restrict competition: at 15 [2.25].

[105] The one-page summary requirement was introduced in the June 2010 edition of the *Best Practice Regulation Handbook*. It seems to be an acknowledgement that the decision-makers do not always have time to read the complete RIS and, in the past, frequently did not.

[106] This problem is also recognised in Organisation for Economic Co-Operation and Development, *OECD Reviews of Regulatory Reform: Australia — Towards a Seamless National Economy* (2010) 106, which suggests the original RIS should be published but acknowledges this can create 'some confusion'.

- to include analysis of the option adopted where that option was not considered in the original RIS.

2.39 While it may be possible to add further information to give greater context to the decision, as a general principle information on the options considered will not be able to be removed. Any changes to the RIS intended for publication need to be approved by the OBPR.[107]

The strength of the federal government RIA requirements as an accountability measure is that they are mandatory and compliance with them is assessed, and reported on, by the OBPR. That is, whenever a government department or agency makes regulation, they are required to comply with the RIA requirements and the OBPR makes the judgment about whether those requirements are triggered and whether they are complied with. However, the requirements are mandatory by executive order, not as a matter of law. The government has agreed that, in the absence of exceptional circumstances as found by the Prime Minister, a regulatory proposal that requires a RIS should not go to Cabinet or other decision-makers, such as the Commission of ASIC or APRA's executive group, unless RIA requirements have been complied with.[108] However, the only sanction for the failure to comply with this is negative publicity. In this sense, the RIA requirements are a weak accountability mechanism. This position contrasts to that in the United States, where failure to conduct an adequate cost–benefit analysis before making a regulation can in certain circumstances lead a court to vacate that regulation.[109] As evidence that government departments and regulators are not perfect when it comes to complying with regulatory requirements imposed on them, rates of compliance with the federal government RIA requirements are dropping. Compliance rates have fallen, from 90 per cent in 2007–08 to 84 per cent in 2009–10; there were 12 non-complying regulations in 2009–10.[110] However, ASIC and APRA are fully compliant.[111]

Most advanced countries have similar RIA processes. Australia's process is highly ranked. The Organisation for Economic Co-Operation and Development ('OECD') has described it as 'among the most rigorous and comprehensive in the OECD'.[112] The Australian RIA requirements do have much to recommend themselves. They impose a disciplined and systematic approach to regulation-making on regulation-makers. However, it is important to maintain some scepticism about the process and to understand the impact that the process has on efficiency. There are incredible implementation challenges. The RIS requires

[107] *Best Practice Regulation Handbook*, above n 96, 20.
[108] Ibid 19.
[109] See *Chamber of Commerce v Securities and Exchange Commission*, 412 F 3d 133 (DC Cir, 2005); *Business Roundtable v Securities and Exchange Commission*, 647 F 3d 1144 (DC Cir, 2011).
[110] *Best Practice Regulation Report 2009–10*, above n 99, 15.
[111] See annual compliance reports from 2006 to 2011: OBPR, *Annual Compliance Reports* (13 December 2011) <http://www.finance.gov.au/obpr/reporting-publications/publications.html#annual_compliance>.
[112] OECD, above n 106, 15–16.

assessment of costs and benefits but certain things are very difficult to assess, especially ex ante. In particular, benefits are hard to measure; future benefits are almost impossible to measure, identify and sensibly analyse. In practice, so many assumptions have to be made that the analysis becomes incredibly tenuous. As noted above, the insistence that the RIS is both a transparency document and a decision-making tool means that it is a challenge to prevent the drafting of a RIS becoming a time-consuming and expensive process of justifying decisions already made.[113]

4 *Other Regulators of Regulators*

Apart from the OBPR, there are a number of other bodies that effectively regulate the regulators. For example, Auditors-General, Ombudsmen and specialist bodies, such as the Inspector-General of Taxation, all play a role in ensuring the accountability of regulators.[114] In general, these regulators of regulators provide weak accountability in that they cannot impose any response; they only make recommendations, generally to the Minister or the regulator concerned.

The Auditor-General, supported by the Australian National Audit Office, audits the financial statements of Commonwealth agencies, such as ASIC and APRA.[115] The Auditor-General must report to the agency's responsible Minister about whether the financial statements have been prepared in accordance with the Finance Minister's orders and give a true and fair view of the matters required by those orders. The audit report has to be included in an agency's annual report, which is tabled in Parliament.[116] The Auditor-General also conducts performance audits of agencies, such as ASIC and APRA.[117] Performance audits conducted by the Auditor-General have examined:[118]

- the effectiveness of ASIC's processes for receiving reports of suspected breaches of the *Corporations Act 2001* (Cth);[119]
- the effectiveness and efficiency of ASIC's implementation of Australian financial services licensing;[120]

113 Lave concludes that cost–benefit analysis is so costly to perform that 'it ought not be applied to every problem or applied lightly. Few issues are worthy of a formal benefit–cost analysis': Lester B Lave, 'Benefit–Cost Analysis: Do the Benefits Exceed the Costs?' in Anthony I Ogus (ed), *Regulation, Economics and the Law* (Edward Elgar, 2001) 441, 466.

114 This list could be further extended. For example, the Office of the Australian Information Commissioner monitors, investigates and reports on compliance by agencies with the *Freedom of Information Act 1982* (Cth) and privacy requirements. Further, the Productivity Commission's regular reviews of regulatory burden could be characterised as an accountability mechanism.

115 *Auditor-General Act 1997* (Cth) s 12; *Financial Management and Accountability Act 1997* (Cth) s 57(2).

116 *Financial Management and Accountability Act 1997* (Cth) s 57(7).

117 *Auditor-General Act 1997* (Cth) s 15.

118 Audit reports are available at Australian National Audit Office, *Audit Reports* (2011) <http://www.anao.gov.au/Publications/Audit-Reports>.

119 Auditor-General (Cth), 'ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001' (Audit Report No 18 2006–07, 2007).

- the efficiency and effectiveness of APRA's prudential supervision of banks;[121] and
- the effectiveness of APRA's supervision of superannuation entities.[122]

The Auditor-General can also conduct a review or examination of a particular aspect of the operations of the whole or part of the Commonwealth public sector.[123]

In Australia, there are Ombudsmen at the state and territory, and federal levels.[124] They have broad powers to investigate potential maladministration by regulators. The Commonwealth Ombudsman, for example, can investigate, either following a complaint or on its own motion, action by a regulator that relates to 'a matter of administration'.[125] When investigating complaints the Ombudsman seeks explanation and justification from the relevant regulator. In practice, the Commonwealth Ombudsman does receive complaints about ASIC and APRA.[126] Complaints about ASIC relate to a number of ASIC's activities, including the imposition of late fees (although these complaints have recently reduced) and its failure to investigate or take action in relation to alleged misconduct.[127] Most complaints about APRA relate to the processing of applications for early release of superannuation benefits.[128]

5 *Removal from Office*

The ultimate response to a failure to meet a required standard of performance is removal from office. This is a strong and effective accountability mechanism. For example, under Australian law, corporate members' power to remove directors from office[129] significantly enhances the accountability of directors to members. Senior officials at regulators can generally be removed from office by the executive government but only in limited circumstances. In order to reinforce their independence from the political process, senior officials working at

[120] Auditor-General (Cth), 'ASIC's Implementation of Financial Services Licences' (Audit Report No 25 2005–06, 2005).

[121] Auditor-General (Cth), 'Bank Prudential Supervision' (Audit Report No 42 2000–01, 2006); Auditor-General, 'Bank Prudential Supervision: Follow-Up Audit' (Audit Report No 2 2005–06, 2006).

[122] Auditor-General (Cth), 'APRA's Prudential Supervision of Superannuation Entities' (Audit Report No 6 2003–04, 2003).

[123] *Auditor-General Act 1997* (Cth) s 18(1).

[124] See generally Michael Head, *Administrative Law: Context and Critique* (Federation Press, 2nd ed, 2008) 71–7.

[125] *Ombudsman Act 1976* (Cth) s 5(1)(b).

[126] See, eg, Commonwealth Ombudsman, *Annual Report 2009–2010* (2010) 124–6.

[127] Ibid 126.

[128] Ibid 124. Interestingly, the government now proposes to transfer responsibility for this function to Medicare: Bill Shorten, Minister for Financial Services and Superannuation, 'Transfer of the Administration of Early Release of Superannuation on Compassionate Grounds' (Media Release, No 103, 7 July 2011).

[129] Public company directors can be removed by resolution of the members, regardless of anything in the company's constitution and any contractual agreement between the company and the director or the members and the director: *Corporations Act 2001* (Cth) s 203D. For proprietary companies, the power to remove directors by resolution is a replaceable rule: s 203C.

regulatory bodies are generally given a form of tenure.[130] For example, the Governor-General, who would, of course, act on the advice of the executive government, may terminate the appointment of an ASIC Commissioner only on the grounds of misbehaviour, physical or mental incapacity, certain absences from duty, breach of legislative requirements relating to disclosure of conflicts of interests, bankruptcy, and paid employment outside the duties of his or her office without consent of the Minister.[131] The requirements in relation to APRA are almost identical, although there is a specific provision stating that the appointment of a member of APRA is immediately terminated if the member becomes a director, officer or employee of a body regulated by APRA;[132] and another provision stating that the member may be removed from office if the member is or becomes a director, officer or employee of a body operating in the financial sector, other than a body regulated by APRA, and the Minister considers that the person is, will be, or could be, prevented from the proper performance of the functions of his or her office because of resulting conflicts of interest.[133]

The purpose of this limitation on removal from office is clearly to ensure the independence of regulators. It ensures that a regulatory official cannot be removed from office merely because he or she has made a decision that is unpopular with the executive government or Parliament. However, this of course does limit the accountability of regulators when compared to other agents. The limitation on the right to dismiss regulatory officials is an example where, in the trade-off between independence and accountability, independence has priority.

6 *Funding*

The role of funding in promoting accountability should be noted. Posner argued that American regulators are subject to market accountability because they compete for funding:

> the agency's head is answerable both to the legislative and (if he desires promotion or reappointment) to the executive branches. Legislative oversight of agencies is too little emphasized. Unlike business firms, government agencies must go to *their* capital markets — the legislative appropriations committees — every year. There is competition among agencies for the largest possible slice of the appropriations pie, and the agency that has a reputation for economy and hard work enjoys an advantage in the competition, for only in the exceptional case will it be to the legislators' advantage that the agency's personnel be lining *their* pockets (whether with pecuniary income or with nonpecuniary income such as leisure).[134]

There is little evidence of this competition for funding in Australia. In fact, poor, rather than good, performance tends to be rewarded by more money from

[130] But see *Competition and Consumer Act 2010* (Cth) s 13, which provides for the termination of appointment of members of the Australian Competition and Consumer Commission.
[131] *Australian Securities and Investments Commission Act 2001* (Cth) s 111.
[132] *Australian Prudential Regulation Authority Act 1998* (Cth) s 25(1).
[133] Ibid s 25(2)(g).
[134] Richard A Posner, 'Theories of Economic Regulation' (1974) 5 *Bell Journal of Economics and Management Science* 335, 338–9 (emphasis in original).

the government because it is often assumed or argued that poor performance by regulators is caused by a lack of resources.[135] However, in Australia the executive government can, and does, use tied funding to exert control over the resource allocation of regulators and ensure that regulators deliver projects that the government considers to be important, such as certain high-profile enforcement actions. Over the years the federal government has allocated significant funds to ASIC for specific projects.[136] As noted by the International Monetary Fund, this has the potential to impede the independence of ASIC.[137]

D *The Public*

1 *Public Participation in Accountability Mechanisms*

Direct accountability to the general public is limited. As a general proposition, accountability to the general public is achieved indirectly through the regulators' accountability to the government and, in particular, the Parliament which represents the general public.

However, the general public is directly involved in a number of the accountability mechanisms referred to above. Administrative law provides a mechanism for individual members of the public affected by regulators' decisions to seek review of those decisions through courts or tribunals.[138] Additionally, individuals or entities who suffer loss because of a regulator's conduct have a very limited right to sue for damages — they can only do so where the regulator acted in bad faith.[139] The *Legislative Instruments Act 2003* (Cth) and the RIA requirements mean that regulators frequently have to consult with members of the public who are affected by their regulatory proposals,[140] and the explanatory statement and RIS must note how the regulator has responded to this consultation.[141] The Ombudsman process is specifically designed to provide an avenue for members of the public to complain about the administration of government, including the administration of regulators.

[135] See, eg, Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products*, above n 58, 96. This Inquiry examined, inter alia, the collapse of Storm Financial. Recommendation 2 was that 'the government ensure ASIC is appropriately resourced to perform effective risk-based surveillance of the advice provided by licensees and their authorised representatives. ASIC should also conduct financial advice shadow shopping exercises annually': at 111. The implication of this recommendation is that if ASIC were adequately resourced it would have conducted more effective surveillance of Storm Financial. See also Commonwealth, HIH Royal Commission, *The Failure of HIH Insurance* (2003) vol 1, 217–19 [8.5.5] ('*HIH Royal Commission Report*'), where one of the issues touched on by Justice Owen was whether APRA required additional funding to pay competitive salaries and improve the quality of its staff and, therefore, the effectiveness of its regulatory supervision.

[136] See, eg, Peter Costello, Treasurer (Cth), 'Increased Budget Funding for ASIC' (Media Release, No 34, 9 May 2006), which indicates that about $146 million of funds allocated to ASIC over a four year period will be tied to certain activities.

[137] International Monetary Fund, above n 80, 98, 125.

[138] See above Part VI(A)(1).

[139] See above Part VI(A)(2).

[140] See above Parts VI(B)(3) and VI(C)(3).

[141] See above Part VI(C)(3).

The Rule of Law Institute of Australia ('ROLIA') has argued that Senate Estimates Committees should take evidence and potential questions directly from the public.[142] Probably in direct response to this lobbying, a representative of the ROLIA and an academic gave evidence in the Parliamentary Joint Committee on Corporations and Financial Services' ASIC Oversight Hearing on 15 June 2011.[143] According to the evidence at that hearing, the ROLIA was only the third non-ASIC organisation to provide evidence at an oversight hearing.[144] Even without this innovation, in practice, interest or lobby groups and other members of the public already feed evidence and questions to parliamentary committees.

2 *Freedom of Information*

Freedom of Information ('FOI') legislation[145] also supports direct accountability to the public. Subject to limited exceptions, FOI legislation gives members of the public the right to access information held by regulators.[146] This information may explain to the public why regulators have acted as they have. This is a weak accountability mechanism but it is a useful way to ensure that information about the broad range of regulators' activities is made public, generally via the intervention of the media. However, it should not be thought that this accountability mechanism has no downsides. Studies indicate that transparency measures, such as FOI legislation, can merely encourage regulators 'to hide away from being held to account' by ensuring that real decision-making is not recorded in a way that could be made public.[147] Moreover, processing FOI applications imposes a significant financial and time burden on regulators.[148] Finally, it should be noted that in Australia regulators also tend to voluntarily make a significant amount of information public.[149]

[142] ROLIA, *ROLIA Senate Estimates Survey No 2* (2010) 22 <http://www.ruleoflawaustralia.com.au/Downloads/Senate_Estimates_Survey_2.pdf>.

[143] Evidence to the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 15 June 2011, 1–7 (Richard Gilbert, Chief Executive Officer, ROLIA), 8 (Carole Comerton-Forde, Professor, Australian National University).

[144] Ibid 1 (Richard Gilbert).

[145] There is freedom of information legislation at the federal and state and territory level: *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (ACT); *Government Information (Public Access) Act 2009* (NSW); *Information Act 2003* (NT); *Right to Information Act 2009* (Qld); *Freedom of Information Act 1991* (SA); *Right to Information Act 2009* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA).

[146] See, eg, *Freedom of Information Act 1982* (Cth) ss 3–3A.

[147] See Lodge and Stirton, above n 1, 364.

[148] See Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007) 27–8, which notes that in the United States '[b]y the mid-1990s, the executive branch was processing more than half a million requests for information each year at a cost of about $100 million.'

[149] Australian regulators make a significant amount of information available, largely through their websites. Regulators also publish specific documents explaining their regulatory approach. For example, ASIC's Regulatory Guides explain when and how ASIC will exercise specific powers under legislation, explain how ASIC interprets the law, describe the principles underlying ASIC's approach and give practical guidance. It should also be noted that recent amendments to the *Freedom of Information Act 1982* (Cth) require agencies, including federal regulators, to proactively publish information, including information in documents to which the agency routinely gives access in response to freedom of information requests: *Freedom of Information Act 1982* (Cth) pt II, as amended by *Freedom of Information Amendment (Reform) Act 2010* (Cth) sch 2.

3 *The Media*

The role of the media in enhancing accountability should be acknowledged. Australian media frequently reports on the activities of Australian regulators.[150] Sometimes this reportage uses the information gathered through the formal accountability mechanisms referred to above, such as evidence from parliamentary committees or material gained through FOI actions.[151] Media coverage of the activities of regulators contributes significantly to regulators' accountability in that it often forces them to explain and justify their actions to the general public.

VII Is Change Really Necessary?

The analysis above in Part VI demonstrates that Australian federal regulators are subject to a comprehensive web of accountability mechanisms. There is a broad array of weak accountability mechanisms, covering all aspects of regulators' performance. There are also significant strong accountability mechanisms, such as administrative and merits review as well as ministerial directions. These too relate to all aspects of regulators' performance.

Given the breadth of the existing accountability mechanisms and the competing public interests referred to in Part V(A), the case for change is not overwhelming. Certainly, it cannot be argued that Australian regulators are unaccountable. Nevertheless, improvements can always be made. The challenge for those calling for change is to explain exactly what change should be made and how that change would improve accountability without undermining independence, expertise and efficiency, or would improve the balance between accountability, on the one hand, and independence, expertise and efficiency, on the other. This Part tentatively suggests three changes that should overcome this challenge but which need to be further explored.

A *'Super Regulator of Regulators'*

As outlined above in Parts VI(C)(3) and VI(C)(4), Australian regulators are subject to oversight by a number of other regulators. Just as this sort of regulatory overlap and complexity is inefficient for the business community,[152] so too is it inefficient for Australian regulators. There must be some scope to bring together the roles of the government authorities that oversee and ensure the accountability of regulators, into a 'super regulator of regulators'. The case seems compelling in relation to those bodies, such as the OBPR, the Ombuds-

[150] For example, a search of *The Sydney Morning Herald* website revealed that in a one week period (11 August 2011 to 17 August 2011 inclusive) that newspaper published 15 stories dealing with ASIC.

[151] See, eg, Eyers, above n 61; James Gordon, 'BankWatch Coming Your Way', *The Sydney Morning Herald* (online), 13 October 2008 <http://www.smh.com.au/small-business/bankwatch-coming-your-way-20090619-cqon.html>.

[152] Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation — Report* (2006) 94–6 ('*Banks Report*').

man and the Auditor-General, that only have roles in relation to other government authorities.

Rationalisation of the accountability of regulators would not just improve efficiency for regulators. Currently there are so many 'regulators of regulators' that certain areas of accountability fall through the cracks. For most regulators there is no government regulator monitoring their substantive regulation-making or their overall management.[153]

Uhrig recommended the creation of a new regulator of regulators, called an Inspector-General of Regulation.[154] He modelled his proposed Inspector-General of Regulation on the Inspector-General of Taxation. The Inspector-General of Taxation can identify systemic problems with the administration of the tax laws[155] and, therefore, operates one of the few accountability mechanisms that examines the overall regulatory approach of a regulator. The Inspector-General reviews and reports on the systems established by the Australian Taxation Office to administer the tax laws, and the systems established by tax laws.[156] The Minister may direct the Inspector-General to conduct a review and the Minister, the Commissioner of Taxation, the Parliament or a parliamentary committee may all request a review.[157] The Inspector-General of Taxation can also conduct a review on his or her own initiative following, for example, complaints by individual taxpayers, tax professionals or the Ombudsman.[158] After conducting a review, the Inspector-General gives a written report, which may include recommendations, to the Minister, and the report is made public.[159] When conducting a review the Inspector-General may invite submissions from the public and has broad powers to request or require information, documents and evidence from tax officials.[160]

Uhrig envisaged that the Inspector-General of Regulation would 'investigate the systems and procedures used by regulatory statutory authorities to administer regulation and to recommend improvements where appropriate'[161] and 'would provide the community with a mechanism to ensure that the regulators are being held to account for the way in which they exercise their powers.'[162] Uhrig saw the Ombudsman as providing an avenue to ensure accountability in relation to services or administration, whereas the Inspector-General of Regulation would provide an avenue for complaint about systemic regulatory issues. He stated:

153 However, other accountability mechanisms do deal with these areas of regulatory activity. Moreover, for certain regulators, such as the Australian Taxation Office, there are oversight bodies dealing with this area: see below n 156 and accompanying text.
154 *Uhrig Report*, above n 1, 67–8.
155 *Inspector-General of Taxation Act 2003* (Cth) s 3.
156 Ibid s 7.
157 Ibid ss 8(2)–(3).
158 Ibid s 8(1).
159 Ibid ss 10–11.
160 Ibid pt 2 div 3.
161 *Uhrig Report*, above n 1, 90.
162 Ibid 68.

> Where statutory authorities provide services, dissatisfied individuals are able to seek redress through the Ombudsman. Where a pattern of complaints emerges, the Ombudsman has the power to undertake investigations into systemic issues. However, in the case of systemic regulatory issues, it is the opinion of the review that the business community will be more inclined to seek an investigation of issues through an Inspector-General of Regulation.[163]

The government did not accept Uhrig's recommendation to create an Inspector-General of Regulation.[164]

Uhrig's proposal could be both revived and revised. An Inspector-General of Regulation could ensure accountability in relation to systemic regulatory issues, as envisaged by Uhrig, but it could also take over the roles currently performed by the OBPR, the Ombudsman and, possibly, the Auditor-General. This proposal has a number of advantages. It would improve the efficiency of the accountability system from the point of view of the regulators as they would need to deal with fewer oversight bodies. It would also make it easier for members of the public to hold regulators to account. Currently, given the diversity of oversight bodies, the general public may be confused about who to complain to about regulators. Finally, the introduction of an Inspector-General of Regulation, with broad responsibility, would streamline oversight and fill the current gaps in the oversight of regulators by government monitoring bodies.

B *Replacing the Ministerial Direction and Tied Funding with an Improved Statement of Intention*

Accountability to the executive government is not particularly well dealt with in Australia. The ministerial directions power, referred to above in Part VI(C)(1), can be criticised both on the basis that it is potentially an unacceptable erosion of the expertise and, in particular, independence of the regulator,[165] and on the basis that it is ineffective because its use is extremely rare.[166] The executive government's occasional use of tied funding, as described above in Part VI(C)(6), to override the regulator's priority setting and resource allocation also undermines the regulator's expertise and independence. While the SOI process described in Part V(C)(2) was only introduced about five years ago, it is already moribund. Although it does not impact on the expertise or independence of Australian regulators, it does not contribute to accountability.

The Australian SOI process can be contrasted to that in New Zealand ('NZ'), where the SOI seems to be one of the principal accountability mechanisms for Crown entities, such as regulators. Unlike the Australian SOI process, the NZ SOI process has statutory backing.[167] Section 138 of the *Crown Entities Act 2004* (NZ) specifically acknowledges that:

163 Ibid.

164 Nick Minchin, Minister for Finance and Administration, 'Australian Government Response to *Uhrig Report*' (Media Release, No 57/04, 12 August 2004).

165 International Monetary Fund, above n 80, 41, 85, 125.

166 See especially above n 81 and accompanying text.

167 *Crown Entities Act 2004* (NZ) pt 4 sub-pt 2.

> The purpose of a statement of intent is to promote the public accountability of a Crown entity by —
> (a) enabling the Crown to participate in the process of settling the Crown entity's medium-term intentions and undertakings;
> (b) setting out for the House of Representatives those intentions and undertakings;
> (c) providing a base against which the Crown entity's actual performance can later be assessed.

The SOI must be prepared annually and cover at least three years' future performance.[168] The Act sets out the mandatory content of the SOI,[169] which includes:

- 'the specific impacts, outcomes, or objectives that the entity seeks to achieve or contribute to';[170]
- 'how the entity proposes to manage the organisational health and the capability of the entity';[171]
- 'the main financial and non-financial measures and standards by which the future performance of the Crown entity may be judged';[172]
- 'a statement of forecast service performance' for the first year covered by the SOI;[173] and
- 'any other measures and standards necessary to assess the Crown entity's performance at the end of the [first] financial year' covered by the SOI.[174]

The responsible Minister must have an opportunity to comment on the draft SOI and can also direct that certain content in the draft SOI be amended.[175] A SOI must be presented to the NZ House of Representatives and subsequently published.[176]

The NZ SOI process is clearly not perfect. As can be expected given the difficulty of measuring regulatory performance,[177] the non-financial measures and standards articulated in the SOI may be superficial or overly descriptive. For example, some of the non-financial short-term measures in the 2010–13 SOI of the NZ Securities Commission[178] involve counting matters, such as the number of successful surveillance actions,[179] the number of prosecutions[180] and the

168 Ibid s 139.
169 Ibid s 141.
170 Ibid s 141(1)(c).
171 Ibid s 141(1)(e).
172 Ibid s 141(1)(f).
173 Ibid s 142(1)(b).
174 Ibid s 142(1)(c).
175 Ibid ss 146–8.
176 Ibid s 149.
177 See above Part V(B).
178 See Securities Commission (NZ), *Statement of Intent 2010–2013* (2010). The NZ Securities Commission has now been replaced by the Financial Markets Authority, which released its SOI in October 2011. See Financial Markets Authority (NZ), *Statement of Intent 2011–2014* (2011).
179 Securities Commission (NZ), above n 178, 34.

number of meetings attended,[181] rather than measuring real changes in market behaviour. Some of the medium-term measures describe changes in the market that are either difficult to measure and/or not necessarily caused by the regulator's conduct.[182] Additionally, to a certain extent the NZ SOI process affects the regulator's independence because the Minister is entitled to dictate that certain content is to be included in, and certain amendments made to, the SOI.[183]

However, because the ministerial directions power in relation to the NZ SOI process is ex ante and relates only to broad performance goals, strategies and measures, it is much less likely to erode independence than the Australian ministerial directions power or use of tied funding.[184] In other words, when compared to the ministerial directions power and the use of tied funding in Australia, the NZ SOI process achieves a better balance between accountability on the one hand and expertise and independence on the other. Moreover, the NZ SOI process has the advantage of being regular, systematic and transparent. It leads to the creation of a transparent and comprehensive accountability document, which contains negotiated, albeit imperfect, performance measures and clearly articulates regulators' short and medium-term goals and strategies.

In light of this, consideration could be given to removing the ministerial directions power and abandoning tied funding, in favour of developing a SOI process modelled on the NZ process.

C *Governance*

The governance arrangements of some Australian federal regulators, such as ASIC and APRA,[185] are very different from those of the Australian companies they regulate.[186] They are also very different from those of some key comparable

180 Ibid.

181 Ibid 39. This refers to meetings of the International Organization of Securities Commissions.

182 For example, the measures include 'increased confidence to invest in the market, which in turn will be reflected in the growth of New Zealand's capital markets' (ibid 13) and 'laws … to address shortcomings identified to Government by the Securities Commission' (at 14).

183 *Crown Entities Act 2004* (NZ) s 147.

184 For discussion of the ministerial directions power in Australia, see above Part VI(C)(1). In NZ, the extent of the ministerial directions power depends on the categorisation of the relevant Crown entity. Ministers can direct Crown agents, such as the Civil Aviation Authority and the Environmental Protection Authority, to give effect to a government policy: *Crown Entities Act 2004* (NZ) s 103. Ministers can direct autonomous Crown entities, such as the Broadcasting Commission and the Retirement Commissioner, to have regard to a government policy but cannot direct it to give effect to a government policy unless specifically provided in another Act: s 104. A Minister may not direct an independent Crown entity or a Crown entity company, such as the Financial Markets Authority (the Securities Commission's successor) and the Human Rights Commission, to have regard to or to give effect to a government policy unless specifically provided in another Act: s 105.

185 Some Australian regulators, such as the Reserve Bank of Australia, do have governance arrangements that resemble those of public company boards. The Reserve Bank Board and the Payment Systems Board of the Reserve Bank of Australia have both executive and non-executive directors.

186 They are inconsistent with ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments* (ASX, 2nd ed, 2010) 10 (recommendations 2.1–2.3), which recommended that a majority of the board should be independent directors,

foreign regulatory authorities, which have governing boards with a majority of non-executive directors and separate chairs and chief executive officers ('CEOs').[187] Both ASIC and APRA have governing bodies that are comprised of full-time executives.[188] Further, there is no separation of the role of chair and CEO. In both organisations, the chairman is effectively the CEO and also the chair of the governing body.

The use of a board, comprising executive and non-executive directors, to govern key Australian regulators has been firmly rejected in Australia. The HIH Royal Commission rejected this typical public company governance structure largely because the board of a government regulator could not appoint the CEO. Owen J said, in relation to the then governing board of APRA, which consisted of a majority of part-time directors:

> The imposition of a governance board between the chief executive and the Treasurer has the potential to cloud the line of accountability, especially as it is the board and not the Treasurer that sets the duties of the chief executive.
>
> The chief executive is answerable to the board — although it does not appoint him or her — as well as to the Treasurer. At the same time, the board carries responsibility for the performance of APRA but does not appoint the person who runs the organisation on its behalf.
>
> While individuals of the kind who are appointed to APRA's board would no doubt be able to play a valuable advisory role — including acting as a commercial sounding board — there is a question as to the utility of non-executive board input into how a regulatory body such as APRA carries out its statutory role.[189]

The *Uhrig Report* also firmly rejected the use of public company-type boards for regulators for similar reasons. Uhrig argued that the power of the board is significantly

> derived from the ability to appoint and remove the CEO, appoint the chairman and new directors, finalise and approve strategy, define the values and culture,

the Chair should be an independent director, and the roles of Chair and Chief Executive Officer should not be exercised by the same individual.

187 For example, the United Kingdom Financial Services Authority has a board, the majority of members of which are non-executive. The Deputy Governor (Financial Stability) of the Bank of England is an ex officio director. One of the non-executive members is Deputy Chairman and 'lead' non-executive. The Hong Kong Securities and Futures Commission has a Commission consisting of full-time executive officers and part-time non-executive officers and the role of Chairman and CEO are separate. The New Zealand Financial Markets Authority has a CEO and a board of nine non-executive members and three non-executive associate members.

188 Note that part-time Commissioners can be appointed to ASIC: *Australian Securities and Investments Commission Act 2001* (Cth) s 9(3). However, there has never been an appointment of a part-time Commissioner. Under *Australian Prudential Regulation Authority Act 1998* (Cth) s 16 APRA must have between three and five members and three must be full-time. APRA has had full-time members only following the government's acceptance of the HIH Royal Commission recommendation in relation to the governance of APRA: *HIH Royal Commission Report*, above n 135, vol 1, 209 (recommendation 18), which recommended that APRA's non-executive board be replaced with an executive group. This group would 'comprise the chief executive officer and two or three executive commissioners and would carry the responsibility, and account to government, for the operation and performance of APRA.' Prior to this report, APRA only had non-executive directors.

189 *HIH Royal Commission Report*, above n 135, vol 1, 207–10 [8.5.1].

> 'say no' to management and give final approval to the sale and purchase of significant assets.[190]

When these powers are diluted or modified, as they inevitably are in a regulator, a board of directors is, according to Uhrig, rendered useless. It has no ability to ensure effective oversight of the performance of management. Moreover, the presence of a board dilutes the accountability of the CEO and management to the Minister, as the CEO and management may effectively play the board and the Minister off against each other.[191]

Yet the public company governance system seems to work in foreign regulators, such as the Hong Kong Securities and Futures Commission, the United Kingdom Financial Services Authority and the NZ Financial Markets Authority.[192] Further, there is an argument that this is one way to ensure accountability without undermining independence and expertise.[193] The non-executive directors can ensure that the regulator is aware of and responsive to the needs of the ultimate stakeholders (ie the public) just as a key role of non-executive directors in a public company is to ensure accountability to members of the company.[194] However, the presence of non-executive directors on the board of a regulator does not undermine the independence of the regulator. In other words, the use of a public company-type board is the holy grail of accountability mechanisms for regulators — a mechanism that ensures accountability without undermining independence or expertise.

The arguments in the report of the HIH Royal Commission and the *Uhrig Report* against the use of independent, non-executive directors are strong but, given the example of foreign regulators, there is scope for more research on whether changes to the governance arrangements for Australian regulators could improve accountability without undermining expertise, independence and efficiency.

VIII CONCLUSION

Australian regulators are not perfectly accountable. However, on balance, they are sufficiently accountable. We should, in fact, not strive for perfect accountability because of the need to balance accountability against other important attributes, namely expertise, independence and efficiency.

This conclusion that Australian regulators are sufficiently accountable should not be mistaken for an argument that Australian regulators are perfect. Of course, like most organisations, they could always do a better job. For regulators, doing a better job means that they can improve in terms of:

190 *Uhrig Report*, above n 1, 65 (citations omitted).
191 Ibid 66–7.
192 See above n 187.
193 See the discussion in Luca Enriques, 'Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View' (2009) 30 *University of Pennsylvania Journal of International Law* 1147, 1149–51.
194 See ASX Corporate Governance Council, above n 186, 3; Steven T Petra, 'Do Outside Independent Directors Strengthen Corporate Boards?' (2005) 5(1) *Corporate Governance* 55.

- effectiveness (that is, achieving their regulatory mandate);
- efficiency (that is, achieving their mandate in the most cost-efficient way); and
- respect for non-instrumental values (such as procedural fairness, proportionality, predictability and transparency).[195]

Increased accountability mechanisms are, however, unlikely to improve a regulator's performance along any of these dimensions. In fact, given the clear trade-off between accountability on the one hand and expertise, independence and efficiency on the other, they are likely to undermine regulatory performance in terms of effectiveness and efficiency.

Additionally, the conclusion that Australian regulators are sufficiently accountable is not a suggestion that improvements to accountability cannot be made. Accountability mechanisms have developed incrementally, probably in response to habitual demands for increased accountability, and hence they do not operate together as a coherent system. Further, some mechanisms are ineffective and some potentially lead to an unacceptable erosion of regulator expertise and independence. To deal with these issues, consideration should be given to rationalising the bodies that oversee the performance of regulators, removing ministerial directions powers and the use of tied funding, enhancing the SOI process and changing the governance arrangements of regulators.

[195] Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 258–68.