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Spotlight on the ACCC: Are there lessons ASIC and APRA could learn?

Over the past two years, the Australian Securities and Investments Commission (**"ASIC"**) and the Australian Prudential Regulation Authority (**"APRA"**) have been increasingly under the spotlight.

The recent Royal Commission into Misconduct into the Banking, Superannuation and Financial Services Industry (**"Hayne Royal Commission"**) exposed both regulators to particularly intense criticism as to how they had responded (both in a proactive and reactive sense) to issues confronting Australia's financial institutions. A consistent message from the Hayne Royal Commission and various capability reviews and reports has been that these regulators need to be *'tougher enforcers'* of the law.

At the same time, the Australian Competition and Consumer Commission (**"ACCC"**) has gone from strength to strength. In February 2019, the ACCC was awarded the 2019 "Government Agency of the Year" award at the Global Competition Review's Annual Awards Ceremony hosted in Washington D.C. The Award acknowledges a single *"competition enforcer anywhere in the world whose work in 2018 was particularly effective, strategic or innovative".*

The comparison amongst these three regulators has played out in the media, where ASIC and APRA have been publicly (and unfavourably) compared to the ACCC, which has been described as the "*can-do*" regulator.[1] While this comparison is somewhat unfair - the ACCC has not been subjected to anywhere near the same level of public scrutiny as ASIC and APRA – should we nevertheless expect ASIC and APRA to follow the ACCC's playbook?

We've identified four reasons that we think will limit the extent to which ASIC and APRA could (or should) emulate the ACCC's approach.

1. Different functions

What works for the ACCC, a competition and consumer advocate primarily focused on enforcement, will not necessarily work for ASIC and APRA, which, in addition to enforcement, are tasked with maintaining certainty and stability in the economy.

[1] See, eg, Sarah Danckert, *Watchdogs at ten paces: How the ACCC is raising ASIC's hackles* (Sydney Morning Herald, 29 June 2019).

For example, in exercising its functions, APRA must *"balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia".*[2] *ASIC* must similarly strive to *"maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy".*[3]

Significant, risky enforcement decisions and actions which have the potential to disrupt markets or result in uncertainty are not likely to be as appropriate for ASIC and APRA as they are for the ACCC.

2. Messaging

The ACCC's activities reach into all sectors of the economy and touch a substantial and wide demographic, and its work is visible and immediately relevant to both large corporations and individual consumers. This is reflected in the relative diversity of the ACCC's Commissioners: one of the Deputy Chairs of the ACCC, Mick Keogh, has a background in agriculture and university degrees in Wool & Pastoral Sciences, whereas the backgrounds of ASIC's and APRA's leaders tend to be limited to areas such as banking, law and economics.

Further, one of the ACCC's specific statutory functions is to disseminate information about competition and consumer laws and issues to the public. ASIC and APRA do not have corresponding statutory functions.

Some of the laws the ACCC is tasked with enforcing, for example, consumer guarantees, are easier to educate the public about than the often complex corporate and securities issues, and financial and prudential requirements that ASIC and APRA enforce. The laws that the ACCC enforces are also, by their nature, inherently more relatable to the average consumer.

For these reasons, we expect that the ACCC is always going to have a naturally stronger media presence than those other regulators, and an easier time articulating its mandate.

3. Public failures

Since the Hayne Royal Commission released its Final Report, both ASIC and APRA have brought legal actions against various high-profile targets with mixed success,[4] and received some harsh criticism from both the judiciary and the media for the way they have run their unsuccessful cases.

We would expect ASIC and APRA's enthusiasm for their current litigation-focussed enforcement strategies to be somewhat diminished if they continue to have notable high-profile losses, without any apparent benefit such as providing better clarity on the proper interpretation of the law.

4. Premature praise?

Some of the recent praise of the ACCC may turn out to be premature.

For example, if the ACCC were to lose the criminal cartel case against Citigroup, Deutsche and ANZ or the TPG / Vodafone merger case, or if its Digital Platforms Inquiry final report turns out to be of little impact, we expect that public praise of the ACCC will become more muted and there will be less incentive for ASIC and APRA to follow its lead.

We also consider it likely that the ACCC's desire to change the test in Australia's merger control regime, and some of its suggestions for changing the way it administers its mergers powers, will meet with widespread resistance.

Overall, administrative power is rising in Australia, without any public debate around whether that is desirable, including if it is occurring at the expense of judicial power.

2 Australian Prudential Regulation Authority Act 1998 (Cth) s 8(2).

3 *Australian Securities and Investments Commission Act* 2001 (Cth) s 1(2)(a).

4 We refer to ASIC's action against Westpac (responsible lending laws) and APRA's action against IOOF.

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