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Auditor-General for Australia



22 October 2020

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Dear Treasurer

I am writing to you under paragraph 26(1)(a) of the *Auditor-General Act 1997*, whereby I must bring to the attention of the responsible Minister any matter that comes to my attention while conducting an audit of annual financial statements which I consider of such importance that it should be brought to the responsible Minister's attention.

During the 2019-20 financial statements audit of the Australian Securities and Investments Commission (ASIC), the ANAO identified payments made on behalf of the ASIC Chair and one Deputy Chair that we consider may exceed the limits set in the Remuneration Determination made by the Remuneration Tribunal. In reviewing these payments made in relation to the Chair, the ANAO also identified instances where the Commonwealth Procurement Rules were not followed and payments were made on behalf of the Chair where appropriate governance mechanisms were lacking. These matters were not included in the ANAO's Independent Auditor's Report to you on the ASIC 2019-20 financial statements as they did not impact on the audit opinion.

I consider these as important matters to bring to your attention as they relate to the stewardship by the Accountable Authority of taxpayer resources, particularly with respect to payments made to the benefit of the Accountable Authority. Further, I formed a view during the course of the audit that in order to gain greater confidence that appropriate action would be taken, I should indicate that I would bring the matter to your attention.

#### *Relevant Frameworks*

The ASIC Chair and Deputy Chairs are covered by Remuneration Tribunal Determinations for full time public office holders. The relevant Determinations provide that the remuneration and benefits paid to office holders must not be supplemented. The Determinations outline payments that do not form part of the total remuneration package of office holders.

The Commonwealth Procurement Rules (CPRs) set out rules that officials of relevant entities must comply with when they procure goods and services. As a non-corporate Commonwealth entity, ASIC must comply with the CPRs. The core rule of the CPRs is achieving value for money which includes ensuring the efficient, effective, ethical and economic use of public resources.

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*Payments made on behalf of Deputy Chair Crennan*

In both 2018-19 and 2019-20 regular accommodation payments of \$750 per week were made by ASIC on behalf of Deputy Chair Crennan following a request by ASIC for the Deputy Chair to relocate from Melbourne to Sydney. These payments were over and above the total remuneration package per the Remuneration Determination that applies to the Deputy Chair.

Under the relevant Determination, the Remuneration Tribunal has determined that certain named office holders are eligible to be reimbursed for accommodation costs where the office holder has a principal place of residence in a locality other than the office locality. The Deputy Chair did not have a principal place of residence in a locality other than the office locality and is not listed as receiving such an allowance in the relevant Determination.

The ANAO's 2018-19 Closing Report, issued in early August 2019, recommended that ASIC seek advice from the Remuneration Tribunal on the classification of these payments and whether they fell within the Remuneration Tribunal Determination. As at the end of September 2020 this had not occurred. Following the release of our draft finding to ASIC on this matter on 6 October 2020, ASIC communicated that the total amount of accommodation support provided would be repaid by the Deputy Chair as a debt to the Commonwealth.

*Payments made on behalf of the Chair*

Prior to the appointment of the current Chair to ASIC, ASIC held discussions with the Department of the Treasury on relocation expense package options. These options included estimates for an initial tax briefing (\$3,000) and annual tax return submissions (\$5,000) for the successful applicant. ASIC approved an engagement letter from KPMG for the provision of taxation services to the incoming Chair with costings of \$4,050.

Following the agreed initial tax briefing provided by KPMG to the Chair on 22 December 2017, ASIC received an email from KPMG requesting approval for the preparation of tax returns for the Chair for both 2017 and 2018 in Australia and the United States (US). The request did not contain any cost estimates or other indications of costs to be incurred. This was approved by ASIC without costings or limits on the services to be provided.

The Chair was advised by KPMG in September 2018 that its fees for taxation services would be approximately \$60,000-\$70,000 and that discussions with ASIC representatives confirmed a total of \$9,500 would be covered by ASIC with any additional fees requiring a separate engagement with the Chair on an individual basis. Email correspondence provided by ASIC indicates that on 11 October 2018 advice provided to the Chair by ASIC was that the full amount would be paid by ASIC given it fitted within the overall relocation limits discussed with Treasury and the services fitted within the definition of tax briefings and returns.

The procurement of taxation services from KPMG was documented in ASIC's procurement workflow system and approved as three \$25,000 procurements on 30 October 2018, ten months after the initial KPMG tax briefing. The final invoices issued in August 2019 totalled \$118,557 and were in excess of the approved procurements. The fee increases were described by KPMG as being due to the complexity of the tax affairs being managed. In addition to the invoiced amounts paid by ASIC, Fringe Benefits Tax of \$78,266 was paid by ASIC in relation to these benefits.

As well as the agreed tax briefing and completion of Australian and US tax returns, the KPMG invoices describe the services rendered as encompassing "tax advice on personal investments", "optimisation of the Australian taxation of foreign exchange gain or loss in foreign bank accounts" and "assistance in respect of

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resolution of Massachusetts State tax notices and penalties due to late filing of 2017 Massachusetts state tax return". Taxation support services were rendered to the Chair as late as March 2019.

The ANAO was unable to obtain any documentary evidence that a confirmation of the services provided occurred prior to payment by ASIC. ASIC asserts that discussions were held with the Chair to confirm that the amounts invoiced represented the services provided. No evidence was available to support that the approval of services to be provided on behalf of the Chair was subject to any additional advice or consideration prior to approval nor supported by a formalised policy on executive officer relocation costs and benefits. ASIC has stated that no advice was sought from the Remuneration Tribunal concerning the payment of additional benefits on behalf of the Chair.

Under the relevant Remuneration Tribunal Determinations, office holders may receive reimbursement of expenses incurred on geographic relocation following appointment in accordance with the relevant entity's policy and practices. Expenses for the preparation of components of tax returns and other advice received may have been required regardless of relocation and therefore fall within the definition of Total Remuneration in the relevant Determination. This would result in a breach of the limits on Total Remuneration set by the Determination.

In the context of the financial statements audit, the ANAO had requested that all relevant information regarding these transactions be provided and ASIC's Management Representation Letter signed by the Accountable Authority on 9 September 2020 stated that the ANAO "has been provided with access to all information, such as records and documentation and other matters, of which we are aware that is relevant to the preparation of the financial statements". A further issue of governance concern is that following the release of the ANAO's draft finding for comment by ASIC on 5 October 2020 and subsequent to the Management Representation Letter, additional records were provided by ASIC on 16 October 2020.

The ANAO has recommended to ASIC that:

- ASIC undertake a review of the processes supporting the approval of remuneration and benefits paid to Executive Office holders, including the trigger points for seeking advice should amounts outside of the Remuneration Determination be considered for approval; and
- a review be undertaken of the procurement processes around payments made for the taxation advice paid on behalf of the Chair to determine those internal controls that need to be either reinforced with relevant staff or redesigned to ensure effective implementation.

Following the release of the ANAO's draft finding for comment by ASIC on 5 October 2020, ASIC informed the ANAO that it will disclose in its annual report that the amounts paid for accommodation support for Deputy Chair Crennan and taxation advice for the Chair would be repaid in full by the respective officers. Repayment does not change the nature of the findings from the audit.

I understand that ASIC is progressing the implementation of a review and have engaged in conversations with Treasury in this regard.

Yours sincerely



Grant Hehir  
Auditor-General