



REPORT TO:

**Dr Steven Kennedy PSM**  
Secretary to the Treasury

**Abridged report on the review of ASIC governance arrangements**

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28 January 2021

*The final confidential report was provided to Treasury on 17 December 2020. This abridged version was prepared by the Treasury in consultation with Dr Thom for public release so as not to disclose personal or commercial information or legal advice.*

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## EXECUTIVE SUMMARY

On 22 October 2020 the Auditor-General raised concerns with the Treasurer in relation to payments made to key management personnel at Australian Securities and Investments Commission (ASIC). The concerns included whether certain payments exceeded the limits set by the Remuneration Tribunal and the procurement processes around the payments.

On 25 October 2020 the Secretary to the Treasury appointed Dr Vivienne Thom to conduct a review into the findings of the Australian National Audit Office (ANAO) financial statements audit in relation to payments made to key management personnel of ASIC and related governance matters. This is the report of that review.

### **Payments made on behalf of Mr Crennan**

In both 2018-19 and 2019-20 regular accommodation payments of \$750 per week were made by ASIC on behalf of Deputy Chair, Mr Daniel Crennan, QC.

In early August 2019 the ANAO's 2018-19 Closing Report recommended that ASIC seek advice from the Remuneration Tribunal on the classification of these payments and whether they fell within the Remuneration Tribunal Determination. ASIC decided in September 2020, some 13 months later, not to pursue a ruling or determination from the Remuneration Tribunal.

ASIC should have moved more swiftly to resolve the matter on the basis of the facts as they were known at the time – or to establish facts with some precision if they were not. This might have resulted in a decision in September 2019 not to pursue the matter with the Remuneration Tribunal.

ASIC's Audit Committee did not monitor the ANAO's recommendation because it was related to an observation not a finding. The review was advised that in future all ANAO recommendations would be followed up by the Audit Committee.

The review was also advised that ASIC is contemplating the development of a central risk and breach register clearly identifying the party accountable for any resolution. This should have oversight and monitoring from the Executive Risk Committee and should provide regular reports to the Audit Committee.

### **Recommendation 1**

**The review recommends that ASIC should develop a central risk and breach register clearly identifying the party accountable for any resolution. This should have oversight and monitoring from the Executive Risk Committee and should provide regular reports to the Audit Committee.**

The Commission did not monitor, nor arguably had a real opportunity to monitor, the response to the ANAO's recommendation of August 2019. The matter of the ANAO's concerns about the accommodation allowance should reasonably have been escalated to the Commission and fully and transparently discussed at that level at the earliest opportunity. The Commission could have delegated the day-to-day management of the issue but should have retained some visibility and oversight.

The review was informed that ASIC has recently introduced revised governance arrangements relating to Commission oversight and the formation of an Executive Integrity Committee. The review considers that these proposed changes, if fully implemented, could address and prevent some of the issues raised in this part of the report in relation to oversight and progression of the issues.

### **Recommendation 2**

**The review recommends that ASIC should progress its reforms in relation to Commission oversight of audit findings and actions and the formation of an Executive Integrity Committee. ASIC's Audit Committee should monitor the progress of the implementation of these arrangements. ASIC should review the effectiveness of these new governance arrangements within eighteen months.**

### **The payments made on behalf of Mr Shipton**

ASIC made payments for taxation advice on behalf of the Chair, Mr James Shipton, that amounted to \$118,557 (including GST).

The review considered the nature of an agreement between Mr Shipton and the Commonwealth for the payment of the tax advice upon Mr Shipton's relocation to Australia. While the review confirms that there was an agreement between Mr Shipton and the Commonwealth to pay for some tax advice, there could be no 'pre-existing agreement' with the Commonwealth to pay uncapped costs.

In the absence of any monetary value in that agreement, there should have been no expectation that the agreement was for an uncapped amount. While in practice it is clear that the costs were not specified or capped, based on the estimates sought and provided at the early stages, a reasonable payment for the additional costs for tax returns would have been approximately up to \$11,750 (in addition to the \$1,916.76 cost of an initial briefing).

It is the opinion of this review that any increases after that should have been subject to a further consideration as to whether the costs were reasonable and whether a clear ceiling was to be established.

If the expenditure was not compliant with ASIC's Relocation Policy, then these expenses would not be excluded from Mr Shipton's total remuneration, and his remuneration would exceed that allowed under the Remuneration Tribunal Determination.

The review also identified a number of potential breaches of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the Commonwealth Procurement Rules and ASIC policies in respect of the process of procurement for the tax advice on behalf of Mr Shipton.

### **Recommendation 3**

**The review recommends that ASIC should have regard to the findings in this report and proceed to finalise the investigation and review of potential breaches of legislation and policy related to the procurement of tax advice services from KPMG.**

#### **Conduct of Mr Shipton**

The review examined Mr Shipton's conduct in relation to the circumstances of a decision by a senior official to increase the level of tax advice support to Mr Shipton on 9 October 2018.

### **Recommendation 4**

**The review recommends that, based on the evidence available to this review, it would be reasonably open to Treasury to obtain legal advice about whether Mr Shipton's conduct in late 2018 amounts to a breach of section 13(7) of the Australian Public Service (APS) Code of Conduct or any other obligation, and, if so, what action could be taken in relation to the conduct giving rise to that breach.**

**This consideration should have regard to the interviews conducted in the course of this review, the documents provided to it and the submissions made to it.**

The review also examined the level of disclosure and other actions taken by Mr Shipton following advice on 11 August 2020 from an ANAO official that the ANAO's view at that time was that the payments for Mr Shipton's tax advice 'do not meet the definition of a relocation expense and have resulted in the Remuneration Tribunal Determination being exceeded. This is considered a breach of the Remuneration Tribunal Act.'

### **Recommendation 5**

**The review recommends that, based on the evidence available to this review, it would be reasonably open to Treasury to obtain legal advice about whether Mr Shipton's conduct, in the period from 11 August 2020 to 25 September 2020, may amount to a breach of section 14 of the ASIC Code of Conduct or any other obligation and, if so, what action could be taken in relation to the conduct giving rise to that breach.**

**This consideration should have regard to the interviews conducted in the course of this review, the documents provided to it and the submissions made to it.**

#### **Conduct of ASIC officials**

It would be open to ASIC to review the actions of the ASIC officials involved in these procurement decisions, to determine what, if any, further action is warranted. ASIC might want to take into account the

circumstances at the time of the procurement, the time that has elapsed since the procurement, and the acknowledgment by the officials of the potential breaches. Given the public attention this matter has received, it is unlikely that these actions will be repeated. No recommendation is made in respect of the conduct of these officials. On the face of the findings in this report, the actions of some ASIC officials involved in providing the information for, preparing, or oversighting the quality and accuracy of briefings, submissions and legal advices may be open to question. ASIC may wish to consider whether these matters are indicative of a possible lack of quality assurance and consider whether additional controls should be introduced to ensure accuracy in their legal advising processes.

#### **Recommendation 6**

**The review recommends that ASIC should consider whether the matters identified in the report are indicative of a possible lack of quality assurance and investigate whether additional controls should be introduced to ensure accuracy in their legal advising processes.**

#### **Provision of records to the Auditor-General**

ASIC provided additional documents to the ANAO on 16 October 2020 that were relevant to Mr Shipton's tax advice assistance after 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'.

The review did not identify any evidence to suggest that the late provision of these documents suggested a lack of diligence or that the statement by the Accountable Authority was false on the date on which it was signed.

#### **Governance practices**

It is clear to this review that the management of pre-appointment processes lacked certainty around the relocation allowances that might or would apply and the application of Remuneration Tribunal requirements.

#### **Recommendation 7**

**The review recommends that Treasury should:**

- **Ensure there is a clearly documented agreement of all terms and conditions of employment, including relocation expenses with limits, prior to the appointment of a statutory officer. The employing authority would necessarily be a party to any agreement;**
- **Develop a policy document to ensure consistency of approach;**
- **Establish a central expert contact to respond to questions about matters regarding the terms and conditions of statutory officers in the portfolio;**
- **Hold the responsibility for formally approaching the Remuneration Tribunal through the Treasurer if further individual determinations are sought both pre-appointment and on an ongoing basis; and**
- **Arrange briefings for statutory appointees including an overview of their responsibilities under their governing legislation and other relevant obligations that are particular to working in the Australian public sector.**

There are particular challenges that arise when subordinate officials are required to approve expenses for very senior statutory officers, particular expenses for the Accountable Authority.

#### **Recommendation 8**

**The review recommends that ASIC should:**

- **Develop policies in relation to the payment of expenses for Commission members setting threshold amounts and defining sensitive expenses that require additional controls;**
- **Require the endorsement of the Commission for expenses beyond a threshold and for sensitive expenses;**

- **Require the Chair's approval for the expenses of Commission members; and**
- **Require a Deputy Chair's approval for the Chair's expenses.**

#### **Other matters**

The governance issues in this report raise questions about the overall governance arrangements in ASIC, particularly in respect of the responsibilities of the Accountable Authority.

This review has raised issues of concern regarding:

- The proper use and management of public resources;
- Systems of risk oversight and management for the entity;
- System of internal control for the entity; and
- Cooperation between ASIC officials.

## 1. INTRODUCTION

The Australian Securities and Investments Commission (ASIC) is Australia's integrated corporate, markets, financial services and consumer credit regulator. It is an independent Australian Government body corporate set up under and administering the Australian Securities and Investments Commission Act 2001 (ASIC Act).

Under the ASIC Act, the Commission, currently comprising five members (including the Chair), is responsible for the management and administration of ASIC. The Commission is ASIC's governing body and is responsible for achieving ASIC's statutory objectives set out in the ASIC Act. It makes strategic and/or significant regulatory decisions, sets ASIC's strategy and oversees ASIC's delivery and performance against the strategy. The Chair of the Commission is responsible for the duties of the Accountable Authority contained in the *Public Governance Performance and Accountability Act 2013* (PGPA Act) which forms part of the executive responsibilities of governing ASIC.<sup>1</sup>

Under the *Auditor-General Act 1997*, the Auditor-General's functions include auditing the financial statements of Commonwealth entities, Commonwealth companies and their subsidiaries, including ASIC. The Auditor-General can report directly to the Parliament on any matter or to a minister on any important matter

On 22 October 2020 the Auditor-General, Mr Grant Hehir, wrote a letter to the Treasurer, the Hon Josh Frydenberg MP (the s 26 letter). In that letter Mr Hehir wrote:

*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.*

The letter sets out the relevant legal framework and details of the concerns. Mr Hehir concludes:

*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.*

On 25 October 2020 the Secretary to the Treasury, Dr Steven Kennedy PSM, appointed Dr Vivienne Thom to conduct this review into the findings of the ANAO financial statements audit in relation to payments made to key management personnel of ASIC.

This review was tasked to make findings and recommend actions in relation to the following matters, to provide a factual basis for legal advice concerning the next steps available:

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<sup>1</sup> Section 10A of the ASIC Act states that the Chairperson is not subject to direction by ASIC (that is, the Commission) in relation to the Chairperson's performance of functions, or exercise of powers, under the PGPA Act, or under Part 6 (ASIC's staff) or Part 7 (Preventing conflicts of interest and misuse of information) of the ASIC Act.



- The adequacy of the governance practices concerning remuneration and other payments to ASIC members.
- Whether changes should be made to those practices, including whether those matters should be undertaken by the Treasury.
- Whether payments made on behalf of James Shipton, in his capacity as the Chair of ASIC, and Daniel Crennan QC, in his capacity as Deputy Chair of ASIC, were made with appropriate authorisation and in accordance with all legislative, policy and procedural requirements, including the *Remuneration Tribunal Act 1973*, the *Public Governance, Performance and Accountability Act 2003* and the Commonwealth Procurement Rules.
- The conduct of ASIC members and officials who were involved in these and other processes concerning remuneration and other payments to members, and the response to the ANAO audit.

Before this review commenced both Mr Shipton and Mr Crennan reimbursed ASIC for these expenses. Mr Shipton took leave from his position on 23 October 2020 and Mr Crennan resigned on 26 October 2020.

## 2. THE REVIEW

This review was initially provided with a large volume of documentary information by Treasury and ASIC relating to the Terms of Reference.

After consideration of these documents, fourteen individuals, including the Chair, Mr James Shipton and the former Deputy Chair, Mr Daniel Crennan, were interviewed between 18 and 23 November 2020. Interviewees were provided with transcripts of their interviews and given the opportunity to correct the transcript and provide additional information. A number of interviewees were asked follow-up questions in writing, or were afforded the opportunity to comment in writing on information provided by other interviewees. ASIC was also approached for further material as the review progressed.

Mr Shipton also provided an extensive written submission on 20 November 2020, which included a narrative of events (the Shipton narrative) and on 30 November 2020 provided further written submissions as a response to issues raised in his interview (the Shipton response).

All interviewees and ASIC cooperated fully with the review and provided prompt and comprehensive responses upon request.

The relevant procedural fairness principles were applied throughout the review including:

- I declare that I am not biased and have no conflicts of interest in this matter.
- Findings of fact are made based on the evidence available.
- Those who are subject to requests for documents or information have had a reasonable opportunity to provide information.
- People were provided with the opportunity to respond to any material which could adversely affect their interests.

Additionally, in this review, a number of individuals were provided with a reasonable time to consider and respond to any proposed findings or recommendations which could adversely affect their interests. These comments were all considered in the preparation of the final report.

Mr Shipton was offered an opportunity to comment on a draft version of this report. His legal counsel advised that:

*In substance, it is our submission that the Draft Report does not accord Mr Shipton procedural fairness, misdirects itself on the correct test to apply, erroneously applies the wrong test, is flawed as to the facts and improperly draws conclusions of law.*

The civil standard of proof was applied as is standard in administrative investigations – that is, a ‘balance of probabilities’ or ‘more probable than not’ approach. In other words, any findings should be based on the conclusion that it is more probable than not that the matter alleged to have occurred, in fact occurred.

The strength of the evidence necessary to establish a fact on the balance of probabilities will vary according to the seriousness of the allegation. The more serious the allegation the stronger the evidence needs to be to support a finding that the alleged conduct did in fact occur (known as the Briginshaw test). Examples of serious allegations are those involving a crime, fraud or other moral wrongdoing which if proved, would have serious consequences for the person, or serious and wilful misconduct warranting dismissal. In such serious cases, for example, an allegation without corroborating evidence will probably not meet the standard of proof required. The Briginshaw test has been applied in this investigation.

### **3. THE REMUNERATION FRAMEWORK**

#### **Remuneration Tribunal Determinations**

The ASIC Chair and two 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 also outline payments that do not form part of the total remuneration package of office holders.

*Determination 2017/11: Remuneration and Allowances for Holders of Full-Time Public Office*, which commenced on 1 July 2017, excludes the ‘reimbursement of expenses incurred on geographic relocation following appointment as an Office Holder, in accordance with agency policies and practices when approved by the employer’. ‘Employer’ means the Commonwealth and includes any person authorised to exercise powers, perform acts, grant approvals or give directions for, or on behalf of, the Commonwealth.

*Remuneration Tribunal (Specified Statutory Offices—Remuneration and Allowances) Determination 2018* (the Determination) in place from 26 August 2018 excludes the ‘reimbursement of expenses incurred on geographic relocation following appointment as an office holder, in accordance with agency policies and practices where approved by the employing authority’ where ‘employing authority’, in relation to an office holder, means an entity exercising a power or performing a function in relation to the office holder’s employment or remuneration.

In specific cases the Remuneration Tribunal (the Tribunal) may make a specific determination to provide additional remuneration to account for the officeholder’s specific circumstances. No such specific determination has been made in respect of any current ASIC member.

Where an officeholder receives amounts which exceed the determined remuneration for that office, then the excess amount is a debt owing to the Commonwealth and should be repaid or recovered.

The Tribunal also issues guidelines on geographic relocation of full time office holders. The Guidelines issued on 9 December 2014 state that:

*Where a person is appointed to an office and their principal place of residence is in a geographic locality (‘the home locality’) is different from that of the office (‘the office locality’) it is expected that the person will relocate their principal place of residence to the new locality. When this occurs, reasonable relocation costs may be approved by the employer in accordance with agency policies and practices, without referral to the Tribunal.*

In October 2018 the Tribunal issued *Relocation Assistance Guidelines: Accommodation and Reunion Travel*. It advises:

*If an office holder relocates his or her principal place of residence to the office locality on appointment, the person’s employing authority is able to approve relocation costs in accordance with that agency’s policies and practices. This does not require the agreement of the Tribunal.*

#### **ASIC’s relocation policy**

ASIC has a *Relocation Policy* that applies to ‘ASIC team members’. The versions approved in November 2016 and August 2018 are relevant to this review.

The 2016 policy sets out as a principle that ‘Where team members are required to relocate on a temporary or permanent basis, ASIC will meet reasonable costs arising from their relocation and if appropriate, their family’s relocation.’ It notes that ‘ASIC may not necessarily meet all of costs arising from a relocation and may impose a maximum limit on assistance.’ The 2018 policy contains similar principles.

In respect of international relocations, the 2016 policy states that ‘International relocation (such as overseas secondment) is negotiated on a case-by-case basis by People & Development. Relocation assistance will depend on the duration of the assignment, country, and arrangements with Host agencies.’

In respect of accommodation costs for domestic relocations, the 2018 policy states that ‘The team member will be responsible for the normal rental costs. If any rental assistance is required, the Senior Executive Leader will approve the amount and duration of such assistance.’

#### **4. PAYMENTS MADE ON BEHALF OF MR CRENNAN**

In the following section of this report the review considers a number of questions relevant to the rental allowance payments made to Mr Crennan.

It examines whether the rental allowance payments were made with appropriate authorisation and in accordance with legislative policy and procedural requirements. It then examines what occurred after the ANAO advised its view about the payments and offers some observations about the governance arrangements as they applied to this matter as it unfolded.

##### **The Auditor-General’s concerns**

In the s 26 letter the Auditor-General advised the Treasurer:

###### ***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.*

##### **Accommodation payments made to Mr Crennan**

The review interviewed Mr Crennan and a number of other individuals about this matter.

Mr Crennan was appointed as Deputy Chair in July 2018. He was to be based in Melbourne. After Deputy Chair Mr Peter Kell, who was Sydney-based, resigned unexpectedly in September 2018, Mr Crennan and the ASIC Chair discussed the need to have another member located in Sydney. They agreed that it would be preferable to have a Deputy Chair based in Sydney. Mr Crennan agreed to consider the move. There was no evidence to suggest that he was directed to move – another member could have been requested to move or ASIC could have continued under the existing arrangements.

In October 2018 Mr Crennan had discussions with ASIC’s People and Development (P&D) staff about relocation expenses. While the relevant P&D officer records that Mr Crennan was ‘keen to receive some form of rent assistance’, Mr Crennan’s recollection is that he was ‘keen to know because we had to budget ... as to where we could live and how much it would be and that sort of stuff. So I was keen to find out how much

it would be but I don't think I was told until, I'm not sure when exactly but it was some time in November.' Mr Crennan said he wanted to know what parts of the package might be available so that he could quickly organise his move to Sydney. He said he did not consider what the Remuneration Tribunal's guidance might be. He does not recall any discussion about 'reasonable costs'.

In October 2018, the P&D staff member prepared a draft proposal for consideration by the then Senior Executive Leader (SEL P&D) relating to Mr Crennan's relocation, including a proposal for temporary accommodation estimated at \$40 000. The draft noted that the allowance was likely to incur fringe benefits tax (FBT) and may constitute an allowance reportable to the Remuneration Tribunal. This draft proposal was later refined to specify that the \$40 000 was to be rent paid by ASIC for 6 months, noting that the Remuneration Tribunal allows agencies to meet reasonable relocation costs in accordance with the agency's Relocation Policy. This draft proposal was not forwarded to Mr Crennan or implemented.

On 30 November 2018 the then SEL P&D advised Mr Crennan that ASIC would support his relocation to Sydney by making payments for removals, storage, and \$40 000 rental allowance annually for two years. The evidence is that Mr Shipton had been consulted on the arrangement, but did not formally approve the amount. That approval was made by the SEL P&D.

In May 2019 there was some email discussion within P&D (apparently not involving Mr Crennan) to restructure the rental support, or to request Mr Crennan to declare he was looking for longer term accommodation to minimise FBT, but these options were not pursued. (No information was provided to the review to confirm that Mr Crennan had indicated that he was, in fact, looking for other accommodation.)

The emails within P&D about the FBT treatment of the rental allowance include that 'It was discussed with Daniel at the time of his appointment that the office locality of his appointment would need to be Sydney once the other Deputy Chair, Peter Kell left'. Mr Crennan's evidence did not confirm that this statement was correct and it is not clear how this conclusion had been reached.

Internal emails also advise that the 'office locality of his appointment' was the basis, 'in accordance with the Remuneration Tribunal's Guidelines on Accommodation and Reunion Travel', for the approval of the relocation costs 'in accordance with ASIC's Relocation Policy'.

The evidence is that in May 2019 P&D staff discussed contacting the Tribunal to clarify whether there was a distinction between 'relocation costs' (not requiring Tribunal approval) and 'accommodation costs' (requiring Tribunal approval). The evidence of one P&D staff member was that they had always held the belief that temporary accommodation up to six months may be permitted without referral to the Remuneration Tribunal, but that they would still have preferred to seek their advice on this, and that two years accommodation would certainly constitute a benefit that required approval.

On 4 June 2019 this P&D staff member raised concerns about the payment with a new and recently appointed SEL (P&D) and questioned whether ASIC should seek clarification from the Remuneration Tribunal. The matter was referred to the P&D lawyer for advice. This legal advice was provided on 17 June 2019.

On 22 June 2019 the Commission Counsel questioned P&D as to whether the Tribunal had guidance on what could be considered to be 'relocation costs' – were they one-off costs or recurring costs. She also asked whether ASIC documented the reasons to give rental assistance to Mr Crennan. The response from the P&D staff member stated that it was decided 'as soon as Mr Crennan commenced that his role needed to be in Sydney not Melbourne' and that 'we considered the move to do with his appointment' and asked whether ASIC could still apply the appointment provisions even though this was an ASIC decision rather than a Treasury decision. (The review has not seen any evidence to confirm that the move was considered 'to do with Mr Crennan's appointment' when the allowance was approved.)

The response from P&D also advised there were no documented criteria. The SEL P&D determined the amount considering the need for the move and the cost of relocation. It was noted that ASIC was 'only paying approximately 30%' of Mr Crennan's rent and that he was paying the remainder.

On 16 July 2019 the SEL P&D met with Mr Crennan to ask about his living expenses in Sydney and Melbourne. The information was recorded as 'The net rent for my house in Melbourne was approximately the same as

the rent net of the ASIC contribution of the rented house in Sydney' and that other expenses had been incurred including higher school fees and private travel and accommodation.

On 1 August 2019 the draft financial statements for 2018-19 were presented to the ASIC Audit Committee. At the meeting to consider those statements the Chief Finance Officer (CFO) advised the Committee that two instances of potential non-compliance with the Tribunal determination were disclosed and at that time they were being reviewed by CLO with P&D.

The ANAO was provided with ASIC's internal legal advice on 5 August 2019.

The ANAO responded to ASIC on 6 August 2019 that they were not satisfied that the arrangement was approved in accordance with ASIC's policies and practices. They formed this view on the basis that:

- The relocation policy is explicit in defining 'team member' and that a different policy would apply to Commissioners.
- In two previous examples given the approval was granted by someone who was not subordinate to the Deputy Chair. In both cases approval was granted by the Chair.
- The previous costs were one-off costs rather than ongoing rental costs. An accommodation allowance for a period of two years is arguably an employment benefit rather than an expense incurred on geographic location.

The ANAO recommended ASIC approach the Remuneration Tribunal directly to obtain a decision on whether these arrangements, including the above factors, satisfied subparagraph 7(3)(c) of the Determination, or represent breaches of the *Remuneration Tribunal Act 1973* (RT Act).

### **ASIC's response to the ANAO's recommendation that ASIC approach the Tribunal**

On 7 August 2019 the CFO referred the matter of the ANAO concerns about Mr Crennan's rental allowance to the CLO as the CFO now considered it to be a legal issue.

Internal emails seen by this review indicated that the Chair would be briefed on the matter in the week commencing 19 August 2019, and that ASIC would now seek a determination to approve the arrangement going forward and, if possible, seek retrospective approval for the assistance already paid..

The email exchanges noted that there were two separate issues:

- Whether a breach of s 8 of the Determination has occurred.
- The steps to obtain a determination from the Tribunal to regularise the arrangement.

On 15 August 2019 the Audit Committee was advised of the ANAO's concerns about the payment to Mr Crennan potentially not being in accordance with the Tribunal Determination. The Committee was also advised that ASIC had commenced work to action this recommendation. The ANAO's draft closing letter stated that the expenses associated with the relocation allowance for the Deputy Chair have been referred to the Tribunal for review. The Committee minutes make no mention of the issue as a future action or monitoring item.

On 20 August 2019 the ANAO provided Mr Shipton with its closing letter on completion of the audit of ASIC's financial statements. The ANAO made a number of observations arising from the audit, including, under the heading 'Compliance with laws and regulations', an observation about a potential breach of the Remuneration Tribunal Act, in regard to arrangements made to provide relocation assistance to a Key Management Personnel (KMP) during 2018-19. The ANAO recommended ASIC seek a decision from the Tribunal on this matter. If it was determined to be a breach by the Tribunal, ASIC would be required to publicly report it. There was no requirement for this to occur in the financial statements but if a breach was confirmed, it would be disclosed in the Annual Report. The ANAO would confirm that ASIC has met its reporting obligations once the outcome is known.

At interview Mr Shipton advised this review that this was the first time that he recalls the issue of concern about Mr Crennan's relocation support being raised with him.

Two months later, on 27 October 2019, Commission Counsel prepared a memorandum for the Chair and a draft submission to be sent to the Tribunal by the Treasurer. This was provided to General Counsel with a note that the draft submission did not contain details of Mr Crennan's rental costs or the cost savings made by ASIC because of the relocation and that Commission Counsel would seek Mr Crennan's comments on the submission.

There are a number of internal emails about the matter, but it does not appear to have progressed beyond that point and no formal submission appears to have been made in the closing months of 2019. At the 14 November 2019 ASIC Audit Committee meeting there was no mention of the matter.

The memorandum and draft submission were emailed to Mr Crennan on 5 February 2020. Mr Crennan advised the review that he did not open or read the email at that time.

The papers indicate that there was further internal discussion between ASIC's finance area (Finance) and P&D about who was responsible for following the matter up.

At the 25 February 2020 Audit Committee meeting there was again no mention of the matter.

On 11 March 2020 Commission Counsel met with Mr Crennan.

Mr Crennan advised the review that:

*On 11 March [Commission Counsel] came into my room and she was holding a hard copy of the submissions. ... I said to her,*

*'I don't wish to participate in the drafting of submissions about something to do with me, but if you just talk to me about – give me an update as to what's going on and ask me anything you need to ask me about, then that will be fine.'*

On 17 April 2020 the acting CFO followed up with SEL P&D, noting that ASIC would have to address the issue with the ANAO. The SEL P&D respond that the matter had been in the hands of the CLO for more than six months.

The draft submission and brief was forwarded to Mr Shipton on 11 May 2020. Mr Shipton advised the review that this was the first time he had received a full briefing on the matter and that having received it he identified it as an important matter.

On 13 May 2020, some nine months after the matter was first referred to the CLO, the Commission Counsel met with the Chair to discuss the matter. Mr Shipton's recollection is that he sought to have it expeditiously referred to and resolved by the Tribunal at that stage.

On 26 May 2020 Commission Counsel provided the briefing note and draft submission to the acting COO for forwarding to Treasury.

At the 29 May 2020 Audit Committee meeting there was again no mention of the matter.

A meeting was held with Treasury on 11 June 2020 to discuss the Tribunal submission. Mr Shipton recalled that he met with Commission Counsel on 23 July 2020 and that he asked her to continue to progress the application with the Tribunal. This was followed up on 31 July 2020 with an email from the Commission Counsel to Treasury setting out the background to the matter and enclosing the draft Tribunal application. ASIC sought Treasury's advice and assistance in bringing the matter to the Treasurer's attention so that the application to the Tribunal could be made.

At the Audit Committee meeting on 4 August 2020, the ANAO interim management letter does not contain any mention of KPM issues of concern.

On 6 August 2020 the ANAO was provided with a briefing paper and draft Tribunal submission in respect of Mr Crennan's relocation support. The briefing paper sets out:

*... the steps taken by ASIC following the recommendation made by the Australian National Audit Office (ANAO) that ASIC test with the Remuneration Tribunal whether the package of relocation assistance approved in January 2019 for the relocation of Deputy Chair Crennan from Melbourne to Sydney is compliant with the provisions of the Remuneration Tribunal Act 1973 (RT Act).*

The briefing paper advised that ASIC had prepared a draft submission to the Tribunal seeking retrospective approval for the rental assistance part of the relocation assistance approved in January 2019. It included advice that in the event the Remuneration Tribunal came to the view the rental assistance was not compliant with the Remuneration Tribunal Act, the application (if successful) would have the effect of making the rental assistance compliant retrospectively. The briefing advised that ASIC had consulted with Treasury and that it was now able to file the application with the Tribunal.

On 6 August 2020 Treasury advised that ASIC should submit to the Tribunal directly. Treasury did not see a role in furthering the application at this point. They discussed ASIC briefing the Treasurer's office.

On the same day the ANAO asked ASIC about a timeframe for the lodgement of the submission with the Tribunal. The Commission Counsel advised that they would be able to file the application with the Tribunal in the next 14 days and were seeking AGS advice.

On 12 August 2020 the COO advised Mr Crennan that CLO would lodge a submission with the Tribunal. She suggested a discussion about the wording of disclosures that might be required in the financial statements.

Mr Shipton recalls being told at a meeting on 27 August 2020 that the Tribunal would not hear the matter without ministerial support and that the SEL Corporate Affairs was going to contact the Treasurer's office.

On 3 September 2020, in the context of following up on a discussion with the ANAO, the CFO suggested to the Commission Counsel that 'If possible can we get the RT application for Dan away by Tuesday [8 September]. Would be nice to confirm this with the Tribunal when we appear at the Audit Committee.'

On 8 September 2020 the CFO advised Mr Crennan that ASIC would continue to seek closure of this matter through the Remuneration Tribunal and that there would be a more fulsome discussion around KMPs at the Commission meeting to be held the following day.

On 18 September 2020 Mr Shipton advised Commission Counsel that Mr Crennan had agreed to the cessation of his rental allowance.

ASIC's response in the ANAO's final management letter dated 16 October 2020 states that:

*Deputy Chair Crennan has offered and agreed to repay the regular accommodation payments made on his behalf in both 2018-19, 2019-20 and 2020-21, as a debt to the Commonwealth. In those circumstances, ASIC does not propose to seek a ruling from the Remuneration Tribunal in relation to those payments.*

Mr Crennan advised the review that:

*I offered to pay it back on the basis that it was a debt to the Commonwealth, was important for me because that reflects what I understood the realities of the situation which was when ASIC offered to provide me this rental location, they hadn't taken into consideration the Remuneration Tribunal determination and therefore the debt arose from me to the Commonwealth.*

The decision to not pursue a ruling or determination from the Tribunal was taken some 13 months after the ANAO's recommendation.

## **Why did it take 13 months to resolve the ANAO's recommendation?**

### **Views of ASIC officials**

This review asked ASIC officials why it had taken 13 months to resolve this matter. They variously advised that:

- The matter was much more complex than initially understood – it was not simply a matter of ASIC drafting a submission which the Tribunal would consider and make a ruling or determination. One official said that the ANAO had 'set us a task that wasn't achievable and therefore they then got the impression that we weren't trying to do it'.
- The complications of COVID-19 from March 2020 and the focus on that issue in the Treasurer's office can also explain part of the delay at that time.
- No timeframe or deadline had been provided to staff who were progressing the matter and there were competing priorities.

While all of these reasons are contributory factors, none explain satisfactorily the overall time taken to resolve the matter.

The draft submission to the Tribunal provided to the ANAO on 6 August 2020 states at paragraph 17:

*17. In respect of the specific component of the Relocation Package for rental assistance, **the rental assistance represents the increased rental payable by Deputy Chair Crennan in Sydney compared to his residence in Melbourne.** [Emphasis added]*

The review was not provided with any documentary basis for this statement and Mr Crennan advised this review that it is not correct. In any event, it had not been verified by Mr Crennan. It is reasonable to conclude that the statement is not true and should not have been included in any briefing or advice.

This review notes that it had already been recognised as early as 16 July 2019 that more detailed information would be needed.

Mr Crennan advised this review that he does not recollect being asked for that information at that time.

The review accepts that many individuals made repeated efforts to obtain better information.

Clearly, a reasonable person would conclude that ASIC should have moved more swiftly to resolve the matter on the basis of the facts as they were known at the time – or to establish facts with some precision if they were not. This might have resulted in a decision in September 2019 not to pursue the matter with the Tribunal.

It should also be noted that two other statements made in internal discussion about his matter appear to have no documentary basis and are not consistent with Mr Crennan's own evidence and other emails. On 31 May 2019 in an internal email a P&D officer wrote:

*It was discussed with Daniel **at the time of his appointment that the office locality of his appointment would need to be Sydney once the other Deputy Chair, Peter Kell left.** On this basis, in accordance with the Remuneration Tribunal's Guidelines on Accommodation and Reunion Travel the Senior Executive People and Development has approved relocation costs in accordance with ASIC's Relocation Policy.*

On 25 June 2019 the same officer asked whether the accommodation costs could be considered to be 'on appointment' because:

*... given it was decided **as soon as Dan commenced** that his role needed to be in Sydney not Melbourne we considered the move to do with his appointment. However this was an ASIC decision rather than a directive from Treasury.*

This is not consistent with Mr Crennan's advice to the review that at the time of his interview there had been a commitment made that he would be based in Melbourne.

Mr Crennan was appointed in July 2018. The first discussion about his relocations started after Mr Kell's resignation which took place in mid-September 2018.

It is not clear to what extent this apparently incorrect information about the timing of the proposal of Mr Crennan's move to Sydney affected later briefings and advice.

### **Consideration by the Audit Committee**

The issue of potential non-compliance with the Determination was first raised with the Audit Committee on 1 August 2019 and the Committee was advised at that time that it was being reviewed.

At the 15 August 2019 special meeting to consider the financial statements, the Committee first became aware of the ANAO's concerns about the payment to Mr Crennan potentially not being in accordance with the Remuneration Tribunal Determination. The Committee was advised that ASIC had commenced work to action this recommendation. The draft closing letter advises that 'expenses associated with the relocation allowance arrangements for the Deputy Chair, which have been referred to the Remuneration Tribunal for review'.

At the three subsequent meetings of the Audit Committee the issue was not on the agenda or in the minutes.



At the meeting on 4 August 2020 the ANAO interim management letter was discussed, but as covered above, it does not contain any mention of KPM issues of concern. It seems that the issue was not discussed at the meeting.

At the 11 August 2020 special meeting to consider the financial statements, the Committee first became aware of the payments to James Shipton, and that the issue of payments to both Mr Shipton and Mr Crennan were to be considered by the ANAO's Qualifications and Technical Advisory Committee on or around the 3rd of September 2020. The Committee planned a second special meeting to consider the outcome of that meeting. The minutes also show that the Committee requested that management consider implementing a requirement for ASIC's finance team to be consulted prior to decisions relating to payment arrangements to Commissioners and that the briefing note to the ASIC Chair include reference to the outstanding action items arising out of [KMP issues], and the recommendation that Finance be involved in early discussions relating to the hiring of Commissioners and associated payments.

It seems that from 15 August 2019 to 11 August 2020 the recommendation of the ANAO to approach the Tribunal directly about the rental allowance was not raised or discussed at an Audit Committee meeting.

At the special meeting of the Audit Committee reconvened on 8 September 2020 the ANAO provided their draft closing report immediately prior to the commencement of the Audit Committee meeting. That draft noted there will be a finding on KMP detailed in the final management letter. The Committee noted that the issues relating to KMP would be made public for the first time in the annual report where ASIC will need to provide comprehensive information; and recommended that the full Commission be apprised of this issue and that ASIC develop an issues management plan.

While the Audit Committee must retain independence from the day-to-day activities of management and had no responsibility for the action required to effect this recommendation, it would be usual for such a significant issue to be monitored at subsequent meetings until the matter was resolved. If this had happened it is possible that the regular reporting in itself would have hastened resolution of the issue.

The Department of Finance guide *A guide for non-corporate Commonwealth entities on the role of Audit Committees* suggests that an Audit Committee needs to question:

- whether management has taken or initiated action to redress any major control or other shortcomings identified by Finance, the ANAO or internal audit.
- whether management is managing the entity's risks— including that the controls designed to mitigate these risks are relevant and are working effectively and that responsibilities are clearly assigned.
- whether the Committee identified information about any significant internal control breakdown or near miss. Is the Committee satisfied that the entity's management has implemented the lessons learnt and the risks have been reassessed and treated accordingly?

The review was advised by the current Audit Committee Chair that the recommendation from the ANAO had not been tracked and placed on the Committee agenda because it was related to an observation and not a finding, and that for the future such circumstances could be addressed by including a requirement that observations should also be followed up. While this would have been adequate in the current circumstances, the review is not sure that this approach is sufficient for the Committee to discharge its obligations to satisfy itself that all significant compliance issues are progressed by management.

According to ASIC's current governance arrangements the Executive Risk Committee has the following responsibilities:

*... identifying and monitoring significant risks to ASIC, maintaining ASIC's risk management frameworks and policies, managing risks in line with those frameworks and policies, and implementing and overseeing audit/assurance processes and risk mitigation strategies. It reports to the Accountable Authority and the Commission Risk Committee.*

The review was advised that ASIC is contemplating the development of a central risk and breach register clearly identifying the party accountable for any resolution. This should have oversight and monitoring from the Executive Risk Committee and should provide regular reports to the Audit Committee.

### **Recommendation 1**

**The review recommends that ASIC should develop a central risk and breach register clearly identifying the party accountable for any resolution. This should have oversight and monitoring from the Executive Risk Committee and should provide regular reports to the Audit Committee.**

### **Consideration by the Commission**

ASIC describes the role of the Commission as:

*ASIC's governing body and is responsible for achieving ASIC's statutory objectives set out in the ASIC Act. It makes strategic and/or significant regulatory decisions, sets ASIC's strategy and oversees ASIC's delivery and performance against the strategy.*

The Commission has a regulatory role not relevant to this review, but it also has a governance role described as 'shared between the Accountable Authority and Commission'. This role is described as:

*Providing strategic leadership by setting ASIC's vision, risk appetite and corporate plan, determining budget and resourcing priorities, ASIC's Values and Code of Conduct and overseeing management performance and accountability and audit processes*

The review was advised that Ms Amour was advised about the ANAO's recommendation as a member of the Audit Committee on 15 August 2019. The ANAO's draft closing letter was included in the pack for the Special Commission Meeting for the 2018-19 financial statements on 20 August 2020.

ASIC Deputy Chair Ms Chester recalled that the concerns of the ANAO had been discussed at the time of the signing of the financial statements in August 2019. She knew that an issue had been raised because of the disclosure note in the annual report and in the context of the financial statements, but believed at the time the allowance was a temporary allowance and was advised that the Executive Committee was monitoring the matter.

The review requested ASIC to identify all agendas, papers, minutes and decisions of the Commission in relation to any of the KMP issues that were raised by the ANAO in the closing letter of August 2019. It seems that from the time that the ANAO recommendation was discussed in August 2019 until 9 September 2020 there was no documented discussion at the Commission about this issue. The matter was discussed to some extent at the meeting on 9 September 2020 and the Commission was then briefed fully on this matter as well as the tax advice payments on behalf of Mr Shipton on 30 September 2020.

It is fair to conclude that the Commission did not monitor, nor arguably had a real opportunity to monitor, the response to the ANAO's recommendation of August 2019.

### ***Who was responsible for managing and monitoring the issue?***

The review asked interviewees who they believed had the responsibility, or should have had the responsibility, for resolving ANAO's recommendation. There was a consistent lack of clarity around the issue. Responses included:

- General Counsel was managing it.
- Internal audit should have been managing it.
- The Commission was managing it.
- The Audit Committee should have been monitoring it.
- The CLO with P&D was managing it.
- The Executive Committee should have been managing it.

The matter of the ANAO's concerns about the accommodation allowance should reasonably have been escalated to the Commission and fully and transparently discussed at that level at the earliest opportunity.

The Commission could have delegated the day-to-day management of the issue but should have retained some visibility and oversight.

### **Revised governance arrangements**

The review was advised on 24 November 2020 that ASIC has introduced the following arrangement:

*Commission oversight has been extended to all audit findings and actions. All open ANAO and internal audit items are reported to the Commission Risk Committee, extending existing reporting to the Executive Risk Committee and the Executive Committee relating to internal audit action items.*

*ASIC has also adopted a more holistic and strategic perspective to the ANAO findings, (addressing also forthcoming ACLEI oversight from 1 January 2021), with the formation of an Executive Integrity Committee. This Committee will be Chaired by the Chief Risk Officer, which will oversight policies, procedures, investigations and training/awareness for all internal integrity related matters across the organisation, including oversight of an earlier program of work to draw together Public Interest Disclosure, Code of Conduct, Security, and other feedback and complaint mechanisms, forums and processes. Preparations are underway for the Committee and program to commence in early December.*

*The Commission has also decided to immediately revisit and consider further the recommendation contained in the Capability Review of ASIC conducted in 2014-15 (the Capability Review), namely, "Recommendation 4: ASIC to establish a new role of Head of Office (HoO), with delegated responsibility and accountability for executive line management functions". In doing so, the Commission will take into account recent developments, including to: ASIC's governance and legislative framework and operating environment; ASIC's Executive Committee (including the recent appointment of a new Chief Operating Officer); and advances in contemporary governance models of comparable peers' agencies. The Commission intends to complete its consideration of this recommendation and to develop any related role and accountabilities statement and title description by end 2020.*

The review considers that these proposed changes, if fully implemented, could address and prevent some of the issues raised in this part of the report in relation to oversight and progression of the issues. To ensure that these matters are progressed, the Audit Committee should regularly monitor the implementation of these changes and there should be a review of the effectiveness of these revised governance arrangements within eighteen months.

### **Recommendation 2**

**The review recommends that ASIC should progress its reforms in relation to Commission oversight of audit findings and actions and the formation of an Executive Integrity Committee. ASIC's Audit Committee should monitor the progress of the implementation of these arrangements. ASIC should review the effectiveness of these new governance arrangements within eighteen months.**

## **5. WERE THE RENTAL ALLOWANCE PAYMENTS MADE WITH APPROPRIATE AUTHORISATION AND IN ACCORDANCE WITH ALL LEGISLATIVE POLICY AND PROCEDURAL REQUIREMENTS?**

### **Compliance with the Tribunal Determination**

ASIC obtained internal and external legal advice in the course of trying to establish compliance with Tribunal guidelines. This issue is not canvassed further in this report.

### **Compliance with the Commonwealth Procurement Rules**

The PGPA Act requires the proper use of public resources. 'Proper' when used in relation to the use or management of public resources, means efficient, effective, economical and ethical.

Paragraph 4.4(b) of the Commonwealth Procurement Rules (CPRs) require that:

4.4 Achieving value for money is the core rule of the CPRs. Officials responsible for a procurement must be satisfied, after reasonable enquires, that the procurement achieves a value for money outcome. Procurements should:

b. use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth.

In November 2018, when deciding on the quantum of accommodation payments to be made to Mr Crennan, it seems that the decision maker was guided by the figure of \$40,000 that the Tribunal had identified as a maximum amount for relocation for statutory appointees who are relocated. Importantly however, even that provision only applied to those who maintain their principal place of residence elsewhere. As covered elsewhere in this report, at the time of moving from Melbourne to Sydney a principal place of residence was not being maintained by Mr Crennan elsewhere.

For some obvious reasons, the assumption that the Tribunal maximum could be used as a guide was flawed: the relocation allowance for a person who maintains a principal place of residence elsewhere is to compensate for the increase in costs in maintaining two residences - which clearly did not apply in the case of Mr Crennan. The Tribunal makes such a decision when approving total remuneration on engagement and not several months after an appointment.

The CPRs explain that the word 'ethical' means:

*Ethical relates to honesty, integrity, probity, diligence, fairness and consistency. Ethical behaviour identifies and manages conflicts of interests, and does not make improper use of an individual's position.*

The records do not show that the decision maker sought any internal or external advice on this matter.

## **6. PAYMENTS MADE ON BEHALF OF MR SHIPTON**

In the s 26 letter the Auditor-General advised the Treasurer:

### ***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 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.*

## **The approval of and payment for tax advice on behalf of Mr Shipton**

The review interviewed Mr Shipton and a number of other individuals about this matter.

In late 2016 and during early 2017 the recruitment process for the new Chair of ASIC was being considered. Although the process was being handled by Treasury, it was clear that ASIC would be responsible for the payment of any costs relating to the appointment. Discussion took place between Treasury and P&D branch about what ASIC might consider to be a reasonable relocation package. The package could include such items as school fees, temporary accommodation and relocation costs.

In March 2017 P&D provided Treasury with a paper including two options from external providers. The options provided for a range of services including airfares, removals and storage, an orientation visit, immigration services and visas, annual school fees, annual travel and medical insurance, short term accommodation. Option 1 included a one off taxation briefing (\$3 000), and tax lodgement (\$5 000 per annum). Option 2 included a one off taxation briefing (\$3 000). The options were based on a family of four relocating from Europe and had total estimated costs over five years of \$500 050 and \$362 400 respectively. Treasury undertook to discuss it internally, particularly the quantum of cost and how the process was to be managed.

Mr Shipton's recollection of these events is that during the recruitment process the Commonwealth Government offered and agreed to provide 'fulsome relocation support' including tax assistance to enable him to relocate to Australia, but acknowledged that this was not adequately documented. He referred to an email from the executive search agency that included 'taxation advice' in the list of relocation expenses that would be covered.

Mr Shipton said that he attended meetings in Canberra between 14 and 16 October 2017. He was advised at that time that there was no written contract of employment. He recalled that in subsequent telephone calls he was advised by officials that his and his family's relocation to Australia would be supported by ASIC if he accepted the role. The narrative provided by Mr Shipton's solicitor on 20 November 2020 states:

*Although he does not recall specifically the words which were used, he left those discussions with the clear understanding that the relocation package would be a full and complete one and in line with equivalent private sector international relocation arrangements. Having twice previously been provided with such support by new employers, Mr Shipton was familiar with such arrangements as including household relocation, housing support, visa support and taxation advice and support. Although Mr Shipton does not remember the specifics of any discussion of the particular services or amounts which would be paid to support the relocation, he does recall that he left those discussion with the clear understanding that the relocation support to be provided to him extended to the provision of taxation advice and services associated with his relocation to Australia.*

After the proposed appointment of Mr Shipton was announced in October 2017, in response to a query, Treasury provided P&D its communication with Mr Shipton about relocation assistance. The communication advised that the package would still need to be negotiated. A number of items were listed including 'taxation briefing'. No individual or package costs were indicated. Treasury then informed Mr Shipton that the then SEL P&D was the contact for relocation and visa advice.

The records show that staff in P&D proceeded to get a quote for taxation advice. Initially they considered bundling immigration with taxation advice but, in the event, pursued taxation advice separately. Following a meeting with KPMG to ascertain what services were appropriate and could be provided, P&D requested a quotation from KPMG for these services.

On 3 November 2017 there was an ‘onboarding discussion’ between Mr Shipton and P&D. The agenda from the meeting indicate that under a heading ‘Assistance that can be provided’ is an item ‘Taxation briefing – pre-arrival’. Under ‘Items to confirm’ is an item ‘Taxation consultant’. There is no record of any amounts being discussed.

KPMG provided a quotation on 3 November 2017. They proposed joint US/Australian tax briefing (\$1,700), a review of Mr Shipton’s employment contract and recommendations on structuring tax effectively (\$2,500), preparation and filing of Australian tax return (\$1,750) and preparation and filing of US tax return (\$3,000 to \$5,000 depending on his circumstances). Mr Shipton has advised this review that this email was not copied to him, nor did it take into account his particular circumstances, because these were not known to KPMG at that time. The P&D officer recalls that at that time the tax advice was going to cost less than \$10,000 whereas the SEL P&D described it to the review as ‘an opening procurement to manage this first briefing and then we’ll see where we go from there’. She said she did not have a sense it was going to be \$70,000, but considered it as you would physical relocation – that you had to cover increases in costs.

This quotation was accepted on 10 November 2017 in the following terms:

*The services will include:*

- *Joint US/Australian tax briefing (up to 2 hours) discussing the general tax implications of James moving back to Australia – AUD 1,700*
- *Review of his employment contract and recommendations on structuring tax effectively – AUD 2,500*
- *Plus GST and Technology and Admin Charge (2.5%)*

*At this stage I have not included a tax return in the United States or Australia.*

After receiving an engagement letter on 4 December 2017, P&D accepts the KPMG offer – which included the following:

- *Tax briefing – US and Australia combined – Estimate AUD\$1700 but fees will depend on individual circumstances*
- *Australian Tax return – Estimate AUD\$1750*
- *Certificate of Coverage – Estimate AUD\$600*
- *US Tax return – To be agreed separately*
- *Other Compliance work – Based on hourly consulting rates on a time spent basis*
- *Plus GST and Technology and Admin Charge (2.5%).*

It is not clear from the acceptance letter whether the services to be provided by KPMG were to be limited to the services accepted in the letter of 10 November 2017, or whether this engagement contemplated further services being provided on an hourly charge.

At the time these arrangements were being put in place, KPMG contacted Mr Shipton to arrange a tax briefing. He was advised that the briefing would usually take about an hour but that if he was seeking a US briefing it could last up to two hours. Mr Shipton provided information about dates, and KPMG suggested that he receive both an Australian and US briefing.

The review was advised that the initial meeting between KPMG staff and Mr Shipton was held on 22 December 2017 by teleconference. No records of that meeting were provided.

On 12 January 2018 KPMG issued a tax invoice for this briefing with a total payable of \$1 916.76.

On 10 January 2018 KPMG emailed P&D and advised that Mr Shipton would appreciate Australian/US support by KPMG. They asked:

*One of the outstanding items is with regard to his tax return support. James mentioned that he would appreciate Australian/US support by KPMG. Can you confirm if that is authorised and if so for what years and countries? He will require a US tax return for the 2017 and 2018 calendar year and then assistance with his 2017/18 Australian tax return. The only time critical item would be the 2017 US return (due to be lodged by 15 April 2018). Please let us know either way.*

A P&D staff member responded to KPMG on 18 January 2018 indicating that:

*I have spoken with the Senior Executive Leader, People & Development and she has agreed to providing tax return support for the following tax years:*

*US 2017, US 2018, AUS 2017/18.*

This approval was made in the absence of any updated estimates of fees for these services tailored for Mr Shipton. The staff member advised the review that while these fees were not listed on the s23 procurement workflow in November 2017, they were mentioned in the quote and the engagement letter. The Australian tax return was listed with a dollar amount in both the quote and engagement letter. The US tax return only provided a range of \$3 000 - \$5 000 in the quote. The intention was to vary the procurement once they knew the quantum.

Mr Shipton was advised by KPMG that ASIC had agreed to pay for these services. Mr Shipton advised the review that KPMG provided services to him and completed his 2017 US tax return in or about August 2018. It had been delayed because documents had been mislaid by the removalists.

On 23 August 2018 KPMG emailed P&D asking them to call.

KPMG are recorded as having stated in the call that Mr Shipton had requested additional assistance and KPMG wanted to discuss the arrangement and agree whether Mr Shipton or ASIC should pay the fees. Mr Shipton advised the review that he does not recall requesting this additional assistance and does not agree that the reference to 'additional assistance' is correct.

On 25 September 2018 KPMG emailed Mr Shipton advising him that there would be a considerable amount of work required to support him with his Australian and US tax affairs. They estimated fees for the first year of approximately \$60,000 to \$70,000 to cover both the US and Australian tax compliance. This would also include detailed written advice and estimated tax calculations around establishing and ceasing to be a tax resident of Australia and the impact to his personal investments. In the email KPMG advised Mr Shipton that they had discussions with ASIC regarding the scope of their engagement and how much work they were authorised to assist him with. ASIC had confirmed to KPMG that they would pay up to \$9 500 AUD for tax return and tax briefing assistance. KPMG conclude that to provide Mr Shipton with services over and above this cap, they would need to engage with him individually and invoice him accordingly. Mr Shipton responded that this was a 'huge surprise' and requested a discussion as soon as possible.

The Shipton narrative notes:

*It is to be noted that Mr Shipton did not utilise all of the services being offered by [KPMG]. In particular, while KPMG provided advice about capital gains tax, it did not provide the 'detailed tax calculations around establishing and ceasing to be a tax resident of Australia', nor did it implement the advice. Instead, the work to be performed by KPMG was in line with that agreed at the 22 December 2017 meeting and set out in the 4 December 2017 engagement letter, again noting that the letter specifically provided that complexities may arise in providing such support.*

Mr Shipton forwarded KPMG's email to the then SEL P&D on 9 October 2018. He expressed surprise and said that he had briefed KPMG late the previous year on his multi-jurisdictional asset and income circumstances. The then SEL P&D replied on the same day and explained that KPMG had spoken to P&D:

*KPMG gave us a quote of 8K when we were procuring their services prior to you starting.*

*They rang [P&D] a couple of weeks ago saying it will cost in the vicinity of 60-70K. They said the usual amount for an organisation to pay is around 8-10K and they would go back to you and let you know this is what they think it should cost. They also said some of the work falls outside of the scope of a tax return. I note they have positioned it differently in the email. I can go back to them and determine what exactly is outside the scope and then we can review on that basis.*

The P&D officer who had spoken to KPMG advised the then SEL P&D that:

*[The KPMG partner] advised that although KPMG briefly discussed James' tax affairs in December/January, that it was only recently that they had discussed it in detail. She advised that the assistance James required was in relation and that she would consider it as additional assistance beyond that of a tax return.*

The P&D officer advised the review that after discussing the matter with the SEL P&D, the latter had said words to the effect 'Look, let them go to James and see what his reaction is and then we'll take it from there.'

After reviewing an estimated total relocation expenditure for Mr Shipton (projected to be \$250,924), the then SEL P&D advised Mr Shipton the same day that

*I have reviewed relocation package we provided to Treasury as part of the recruitment process for the ASIC Chair.*

*The cost to date for your relocation is less than we agreed with Treasury, largely because you have not utilised all the elements included in the package. While the cost for the 'tax briefing and return' is higher than we anticipated, this is due to your specific circumstances. I have also reviewed the scope of the work as described in the KPMG email and am comfortable this falls within the intent of the 'tax briefing and return' line item. However, because the amount is above 10K we will need to redo the procurement. [P&D] will manage this process. She will also talk to KPMG, so could you please not get back in contact with KPMG until this process is finalised. It should take 3-4 weeks*

Mr Shipton responded later the same day:

*Thanks for this ... – the only thing to keep in mind is that I need to do a tax filing (via KPMG) to the US tax authorities by 15 October. I understand they (KPMG) have everything they need, but they may need to be back in touch with me in relation to this filing. Would that be okay? How should I handle that?*

The P&D officer reported to the then SEL P&D the next day that she had spoken to KPMG to confirm that ASIC had approved the following services:

- *Tax return United States*
- *Tax return Australia*
- *Tax briefing to consider the implications of relocating to Australia to undertake the appointment.*

*Prior to James' commencement we agreed to pay for a tax briefing for James and for his tax return for the United States and Australia. This is within the relocation support parameters initially provided to Treasury.*

She advised that she would finalise the documentation, and that KPMG would progress the US tax return as a matter of some urgency. She concluded 'To be clear, this will cover all services KPMG are providing in relation to James' taxation. He will not need to anticipate any costs personally on this as there is nothing outside of our taxation brief to them'.

This information was forwarded to Mr Shipton who expressed concerns. He wrote

*The question (for KPMG) that I am still keen to know about is why the fee estimate increased 6x (from late last year to September this year) when the information passed on to them was exactly the same on both occasions?'*

The SEL P&D responded to Mr Shipton that 'it is as simple as the original quote was done before were appointed – it was generic. KPMG never came back to update us after speaking to you'.

On 12 October 2018 the P&D officer requested three 'Panel Procurement Approval to Approach Panel' requests each with an estimated value of \$25 000. She advised the review that at that stage she still thought that Mr Shipton might pay some of the additional amounts.

On 30 October 2018 KPMG emailed P&D an estimate of the various components of work. In summary the fees for the three separate components were estimated at:

- 2017 US tax compliance: \$20,000 - \$25,000
- FY2018 Australian tax compliance: \$20,000
- Tax advice: \$20,000 to \$25,000

In response to a follow up about the US tax return, KPMG replied on 1 November 2018 that they had requested an extension for the 2017 US tax return, and on 18 December 2018 that they had completed the US tax return.

On 18 December 2018 the P&D officer asked Mr Shipton to confirm that there was nothing outstanding from his point of view before she finalised the account relating to his US return with KPMG.



On 19 June 2019 KPMG advised P&D of the summary of the work completed, including the original scope of work costed at \$70,000 and the additional work costed at \$31,950 with a total fee to invoice of \$101,950. After some internal P&D discussion about the increase in costs KPMG was advised on 21 June 2019 that a new contract was required prior to the issue of any invoices.

On 28 and 29 August 2019 KPMG issued three invoices:

- General tax advice: \$29,878
- US tax compliance: \$50,173
- Australian tax compliance: \$36,587.

The records seen by the review indicate that there was internal discussion within P&D about how this increased fee should be invoiced and paid (discussed later in this report) but it appears that no concerns were raised by P&D about the quantum of the increase, either with KPMG or with Mr Shipton. The P&D staff member did suggest in an email that 'An alternative would be for James to incur the costs. I could investigate whether we could pay for him as a loan and recover from his fortnightly pay.' But there is nothing to indicate that this suggestion was further pursued.

These invoices were paid by ASIC on 19 September 2019.

### **The ANAO expresses concerns about the payments on behalf of Mr Shipton**

On 3 January 2020 P&D responded to a query from ASIC's Finance area about payments made to Mr Shipton. This was done in the context of a discussion about FBT payments. The email states:

#### ***Shipton***

*I know you are aware of the situation but for completeness for all others:*

- *The payments to KPMG relate to tax services provided for as part of Shipton's recruitment process prior to his commencement.*
- *Taxation services were discussed with Treasury as likely relocation support and approved by ASIC Delegate, [SEL P&D]*
- *The payments were not made until this financial year due to complexities and delays (Shipton requested several extensions to submitting his tax returns in Australian and US due complications).*
- *We anticipate an FBT liability for elements of his support and a reportable disclosure in the next annual report.*

The review was advised that a meeting had been held between P&D staff and the ANAO on 23 January 2020. The recollection of a P&D staff member as stated in a later email was that:

*They asked whether we have made any other payments to Commission appointments that they should be aware of. I advised that this year's financial statements will include an amount paid for taxation services for James Shipton but these services were offered to Mr Shipton as part of the recruitment activity undertaken by Treasury prior to his appointment. I advised that Treasury met with the P&D Senior Executive Leader at the time and myself wanting ASIC's commitment for relocation expenses for an international candidate, should they be successful. ASIC had to commit to the level of relocation support that they could include in the job offer. Remuneration Tribunal approval was not sought as the relocation expenses were associated with the appointment – as per the Remuneration Tribunal's Guidelines of Geographic Relocation.*

*I advised that the costs were to occur in the previous financial year, however the costs were not charged to us at that time due to some delays with the services.*

*I was not asked to provide any further detail but for your information, the supplier delayed charging ASIC because there were some complications and they were unable to complete the taxation services they were contracted to do:*

- *KPMG were contracted to complete a US tax return and an Australian Tax return given James had earned income in both countries as well as taxation advice on how to structure financial affairs to avoid the tax burden often associated with relocating internationally. This is something we have provided to international secondees in the past.*

- *The delays were because important documents relevant to the tax services were accidentally packed by removalist company in relocation.*
- *The documents could not be located due to delays in quarantine and storage arrangements.*
- *The Royal Commission commenced and involved a huge impost of time for Mr Shipton. This meant he did not have an opportunity to locate missing documents and complete what was needed to do for the tax services.*
- *As a result, he was granted numerous extensions to complete his tax returns. Once this was resolved and the tax returns lodged, the supplier charged ASIC.*

On 6 February 2020 an email from the SEL P&D to Commission Counsel set out the matters that the ANAO had raised following an audit of ASIC's payroll team and requested an update for Commission Counsel. The matter included:

*James Shipton: They enquired why we had paid for the Chair's tax advice as part of the relocation costs. Again, the strong intimation was that this matter would be in the Rem Tribunal's hands by the time they came back and for obvious reasons, that the matter would not be placed in the Chair's hands.*

The review did not receive any evidence as to whether the latter part of the statement, that is that 'for obvious reasons, that the matter would not be placed in the Chair's hands', was discussed more broadly or followed up at the time.

P&D proposed that words along the following lines could be used in the disclosure for the annual report:

*This disclosure includes relocation costs approved for James Shipton at the time of his appointment. Reasonable relocation costs were approved under the ASIC Relocation Policy without referral to the Tribunal according to the Tribunal's Guidelines on Geographic Relocation.*

The ASIC Finance area then proposed to provide the ANAO with relevant information about the payments. This was done in the context of FBT payments and the reporting of remuneration.

On 3 August 2020 ASIC Finance alerted P&D and the Commission Counsel that the ANAO had raised concerns about 'the tax advice paid by ASIC to entice James [Shipton] to the role of ASIC Chair'. They noted that the ANAO were of the view that this was a benefit over and above what was allowed under the Rem Tribunal Determination. They stated that they would need to explain to the ANAO that this constituted a 'pre-employment agreement' and therefore outside the requirements of the Tribunal Determination.

The following day the ANAO was advised that the tax advice payments related to a 'pre-employment agreement'. The ANAO responded seeking a copy of the agreement. P&D responded advising that there were no contracts or pre-employment agreements for Remuneration Tribunal appointments, but that there had been discussions between ASIC and Treasury prior to Mr Shipton's appointment as to what would be reasonable support. They advised that ASIC was not required to seek approval from Treasury as it was ASIC's budget.

On 5 August 2020 the ANAO was provided with a timeline of Mr Shipton's relocation with an explanation as to why the tax payments had been delayed into the 2018-19 financial year.

P&D provided the ANAO with a briefing paper the same day advising them that, due to Mr Shipton's unique circumstances he required taxation support to enable him to relocate to Australia; that these services were only required because he relocated to take up the role of Chair and that the advice was not ongoing or general advice related to his investments.

The ANAO responded on 6 August 2020. They advised that in their view a legal opinion was required to support the categorisation of the tax advice payments as relocation costs. The advice would need to address the breakdown of services provided by KPMG per their invoiced statement of work.

The acting CFO then requested further information from P&D, the Chief of Staff and Commission Counsel. She includes the statement 'I think we should also mention that unforeseen tax issues arose from the first KPMG meeting that put James' acceptance of the role in jeopardy.' The email also notes that it could be the quantum of support that was an issue and requests further information about the '\$250 000 limit' that was 'agreed to' in 2017-18.

On 7 August 2020 KPMG, in response to a request, confirmed that ‘the work that KPMG did for Mr Shipton was all directly related to his relocation to Australia to take up the role as ASIC Chairman. Had he not taken up the role, as a non-resident of Australia he would not have required advice on the Australian taxation of his foreign investments.’

On 10 August 2020 the acting CFO emailed Mr Shipton with a list of questions for his response about his tax obligations. Mr Shipton provided written responses to the questions and also stated that:

*...I would observe that the KPMG work was required, referable and related to my relocation to Australia and very much line with the type of tax advisory services I have received in private sector cross border relocations.*

Mr Shipton advised the review that this was the first time that he was notified that the ANAO were looking at ASIC’s payments to KPMG.

On 11 August 2020 the acting CFO emailed the ANAO stating that she needed to give Mr Shipton and Commission Counsel an update on the relocation issue. She summarised her understanding of the ANAO’s view at that point in time as that:

- Tax returns represent an ongoing obligation rather than a relocation expense therefore it should not have been something ASIC agreed to as part of the relocation assistance;
- The breakdown of individual amounts for tax advice included in the ‘options’ discussed with Treasury were much smaller than the amounts actually paid (despite being within the total agreed limit of \$250,000).

The acting CFO provided this explanation to Mr Shipton with a copy of the internal legal advice that had been provided to the ANAO. She informed him that the matter had been discussed with the Audit Committee.

Later that day the ANAO advised the acting CFO that:

*The real crux of the issue is that in our view, with the exception of the initial tax advice, the payments made for other taxation support and advice do not meet the definition of a relocation expense and have resulted in the Rem Tribunal Determination being exceeded. This is considered a breach of the Remuneration Tribunal Act.*

On 7 September 2020 the ASIC Finance area provided the ANAO with the draft disclosures for the 2019-20 KMP remuneration:

***Proposed footnote to James Shipton’s remuneration figure:***

*Included in the remuneration figures above is \$105,987 (excluding GST and FBT) in respect of relocation expenses paid in accordance with ASIC’s relocation policy. The relocation expenses were agreed by ASIC prior to the Chair’s appointment and are required to be disclosed as remuneration in the year they are incurred in accordance with AASB 124.*

The ANAO raised concerns that this statement was misleading. They explained that they were not sure the amounts were paid in line with ASIC’s relocation policy (which is applicable to team members) or that, with the exception of the initial taxation advice, the amounts were agreed prior to appointment.

On 12 October 2020 Mr Shipton advised General Counsel that he would voluntarily pay back \$118,557.

## **7. WERE THE TAX ADVICE PAYMENTS MADE WITH APPROPRIATE AUTHORISATION AND IN ACCORDANCE WITH ALL LEGISLATIVE POLICY AND PROCEDURAL REQUIREMENTS?**

### **Compliance with the Commonwealth Procurement Rules**

As noted above, the PGPA Act requires that public resources should be used in an efficient, effective, economical and ethical manner.

All costs must have the test of reasonableness applied to them. This test of reasonableness means that a person cannot expect ASIC to cover all costs, even if the items are listed in the policy and directly related to relocation.

The decision to increase the value of the procurement seemed to be based on:

- whether the payment fitted into an overall package limit ‘agreed with Treasury’ rather than a consideration of the appropriate value and level of advice at the time the decision was made.
- by comparison with what was broadly considered similar commercial practices.

This review questions how much weight should have been placed on either of these considerations.

### ***Consideration of a ‘package’ or ‘agreement’***

The decision maker considered the overall notional value of the total relocation ‘package’ when making the decision on 9 October 2018 to increase the payments for the taxation advice. She wrote:

*I have reviewed relocation package we provided to Treasury as part of the recruitment process for the ASIC Chair.*

*The cost to date for your relocation is less than we agreed with Treasury, largely because you have not utilised all the elements included in the package.*

The review was not provided with any documentation that established that there was an agreed package with an overall value. The correspondence with Treasury had included a list of items with indicative costings and a total for two options. It seems that the total was to get some idea of the sum for budgeting purposes. The language of the correspondence does not imply any agreement of a total amount. ASIC advise that ‘most things are negotiable within reasonable limits’.

Mr Shipton also referred to ‘an agreement’ with the Commonwealth. He advised that he did not access all of the relocation assistance that was offered to him but that the area where he was most in need of relocation support concerned his tax affairs. His relocation to Australia apparently triggered complex issues concerning the interaction of the Australian and US tax regimes and the treatment of his residence in Hong Kong for the purpose of Australia’s capital gains tax rules.

Mr Shipton said that the agreement with the Commonwealth was not expressed in dollar amounts:

*I think it’s also important to note going back to the agreement and the arrangement that I had with the Commonwealth, is that it wasn’t expressed in terms of dollar amounts to me. It was expressed in terms of provision, what type of services would be provided or support that would be provided. I was always acting under the basis that I would get these types of services.*

Mr Shipton said he acted at all times in the belief that there had been an agreement with the Commonwealth:

*I think the other point to note when it comes to decisions in around the taxation support which was provided to me is that I was genuinely acting under the belief that this was an agreement which was set and established with the Commonwealth that was to be provided. That was really important to me because that then informed my decisions and my actions because I was actually only following up on what I understood and still understand to be the agreement that was reached with the Commonwealth in relation to the relocation support and the provision of relocation advice in relation to taxation.*

It is clear from the records that that there was an agreement between Mr Shipton and the Commonwealth to provide support for tax advice. In the absence of any monetary value in that agreement, a reasonable view would be that there should have been no expectation that it was for an uncapped amount.

At 1 February 2018, when Mr Shipton commenced as Chair, ASIC had also agreed to cover the costs of the US 2017, US 2018 and Australian 2017/18 tax returns. While those costs were not specified with any precision, the previous estimates provide a guide:

*Preparation and filing of Australian tax return – AUD 1,750.*

*Preparation and filing of US tax return – AUD 3,000 to AUD 5,000 depending on his circumstances.*

Whilst in practice it is clear that the costs were not specified or capped, based on the estimates sought and provided at the early stages, the additional costs for the tax returns would have been approximately up to \$11,750 (in addition to the \$1,916.76 cost of the initial briefing).

It is the opinion of this review that any increases after that should have been subject to a further detailed and documented consideration as to whether the costs were reasonable and whether a clear ceiling was to be established.

## **Comparison to the private sector**

The decision maker was asked about whether she had put her mind as to whether the amount was 'reasonable'.

The decision maker advised this review that she had previous experience in relocations when working in the private sector and called on this experience in her deliberations.

Whilst noting that position, the environment in the Australian public sector is very different.

A 2012 Statement by the Tribunal notes that:

*The Tribunal commenced its review of the full-time offices in its jurisdiction which it had not already reviewed in December 2011.... . In conducting its review the Tribunal took account of several factors which have been referred to in a number of previous Tribunal Statements and Reports. These factors include:*

- *the scale and complexity of the responsibilities of senior public offices;*
- *changes in remuneration relativities over a number of years between office holders in the Tribunal's jurisdiction and officers in the Senior Executive Service (SES) of the Australian Public Service;*
- *the need for a simplified, and practical, remuneration structure, and the difficulty of justifying small differences in remuneration between offices;*
- *the need for remuneration arrangements for full-time offices to provide adequate compensation for the often onerous duties performed; and*
- *remuneration should be commensurate with current responsibilities, not based on past achievements or potential future challenges.*

***The remuneration arrangements for the appointees to such positions will be lower than may be paid in the private sector, noting that the Tribunal is conscious of the prestige, honour, power and influence attached to certain senior public offices.*** [Emphasis added]

The only comparisons made by the Tribunal are relativities between office holders and the Senior Executive Service of the APS. The Tribunal notes that the remuneration arrangements for appointees will be lower than paid in the private sector.

The more recent Tribunal 2020 *Review of Remuneration for Holders of Public Office Statement* does refer to the movement of wages in the private sector, but does not attempt to match that movement or those wages for office holders. There should be little expectation that the conditions of statutory appointees, including relocation allowances, will match those available in the commercial world.

The review considers that only very limited weight should be placed upon information relating to what would be spent on tax advice during international relocations in the private sector when considering whether expenditure is an efficient, effective, economical and ethical use of public money.

The review acknowledges that the situation was unusual, and a difficult decision for a subordinate to make, but a more reasonable approach might have been to consult with Treasury or other agencies with statutory officers to seek guidance on the matter before determining a position.

## **Compliance with the Tribunal Determination**

To comply with the Tribunal Determination payments must be for expenses incurred on geographic relocation following appointment as an Office Holder, and in accordance with agency policies and practices when approved by the employer.

ASIC obtained internal and external legal advice in the course of trying to demonstrate compliance with Tribunal guidelines. The ANAO expressed concern as to whether the payments were incurred *on geographic location* based on the description of some items. This review has examined the documentation, the evidence of KPMG and, also having regard to Mr Shipton's submissions, it cannot conclude that the payments were not incurred as a result of Mr Shipton's relocation to Australia.

Compliance with ASIC's Relocation Policy also requires that the payments were 'reasonable'. There is no guidance in the policy as to what factors should be taken into consideration when deciding what is 'reasonable'.

If the expenditure was not compliant with ASIC's Relocation Policy, then these expenses would not be excluded from Mr Shipton's total remuneration, and his remuneration would exceed that allowed under the Determination.

## **The process of the procurement of the tax advice**

### **Duties under the Public Governance, Performance and Accountability Act 2013**

Section 23 of the PGPA Act allows the Accountable Authority or delegate to enter into contracts. Section 18(1) of the Public Governance, Performance and Accountability Rules 2014 (PGPA Rules) requires that the delegate must record the approval in writing as soon as practicable after giving it.

The Commonwealth Procurement Rules (CPRs) require that the following records should be kept:

*7.2 Officials must maintain for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement. Documentation should provide accurate and concise information on:*

- a. the requirement for the procurement;*
- b. the process that was followed;*
- c. how value for money was considered and achieved;*
- d. relevant approvals; and*
- e. relevant decisions and the basis of those decisions.*

*Relevant entities must have access to evidence of agreements with suppliers, in the form of one or a combination of the following documents: a written contract, a purchase order, an invoice or a receipt.*

*Documentation must be retained in accordance with the Archives Act 1983.*

Paragraph 9.2 of the CPRs requires an estimate of the total value of a procurement before a decision on the procurement method is made:

*9.2 The expected value of a procurement must be estimated before a decision on the procurement method is made. The expected value is the maximum value (including GST) of the proposed contract, including options, extensions, renewals or other mechanisms that may be executed over the life of the contract.*

*9.3 ...*

*9.4 When a procurement is to be conducted in multiple parts with contracts awarded either at the same time or over a period of time, with one or more suppliers, the expected value of the goods and services being procured must include the maximum value of all of the contracts.*

*9.5 A procurement must not be divided into separate parts solely for the purpose of avoiding a relevant procurement threshold.*

Paragraph 7.18 requires disclosure of procurement information for relevant entity annual reporting purposes. AusTender is the system used to enable relevant entities to meet their publishing obligations under the CPRs. Relevant entities must report contracts and amendments on AusTender within 42 days of entering into (or amending) a contract if they are valued at or above the reporting threshold. The reporting thresholds (including GST) is \$10,000 for non-corporate Commonwealth entities.

### **The Auditor-General's concerns**

The Auditor-General raised a series of concerns about the procurement process for the tax advice in his s 26 letter to the Treasurer. Further information was provided in the ANAO's final management letter. These concerns are set out below, with the ANAO's concerns in bold. The view of the review is also set out under each issue.

- 1. 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. The request did not contain any cost estimates or other indications of costs to be incurred. This was approved by the ASIC without costings or limits on the services to be provided.

2. While the approval for the provision of services was provided to KPMG via acceptance of the engagement letter on 4 December 2017 and increased via email on 18 January 2018, the relevant approval by the SEL P&D for the provision of these services did not occur until 11 October 2018.
3. 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. At the time of these approvals work had already commenced in providing these services. The final invoices issued in August 2019 totalled \$118,557 and were in excess of the approved procurements.

The Auditor-General expressed concern that the procurement of taxation services were documented in ASIC's procurement workflow system and approved as three \$25,000 procurements. The establishment of three separate orders is not a breach of the CPRs unless separation is to avoid procurement thresholds. As this was a panel procurement, the \$80,000 threshold for Non-Corporate Commonwealth Entities to apply Division 2 of the CPRs did not apply. Furthermore, the totals of the original orders are less than the SEL P&D's delegation of \$500,000 which suggests that the separation would not have been used to avoid delegation thresholds.

The review asked the requesting officer why three separate procurements had been used. She explained that it was to simplify the FBT returns as each service had different FBT implications. As this officer had previously made inquiries about the FBT treatment of the payments this is considered a plausible explanation.

4. 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.

### Recommendation 3

**The review recommends that ASIC should have regard to the findings in this report and proceed to finalise the investigation and review of potential breaches of legislation and policy related to the procurement of tax advice services from KPMG.**

Both ASIC officials involved in this procurement acknowledged the deficiencies in the process. She stated that she had full intention of completing the recordkeeping requirements but overlooked these in error due to the urgency. She acknowledged that the procurement advisers had not been provided with sufficient information to provide the correct advice. The requester also advised the review that she had raised her concerns about workload, the procurement processes, and/or the relocation support several times with senior executive leaders in ASIC between August 2018 and October 2019.

This review was also advised by ASIC that in the last two years the guidance and training in procurement has been enhanced. There has been an internal audit of aspects of procurement. The review was also advised that contract managers are now required to undergo contract management training, mandatory training for the PGPA Act and procurement which covers off that compliance with Section 23 approvals. ASIC also provides managers with specialist procurement advice.

This review conducted a very limited review of the current guidance material that would guide transactions of this type and found it comprehensive and clear.

The review makes no recommendations in respect of training or guidance material for procurement.

### Other comments relating to the payment of tax advice

The review notes that there are comments in internal emails dated 3 August 2020 that 'The ANAO have raised a concern with me this afternoon about the **tax advice paid by ASIC to entice James to the role of ASIC Chair** [emphasis added]' and on 6 August 2020 that 'I think we should also mention that unforeseen tax issues arose from the first KPMG meeting **that put James' acceptance of the role in jeopardy** [emphasis added]'.

There is no other corroborating documentary evidence to support these statements and the ASIC official who wrote these emails could not identify the source of this information. It is not clear whether this information informed or influenced ASIC's handling of this matter, but the review again suggests to ASIC the need to ensure accuracy in all discussions.

## **8. CONDUCT OF MR SHIPTON**

### **Conduct Framework**

#### **ASIC Code of Conduct**

ASIC's Code of Conduct is dated July 2019 and contains a message from the Chair, Mr Shipton. The message notes that 'The purpose of ASIC's Code of Conduct is to guide our behaviour, choices and how we undertake our duties. The Code sets clear expectations about the standard of professionalism expected of everyone who works at ASIC and how we interact with each other and our external stakeholders.' Under scope it is noted that 'This Code applies to all ASIC employees, ASIC's Commission members ...'

Since 1 July 2019 the ASIC Code of Conduct says that it applies to ASIC's Commission members. As such it is arguable that it applies to Mr Shipton as Chair. This Code contains the following provision that is relevant to this review:

#### **14. Disclose conflicts of interest**

*ASIC's integrity, the integrity of its staff and our reputation depend on avoiding real, potential or perceived conflicts of interest*

*(a) You must disclose and avoid situations in which there is a real or potential conflict between your personal interests and your duties towards ASIC.*

Mr Shipton was offered an opportunity to comment on a draft version of this report. His legal counsel advised that:

*While on its face the Code of Conduct states that it applies to 'ASIC's Commission members', as a matter of law, the Code cannot and does not bind the Chair. While the APSC Code of Conduct (which applied to Mr Shipton in 2018) was given effect by the Public Service Act 1999, there does not appear to be equivalent enabling legislation for the ASIC Code of Conduct. Section s 126B of the ASIC Act applies the ASIC Code of Conduct to staff employed by the Chair, but does not apply the Code to the Chair. And, as he does not have a written contract of employment into which the ASIC Code of Conduct is incorporated by reference, the ASIC Code of Conduct cannot apply to Mr Shipton as a matter of contract, unless there were a specific contractual agreement to that effect (which there was not).*

#### **The Australian Public Service Code of Conduct**

Prior to 1 July 2019 the Chairperson was subject to the APS Code of Conduct as set out in s 13 of the *Public Service Act 1999*. The following element of the APS Code of Conduct is relevant to this matter:

- (7) An APS employee must:
- (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
  - (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.

#### **Relevant duties under the Public Governance, Performance and Accountability Act 2013**

Section 9A(b) of the ASIC Act provides that the Chairperson is the Accountable Authority of ASIC for the purposes of the PGPA Act.

The 'general duties' outlined in Subdivision A, Division 3 of Part 2-2 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) apply to Mr Shipton as an official of a Commonwealth entity.

Sections 29 of the PGPA Act sets out an official's duty to disclose interests:



## **29 Duty to disclose interests**

(1) *An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.*

(2) *The rules may do the following:*

(a) *prescribe circumstances in which subsection (1) does not apply;*

(b) *prescribe how and when an interest must be disclosed;*

(c) *prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).*

Section 12 of the *Public Governance, Performance and Accountability Rule 2014*, sets out when an official of a Commonwealth entity is not required to disclose a material personal interest that relates to the affairs of the entity. Item 1 specifies that the duty to disclose does not apply to an official's remuneration, when the interest arises in relation to the official's remuneration as the Accountable Authority. This review understands that the payments on behalf of Mr Shipton for tax advice would be considered to be 'remuneration'. This means that arguably Mr Shipton is not required by s 29 to disclose interests related to remuneration.

### **Payment for the additional tax advice: events of 9 October 2018**

On 9 October 2018 the SEL P&D was faced with the decision as to whether ASIC should pay for the additional tax advice or whether Mr Shipton should be required to pay personally for any additional expenses incurred. At that stage the amount of money was expected to be of the order of \$50 000 to \$60 000.

At this time Mr Shipton was the SEL P&D's direct supervisor and also the Accountable Authority. The question that arises for this review is whether Mr Shipton potentially had a real or apparent conflict, and if he did, whether he avoided it or managed it appropriately.

It must be stressed that the review did not identify any evidence to indicate that Mr Shipton attempted to exert any influence on the SEL P&D in the course of her decision-making on this matter; her evidence was very clear that she did not feel pressured to make the decision in a particular way.

This question of whether there was a real or apparent conflict in this case is not dependent on whether the payment was reasonable, or whether the payment complied with the PGPA Act or the Tribunal Determination.

The APSC guide that relates to Code matters, *Handling Misconduct: a human resource manager's guide* (2017) notes:

*To be 'material' a personal interest needs to be of a type that can give rise to a real or apparent conflict of interest. Personal interests do not give rise to a conflict of interest unless there is a real or sensible possibility of conflict and not simply a remote or theoretical possibility of conflict. If no reasonable person could draw a connection between the employee's personal interest and their duties, then the personal interest is not 'material'.*

*Once a material personal interest is identified, the employee must disclose that interest. If an employee is in a position to, or perceived to be in a position to, influence an outcome or a decision then that person needs to take reasonable steps to avoid that conflict of interest.*

The terms of reference of this review require advice on the findings with a view to providing a factual basis for legal advice concerning the next steps available. On that basis the review provides the following comments for further consideration:

#### **Recommendation 4**

**The review recommends that, based on the evidence available to this review, it would be reasonably open to Treasury to obtain legal advice about whether Mr Shipton's conduct in late 2018 amounts to a breach of section 13(7) of the APS Code of Conduct or any other obligation, and, if so, what action could be taken in relation to the conduct giving rise to that breach.**

**This consideration should have regard to the interviews conducted in the course of this review, the documents provided to it and the submissions made to it.**

### **Events following 11 August 2020**

On 11 August 2020 the acting CFO emailed Mr Shipton with the legal advice Commission Counsel provided to the ANAO on 10 August 2020. She advised Mr Shipton the matters were discussed with the Audit Committee and advises that her understanding of the current ANAO view was that:

*Tax returns represent an ongoing obligation rather than a relocation expense (even though the requirement to prepare and lodge an Australian tax return was triggered by your relocation to Australia);*

*The breakdown of individual amounts for tax advice included in the 'options' ASIC discussed with Treasury were much smaller than the amounts actually paid (despite all relocation payments being within the total agreed limit of \$250,000).*

Mr Shipton was asked whether he should have removed himself from the management of the ANAO's concerns about the payments for the tax advice when he was alerted to the nature of those concerns on 11 August 2020.

He responded:

*I think also what's important to raise with these views in early August by the ANAO they were only views. I think by their own context, they were initial concerns that they raised, that they wanted further and better particulars on. So they were premature at that point, or that was my understanding that they were initial views that they wanted further and better particulars on. So those views were put to ASIC and they were certainly put to me, but what I understood was that that was a view at that point in time that ASIC disagreed with and would find out more detail, get internal legal advice and the like.*

*So again, just since you asked me about why didn't I think about disclosing an interest or take a step back, it's because again it was a view that was being put, and I agree with you, it was a serious view but it wasn't a view that at that particular point in time ASIC agreed with. Therefore I was comforted by the fact that this issue would be worked through and that it hadn't reached a level that I needed to step completely out of the matter. As I said before, that point certainly came in September when I just knew more about the issue.*

*Then the final thing is it's been said to me for quite some time is that reasonable minds with the ANAO may differ. They may put views to us that we may differ on and that was the context at that particular point in time that I made that decision.*

Mr Shipton also commented on the information provided in the email from the COO on 11 August 2020 that the ANAO officer's view was that:

*The real crux of the issue is that in our view, with the exception of the initial tax advice, the payments made for other taxation support and advice do not meet the definition of a relocation expense and have resulted in the Rem Tribunal Determination being exceeded. This is considered a breach of the Remuneration Tribunal Act.*

Mr Shipton commented:

*Without a doubt it's a strong statement but it's a statement again, that I was being assured that with further and better explanations could be explained, and that was my understanding at the particular point in time. It was a view, a strong view, a serious view I agree. It was being positive and put forward but at that point in time it wasn't a firm conclusion. It wasn't a formal finding. It was almost a rebuttable presumption or a rebuttable position. That's how I took it at the time.*

*I didn't take it as a formal finding or indeed as a preliminary finding because as the question said, the crux of the question or the crux of the issue, I'm just trying to – then I think there's a response. The response is on 11 or 12 August. [Commission Counsel] tells me that it's a statutory interpretation question. She's giving me advice to say this is a matter which is open to question, which is open to further and better particulars and back and forth, and liaison.*

*So I agree, it was a serious sort of statement, but at that particular point in time I did not take it as a finding or a preliminary finding, but I'd also say that again, I stepped out. I wasn't directly involved in managing the relationship with the ANAO or the engagement. That was something I deliberately left to [acting COO], and as I mentioned before, she also advised that there would be utility in doing that. As I said, I was comforted by the fact that there was also the Audit Committee oversight in parallel.*

Mr Shipton also addressed this issue:

*First, [ANAO officer's] email ought not to be taken to be a formal expression of the Auditor-General's position. It was apparently an opinion expressed by an officer in response to an email by ASIC's CFO in circumstances where the matter was still to be considered by the ANAO's technical advisory committee. Further, the opinion was expressed in a single, short paragraph and was apparently unsupported by legal advice or analysis. It was also inconsistent with what the ANAO had told the Audit Committee that same day, namely that it had "unresolved concerns" about the payments made to KPMG in respect of the international taxation assistance and that "it is anticipated that these issues will be considered by the ANAO's Technical Advisory Committee no earlier than 20 August 2020.*

*Secondly, Mr Shipton had received what was described by ASIC's acting CFO as "compelling" internal and external legal advice and specialist international taxation advice in August 2020 that the payments were relocation support (and therefore did not need a Remuneration Tribunal determination), against which was to be balanced an informal observation by an ANAO officer, as to the nature of the payments.*

*Thirdly, as set out above at paragraph 17, there must be a "real sensible possibility" that Mr Shipton's personal interest could be of such a force that it could improperly influence his performance of his duty or obligations as Chair; a remote or theoretical possibility of a conflict is not sufficient.*

*Fourthly, at no time during or before August 2020 was it suggested by anyone to Mr Shipton that he would be obliged to pay ASIC the amounts it paid to KPMG. Accordingly, it could not be said that Mr Shipton had a personal interest (such as a material prospect of being obliged to repay the moneys) which conflicted with a duty he owed to ASIC, let alone a personal interest of sufficient magnitude and force that a reasonable person would conclude that there was a real sensible possibility of that interest causing him to improperly exercise his duties as Chair.*

*Fifthly, consistent with the observations made above in paragraph 41, even if he had a personal interest, it is difficult to identify with the requisite degree of specificity the duty or obligation Mr Shipton was under which was at risk of being improperly influenced on receiving [an ANAO officer's] 11 August email. Mr Shipton was not responsible for dealing with and addressing the ANAO's concerns. This was the responsibility of [acting COO] and the Audit Committee, assisted by the internal ASIC legal team. The Commission was represented by Ms Armour on the Audit Committee. Mr Shipton's involvement was limited, principally to providing information as requested of him and suggestions to [acting COO] and the ASIC legal team. Further, the receipt of an informal short email from an ANAO official would not have given rise to a "real sensible possibility" that Mr Shipton might improperly perform his duties, especially when this email is weighed against all of the legal advice and international taxation advice provided to Mr Shipton.*

*Sixthly, even if there were such a conflict, Mr Shipton managed it appropriately by limiting his involvement to providing advice and suggestions. Consistently with the advice of [acting COO], he also did not involve himself directly with the ANAO.*

*Finally, it is difficult to see how a conflict could arise where the circumstances said to give rise to it in August 2020 were so widely known and appreciated within ASIC. Those that knew of the circumstances included [acting COO], the Chief Financial Officer, [General Counsel], ASIC's General Counsel and Chief Legal Officer and [Commission Counsel], the Commission's Legal Counsel. The Audit Committee (including Ms Armour) also had the general carriage of the matter at that time.*

As noted above, the terms of reference of this review require advice on findings of fact with a view to providing a basis for legal advice concerning the next steps available. On that basis the review provides the following in relation to a potential or actual conflict of interest on the part of Mr Shipton and whether he acted to avoid or properly manage that conflict (if it existed) in respect of advising the Commission of the ANAO concerns.

- The possibility that the payment for the tax advice was a breach of the Tribunal Determination was at that time a live issue.

- The KMP issues were to be discussed at the Commission meeting, even though no decision were to be taken.
- Although legal counsel did not raise the issue at the time, Mr Shipton may reasonably be seen to have had a personal responsibility for disclosing and avoiding situations in which there is a real or potential conflict.
- Mr Shipton’s personal interest was known by the executive (who all report to Mr Shipton) and a Commission member, but it was not known to the Commission.

## Recommendation 5

**The review recommends that, based on the evidence available to this review, it would be reasonably open to Treasury to obtain legal advice about whether Mr Shipton conduct, in the period from 11 August 2020 to 25 September 2020, may amount to a breach of section 14 of the ASIC Code of Conduct or any other obligation and, if so, what action could be taken in relation to the conduct giving rise to that breach.**

**This consideration should have regard to the interviews conducted in the course of this review, the documents provided to it and the submissions made to it.**

## 9. CONDUCT OF ASIC OFFICIALS

### Conduct Framework

#### The Australian Public Service Code of Conduct

The Australian Public Service Code of Conduct (APS Code) applied to ASIC officials who had been employed under the *Public Service Act 1999* (PS Act) before 1 July 2019. (It might also have applied to contracted staff depending upon contractual arrangements.)

The Code is set out at section 13 of the PS Act. Elements 13(2) and 13(4) are relevant to this review:

#### **13 The APS Code of Conduct**

- (2) *An APS employee must act with care and diligence in connection with APS employment.*
- (4) *An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, **Australian law** means:*
  - (a) *any Act (including this Act), or any instrument made under an Act; or*
  - (b) *any law of a State or Territory, including any instrument made under such a law.*

Where ‘any Act’ or ‘any instrument made under an Act’ includes the PGPA Act, the PGPA Rule and the CPRs.

#### ASIC Code of Conduct

Since 1 July 2019 the ASIC Code of Conduct applied to ASIC officials. This Code contains the following provisions that are relevant to this review:

#### **1. Be accountable**

- (a) *You are accountable for what you do by efficiently providing accurate information so that our colleagues and stakeholders can make informed decisions.*

#### **2. At all times comply with the law and ASIC’s policies**

- (b) *You must at all times comply with applicable laws.*
- (c) *You must comply with ASIC’s policies.*

#### **3. Perform work with competence, care and diligence**

- (a) *You must take responsibility for your work and perform your role to the best of your ability.*
- (b) *You must demonstrate professionalism and a level of competence that would be reasonably expected of a person with your qualifications and experience.*

## **Observations about the conduct of ASIC officials**

It would be open to ASIC review the actions of the ASIC officials involved in these procurement decisions, to determine what, if any, further action is warranted. ASIC might want to take into account the circumstances at the time of the procurement, the time that has elapsed since the procurement, and the acknowledgment by the officials of the potential breaches. Given the public attention this matter has received, it is unlikely that these actions will be repeated. No recommendation is made in respect of the conduct of these officials.

On the face of the findings in this report, the actions of some ASIC officials involved in providing the information for, preparing, or overlooking the quality and accuracy of briefings, submissions and legal advices may be open to question. ASIC may wish to consider whether these matters are indicative of a possible lack of quality assurance and consider whether additional controls should be introduced to ensure accuracy in their legal advising processes.

### **Recommendation 6**

**The review recommends that ASIC should consider whether the matters identified in the report are indicative of a possible lack of quality assurance and investigate whether additional controls should be introduced to ensure accuracy in their legal advising processes.**

## **10. PROVISION OF RECORDS TO THE AUDITOR-GENERAL**

### **The Auditor-General's concerns**

In the s 26 letter the Audit-General advised the Treasurer:

*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.*

### **Why were some documents provided after 9 September?**

The records indicate that ASIC provided ten additional documents to the ANAO on 16 October 2020 that were relevant to Mr Shipton's tax advice assistance. These included some emails that had been sent to Mr Shipton's personal email accounts that he had not had access to earlier to ascertain their relevance. Other emails were to, or from, Mr Shipton's ASIC email address that could have been accessed earlier if they had been identified as relevant.

While it is regrettable that these documents were not available to the ANAO in a timely way, the review did not identify any evidence to suggest that the late provision of these documents suggested a lack of diligence or that the statement by the Accountable Authority was false on the date on which it was signed. It appears that it had taken some time for ASIC to understand fully the nature of the ANAO's concerns and then identify further relevant documentation.

## **11. IMPROVING GOVERNANCE PRACTICES FOR REMUNERATION AND PAYMENTS TO ASIC MEMBERS**

### **Pre-appointment**

It is clear to this review that the management of pre-appointment processes lacked certainty around the relocation allowances and the application of Tribunal requirements.

The review understands that in general, it is Treasury as the portfolio department that is responsible for the recruitment of statutory officers and for engaging with applicants and recruitment agencies over the terms and conditions that will apply. Based on the experience in this case it would be preferred for future

engagements if Treasury ensured there is a clearly documented agreement of all terms and conditions of employment (including approved relocation expenses with limits) prior to the appointment of a statutory officer. A policy document to ensure consistency of approach on what is considered reasonable would also be beneficial.

As ASIC is the employing authority and has responsibility for paying the consequent expenses they would also have to be a party to any agreement.

A central and expert contact in Treasury could also be established to respond to questions about any matters regarding the terms and conditions of statutory officers in the portfolio. This would provide an independent source of decision advice when agency staff are having to make decisions relating to their most senior officers. It could also be made clear that Treasury will hold the responsibility for formally approaching the Remuneration Tribunal through the Treasurer, if further individual determinations are sought - both pre-appointment and on an ongoing basis.

It may also be useful for statutory appointees to periodically receive a series of briefings from Treasury (or other agencies) about other matters, including an overview of their responsibilities under their governing legislation and other relevant obligations that are particular to working in the Australian public sector. This would include advice on:

- their terms and conditions as set out in the Remuneration Tribunal Determinations or other instruments, including leave, travel and relocation allowances;
- obligations under the PGPA Act, including the disclosure obligations and the ethical use of public money, including the requirements for the use of credit cards;
- for accountable authorities, an overview of their special responsibilities;
- any codes of conduct that might apply to them or their staff, including the PS Act (where applicable);
- a particular focus on avoiding any conflict of interest (real or apparent) in connection with their employment – an in-person briefing in a group setting discussing case studies could be useful;
- protocols for dealing with ministers and their offices;
- relationships with portfolio secretaries;
- protocols about media comment and social media;
- privacy, freedom of information and recordkeeping requirements;
- the role of the Auditor-General, the Ombudsman and other appropriate oversight bodies;
- the Australian government’s public interest disclosure scheme and the role of the principal officer;
- requirements for appearing before parliamentary committees; and
- the conditions of employment of their staff and government enterprise bargaining policies.

## **Recommendation 7**

**The review recommends that Treasury should:**

- **Ensure there is a clearly documented agreement of all terms and conditions of employment including relocation expenses with limits prior to the appointment of a statutory officer. The employing authority would necessarily be a party to any agreement;**
- **Develop a policy document to ensure consistency of approach in appointment;**
- **Establish a central and expert point of contact to respond to questions about matters regarding the terms and conditions of statutory officers in the portfolio;**
- **Hold the responsibility for formally approaching the Remuneration Tribunal through the Treasurer if further individual determinations are sought both pre-appointment and on an ongoing basis; and**

- **Arrange briefings for statutory appointees including an overview of their responsibilities under their governing legislation and other relevant obligations that are particular to working in the Australian public sector.**

## **Post-appointment**

Clearly there are particular challenges that arise when subordinate officials are required to approve expenses for very senior statutory officers, particular for the Accountable Authority. These decisions can still be problematic, even if the approving official is very senior, for example, the CFO or COO.

In the case of the current review, the expenses in question related to rental assistance and taxation advice - but similar challenges arise for expenses that, while business expenses in nature, have sensitivities and can be subject to public scrutiny and criticism. This could include expenses beyond a certain threshold or sensitive expenses that relate, for example, to international travel (particularly if combined with personal travel), conferences, home office equipment, professional subscriptions and fees, and executive coaching.

There is no perfect solution for handling these matters. Suggested approaches include:

- requiring the minister to endorse significant payments;
- requiring the portfolio department secretary to endorse the payments; and/or
- seeking advice from the Audit Committee Chair.

These approaches to outside entities may be necessary for agencies where there is a single independent statutory officer who is also the Accountable Authority. Any consideration by a person outside of the agency would be in the nature of an endorsement rather than approval to spend public money.

ASIC has a number of statutory officers who could fulfil the role of approving expenses for their peers. This review suggests that the Commission should be the body that considers and endorses expenses with the Chair as the decision maker. If the expenses related to the Chair, then a Deputy Chair should be the decision maker.

The current ASIC relocation policy is directed to ASIC staff. Given the special nature of the employment arrangements of statutory officers, ASIC should ensure that existing policies are appropriate and develop standalone policies for these statutory officers, where required, to ensure transparency and consistency of decision and set thresholds and define sensitive expenses that require additional controls.

## **Recommendation 8**

**The review recommends that ASIC should:**

- **Develop policies in relation to the payment of expenses for Commission members setting threshold amounts and defining sensitive expenses that require additional controls;**
- **Require the endorsement of the Commission for expenses beyond a threshold and for sensitive expenses;**
- **Require the Chair's approval for the expenses of Commission members; and**
- **Require a Deputy Chair's approval for the Chair's expenses.**

The review was advised on 24 November 2020 that ASIC has introduced the following arrangement:

*In relation to mitigating the risk of non-compliance with applicable Remuneration Tribunal Determinations, Remuneration Statutory Appointment Procedures (as part of Executive Remuneration) now establish that:*

1. *ASIC will not pay or reimburse any expenses incurred by the Statutory Appointee on geographic relocation unless the Payments are endorsed by the Commission and approved by the Accountable Authority;*
2. *Where the recipient Statutory Appointee is the Accountable Authority, the Payment will require endorsement by the Commission;*

3. *The Commission and approving Commissioner will consider as part of their deliberations whether making the Payment requires a determination of the Remuneration Tribunal; and*
4. *ASIC will also ensure that the remuneration and benefit arrangements for new Statutory Appointees are clearly documented and incorporate any arrangements agreed by Treasury.*

The review considers this arrangement to be a sound interim arrangement, but suggests the broader approach to payments to Commission members as recommended should be adopted. If recommendation 7 is agreed to by Treasury then Treasury would be the first point of contact for any question as to whether a determination by the Remuneration Tribunal is required.

## **12. OTHER MATTERS**

During the course of the review ASIC staff and members made some observations that, while not directly related to the terms of reference, do relate to perceived cultural issues within ASIC. There were some recurring themes:

- There is a perceived lack of integration between corporate areas.
- There were a number of comments about the need for a focus on compliance in senior officials, including a suggestion that it should be included as a performance measure for senior executive leaders.
- There were a number of comments expressing concern that when junior staff raise concerns they were not necessarily listened to or respected by more senior staff.

The review has not tested these comments and they are provided for information only. It might be appropriate for ASIC to further explore these issues, perhaps using an instrument such as a staff attitude survey.

The governance issues in this report raise questions about the overall governance arrangements in ASIC, particularly in respect of the responsibilities of the Accountable Authority.

Subdivision A sets out the general duties of Accountable Authorities. Relevantly, sections 15, 16 and 17 set out the following duties of Accountable Authorities:

### **15 Duty to govern the Commonwealth entity**

(1) *The accountable authority of a Commonwealth entity must govern the entity in a way that:*

- (a) *promotes the proper use and management of public resources for which the authority is responsible; and*
- (b) *promotes the achievement of the purposes of the entity; and*
- (c) *promotes the financial sustainability of the entity.*

*Note: Section 21 (which is about the application of government policy) affects how this duty applies to accountable authorities of non-corporate Commonwealth entities.*

(2) *In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.*

### **16 Duty to establish and maintain systems relating to risk and control**

*The accountable authority of a Commonwealth entity must establish and maintain:*

- (a) *an appropriate system of risk oversight and management for the entity; and*
- (b) *an appropriate system of internal control for the entity;*

*including by implementing measures directed at ensuring officials of the entity comply with the finance law.*



### **17 Duty to encourage cooperation with others**

*The accountable authority of a Commonwealth entity must encourage officials of the entity to cooperate with others to achieve common objectives, where practicable.*

This review has raised issues of concern regarding:

- The proper use and management of public resources;
- Systems of risk oversight and management for the entity;
- System of internal control for the entity; and
- Cooperation between ASIC officials.