



Australia's corporate regulators—the ACCC, ASIC and APRA

In the 1990s, a major development in Australian public administration was the creation of specialised statutory agencies responsible for financial regulation. Between 1995 and 1998, the Australian Consumer and Competition Commission (ACCC), the Australian Securities and Investments Commission (ASIC), and the Australian Prudential Regulation Authority (APRA) were established under their own Acts. The responsibilities, resources and public profiles of all three regulators have grown appreciably since their creation. This Research Brief examines a specific challenge for each of the regulators, and the regulatory strategies they employ to monitor Australia's corporate sector.

Richard Grant
Politics and Public Administration Section

Contents

Abbreviations	3
Executive Summary	4
Introduction—Australia's corporate regulators	6
I. Major trends in commercial and financial markets	7
The challenge of commercial regulation	7
Why financial regulation is increasingly important	7
The size and growth of financial institutions	7
The size and composition of Australians' investments	8
Governments' promotion of superannuation funds	9
The risks for investors	9
II. Specific challenges	10
The ACCC—contesting section 46	10
The Dawson Report	11
Senate Economics References Committee Report	12

Government Senators' Minority Report	13
The position of Labor and the Democrats	13
The view of big business	13
The 41 st Parliament	14
ASIC—improving disclosure	14
Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004	14
Assessing CLERP9	15
Businesses' preference for voluntary guidelines	16
APRA—responding to regulatory failure	17
APRA pre HIH	18
The post HIH response	19
National Australia Bank (NAB) trading losses	20
III. Regulatory strategies	21
The ACCC's regulatory strategy	22
ASIC's regulatory strategy	24
Enforcement at the top	24
The importance of education	25
APRA's regulatory strategy	26
PAIRS and SOARS	26
The distinctiveness of APRA's approach	27
The importance of disclosure and data gathering	27
IV. The changing profile of the regulators	28
Backing ASIC	30
The change of tune on APRA	30
V. Concluding comments	31
Endnotes	33
Appendix 1: Enabling legislation	44
Appendix 2: Revenues from government (Appropriation Bill No. 1, \$'000)	44
Appendix 3: Resources for 2002–03 and 2003–04 financial years	45
Appendix 4: Previous bodies	45

Tables

Table 1: Section 46 of the Trade Practices Act—A timeline	11
Table 2: Scrutinising APRA.	18
Table 3: Enforcement actions	23
Table 4: Financial regulators' press releases (number per year).	29

Appendices

Appendix 1: Enabling legislation	44
Appendix 2: Revenues from government (Appropriation Bill No. 1, \$'000).	44
Appendix 3: Resources for 2002–03 and 2003–04 financial years.	45
Appendix 4: Previous bodies	45

Abbreviations

ACCC	Australian Competition and Consumer Commission
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
BCA	Business Council of Australia
CLERP	Corporate Law Economic Reform Program
NAB	National Australia Bank
PAIRS	Probability and Impact Rating System
SOARS	Supervisory Oversight and Response System
TPA	Trade Practices Act

Executive Summary

This Research Brief looks at some important recent developments in the role, mindset and performance of Australia's corporate regulators. Since 1998, the task of regulating corporate Australia has been the responsibility of three statutory authorities—the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). The ACCC was established in 1995 following the amalgamation of the Trade Practices Commission and the Prices Surveillance Authority. APRA and ASIC were established on the recommendation of the 1997 [Wallis Inquiry into the Financial System](#). The Inquiry argued the need for specialised regulatory arrangements given rapid technological innovation, an evolving and more competitive business environment, and longer-term changes in customer needs and profiles.¹ The intensity of these changes—and the need for a sound and flexible financial regulatory structure—has continued unabated in the eight years since this Inquiry.

This Brief has four parts. The first part looks at the challenge of regulating corporate Australia. Australia's financial system is rapidly evolving and increasingly important as a source of income for more Australians. Higher levels of investor participation have encouraged the supply of a wider range of risk management services and products, from a wider range of providers. The general enthusiasm for investment opportunities increases the number of under-capitalised new market entrants, the attractiveness of large-scale mergers, and the opportunities for unscrupulous operators to test regulators' boundaries. The concentration of market power generally is of enduring concern in a market of Australia's size.

The second part of the Brief focuses on a principal challenge facing each of the three regulators. For the ACCC, its status as a proactive and successful regulator has been thwarted by expensive court losses over section 46 of the *Trade Practices Act 1974*. This section protects small business from anti-competitive conduct by companies with 'a substantial degree of market power'. At issue is whether section 46 should be amended to clarify what constitutes 'a substantial degree', and in particular, whether the ACCC should have greater power to protect small business from predatory pricing. The ACCC, the Labor Party, and a 2004 Senate Committee inquiry, all favour widening the scope of section 46. They argue that the courts should be able to prosecute all companies—not just those with market power—based on either proven intent, *or proven effect*, of anti-competitive behaviour. The business community, the Howard Government, and the independent Dawson Inquiry, have defended existing arrangements. They argue that any change to the law would make the mistake of protecting competitors, rather than competition.

Conversely, the main challenge for ASIC has been to keep pace with its legislative responsibilities, and in particular, a framework for accurate and timely disclosure of company information. The Howard Government, with the support of the opposition parties, has progressively strengthened the disclosure framework through its Corporate Law Economic Reform Program (CLERP). The CLERP reforms began in 1997, and are designed to ensure the transparency of the financial sector and the protection of its consumers. In July 2004, CLERP9 introduced measures improving internal auditor independence, ASIC's powers to

enforce continuous disclosure obligations, and its ability to prosecute. However, the business community is sceptical of the changes, preferring a framework of self-regulation through the Australian Stock Exchange Advisory Council.

Since its inception in 1999, APRA's key challenge has been more fundamental. The collapse of insurance company HIH in March 2001, led to strong criticism that the regulator had been 'asleep at the wheel'. The [HIH Report](#) found that APRA had several deficiencies, including staffing shortfalls, outdated legislation, and an inadequate supervisory methodology. Post-HIH, APRA is empowered by law with greater investigatory responsibilities, a methodology that critically assesses the financial risk faced by institutions, and an emphasis on effectiveness over efficiency. The *Australian Prudential Regulation Authority Amendment Act 2003* also reforms APRA's governing structure, with sharper lines of accountability between a newly-created executive group and the Minister.

The third part of the Brief puts these challenges in a wider context, focussing on the regulatory strategies of the agencies. The ACCC and ASIC are primarily enforcement agencies. Their main job is to prosecute to ensure the transparency and fairness of markets. The enabling legislation of both agencies requires remedial action to correct 'unconscionable conduct'. Both have responsibilities under their Act to inform companies, consumers, and investors of their rights and responsibilities under law. On the other hand, APRA is primarily a supervisory agency. Its role is as a 'behind the scenes' monitor of financial institutions, with the aim of protecting depositors. APRA continually assesses the risk that institutions face in terms of the overall impact of their failure on the economy. It fails when major institutions fail, and leave depositors out of pocket. The ACCC and ASIC fail when companies and institutions promote their influence and standing in the market by misleading consumers or injuring their interests. The regulators' ultimate goal is the same—APRA's means of achieving this is substantively different. As prosecutors, the ACCC and ASIC rely on 'naming and shaming'. Publicising successful and proposed prosecutions not only engenders public confidence in their role, but acts as an important deterrent to would-be offenders. APRA, on the other hand, necessarily avoids publicity. It not only has secrecy obligations, but public knowledge of institutions' financial difficulties would generally undermine the Authority's prudential efforts.

The fourth part of this Brief notes that the perception of all three regulators has changed over the last few years. The ACCC's approach appears more selective under Chairman Graeme Samuel than his predecessor, Professor Allan Fels. APRA and ASIC are both perceived as having more bite than in years past. ASIC is respected for its impressive prosecution record, but has allowed APRA to make the running on financial services. APRA is rapidly developing a reputation as a forceful and competent administrator. Perception aside, the broader picture is one of institutional continuity. The two-agency model—where the prudential regulator is separate from the companies and securities regulator—remains in place and is unlikely to change. Moreover, the fundamental challenge of corporate regulation remains. It requires coordination of the regulators' responsibilities to promote confidence in the financial system, and the informed participation of stakeholders in that system.

Introduction—Australia's corporate regulators

The task of regulating the corporate sector in Australia is mainly the responsibility of three key agencies—the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA).² The ACCC is the only national agency dealing with competition matters generally. It was established in 1995 following the amalgamation of the Trade Practices Commission (1974) and the Price Surveillance Authority (1983). The ACCC polices the [Trade Practices Act 1974](#), under which it has general consumer protection responsibilities and powers to prohibit companies from substantially lessening competition (Appendix 1).

ASIC is the national regulator of corporate entities and was originally established as the Australian Securities Commission in 1991 (Appendix 4). Since becoming the Australian Securities and Investments Commission in 1998, it has assumed investor and consumer protection responsibilities for all financial entities. It operates under its own Act—the [Australian Securities and Investments Commission Act 2001](#)—and several supporting statutes, including the [Corporations Act 2001](#) (Appendix 1). ASIC licences financial entities to offer financial products and services provided they adequately disclose their financial position to consumers.³

APRA is the national regulator of prudential institutions—deposit takers, insurance companies, and superannuation funds. The Wallis Committee proposed the Authority in 1997 on the recommendation of the Financial System Inquiry.⁴ Federal Parliament passed the [Australian Prudential Regulation Authority Act 1998](#) (Appendix 1) to ensure that prudentially regulated financial entities maintain a minimum level of financial soundness.⁵ Collectively, the role of Australia's corporate regulators is to protect consumers, investors, and creditors by ensuring that companies and financial institutions adhere to company and competition law.

This Research Brief is divided into four parts:

- the major trends in commercial and financial markets
- some specific challenges facing the regulators
- the regulators' enforcement and supervisory strategies, and
- the regulators' changing public profile.

These analyses use committee debates and reports from the 40th and 41st Parliaments, the agencies' most recent Annual Reports, and the positions of the major parties and key interest groups on financial regulation in the lead-up to the 2004 Federal Election. Parts II and III give an insight into the current mindset of the regulators. Part IV builds on this discussion, examining the changing perception of the regulators within the media.

I. Major trends in commercial and financial markets

To begin, it is important to understand the challenge the regulators face. This section notes major trends in the markets they oversee.

The challenge of commercial regulation

The ACCC is an economy-wide regulator with a general enforcement role in relation to general competition and consumer protection law. One of the Commission's key tasks is to ensure the competitiveness of key network industries such as electricity, gas, telecommunications, aviation and airports, waterfront and shipping, rail and postal services. Healthy competition in these utility markets produces—at least in theory—a flow-on effect to the rest of the economy.

The utility industries are not naturally competitive. They require high capital intensity, a high degree of commonality of production facilities, and a reliance on distribution networks.⁶ The small Australian market accentuates these characteristics. The large distances between major commercial centres and a sparse rural population provide the conditions for single service providers to dominate. In broadband internet services, for instance, the 'incumbent dominant player has control over most of the current telecommunication networks including the copper wire network as well as the major coaxial cable'.⁷ Indeed, Telstra has an estimated 89 per cent of directly connected lines, 81 per cent of local call revenue, and 95 per cent of industry profits. The ACCC's Chairman, Graeme Samuel, has acknowledged that in many rural areas, 'there is not sufficient population to warrant two pharmacies, two supermarkets, two petrol stations, or two of anything'.⁸ The Commission has conceded that population is crucial to attract the number of marketplace participants necessary to have effective competition. It also acknowledges that collusive and/or predatory behaviour in the banking, airline, and petrol industry remains of ongoing concern. Despite several recent prosecutions of cartels, however, there is no evidence that anti-competitive conduct has increased in Australia.

Why financial regulation is increasingly important

The responsibilities of Australia's financial regulators have never been greater. At one level, this is reflected in the legislative and administrative changes that have strengthened the architecture of financial regulation. These developments in turn reflect the growth and dynamism of financial institutions, the high proportion of Australian citizens active in these markets, governments' promotion of the superannuation industry, and the risks for investors, depositors and creditors.

The size and growth of financial institutions

There are several indicators of the size and rapid growth of financial institutions in Australia.

- Australia's financial market turnover for the financial year to June 2004 was in excess of \$69 trillion.⁹ This represents an 18.3 per cent increase on the previous financial year, and a 44.7 per cent increase since 1999–2000. The finance and insurance sector contributes 8 per cent to GDP, and averages 5.3 per cent growth per annum.¹⁰

- In June 1990, the value of superannuation assets and funds was \$124 billion. In September 2004, their value was \$648.9 billion—a 523 per cent increase in 14 years.¹¹ 36 six per cent of this amount was directly invested; 38 per cent was placed with an investment manager; and 26 per cent was invested through life offices.¹²
- Australian Bureau of Statistics figures show that the value of consolidated assets in managed funds at 31 December 2004 was \$813.9 billion, up from \$760.1 billion in June 2004, and \$658.2 billion in June 2003. The value of superannuation funds increased by 17 per cent in the year to December 2004, from \$342.9 billion to \$412.9 billion.¹³
- ASIC regulates 1.36 million Australian companies, 6529 company auditors, roughly 3853 financial services businesses and 3765 managed investment schemes, and eight financial markets including the Australian Stock Exchange (ASX) and the Sydney Futures Exchange.¹⁴
- APRA supervises institutions holding more than \$2 trillion in assets for 20 million Australian depositors, policyholders and superannuation fund members.¹⁵ As of 30 June 2004, the Authority regulated 9980 superannuation entities, 142 general insurers, and 52 banks.¹⁶

The size and composition of Australians' investments

The growth of financial institutions partly reflects the growth in individual Australians' investment portfolios.

- The Australian Stock Exchange share ownership study for 2004 found that 8 million Australians (55 per cent of the adult population) own shares either directly (6.4 million), or indirectly through a managed fund or a self-managed superannuation fund.¹⁷ The Stock Exchange commented: 'we believe that this is the highest reported level of retail share ownership in the world'.¹⁸ The average portfolio has increased from \$35,088 in 2002 to \$41,400 in 2004.¹⁹
- In 2004, Roy Morgan Research found 15.5 million Australians had a deposit account, 10.2 million invested in superannuation, 9.7 million had credit cards, 6.3 million had a home, personal or investment loan, 2.1 million had invested through a financial adviser, and 1.2 million were investing in managed funds.²⁰
- In 2000, roughly 90 per cent of the Australian workforce was covered by superannuation.²¹ For the year to September 2004, total contributions to superannuation were \$60.9 billion. This was an 11.7 per cent increase on the (previous) year to September 2003. Employer contributions increased 8.6 per cent for the year; member contributions increased 17.6 per cent.²²
- In July 1990, 30 per cent of the major Australian banks' total loans were housing loans. In June 2004, housing loans accounted for 55 per cent of the major banks' loans.²³ The annual rate of credit growth for housing has been higher than 20 per cent for some years.²⁴

Governments' promotion of superannuation funds

Successive federal governments have promoted the size and competitiveness of the superannuation industry.

- The Keating Labor Government established the framework for compulsory superannuation payments through the [*Superannuation Guarantee Charge Act 1992*](#). The Act requires a percentage of an employee's salary to be contributed to superannuation, although employees were not generally entitled to decide their preferred fund.
- The Howard Government has emphasised the importance of choice and portability of superannuation.²⁵ It introduced the [*Retirement Savings Accounts Act 1997*](#) which provides greater choice of fund for those contributing, either compulsorily or voluntarily, to superannuation.²⁶ The Act allows superannuation funds to offer more attractive terms for small account holders. On 1 July 2004, measures were introduced to enable a quicker transfer of retirement savings accounts between superannuation providers.²⁷ However, it has also allowed Retirement Savings Accounts to be used by employers as a default fund, thereby enabling employers—and low-income employees who often favour these accounts—to avoid the major funds' insurance premiums.²⁸ The government has also widened the eligibility criteria for low income earners to receive the government co-contribution.²⁹
- In September 2004, the Federal Treasurer, the Hon. Peter Costello, announced plans to establish a privately managed 'future fund' into which all future budget surpluses will be invested. The aim is to fully fund the government's estimated \$89 billion superannuation liability.³⁰ The *Australian Financial Review* noted that major fund managers were 'excited at the prospect of getting in on the new fund'.³¹

The risks for investors

The innovations in Australian financial markets over the past decade have been a response to international trends, the number of Australians investing, and the associated increase in funds under management. These conditions have allowed investors to pursue greater rewards at higher risk. Peak financial industry bodies have noted the 'sophistication of Australian investors and their increasing demand for innovative risk management products'.³² For regulators, these trends present major challenges:

- Credit derivatives have been described as the single largest risk facing global financial institutions.³³ There is a lack of transparency in terms of who holds the risk or what concentrations of risk exist.³⁴ Turnover in credit derivatives in Australia has increased from \$22 307 million in 2001–02, to \$50 607 million in 2002–03, to \$71 305 million in 2003–04.³⁵ The [*2003 Australian Financial Markets Report*](#) notes that the 2002–03 turnover of equity derivatives was \$160 billion, 690 per cent higher than for 2001–02.³⁶ As Part III explains, these increases have led regulators to assess the risk involved in institutions holding derivatives.

- The Australian funds management industry is highly concentrated—the top ten managers at June 2004 accounted for two-thirds market share (\$421 013 million of a total \$760 072 million).³⁷ The concentration of wealth management agencies, insurance companies, and financial services has increased over the past five years, both in Australia and internationally.³⁸ This issue—and the consequences of future merger activity—has been of concern to the ACCC.
- At the other end of the market, a feature of the past five years has been the growth in the number of small-scale investment and wealth creation schemes and seminars. Regulators' efforts to monitor 'pie-in-the-sky', 'get rich quick', and 'too good to be true' schemes, reflect the growth in these smaller scale ventures.
- The number of small 'self managed superannuation funds' has doubled over the past seven years.³⁹ They account for roughly one-fifth of total assets in the Australian superannuation industry. These funds consist of a maximum of four members, and enable these members complete control over the investment and administration of their superannuation. The overall impact of the failure of these funds is obviously smaller than for a major institution, but they nonetheless require regulators' attention.⁴⁰

This Brief examines the role of the ACCC, ASIC and APRA in light of these trends. Australia's financial system is rapidly evolving and increasingly important as a source of income for more Australians. Higher levels of participation have encouraged the supply of a wider range of risk management services and products from a wider range of providers. The general enthusiasm for investment opportunities increases the number of under-capitalised new market entrants, the attractiveness of large-scale mergers, and the opportunities for unscrupulous operators to test regulators' boundaries. The concentration of market power generally is of enduring concern in a market of Australia's size.

II. Specific challenges

These trends present various regulatory dilemmas for the ACCC, ASIC and APRA. This section analyses a key challenge for each of the regulators over the past few years.

The ACCC—contesting section 46

In March 2005, the House of Representatives passed the [Trade Practices Legislation Amendment Bill \(No. 1\) 2005](#). The Bill implements several of the recommendations of the 2003 [Review of the competition provisions of the Trade Practices Act](#) (Dawson Review). The May 2005 Federal Budget allocated \$20 million to the ACCC over the next four years to implement the amendments proposed in the Bill. This Bill amends various aspects of the Trade Practices Act, including merger clearances and authorisations, non-merger authorisations, collective bargaining and exclusionary and price fixing provisions. These issues—particularly the establishment of a formal clearance process for mergers—have been of key concern for the ACCC since mid 2004.⁴¹

Over the past few years, however, the most contentious issue for the Commission has been section 46 of the *Trade Practices Act* (see Table 1). Section 46 prohibits corporations with a

substantial degree of market power from taking advantage of that power for the purpose of damaging a competitor. There have only been three successful prosecutions under the section in thirty years.⁴² The 1974 enactment prohibited a firm that was in a position to ‘control’ a market from taking advantage of its market power.⁴³ The 1986 amendment established a lower threshold test of having ‘a substantial degree of power’.⁴⁴ For the ACCC to prosecute under section 46, the test is now threefold:

- to prove ‘a substantial degree of power in the market’
- to prove that the company has ‘taken advantage’ of that power, and
- to prove it did so with the ‘purpose’ of damaging competitors.

The ACCC has publicly criticised the effectiveness of section 46, and advocates further reform to give greater protection to small business from predatory pricing by larger competitors.⁴⁵ The Howard Government has argued that the Act needs to operate more efficiently ‘to protect competition, not competitors. ... The act promotes competition by protecting markets from uncompetitive conduct, not by protecting uncompetitive firms’.⁴⁶ The Business Council of Australia (BCA) has argued that any change to the Act threatens to compromise the overall competitive process.⁴⁷

Table 1: Section 46 of the Trade Practices Act—A timeline

1974	Section 46 enacted to prevent monopolisation
1986	Parliament amends section 46 to address oligopolistic content
May 2002	Sir Daryl Dawson is appointed as Chairman of inquiry into section 46
January 2003	Dawson Committee’s report released: <i>Review of the Competition provisions of the Trade Practices Act</i> —no change to section 46
February 2003	<i>Boral Messer Masonry v ACCC 2003 HCA 77</i>
April 2003	Government accepts Dawson Committee inquiry
June 2003	Senate refers section 46 to Senate Economics References Committee
September 2003	ACCC lodges submission to Senate Economics References Committee
December 2003	<i>Rural Press v ACCC [2003] HCA 75</i>
March 2004	Senate Economics References Committee tabled report: The effectiveness of the TPA 1974 in protecting small business
April 2004	ALP responds to reforming the Trade Practices Act
June 2004	Treasurer Peter Costello outlines changes to section 46 for tabling in Parliament
March 2005	<i>Trade Practices Legislation Amendment (Small Business Protection) Bill 2005</i> : Press Release by Treasurer Costello announces that the Government expects to introduce the Bill after approval of draft legislation by the States and Territories

The Dawson Report

In May 2002, the Howard Government appointed Sir Daryl Dawson the Chair of an independent inquiry to review and make recommendations on the TPA’s competition

provisions.⁴⁸ The Dawson Committee's Report was released on 16 April 2003. The ACCC strongly supported the Committee's recommendations:

- to introduce criminal sanctions for blatant breaches of cartel laws and
- to raise penalties to \$10 million or three times the gain of the contravention.

On section 46, however, the Dawson Committee argued against amendment and for its interpretation to remain a matter for the High Court. The ACCC had argued that given the difficulty of demonstrating an anti-competitive *purpose*, section 46 should also take into account the anti-competitive *effect* of company behaviour.⁴⁹ It was that disappointed the effects tests were dismissed. The Government accepted the Committee's recommendation, acknowledging 'the extensive consideration given to possible amendments to section 46, including the introduction of an effects test, by this and previous reviews'.⁵⁰

Significant court challenges by the ACCC over section 46 were influential in the Dawson Report's findings. In February 2003, two months before the Report's release, the High Court delivered its finding on *Boral Messer Masonry v ACCC*. The ACCC claimed that Boral had used its market power to drop its prices below cost to protect its market share. One of its competitors left the market as a result. The High Court cleared Boral of any wrongdoing under section 46 because it did not have the market power to recoup the losses it sustained when it dropped prices.⁵¹ The Dawson Committee subsequently noted the High Court's decision, insisting that section 46 continue to be left to the Court's interpretation. The ACCC dropped several investigations under section 46 as a result of the finding.

Senate Economics References Committee Report

In June 2003, the Senate referred section 46 to its Economics Committee. The ACCC's submission to the Committee argued that the Courts had not got the Boral decision wrong, but that Parliament's 1986 amendment of 'a substantial degree of power' was unclear.⁵² The Committee's March 2004 report agreed, unanimous in its view that the parliamentary intent of section 46 could not be properly exercised by the ACCC in its present form. This was an important rejoinder to the Dawson Committee's finding, and a breakthrough for small business and the ACCC on the need for reform. The Committee did not support an effects test, but was strongly supportive of the need to clarify the practical meaning of 'a substantial degree of market power'.

The report proposed three guides to gauge whether a company was taking advantage of its market power:

- that big business justify its actions in terms of a fundamental business rationale
- that an assessment be made of the capacity of a company to sell a good or service below cost, rather than its capacity to recoup losses, and
- that coverage of section 46 be extended to companies that may not have market power but financial power.⁵³

Government Senators' Minority Report

Government Senators on the References Committee favoured only eight of the 17 recommendations in the majority report.⁵⁴ The Government Senators' Report stressed that the consequence of the successful operation of the Trade Practices Act will be to protect firms that, but for anticompetitive conduct, would be competitive.⁵⁵ Their objections to the main Committee were:

- the yardstick of 'financial power' for determining the threshold for market power
- clarification of the terms 'taking advantage' and 'substantial degree of power in the market'
- the absence of any plan to recoup revenue when a firm has engaged in unlawful predatory pricing, and
- strengthening the ACCC's powers to check the 'creeping acquisitions' of small business or to strengthen the Commission's 'cease and desist' powers.⁵⁶

On 23 June 2004, the Government tabled its response to the Senate Inquiry, foreshadowing the eight options endorsed by the Government Senators. The Treasurer acknowledged that the courts needed explicit direction to assess anti-competitive behaviour.⁵⁷ The tabled document suggested two key amendments to section 46, alerting the courts to:

- the capacity of a firm to price at below cost and
- the firm's expectation of recouping losses.⁵⁸

The position of Labor and the Democrats

The Labor Party and the Australian Democrats strongly supported the 17 recommendations made by the Senate Committee.⁵⁹ Both parties argued that the courts needed more guidance—and the ACCC more power—to properly protect small business from predatory action by big business. On 13 April 2004, the leader of the Labor Party, Mark Latham, promised to increase the powers of the ACCC by:

- explicitly banning predatory pricing in section 46
- giving it power to issue 'cease and desist' orders, and
- initiating a formal statutory review of the TPA, ensuring the ACCC's independence.

Latham argued that a Labor government would return the threshold to 'substantial market power' from 'market dominance'.⁶⁰ He claimed that this would give the courts a legislative basis for action, although it is not clear how this would differ from the existing statute.

The view of big business

The BCA has also been a vocal critic of any change to section 46 for fear of its impact on big business. Its argument is that the Senate Committee's proposals for section 46 reform confuse protection of the competitive process with protecting some sectors of the economy.⁶¹ Whereas the Committee viewed cutting prices below cost as an indication of 'substantial

power' under section 46, the BCA argues that outlawing these practices will lead to higher costs for consumers and industry.⁶² Thus, seeking to protect smaller competitors will inevitably harm the wider competitive process. The *Australian Financial Review* put the case tersely:

In the real world, small firms struggle to match the scale and cost advantages of big firms, and need to be innovative, tenacious and willing to accept slimmer profits to carve a niche for themselves, especially in a small, geographically fragmented market like Australia. The false notion that this situation can be simply addressed by legislative fiat is the flaw at the heart of the Senate economics committee's report on how well the Trade Practices Act protects small firms.⁶³

The 41st Parliament

It is expected that a bill making minor amendments to section 46 will be introduced to the new parliament in 2005. In July 2004, the Treasurer had circulated a letter to the states and territories seeking the changes suggested in the Government Senators' report. While the states prefer the full recommendations of the majority report, it is unlikely they will reject an opportunity to make some improvements to the existing statute.⁶⁴ The changes will be introduced separately from the Trade Practices Act Amendment (No. 1) Bill 2005.⁶⁵

ASIC—improving disclosure

In contrast to the ACCC, ASIC's key challenge over the past three years has been to keep pace with rapid legislative change. The Howard Government has significantly bolstered ASIC's responsibilities through laws requiring higher standards of corporate disclosure and auditing independence. This legislation was part of a spate of corporate governance reforms worldwide following the collapse of major financial institutions, and recriminations against company directors and boards. This section examines the content of, and reaction to, the [*Corporate Law Economic Reform Program Act 2004*](#).⁶⁶

Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004

In March 1997, the Howard Government announced its Corporate Law Economic Reform Program (CLERP) in response to the recommendations of the Wallis Inquiry into the Financial System. The principles guiding CLERP are market freedom, investor protection and quality disclosure of relevant information to the market.⁶⁷ The reforms have been aimed at ensuring that regulation keeps pace with a rapidly changing business environment and with international best practice. A policy proposal paper released in September 2002 by the Treasurer, the Hon. Peter Costello, noted the specific challenge of the reform process:

Australian companies will face a cost of capital premium if our framework is perceived to be less rigorous than elsewhere, and they will pay a compliance cost penalty for over-regulation or poorly conceived regulation. In either case, their international competitiveness may be impaired. The objective must be for Australia's regulatory framework to remain in line with or ahead of world's best practice.⁶⁸

On 1 July 2004, most of the provisions of the *Corporate Law Economic Reform Act 2004*, or CLERP9, came into effect. They were fully implemented on 1 January 2005. The CLERP9 amendments alter ASIC's framing legislation—the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*. The CLERP9 amendments are based on the Government's response to the Ramsay Report—[Independence of Australian Company Auditors](#)—and the recommendations of the [HIH Royal Commission](#) (see Part III). The amendments can be grouped into three categories: measures improving internal auditor independence (1–2); measures improving ASIC's ability to prosecute (3–5); and measures outlining ASIC's powers to enforce continuous disclosure obligations (6–8).

1. enhancing auditor independence by defining situations in which a conflict of interest exists (subsection 324CD). Auditors must be able to exercise 'objective and impartial judgement'
2. enabling ASIC to impose conditions on the registration of company auditors (Schedule 1, item 59)
3. requiring auditors to report all significant breaches of the *Corporations Act* to ASIC (Schedule 1, part 7, item 123)
4. establishing a Financial Reporting Panel to adjudicate disputes between ASIC and companies on the application of accounting standards in financial reports (Part 3 of Schedule 2)
5. protection for whistleblowers internally or directly to ASIC provided identity is disclosed and the breaches relate to the *Corporations Act* (Schedule 4, item 2)
6. inclusion of remuneration payments for each director of the company and the five highest-paid executives for the year (Schedule 5, item 12), as well as data on companies' financial performance and shareholder returns for each of the previous four years (Schedule 5, item 13). Shareholders will be given a non-binding vote at annual general meetings on executive pay (Schedule 8).
7. a process for ASIC to pursue continuous disclosure (Part 2, Schedule 6, Sections 1317DAC–DAG). The CLERP9 process begins with ASIC's written notification of the breach before a hearing permitting the entity to give evidence. If ASIC considers a contravention has occurred, it may issue an infringement notice, upon which a financial penalty and remedial action must be taken. If it is not, ASIC can commence civil proceedings.
8. extension of civil liability in relation to continuous disclosure breaches to individuals, not only the company (Schedule 6, items 1 and 2).

Assessing CLERP9

The CLERP9 reforms are significant for several reasons. First, they respond directly to the recommendations of the Ramsay and HIH inquiries, and continue the process of financial sector reform commenced by the Wallis Report. The HIH Royal Commission had

recommended a review of executive remuneration ‘as a matter of priority’ (recommendation 1), the extension of liability ‘to all persons’ (recommendation 2), and several measures to address auditors’ independence and international accounting standards.⁶⁹ CLERP9 is a strong response to these concerns.

Second, CLERP9 significantly enhances ASIC’s enforcement focus and its powers under the *Corporations Act*. Protecting whistleblowers and extending liability to individuals sends a clear signal to the corporate sector that ASIC has extended its prosecutory reach. The process for exercising these powers is through an adjudicating panel to resolve accounting standard disputes, and a system of warnings for breaches of disclosure guidelines (see Part III).

Third, CLERP9 is potentially a significant inducement for shareholder vigilance and better corporate performance. It acknowledges that a key failing in corporate governance over the previous five years has been the ability of boards to selectively filter auditors’ information to the CEO.⁷⁰ The CLERP9 legislation does not guarantee that auditors will be perfectly independent of company boards, or that all financial reports are full and transparent. However, it does set a framework for shareholders to agitate for better executive performance and audit independence.⁷¹ The legislation has placed the issues of executive remuneration and auditor independence on the shareholder agenda. It complements the March 2003 Australian Stock Exchange’s voluntary code—[*Principles of Good Corporate Governance*](#)—aimed at better disclosure of executive pay and improving boards’ risk management procedures.⁷²

In March 2005, the Government gave a belated response to the 2002 Joint Committee of Public Accounts and Audit report on independent auditing.⁷³ The response rejected several of the Committee’s recommendations on the basis that corporate governance standards should not be legislated. It rejected the idea that audit committees should be mandated in the *Corporations Act*, noting that ASX listing rules now require top 500 listed companies to have an audit committee. The Government’s response also rejected the Committee’s proposal for:

- legislated corporate governance standards enforced through the Financial Reporting Council and
- an amendment to sections 307, 308 and 1288 of the *Corporations Act* to establish formal reporting by independent auditors to ASIC on matters relating to the independence of the reporting process.

Businesses’ preference for voluntary guidelines

Despite the Government’s stated preference for promoting best practice rather than legislative requirements, the new rules prescribed in CLERP9 received a negative reaction from business:

- In August 2004, the Treasurer released a report by the Financial Sector Advisory Council which warned against over-regulation of the financial sector.⁷⁴ Prescriptive regulation, the report argued, ‘may come at the cost of hampering business investment opportunities in Australia and abroad’.⁷⁵ It also questioned whether the [*Financial Sector Reform Act 1998*](#) had created a duplication of consumer protection responsibilities between ASIC and the ACCC. The Council normally reports to the Government in confidence. It was publicly

released on this occasion following the Labor Party's claims that the CLERP reforms were weak.

- Frank Spencer, a partner with the chartered accounting group PKF Australia, argued that CLERP9 will make audits more expensive, reduce the number of (small) audit firms, and promote larger firms that enjoy the protection of limited liability structures. Spencer claims the reforms are too narrowly focussed on the audit function which 'is not, and never will be, the cause of company failures'.⁷⁶
- The *Australian Financial Review* conducted interviews with 25 CEOs on their opinion of the new regulations.⁷⁷ In general, the response was that a better balance was needed between compliance and allowing companies to focus on delivering for shareholders. Many of the respondents commented on the large amount of time invested by boards on corporate governance, and the cautious approach to these issues. Caltex chairman Dick Warburton commented: '[T]hat to me is frustrating. It means we've got litigation on our minds rather than business on our minds'.⁷⁸ AMP Chief Executive, Andrew Mohl, noted widespread complaint among directors about the diversion of regulation from the focus on performance.

A comparison of business reaction to the mandatory CLERP9 regulations and the voluntary ASX Guidelines is instructive. Business clearly dislikes a prescriptive approach. In March 2004, a progress report on the implementation of the ASX Guidelines noted that the feedback from business was generally supportive of the ten principles, and 'very supportive of the flexibility inherent in the disclosure-based, non-prescriptive approach'.⁷⁹ The Business Council of Australia's Policy Platform for the 2004 Federal Election similarly supported 'self-regulation through the ASX Corporate Governance Council ... covering a range of corporate governance issues including disclosure, executive pay and shareholder communications'.⁸⁰ It continued:

While the BCA supported most of CLERP9 and is pleased that the government resisted the more prescriptive changes sought by some Members of the Senate, it continues to have concerns about the ASIC fining powers and individual liability for continuous disclosure.⁸¹

It is unsurprising that major advances in a regulator's powers will draw criticism from those directly affected. The introduction of CLERP9, the *Financial Sector Reform Act*, and ASIC's list of successful convictions and actions against corrupt officials (see Table 3) all have bipartisan support. ASIC has been commended accordingly. Part III of this paper recognises the importance of this role, but in the context of educating institutions and consumers about their responsibilities under the law.

APRA—responding to regulatory failure

APRA's main challenge has been more fundamental than that of the other two regulators. Its short tenure as the national prudential regulator has been defined by the major corporate collapses of HIH, FAI, One.Tel and Ansett in 2001, and the subsequent reforms to the regulator's structure. Table 2 lists several inquiries and reviews into APRA's operations dating from October 2000. A common distinction is between APRA 'pre HIH' and 'post HIH'. The reforms to the Authority's governing structure were certainly significant. What is

often overlooked is the scale of the transition in prudential regulation between the establishment of APRA on 1 July 1998, and the liquidation of HIH on 15 March 2001.

Table 2: Scrutinising APRA

Date published	Report title	Author
October 2000 <i>Tabled:</i>	Review of APRA: <i>Who will guard the guardians?</i>	House of Representatives Standing Committee on Economics, Finance and Public Administration
November 2000 <i>Tabled:</i>	Parliamentary paper 266/2000 <i>Bank Prudential Supervision</i> (Report No. 42, 2000–2001)	Australian National Audit Office, Performance Audit
May 2001		
March 2002	Options for Improving the Safety of Superannuation (led to <i>Superannuation Safety Amendment Act 2003</i>)	Superannuation Working Group
April 2003	HIH Royal Commission: <i>A corporate collapse and its lessons</i>	The Hon. Justice Neville Owen, Commissioner
June 2003 <i>Announced:</i>	<i>APRA's prudential supervision of superannuation entities</i>	Auditor General of Australia, Report No. 6, 2003–04
December 2003 <i>Lapsed:</i> August 2004	Review of the Australian Prudential Regulation Authority, <i>Annual Report 2003</i>	House of Representatives Standing Committee on Economics, Finance and Public Administration
November 2003	APRA Public Hearing*	Senate Economics Legislation Committee
May 2004	APRA Public Hearing*	House of Representatives Economics Committee
February 2005	APRA Public Hearing*	Economics Legislation Committee

These hearings are part of the Senate Estimates reviews of the agencies within the Treasury portfolio. Evidence from these hearings is used in the discussion below.

APRA pre HIH

The rationalisation of prudential regulation in Australia came on 23 August 1999 when eleven Commonwealth and State regulators were merged to form the ‘new APRA’. There were new premises in Sydney and new administrative structures, but the Authority continued to regulate insurance companies under the *Insurance Companies Act 1973*. The HIH Report identified three main difficulties with these arrangements—staffing shortfalls, outdated legislation and inadequate supervisory methodology:

- The amalgamation left APRA with roughly 150 fewer staff than pre-1998 levels. Many staff from APRA’s predecessor—the Insurance and Superannuation Commission (ISC)—elected not to apply for new positions. A significant percentage of staff left APRA in the two-and half years from July 1998.⁸² There were also disputes over remuneration levels which had ‘long-term implications for APRA’s ability to recruit more experienced individuals with more senior and stronger technical industry expertise’.⁸³ The *Australian Financial Review* opined that ‘the lack of knowledge among key APRA staff right up to

chief executive Graeme Thompson about basic insurance industry prudential issues was little short of astounding'.⁸⁴

- Pre-HIH, APRA was guided by the *Insurance Act 1973*. An expert report into the HIH collapse by former Canadian prudential regulator, Mr John Palmer, argued that the Act was unsuited to the challenges faced by APRA.⁸⁵ It was too narrow to assess the true risks faced by institutions and contained no early intervention powers. The report argued that 'various weaknesses in the Act created a simple and non-interventionist regulatory and supervisory regime'.⁸⁶ The Chairman of the HIH Royal Commission, the Hon. Justice Owen, accepted these observations.
- The limitations of the Act had a significant impact on APRA's supervisory framework. The Authority *assumed* financial institutions had both further capital or solvency support and internal compliance systems. While APRA ensured compliance with minimum legal solvency requirements, it assumed that 'they [financial institutions] are not relying on us to detect breaches of key prudential requirements, provide guidance on appropriate risk management practices or perform an audit role'.⁸⁷ The Royal Commission noted that HIH failed these assumptions.⁸⁸ Some hinted that APRA's oversight stemmed from a lack of will, not a lack of power.⁸⁹

The post HIH response

The HIH collapse changed APRA's founding premises. The 1997 Wallis report established APRA as a light-handed regulator, viewing all financial institutions as much the same with a view to achieving major efficiency gains.⁹⁰ Post-HIH, APRA is empowered by law with greater investigatory responsibilities, a methodology that critically assesses the financial risk faced by institutions, and an emphasis on effectiveness over efficiency.

Dr John Laker, the APRA Chairman, addressed the House of Representatives Standing Committee on Economics, Finance and Public Administration in May 2004 to outline the major changes to the Authority since HIH. The key changes include:

- the introduction on 1 July 2002 of the [General Insurance Reform Act 2001](#).⁹¹ The Act 'gives APRA greater flexibility to intervene early in response to warning signals in general insurance and a wider range of triggers for such intervention'.⁹² It is ultimately aimed at protecting policy holders by strengthening APRA's powers and reducing the number of very small insurers. This is to be achieved by increasing the absolute minimum capital requirement for general insurers from \$2 million to \$5 million.⁹³
- the introduction on 1 July 2004 of the [Superannuation Safety Amendment Act 2004](#).⁹⁴ The Act introduces a universal superannuation licensing system. The system is designed to enable APRA to take preventative, rather than reactive enforcement action. It applies stricter conditions on superannuation licences, and the provision to vary and revoke licences (29F to 29GB).⁹⁵ One of these conditions is the presence of a suitable risk management strategy (29H to 29HC). From 1 July 2006, all corporations or groups of individuals wishing to act as a trustee for a registrable superannuation entity must be

licensed.⁹⁶ Although APRA anticipates that as many as 700 trustees will apply, in March 2005, it had received only 12 applications and issued one licence.⁹⁷

- the introduction of a risk ratings system in October 2002. This system ranks institutions according to their exposure to risk and susceptibility to collapse. Part III of the paper examines the role of this system within APRA's regulatory strategy.
- the development of supervisory resources and skills. Dr Laker noted that since the beginning of 2003, 'APRA has hired 55 additional staff into frontline and supporting supervisory roles. That is a 16 per cent increase in staffing numbers in those areas'.⁹⁸ APRA's current average staffing level is 524 (Appendix 3), a 30 per cent increase on 1999–00 (397). The staffing focus has changed from ensuring the general application of skills across all prudentially regulated industries, to ensuring 'narrower but deeper specialisations'.⁹⁹
- a firmer supervisory mindset as evidenced by the doubling of APRA's enforcement actions in 2002–03, and a further slight increase in 2003–04. Again, Part III of the paper will examine this issue in greater depth.
- the abolition of APRA's board, replaced on 1 July 2003 with a three person executive group. Justice Owen had recommended a small full-time executive, 'akin to the way ASIC is governed'.¹⁰⁰ The *APRA Amendment Act 2003* creates an executive group, abolishes the APRA board, and gives APRA greater responsibility for informing the Minister of laws and policies relating to the prudential regulation framework.¹⁰¹

The APRA Chairman continued by listing the Authority's priorities. These included a continuing response to the HIH Royal Commission's 21 recommendations, the implementation of the superannuation licensing regime, applying international financial reporting standards to APRA regulated entities and international capital adequacy requirements to banks.

National Australia Bank (NAB) trading losses

APRA's reforms since the collapse of HIH have been tarnished by the National Australia Bank's unauthorised foreign currency trading losses of \$360 million. In February 2004, the NAB Chairman and Chief Executive both resigned. In March 2005, the Bank's forex head, Luke Duffy, pleaded guilty to charges brought against him by ASIC. Two co-defendants await a court hearing in August 2005, while the case of a third will go direct to trial.¹⁰² APRA was again asked to explain why it had failed to intervene.

However, the NAB losses were no HIH. The financial loss was significantly less, as was APRA's culpability. The APRA Chairman explained to a parliamentary committee in May 2004 that:

while the amount lost through irregular foreign currency trading is large in absolute terms—\$360 million is a large figure—it did not at any time, in our view, threaten the depositors of the institution.¹⁰³

Moreover, the APRA Chairman argued that ‘the problem at the NAB was the NAB’s problem. With HIH we readily accepted that APRA had a responsibility there and could have done better’.¹⁰⁴ Dr Laker gave evidence to the Committee, and in a report published by the ASX, that APRA had told the NAB of its concerns at least six months before the bank began to incur losses. These concerns began in mid 2002 when APRA made an on-site visit. A report based on the NAB’s risk management systems was delivered to the Chairman and the head of risk management in January 2003. It received ‘a fair degree of resistance’ and was not passed on to the board. The Bank took no heed of this warning. It gave a commitment to APRA to meet a timetable for remedial risk management action based on an August 2003 meeting, but again, no action was taken. The trading losses were incurred between October 2003 and January 2004.

The NAB episode does seem to have strengthened APRA’s resolve to affirm its supervisory credentials. In late March 2004, an APRA report criticised the Bank’s management for ‘turning a blind eye to known risk-management concerns’.¹⁰⁵ It imposed higher minimum capital requirements (from nine to ten per cent), ordered the closure of the currency trading business to big corporate clients, and imposed an APRA model for risk management.¹⁰⁶ A financial services executive commented that APRA’s intervention at the NAB was so comprehensive that the next 12 months would be a test of how well APRA could run a bank.¹⁰⁷ Part IV of the paper discusses the media reaction to these announcements.

III. Regulatory strategies

The issues discussed above are all part of the wider regulatory challenge of fostering improved relationships between regulators and the business community. This was the subject of the August 2004 [*Review of the Corporate Governance of Statutory Authorities and Office Holders*](#) by businessman John Uhrig. The Uhrig Review emphasised the need for business to develop an understanding of the strategies of regulators, the need for regulators to be seen to be operating competently and equitably, and the need for regulators to be able to raise concerns about the way they deliver their responsibilities.¹⁰⁸ He suggests that communication between regulators and the regulated community could be improved. The report notes:

a reluctance of individuals or businesses in the regulated community to voice complaints with a regulator about the way in which it uses its discretionary powers, because of the perceived possibility for an adverse future reaction.¹⁰⁹

An October 2002 survey by the Australian Chamber of Commerce and Industry gives a sense of this unease. The survey results were presented to the Dawson Inquiry to voice business concerns of the ACCC’s role. It showed ‘only 36 per cent within business believe the ACCC has an adequate understanding of the commercial environment which it is asked to regulate’.¹¹⁰ The survey also indicated a ‘high level of concern’ within the business community over the powers of investigation given to the ACCC under section 155 of the TPA. Forty per cent believed the request for information was unreasonable. The Chamber of Commerce and Industry’s submission tempered its support for fair competition and a strong TPA with concern over the regulator’s intrusiveness:

what business cannot accept is a regulatory environment that makes it more difficult to compete because of a constant concern that the regulator will interpret its normal commercial actions as anti-competitive and subject to prosecution.¹¹¹

The informal relationships between the financial regulators and the business community do matter. The Uhrig Report rightly notes the need for regulators to have the support and respect of the regulated community.¹¹² Mechanisms for enabling business to raise their concerns with regulators, and for business to understand the priorities and strategies of the regulators, are both important. Australian National University Professor John Braithwaite's widely accepted regulatory design—ascending from voluntary compliance to verbal warnings, the cancellation of licences, and prosecution as a last resort—is not simply a tool to structure the regulator's actions and finances.¹¹³ It is also a basis on which to explain their requirements to the regulated community.

The ACCC's regulatory strategy

A preference for voluntary compliance was expressed in ACCC Chairman Graeme Samuel's first major policy speech in August 2003. Samuel announced a plan to absolve companies that adopted a voluntary code of conduct from being subject to competition laws. This, he argued, would give consumers greater certainty of business standards and cut businesses' compliance costs. The *Australian's* interpretation was that 'Mr Samuel proposes a middle course between mandatory government regulation at one extreme, and trusting business to do the right thing by customers on the other'.¹¹⁴ Samuel's argument was that business should have the opportunity to prove it could operate through an industry code, but that the ACCC will 'advertise the removal of endorsement if an industry group fails to maintain the effectiveness of the code'.¹¹⁵

This announcement received a mixed reaction. The BCA and the Queensland Premier, Peter Beattie, supported the proposal. The Federal Labor leader, Mark Latham, criticised the approach:

Graeme Samuel is being paid good money to regulate industry for the benefit of consumers. We don't think that competition policy should be voluntary. We don't think that industry should regulate itself.¹¹⁶

There is other evidence to support the less prescriptive approach under Samuel. Table 3 shows a marked fall on the previous financial year in the number of cases commenced by the Commission in 2002–03, and a further significant reduction in 2003–04. In early June 2004, the *Australian Financial Review* revealed a 'secret dossier' prepared for a major public company showing not only a fall in the number of press releases at the same time last year, but also that they contained almost nothing by way of formal enforcement action.¹¹⁷ The document claimed the Commission had 'gone soft', initiating just three actions in the first four months of 2004.

Table 3: Enforcement actions

Agency	2001–02	2002–03	2003–04
ACCC	Cases commenced: 60 Cases before courts: 74	Cases commenced: 39 Cases before courts: 71	Cases commenced: 22 Cases before courts: 43
ASIC	Jailings: 19 Civil Proceedings: 81 Litigations concluded: 205	Jailings: 29 Civil proceedings: 67 Litigations concluded: 222	Jailings: 28 Civil proceedings: 51 Litigations concluded: 220
APRA	Superannuation industry: 107 Other enforcement actions: 92	Superannuation industry: 261 Other enforcement actions: 127	Superannuation industry: 277 Other enforcement actions: 114

Source: Australian Competition and Consumer Commission *Annual Report* 2001–2002, 2002–03 and 2003–04.
 Australian Prudential Regulation Authority, *Annual Report* 2001–02, 2002–03 and 2003–04.
 Australian Securities and Investments Commission, *Annual Report* 2001–02, 2002–03 and 2003–04.

Graeme Samuel's public comments have strongly dismissed suggestions that his style is 'soft touch', or that the Commission's attitude to law enforcement has changed. At a February 2005 Senate Estimates hearing, the Chairman emphasised that an effective enforcement process is crucial for ensuring compliance with the law. To this end, Samuel noted the recent introduction of a database management system which centralises the monitoring of enforcement. The system enables enforcement cases to be categorised as either 'serious investigations' or 'under initial investigation'. It is a nationwide system to monitor and prioritise the Commission's enforcement action. Many of the cases 'under initial investigation' will fall off the database if the investigation finds there is no potential breach of the *Trade Practices Act*. Whether the Commission's 'serious investigations' lead to litigation depends principally on the extent of consumer detriment, and the evidence that it is deliberate and repeated.¹¹⁸ For example, the decision to disallow the merger of Qantas with Air New Zealand was based on an assessment that 'the alliance was assessed as generating small public benefits ... resulting in a high level of anti-competitive detriment'.¹¹⁹

The cost and likelihood of a prosecution are also factors the Commission must consider. In November 2003, the Senate Economics Legislation Committee inquired into the ACCC's process for assessing the likely legal costs of a case. The ACCC's CEO, Brian Cassidy, explained that the Commission does 'make some sort of estimate of just what is involved in particular cases', noting that section 46 cases are invariably complex and expensive.¹²⁰ He explained that the Commission's future strategies would depend partly on the Government's funding (see Appendix 2 and 3), although many of the Commission's responsibilities—such as assessing merger proposals under section 50—were non-discretionary. In February 2004, Samuel sought to put the cost of recent High Court cases in perspective:

We tend to try to resolve complaints by a non-litigious method but frankly when we've got very difficult miscreants, where we've got misbehaviour that's causing substantial consumer harm, we'll litigate.¹²¹

More recently, the Commission has defined its enforcement strategy through its focus on breaking cartels. Its approach is based on leniency for 'whistleblowers', publicity and selective enforcement. In 2003, the ACCC introduced a leniency policy for cartel 'whistleblowers' to expose cartels and indicate areas of the economy where others might

exist.¹²² Information on wider cartel use has been volunteered by some business people in return for reduced penalties.¹²³ For example, a whistleblower tipped off the ACCC on the Amcor case, which concerned allegations of a cartel forcing up cardboard box prices.¹²⁴ According to Graeme Samuel, whistleblower immunity has produced 'high quality information'. As of March 2005, the Commission had 25 cartels under 'serious investigation', more than half of which resulted from the leniency policy.¹²⁵

The leniency policy has been accompanied by a publicity campaign aimed at raising corporate stigma of being associated with a cartel, and explaining to the public the impact they have on consumers. Samuel has acknowledged that this campaign has heightened public expectations for action on cartel prosecutions. These expectations have intensified since the announcement of proposed criminal penalties for cartel activity. These new powers—which include provisions for jailing those found guilty of 'hard-core' cartel activity—will require the ACCC to work more closely with the Department of Public Prosecutions.¹²⁶ It is expected they will be introduced on 1 July 2005. The current interest within the business community is whether the ACCC's new power of criminal sanctions will increase its vigilance detecting and prosecuting cartel activity. Alternatively, the deterrent of a jail term may lead the regulator to place more emphasis on its immunity clause. While Samuel is promising legal action on cartel activity, he has also stressed the importance of avoiding 'blind alleys'—investigations that do not lead to prosecutions.¹²⁷

ASIC's regulatory strategy

ASIC's Chairman, Jeffery Lucy, has described the Commission's regulatory task in terms of a pyramid divided into three layers.¹²⁸ At the bottom of the pyramid are those who comply with the law. For this group, ASIC's role 'is to provide guidance to help them continue to comply'. The middle band contains opportunists who are 'prepared to bend the rules if they think they can get away with it'. ASIC's strategy is to influence their views and conduct. At the top of the pyramid is the smallest layer—those who engage in improper and illegal behaviour. 'ASIC uses its full enforcement strength to regulate this group'.¹²⁹

Enforcement at the top

ASIC emphasises enforcement as 'an essential part of effective regulation'.¹³⁰ In contrast to the ACCC's interpretation of the TPA, the ASIC Act is relatively unambiguous and uncontested. The rules governing the conduct of companies and the operation of investment schemes have not produced divisions between big and small business. The standards apply equally to all, and relate to charges of fraud and misconduct. In contrast to the APRA Act, ASIC is not expected to give the same kind of attention to the financial viability of regulated institutions.¹³¹ The Commission's prosecution strategy is determined in consultation with the Director of Public Prosecutions. If the Director's advice is of there being strong prospects for criminal prosecution within an acceptable timeframe, 'it is ASIC's policy to prefer the laying of criminal charges'.¹³² Its Annual Reports prominently cite successful criminal and civil prosecutions with reference to 'protecting the public' and 'saving investors' (see Table 2). The most recent, and arguably the most significant prosecution, was the jailing of former HIH Directors Ray Williams and Rodney Adler in April 2005. In the wake of these prosecutions, ASIC chairman, Jeffrey Lucy, encouraged criminals to 'plead guilty and do it early'.¹³³ Lucy

argued that refusing to cooperate with ASIC might sound like a good legal strategy, but ‘the lawyer is not the one who might end up [with] a jail sentence’.¹³⁴

ASIC’s primary goal of successful enforcement within the quickest possible timeframe has wide support among industry, consumer groups and the media. The media’s close attention to prominent cases of corporate fraud has undoubtedly enhanced the Commission’s profile. The *Australian Financial Review* argued in December 2001 that ASIC’s credibility lay in securing ‘a reasonable number of successful prosecutions’. On the other hand, it noted the unduly constraining harm of a regulator ‘that pursues actions for the purpose of demonstrating that it is on the beat’.¹³⁵ The BCA has expressed concern that the continuous disclosure requirements legislated in CLERP9 will be harmful to business.¹³⁶ A key concern is the provision that penalties for a breach of continuous disclosure laws can apply both to the company and to individual directors (p. 15, point 8). This may encourage directors to insure against increased risk, which will lead to higher remuneration. The other point of conjecture is the potential for disagreement between ASIC and companies as to when information should be released.

The importance of education

ASIC has acknowledged that enforcement actions ‘will only ever catch a relatively small number of offenders, often after the horse has bolted’.¹³⁷ Its long-term strategy is to inform the financial services sector of recent legislative changes and ‘to promote public awareness about scams and frauds as part of our consumer education strategy’.¹³⁸ These consumer and industry information campaigns serve to enhance the effectiveness of ASIC’s existing enforcement measures and compensate for the lack of resources to widen the regulatory net.

The Commission’s 2001–02 Annual Report noted ‘a massive increase in public requests for our assistance’.¹³⁹ As Part I of this paper flagged, several factors might explain this increase and the associated need for a public education strategy:

- nine million Australians have invested \$719 billion in funds management¹⁴⁰
- the growing range of financial services products on the market
- the presence of ‘new and increasingly sinister scams’¹⁴¹
- the credibility of ASIC as a financial regulator
- the ageing population and Australia’s compulsory superannuation scheme, and
- the high level of share ownership in Australia.

The financial services consumer education strategy was launched in October 2001. The strategy is focused on ‘helping consumers actively look after their money and their financial future’.¹⁴² The Commission operates a [website](#) for financial services consumers providing information on a range of investment schemes and scams. ASIC’s 2003–04 Annual Report records 1.2 million visits to this site, a 37 per cent increase on the previous financial year. ASIC communicates directly with consumers through an annual Stakeholder Forum which brings together people from the education sector, the financial services industry, the consumer movement and government, to discuss a particular issue. In July 2004, the Forum was titled *Fostering Financial Literacy*. This followed a June 2003 report on the

opportunities and resources for financial literacy education in Australian secondary schools.¹⁴³ ASIC's general approach to the issue of financial literacy is to target particular socio-economic groups. As Chairman Lucy remarked:

we endeavour to target our consumer education campaigns directly at specific 'at risk' consumers so that our message gets to those who need it most, at the time they need it most, and in a manner they will fully consider.¹⁴⁴

The Commission has also been active in explaining and enacting the provisions of CLERP9 and the *Financial Services Reform Act 2003*. In May 2004, ASIC released a guide on companies' continuous disclosure obligations in advance of CLERP9. The guide explains the operation of new infringement notices for breaches of the continuous disclosure guidelines under Chapter 6CA of the *Corporations Act*. Similarly, the *Financial Services Reform Act's* licensing requirements required detailed explanation to the financial services sector of the process for obtaining a licence and the penalties for offering financial advice without one. Over the two year transition period to March 2004, ASIC considered hundreds of applications for relief from the law and answered several hundred enquiries through its Project Office and Frequently Asked Questions on its website.¹⁴⁵ This process has continued in 2005.

APRA's regulatory strategy

APRA's regulatory strategy substantively differs from the other two financial regulators. The Authority's emphasis is on supervision rather than enforcement. Its brief is not to prosecute companies, but to ensure their financial health in the interests of protecting depositors, policyholders and superannuation fund members. ASIC's regulatory mindset is 'enforcement supported by education'; APRA's focus is 'supervision supported by enforcement'.

PAIRS and SOARS

APRA's 2002–03 Annual Report notes the Authority has 'substantially upgraded its risk assessment capabilities and has significantly increased the intensity of its supervision over the past two years'.¹⁴⁶ In October 2002, it developed a risk-rating system which classifies supervised financial institutions according to the probability they are unable to honour their financial promises to depositors and investors. The Probability and Impact Rating System (PAIRS) is based on the inherent risk of the institution, its management and controls, capital support, and the potential impact of the institution's failure on the financial system.¹⁴⁷ *APRA Insight* explained the logic of PAIRS:

A prudential regulator must balance the probability of an institution failing and the impact of that failure on the community. The potentially substantial impact of a major institution failing, no matter how remote that possibility, demands a significant commitment of supervisory resources to deal with that institution. Conversely, the deployment of supervisory resources to a very small institution needs to reflect the significantly smaller impact the failure of that institution would have, no matter how risky it is.¹⁴⁸

APRA's assessments through PAIRS, therefore, weigh the relative risk faced by an institution against the relative impact of its defaulting. This is calculated by subtracting the institution's capital support and internal risk management controls from the factors contributing to inherent risk of the institution.¹⁴⁹ A score is then given from 'AAA'—the lowest risk rating—

to 'CCC'. PAIRS is complemented by the Supervisory Oversight and Response System (SOARS). SOARS is APRA's mechanism for acting on the PAIRS rating. From low impact, low probability to high impact, high probability, there are four ratings—'normal', 'oversight', 'mandated improvement' and 'restructure'.

The distinctiveness of APRA's approach

The PAIRS and SOARS scales are similar conceptually to Braithwaite's regulatory design (p. 22). They allow for the possibility that APRA's assessment of—and response to—an institution's rating will change over time. However, unlike the approach taken by the ACCC and ASIC, the peak of APRA's regulatory pyramid is 'restructure' rather than 'prosecution'. Whereas APRA's highest supervisory power strengthens a financial institution's standing, the ACCC's equivalent is to weaken the relative power of a company in the market. APRA's responsibility is to ensure the health of specific financial institutions in the interests of their investors. The ACCC's mandate is to ensure the health of markets by taking punitive action against companies that injure the interests of consumers. This raises a broader point of difference; namely, the difficulty in measuring APRA's success. Dr Jeffrey Carmichael, then the Chairman of APRA, expressed this point well:

The difficulty for a prudential regulator is that it is much easier for the community to identify when you are doing a poor job than it is for them to identify when you are doing a good job. Unlike a conduct regulator, which can at least count heads on pikes, there is no ready metric for APRA's performance.¹⁵⁰

These differences may also account for APRA's distinctive style of supervisory regulation. The ACCC has developed a reputation as a 'noisy regulator' that pursues the wider consumer interest through media publicity (see Part IV). APRA's approach necessarily avoids this publicity. As John Laker explains:

[APRA's] behind the scenes approach enables us, without undermining the confidence of beneficiaries or destabilising the financial system, to pursue our prudential objectives, taking into account—but without being driven by—commercial considerations. Given our secrecy obligations, APRA cannot publicise these efforts ... For a prudential regulator, the private workout of difficulties is generally the more effective route and highly publicised intervention, such as APRA's recent dealings with the National Australia Bank, is the exception.¹⁵¹

Accordingly, the Chairman argued that the strength and effectiveness of APRA's regulation 'is not always easy for the parliament and the community to judge'.¹⁵²

The importance of disclosure and data gathering

APRA's own efforts to assess risk and strengthen regulation depend crucially on accurate and reliable disclosure of institutional information. As Chairman of APRA, Jeffrey Carmichael likened the Authority's role to that of a doctor—it 'is heavily reliant on having the patient reveal honestly the symptoms that they are experiencing'.¹⁵³ APRA and ASIC both depend on effective systems of disclosure. For APRA, however, the disclosure imperative is to assist rehabilitation, rather than punish corporate greed.

APRA's powers on reporting standards are set out in Part 3, Division 2 of the *Financial Sector (Collection of Data) Act 2001*.¹⁵⁴ Section 13 of the Act establishes APRA's power to set standards for a wide range of reporting documents, and the timeframe within which these are to be supplied. It allows different reporting standards to be set for different authorities. Section 14 requires financial entities' chief executive officers 'to notify the entity's governing body of a failure to provide reporting documents to APRA'.¹⁵⁵ This requirement does not apply to superannuation entities.

For its part, APRA has responsibilities under legislation to engage industry in a thorough consultation process before reporting standards take effect. In June 2003, the Auditor-General released a report into APRA's supervision of superannuation entities.¹⁵⁶ It found that APRA 'did not conduct enough onsite reviews', but acknowledged that these visits were effectively targeted at small funds.¹⁵⁷ Many of the reporting standards for the superannuation industry came into effect on 1 July 2003.¹⁵⁸ Two developments since then deserve mention.

- APRA has developed and updated a single data collection tool—'Direct to APRA' (D2A)—which allows electronic transmission of superannuation entities' regulatory forms. D2A is similar to the Australian Taxation Office's *Business Activity Statement*, providing institutions with electronic access to their relevant reporting standards forms. It then allows the user to enter the data and send the form through to APRA.¹⁵⁹
- APRA officials explained to the Senate Economics Legislation Committee in November 2003 that a more comprehensive system for statistical collection from superannuation funds was forthcoming. Ross Jones, APRA's Deputy Chairman, expressed hope that the *Financial Sector (Collection of Data) Act* 'will lead to greater transparency once the new collection mechanism comes into place'.¹⁶⁰ This system was established in June 2004 and required superannuation entities to lodge their annual returns by early November 2004.

The other issue associated with data collection is the assessment of lenders mortgage insurers. These organisations protect lenders from losses in the event of borrower default on loans secured by mortgages. In 2003, APRA conducted a home loan stress test which found that deposit institutions 'could withstand a significant increase in housing loan defaults without a material deterioration in their prudential soundness'.¹⁶¹ A significant portion of the risk is transferred to lenders mortgage insurers. A further test later in 2003 found inadequacies and inconsistencies in the supervision of these insurers. Accordingly, in August 2004 and February 2005, APRA released discussion papers proposing measures to strengthen and standardise capital reporting requirements for mortgage insurance.

IV. The changing profile of the regulators

Over the past five years, the public profile of the ACCC and APRA has changed. Under the chairmanship of Professor Allan Fels, the ACCC achieved substantial publicity for consumer and competition issues. Its proactive approach is indicated in Table 4, which shows an average of over 330 media releases a year since 2000. Some argued that this level of activity reflected the Commission's tendency to pursue big business through court processes 'in the hope something will turn up', and using the media in the interim to exert pressure.¹⁶² Allan Fels had negotiated with the Dawson inquiry in 2002 to be more selective in announcing an

investigation and to word press releases more moderately.¹⁶³ The subsequent Report even flagged the possibility of a media code for the ACCC, limiting its comment on investigations.

Table 4: Financial regulators' press releases (number per year)

	2000	2001	2002	2003	2004	Average
ACCC	371	343	339	290	310	331
ASIC	557	465	466	423	428	469
APRA	32	47	59	78	51	53

Source: Agency websites

The way that Professor Fels used the media to publicise the Commission's agenda aroused wider debate on the Chairman's legacy for corporate Australia. Fels' biographer, Fred Brenchley, is unequivocal:

Allan Fels was Australia's competition watershed. His legacy will be that he embedded a competitive culture in the nation for the first time ... The publicity obsession was crucial. In effect this became the shield for Fels' ACCC, creating an aura of power and public support that protected the agency from attacks by politicians and business.¹⁶⁴

Newspapers' editorial comment on the ACCC was more guarded of the Fels agenda, and the influence of his style. In March 2003, *The Australian's* editorial argued:

The ACCC chair must do a great deal more than play the battler's friend, and should be capable of assessing the national interest as well as looking convincing in front of the cameras.¹⁶⁵

The *Australian Financial Review's* praise was similarly qualified:

Professor Fels has become Australia's best-known regulator as the ACCC's influence has spread across the economy under national competition policy. He deserves some credit for the success of this policy and the growing competitiveness of the Australian economy ... But ... it is becoming obvious that an approach more in tune with the needs of a small, isolated economy in the 21st century is now needed.¹⁶⁶

The editorial argued that the Dawson Review's concerns:

could be addressed by appointing a chairman with a keener understanding of the role of modern competition policy and the rights of companies under investigation to the presumption of innocence.¹⁶⁷

In 2004, a survey of business attitudes to Samuel's approach described his style as 'soft touch'. Samuel himself strongly rejects this perception, although much of the media coverage has raised uncertainty over the Commission's willingness to prosecute. The contrast is often made with Fels' tenure, particularly given Samuel's background in big business. The media seized on the announcement of voluntary industry codes as evidence that the Commission's attitude to law enforcement has softened. On the other hand, the media widely interpreted the recent announcement of new powers to jail cartelists as a sign that the Commission will be

more focussed on achieving results. The broader point is that under Samuel's direction, the media have tended to debate the Commission's direction. Under Fels' chairmanship, the media was more focussed on the Commission's activities vis-à-vis its impact on big business.

Backing ASIC

Historically, the perception of ASIC was as a fairly passive regulator, burdened with a huge administrative responsibility.¹⁶⁸ In 2002, Christine Parker, then a senior lecturer in Law at the University of New South Wales, observed: 'on the whole, ASIC has not yet managed to create the image of invincibility in tough enforcement action that can motivate preventative self-regulation'.¹⁶⁹ Parker noted that the Commission's preference for civil, rather than criminal action, meant that it failed to cast a threatening shadow in the way that the ACCC's price-fixing cases had done.¹⁷⁰ However, the April 2005 jailing of HIH founder, Ray Williams, and former HIH Director, Rodney Adler, led to strong media support for a more proactive stance from the Commission. Several sources made mention of ASIC's 93 per cent prosecution success rate, but noted its reluctance to follow through with their cases.¹⁷¹ The *Australian Financial Review* commented that Adler's maximum four and a half year sentence:

might help prevent others from acting like him, but equally importantly should spur ASIC to chance its arm some more even if its admirable litigation success rate may slip a touch.¹⁷²

Bryan Frith wrote of the judgement in the *Weekend Australian* that not only are the courts 'catching up with public opinion', but ASIC is now much more vigorous in its pursuit of corporate crime.¹⁷³ Elizabeth Knight argued that while the convictions were 'nowhere near as onerous as some had been expecting', ASIC had done as much as it could to gain the maximum possible prosecution.¹⁷⁴ Knight reasoned that 'if any jail term is a good deterrent, then ASIC has done its job': others, including Labor's corporate governance spokesperson, Senator Penny Wong, questioned why some charges against Adler had been dropped.¹⁷⁵ Certainly, ASIC continues to be confronted with the public perception that white-collar crime tends to go unpunished. Accordingly, although criminal prosecutions account for a small portion of ASIC's activities, there will be strong interest in the remaining HIH prosecutions.¹⁷⁶

The change of tune on APRA

The comparatively few press releases issued by APRA (Table 4) cannot be attributed to the personal style of its Chairman. Whereas the ACCC and ASIC often rely on publicity to expose corporate fraud and malpractice, APRA has strict secrecy obligations. Part III of this paper recognised that APRA's success in supervising financial institutions depends on maintaining the confidence of beneficiaries and the stability of the financial system.¹⁷⁷ The publicity that APRA itself initiates is thereby restricted to general policy announcements and the remedial measures undertaken on the NAB.

The media coverage of APRA has generally been critical of its inaction. The media widely explained the high-profile corporate collapses of the early 2000s in terms of regulatory failure. The media tended to connect the HIH, One.Tel, Ansett, FAI Insurance and NAB failures to APRA, rather than ASIC. Its critique was often damning. In November 2002, for

example, the *Australian Financial Review* commented on what it saw as APRA's mishandling of the HIH case:

The lack of knowledge about basic insurance issues was little short of astounding ... APRA management appears to have spent 1999 and 2000 trying very hard to believe there were not serious problems at HIH, rather than using professional scepticism and assuming there were.¹⁷⁸

The theme continued in March 2004 after the NAB trading losses:

A regulator is supposed to take the punch bowl away before the party gets out of hand. The impact of its actions is blunted if it waits until the miscreants are numb with remorse before bursting into the room and issuing fire and brimstone denunciations.¹⁷⁹

The same month, when APRA announced its remedial action for the NAB, the commentary was quite different. The *Australian Financial Review* noted banking and finance circles were 'agog' at the extent of APRA's action. In May, the paper reported that 'APRA's punishment was the most severe given to a financial institution since the prudential regulator was constituted in 1998'.¹⁸⁰ In August 2004, the *Australian* reported BCA chief Hugh Morgan's claims that 'we're dripping in regulatory madness' and observed:

How quickly times have changed. It was not so long ago that APRA was traduced for its inept monitoring of HIH before the insurer collapsed in 2001.¹⁸¹

The article also noted the comments of Wallis Inquiry member, Professor Ian Harper, that 'ASIC is allowing APRA to make the running on financial services'.¹⁸²

V. Concluding comments

This Research Brief raises various points of similarity and contrast in the role of, and reaction to, Australia's three main corporate regulators.

- The Howard Government—with the support of the opposition parties—has expanded the regulators' legislative and financial power. The notable exception is the dispute on section 46 of the *Trade Practices Act*, although increased funding for the ACCC in the May 2004 budget does confirm the Government's support for this section in its current form (see Appendix 2).
- The three regulators each have a mandate to protect consumers and depositors, but their focus differs. APRA supervises specific financial institutions to protect depositors from institutional failure. ASIC monitors the practices of financial product and financial service providers to protect investors from misleading advice and scams. The ACCC promotes competitive markets by penalising companies which promote their market influence through deliberately misleading consumers, or employing restrictive trade practices.
- All three regulators rely on a targeted approach. The ACCC assesses the costs and benefits of prosecution on a case-by-case basis according to the likely, or actual, impact on consumers. It targets trade practices that are most injurious to consumer interests and, by extension, those companies with the market power to have this effect. ASIC guides the

compliers, influences the opportunists, and prosecutes those who engage in improper and illegal behaviour. It targets providers based on their actions, not their position in the market. APRA classifies and targets institutions according to the probability and impact of default.

- Disclosure and education are key aspects of all three regulators' activities. ASIC and APRA's legislative power over the past two years has been significantly enhanced through continuous disclosure requirements. Transparency is important for APRA in its supervisory capacity. It is important for ASIC not only in determining its prosecution strategy, but for alerting consumers and shareholders of the risks and past performance of financial institutions. In this way, disclosure is a crucial process for determining which companies to 'target' for supervision or prosecution, and as a proactive measure to avoid prosecution.
- The ACCC and ASIC rely on 'naming and shaming'. Publicising successful and proposed prosecutions engenders public confidence in their role, and acts as an important deterrent to would-be offenders. APRA necessarily avoids publicity. It not only has secrecy obligations, but public knowledge of institutions' financial difficulties would generally undermine APRA's prudential efforts.
- The BCA has consistently rejected the growing compliance and prosecution powers of the regulators. It continues to reserve strong criticism for the ACCC's actions under section 46, which it claims confuse the protection of competition with the protection of small business. The BCA has also chided the workload and intrusion of CLERP9's disclosure requirements, and APRA's close supervision of the NAB.
- All three regulators have changed their profile over the past few years. The ACCC's approach appears more selective under a new chairman. The media has often reflected on this change. Its coverage seems to have switched from responding to the ACCC's activities, to speculating on the Commission's direction. APRA and ASIC both have more bite in the wake of major corporate collapses of the past few years. ASIC has emerged with greater legislative clout, and recent success in prosecuting former HIH directors. APRA has emerged with a sharper institutional framework, better credentials for strict supervision of institutions in difficulty, and greater responsibility for many of ASIC's responsibilities on financial services. The media has supported ASIC and APRA's more vigilant approach.
- The broader picture is one of institutional continuity. The two-agency model—where the prudential regulator is separate from the companies and securities regulator—remains in place and is unlikely to change. The challenge will continue to be the coordination of the regulators' responsibilities to promote confidence in the financial system, and the informed participation of stakeholders in that system.

Endnotes

1. Commonwealth of Australia, *The Financial System: Towards 2010*, Department of the Treasury, at <http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf> (accessed 18 April 2005).
2. The Reserve Bank of Australia is often included among Australia's corporate regulators. It has responsibility for monetary policy and for the stability of the financial system. As part of the July 1998 changes to the financial regulatory structure, responsibility for the supervision of banks was transferred to APRA. This paper acknowledges the role of the Reserve Bank, but distinguishes between the three agencies—whose charter is to protect consumers, investors and companies—and the Bank—whose mandate is actively to manage macro-economic performance. For this reason, the Reserve Bank is excluded from the central analysis.
3. Australian Prudential Regulation Authority, Submission to the HIH Royal Commission, cited in 'The failure of HIH Insurance', *The HIH Royal Commission*, 2003, p. 201.
4. See J. Perkins, *The Wallis Report and the Australian Financial System*, Melbourne University Press, Melbourne, 1998, p. 18. The *Financial System Inquiry* is available at <http://fsi.treasury.gov.au/content/FinalReport.asp>
5. Australian Prudential Regulation Authority, op. cit.
6. G. Samuel, 'Some thoughts on economics and regulation', *Economics Papers*, vol. 23, no. 1, March 2004, p. 17.
7. Parliament of the Commonwealth of Australia, 'Review of the ACCC Annual Report', *House of Representatives Standing Committee on Economics, Finance and Public Administration*, June 2004, p. 22.
8. *Official Hansard*, Melbourne, 5 March 2004, p. 15. See also Parliament of the Commonwealth of Australia, 'Review of the ACCC Annual Report 2003', *House of Representatives Standing Committee of Economics, Finance and Public Administration*, June 2004, p. 26.
9. Australian Financial Markets Association, *2004 Australian Financial Markets Report*, January 2005, at http://www.afma.com.au/afmawr/pdf/2004afmr_overview.pdf (accessed 18 April 2005).
10. *ibid.*
11. See Australian Prudential Regulation Authority, 'APRA statistics reveal superannuation assets close to \$650bn', *APRA Media Release*, 11 January 2005.
12. Australian Prudential Regulation Authority, 'Superannuation Trends, September Quarter 2004', *APRA Statistics*, January 2005, p. 5.
13. Australian Bureau of Statistics, [*Managed Funds Australia, ABS Cat No. 5655.0*](#), December Quarter 2004.
14. Australian Securities and Investments Commission, [*Annual Report 2003–04*](#), 2004, p. 45.
15. Australian Prudential Regulation Authority, [*Annual Report 2003–04*](#), 2004, inside cover.
16. Australian Prudential Regulation Authority, [*Annual Report 2003–04*](#), 2004, p. 29.

17. Australian Stock Exchange, *ASX Share Ownership Study 2003—Highlights*, 3 February 2004, at <http://www.asx.com.au/shareholder/pdf/SOSHIGHLIGHTS03.pdf> (accessed 18 April 2005).
18. Australian Stock Exchange, *2004 Australian Share Ownership Study*, February 2005.
19. Australian Stock Exchange, 'ASX Share Ownership Study 2004—Highlights', 24 February 2005, at <http://www.asx.com.au/about/pdf/ShareStudy2004highlights.pdf> (accessed 18 April 2005).
20. Australian Securities and Investments Commission, *Annual Report 2003–04*, 2004, p. 44.
21. Australian Bureau of Statistics, 'Survey of Employment Arrangements and Superannuation', *ABS Cat. No. 6361.0*, June 2000. The Survey of Employment Arrangements and Superannuation was conducted for the first time in 2000. The ABS will conduct a similar survey in 2005.
22. Australian Prudential Regulation Authority, 'Superannuation Trends, September Quarter 2004', *APRA Statistics*, January 2005, p. 4, at <http://www.apra.gov.au/Insight/Home.cfm> (accessed 18 April 2005).
23. Australian Prudential Regulation Authority, *APRA Insight*, 3rd Quarter 2004, p. 18, at <http://www.apra.gov.au/Insight/Insight-3rd-Quarter-2004.cfm> (accessed 18 April 2005).
24. J. Laker, Appearing before the House of Representatives Standing Committee on Economics, Finance and Public Administration, House of Representatives Standing Committees Budget Estimates, *Debates*, 10 May 2004.
25. See Department of the Treasury, *A more flexible and adaptable retirement income system*, Department of the Treasury, Canberra, 25 February 2004, at http://demographics.treasury.gov.au/content/download/flexible_retirement_income_system/flexible_retirement_income_system.pdf (accessed 18 April 2005).
26. See C. Field, 'Retirement Savings Accounts Bill 1996', *Bills Digest*, no. 80, Parliamentary Library, Canberra, 1997, at <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd080.htm> (accessed 18 April 2005).
27. G. Selleck, 'Superannuation Laws Amendment (2004 Measures No. 2) Bill 2004', *Bills Digest*, no. 170, Parliamentary Library, Canberra, 22 June 2004, at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd170.pdf>.
28. See B. Dunstan, 'Brough defends super stance', *Australian Financial Review*, 22 March 2005, p. 5.
29. G. Selleck, 'Superannuation Laws Amendment (2004 Measures No. 1) Bill 2004', *Bills Digest*, no. 169, Parliamentary Library, Canberra, 21 June 2004, at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd169.pdf>.
30. See L. Nielson and R. Webb, 'The Future Fund', *Research Note*, no. 43, Parliamentary Library, Canberra, 2004–05, April 2005, at <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn43.pdf>.
31. C. Wright, 'Multibillion-dollar fund fight', *Weekend Australian Financial Review*, 11–12 September 2004, p. 12.
32. D. Kent, *Australian Financial Markets Report*, Australian Financial Markets Association, 2003, at http://www.afma.com.au/afmawr/pdf/2003afmr_overview.pdf (accessed 18 April 2005).

33. A derivative is a financial instrument, the price of which is based on the value of one or more underlying pricing indices (eg: securities, shares, commodities). A *credit* derivative is a contract to transfer the risk of the total return on a credit asset falling below an agreed level, without transfer of the underlying risk. See http://en.wikipedia.org/wiki/Credit_derivatives (accessed 18 April 2005).
34. T. Boyd, 'Risk of a slip-up in derivatives', *Australian Financial Review*, 5 November 2003. See also D. Lascelles, 'Banana Skins 2003: The CSFI's annual survey of risks facing banks', *Centre for the Study of Financial Innovation*, September 2003, at <http://www.csfi.org.uk/> (accessed 18 April 2005).
35. Australian Financial Markets Association, *2004 Australian Financial Markets Report*, January 2005, p. 44, at http://www.afma.com.au/afmawr/pdf/2004afmr_overview.pdf (accessed 18 April 2005).
36. The 2004 Australian Financial Markets Report notes that turnover in 'over-the-counter' equity derivatives fell from \$158 billion in 2002–03 to \$41 billion in 2003–04. Still, turnover has doubled since 2001–02 (\$20 billion).
37. Investment and Financial Services Association, 'Statistics on the industry', at <http://www.ifsa.com.au/IFSAWeb/IFSAPubl.nsf/HeadingPagesDisplay/About+Our+IndustryStatistics+on+the+Industry?OpenDocument&ML> (accessed 18 April 2005).
38. M. Pearson, Appearing before the Senate Economics Legislation Committee, Senate Standings Committee Budget Estimates, *Debates*, 6 November 2003, E123.
39. Australian Prudential Regulation Authority, 'Superannuation: Do It Yourself?', *APRA Insight*, 1st Quarter 2004, at <http://www.apra.gov.au/Insight/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=7094> (accessed 18 April 2005).
40. The vast majority of self-managed superannuation funds are regulated by the Australian Tax Office.
41. See G. Samuel, Appearing before the Senate Economics Legislation Committee, Senate Standings Committee Budget Estimates, 17 February 2005.
42. There have been 28 cases taken under section 46 that have gone through a hearing and determination. Twenty-four have failed, three have succeeded and one is pending.
43. B. Bailey, 'Protecting Small Business from the Misuse of Market Power', *Research Note*, no. 15, Parliamentary Library, Canberra, 27 October 2003.
44. *Trade Practices Revision Bill 1986*.
45. See the comments of ACCC Chairman Graeme Samuel in 'Business laws a flop, says ACCC', *Herald Sun*, 21 June 2004, p. 24.
46. Senator George Brandis, Letter to the Editor, 'We all agree on competition reform', *Australian Financial Review*, 10 March 2003, p. 52.
47. See G. Costa, 'Canberra acts on competition laws', *The Age*, 24 June 2004, p. 3.
48. Review of the Competition Provisions of the Trade Practices Act, *Review Committee*, January 2003. The Chairman was Sir Daryl Dawson. Ms Jillian Segal and Mr Curt Rendall were also appointed to the Committee.

49. Australian Competition and Consumer Commission, 'Dawson Report—Preliminary response: criminal sanctions major step forward for competition policy', *Press Release*, no. 74, 16 April 2003, at <http://www.accc.gov.au/content/index.phtml/itemId/347733> (accessed 18 April 2005).
50. The Hon. Peter Costello, 'Commonwealth Government response to the review of the competition provisions of the Trade Practices Act 1974', *Commonwealth of Australia*, at <http://www.treasurer.gov.au/tsr/content/publications/TPAResponse.asp> (accessed 18 April 2005).
51. Editorial, 'Fels: section 46 needs overhaul', *Australian Financial Review*, 6 June 2003, p. 3.
52. See Australian Competition and Consumer Commission, 'Market Power' Definition Needs Legislative Clarification: ACCC', *Press Release*, no. 193, September 2003, at <http://www.accc.gov.au/content/index.phtml/itemId/363639/fromItemId/378016> (accessed 18 April 2005).
53. Senate Economics References Committee, 'The effectiveness of the Trade Practices Act 1974 in protecting small business', *Debates*, March 2004, Chapter 2, pp. 7–28. See also B. Bailey, 'Small business success on section 46 of the Trade Practice Act', *Research Note*, no. 48, Parliamentary Library, Canberra, at <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn48.htm> (accessed 18 April 2005).
54. *ibid.* pp. 85–91.
55. *ibid.*, p. 81.
56. See also G. Brandis, Senate Economics References Committee Report, *Debates*, 1 March 2004, p. 20,345.
57. The Hon. P. Costello, *Press Conference*, Parliament House, 23 June 2004, at <http://www.treasurer.gov.au/tsr/content/transcripts/2004/073.asp> (accessed 18 April 2005).
58. *ibid.*
59. M. Latham, 'Restoring Innovation and Success—Labor's plan to reform the Trade Practices Act', *ALP News Statements*, 13 April 2004. Senator A. Murray, 'Senate report offers small business some real TPA protection', *Media Release*, 1 March 2004.
60. M. Latham, *op. cit.*, p. 3.
61. See H. Morgan cited in G. Costa, 'Canberra acts on competition laws', *Australian Financial Review*, 26 June 2004, p. 3.
62. T. O'Loughlin, 'Call for fair go for small firms', *Australian Financial Review*, 2 March 2004, p. 3.
63. Editorial, 'Senate misses point on TPA', *Australian Financial Review*, 3 March 2004, p. 54.
64. F. Brenchley, 'Minor changes tipped for act', *Australian Financial Review*, 21 July 2004, p. 3.
65. See S. Dudley, T. John and J. Davidson, Trade Practices Legislation Amendment Bill 2004, *Bills Digest*, no. 23, Parliamentary Library, Canberra, 2004–05, at <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd023.htm> (accessed 18 April 2005). Also, see K. Murphy, 'Dawson dawdle is over', *The Australian*, 22 October 2004, p. 25.
66. For an explanation of these Acts, see:

- S. Dudley, 'Corporate Law Reform Program (Audit Reform and Disclosure) Bill 2003', *Bills Digest*, no. 166, Parliamentary Library, Canberra, 2003–04, 21 June 2004, at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd166.pdf> (accessed 18 April 2005).
67. The Hon. Peter Costello, 'Corporate disclosure: Strengthening the financial framework', *Commonwealth of Australia*, September 2002, p. iii, at <http://www.treasury.gov.au/documents/403/PDF/Clerp9.pdf> (accessed 18 April 2005).
68. *ibid.*, p. 12.
69. The Hon. Justice Owen, *HIH Royal Commission*, *op. cit.*, lxv–lxvii, at <http://www.hihroyalcom.gov.au/finalreport/> (accessed 18 April 2005).
70. See J. Arbouw, 'Looking through the hourglass', *Company Director*, August 2003, pp. 6–10.
71. S. Wilson, 'All hail Clerp9 – but no resting on our laurels', *The Australian*, 29 June 2004, p. 25.
72. ASX Corporate Governance Council, 'Principles of Good Corporate Governance and Best Practice', *Australian Stock Exchange*, March 2003, at <http://www.shareholder.com/visitors/dynamicdoc/document.cfm?documentid=364&companyid=ASX> (accessed 18 April 2005).
73. Australian Government, 'Government response to Joint Committee of Public Accounts and Audit, Review of independent auditing by registered company auditors', March 2005, at <http://www.aph.gov.au/house/committee/jpaa/indepaudit/govresp391.pdf> (accessed 18 April 2005).
74. See The Hon. Peter Costello, 'Financial Sector Advisory Council Review of the outcomes of the Financial System Inquiry', *Press Release*, 2 August 2004, at <http://www.treasurer.gov.au/tsr/content/pressreleases/2004/062.asp> (accessed 18 April 2005).
75. See A. Fabro and J. Moullakis, 'Regulation can go too far: report', *Australian Financial Review*, 3 August 2004, p. 3. The original quote comes from Financial Sector Advisory Council, 'Review of the Outcomes of the Financial System Inquiry 1997', August 2003, p. 9, at <http://www.treasury.gov.au/documents/860/PDF/FSAC%20Final%20Report.pdf> (accessed 18 April 2005).
76. F. Spencer, 'CLERP9 reforms add too much complexity', *Australian Financial Review*, 20 August 2004, p. 54.
77. D. Kitney, 'Compliance crunch hits the boardroom', *Australian Financial Review*, 7 September 2004, p. 1.
78. *ibid.*, p. 61.
79. ASX Corporate Governance Council Implementation Review Group, 'Principles of good corporate governance and best practice recommendation', *IRG Report to ASX Corporate Governance Council*, 31 March 2004, at http://www.asx.com.au/about/pdf/IRG_Report_to_ASX_CGC_final.pdf (accessed 18 April 2005).
80. Business Council of Australia, *Policy Platform for the 2004 Election*, at http://www.bca.com.au/upload/BCA_Policy_Platform_for_the_2004_Federal_Election.pdf (accessed 18 April 2005).
81. *ibid.*

82. The Hon. Justice Owen, 'The collapse of HIH: reasons, circumstances and responsibilities, Volume 3', *The HIH Royal Commission*, p. 368. Also available at <http://www.hihroyalcom.gov.au/finalreport/Chapter%2024.HTML> (accessed 18 April 2005).
83. *ibid.*, p. 367.
84. Editorial, 'A tragedy of APRA errors', *Australian Financial Review*, 13 November 2002.
85. The Palmer Report was commissioned by the APRA Board to provide an independent and impartial review of APRA's actions and inactions with respect to HIH. See J. Carmichael, 'APRA: the way forward', *Speech*, 22 November 2002, p. 4.
86. The Hon. Justice Owen, *op. cit.*, p.367.
87. *ibid.*, p. 372.
88. HIH had been consistently under-reserved since listing in 1992.
89. Editorial, 'After HIH, what to do with APRA', *Australian Financial Review*, 15 January 2003.
90. J. Phillips, 'APRA doesn't escape due criticism', *Australian Financial Review*, 22 April 2003, p. 71. APRA's Chairman, John Laker, denies that the Wallis Report got 'the premise of APRA wrong'. See House of Representatives Standing Committee on Economics, Finance and Public Administration, House of Representatives Standing Committee Budget Estimates, *Debates*, 10 May 2004, p. 1.
91. For an explanation of (and background to) the Act, see I. Ireland, 'General Insurance Reform Bill', *Bills Digest*, no. 21, Parliamentary Library, Canberra, 2001–02, at <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd021.pdf> (accessed 18 April 2005).
92. J. Laker, Senate Economics Legislation Committee, *Debates*, 6 November 2003, p. 89.
93. See the comments of The Hon. Joseph Hockey in Associated Press, 'Up to 50 insurers to be forced out', *Canberra Times*, 10 August 2001.
94. For an explanation of (and background to) the Act, see D. Walsh, 'Superannuation Safety Insurance Act 2004', *Bills Digest*, no. 83, Parliamentary Library, Canberra, 2003–04, at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd082.pdf> (accessed 18 April 2005).
95. *ibid.*, p. 3.
96. Australian Prudential Regulation Authority, *Superannuation: Licensing and registering a superannuation entity*, July 2004, p. 6, at <http://www.apra.gov.au/Superannuation/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=7189> (accessed 18 April 2005).
97. S MacKenzie, 'APRA fears a licence take-up bottleneck', *Australian Financial Review*, 10 March 2005, p. 7.
98. J. Laker, House of Representatives Standing Committee on Economics, Finance and Public Administration, House of Representatives Standing Committee Budget Estimates, *Debates*, 10 May 2004, p. 1.
99. *ibid.*
100. The Hon. Justice Owen, 'The failure of HIH Insurance', *The HIH Royal Commission*, Sydney, 2003, p. 208.

101. Commonwealth of Australia, *Australian Prudential Regulation Authority Amendment Bill 2003*, at <http://scalegtext.law.gov.au/html/ems/0/2003/0/2003060503.htm> (accessed 18 April 2005).
102. O. Galacho, 'Sting in ASIC's tail', *Herald Sun*, 29 March 2005, p. 25.
103. J. Laker, House of Representatives Standing Committee on Economics, Finance and Public Administration, House of Representatives Standing Committee Budget Estimates, *Debates*, 10 May 2004, p. 14.
104. *ibid.*, p. 6.
105. Australian Prudential Regulation Authority, 'Report into irregular currency options trading at the National Australia Bank', 23 March 2004, p. 6, at http://www.nabgroup.com/vgnmedia/download/APRAreport_24march04.pdf (accessed 18 April 2005).
106. S. Oldfield, 'Forex fallout: NAB raises \$3bn to appease regulator', *Australian Financial Review*, 12 May 2004, pages 1 and 55.
107. T. Boyd, 'It could have been tougher', *Australian Financial Review*, 26 March 2004, p. 73.
108. J. Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Commonwealth of Australia, June 2003, p. 51, available at http://www.finance.gov.au/governancestructures/docs/The_Uhrig_Report_July_2003.pdf (accessed 18 April 2005).
109. *ibid.*
110. Australian Chamber of Commerce and Industry, 'Business Concerns about ACCC's Understanding of the Commercial Environment: Supplementary Submission to Trade Practices Act Review, Results of a Survey of Australian Business', *Press Release*, 29 October 2002, p. 2.
111. *ibid.*
112. J. Uhrig, *op. cit.*, p. 59.
113. See P. Grabosky and J. Braithwaite, *Of Manners Gentle: enforcement strategies of Australian business regulatory agencies*, Melbourne University Press, Melbourne, 1986.
114. Editorial, 'Samuel must bark and bite', *The Australian*, 14 August 2003, p. 10.
115. See T. O'Loughlin et al., 'Samuel's grand vision: a world without regulation', *Australian Financial Review*, 12 August 2003, p. 4.
116. M. Latham cited in *ibid.*, p. 1.
117. T. O'Loughlin, 'Competition regulator has lost its hard edge: dossier', *Australian Financial Review*, 4 June 2004, p. 29.
118. G. Samuel, Appearing before the Senate Economics Legislation Committee, Senate Standings Committee Budget Estimates, 17 February 2005.
119. *ibid.*, p.11.
120. B. Cassidy, Appearing before the Senate Economics Legislation Committee, Senate Standings Committee Budget Estimates, *Debates*, 6 November 2003, p. 113.

121. 'ACCC sets sights on Cartels', *Inside Business*, ABC Television, 15 February 2004, at <http://www.abc.net.au/insidebusiness/content/2004/s1045295.htm> (accessed 18 April 2005). See also, G. Samuel, *Official Hansard*, 5 March 2004, Melbourne, p. 26.
122. *Inside Business*, *ibid.* See also *Maddocks Trade Practices Update*, 'ACCC submission to the Dawson Inquiry', July 2002, at <http://www.maddocks.com.au/download/trade-july-2002.pdf> (accessed 6 February 2005).
123. F. Brenchley, 'Samuel on a mission to bust cartels', *Australian Financial Review*, 26 June 2004, p. 7.
124. F. Brenchley, 'Soft-speaking Samuel now has a big stick', *Weekend Australian Financial Review*, 5–6 February 2005, p. 6.
125. G. Samuel, Appearing before the Senate Economics Legislation Committee, Senate Standings Committee Budget Estimates, 17 February 2005.
126. The ACCC's July 2002 submission to the Dawson Review noted that 'the draft policy would assist the ACCC eliminate hard core cartels operating in Australia that harm consumers'. See Australian Competition and Consumer Commission, 'Draft leniency policy to break hard core cartels issued', *Press Release*, at <http://www.accc.gov.au/content/index.phtml/itemId/88120> (accessed 18 April 2005). The Dawson Review endorsed the Commission's proposal of jail terms for cartel members, subject to a suitable definition of 'hard core cartel behaviour'. The government also wanted clarification of the term 'hard core'. The term is not used in legislation, but receives occasional use in the press.
127. *ibid.*
128. J. Lucy, 'Significant regulatory issues facing ASIC and Australian business', Australian Securities and Investments Commission, Presentation to the Australia-Israel Chamber of Commerce, 4 August 2004, at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AICC_speech_040804.pdf/\\$file/AICC_speech_040804.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AICC_speech_040804.pdf/$file/AICC_speech_040804.pdf) (accessed 18 April 2005).
129. *ibid.*, p. 3.
130. D. Knott, Australian Securities and Investments Commission, 'ASIC Annual Report 2002–03', *Commonwealth of Australia*, 2003, at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual_report2002-03.pdf/\\$file/annual_report2002-03.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual_report2002-03.pdf/$file/annual_report2002-03.pdf) (accessed 18 April 2005).
131. The Hon. Justice Owen, *op. cit.*, p. 205.
132. Australian Securities and Investments Commission, 'ASIC Annual Report 2002–03', *Commonwealth of Australia*, 2003, p. 6.
133. See Statement by Mr Jeffery Lucy, Chairman, Australian Securities and Investments Commission, 15 April 2005, at http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/05-94+Ray+Williams+sentenced+to+four-and-a-half+years'+jail?openDocument (accessed 18 April 2005).
134. J. Lucy cited in F. Buffini, 'Integrity is paramount, says ASIC', *Australian Financial Review*, 16 April 2005, p. 13.
135. Editorial, 'More than credibility on the line for ASIC', *Australian Financial Review*, 12 December 2001.

136. See Editorial, 'Canberra gets in on the Act', *The Australian*, 21 May 2004, p. 6.
137. Australian Securities and Investments Commission, 'ASIC Annual Report 2002–03', *Commonwealth of Australia*, 2003, p. 5.
138. *ibid.*, p. 31.
139. Australian Securities and Investments Commission, 'ASIC Annual Report 2001–02', *Commonwealth of Australia*, 2002, p. 5.
140. Institute of Financial Services Australia, *IFSA industry statistics*, at <http://www.ifs.com.au> (accessed 18 April 2005).
141. J. Lucy, 'Significant regulatory issues facing ASIC and Australian business', *Australian Securities and Investments Commission*, Presentation to the Australia-Israel Chamber of Commerce, 4 August 2004, p. 5.
142. Australian Securities and Investments Commission, 'ASIC launches financial services consumer education strategy', *Media Release*, no. 378, 25 October 2001, at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/consumer_ed_strategy.pdf/\\$file/consumer_ed_strategy.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/consumer_ed_strategy.pdf/$file/consumer_ed_strategy.pdf) (accessed 18 April 2005).
143. Australian Securities and Investments Commission, 'Financial Literacy in Schools', *Discussion Paper*, 30 June 2003, at [http://www.fido.asic.gov.au/asic/pdflib.nsf/LookupByFileName/FinLit_schools_DP.pdf/\\$file/FinLit_schools_DP.pdf](http://www.fido.asic.gov.au/asic/pdflib.nsf/LookupByFileName/FinLit_schools_DP.pdf/$file/FinLit_schools_DP.pdf) (accessed 18 April 2005).
144. J. Lucy, 'Significant regulatory issues facing ASIC and Australian business', *Australian Securities and Investments Commission*, Presentation to the Australia-Israel Chamber of Commerce, 4 August 2004, p. 9.
145. Australian Securities and Investments Commission, 'ASIC's approach to Financial Sector Reform Act following the transition', *Media Release*, IR 04–05, 23 February 2004.
146. Australian Prudential Regulation Authority, 'APRA Annual Report 2002–03', 2003, p. 9.
147. *ibid.*
148. Australian Prudential Regulation Authority, 'APRA's risk of superannuation funds: PAIRS', *APRA Insight*, 1st Quarter 2004, p. 19.
149. For a detailed explanation of this calculation, see 'APRA's risk rating of superannuation funds', *APRA Insight*, 1st Quarter 2004, pp. 20–25.
150. J. Carmichael, 'APRA: the way forward', *Australian Prudential Regulation Authority*, Speech to CEDA, 22 November 2002, p. 4.
151. John Laker, Opening Statement appearing before the House of Representatives Standing Committee on Economics, Finance and Public Administration, House of Representatives Standing Committee Budget Estimates, *Debates*, 10 May 2004, p. 1.
152. *ibid.*
153. J. Carmichael, *op. cit.*
154. *Financial Sector (Collection of Data) Act 2001*, at <http://scaleplus.law.gov.au/html/pasteact/3/3469/pdf/FinanSectorCollData2001.pdf> (accessed 18 April 2005).

155. *ibid.*, p. 14.
156. Australian National Audit Office, 'APRA's Prudential Supervision of Superannuation Entities', *Audit Report no. 6*, 2003–04, Commonwealth of Australia, at <http://www.anao.gov.au/WebSite.nsf/Publications/0EC3543C99FB257DCA256D9C007FE71F> (accessed 18 April 2005).
157. Joint Committee of Public Accounts and Audit, *Review of Auditor-General's Reports 2003–04, First and Second Quarters*, p. 38, at http://www.aph.gov.au/house/committee/jpaa/agfirst-sec03_04/chapter4.pdf (accessed 18 April 2005).
158. Australian Prudential Regulation Authority, *Superannuation Reporting Standards*, at <http://www.apra.gov.au/Statistics/Superannuation-Reporting-Standards.cfm> (accessed 18 April 2005).
159. Australian Prudential Regulation Authority, 'Technical information about the new data collection tool', at <http://www.apra.gov.au/statistics/Information-about-the-new-data-collection-tool.cfm> (accessed 18 April 2005).
160. Senate Economics Legislation Committee, *Debates*, 6 November 2003, E97.
161. Australian Prudential Regulation Authority, 'Prudential Supervision of Lenders Mortgage Insurance', *Proposed reforms, Discussion Paper*, August 2004, p. 2.
162. See comments of Federal Court Judge Peter Heerey, *ACCC V Exxon Mobil, BP and Shell*, 1997. See also the comments of Federal Court Judge Paul Finn, *ACCC V Electricity Supply Association of Australia*, 2001.
163. F. Brenchley, *op. cit.*, pp. 250–1.
164. F. Brenchley, *Allan Fels: A Portrait of power*, John Wiley and Sons, Milton, 2003, pp. 278–9.
165. Editorial, 'Fels failure must end era at ACCC', *The Australian*, 31 March 2003, p. 8.
166. Editorial, 'Changing the ACCC guard', *Australian Financial Review*, 2 April 2004, p. 62.
167. *ibid.*
168. See A. Ferguson, 'ASIC: The watchdog no one fears', *Business Review Weekly*, vol. 22, pp. 58–64.
169. C. Parker, 'Regulating self-regulation: The ACCC, ASIC, Competition Policy, and Corporate Regulation', in S. Bell (ed.), *Economic Governance and Institutional Dynamics*, Oxford University Press, Melbourne, 2002, p. 258.
170. *ibid.*, p. 259.
171. For example, R. Bromby, 'Jailings make market 'safer'', *Weekend Australian*, 16 April 2005, p. 36.
172. Chanticleer, 'ASIC should chance its arm some more', *Australian Financial Review*, 15 April 2005, p. 92.
173. B. Frith, 'Corporate crims have to account', *Weekend Australian*, 16 April 2005, p. 36.
174. E. Knight, 'As for the corporate cop's plea, it did the best it could', *Sydney Morning Herald*, 15 April 2005, p. 19.
175. See V. Carson, 'Corporate criminals will pay: Costello', *The Australian*, 15 April 2005, p. 4.

176. At the time of writing, two other HIH and FAI officials had pleaded guilty, four awaited trial, and one awaited a committal hearing.
177. See the comments of APRA Chairman John Laker; p. 37.
178. Editorial, 'A tragedy of APRA errors', *Australian Financial Review*, 13 November 2002.
179. Editorial, 'APRA has a lot to learn', *Australian Financial Review*, 25 March 2004, p. 78.
180. S. Oldfield, 'Forex fallout: NAB raises \$3bn to appease regulator', *Australian Financial Review*, 12 May 2004, p. 55.
181. R. Gluyas, 'Watchdog gets off the leash', *The Australian*, 30 August 2004, p. 37.
182. *ibid.*

© Copyright Commonwealth of Australia 2005

Except to the extent of the uses permitted under the Copyright Act 1968, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

Appendix 1: Enabling legislation

Agency	Est.	Enabling Act(s)	Key Sections of 1 st listed Act
Australian Competition and Consumer Commission (ACCC)	1995	Trade Practices Act 1974 Price Surveillance Act 1983	S46 misuse of market power S50 'acquisitions resulting in a substantial lessening of competition' S51AB unconscionable conduct S52 'misleading or deceptive conduct'
Australian Securities Investments Commission (ASIC)	1997	Australian Securities and Investments Commission Act 2001 Corporations Act 2001	S12 Directions by Minister S12CA-CC unconscionable conduct S12DA-DN consumer protection S14 Minister may direct investigations
Australian Prudential Regulation Authority (APRA)	1991	Australian Prudential Regulation Authority Act 1998 General Insurance Reform Act 2001	S8 Purpose for establishing APRA S10 Advice to the Minister S11 APRA's powers S12 Directions by the Minister

Source: *Trade Practices Act 1974, Australian Prudential Regulation Authority Act 1998, Australian Securities and Investments Commission Act 2001*. See <http://scaleplus.law.gov.au/>

Appendix 2: Revenues from government (Appropriation Bill No. 1, \$'000)

	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05 Budget
ACCC	\$57 442	\$75 687	\$83 490	\$62 560	\$74 217	\$97 807 (\$23 959)*
ASIC	\$132 571	\$131 621	\$146 090	\$162 832	\$183 285	\$199 842 (\$11 300)*
APRA#	\$61 006	\$49 367	\$57 196	\$61 152	\$70 309	\$77 500 (\$3000)*

Source: *Statement of Financial Performance, APRA, ASIC and ACCC Annual Reports*.

2003-04 and 2004-05 estimates are taken from *Appropriation Bill No. 1, Budget Statement No. 4, Agency Resourcing, 2004-05*.

* *Appropriation Bill No. 2* (equity injections)

APRA's funding comes from *Special Appropriations*.

Appendix 3: Resources for 2002–03 and 2003–04 financial years

Agency	Operating Budget (\$'000) 2002–03	Operating budget (\$'000) 2003–04	Additional funding in 2004–05 Budget	Staff (average) 2003 / 2004
ACCC	Revenue: \$63 147 Expenses: \$73 270 Deficit: \$10 203	Revenue: \$74 665 Expenses: \$81 656 Deficit: \$7 038	\$46.7 million (next four years) & \$22 million equity 2004–05	469 / 449
APRA	Revenue: \$68 456 Expenses: \$68 624 Deficit: \$168	Revenue: \$76 298 Expenses: \$74 231 Deficit: \$2 067	\$47.4 million (next four years)	457 / 524
ASIC	Revenue: \$172 495 Expenses: \$172 048 Deficit: \$112	Revenue: \$191 338 Expenses: \$195 553 Deficit: \$4820	\$52.5 million (next four years) and \$7.6 million to implement CLERP9	1 396 / 1 531

Source: Australian Competition and Consumer Commission, Annual Report 2002–03, Annual Report 2003–04; Australian Prudential Regulation Authority, Annual Report 2002–03, Annual Report 2003–04; Australian Securities and Investments Commission, Annual Report 2002–03, Annual Report 2003–04; Commonwealth Budget 2003–04, Budget Paper No. 2, p. 259.

Appendix 4: Previous bodies

	Forerunners	Recent and current chairman
ACCC	Trade Practices Commission (TPC) 1974–1995 Prices Surveillance Authority (PSA) 1983–1995 Australian Competition and Consumer Commission 1995–	Allan Fels, Chairman of PSA, 1989–1992; Chairman of TPC, 1991–1995; Chairman of ACCC, 1995–2003 Graeme Samuel, 2003–
ASIC	National Companies and Securities Commission 1979–1991 Australian Securities Commission 1991–1998 Australian Securities and Investments Commission 1998–	David Knott, 2000–2003 Jeffrey Lucy, 2004–
APRA	Australian Prudential Regulation Authority 1998–	Jeffrey Carmichael, 1998–2003 John Laker, 2003–2008

Acknowledgements

This is to acknowledge the help given by Christine Parker, Deirdre McKeown, Rob Lundie, Janet Wilson, Cathy Madden, Fred Cook, Richard Ryan, Scott Bennett, and Gerry Newman in producing this paper.