



Submission by the  
Commonwealth Ombudsman

**SENATE ECONOMICS  
REFERENCES COMMITTEE:  
INQUIRY INTO THE  
PERFORMANCE OF THE  
AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION**

Submission by the Commonwealth Ombudsman, Mr Colin Neave AM

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# CONTENTS

<b>INTRODUCTION AND SUMMARY .....</b>	<b>4</b>
<b>BACKGROUND .....</b>	<b>5</b>
<b>RESPONSE TO TERMS OF REFERENCE.....</b>	<b>5</b>
<b>COMPLAINTS TO THE OMBUDSMAN REGARDING ASIC .....</b>	<b>5</b>
<b>Recent rise in complaint numbers .....</b>	<b>6</b>
<b>Other common ASIC complaints themes.....</b>	<b>8</b>
1. ASIC’s discretionary decision to investigate a report of misconduct .....	8
Broader public benefit.....	9
2. Annual company statements and ASIC’s decision not to waive late fees.....	11
3. Accessibility of ASIC’s services .....	12
<b>ASIC’S COMPLAINTS MANAGEMENT .....</b>	<b>14</b>
<b>Making a complaint to ASIC about ASIC.....</b>	<b>14</b>
<b>Communication between ASIC and a complainant.....</b>	<b>15</b>
1. Delay.....	15
2. Explanation of decision .....	16
3. Setting expectations.....	17
4. Review of ASIC’s decisions.....	18
<b>Recent improvements by ASIC.....</b>	<b>19</b>
<b>ATTACHMENT A:</b>	
<b>COMPARISON WITH COMPLAINT HANDLING PRACTICES AT OTHER AGENCIES .....</b>	<b>20</b>
1. Tax Practitioners Board.....	20
2. Australian Taxation Office .....	21

## INTRODUCTION AND SUMMARY

On 20 June 2013, the Senate referred an inquiry into the performance of the Australian Securities and Investments Commission (ASIC) to the Senate Economic References Committee (the Committee) for inquiry and report (the Inquiry). This submission by the Commonwealth Ombudsman (the Ombudsman) responds to part “d” of the Inquiry’s Terms of Reference: ASIC’s complaints management policies and practices.

In 2012-13, the Ombudsman received a total of 338 complaints about ASIC, which represents an increase of almost 90% on the previous financial year. This increase was mainly due to problems associated with the commencement of the national Business Name Register (BNR) by ASIC on 28 May 2012.

Issues leading to complaints about the BNR have now been largely addressed and resolved by ASIC. Other common complaint themes indicate client dissatisfaction with:

- ASIC’s discretionary decision to investigate a report of misconduct;
- ASIC’s decision to not waive late fees; and
- Accessibility, including difficulties making contact with ASIC, delays in receiving a response from ASIC, and the usability of ASIC’s online services.

Another common theme in complaints received by the Ombudsman is that clients are often unsure about how to complain to ASIC about ASIC. While ASIC’s website contains a clear heading, “how to complain”, the subsequent list of links does not offer a clear and explicit opportunity to make a complaint about ASIC.

Investigations conducted by the Ombudsman reveal many complaints are ultimately resolved by ASIC through:

- Providing a better explanation of its decision;
- Expediting a request for a response or action; and/or
- Reconsidering its decision, taking into account all relevant information.

ASIC has done much to improve the quality and extent of information available on its website, for example, by publishing information sheets on popular complaint topics.

A planned increase to ASIC’s call centre capacity<sup>1</sup> will enable it to better address complaint issues related to contact and accessibility. However, there remain steps available to ASIC to further improve its customer service and complaint handling (and thereby further reduce complaint numbers). These opportunities include making its complaints process simpler and more accessible, in particular, by clearly delineating its complaints process from misconduct reporting. There is also room for ASIC to further improve its communication with complainants.

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<sup>1</sup> [ASIC Budget Statements, May 2013](#)

## **BACKGROUND**

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- Correcting administrative deficiencies through independent review of complaints about Australian Government administrative action;
- Fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- Assisting people to resolve complaints about government administrative action;
- Developing policies and principles for accountability; and
- Reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

## **RESPONSE TO TERMS OF REFERENCE**

On 20 June 2013, the Senate referred an inquiry into the performance of ASIC to the Committee for inquiry and report on the following matters:

*The performance of the Australian Securities and Investments Commission (ASIC), with particular reference to:*

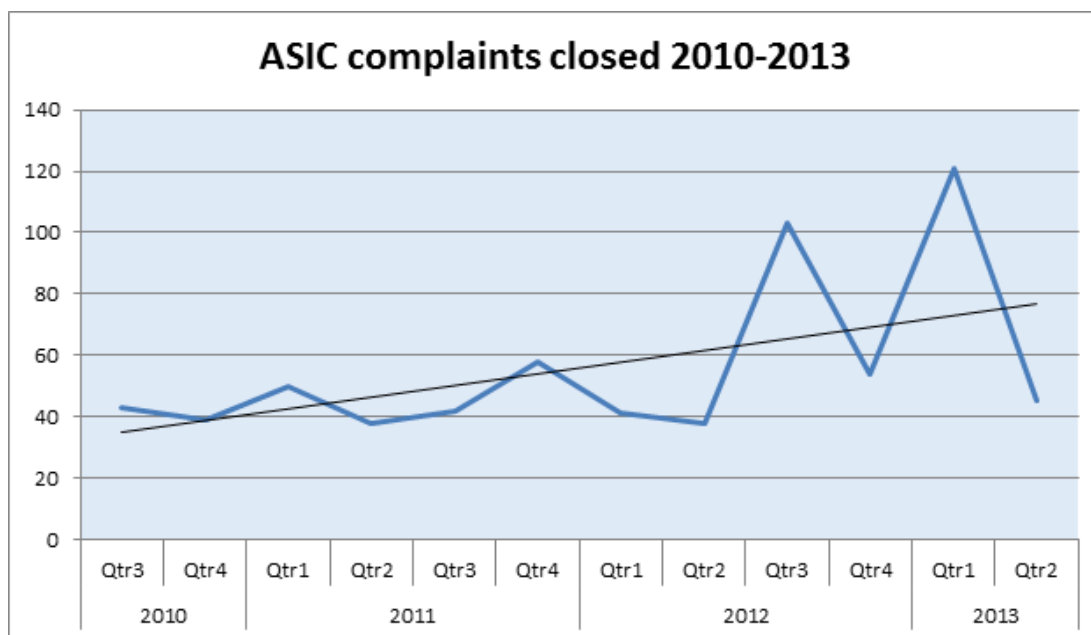
- a. ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations;*
- b. The accountability framework to which ASIC is subject, and whether this needs to be strengthened;*
- c. The workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies;*
- d. ASIC's complaints management policies and practices;*
- e. The protections afforded by ASIC to corporate and private whistleblowers; and*
- f. Any related matters.*

On 1 July 2013, the Committee invited the Ombudsman to provide a submission to the Inquiry. The Ombudsman has regular involvement with ASIC in relation to its complaint management. This submission focuses on part "d" of the terms of reference, ASIC's complaints management policies and practices.

## **COMPLAINTS TO THE OMBUDSMAN REGARDING ASIC**

In 2012-13, the Ombudsman received a total of 338 complaints about ASIC, which represented an increase of almost 90% on the previous financial year (179 complaints).

Table 1: ASIC complaints closed 2010-2013



The Ombudsman received a total of 18,097 complaints within jurisdiction in the 2012-13 financial year. ASIC complaints represented only 2% (approximately) of all complaints made to the Ombudsman that year. However, when compared to other regulatory agencies within the Ombudsman’s jurisdiction, the figure is relatively high.

Table 2: Number of complaints made to the Ombudsman regarding in-jurisdiction regulators in 2012-13

Agency	Number of complaints received in 2012-13	Percentage of all complaints received by the Ombudsman
ASIC	338	1.9%
Australian Financial Security Authority (previously Insolvency and Trustee Service Australia)	55	0.3%
Australian Communications and Media Authority	35	0.2%
Tax Practitioners Board	25	0.1%
Office of the Registrar of Indigenous Corporations	17	<0.1%
Australian Competition and Consumer Commission	17	<0.1%

### Recent rise in complaint numbers

As indicated in Table 1, the Ombudsman experienced a significant increase in complaints concerning ASIC from June 2012, which coincided with ASIC’s implementation of the BNR on 28 May 2012. The BNR replaced eight separate state and territory (paper-based) registers with one national online service. The peaks in complaint numbers seen in Table 1

reflect the staged business name renewal process undertaken by ASIC between May 2012 and April 2013 in order to deal with the high volume of renewals and enquiries during the transitional period. At this time, complainants told the Ombudsman they were experiencing difficulties lodging online business name renewals via the ASIC Connect website<sup>2</sup> and also making contact with ASIC by telephone to obtain assistance or advice. Many complainants said they had made several attempts over a number of days to contact ASIC, including contacting ASIC using its General Inquiry Form,<sup>3</sup> but did not receive a response.

In response to an Ombudsman investigation, ASIC advised it experienced a significant increase in the number of telephone and email enquiries at this time (well above the forecast level), which stretched technology systems and strained resourcing levels at ASIC's Customer Contact Centre (CCC).<sup>4</sup>

It was apparent that despite planning for the implementation of the BNR, ASIC was not sufficiently prepared for the volume of contacts it received, nor was its telephony system capable of dealing with the volume peaks it was experiencing. ASIC indicated that it was aware of these limitations and advised that it had made a request to the Government seeking resources to allow for additional staffing for its CCC and technology upgrades for its telephone information technology.<sup>5</sup>

The Ombudsman proposed that complaints made to the Ombudsman's office concerning contact issues related to the BNR would be transferred directly to ASIC with the expectation that ASIC would contact the complainant directly within 3 business days to address the issue (the "complaint transfer agreement"). ASIC agreed and the solution was positively received by complainants. At the same time, ASIC reallocated some of its resources to meet the increased demand at its CCC and also addressed some of the ASIC Connect technical issues.

The following case study illustrates the problems experienced by ASIC clients during this period when contacting ASIC in an attempt to resolve a query or problem.

#### **Case Study: Mr A**

*Mr A attempted to register a business name online using ASIC Connect. His application was automatically rejected, as the name he was attempting to register was too similar to an existing registered business name. The existing registered business name was the name of Mr A's existing business and the purpose of his application for a new business name was to rename this business.*

*Mr A successfully contacted ASIC by phone to explain the situation and to seek advice. In response, ASIC sent an email to Mr A with a link to a form for an application for review of the decision to reject the application. Mr A claimed that the link in the email did not work, and that after searching ASIC's website, most of the relevant links on the website were also broken. Mr A emailed ASIC explaining that the links were broken and that he still required assistance. After waiting a further 9 days without a response, Mr A contacted ASIC by phone. Mr A claimed that ASIC told him it was still unable to provide a response and that he would need to wait. Following this, Mr A tried on several occasions to contact ASIC by phone to check the progress of his matter. Mr A claimed he was either told that he would need to*

<sup>2</sup> ASIC Connect: <https://asicconnect.asic.gov.au/>

<sup>3</sup> The [General Inquiry Form](#) invites clients who are experiencing difficulties using ASIC's online services (including business names, searches, paying fees and other issues) to [report a service difficulty](#).

<sup>4</sup> Letter from ASIC to Ombudsman, 12 December 2012.

<sup>5</sup> Letter from ASIC to Ombudsman, 12 December 2012.

*wait up to 2 hours in the phone queue or received a “busy announcement” message which advised that he should call back later.*

*Three months after Mr A applied for the business name, Mr A complained to the Ombudsman that he had still not received a response from ASIC and that he was now unable to contact ASIC to discuss the matter.*

*The Ombudsman transferred the complaint to ASIC pursuant to the complaint transfer agreement, and the matter was resolved.*

## **Other common ASIC complaint themes**

While the issues leading to complaints regarding the BNR have been largely addressed and resolved by ASIC, other common causes of complaints to the Ombudsman indicate client dissatisfaction in three broad areas:

1. ASIC’s discretionary decision to investigate a report of misconduct;
2. ASIC’s decision not to waive late fees; and
3. Accessibility, including difficulties making contact with ASIC, delays in receiving a response from ASIC, and the usability of ASIC’s online services.

### **1. ASIC’s discretionary decision to investigate a report of misconduct**

One of the most frequent complaints that the Ombudsman receives about ASIC is that it has not investigated and/or taken enforcement action in relation to a report of misconduct or breach of legislation.

Complainants typically state they have reported to ASIC what they believe to be a significant act of misconduct or breach of legislation by a director, other company official or a company itself. Following receipt of a letter from ASIC responding to the complainant’s report of misconduct and advising that it will not investigate, the complainant contacts the Ombudsman because they consider ASIC is not meeting its responsibility as a regulator.

The Ombudsman has investigated a number of similar complaints about ASIC’s decision not to investigate some reports of misconduct /breaches of legislation. The results of these investigations indicate that:

- Section 13 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) permits ASIC to be selective about the matters it investigates and allows it to direct its resources to matters it considers best meet its regulatory priorities;
- ASIC’s policy is that it generally only takes action on those reports of misconduct where action will result in a greater impact in the market and will benefit the general public more broadly;
- ASIC provides information concerning its investigation policy in its Information Sheets *ASIC’s approach to enforcement* and *How ASIC deals with reports of misconduct*;<sup>6</sup> and
- Where it decides not to investigate, ASIC generally informs those who made the report of other possible avenues to address their concerns, for example, by complaining to other regulators or initiating civil action.

In its 2011-12 Annual Report, ASIC reported that it dealt with 20% fewer reports of misconduct than in the previous year and of these, 26% (28% previous year) were escalated for compliance, investigation or surveillance.<sup>7</sup> ASIC suggested that the reduction reflected a

<sup>6</sup> ASIC [Information Sheet 151](#): *ASIC’s approach to enforcement and Information* and Sheet 15: *How ASIC deals with complaints of misconduct*.

<sup>7</sup> ASIC Annual Report 2011-12, page 47: [Accessing misconduct and other reports](#)

longer-term trend following several years of higher volumes that were due to the Global Financial Crisis.<sup>8</sup>

### Broader public benefit

In complaints received by the Ombudsman, a frequent point of dispute appears to be the reporter's perception of ASIC's role as regulator and the expectation of a specific outcome from making a report, compared with ASIC's stated broader public benefit purpose. In its Information Sheet 'How ASIC deals with complaints of misconduct', ASIC advises that:

*All reports of misconduct that we receive provide us with valuable information, but not every matter brought to our attention requires us to take action. Under the laws we administer, we have the discretion to decide whether to take further action on reports of misconduct that we receive. Generally we do not act for individuals and we will seek to take action only on those reports of misconduct where our action will result in a greater impact in the market and benefit the general public more broadly.<sup>9</sup>*

This conflict between how many complainants view ASIC and how ASIC actually deals with complaints of misconduct is demonstrated in the following case study.

#### **Case Study: Mr B**

*Mr B claimed that two other directors of his company orchestrated his removal as a director by having the company secretary prepare a Notice of the Annual General Meeting (AGM) which reported that Mr B would be retiring. Mr B claimed that was forced to retire from the company at the AGM.*

*Mr B made a report of misconduct to ASIC claiming he was made to retire in contravention of the company's constitution and the Corporations Act 2001 (Cth).*

*Following an initial assessment, ASIC decided that it would not take any further action in relation to Mr B's complaint. ASIC explained to Mr B that it does not investigate every report of alleged misconduct it receives. Based on the information provided by Mr B, ASIC concluded that the issues raised related to an internal company dispute, and as such, the matter failed the public interest element of ASIC's assessment criteria of a complaint's suitability for further action.*

*Mr B complained to the Ombudsman that ASIC did not properly investigate his report of misconduct and sought the Ombudsman's assistance to have ASIC take the enforcement actions he believed it should take.*

*We explained to Mr B that ASIC's decision not to take further action was, in our view, one reasonably open to it to make, and the Ombudsman does not have the power to require ASIC to make a different decision. ASIC's handling of Mr B's report accorded with its stated practice and procedures for assessing reports of alleged misconduct and we could not conclude that ASIC's actions were administratively unreasonable.*

*We encouraged Mr B to consider seeking legal advice in order to be informed of his other options for resolving the dispute.*

<sup>8</sup> ASIC Annual Report 2011-12, page 47: [Accessing misconduct and other reports](#)

<sup>9</sup> ASIC [Information Sheet 153](#): How ASIC deals with complaints of misconduct



The following case study provides an example of where a complainant was dissatisfied with ASIC's approach to his individual complaint as a part of a larger investigation of misconduct.

**Case Study: Mr C**

*Mr C provided information to ASIC which he considered was relevant to ASIC's investigation of a bank and the collapse of a financial advice company.*

*ASIC assessed the information, but Mr C felt that ASIC did not adequately interview him in relation to the information he provided to it regarding the bank. ASIC informed Mr C that ASIC must investigate complaints made to it in the manner it considers the most appropriate.*

*Mr C complained to the Ombudsman and we investigated Mr C's complaint.*

*ASIC explained to the Ombudsman that it was investigating a range of issues relating to the matter, and was also monitoring related court proceedings. ASIC stated that it had made a decision to accept any information from callers relating to the investigation, but it did not believe it was required to interview every individual complainant as a separate investigation.*

*We explained to Mr C that further investigation of his complaint was not warranted because ASIC was still actively conducting its investigation into the matter and any recommendations made by the Ombudsman would be pre-emptive.*

ASIC advises that it weighs every report of misconduct it receives against four basic questions:<sup>10</sup>

1. What is the extent of harm or loss?
2. What are the benefits of pursuing the misconduct?
3. How do other issues, like the type and seriousness of the misconduct and the evidence available, affect the matter?
4. Is there an alternative course of action?

ASIC states that, when considering the benefits of pursuing the misconduct, it determines if the enforcement action will be cost effective and whether the enforcement action will send an effective message to the market.<sup>11</sup> The Ombudsman understands that, even where there may be clear evidence of a breach of the law, ASIC may still not take action if it considers that action is not likely to succeed before a court or result in a clear message being received by the market.

The Ombudsman recognises ASIC is a specialist independent regulator with market knowledge and expertise which informs its decision making concerning what best serves the broader public benefit. ASIC is not compelled by legislation to investigate every report of misconduct it receives. Its decision to not investigate a particular report is therefore one which is reasonably open to it to make. Any investigation the Ombudsman undertakes typically focuses on the administrative process ASIC follows in considering a report of misconduct, giving regard to what is fair and reasonable in all the circumstances.

While we accept that ASIC is best placed to determine its priorities and what may be in the broader public interest, complaints received by the Ombudsman regarding decisions by ASIC not to investigate reports of misconduct are usually resolved only after a more detailed and better explanation of the decision has been provided.

<sup>10</sup> ASIC [Information Sheet 153](#); *How ASIC deals with complaints of misconduct*

<sup>11</sup> ASIC [Information Sheet 151](#); *ASIC's approach to enforcement and Information*

ASIC recently released the results of its 2013 Stakeholder Survey,<sup>12</sup> and while it reports many positives, we note that it also identified areas for potential improvement, including:

- Improving the speed in which it investigates breaches of the law;
- Communicating what it is doing more clearly; and
- Reducing the red tape associated with compliance.

The results of the survey and complaints received by the Ombudsman suggest that ASIC could seek to reduce the number of complaints made about it through:

- Providing a better explanation of its role at the beginning of the reporting process, to set realistic expectations for the reporter;
- Providing a more detailed explanation of its reasons for a decision not to investigate, clarifying why ASIC considers an investigation of the misconduct included in the report would not serve a broader public purpose; and
- Providing better information about what regulatory action it has already taken.

## **2. Annual company statements and ASIC's decision not to waive late fees**

Every year, ASIC sends a company statement to every registered company, which includes an invoice for the annual review fee (the annual statement pack). If a company does not respond to the annual statement and/or pay the annual review fee within the prescribed time, it may incur late fees pursuant to the *Corporation (Fees) Regulations 2001*.

The following late fees may be levied:<sup>13</sup>

- Late review fee: If a company does not notify ASIC of the correct information within the 28-day review period;
- Late payment fee: If payment is made later than two months after the annual review date; and/or
- Late lodgement fee: If notifications of changes to company details are lodged outside the 28-day period.

Companies can apply to ASIC to waive the fees.<sup>14</sup> ASIC states that it has the power to waive late fees but will only consider doing so where it is satisfied that the reasons leading to the late fee being levied were beyond the control of *all* the officers of the company and any representatives, including agents.<sup>15</sup> ASIC provides some examples of when a late fee might be waived, which include ASIC or a court caused delay, relevant records were damaged or destroyed, an industrial dispute, or other exceptional circumstances such as illness or an accident prevented lodging.<sup>16</sup>

The Ombudsman receives a significant number of complaints relating to ASIC's refusal to exercise its discretion to waive these fees. Complainants commonly state that they did not receive any notification or reminders that the annual review date was approaching and therefore should not have to pay late fees.

In response to Ombudsman investigations, ASIC expressed the view that the law places an onus on company officers to understand and carry out their legal obligations and

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<sup>12</sup> [ASIC Stakeholder Survey 2013, 11 September 2013](#)

<sup>13</sup> ASIC [Information Sheet 3: Annual statements and late fees](#)

<sup>14</sup> ASIC [Information Sheet 3: Annual statements and late fees](#)

<sup>15</sup> ASIC Information Sheet 87: *Fee waivers*

<sup>16</sup> ASIC Information Sheet 87: *Fee waivers*

administrative duties, and as such, it is important that a company is aware of its annual review date. Although ASIC seeks to provide companies with annual statement packs, late fees are payable irrespective of whether these packs are actually received by companies.

The Ombudsman takes the view that ASIC's assessment of a company's duties and obligations is not unreasonable. However, where it appears that ASIC may not have taken into account all the relevant facts, the Ombudsman may, after an investigation, suggest that ASIC reconsider its decision, such as in the following case study.

#### **Case Study: Ms D**

*Ms D was a registered agent with ASIC for numerous companies and used EDGE (ASIC's software package for registered agents) to receive and lodge documents with ASIC on behalf of her clients. Ms D's computer needed repairs and she was unable to use it for approximately 4 days. As a result, Ms D did not receive the annual statement pack for several companies. As she was unaware that the annual review fee was due for these companies, Ms D did not pay the fees by the due date and the relevant companies were charged late fees by ASIC.*

*Ms D advised ASIC that she had computer issues which resulted in not paying the annual review fees on time and on this basis, applied to ASIC for late fee waiver.*

*ASIC denied Ms D's request to waive the late fees because its records indicated that the annual statement packs had been successfully delivered to Ms D's EDGE mailbox.*

*Ms D complained to the Ombudsman that ASIC had not given due consideration to her application for fee waiver.*

*The Ombudsman communicated its intention to investigate Ms D's complaint to ASIC. After receiving more detailed evidence of the computer repairs, ASIC accepted that it was possible that computer failure inadvertently resulted in the annual review packs being downloaded unbeknown to Ms D and subsequently agreed to waive the relevant late fees.*

### **3. Accessibility of ASIC's services**

Other than complaints regarding difficulties making contact with ASIC relating to the BNR, one of the most common complaints we receive about accessibility relates to the usability of ASIC's online services, particularly ASIC Connect. ASIC Connect allows online transactions such as registering business names, renewing the registration of business names, updating business name details, and searching for companies and business names.

In June 2011, Australian Bureau of Statistics reported that:

*In 2008-09, three-quarters (74%) of people aged 15 years and over had used the internet in the previous 12 months. Whether people used the internet, and where they used it, both varied with age. Much lower rates of internet use were reported among older age groups (31% for people 65 years and over).<sup>17</sup>*

Pursuant to the Australian Public Service Information and Communications Technology (ICT) Strategy 2012 -2015, Australian government agencies are moving to use ICT in new and innovative ways to deliver easier-to-use services that best meet people's needs and expectations.<sup>18</sup> ASIC states that its ASIC Connect website was developed to adhere to the

<sup>17</sup> ABS Australian Social Trends, [June 2011](#)

<sup>18</sup> [Australian Public Service ICT Strategy 2012 – 2015](#) and [Government 2.0](#)

Australian Government standards in respect to accessibility (more specifically, the *Disability Discrimination Act 1992 (Cth)*).<sup>19</sup>

ASIC informs the Ombudsman that it has instructed its call centre staff that they need to be aware of people with limited or no computer literacy and will continue to provide support for this group. However, the move towards online services can still be a source of frustration for some clients. For example, the Ombudsman has been provided with ASIC's Procedural Guide "How to handle requests for a paper transaction – Business Names", which indicates that clients must meet certain criteria in order to be provided with a paper form, and may also need to have their request reviewed and approved by a Team Leader or Manager.<sup>20</sup> Accessibility problems such as this are demonstrated in the following case study.

#### **Case Study: Mr E**

*Mr E knew that the date for the renewal of his business name was approaching. Mr E did not have access to a computer so he was unable to use ASIC Connect to renew the registration online.*

*Mr E attempted to contact ASIC on many occasions over a three week period to explain his situation and to seek advice. He claimed he was constantly put on hold and on each occasion the phone line was disconnected after around 30 minutes of waiting.*

*Mr E complained to the Ombudsman that he was unable to contact ASIC about the renewal of his business name.*

*The Ombudsman investigated Mr E's complaint. ASIC advised that it had not yet issued Mr E with the renewal notice for his business name because it was taking a staged approach to the issuing of renewal notices during the implementation of the new BNR. ASIC advised that Mr E would be notified in writing when the renewal process began and that he should contact ASIC at that time in order to request a paper application form. ASIC apologised that Mr E had faced difficulties when attempting to contact it.*

*Approximately four months later, Mr E contacted the Ombudsman again. Mr E had still not received written notice regarding the renewal of his business name. ASIC advised the Ombudsman that it would contact Mr E to discuss the situation with him.*

*One month later, Mr E complained to the Ombudsman that he had received a phone call from ASIC advising that it was aware of his earlier complaint but he would have to speak to someone more senior about his request for a paper application form. When Mr E attempted to make contact with the more senior person at ASIC, he was unable to get through to them on the phone.*

*The Ombudsman transferred the complaint to ASIC pursuant to the complaint transfer agreement, and the matter was resolved.*

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<sup>19</sup> ASIC Connect - [Accessibility](#)

<sup>20</sup> ASIC's Procedural Guide "How to handle requests for a paper transaction – Business Names", 27 May 2012

# ASIC'S COMPLAINTS MANAGEMENT

## Making a complaint to ASIC about ASIC

A key theme in many complaints received by the Ombudsman is that clients are unsure about how to complain to ASIC about an action or decision taken by ASIC.

While its website contains a clear link "how to complain"<sup>21</sup>, the subsequent list of options directs a complainant to select from a list of 14 possible complaint topics. Only three of these topics directly relate to complaints about ASIC services:

1. ASIC decisions or officers: Complainants are invited to bring the matter to the attention of a more senior ASIC officer or to request a review. It also informs the complainant that they can seek an external review from the Administrative Appeals Tribunal (AAT) or complain to the Ombudsman.
2. ASIC online services: Complainants are invited to report a service difficulty online or lodge a general inquiry using its online form. The General Inquiry Form has an option to make an on-line complaint but only for reporting misconduct
3. ASIC's call centre: Complainants are provided with a detailed explanation of the cause of delays which also refers to a March 2012 funding announcement.<sup>22</sup> Complainants are invited to ask a question online via ASIC's General Inquiry Form. This form has an option to make an on-line complaint but only for reporting misconduct.

One of the key messages of the *Commonwealth Ombudsman Better Practice Guide to Complaint Handling*<sup>23</sup> (Better Practice Guide to Complaint Handling) is that an agency should tell its clients about its complaint system and how to gain access to it. Barriers to complaining should be dealt with in order to establish effective complaint handling mechanisms. In our view, ASIC could improve the information it provides to the public about how to make a complaint about ASIC to ASIC, and could also make its complaints process simpler and more accessible, in particular, by clearly delineating its complaints process from misconduct reporting. We note that ASIC does not have a dedicated complaints telephone or fax number.

We also note that the ASIC Stakeholder Survey 2013 demonstrated that small business people rated the ASIC website negatively, and 23% of small businesses who had dealt with ASIC rated ASIC as 'very' or 'somewhat' difficult to deal with.<sup>24</sup>

We consider that ASIC's website could be improved, particularly by clearly articulating its complaint process and simplifying the information it provides to its clients.

The following case study demonstrates the difficulties that complainants may experience when attempting to make a complaint to ASIC.

### **Case Study: Mr F**

*Mr F attempted to register a business name online, and after being presented with the option to either "pay now" or "pay later", he selected the "pay later" option so that he would be sent an electronic invoice by email. However, he did not receive the email.*

<sup>21</sup> ASIC website: [How to complain](#)

<sup>22</sup> Increased Funding to Improve ASIC Client Contact Centre, The Hon Bernie Ripoll MP, [5 March 2012](#)

<sup>23</sup> [Better Practice Guide to Complaint Handling](#), page 11

<sup>24</sup> [ASIC Stakeholder Survey 2013, 11 September 2013](#), page 69



*Mr F made a complaint to ASIC via ASIC's online General Inquiry Form. Mr F claimed that one week passed and he did not receive a response from ASIC in relation to his online complaint. Mr F claimed that he then contacted ASIC by phone four times (each time waiting for at least 15 minutes for his call to be answered), and on each occasion was told that an email invoice would be sent to him. Mr F states that he did not receive an email invoice on any of these occasions. During the final phone call to ASIC, Mr F was told that he should use the "pay now" option instead.*

*Mr F complained to the Ombudsman that ASIC had not adequately resolved his complaint in relation to the "pay later" option when registering his business name online. He also complained that ASIC did not respond to his online complaint and that he experienced long delays when attempting to contact ASIC by phone.*

*The Ombudsman transferred the complaint to ASIC pursuant to the complaint transfer agreement, and the matter was resolved.*

## **Communication between ASIC and a complainant**

### **1. Delay**

Complainants often tell us they experience long delays when waiting for a response from ASIC about their complaint, which can be a source of frustration, especially when delay results in lost revenue.

Our Better Practice Guide to Complaint Handling states that once a complaint has been made to an agency, the complaint should be resolved as quickly as possible in order to prevent irritation or fatigue which can thwart successful complaint handling.<sup>25</sup>

The following case study provides an example of a complaint which was not promptly resolved by ASIC, which resulted in frustration and lost revenue for the complainant.

### **Case Study: Ms G**

*Ms G had a registered company. Ms G discovered that a competitor to her business registered a substantially similar business name to that of her company. Ms G believed that she had been losing revenue since this occurred, as some customers were confusing the competitor's business with her own.*

*Ms G complained to ASIC about the registration of the substantially similar business name. Despite numerous phone calls to ASIC, the matter was still not resolved over 5 months later. Ms G complained to the Ombudsman that ASIC had not resolved the issue within a reasonable time period.*

*The Ombudsman investigated Ms G's complaint. ASIC cancelled the registration of the substantially similar business name, and apologised to Ms G for its delayed and insufficient communication.*

*ASIC informed the Ombudsman that the delay in responding to Ms G was largely attributable to the high number of enquiries received by ASIC about business names following the introduction of the BNR, and that systems and processes for dealing with business name conflicts and reviews were still in development.*

<sup>25</sup> [Better Practice Guide to Complaint Handling](#), page 14

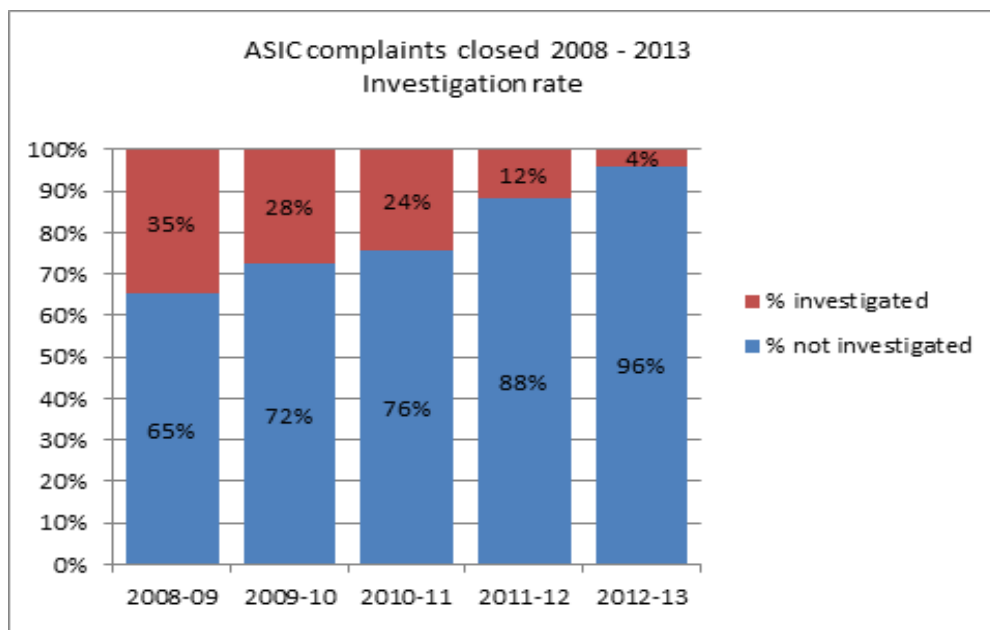
## 2. Explanation of decision

When a decision has been made regarding a complaint, our Better Practice Guide to Complaint Handling suggests that an explanation of the decision should be presented in a style the complainant can understand and should deal with each concern raised by the complaint.<sup>26</sup>

Complainants often tell us that even after being told of a decision made by ASIC they do not understand why ASIC came to the conclusion it did. This is particularly the case when the decision relates to the exercise of ASIC's discretion, such as the discretion to not investigate a report of misconduct or waive late fees.

The Ombudsman accepts that ASIC has a discretion to decide whether or not to investigate misconduct and waive late fees. The Ombudsman is not able to change ASIC's decision to exercise its discretion. Unless there are special circumstances, an investigation by the Ombudsman would not likely lead to a better or different outcome for the complainant. In such cases, the Ombudsman usually refers the complainant back to ASIC to request a review of its decision, which gives the complainant the opportunity to present further information where available and also gives ASIC the opportunity to reconsider its decision and/or provide further explanation of its decision to the complainant. As a result of this, the majority of complaints to the Ombudsman concerning ASIC's discretionary decisions do not result in investigations by the Ombudsman, as demonstrated in the following table.

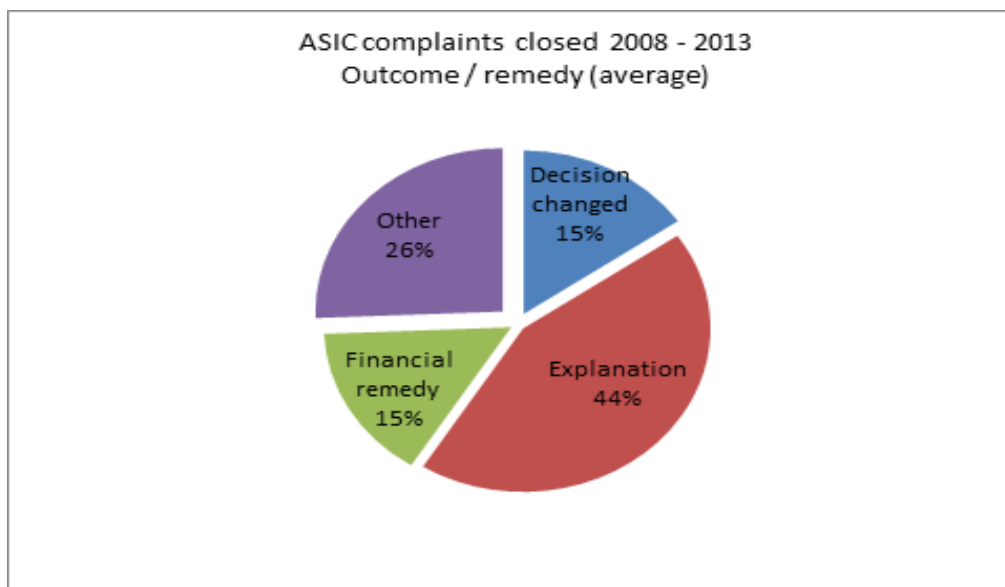
Table 3: ASIC complaints closed 2008-2013 – Investigation rate



However, where we do investigate a complaint, the remedy provided in the majority of cases is a further explanation of the decision by ASIC. In these cases, our investigations typically lead us to conclude that ASIC's decision was not unreasonable or administratively flawed, but that ASIC's decision simply required further and better explanation.

<sup>26</sup> [Better Practice Guide to Complaint Handling](#) page 25

Table 4: ASIC complaints closed 2008-2013 – Outcome / remedy (average)  
(Note: Financial remedy usually consists of a waiver of fees)



Although ASIC is a specialist independent regulator with market knowledge and expertise which informs its decision making, the fact that complaints are usually resolved through ASIC’s internal review process or where ASIC (or this office) provides a better explanation to the complainant suggests that ASIC could improve the explanations of its decisions in the first instance.

This view is supported by the results of the ASIC Stakeholder Survey which suggests that one of ASIC’s perceived limitations is that it is not clearly communicating what it is doing.<sup>27</sup> We note that ASIC has outlined a number of measures which it intends to take to address this feedback in its response to the Survey (which largely focuses on increasing ASIC’s media presence).<sup>28</sup> We would encourage ASIC to also consider how it could improve its communication to individuals on a one-to-one basis.

### 3. Setting expectations

The results of the ASIC Stakeholder Survey indicate that people do not believe ASIC acts quickly to investigate potential breaches of the law. We support ASIC’s response that it will seek to improve its communication in relation to its investigations, including information relating to legal procedures and other complexities involved.<sup>29</sup>

In the Ombudsman’s view, early management of expectations about what ASIC can or will do and the provision of better explanations of decisions to complainants should lead to a decrease in the number of complainants seeking an internal review of decisions by ASIC, as well as the number of complaints to the Ombudsman about ASIC. This will benefit ASIC by reducing its complaint handling workload, as well as reassuring staff and complainants that problems have been dealt with in the appropriate manner and have not been allowed to fester.<sup>30</sup>

<sup>27</sup> [ASIC Stakeholder Survey 2013, 11 September 2013](#), page 66

<sup>28</sup> [ASIC Stakeholder Survey 2013, 11 September 2013](#), Response from G Medcraft

<sup>29</sup> [ASIC Stakeholder Survey 2013, 11 September 2013](#), Response from G Medcraft

<sup>30</sup> [Better Practice Guide to Complaint Handling](#), page 14



The case study below provides an example of a complaint which may have been better handled by ASIC if it had managed the expectations of the complainant and provided a better explanation of its decision in the first instance.

#### **Case Study: Ms H**

*Ms H purchased software from a company for investment purposes. She experienced difficulties with the product and sought a refund. Ms H's communications with the company's representatives were unsuccessful and she was unable to contact the director of the company. Ms H also discovered that the registered office of the company was a virtual office.*

*Ms H made a report of misconduct to ASIC, where she asked ASIC to investigate the company's operations.*

*ASIC assessed Ms H's complaint and determined that the purchased product was not an investment product and was therefore outside its jurisdiction to investigate. ASIC referred Ms H to the ACCC and also suggested Ms H contact NSW Fair Trading.*

*Ms H contacted ASIC again after her approaches to the Financial Ombudsman Service, the ACCC and NSW Fair Trading were all unsuccessful. Ms H asked ASIC for an explanation of why the company could continue to operate from a virtual office as its registered address on the ASIC register and also requested that ASIC investigate whether the company was insolvent.*

*After assessing Ms H's second complaint, ASIC advised Ms H it would not be taking further action on the basis that it could not confirm a current, reliable address for the company or the company director, and that there was insufficient evidence of insolvent trading. ASIC did, however, make a note on the corporate register that the address was possibly invalid and advised Ms H to seek legal advice.*

*Ms H was dissatisfied with ASIC's response and asked for a review of the decision. After conducting a review, ASIC affirmed its decision not to take further action in relation to Ms H's complaints.*

*Ms H complained to the Ombudsman that ASIC had not taken action against the company for misconduct. Ms H was frustrated that ASIC had not taken further action in relation to the inability to make contact with the company and the company director.*

*We investigated Ms H's complaint, and determined that ASIC's actions in handling and reviewing Ms H's complaints were not unreasonable or administratively flawed. We then provided further explanation of ASIC's decision to Ms H to resolve the complaint.*

#### **4. Review of ASIC's decisions**

Our Better Practice Guide to Complaint Handling recommends that the procedure for seeking internal review of an agency's decision is explained to the complainant.<sup>31</sup>

Despite the large amount of information provided on ASIC's complaints webpages, it appears that little explanation is given of ASIC's internal review process. Furthermore, it does not appear that ASIC always explains its procedure for internal review in its letters of

<sup>31</sup> [Better Practice Guide to Complaint Handling](#), page 26

notification of decisions. The result is that some complainants have contacted the Ombudsman with no knowledge of ASIC's review mechanisms and instead seek advice from the Ombudsman. It is then left to the Ombudsman to explain this to complainants and refer them back to ASIC to seek internal review.

## **RECENT IMPROVEMENTS BY ASIC**

In response to the significant increase in complaints about ASIC (to it and also to the Ombudsman) in the second half of 2012, ASIC undertook to introduce a number of measures to improve its services and complaint handling. These improvements included:

- The addition of 30 extra telephone lines to the CCC in May 2012, plus an additional 60 telephone lines in October 2012;
- Improved email management practices with the aim of answering more emails each day and lowering the overall response time; and
- Training additional staff to assist customers with enquiries (particularly in relation to the BNR).<sup>32</sup>

ASIC also made significant efforts to better communicate its position in relation to reports of misconduct more clearly. This included:

- Redesigning ASIC's complaints webpage;
- Placing more information (including public information sheets) on the ASIC website on a wider range of commonly reported matters, so that people can be directed to the information when seeking information on the best course of action for dealing with their concern; and
- Making improvements to the way ASIC processes requests for review of its decisions.

We welcomed these measures which we believe have contributed to the recent decrease in the number of complaints which we receive about ASIC.

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<sup>32</sup> Letter from ASIC to the Ombudsman, 12 December 2012

# ATTACHMENT A:

## COMPARISON WITH COMPLAINT HANDLING PRACTICES AT OTHER AGENCIES

In light of the analysis above, it is useful to compare ASIC's complaint handling practices to that of other agencies, particularly other regulators.

### 1. Tax Practitioners Board (TPB)

The TPB is responsible for the registration and regulation of tax practitioners in Australia. Although in comparison with ASIC the TPB is a small agency in terms of the population it regulates, it is nevertheless a useful example of an agency with an effective complaint handling system.

The TPB recently improved its complaint handling, in particular its communication to complainants by providing a better explanation of its decisions, especially in cases where the TPB decided not to commence a formal investigation in relation to a complaint.

The simple and clear information provided to complainants on the TPB website is also particularly good from a complaints handling perspective.<sup>33</sup> It informs a potential complainant of the two complaint options, namely:<sup>34</sup>

*Complaints may be about:*

- *Tax or BAS agents, whether they are registered or not*
- *Us (the Tax Practitioners Board), including the decisions we make and our products and procedures.*

The information on the website:

- Helps manage people's expectations of what the TPB can do from the very beginning of the complaints process by providing an upfront summary of complaints it will generally not take action on, as well as a summary of outcomes that may result from an investigation;
- Includes a brief summary (and link to a fact sheet) in relation to the top complaint subject matters;
- Explains the TPB complaints process in a simple manner, including providing the list of questions that it will generally consider when assessing a complaint; and
- Explains the internal review mechanism available to a complainant, as well the options for external review of its decisions.

The TPB provide a separate complaints address,<sup>35</sup> provide an online complaints form and also offer an email address for enquiries.

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<sup>33</sup> [Tax Practitioners Board website](#)

<sup>34</sup> Tax Practitioners Board website: [Complaints overview](#)

<sup>35</sup> Tax Practitioners Board website: Make a complaint about the [TPB](#)

## **2. Australian Taxation Office (ATO)**

The ATO is a good example of a large agency which has recently made substantial improvements to its services and complaint handling process, resulting in a significant reduction in complaint numbers.

The ATO has a dedicated complaints phone and fax line, a dedicated address for written complaints, and an online complaints form.

In collaboration with, and based on feedback from the Ombudsman, the ATO identified a number of areas within its service offering and complaint handling framework which could be improved and made a commitment to act on these. As a result, some of the actions taken by the ATO included:

- Improved communication with taxpayers, particularly by using an “early advice” principle;
- New escalation procedures to quickly address delays, given that a large majority of complaints to the ATO had a time critical element; and
- Updated website,<sup>36</sup> in order to provide more user-friendly information.

Following the introduction of these improvements, the number of complaints received by the Ombudsman in relation to the ATO decreased by 34% in the following (2012-2013) financial year.

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<sup>36</sup> [Australian Taxation Office](#)