



**ASIC**  
Australian Securities &  
Investments Commission

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and Investments Commission**

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Discretionary Payments Team  
Risk & Claims Branch  
Department of Finance

7 December 2020

Dear Sir/Madam,

**ACT OF GRACE APPLICATIONS SUBMITTED BY s22(1)(a)(ii)**

1. ASIC refers to six applications submitted by s22(1)(a)(ii) to the Department of Finance (**Finance**) from 28 September 2020 to 9 October 2020 seeking act of grace payments (**Applications**).
2. s22(1)(a)(ii) submitted the Applications on behalf of investors in SFS Global Group Pty Ltd (**SFS Global**) and Suncoast Financial Solutions Pty Ltd (**Suncoast Financial**) listed in in the excel spreadsheet found at **Annexure 1 (Applicants)**.
3. The Applications were made under s65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) in relation to the loss of the Applicants' investments in SFS Global and Suncoast Financial.
4. ASIC notes that the Applications are accompanied by forms signed by the Applicants authorising s22(1)(a)(ii) from s22(1)(a)(ii) to act on behalf of the Applicants as their representative.

**SUMMARY OF ASIC'S RESPONSE**

5. ASIC recommends that Finance finalises the Applications as they do not disclose any 'special circumstances' within the meaning of s65(1) of the PGPA Act or *Resource Management Guide 401: Requests for*

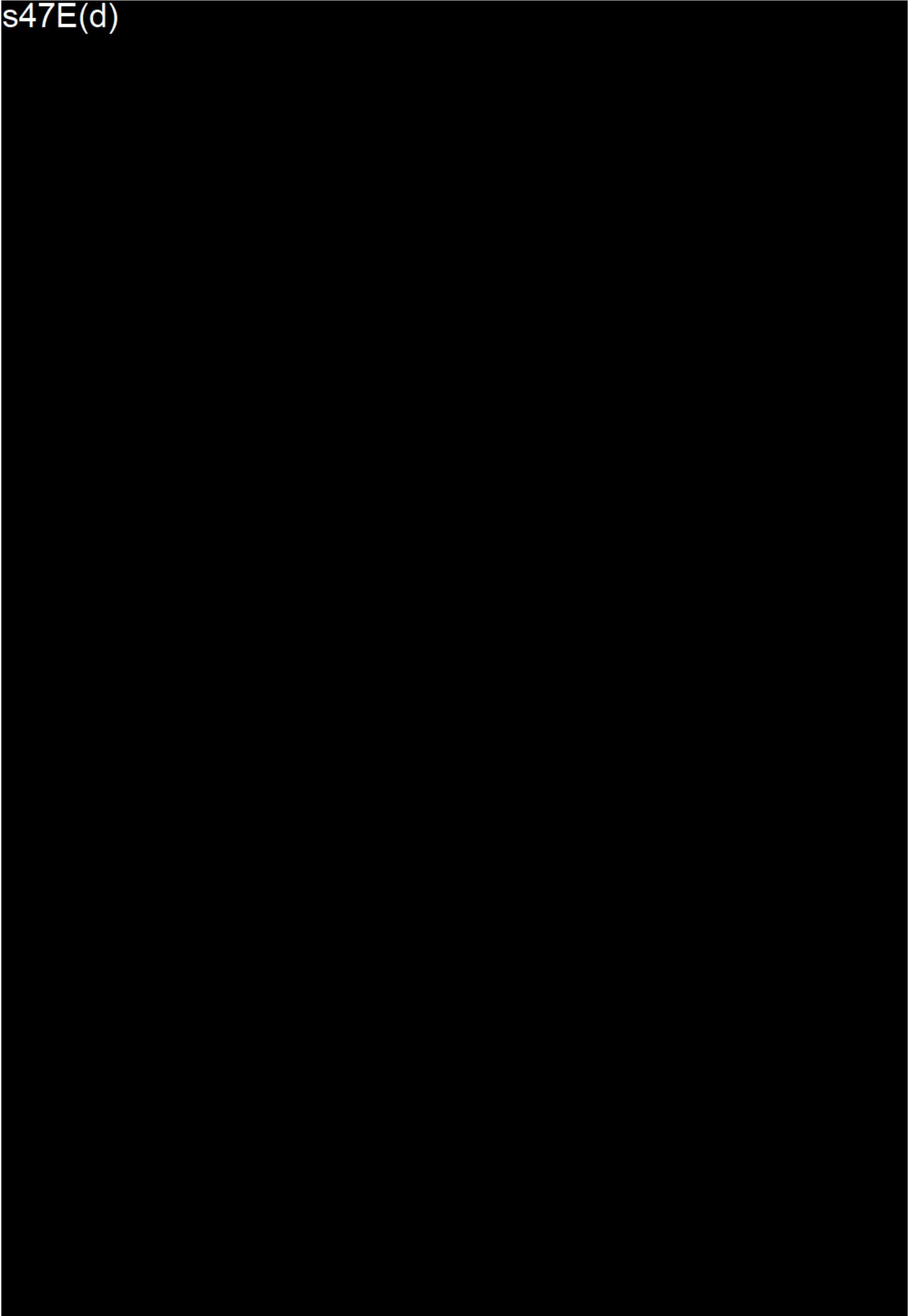
*discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013 ([RMG 401](#)).*

6. ASIC's steps in relation to SFS Global, Suncoast Financial and their s47F, were appropriate and in accordance with its statutory obligations. s47F, s37(2)(b), s47E(d), s47C  
[REDACTED]  
[REDACTED] In any event, the loss of the Applicants' investments in SFS Global and Suncoast Financial cannot be attributed to any acts or omissions by ASIC.

**BASIS OF CLAIM**

**s47E(d)**

s47E(d)



### **Victim Impact Statements**

14. ASIC notes that the Applications are supported by Victim Impact Statements. The §22(1)(a)(ii) Report states that the purpose of the Victim Impact Statements is *'to illustrate the severity of the misconduct perpetrated upon'* the Applicants.
15. ASIC is sympathetic to the suffering of the Applicants as a result of the losses of their investments in SFS Global and Suncoast Financial and considered each of the Victim Impact statements in the preparation of this submission in determining whether any special circumstances for the

purposes of s65(1) of the PGPA Act existed. For practical reasons, ASIC will not comment on any circumstances specific to the Applicants as referred to in their Victim Impact Statements.

## **STATUTORY FRAMEWORK FOR ACT OF GRACE PAYMENTS**

16. Subsection 65(1) of the PGPA Act sets out the statutory basis for the Finance Minister to authorise an act of grace payment to an applicant. It states:

*'The Finance Minister may, on behalf of the Commonwealth, authorise, in writing one or more payments to be made to a person if the Finance Minister considers if **appropriate to do so because of special circumstances.***

*Note 1: A payment authorised even though the payment or payments would not be authorised by law or required to meet a legal liability.*

*Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity's annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.*

*(emphasis added)*

17. The terms 'appropriate' and 'special circumstances' are not defined in the PGPA Act. However, ASIC understands that the act of grace payment scheme is discretionary and that it is intended to promote fairness and equity in certain circumstances.

18. RMG 401 states at paragraph 10 that examples of special circumstances which may make it appropriate to approve an act of grace payment include where:

- a. an act of an NCE has caused an unintended and inequitable result to the individual seeking the payment;
- b. Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the claimant's circumstances; or

- c. the matter is not covered by legislation or a specific policy, but the Commonwealth Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively.

19. RMG 401 also states:

*'3. The act of grace mechanism is generally a remedy of last resort and it is not used when there is another viable remedy available to provide redress in the circumstances giving rise to the application.*

*4. If other avenues exist for a person to receive financial assistance from the Commonwealth (such as existing legislation or schemes), it is recommended that those avenues are investigated before a request is made for an act of grace payment.'*

## **ASIC RESPONSE**

20. ASIC understands that the concerns expressed in the **s22(1)(a)(ii)** Report are:

- a. ASIC failed to perform the duties conferred on it by the ASIC Act, by allowing **s22(1)(a)(ii)** to operate an investment scheme while contravening numerous laws and legislative requirements;
- b. ASIC failed to regulate **s22(1)(a)(ii)** and take enforcement action against him, allowing him to operate without membership of an EDR scheme; and
- c. The Applicants are unable to obtain redress elsewhere.

21. In preparing its response, ASIC considered the statutory framework for act of grace payments and RMG 401, as referred to at paragraphs 16 to 19 above.

22. ASIC will address each of these concerns below.

### **Statutory objectives of ASIC**

23. ASIC regulates corporations, managed investment schemes, participants in the financial services industry and people engaged in

credit activities under a number of Commonwealth laws. These laws include the Act and the ASIC Act.

24. Section 1(2) of the ASIC Act sets out ASIC's objectives. It states that:

*'In performing its functions and exercising its powers, ASIC must strive to:*

*[...]*

*(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.'*

25. It is clear from the statutory language of s1(2) of the ASIC Act that ASIC generally does not operate under any legal duty to take any particular action in any given set of facts.

#### **ASIC's oversight in regulation and failure to take enforcement action**

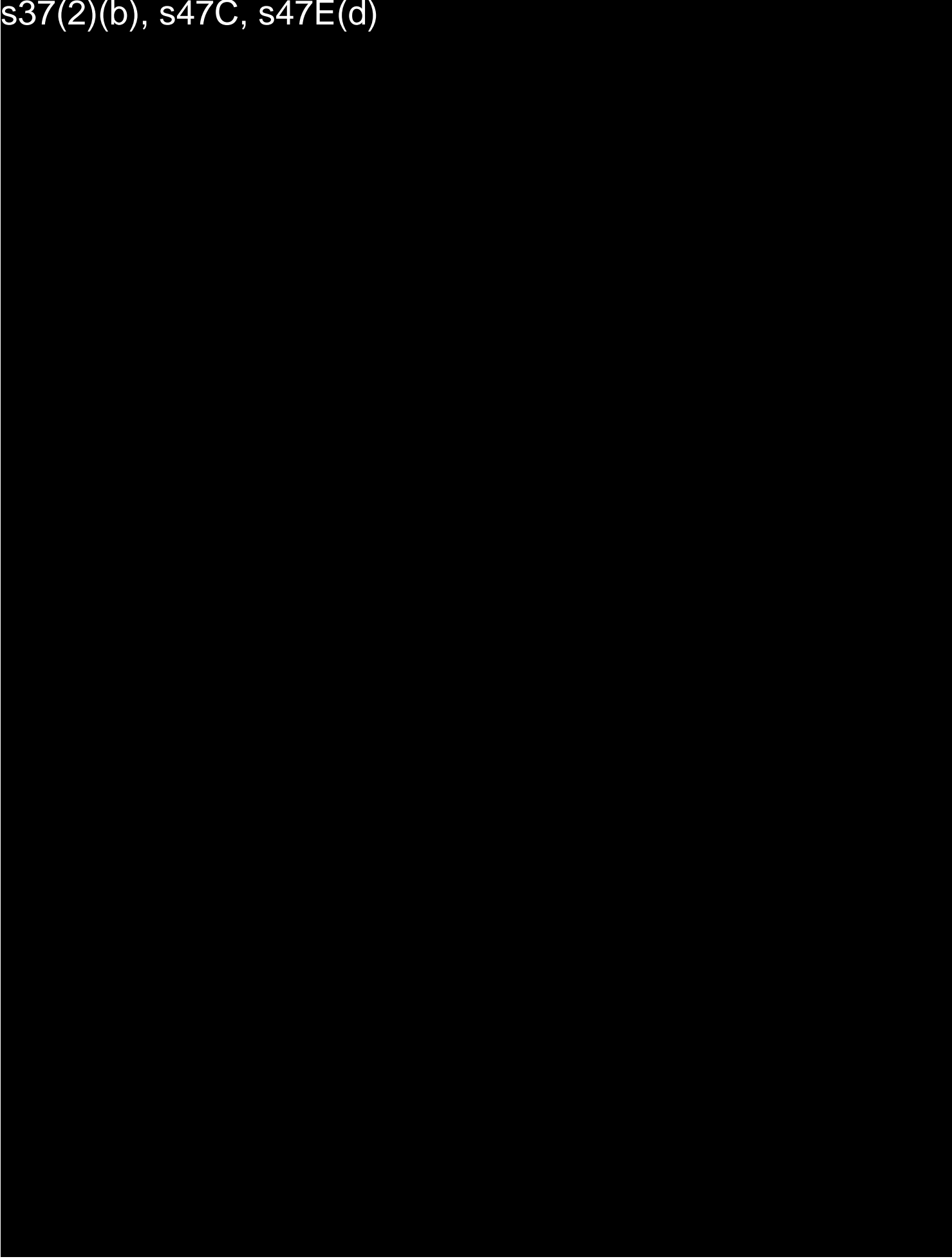
26. ASIC refers to *Info Sheet 151: ASIC's approach to Enforcement* ([INFO Sheet 151](#)) which sets out how ASIC selects matters for formal investigation.

27. INFO Sheet 151 states that ASIC considers the following issues when deciding whether to take enforcement action:

- a. ASIC's strategic priorities, taking into account matters such as the seriousness of the alleged misconduct;
- b. the regulatory benefits of pursuing the alleged misconduct;
- c. the issues specific to a case, such as the availability of evidence admissible in court and whether the alleged conduct is continuing; and
- d. alternatives to a formal investigation which might address ASIC's concerns more effectively, such as engagement with stakeholders and surveillance.

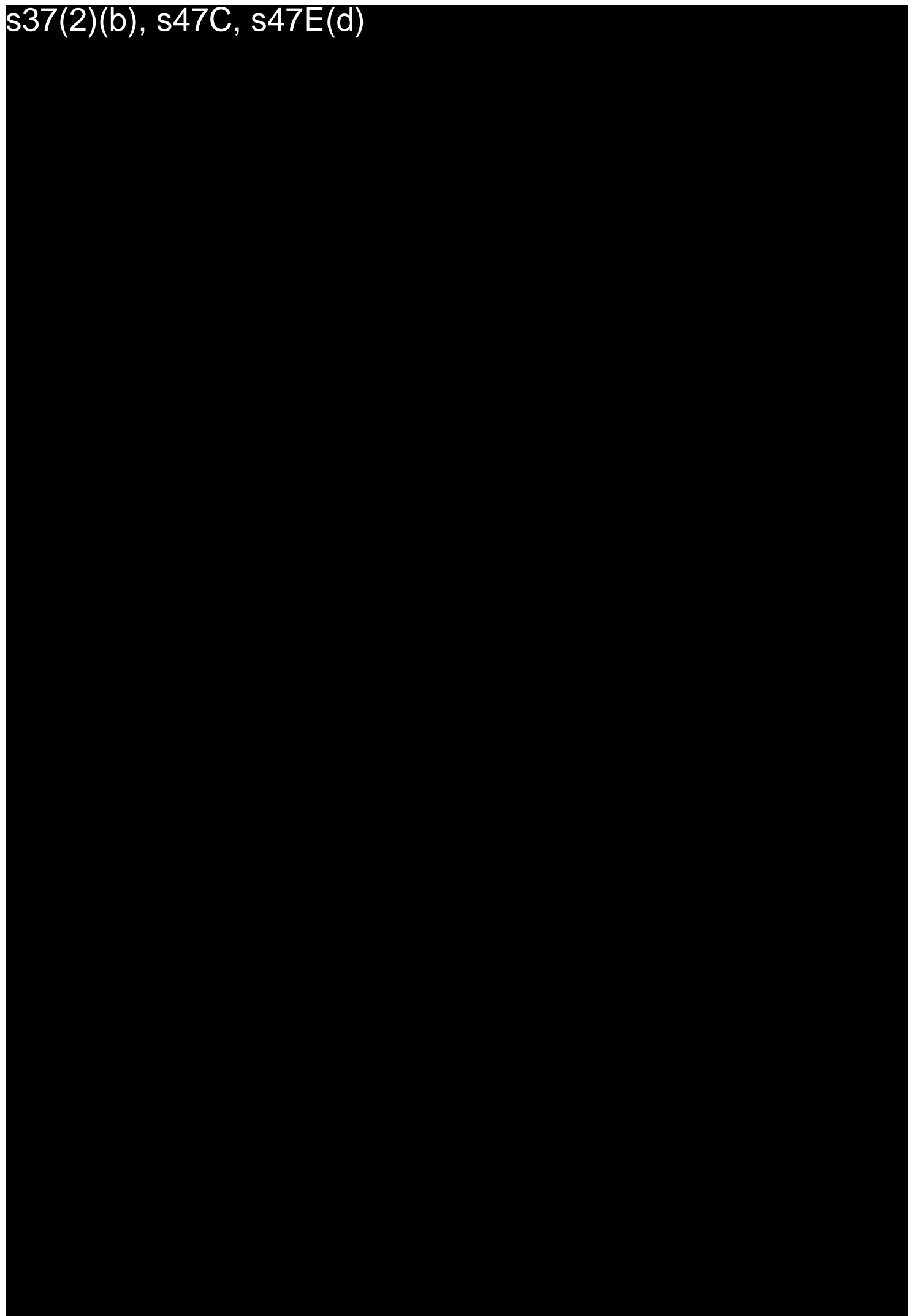
**ASIC action**

s37(2)(b), s47C, s47E(d)





s37(2)(b), s47C, s47E(d)





## Final Report

41. ASIC also notes the submission in the **s22(1)(a)(ii)** Report with respect to comments in the Final Report about ASIC's performance. ASIC's initial response to the Final Report is found on ASIC's website<sup>3</sup>. ASIC subsequently provided an update on the implementation of recommendations in the Final Report<sup>4</sup>. ASIC makes no further comment about this submission.

Yours faithfully,

**Australian Securities and Investments Commission**

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<sup>3</sup> [MR 19-020 Statement from ASIC Chair James Shipton on the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#)

<sup>4</sup> [MR 10-035 ASIC update on implementation of Royal Commission recommendations Report - ASIC update on implementation of Royal Commission recommendations - February 2019](#)