

New ASIC Chief is Frydenberg's white-collar defender

Treasurer Josh Frydenberg's decision to appoint Joe Longo as the new Chair of the Australian Securities and Investments Commission (ASIC) does not bode well for the Australian public. Longo's recent decision to drop ASIC's post-Royal Commission "why not litigate?" enforcement strategy is consistent with his history of ideological opposition to effective financial regulation and affinity with perpetrators of white-collar crime.

In his early career, Longo practised commercial and corporate finance law in New York. In 1988, he joined Western Australia-based Parker & Parker as a partner, specialising in corporate litigation and contentious regulatory matters, during which time he was a staunch advocate for white-collar defence. For example, in 22 November 1994 testimony to a parliamentary inquiry, Longo claimed it was "unreal" and "unworkable" to ascribe "corporate culture" to a company, although it had successfully been used for sentencing in the United States. Other legal professionals testified that the concept of "corporate culture" was used to hold companies liable for their policies and operations, and was key to establishing intent (essential to criminal prosecution).



ASIC chairman Joe Longo. Photo: Screenshot

A 4 March 1992 *Canberra Times* article, titled "ASC 'threat' to civil liberties", reported Longo had told a conference on regulatory enforcement that the Australian Securities Commission's (ASC, later renamed ASIC) "push to remove 'derivative use immunity' would remove people's right not to incriminate themselves". In a December 1992 paper published by the Australian Institute of Criminology, Longo demanded the immunity provisions be restored, despite acknowledging that ASIC's legal team said the immunity from prosecution had created "profound" difficulties in investigating suspected offences.¹

In the same paper, Longo claimed that a steady expansion of the ASC's investigative powers had occurred as an "over-reaction to instances of serious commercial misconduct", referring to the corporate crimes (which Longo called "excesses") of the 1980s. This "over-reaction" had "led to an erosion of the civil liberty rights not only of those involved in the management of the affairs of corporations, but to any body corporate being the potential target of an investigation, whether or not the public might in any way be adversely affected by its activities". Evidencing his ideological opposition to financial regulation, Longo wanted to re-draw some of the ASC's powers back to those envisaged in 1957.

Longo declared that "perceptions of the typical white-collar criminal" as "intelligent, wealthy, powerful ... business people, who are extraordinarily well placed to look after themselves", were misconceived. Longo claimed the "vast majority" of individuals suspected of commercial misconduct were probably of the middle class and would "have little or no capacity to stymie the investigative process" when up against the ASC's vast powers.

Longo's impassioned defence of the purportedly misunderstood white-collar criminal may have been more believable if he had not simultaneously served as the primary legal representative of one of Australia's most infamous financial criminals, Western Australian businessman Alan Bond. Longo's law firm, Parker & Parker, had a long history of association with Bond, whose financial crimes were part of the scandals of "WA Inc", the era of widespread financial corruption involving state government officials and Perth's biggest businessmen in the 1980s.

On 5 January 1995 consent was granted for court proceedings, which involved the WA state government as a creditor, to commence against banks involved in the collapse of Bond's Bell Group. One month later, Longo joined the ASC's WA regional office as a "litigation consultant". Although concerns were raised in federal parliamentary hearings about possible conflicts of interest, the ASC claimed Longo would not be involved in any matters related to its investigations of Bond's companies. WA taxpayers shouldered approximately \$328 million in legal costs over the marathon 30-year court case, which was only finalised in August 2020.

Additionally, in 1997, after 22 ASC investigators spent four years investigating and produced 1.2 million pages of evidence, Alan Bond finally pleaded guilty in the expectation of receiving a light sentence, which he did. Veteran Australian journalist Paul Barry calculated that Bond spent roughly one day behind bars for every million dollars he had stolen.

Poacher turns gamekeeper

In September 1996 Longo was promoted to the ASC's National Director of Enforcement, where he was responsible for the overall direction and coordination of the ASC's enforcement activities for nearly

five years.

Media headlines around Longo's tenure are demonstrative of the regulator's performance: "Corporate watchdog: more bark than bite" (1996); "ASC verdict: this watchdog lacks bite" (1998); and Adele Ferguson's blistering assessment in "The watchdog no one fears", for the 1 September 2000 *Australian Financial Review*.

Ferguson reported that in the recent years under Longo, the ASC (renamed ASIC in 1998) had "routinely been described as a toothless tiger, a spineless watchdog, a gummy shark and a Constable Plod when it comes to enforcement". The chairman of CPA Australia's Insolvency and Reconstruction Centre of Excellence, George Lopez, reported that he was constantly handing files to ASIC with examples of corporate fraud and malpractice. However, Lopez lamented, "[n]othing is ever done. ... It is a cause of constant frustration and demotivation that we spend thousands of hours investigating and uncovering matters of fraud, breaches of the Corporations Law, evidence of abuse by directors, and evidence of directors using their position to benefit themselves and associated entities, and we report it all to ASIC and nothing happens."

During Longo's tenure, of the 7,904 complaints ASIC received in 1998-99, it only investigated 233. Over a third of these turned out to be serious crimes. Ferguson reported the catch cry of ASIC's surveillance and enforcement divisions was "glorious defeats"—believing that "headline" investigations and prosecutions should be pursued even if the success rate was poor. Similarly, Longo focused on "regulatory impact", saying there was no point investigating a case that didn't matter. Troublingly, it appears that despite the poor track record of this approach at changing corporate conduct, today Longo's ideology hasn't changed—on 2 September 2021 *The Australian* reported "[t]he Longo view is that ASIC cannot run every case, nor can it investigate everything. Action is intended to be high-impact."

Under Longo's enforcement leadership, Ferguson recounted a laundry list of high-profile cases which failed on technicalities when ASIC's prosecutors had improperly presented the case, or from ASIC's bureaucratic blunders or investigators' foot-dragging. Additionally, Ferguson reported concerns over ASIC's dubious decisions to drop high-profile cases which involved individuals connected to Australian parliamentarians.

Hauntingly reminiscent of the Sterling First catastrophe which occurred decades later, the 6 December 2000 *Sydney Morning Herald* reported in "While the watchdogs slept" that a pensioner from Perth had been defrauded out of his life savings by a serial scammer who had stolen a total of \$20 million from the Australian public. Despite having received complaints about the scammer since 1993, ASIC had refused to investigate or take action. While questioning Longo over the matter during Senate Estimates, *SMH* reported, Labor Senator Stephen Conroy had remarked his office was "clogging up because people are beginning to feel that the only way to get your attention is to come to a politician". Longo acknowledged the matter was "regrettable" but claimed that ASIC had issued a public warning on the scheme. However, the *SMH* reported this was untrue.

In parliamentary hearings during Longo's tenure, he was repeatedly grilled by Senator Conroy over ASIC's poor performance. This included Conroy's questioning of Longo's perplexing enforcement decisions—such as reducing corporate surveillance and compliance checks which other ASIC officials said were an effective deterrent, and declining to investigate obvious red flags of insider trading. When reading Hansard transcripts, Longo's talent for smooth dissembling is apparent.

From Deutsche Bank 'cesspit' to head of ASIC

In 2000, Longo left ASIC and briefly returned to Parker & Parker (now Herbert Smith Freehills), before joining the notorious Deutsche Bank in 2002 as General Counsel for the AsiaPacific, and later Europe and the UK, where he was based in London from 2016.

During Longo's 17 years at Deutsche, the bank was mired in scandal, paying hundreds of millions of dollars in fines for financial misconduct. The 30 April 2021 *AFR* reported that upon Longo's 2021 appointment to head ASIC, former Treasury official John Hempton described Deutsche Bank as "a cesspit walking from one investment banking fraud to another and where the legal team would have gasped for breath before walking into another pool of pus ... I don't know anything about Joe Longo. He may have spent seventeen years in that moral vacuum trying to clean the mess up from inside but that case has not been made".

Longo left Deutsche Bank in March 2019, months before its July restructuring and mass lay-offs, re-joining Herbert Smith Freehills as a senior advisor.

Shortly thereafter, Longo was appointed to the advisory committee for the Australian Law Reform Commission's (ALRC) review of Australia's corporate criminal responsibility regime. The review, which was the first of its kind since passage of the *Criminal Code Act 1995*, was initiated by the government in April 2019, one month after legislation introducing extraordinary new penalties and powers for ASIC came into effect. Former ASIC Deputy Chair and enforcement head, Daniel Crennan QC, said this legislation entitled ASIC to pursue "extremely long custodial sentences" and "very high, crippling" financial penalties. As reported by the 29 April 2020 *AFR*, in the period of July-December 2019, criminal charges led by ASIC surged almost 300 per cent.

The ALRC's final report, which acknowledges Longo as a member of its advisory committee, contains a number of recommendations which, if enacted, would appear to soften the blow of ASIC's new enforcement powers. The ALRC report was tabled in Parliament on 31 August 2020, weeks before Frydenberg initiated the ousting of ASIC Chair James Shipton and Deputy Chair Daniel Crennan over a contrived expenses scandal in October 2020. Frydenberg then installed Longo as ASIC's new Chair, where he "made it clear at his first public appearance he will be the 'business-friendly' regulator craved by Treasurer Josh Frydenberg", as reported by the 3 June 2021 *AFR*. ([AAS, 23 June 2021.](#))

Regulatory déjà vu

A few months after Longo's 1 June 2021 appointment as the new head of ASIC, it is obvious that the corporate regulator is intended to regress to the "spineless watchdog" it was during his leadership two decades ago.

For example, Longo helped to introduce ASIC's "Enforceable Undertakings" (EUs) in 1998. EUs were blasted during the 2018-19 Financial Services Royal Commission for being an ineffective slap on the wrist. Under ASIC Chair James Shipton, EUs dropped dramatically, from 45 in the two years prior to the Royal Commission, to zero in the financial year ending June 2020. Now that Longo is back at ASIC, he recently confirmed a renewed focus on enforceable undertakings, likely delighting would-be corporate crooks.

In Adele Ferguson's 2000 article, "The watchdog no one fears", she reported that one solution to address ASIC's dismal performance would be to separate its regulation and enforcement divisions. Almost twenty years later, James Shipton did precisely that—appointing Crennan to lead a newly-created Office of Enforcement, supervised by an Oversight Committee comprising senior legal professionals, academics and a senior law enforcement officer independent of ASIC. However, after ousting Shipton and Crennan, Treasurer Josh Frydenberg restructured ASIC and gave Longo sole responsibility for all operational matters, effectively undoing Shipton's separation of ASIC's dual roles of enforcer and regulator. ASIC is seemingly back to where it was under vintage Joe Longo.

This is the second time Joe Longo has switched from poacher to gamekeeper, seemingly motivated by his ideological opposition to strong and effective financial regulation. At the 1992 Australian Institute of Criminology conference that complained about the "massive overreaction" to the corporate crimes of the 1980s, Longo told the audience that the ASC's "rush for regulatory power should be slowed down".² Within a few years, Longo had placed himself in a position to do just that. As head of ASIC's enforcement, Longo presided over years of regulatory failings which let white collar criminals fleece the Australian public and get away unscathed.

Twenty years later, there is a troubling déjà vu about Longo's reappointment to ASIC. In the wake of public outrage over financial crimes exposed in the banking royal commission, ASIC received expanded powers which enabled Shipton's wave of court-based enforcement against corporate crime. Now Longo has been brought back, presiding over the dismantling of ASIC's powers.

Australians must join the campaign to demand a Senate Inquiry into ASIC—we must expose the government's agenda to strip Australians of financial regulatory protection.

Footnotes

¹ Joseph Longo, "The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State", *Business Regulation and Australia's Future*, Australian Institute of Criminology, Dec. 1992.

² Margot Black, "Securities Commission under fire", *The Australian Jewish News*, 13 Mar. 1992.

By *Melissa Harrison*, *Australian Alert Service*, 15 September 2021