Senate inquiry into the performance of the Australian Securities and Investments Commission

Main submission by ASIC

October 2013
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Executive summary

1 The Australian Securities and Investments Commission (ASIC) has a growing regulatory remit and operates in a global environment that is both complex and dynamic.

2 The forces of market-based financing, financial innovation-driven complexity and globalisation that are converging on our financial system create opportunities to fund economic growth; however, they also create risks.

3 Our challenge as a regulator is to respond quickly to the matters that require our attention, inform and educate investors and financial consumers so they can make confident and informed decisions, and ensure we have the capacity to effectively regulate financial markets, financial products and financial services providers, within the resources we have.

4 In this challenging environment, we remain committed to achieving our key strategic priorities to ensure:
   (a) confident and informed investors and financial consumers;
   (b) fair and efficient financial markets; and
   (c) efficient registration and licensing.

5 In meeting our strategic priorities, we carry out work in a number of areas, including:
   (a) achieving compliance with and enforcing the law;
   (b) promoting financial literacy;
   (c) facilitating business; and
   (d) detecting and responding to market issues and risks.

ASIC’s submission

6 This submission sets out:
   (a) ASIC’s structure, strategic priorities and performance (see Section A);
   (b) the origins and evolution of ASIC’s enabling legislation (see Section B);
   (c) ASIC’s accountability framework (see Section C);
   (d) ASIC’s collaboration with other regulators and law enforcement bodies (see Section D);
   (e) ASIC’s complaints management policies and practices, including improvements to our processes (see Section E);
(f) ASIC’s approach to compliance and enforcement, with a focus on our regulatory toolkit (see Section F);

(g) how ASIC works with whistleblowers (see Section G);

(h) ASIC’s response to market problems in the financial advice industry (see Section H); and

(i) options for overcoming regulatory barriers and gaps in relation to financial advice, whistleblowers, ASIC’s licensing toolkit, ASIC’s investigative toolkit and ASIC’s enforcement toolkit (see Section I).

Appendices are also attached to this submission setting out:

(a) ASIC’s responses to issues raised in other submissions to the inquiry (see Appendix 1); and

(b) an outline of the compensation and dispute resolution framework for the financial services industry and credit industry (see Appendix 2).

ASIC has provided two previous submissions to the inquiry:

(a) the Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters provides an overview of ASIC’s actions on Commonwealth Financial Planning Limited (CFPL), as well as context about our work in the financial advice industry; and

(b) the Submission by ASIC on reforms to the credit industry and ‘low doc’ loans deals with ASIC’s role in regulating consumer credit both before and after the primary responsibility for credit regulation shifted from the states to the Commonwealth in 2010.

Given the significance of ASIC’s handling of the CFPL matter in the origins of this inquiry, we have focused primarily on issues affecting retail financial services. We are, of course, happy to assist the Senate Economic References Committee with any additional questions members of the Committee may have in relation to any aspect of our work or performance.

Following the recent federal election, we are also considering our contribution to any broader review of the financial system that may be established. We are considering the current regulatory boundaries, our regulatory toolkit and the regulatory framework for particular sectors. We look forward to making a detailed submission to any financial system inquiry.

ASIC’s performance

ASIC welcomes this inquiry into our performance. Given the breadth of the inquiry’s terms of reference we see it as an opportunity to provide the Government, the financial services sector and the community with a better
understanding of the results we have achieved and the tools and processes we use to fulfil our regulatory role.

12 We are proud of our performance track record. Our financial system performed better than nearly every other jurisdiction in the world during the global financial crisis and ASIC worked closely and effectively with other regulators and the Government during that period. We are world renowned for having safe, stable, high-functioning and well-regulated financial markets.

13 We work hard and use a variety of tools to improve market outcomes, minimise losses and lift investor and financial consumer confidence.

14 We work to promote investors’ and financial consumers’ understanding of financial markets and market risk through our financial literacy programs: see paragraphs 121–133. We also promote high standards of disclosure through our guidance to industry (see paragraphs 98–101), and our related compliance enforcement work: see paragraphs 71–94.

15 We take tough enforcement action where warranted. We pursue a range of different types of enforcement action, including criminal, civil and administrative actions. Section F provides a detailed account of our approach to enforcement.

16 Our role is not limited to taking enforcement action—we want to achieve permanent and systemic changes to behaviour. If we can do so by using other types of regulatory tools, we will. The other tools we use include engaging with industry, conducting surveillance of a sector, issuing guidance, negotiating outcomes and educating investors.

17 We are active in monitoring and promoting compliance with the law and appropriate standards of conduct. Section H sets out our work on improving the quality of advice in the financial services industry. Our earlier submission to this inquiry, Submission by ASIC on reforms to the credit industry and ‘low doc’ loans, outlines our efforts to improve standards in the credit industry.

18 Where we do not think our tools adequately deal with a regulatory problem we may suggest policy changes to Government. Section I outlines some areas where we have identified barriers to fulfilling our legislative responsibilities and obligations, and options for change to address them. These are also summarised in Table 1.

19 While it is not ASIC’s role to act on every complaint or individual dispute in the market, we are active in obtaining compensation where there has been large-scale misconduct: see Table 3.
We have also worked to shape Australia’s dispute resolution systems for the financial services industry and credit industry to ensure that investors and financial consumers have access to independent and fair dispute resolution and, where justified, compensation. Australia’s dispute resolution system is widely recognised as being of a very high standard. See Section E and Appendix 2 for a more detailed explanation of our approach to complaints and the role that external dispute resolution plays.

In the last three years we have:

(a) completed over 4,000 surveillances and 554 investigations with a broad range of regulatory outcomes;
(b) banned 168 individuals from providing financial services or credit services and 209 directors from managing a corporation;
(c) completed 73 civil and 79 criminal proceedings;
(d) entered into 56 enforceable undertakings with entities, as well as numerous other negotiated outcomes;
(e) cancelled, suspended or varied 19 Australian financial services (AFS) licences and Australian credit licences (credit licences);
(f) obtained over $349 million in compensation for consumers;
(g) handled over 2 million telephone queries and 200,000 email queries;
(h) participated in over 1,500 stakeholder meetings;
(i) launched our MoneySmart website with over 5 million Australians visiting the site;
(j) launched the new national Business Names Register, which saved business over $30 million in its first year;
(k) granted relief (waivers) from the law to over 3,000 applicants to facilitate their business transactions; and
(l) handled nearly 40,000 complaints about misconduct.

We have also released a considerable amount of guidance to the market on a broad range of topics. We have published a total of 148 information sheets, 215 regulatory guides and 375 reports to help our stakeholders understand their obligations and comply with the law.

We are committed to continually reviewing and improving the work we do and how we do it. To this end we have recently put in place new initiatives to better handle reports of misconduct by both the general public and by whistleblowers. These initiatives are discussed in more detail in Section G.
Investor and financial consumer losses

More than any other aspect of our role, ASIC’s performance as the enforcer of Australia’s corporate and securities laws attracts attention when people lose money in the financial system.

This is understandable—financial loss can cause very significant hardship for consumers and investors. ASIC sees the effect of such losses first hand, and we understand how such losses can affect the economic wellbeing and confidence of Australians. That is why a key focus of our regulatory activity is minimising the risk of loss for consumers and investors.

However, ASIC’s regulatory role does not involve preventing all consumer losses or ensuring full compensation for consumers in all instances where losses arise. Our underpinning statutory objectives, regulatory tools and resources are not intended to prevent many of the losses that investors and consumers will experience. This is true of every financial market regulator.

Broadly speaking, consumers and investors may experience loss for three reasons:

(a) market and credit risk;
(b) inappropriate conduct; and
(c) outright criminal misconduct.

These three sources of loss are discussed in more detail in paragraphs 52–58 in Section A.

None of these sources of loss can be removed absolutely and no financial regulator can prevent all losses from occurring:

(a) it would be highly undesirable to remove market risks that can result in losses from a market system, because this would substantially reduce growth and returns, and some uncertainty will always remain about a borrower’s future capacity to repay their loan; and
(b) while increasing regulatory activity through increased resources would reduce losses, the resources needed to remove all losses arising from inappropriate products/conduct and criminal conduct would require a level of regulatory intervention that is both highly intrusive and very expensive.

Our actions in relation to the Commonwealth Financial Planning Limited (CFPL) matter

Our work on Commonwealth Financial Planning Limited (CFPL) was central to the instigation of this inquiry.
As noted in paragraph 8, ASIC provided an initial submission to the inquiry on CFPL and related matters in August 2013, including an overview of our actions in relation to CFPL: see the Initial submission by ASIC on Commonwealth Financial Planning Limited and related matters to the Senate Economic References Committee.

Our work in relation to CFPL achieved a number of positive outcomes. We secured the payment of compensation in excess of $50 million, the banning of seven advisers and a wholesale change in the manner and culture in which advice is now provided by CFPL. We will be providing a further submission on this point later this year.

Despite the results we achieved in the CFPL matter, there continues to be a misapprehension that before ASIC commenced its investigation into CFPL we were not taking an active role in the matter. This view overlooks the wide range of other regulatory tools that we commonly use—a number of which we were using in the CFPL matter—in response to whistleblower complaints and wider concerns ASIC had about CFPL.

The view that we were inactive also disregards the fact that we do not generally publicly comment on whether we are looking at a matter until we have begun civil or criminal action. This is because public commentary can adversely affect future legal action. ASIC’s policy is to be as transparent as possible about the work we do and how we do it; however, there will be times when it is not possible or appropriate for us to comment about our work.

The fact that ASIC has not announced an investigation or commented on a matter should in no way be construed as meaning that ASIC is not taking action in relation to a market problem.

Our people and resourcing

Of course, the good work we do depends on the people who work at ASIC. They are our main asset and work hard to fulfil our strategic priorities.

What we are able to achieve also depends on our level of funding. Ensuring ASIC has adequate resources affects the strength and integrity of the financial system and the confidence of investors.

ASIC can only achieve what it is resourced to do. Funding levels should be set by reference to Government and community expectations of what ASIC should deliver and, as a result, what level of resilience they want in the financial system.
Options for change to address regulatory barriers and gaps

To address the inquiry’s terms of reference, we have identified issues we regard as barriers to fulfilling our legislative responsibilities and obligations, specifically focusing on the areas of relevance to this inquiry and the CFPL matter that initiated it: see Section I. If implemented, these proposals would improve ASIC’s ability to deliver on our legislative responsibilities and increase our effectiveness.

The barriers and gaps we have identified, and options for change to address them and improve ASIC’s effectiveness, are summarised in Table 1.

Table 1: Options for legislative and regulatory change to improve ASIC’s effectiveness

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<th>Issue</th>
<th>Regulatory change options for consideration by Government</th>
<th>Paragraph references in Section I</th>
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<td>Financial advice industry</td>
<td>Adviser competence through a national examination—introducing a system under which advisers would need to successfully pass a national examination before being able to give personal advice on Tier 1 products</td>
<td>See paragraphs 563–575</td>
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<td>The current system for training and assessing advisers is inadequate and standards need to be lifted</td>
<td>Mandatory reference checking—introducing a requirement for mandatory reference checking procedures in the financial advice industry</td>
<td>See paragraphs 576–583</td>
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<td>There are currently insufficient controls on ‘bad apple’ (problem) advisers in the financial services industry</td>
<td>Employee adviser register—requiring a register of employee representatives providing personal advice on Tier 1 products to be established</td>
<td>See paragraphs 584–593</td>
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<td>While we can ban a person from directly providing financial services or credit services, we cannot ban them from managing a financial services business or credit business</td>
<td>Controlling who manages the business—allowing ASIC to ban a person from managing a financial services business or credit business</td>
<td>See paragraphs 594–598</td>
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<td>Issue</td>
<td>Regulatory change options for consideration by Government</td>
<td>Paragraph references in Section I</td>
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<td>Whistleblowers</td>
<td><strong>Expanding the definition</strong>—expanding the definition of whistleblower in Pt 9.4AAA of the Corporations Act to include a company’s former employees, financial services providers, accountants and auditors, unpaid workers and business partners</td>
<td>See paragraphs 603–606</td>
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<td><strong>Expanding the scope</strong>—expanding the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate</td>
<td>See paragraphs 607–609</td>
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<td><strong>Protecting whistleblower information</strong>—amending the legislation so that ASIC cannot be required to produce a document revealing a whistleblower’s identity unless ordered by a court or tribunal, following certain criteria</td>
<td>See paragraphs 610–614</td>
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<td>ASIC’s licensing powers</td>
<td><strong>Changing the licensing tests</strong>—changing the licensing tests in s913 of the Corporations Act and s37 of the National Credit Act to ensure that ASIC can take all relevant factors into account when making a licensing decision</td>
<td>See paragraphs 615–623</td>
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<td>ASIC’s investigation and enforcement powers</td>
<td><strong>Search warrants</strong>—including a general power to issue search warrants in the ASIC Act</td>
<td>See paragraphs 624–631</td>
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<td><strong>Review of penalties</strong>—conducting a holistic review of criminal and civil penalties and the broader availability of infringement notices</td>
<td>See paragraphs 632–653</td>
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A  ASIC’s structure, strategic priorities and performance

Key points

ASIC contributes to Australia’s economic reputation and wellbeing by ensuring that Australia’s financial markets are fair and transparent, supported by confident and informed investors and consumers.

We do this through our work in a number of areas, including promoting compliance with and enforcing the law, assisting and providing guidance to our stakeholders, facilitating business, promoting financial literacy, and detecting and responding to market issues and risks.

As outlined in this section our performance in all of these areas is strong.

Given the significance of ASIC’s handling of the Commonwealth Financial Planning Limited (CFPL) matter in the origins of this inquiry, we have primarily focused on issues affecting retail financial services. We are happy to assist the Senate Economic References Committee with any additional questions members of the Committee may have about any aspect of our work or performance.

ASIC’s structure

ASIC is headed by a full-time Commission, whose terms and conditions of appointment are set out in the Australian Securities and Investments Commission Act 2001 (ASIC Act). ASIC currently has five Commissioners, including Chairman Greg Medcraft and Deputy Chairman Peter Kell. Greg Tanzer, John Price and Cathie Armour form the rest of ASIC’s Commission.

The Governor-General appoints the members of the Commission for a fixed term. Prospective members are nominated by the relevant Minister and must have knowledge or experience relevant to the areas we regulate.

The Commission is responsible for ASIC’s strategic direction and priorities. The Commission:

(a) makes decisions on matters within ASIC’s regulatory functions and powers that have strategic significance; and

(b) oversees the management and operations of ASIC as an Australian Government agency.

Individual Commissioners also have executive responsibility for particular stakeholder and enforcement teams. There are currently 12 stakeholder teams and four enforcement teams. Additionally, we have a Small Business Compliance and Deterrence team. Figure 1 provides an outline of ASIC’s corporate structure.
Figure 1: ASIC's corporate structure
ASIC’s strategic priorities and performance

ASIC’s strategic priorities are to ensure:
(a) confident and informed investors and financial consumers;
(b) fair and efficient financial markets; and
(c) efficient registration and licensing.

Resource allocation

Figure 2 shows the proportion of ASIC’s 2012–13 budget allocated to achieving each of our three priorities, and Figure 3 shows the proportion of this budget allocated to each of the tools we use to achieve these priorities—engagement, surveillance, policy advice, guidance, education and enforcement, as well as our registry responsibilities.

Note: Percentages are based on ASIC’s budgeted staff and supplier costs (totalling $341.2 million), which reflects ASIC’s 2012–13 budget, excluding statutory bodies, ASIC’s costs to support statutory bodies and implementation costs for new projects.
Our work to meet our strategic priorities

In meeting our strategic priorities, we carry out work in a number of areas, including:

(a) promoting compliance with and enforcing the law;
(b) assisting and providing guidance to our stakeholders;
(c) facilitating business;
(d) promoting financial literacy; and
(e) detecting and responding to market issues and risks.

Our performance in all of these areas is strong, and we are proud of our track record. Our financial system performed better than nearly every other jurisdiction in the world during the global financial crisis and ASIC worked closely and effectively with other regulators and the Government during that period. We are world renowned for having safe, stable, high-functioning and well-regulated financial markets.

Investor and consumer losses

More than any other aspect of our role, ASIC’s performance as the enforcer of Australia’s corporate and securities laws attracts attention when people lose money in the financial system.

This is understandable—financial loss can cause very significant hardship for consumers and investors. ASIC sees the effect of such losses first hand, and we understand how such losses can affect the economic wellbeing and confidence of Australians. That is why a key component of our regulatory activity involves minimising the risk of loss for consumers and investors.

However, ASIC’s regulatory role does not involve preventing all consumer losses or ensuring full compensation for consumers in all instances where losses arise. Our underpinning statutory objectives, regulatory tools, and resources are not intended to prevent many of the losses that investors and consumers will experience. This is true of every financial market regulator.

This is a very important issue that goes to the heart of what financial market regulation is intended to achieve, and thus to expectations about ASIC’s performance. Unlike prudential regulators, market conduct regulators such as ASIC do not have the same focus on preventing institutional collapse and the losses this may bring. In addition, our market-based system for investment and for capital raising, which has served Australia’s development well, inevitably involves investors assuming an amount of risk in order to make a return.

Broadly speaking, consumers and investors may experience loss for three reasons:

(a) market and credit risk;
(b) inappropriate conduct; and

(c) outright criminal misconduct.

**Market and credit risk**

Market risk is an inherent feature of financial markets and a fundamental feature of market economies. Taking on risk can lead to reward, but it can also result in losses. The effect of such losses can be exacerbated when investors and financial consumers do not understand the products they buy, or when potential losses are not mitigated by an appropriate degree of diversification. While investors receive disclosure of market risks, there is no guarantee that they will understand such risks.

Consumer borrowing also inevitably involves risk in that it requires a judgement about capacity to repay the borrowed funds in the future, either from savings or expected income. Where borrowed funds are used for investment, the loan may need to be repaid from the returns on that investment. None of those sources of repayment is certain. The consumer benefits from having the borrowed funds in the present but risks not being in a position to repay in future.

**Inappropriate conduct**

While some investors and financial consumers may take on risk through their own choices, others may take on inappropriate risk after receiving poor advice, seeing misleading or deceptive advertising, reading defective disclosure documents, or being subjected to unconscionable selling practices. Factors behind this could include adviser incompetence, conflicts of interest, or inadequate compliance systems. ASIC seeks to reduce the incidence of such conduct, but, given the number of product and service providers operating within the financial system, conduct below the appropriate standard will inevitably occur.

**Outright criminal misconduct**

Investors and financial consumers may suffer losses because of the outright misconduct of operators that are within the industry or are external to it (e.g. internet scams). Such misconduct can include fraud or other criminal behaviour. Inevitably, financial markets and large pools of savings will attract those with criminal intent.

ASIC responds quickly where we identify scams, and we have taken a number of innovative approaches to warn investors of the dangers, but regrettably much of this work will be reactive—that is, after some investors have lost money.
None of these sources of loss can be removed absolutely and no financial regulator can prevent all losses from occurring:

(a) it would be highly undesirable to remove market risks that can result in losses from a market system, because this would substantially reduce growth and returns, and some uncertainty will always remain about a borrower’s future capacity to repay their loan; and

(b) while increasing regulatory activity through increased resources would reduce losses, the resources needed to remove all losses arising from inappropriate products/conduct and criminal conduct would require a level of regulatory intervention that is both highly intrusive and very expensive.

ASIC’s work to minimise investor and financial consumer losses

While ASIC has a good track record of pursuing compensation, and there are a range of private options available to investors, it is also impossible to obtain compensation in all of the cases where loss has arisen.

At a practical level, in many cases money will have dissipated and it is particularly difficult to obtain investor money once it has been sent overseas.

From an economic perspective, it may be unwise to provide compensation as a matter of course for investment losses, especially when they arise from market risk. Investors and financial consumers should not be encouraged to take on inappropriately high levels of risk or to be less careful with their money in the expectation that compensation is automatic. This is why compensation schemes that do exist (such as in the superannuation system) typically have very carefully defined limits.

Despite this, we work hard to minimise losses and use different combinations of tools to address each of these sources of loss.

We work to promote investors’ and financial consumers’ understanding of financial markets and market risk through our financial literacy programs: see paragraphs 121–133.

We also promote high standards of disclosure through our guidance to industry (see paragraphs 98–101), and our related compliance and enforcement work: see paragraphs 71–94.

We take tough enforcement action where warranted. We pursue a range of different types of enforcement action, including criminal, civil and administrative actions. Section F provides a detailed account of our approach to enforcement.

Our role is not limited to taking enforcement action—we want to achieve permanent and systemic changes to behaviour. If we can do so by using other types of regulatory tools, we will. The other tools we use include
engaging with industry, conducting surveillance of a sector, issuing
guidance, negotiating outcomes and educating investors.

67 We are active in monitoring and promoting compliance with the law and
appropriate standards of conduct. Section H sets out our work on improving
the quality of advice in the financial services industry. The Submission by
ASIC on reforms to the credit industry and ‘low doc’ loans made to this
inquiry also outlines our efforts to improve standards in the credit industry.

68 Where we do not think our tools adequately deal with a regulatory problem
we may suggest policy changes to the Government. In recent years we have
raised the need for policy change in both the financial advice and credit
industries, and reforms were subsequently made: see Section H and the
Submission by ASIC on reforms to the credit industry and ‘low doc’ loans
made to this inquiry. Section I outlines some areas where we have identified
barriers to fulfilling our legislative responsibilities and obligations, and
options for change to address them.

69 While it is not ASIC’s role to seek to act on every complaint or individual
dispute in the market, we are active in obtaining compensation where there
has been large-scale misconduct: see Table 3.

70 We have also shaped Australia’s dispute resolution systems for the financial
services industry and credit industry to ensure that investors and financial
consumers have access to independent and fair dispute resolution and, where
justified, compensation. Australia’s dispute resolution system is widely
recognised as being of a very high standard. See Section E and Appendix 2
for a more detailed explanation of our approach to complaints and the role
that external dispute resolution plays.

Compliance and enforcement

71 Each year, we take a wide range of compliance and enforcement action to
enforce the law and deal with misconduct. Actions we take include
surveillances, negotiated outcomes, seeking compensation, and
administrative, civil and criminal action. We take these actions in order to
achieve long-term change in behaviour.

Surveillances

72 ASIC undertakes extensive surveillance to monitor the activities of
individuals and entities within our large regulated population. Within its
resources, ASIC takes a risk-based approach to surveillance, identifying
significant and strategically important industry participants and gatekeepers,
and directing surveillance resources towards the entities, products or
transactions:
(a) where the risk of non-compliance or misconduct is greatest; and
(b) where the non-compliance or misconduct will result in the greatest harm in the context of delivering against ASIC’s strategic priorities.

73 Since 2010, we have completed approximately 4,000 surveillances. As part of our commitment to improving transparency and increasing awareness of the work we do, we released the first snapshot of our surveillance work in September 2012. The scope of ASIC’s task in effectively monitoring conduct in the markets we regulate is indicated in Table 2, which provides information on the size of the regulated populations involved.

74 Table 2 shows the number of years it would theoretically take ASIC to cover the entire population through ‘high intensity’ surveillances (i.e. those lasting more than two days), based on the number of surveillances conducted during 2012–13. In practice, ASIC’s risk-based approach to surveillance means that some portion of the population would be touched multiple times, while others would not be touched at all. The data is indicative only.

Table 2: ASIC’s surveillance coverage of regulated populations

<table>
<thead>
<tr>
<th>Team*</th>
<th>Surveillance coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Advisers (29 staff)</td>
<td>3,394 Australian financial services (AFS) licensees authorised to provide personal advice:</td>
</tr>
<tr>
<td></td>
<td>• top 20—0.8 years on average</td>
</tr>
<tr>
<td></td>
<td>• next 30—1.8 years on average</td>
</tr>
<tr>
<td></td>
<td>• remaining 3,344—primarily reactive surveillances</td>
</tr>
<tr>
<td></td>
<td>1,395 AFS licensees authorised to provide general advice—reactive surveillances only</td>
</tr>
<tr>
<td></td>
<td>2 ASIC-approved external dispute resolution schemes—every year</td>
</tr>
<tr>
<td>Investment Banks (23 staff)</td>
<td>26 investment banks—once a year</td>
</tr>
<tr>
<td></td>
<td>250 hedge fund investment managers/responsible entities—11.3 years on average</td>
</tr>
<tr>
<td></td>
<td>43 retail over-the-counter (OTC) derivative providers—every year</td>
</tr>
<tr>
<td></td>
<td>7 credit rating agencies—every year</td>
</tr>
<tr>
<td>Investment Managers and Superannuation (40 staff)</td>
<td>483 active responsible entities:</td>
</tr>
<tr>
<td></td>
<td>• top 25 (70% of funds under management)—every 2 years</td>
</tr>
<tr>
<td></td>
<td>• 9 identified as most at risk of non-compliance—every year</td>
</tr>
<tr>
<td></td>
<td>• 91 responsible entities in sectors where risks have been identified or where we have concerns—varies from year to year</td>
</tr>
<tr>
<td></td>
<td>• remaining 358—primarily reactive surveillances</td>
</tr>
<tr>
<td></td>
<td>200 superannuation fund trustees:</td>
</tr>
<tr>
<td></td>
<td>• 5 identified as most at risk of non-compliance—every year</td>
</tr>
<tr>
<td></td>
<td>• remaining 195—primarily reactive surveillances</td>
</tr>
<tr>
<td></td>
<td>20 major custodians—2.9 years on average</td>
</tr>
</tbody>
</table>
### Surveillance coverage

<table>
<thead>
<tr>
<th>Team*</th>
<th>Description</th>
</tr>
</thead>
</table>
| Deposit Takers, Credit and Insurers (65.5 staff) | 173 authorised deposit-taking institutions (ADIs):  
  - big four banks—*every year*  
  - remaining 169—*13 years on average*  
141 insurers—*7 years on average*  
641 licensed non-cash payment facility providers—*primarily reactive surveillances*  
13 trustee companies—*7 years on average*  
5,688 non-ADI credit licensees (lenders and intermediaries) with 28,201 credit representatives—*37 years on average* |
| Corporations and Emerging Mining and Resources (65 staff) | 21,690 public companies, including 1,983 listed entities (excludes foreign companies):  
  - control transactions for listed entities—*all transactions*  
  - prospectuses—*a significant proportion every year*  
  - a small sample of entities in areas of emerging risk—*every year*  
Remaining entities—*reactive surveillances only* |
| Insolvency Practitioners (23.5 staff) | 685 registered liquidators—*3.6 years on average* |
| Financial Market Infrastructure (28 staff) | 18 authorised financial markets—*every year*  
6 licensed clearing and settlement facilities—*every year* |

* Data on staff numbers is indicative. See relevant sections of ASIC’s Annual Report (2013) for 2012–13 data. All staff figures are full-time equivalent employees and represent staff dedicated to respective populations, excluding Strategy and Policy, Corporate Affairs, Operations, People and Development and statutory bodies. Staff may be engaged in a variety of other tasks in addition to surveillance work.

We undertake surveillances to:

(a) assess compliance with the laws that we administer;
(b) identify and better understand problems that exist in the market;
(c) produce constructive change in the regulated populations; and
(d) enhance public confidence.

Through surveillances we engage with our regulated populations (often on a face-to-face basis) and actively monitor activity. This presence in the market increases the regulated populations’ awareness of the law and of the need to comply.

In many cases, we publish the findings of, and recommendations arising from, our surveillance work either in a media release or as a report. Publishing this information improves compliance levels, encourages awareness of statutory obligations, and may deter future contraventions: see case study 7 in Section F on term deposits.
In late 2012, ASIC conducted a surveillance of over 100 investor files relating to the establishment of a self-managed superannuation fund (SMSF) that were provided by financial planners and accountants. The files targeted were considered to be in higher risk categories through, for example, having lower balances or less diversified investments. Following our surveillance, we released Report 337 Improving the quality of advice given to investors (REP 337). The report discussed the findings of our surveillance as well as providing specific recommendations to advisers on steps to improve the quality of their SMSF advice.

Where particular concerns are discovered, depending on their nature, ASIC may address these concerns by working with the industry sector or with specific entities. Working with individual entities may involve a negotiated outcome or enforcement action. A specific problem may indicate a systemic issue—in which case, ASIC may initiate a further, broader surveillance to ensure compliance across a particular sector.

Negotiated outcomes

ASIC frequently deals with market misconduct by negotiating an outcome with an entity or individual. Negotiated outcomes, such as enforceable undertakings, can offer a faster, more flexible and effective regulatory outcome than could otherwise be achieved through administrative or civil action.

Since 2010, ASIC has entered into 56 enforceable undertakings with entities. Many of these enforceable undertakings have required entities to pay compensation to consumers, improve internal compliance arrangements, appoint an independent expert to oversee elements of the entity’s business and report back to ASIC on performance.

Case study 1: Stakeholder and enforcement teams working together to obtain an enforceable undertaking from Macquarie Equities Limited

Through a surveillance of Macquarie Equities Limited’s (MEL) compliance systems and client files, ASIC found MEL had failed to address recurring compliance deficiencies, including:

- instances of client files not containing Statements of Advice;
- advisers failing to demonstrate a reasonable basis for advice provided to the client;
- poor client records and lack of detail contained in advice documents; and
- lack of supporting documentation on file to determine whether there was a reasonable basis for advice provided to the client.
Working together, ASIC’s stakeholder and enforcement teams negotiated an enforceable undertaking, under which:

- MEL reviewed its Macquarie Private Wealth business, including its licence risk and operating model and systems, and its legal and regulatory obligations; and
- MEL was required to develop and implement, with the oversight of an independent expert, a plan to rectify licence risk management and compliance deficiencies.

See Media Release (13-010MR) *ASIC accepts enforceable undertaking from Macquarie Equities Ltd (29 January 2013).*

Through negotiating outcomes in appropriate cases, we can:

(a) provide compensation for affected investors and financial consumers that may not otherwise be obtained in a timely and cost-effective manner;

(b) specifically deter the entity involved from future instances of the conduct that gave rise to the undertaking;

(c) deter the rest of the industry from engaging in similar conduct by raising awareness of the conduct and the regulatory consequences;

(d) compel the entity to implement improved compliance arrangements, and change its culture monitored by an independent expert who reports to ASIC over an extended period of time to ensure that changes are in fact made;

(e) restrict the activities that the entity may undertake; and

(f) achieve specific regulatory outcomes far more quickly and cost-effectively than through court action.

**Compensation for investors and financial consumers**

In the past five years, ASIC has achieved significant compensation results for consumers. The top 10 compensation outcomes for consumers are listed in Table 3.

**Table 3: Top 10 compensation outcomes for consumers, 2008–13**

<table>
<thead>
<tr>
<th>Matter</th>
<th>Compensation ($ million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opes Prime—Australia and New Zealand Banking Group Limited (ANZ) (enforceable undertaking)</td>
<td>253.0</td>
</tr>
<tr>
<td>Storm Financial—damages (negotiated outcome with Commonwealth Bank of Australia (CBA))</td>
<td>135.6</td>
</tr>
<tr>
<td>Westpoint—auditors (compensation under s50 of the ASIC Act*)</td>
<td>67.5</td>
</tr>
</tbody>
</table>
Matter | Compensation ($ million)
---|---
Don Nguyen, Anthony Awkar, Alison White and Commonwealth Financial Planning Limited (CFPL) (negotiated outcome) | 50.0
Westpoint—State Trustees Limited as trustee for Market Street Mezzanine (compensation under s50 of the ASIC Act*) | 13.5
Bank of Queensland (BOQ) (negotiated outcome) | 12.0
Westpoint—Power Loan (court-ordered compensation) | 10.3
Primelife Corporation Limited (negotiated outcome) | 9.9
Westpoint—Professional Investments Services Pty Ltd (compensation under s50 of the ASIC Act*) | 6.0
Elders Insurance (negotiated outcome) | 5.2

* Under s50 of the ASIC Act, ASIC may run a group action to obtain compensation for investors who suffered loss from the same type of misconduct. Before initiating such action, ASIC has to consider whether it is in the ‘public interest’ to do so.

Our role in obtaining compensation for investors and financial consumers is difficult and challenging. In some cases, there is no money left to pay compensation or funds are held overseas. In these circumstances, there is no regulatory benefit in taking compensatory action under s50 of the ASIC Act or negotiating an enforceable undertaking to secure compensation.

ASIC and disadvantaged consumers

ASIC is conscious that disadvantaged Australian consumers face particular problems when accessing and using financial services and that they may be less likely to raise these problems with us or to pursue individual matters successfully through EDR or the courts.

Such consumers include Indigenous Australians, rural and remote residents, newly arrived migrants, people from lower socio-economic backgrounds and people living in the outer suburbs of large metropolitan areas. We pay particular attention to identifying and addressing their needs.

We do this by working closely with other agencies such as legal aid providers, financial counsellors and community legal centres that provide services to disadvantaged consumers. We have partnered with these organisations in a number of initiatives, and many are represented on our Consumer Advisory Panel. This facilitates the early identification of problems and issues.

We also have two outreach teams, a general one and a specific Indigenous outreach team. These teams reach out to disadvantaged consumers and communities to:

• provide targeted education and resources specifically designed for them;
• work with industry and other stakeholders to identify better ways to address their financial services needs;
• identify problems being experienced, including misconduct by financial services
ASIC and disadvantaged consumers

providers and credit service providers; and

• communicate these issues back to ASIC and work with other teams to identify and employ the appropriate regulatory tools for addressing them.

As part of our outreach activities we conduct ongoing rural, regional and remote visits and facilitate education sessions/pathways in every state and territory, in conjunction with other government departments and non-profit organisations.

We are also aware that young people and older Australians are particularly at risk, and seek specific ways to address their needs, such as the ‘MoneySmart Rookie’ education initiative for young people.

Our work to assist disadvantaged consumers has also led to a number of specific enforcement outcomes, including in relation to:

• inappropriate conduct in the provision of leases of white goods and electronic equipment;
• pay-day lending; and
• undue harassment in debt collection.

Changing behaviour

Beyond direct compensation, the outcomes ASIC achieves that result in changes of behaviour can have very tangible benefits for investors and financial consumers. For example, in case study 2 of RHG Mortgage Corporation, the direct payment of compensation to affected borrowers exceeded $3.3 million, but the impact of the agreement to reduce and remove future fees will generate even greater savings over the longer term.

Case study 2: Negotiated outcome—RHG Mortgage Corporation

Following an industry review of early termination fees and receiving a number of complaints specifically in relation to RHG Mortgage Corporation (RHG), ASIC became concerned that some of RHG’s discharge and early termination fees were unconscionable or unjust under the National Credit Code.

ASIC reached a negotiated outcome with RHG, under which:

• RHG provided refunds to 6,400 consumers totalling more than $3.3 million. Affected customers received refunds ranging from $50 to over $10,000, with the most common refund being $400.
• RHG agreed to reduce its discharge fees on existing loans and to the staggered removal of early termination fees for thousands of customers.

See Media Release (12-169MR) RHG customers refunded over $3.3 million (19 July 2012).

Similarly, in February 2012, ASIC achieved changes in the manner in which American Express Australia Limited charged default interest to its cardholders who were late in making payments. Those changes, which reduced the default rate of interest by up to 6% and reduced the period
during which the ‘default’ rate is imposed, have resulted in significant savings to cardholders who may be experiencing financial difficulty. These savings are ongoing: see Media Release (12-31MR) *American Express agrees to change credit card interest rate policy for defaulting cardholders* (24 February 2012).

**Administrative action (including bannings)**

Each year, ASIC undertakes a range of administrative actions to uphold the law and support our strategic priorities.

Since 2010, we have taken action to ban 168 individuals from providing financial services or credit services. In taking banning action, we remove the source of misconduct and consumer detriment from the marketplace, thereby addressing the risk of ongoing misconduct and future harm.

The top five matters since 2007 resulting in bannings or undertakings not to engage in financial services are listed in Table 4.

### Table 4: Top five matters resulting in bannings or undertakings not to engage in financial services, 2007–13

<table>
<thead>
<tr>
<th>Matter</th>
<th>Number of persons involved*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Westpoint</td>
<td>31</td>
</tr>
<tr>
<td>Hobbs</td>
<td>8</td>
</tr>
<tr>
<td>CFPL</td>
<td>7</td>
</tr>
<tr>
<td>Trio Capital</td>
<td>7</td>
</tr>
<tr>
<td>Storm Financial</td>
<td>5</td>
</tr>
</tbody>
</table>

* Includes bannings by administrative or civil action and enforceable undertakings.

ASIC may disqualify a director from managing a corporation for up to five years, where they have been a director of two or more failed companies in the past seven years. Since 2010, 209 directors have been banned by ASIC for an average period of 2.7 years. ASIC can also make an application to the court to disqualify a person from managing a corporation in some circumstances. Since 2010, nine directors have been disqualified by the court for periods ranging from 15 months to permanently (with an average period of 10.5 years). ASIC has also accepted enforceable undertakings from 10 directors not to act as a director for periods ranging from two years to permanently. Table 5 summarises these results.
### Table 5: Total number of directors disqualified from managing a corporation, 2010–13

<table>
<thead>
<tr>
<th>Type of matter</th>
<th>2010–11</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil</td>
<td>0</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Administrative</td>
<td>72</td>
<td>76</td>
<td>61</td>
</tr>
<tr>
<td>Enforceable undertaking</td>
<td>0</td>
<td>6</td>
<td>4</td>
</tr>
</tbody>
</table>

In 2012–13, we have also:

(a) taken stop order action in relation to 33 prospectuses;
(b) issued nine infringement notices; and
(c) cancelled, suspended or varied 13 AFS licences and 19 Australian credit licences.

#### Case study 3: AAA licence cancellation

In February 2013, ASIC cancelled the AFS licences of AAA Financial Intelligence and AAA Shares (in liquidation) after we found that the entities had comprehensively and repeatedly failed to comply with their legislative obligations and licence conditions.


#### Civil action

Where we see more serious contraventions of the law, we will often take civil action. Since 2010, ASIC has completed 73 civil proceedings, with outcomes ranging from declarations that individuals and companies have breached the law, orders disqualifying individuals from managing corporations and providing financial services, orders for the payment of a pecuniary penalty and/or compensation, and orders for the winding up of companies and schemes.

The challenges of pursuing civil action are discussed further in Section F.

#### Case study 4: Recent successful civil outcomes

Recent successful outcomes of civil actions include:

- declarations of contravention against seven directors of Centro Properties Group and Centro Retail Group for breaches of directors’ duties (see Media Release (11-125MR) Decision in Centro civil penalty case (27 June 2011));
- declarations that Camelot Derivatives Pty Limited and its sole director, Neil King, engaged in misleading and deceptive conduct in relation to the ability of its clients to generate significant returns from investments
in an options trading market (see Media Release (12-78MR) ASIC obtains Federal Court order banning derivatives trading director from providing financial services for six years (23 April 2012));

- orders for the payment of pecuniary penalties and disqualification orders against former non-executive directors and the company secretary of James Hardie Industries Limited (see Media Release (12-275MR) Decision in James Hardie penalty proceedings (13 November 2012));

- orders permanently banning David Hobbs from providing financial services and from managing a corporation following his role in illegal offshore schemes (currently under appeal). In the same matter, three advisers were jailed following criminal proceedings and a further three people were disqualified from managing corporations and from providing financial services (see Media Release (13-031MR) Ponzi scheme ‘mastermind’ handed record penalty (21 February 2013));

- orders banning Melinda Scott from providing any financial services and from managing corporations for 25 years after she defrauded clients of more than $3.6 million over eight years (see Media Release (12-302MR) ASIC obtains court orders permanently banning Sydney financial adviser (4 December 2012));

- orders against the operators of a Gold Coast-based unlicensed financial services business, preventing it from carrying on its activities after an investment scam resulted in 37 investors losing approximately $680,000. ASIC alleged that West Trade Group Pty Ltd, West Trade Cars Pty Ltd, West Two Pty Ltd and its directors Tiffany Lea O’Donnell, Russell John Lewis and John Steven Pitcher used cold calling and a website to induce investors to deposit funds into a number of bank accounts with the promise that funds would be used to buy shares on behalf of investors and generate profits well above market returns (see Media Release (12-157MR) ASIC obtains court orders against Gold Coast-based investment scam (5 July 2012)); and

- orders prohibiting Melbourne liquidator Andrew Leonard Dunner from being registered as a liquidator for five years. The court found that Mr Dunner had failed to adequately investigate the circumstances and affairs of companies to which he was appointed, had inaccurately reported to ASIC and creditors, and that he had drawn remuneration in excess of $600,000 without appropriate approval or adequate supporting documentation (see Media Release (13-239MR) Federal Court indicates Melbourne liquidator should be banned for 5 years (30 August 2013)).

Criminal action

Where we see serious conduct that is intentional, dishonest or highly reckless, we may take criminal action. Since 2010, 79 criminal proceedings have been completed. Outcomes range from the imposition of fines, good behaviour bonds and community service to jail terms.

The challenges of pursuing criminal action are discussed further in Section F.
Case study 5: Recent successful criminal outcomes

Recent successful outcomes of criminal actions include:

- sentencing of former Chartwell Enterprises director Graeme Hoy to 13 years and nine months imprisonment after pleading guilty to 44 deception charges. Former company secretary Ian Rau was sentenced to two years and seven months imprisonment on eight charges (see Advisory (11-55AD) Chartwell director Graeme Hoy sentenced to jail for 13 years and nine months for one of Australia’s largest Ponzi schemes (23 March 2011));

- sentencing of Fincorp Chairman and CEO Eric Krecichwost to three years and six months imprisonment for dishonest use of his position as a company director with the intention of gaining an advantage for himself and others (see Media Release (11-78AD) Fincorp director imprisoned for dishonesty offences (8 April 2011));

- sentencing of Peter Couper, the former CFO of the parent company of Bill Express, to 22 months imprisonment following an ASIC appeal against a suspended jail sentence. The sentence was imposed on Mr Couper over his role in the collapse of the payments processor. Mr Couper was sentenced to 22 months in jail, to be released after 60 days, and fined $10,000 (see Media Release (13-077MR) ASIC appeal sees former CFO jailed (10 April 2013));

- sentencing of Nicholas Glynatsis, a former tax consultant, on nine charges of insider trading following a guilty plea. Mr Glynatsis was initially sentenced to two years imprisonment to be served by way of intensive correction order. In June 2013, the NSW Court of Criminal Appeal upheld a prosecution appeal that the original sentence was manifestly inadequate and re-sentenced Mr Glynatsis to imprisonment for a total period of 21 months with a minimum term (involving full-time custody) of 12 months. Mr Glynatsis also consented to a pecuniary penalty order of $50,826 to the Commonwealth representing total profits from his trading (see Media Release (13-133MR) Prosecution appeal sees insider trader sent to jail (7 June 2013));

- sentencing of the former director of investment manager Astarra Asset Management Pty Ltd, Shawn Richard, to three years and nine months imprisonment with a minimum of two years and six months, following a guilty plea. Mr Richard was an investment manager of the Astarra Strategic Fund and Astarra Superannuation Plan, which were part of the Trio group of companies. Mr Richard also entered into an enforceable undertaking which permanently prevents him from working in financial services or from managing a corporation (see Advisory (10-261AD) Former Astarra investment manager pleads guilty to dishonest conduct (7 December 2010); Media Release (12-116MR) ASIC provides update on Trio (5 June 2012));

- sentencing of the former CEO of Sonray Capital Markets Pty Ltd, Scott Murray, to a minimum of two years and six months imprisonment after pleading guilty to charges of false accounting involving fictitious deposits, false withdrawals, theft, obtaining a financial advantage by deception and misleading an auditor (see Media Release (11-222MR) Former Sonray CEO jailed (14 October 2011)); and
• sentencing of former company director and financial adviser Simon Finnigan to nine years imprisonment after pleading guilty to nine charges of dishonest conduct relating to a financial product or financial service (see Advisory (11-304AD) Sydney company director sentenced to jail (16 December 2011)).

Assisting and providing guidance to our stakeholders

95 We work very closely with our diverse range of stakeholders to achieve our strategic priorities and to understand developments in the markets we regulate. In 2012–13, we participated in over 600 stakeholder meetings.

96 Our recent interactions with stakeholders have included a series of national roadshows on financial education for young people, workshops and training programs for Indigenous consumers, national roadshows on the implementation of the Future of Financial Advice (FOFA) and Stronger Super reforms, and consultation with the banking sector about the implications of the Basel III reforms for the marketing of term deposits.

Taking the lead on FOFA reforms

ASIC has undertaken a significant program of work to prepare industry for the commencement of the FOFA reforms.

We held a series of public FOFA workshops in Brisbane, Sydney, Melbourne, Hobart, Adelaide and Perth in early 2013. The workshops focused on practical advice about the implementation of FOFA. At the workshops, senior staff from ASIC’s Financial Advisers team provided an overview of the legislation, and detailed ASIC’s approach to FOFA, including enforcement and our facilitative approach.

The audience was able to ask questions and be involved in an interactive panel on the practical application of ASIC’s policy. The interactive panel featured leading industry participants. Over 1,200 industry participants attended the session.

97 We have a structured program of periodic liaison meetings with key industry bodies. We also regularly meet with stakeholders on an individual basis. For example, during the past financial year, we visited 24 new AFS licensees to build relationships with them and to help them understand and meet their obligations. During our visits, we asked questions about the licensees’ general business model, their advice processes and their approach to risk and compliance. As a result of the positive feedback we received, we will be conducting similar visits this financial year.

98 We also regularly provide guidance to assist our industry stakeholders. The legislation we administer sets broad principles for how our industry stakeholders should conduct themselves. In many cases, specific guidance from ASIC on how to apply these principles in particular circumstances is helpful and much welcomed.
Our guidance is only settled after an extensive process of consultation with all of our stakeholders, including industry, investors and financial consumers, and other government departments and agencies. We also comply with the Government’s Best Practice Regulatory Requirements, including undertaking regulatory impact assessment: see paragraphs 214–215 in Section C for more details.

We provide guidance to our stakeholders in a number of circumstances, including:

(a) to help industry comply with new legislation;
   Note: For example, Table 21 outlines the guidance we provided to industry to comply with significant reforms to the regulation of the financial advice industry.

(b) where industry asks us for guidance on how the existing law applies to a particular situation;

(c) where we become aware of a novel situation and there is uncertainty about how the existing law applies; and

(d) where we detect a lack of compliance with the law that is systemic and relates to industry not understanding what the law requires of them.

We currently have a total of 148 information sheets, 215 regulatory guides and 375 reports on a wide range of issues to help our stakeholders. All of these publications are available on our website.

Facilitating business

ASIC plays a very active role in facilitating Australian business. We are committed to continually improving our systems and processes to create more efficient registration and licensing for business. We also proactively look for ways to save business time and money. Without ASIC undertaking this role, there would be a major impact on Australian businesses, financial markets, and the broader economy.

Using our relief powers to facilitate business

ASIC has powers under the legislation we administer to vary or set aside certain requirements of the law. ASIC’s policy on the use of these powers is outlined in Regulatory Guide 51 Applications for relief (RG 51).

ASIC seeks to facilitate business transactions by granting relief (waivers) from the legislation we administer where there is a net regulatory benefit, or any regulatory detriment is minimal and is outweighed by the commercial benefit.
We regularly publish reports summarising examples of situations where we have exercised, or refused to exercise, our exemption and modification powers for participants in the capital markets and financial services industry who are prospective applicants for relief. In 2012-13 ASIC received 3,094 applications for relief. Of these, 2,047 have been approved, 358 have been refused, 318 have been withdrawn and 371 are under consideration.

In many cases, financial innovation would not be possible without ASIC relief, denying business opportunities to expand, and investors and financial consumers the possibility of new and more useful products.

### ASIC’s relief to facilitate the operation of platforms

Many investors want the opportunity to build an investment portfolio through an investment vehicle that gives them the convenience of transactional and reporting services where the client makes all of the investment decisions and can access a wide range of financial products that would not otherwise be available to them. Industry has developed a range of such vehicles that are typically known as ‘platforms’ or ‘wraps’, which are more formally referred to as investor-directed portfolio services (IDPS) and IDPS-like schemes.

The legislation does not specifically recognise such structures, and most technically fall within the definition of a ‘managed investment scheme’.

However, meeting the legal requirements for registering and operating a managed investment scheme would be onerous in practice for many platform operators, for example, because investors investing through a platform are able to exercise more discretion in their portfolio than a typical scheme member, or because applying the general product disclosure requirements to platform operators would result in duplication and unnecessary cost.

Because of this, ASIC provides the following relief to platform operators:

- For IDPS-like schemes: relief from fundraising, cooling-off requirements and financial product disclosure provisions (to the extent that these provisions require disclosures about the investments available through the scheme in the Product Disclosure Statement (PDS)); and
- For IDPS: relief from registration as a managed investment scheme, fundraising, hawking and most of the financial product disclosure provisions of the Corporations Act.

ASIC has provided this relief to create a tailored regulatory regime for platform operators, which balances the objectives of:

- applying the minimum required regulatory requirements to platform operators, consistent with the objectives of the broader financial regulatory regime; and
- ensuring that there is a high degree of protection for investors through appropriate disclosures and reporting to investors.

Our relief is contained in Class Order [CO 13/763] Investor directed portfolio services and Class Order [CO13/762] Investor directed portfolio services provided through a registered managed investment scheme. Our relief for platform operators is explained further in Regulatory Guide 148 Platforms that are managed investment schemes (RG 148).
Applying for, or varying, a licence

107 Each year, many businesses either apply for, or ask to vary, an AFS licence or credit licence. Since 2010, we have handled nearly 12,000 applications for a new AFS licence or credit licence, or a licence variation.

108 We have recently conducted an internal review of our online AFS licence application form.

109 As a result of our review, we have reworded or completely removed a number of questions from the form. The form now requires applicants to answer 105 questions, down from 150 questions. The majority of questions now require a yes/no response or allow applicants to select from a menu of responses. This mirrors the simplified approach we developed for our credit licence application form, introduced when we assumed responsibility for the regulation of credit. The Submission by ASIC on reforms to the credit industry and 'low doc' loans to the Senate Economic References Committee provides more details about ASIC’s role in regulating the credit industry.

Engagement with small business

110 We are working to better understand, meet the needs of, and communicate with, small business. In 2012–13, ASIC’s small business team conducted over 45 meetings with industry representatives and small businesses to discuss regulatory initiatives, ASIC’s role, and the assistance available to help small business understand and comply with the law.

111 We also conducted an online survey seeking feedback from small businesses on our engagement with the sector and how we can keep small businesses better informed. More than 1,500 small businesses took part in our survey. Based on the survey findings, we have developed a strategy that focuses on engagement, assistance and regulatory initiatives to raise awareness, enhance compliance and target illegal phoenix activity.

Note: ‘Phoenix activity’ is typically associated with directors who transfer the assets of an indebted company to a new company of which they are also directors. The directors then place the initial company into administration or liquidation with no assets to pay creditors, meanwhile continuing the business using the new company structure.

Doing more business online

112 One of our priorities is to increase the proportion of business done online. This reflects ASIC’s view that online transactions are easier and cheaper for business. In 2012–13, 83.8% of the 2.4 million forms lodged with ASIC were submitted online, up from 75.5% in 2011–12.
In March 2012, we launched a new online user interface, ASIC Connect. ASIC Connect allows customers to conduct ASIC registry searches online through ASIC’s website and pay search fees by credit card.

Over 28.3 million free searches and 250,700 paid searches were conducted through ASIC Connect in 2012–13. The availability of the ASIC Connect online search has seen a 56% decrease in paper searches conducted directly with ASIC (on paper and over the counter). These fell from 27,492 in 2011–12 to 12,028 in 2012–13.

**Business Names Register**

ASIC launched the new national Business Names Register in May 2012. The Business Names Register replaces the eight previous state and territory services, so that businesses only need to register their name once to be registered throughout Australia. The Business Names Register is also cheaper, especially for customers with multiple business names.

At its one year anniversary, the Business Names Register had saved business $34 million in reduced fees to register or renew a name.

ASIC has continued to improve key services introduced at the launch of the Business Names Register. This includes data migration, process changes, systems enhancements, website content updates, and new communication products to improve services and the register, based on known defects and customer feedback.

**SMSF auditor register**

ASIC’s new register of SMSF auditors went live on 31 January 2013, allowing auditors doing SMSF audits to apply for registration online using ASIC Connect.

The new register is part of the Government’s Stronger Super reforms. ASIC has worked closely with the Government and industry on measures, including the register, to improve integrity and community confidence in the sector.

At 30 June 2013, ASIC had registered 5,935 SMSF auditors, with 100% of applications received online. Ninety-eight per cent of applications were registered within 28 days of receipt of a full application.

**Promoting financial literacy**

ASIC shares responsibility for developing and delivering financial literacy programs with business, community, government and education sectors, with
ASIC having overall responsibility for developing the National Financial Literacy Strategy.

**ASIC’s MoneySmart website**

ASIC’s MoneySmart website (www.moneysmart.gov.au) is a key element of the National Financial Literacy Strategy. It was launched in March 2011, and has over 400 pages of content, with information available in 26 languages.

The site has 26 free, independent and high-quality calculators and tools, including:

(a) the TrackMySpend mobile telephone application (downloaded by over 222,000 people so far); and

(b) a ‘Money Health Check’ that helps people identify areas where their finances are not in order and suggests actions to address these areas.

ASIC’s MoneySmart website regularly gets over 400,000 unique visitors a month. Over 6.9 million people have visited MoneySmart since its launch.

Our research shows that 89% of users rate the site as ‘useful’, and 90% of users said they had taken specific action with their finances as a result of visiting MoneySmart.

ASIC promotes MoneySmart through social media, including Twitter and Facebook, reaching on average 100,000 people through Twitter and on average over 150,000 mentions in Facebook timelines each month. MoneySmart’s 260 videos have been viewed 134,000 times. ASIC has also used print, radio and online advertising since June 2012 to raise awareness and increase usage.

ASIC’s MoneySmart website has won several awards for excellence in service delivery and interactive media. MoneySmart was named ‘best service delivery website’ at the 2012 Excellence in e-Government Awards, and ‘Best in Class’ at the 2012 Interactive Media Awards in two categories: Government and Financial Information. In 2011, it was one of only 10 sites, from 200 investor protection sites ranked by the International Organization of Securities Commissions (IOSCO), rated ‘outstanding’ and given a 5/5 rating. In 2013, ASIC’s TrackMySpend mobile telephone application won an award for the best applicant in the government category of the Australian Mobile Awards.

To promote the importance of financial literacy, ASIC also runs MoneySmart Week, which is held each year in September.

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**MoneySmart Week**

MoneySmart Week is a national initiative promoting the importance of financial literacy, held annually in the first week of September since 2012. MoneySmart Week includes:
MoneySmart Week

- a call to action for all Australians to take the next step in their financial health—‘Do a Money Health Check’;
- a National MoneySmart Awards program to recognise outstanding achievements in financial literacy;
- promotion of existing money management programs, tools and resources; and
- a range of special activities and events in workplaces and the community.

MoneySmart Week is a collaborative initiative involving over 100 industry, community and government organisations. The initiative is coordinated by a non-profit company established by the Australian Government Financial Literacy Board and involves teams of volunteers working on different aspects of the initiative. A key objective of the week is to promote partnerships between government, community organisations and the corporate sector.

MoneySmart Week involves a large range of events, including webinars, presentations, financial quizzes, workplace seminars, online competitions for school students and the MoneySmart Week Awards, which are presented to a wide range of organisations for advancing Australians’ financial literacy across categories such as research, schools, workplaces and the community.

MoneySmart Teaching

ASIC’s MoneySmart Teaching team has completed the trial phase of a MoneySmart Teaching program, which is now being expanded for delivery over the next four years.

MoneySmart Teaching

ASIC’s MoneySmart Teaching program (www.teaching.moneysmart.gov.au) is the primary mechanism for provision of consumer and financial literacy education to young people in schools and tertiary education.

A national reference group, with representatives from all Australian state and territory education departments, non-government school sectors and key stakeholder organisations, was established to guide the development of the MoneySmart Teaching program and resources.

The MoneySmart Teaching Primary and Secondary packages include face-to-face professional learning for teachers in Australian primary and secondary schools, online modules to supplement the face-to-face professional learning, and a range of digital resources for students, linked to the Australian Curriculum. There are over 90 MoneySmart Schools trialling the MoneySmart Teaching professional learning packages and their units of work.

The program is delivered in schools using state and territory education department project officers. Over 8000 teachers have received professional learning so far. ASIC has also developed a monthly personal learning program for teachers called ‘Financial Health for Teachers’, featuring videos, podcasts and newsletters designed to help teachers take control of their own finances.
MoneySmart Rookie

In June 2013, we launched MoneySmart Rookie, our flagship education program for young people (aged 16–25). Its aim is to help young people transition to financial independence and to understand the importance of making smart financial decisions.

We took MoneySmart Rookie on the road, running 239 education and training session about money management. These sessions were attended by over 12,000 community workers and consumers.

Outreach work

To make sure our resources reach the broader community, ASIC has an outreach team that works in partnership with community organisations, consumer advocates and other government agencies to identify problems that people are having with their use of financial services, to deliver community education on issues most relevant to them, and provide support to intermediaries that work with these consumers. Campaigns and resources developed by the outreach team include:

(a) a campaign in 2011 on mortgage health, encouraging people to take action if experiencing mortgage stress; and

(b) a Money Management Kit, launched in March 2012, with a suite of translated online and printed resources originally developed for settlement workers supporting newly arrived Australians, and now used more widely by intermediaries in the community sector.

ASIC also has a specific Indigenous outreach program, which supports Indigenous people in understanding and making decisions about financial services. This team liaises with Australia’s Indigenous community, looks into their complaints about financial services issues and promotes resources for Indigenous Australians about topics such as managing money, banking and credit, insurance, superannuation and scams. The team’s work in remote communities has identified problems and conduct that have resulted in a number of ASIC enforcement outcomes.

Detecting and responding to market issues and risks

Where there are significant issues and risks in a market, we take action using a range of tools to address them. Surveillance is important for identifying the problems and their causes and for gathering initial evidence. Subsequently, we commonly use negotiated outcomes, and administrative and court action, as well as enhanced guidance for the rest of industry to achieve change. We may report on the issues to encourage public understanding, discussion and debate, and potential consideration of reform. We also develop information
and tools for consumers to help them better navigate the issues or problems in the market.

An example of this longer term, multifaceted effort to address market problems in the financial advice industry is set out in more detail in Section H. The Submission by ASIC on reforms to the credit industry and ‘low doc’ loans to the Senate Economic References Committee also outlines our efforts to identify and address problems in the credit industry.

External assessment of our performance

Our performance has recently been measured in the 2013 ASIC stakeholder survey. The survey provided stakeholders’ frank assessment of how well we are meeting our three strategic priorities.

Pleasingly, the survey found that the majority of stakeholders are positive about ASIC’s performance and consider that ASIC is performing better than, or the same as, two years ago. Among those surveyed, particular strengths were ASIC’s work in:

(a) market supervision;
(b) keeping markets free from insider trading, and ensuring companies provide reliable and timely information to the market;
(c) holding to account the organisations that are involved in providing financial products and services;
(d) holding auditors to account; and
(e) holding market operators to account.

The majority of respondents also found that ASIC:

(a) acts professionally, promotes confidence in Australia’s financial system, and understands the industries and markets we regulate;
(b) is easy to deal with;
(c) demonstrates transparency in enforcement actions;
(d) effectively monitors compliance by industry;
(e) provides guidance to industry to help organisations to comply with the law; and
(f) provides registration and licensing systems that are easy, efficient, timely and cost-effective, accompanied by information that is easy to understand.

1 The regular independent survey of ASIC’s stakeholders commissioned by ASIC. To date, ASIC has commissioned surveys to be undertaken in 2008, 2010 and 2013.
In addition to our stakeholders, the International Monetary Fund (IMF) has also recently commented on ASIC’s performance, concluding that Australia’s legal and regulatory framework for securities markets is highly compliant with IOSCO’s *Objectives and principles of securities regulation*,\(^2\) although a few concerns need to be resolved.

IMF conducts a regular Financial Sector Assessment Program (FSAP). The FSAP review is a comprehensive and in-depth analysis of a country’s financial sector. It assesses the financial sector and rates the quality of its financial market supervision against international standards.

Australia’s first FSAP review was conducted in 2005–06 and the second review was undertaken in 2012, consistent with a recent commitment of the international Financial Stability Board members to undergo an FSAP review approximately every five years.

In 2012, ASIC prepared material about Australia’s regulation and our supervision of financial markets for the FSAP review of Australia’s financial sector.

A report containing the IMF’s detailed assessment and policy recommendations was published in November 2012. While the report was very positive about Australia’s legal and regulatory framework for securities markets, it also raised concerns with ASIC’s operational independence, sufficiency of resources and our ability to discharge our supervisory functions adequately and effectively across the entire regulated population.

While some of these recommendations are matters for the Government’s consideration, ASIC is working with Treasury to address recommendations for changes that fall within our operational jurisdiction.

### Selected results by team

Table 6 sets out additional information about ASIC’s teams, the regulated populations for which they are responsible and selected key achievements by team during 2010–13.

\(^2\) **IOSCO** released its *Objectives and principles of securities regulation* in May 2003. These comprise 30 principles of securities regulation, which are based upon three objectives of securities regulation, being the protection of investors; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk.
Table 6: ASIC’s team structure, regulated populations and selected key achievements by team, 2010–13

<table>
<thead>
<tr>
<th>Regulated population</th>
<th>Significant achievements in 2010–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deposit Takers, Credit and Insurers team (65.5 staff)</td>
<td></td>
</tr>
</tbody>
</table>
| 173 authorised deposit takers | • Proactive engagement with industry  
5,861 credit providers (credit licensees) | • Consumer compensation: tyre and rim insurance, Fair Loans Australia, Suncorp, BOQ, Mr Rental Australia, RHG Mortgage Corporation Ltd, BMW Finance, Toyota Finance, Elders Insurance  
28,201 credit representatives | • Enforceable undertakings: Credit Union Australia, Fair Loans Foundation, Mr Rental Australia, Graham Rendell (trading as Key Credit)  
55 licensed insurance companies | • Licence cancellations: Zaam, Mobile Rentals  
641 non-cash payment facility providers | • Infringement notices: Fair Finance Australia, Graham Rendell (trading as Key Credit)  
13 trustee companies | • Public reports: 12 reports released on a range of topics  
| | • Consultation and guidance: 9 papers released on a range of topics  
| | • Indigenous consumer engagement: outreach trips to 30 locations annually, 3 revised Indigenous-specific publications |
| Financial Advisers team (29 staff) |  |
| 3,394 AFS licensees licensed to provide personal advice | • Proactive engagement with industry: new licensee visits, risk-based surveillance project, Future of Financial Advice (FOFA) roadshows  
1,395 AFS licensees authorised to provide general advice | • Enforceable undertakings: Macquarie Equities Limited, Wealthsure, Darren Pawski, UBS Wealth Management Australia Ltd  
| | • Licence cancellations: AAA Financial Intelligence and AAA Shares (in liquidation), Morrison Carr Financial Services, Addwealth Financial Services Pty Ltd  
| | • Licence conditions: Australian Financial Services Limited, Moneywise Securities  
| | • Negotiated outcomes: AMP Horizons Group, Anne Street Partners, Professional Investment Services  
| | • Public reports: Report 341 Retail investor research into structured ‘capital protected’ and ‘capital guaranteed’ investments (REP 341), Report 337 SMSFs: Improving the quality of advice given to investors (REP 337), Report 224 Access to financial advice in Australia (REP 224), Report 205 Contracts for difference and retail investors (REP 205)  
| | • Shadow shop and accompanying report: Report 279 Shadow shopping study of retirement advice (REP 279) |
| Financial Literacy team (41 staff) |  |
| Approximately 20 million financial services consumers | • National Financial Literacy Strategy 2011 (currently being updated)  
| | • ASIC’s MoneySmart website: helps around 400,000 people a month  
| | • MoneySmart Teaching: online resources for teachers and students, linked to Australian curriculum  
| | • National cross-sector multi-agency Financial Literacy Community of Practice  
| | • Major partnership work with banks and financial services providers, such as annual MoneySmart Week with over 100 participating organisations |
### Regulated population

<table>
<thead>
<tr>
<th>Significant achievements in 2010–13</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Investment Banks team (23 staff)</strong></td>
</tr>
<tr>
<td>26 investment banks</td>
</tr>
<tr>
<td>250 hedge fund managers/responsible entities</td>
</tr>
<tr>
<td>43 OTC derivative providers</td>
</tr>
<tr>
<td>7 credit rating agencies</td>
</tr>
<tr>
<td>26 investment banks</td>
</tr>
<tr>
<td>250 hedge fund managers/responsible entities</td>
</tr>
<tr>
<td>43 OTC derivative providers</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Investment Managers and Superannuation team (40 staff)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>More than $1 trillion funds under management</td>
</tr>
<tr>
<td>200 superannuation fund trustees</td>
</tr>
<tr>
<td>483 active responsible entities</td>
</tr>
<tr>
<td>4,130 registered managed investment schemes</td>
</tr>
<tr>
<td>614 foreign financial services providers</td>
</tr>
<tr>
<td>718 custodial service providers</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Corporations and Emerging Mining and Resources teams (65 staff)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>2 million registered companies</td>
</tr>
<tr>
<td>2,200 listed entities</td>
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</tbody>
</table>
### Regulated population

#### Significant achievements in 2010–13

**Financial Market Infrastructure team (28 staff)**

<table>
<thead>
<tr>
<th>18 authorised financial markets</th>
<th>6 licensed clearing and settlement facilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Co-managed the transfer to ASIC of frontline supervision for ASX and other Australian markets</td>
<td>• Led the introduction of competition in trading (Chi-X)</td>
</tr>
<tr>
<td>• Established dark pools and high-frequency trading taskforces which produced world-leading changes to regulation</td>
<td>• Established dark pools and high-frequency trading taskforces which produced world-leading changes to regulation</td>
</tr>
<tr>
<td>• Advanced significant OTC derivative reforms following the global financial crisis (e.g. mandatory trade reporting of OTC derivatives)</td>
<td>• Worked with industry to introduce central clearing services for OTC derivatives creating efficiencies and reducing risks</td>
</tr>
</tbody>
</table>

**Insolvency Practitioners team (23.5 staff)**

<table>
<thead>
<tr>
<th>685 registered liquidators</th>
<th>10,746 companies entering external administration per year</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Surveillance of registered liquidators in 2011 and 2012: 180 transaction reviews, 32 proactive practice reviews, 146 reviews of declarations of relevant relationships and 64 reviews of remuneration reports completed</td>
<td>• Surveillance of registered liquidators in 2011 and 2012: 180 transaction reviews, 32 proactive practice reviews, 146 reviews of declarations of relevant relationships and 64 reviews of remuneration reports completed</td>
</tr>
<tr>
<td>• Industry-wide review of professional indemnity insurance policies held by registered liquidators to assess compliance against ASIC regulatory guidance</td>
<td>• Industry-wide review of professional indemnity insurance policies held by registered liquidators to assess compliance against ASIC regulatory guidance</td>
</tr>
<tr>
<td>• Initiated a series of annual reports on ASIC’s regulation of registered liquidators, summarising the outcomes achieved by ASIC in regulating liquidators for the period indicated in the reports. See Report 287 ASIC regulation of registered liquidators: January to December 2011 (REP 287) and Report 342 ASIC regulation of registered liquidators: January to December 2012 (REP 342)</td>
<td>• Initiated a series of annual reports on ASIC’s regulation of registered liquidators, summarising the outcomes achieved by ASIC in regulating liquidators for the period indicated in the reports. See Report 287 ASIC regulation of registered liquidators: January to December 2011 (REP 287) and Report 342 ASIC regulation of registered liquidators: January to December 2012 (REP 342)</td>
</tr>
<tr>
<td>• Worked with industry to improve professional standards by contributing to the development of the Code of Professional Practice (IPA Code) issued by the Insolvency Practitioners Association of Australia (IPA)</td>
<td>• Worked with industry to improve professional standards by contributing to the development of the Code of Professional Practice (IPA Code) issued by the Insolvency Practitioners Association of Australia (IPA)</td>
</tr>
<tr>
<td>• 4 enforceable undertakings from registered liquidators</td>
<td>• 4 enforceable undertakings from registered liquidators</td>
</tr>
<tr>
<td>• Enhanced data collection and improved ASIC reporting through changes to two ASIC forms (Forms 505 and 5047)</td>
<td>• Enhanced data collection and improved ASIC reporting through changes to two ASIC forms (Forms 505 and 5047)</td>
</tr>
<tr>
<td>• Commenced project to convert Form 524 Presentation of accounts and statement to structured data to facilitate public reporting on external administrations</td>
<td>• Commenced project to convert Form 524 Presentation of accounts and statement to structured data to facilitate public reporting on external administrations</td>
</tr>
<tr>
<td>• Implemented the insolvency notices website on 1 July 2012. In the first year of operation, 3,382 registered users published 29,709 notices and 112,942 notices of intention to deregister a company</td>
<td>• Implemented the insolvency notices website on 1 July 2012. In the first year of operation, 3,382 registered users published 29,709 notices and 112,942 notices of intention to deregister a company</td>
</tr>
<tr>
<td>• Guidance issued on how ASIC proposes to exercise our new power to administratively wind up abandoned companies</td>
<td>• Guidance issued on how ASIC proposes to exercise our new power to administratively wind up abandoned companies</td>
</tr>
</tbody>
</table>
### Regulated population

<table>
<thead>
<tr>
<th>Significant achievements in 2010–13</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Financial Reporting and Audit team (38 staff)</strong></td>
</tr>
</tbody>
</table>

- 4,707 registered company auditors
- 28,000 companies that are required to produce financial reports
- 86 audit firms

- Proactive risk-based financial report surveillance: 1,415 financial reports of listed entities and large unlisted entities reviewed, 300 financial reports of proprietary companies reviewed, 177 entities contacted, 49 material changes to financial reports
- Audit firm inspections: 8 of Big 4 firms; 12 of mid-tier firms; 18 of small firms, with 256 audits reviewed
- Audit surveillances: 60
- Enforceable undertakings with auditors: Peter Lockyer of Trood Pratt (Elderslie & Grenfell), Stuart Cameron of KS Black & Co (Citigold and others), Tim Frazier of WHK (Astarra Strategic Fund), Graham Abbott (Central West Gold and another), Simon Green of Pitcher Partners Brisbane (ABC Learning Centres), Stephen Cougle of PwC (Centro), Brian Kingston (Wickham Securities), Anthony Hyndman (Hargraves and others)
- Other auditors accepting conditions or ceasing practice: 5 auditors
- Matters heard by former Financial Reporting Panel: 4 matters (referrals ceased in 2010)
- Public reports: 6 media releases at half-yearly intervals reporting findings from financial report surveillance and focus areas for preparers and auditors of financial reports for the upcoming reporting season; audit inspection program reports for the 18 months to 30 June 2012 and the 18 months to 31 December 2010
- Consultation and guidance:
  - Updated regulatory guides: Regulatory Guide 180 *Auditor registration* (RG 180) and revised Regulatory Guide 34 *Auditors’ obligations: Reporting to ASIC* (RG 34)
  - Consultation Paper 209 *Resignation, removal and replacement of auditors: Update to RG 46* (CP 209)
  - Class Order [10/654] *Inclusion of parent entity financial statements in financial reports*
- Other: action plans to improve audit quality prepared by largest 6 audit firms

### Market and Participant Supervision team (67 staff)

- 136 market participants
- 800 securities dealers
- Supervision of 7 markets

- Co-managed the transfer to ASIC of frontline supervision of ASX and other markets
- Led the taskforce into high-frequency trading, adopting a facilitative approach to improving conduct. Also supported the taskforce into dark liquidity
- Oversaw the replacement of ASIC’s market surveillance system, adding capacity and capability to supervise technologically advanced markets
- Ensured participant readiness for the introduction of competition
- Established a strong and efficient risk-based model for reviewing the adequacy of compliance and risk management systems of participants
<table>
<thead>
<tr>
<th>Regulated population</th>
<th>Significant achievements in 2010–13</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Registry Services and Licensing team (271 staff)</strong></td>
<td></td>
</tr>
<tr>
<td>68 million searches of ASIC’s registers</td>
<td>- Established a simple registration process following the introduction of the national regulation of credit</td>
</tr>
<tr>
<td>Licensing and registration for 2 million companies 1.7 million business names</td>
<td>- Established the Business Names Register. This required the transfer of more than 1.4 million active business name registrations previously held on state and territory business name registers, with a number of additional names registered after establishment</td>
</tr>
<tr>
<td>4,955 AFS licensees 5,856 credit licensees 4,852 registered company auditors 685 registered liquidators 4,125 registered managed investment schemes 7,042 registered SMSF auditors 1.2 million calls handled</td>
<td>- Launched ASIC Connect: over 28.3 million free searches and 250,700 paid searches conducted in 2012–13</td>
</tr>
<tr>
<td></td>
<td>- Varied over 900 AFS licences following the introduction of margin lending as a financial product</td>
</tr>
<tr>
<td></td>
<td>- Issued over 120 new licence authorisations relating to regulated emissions units</td>
</tr>
<tr>
<td></td>
<td>- Introduced registration of SMSF auditors</td>
</tr>
<tr>
<td></td>
<td>- $72 million paid to owners of unclaimed money in 2012–13</td>
</tr>
<tr>
<td><strong>Misconduct and Breach Reporting team (90 staff)</strong></td>
<td></td>
</tr>
<tr>
<td>All areas of ASIC’s jurisdiction</td>
<td>- 11,682 reports of misconduct received and assessed in 2012–13</td>
</tr>
<tr>
<td></td>
<td>- 11,320 statutory reports received and assessed in 2012–13</td>
</tr>
<tr>
<td></td>
<td>- 1,214 breach reports received and assessed in 2012–13</td>
</tr>
<tr>
<td><strong>Small Business Compliance and Deterrence team (38 staff)</strong></td>
<td></td>
</tr>
<tr>
<td>Small businesses Company directors</td>
<td>- Established a new team to enhance ASIC’s engagement with small businesses</td>
</tr>
<tr>
<td></td>
<td>- Released the Your obligations as a small business operator booklet, which was downloaded over 6,000 times in the first month following publication</td>
</tr>
<tr>
<td></td>
<td>- Handled 4,267 requests from liquidators seeking ASIC’s assistance in ensuring directors comply with their obligations</td>
</tr>
<tr>
<td></td>
<td>- Obtained compliance prior to prosecution at a rate increasing from 40% to 45% in the past 3 years</td>
</tr>
<tr>
<td></td>
<td>- Disqualified 116 directors in the past 3 years from managing corporations</td>
</tr>
<tr>
<td></td>
<td>- Successfully prosecuted 1,428 directors in the past 3 years</td>
</tr>
<tr>
<td></td>
<td>- Obtained the first criminal outcome for unlicensed credit activity (John Sharp)</td>
</tr>
<tr>
<td></td>
<td>- Conducted a national program to identify unregistered credit activity in the first year of the credit regime</td>
</tr>
<tr>
<td>Regulated population</td>
<td>Significant achievements in 2010–13</td>
</tr>
<tr>
<td>----------------------</td>
<td>------------------------------------</td>
</tr>
<tr>
<td>Enforcement teams (243.8 staff across the areas outlined)</td>
<td></td>
</tr>
<tr>
<td>Financial services:</td>
<td>Completed 554 investigations in 2010–13, with 308 investigations currently in progress</td>
</tr>
<tr>
<td>• all providers of financial services and credit (including provision of these services by unlicensed persons)</td>
<td>• Obtained 149 outcomes in which persons or entities:</td>
</tr>
<tr>
<td>• AFS licensees and their representatives/advisers</td>
<td>– were banned from providing financial services or engaging in credit activities</td>
</tr>
<tr>
<td>• credit licensees and their representatives/advisers</td>
<td>– undertook not to provide financial services or engage in credit activities, or</td>
</tr>
<tr>
<td>Market integrity:</td>
<td>– had their AFS licence or credit licence suspended or cancelled, or additional conditions imposed</td>
</tr>
<tr>
<td>• persons and entities trading on licensed financial markets</td>
<td>• Obtained 12 infringement notices for alleged breaches of continuous disclosure obligations, and 19 infringement notices issued by the Markets Disciplinary Panel for alleged breaches of market integrity rules</td>
</tr>
<tr>
<td>Listed entities</td>
<td>• Assisted in negotiating 62 enforceable undertakings with entities and individuals</td>
</tr>
<tr>
<td>Corporations and corporate governance:</td>
<td>• 79 criminal proceedings were completed (for recent examples see case study 5), including:</td>
</tr>
<tr>
<td>• corporations</td>
<td>– 30 convictions for false or misleading statements, misleading or deceptive conduct, or failure to comply with disclosure requirements</td>
</tr>
<tr>
<td>• officeholders</td>
<td>– 16 convictions for insider trading and 4 convictions for market manipulation</td>
</tr>
<tr>
<td>• liquidators</td>
<td>– 19 convictions relating to breach of directors’ duties, and</td>
</tr>
<tr>
<td>• auditors</td>
<td>– 7 convictions for misappropriation or theft</td>
</tr>
<tr>
<td>Note: A dedicated WA enforcement team handles matters across all these areas for that state.</td>
<td>• 73 civil proceedings completed (for recent examples see case study 4)</td>
</tr>
<tr>
<td></td>
<td>• Obtained compensation for former investors in Westpoint and Storm Financial</td>
</tr>
</tbody>
</table>

* Data is indicative. See relevant sections of ASIC’s Annual Report (2013) for 2012–13 data. All staff figures are fulltime equivalent employees and represent staff dedicated to respective populations. Excludes Strategy and Policy, Corporate Affairs, Operations, People and Development and statutory bodies.
B ASIC’s enabling legislation: Origins and evolution

Key points

Under ASIC’s enabling legislation, we perform various roles, including as Australia’s corporate, markets, financial services and consumer credit regulator.

The legislation under which ASIC operates generally envisages that we will act as a conduct and disclosure regulator. This is consistent with an underlying economic philosophy that markets operate most efficiently when regulatory intervention is at a minimum (efficient markets theory).

Nevertheless, despite this basic premise, financial regulation has evolved considerably over the past decade. Notable developments have been the introduction of the national credit regime, which seeks to ensure certain minimum outcomes for consumers, and recent new requirements for financial advisers to remove certain conflicts of interest from their business models to drive better quality advice.

Internationally, regulators are looking for a broader toolkit to address market problems, moving beyond traditional conduct and disclosure regulation to design regulatory interventions that address the types of problems investors and financial consumers often experience in financial markets.

ASIC’s enabling legislation

ASIC is an independent Australian government body. We are set up under, and administer, the ASIC Act, and we carry out most of our work under the Corporations Act 2001 (Corporations Act).

Note: Together with their associated regulations, these two Acts collectively form the 'corporations legislation'.

The ASIC Act requires ASIC to:

(a) maintain, facilitate and improve the performance of the financial system and entities in it;
(b) promote confident and informed participation by investors and consumers in the financial system;
(c) administer the law effectively and with minimal procedural requirements;
(d) enforce and give effect to the law;
(e) receive, process and store, efficiently and quickly, information that is given to us; and
(f) make information about companies and other bodies available to the public as soon as practicable.

The box below sets out the legislation administered by ASIC. ASIC also administers relevant regulations made under the legislation listed below. Other regulators also administer some parts of these Acts. For example, parts of the Superannuation Industry (Supervision) Act 1993 (SIS Act) and the Life Insurance Act 1995 are administered by the Australian Prudential Regulation Authority (APRA).

### Legislation administered by ASIC

- **ASIC Act**
- **Business Names Registration (Transitional and Consequential Provisions) Act 2011**
- **Business Names Registration Act 2011**
- **Corporations Act**
- **Insurance Contracts Act 1984**
- **Life Insurance Act 1995**
- **Medical Indemnity (Prudential Supervision and Product Standards) Act 2003**
- **National Consumer Credit Protection Act 2009**
- **Retirement Savings Accounts Act 1997**
- **SIS Act**
- **Superannuation (Resolution of Complaints) Act 1993**

### ASIC’s roles and responsibilities

- **ASIC regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.**

- **As the corporate regulator, we ensure that companies, schemes and related entities meet their obligations under the Corporations Act. We register and regulate companies at every point from their incorporation through to their winding up, and ensure that company officers comply with their responsibilities. This ‘cradle to grave’ approach enhances regulatory oversight. We also register and, where necessary, take disciplinary actions against auditors and liquidators. We monitor public companies’ financial reporting and disclosure and fundraising activities.**

- **As the consumer credit regulator, we license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers). We ensure that licensees meet the standards—including their responsibilities to**
consumers—that are set out in the National Consumer Credit Protection Act 2009 (National Credit Act).

As the markets regulator, we assess how effectively financial markets are complying with their legal obligations to operate fair, orderly and transparent markets. We also advise the Minister about authorising new markets. On 1 August 2010, we assumed responsibility for the supervision of trading on Australia’s domestic licensed equity, derivatives and futures markets.

As the financial services regulator, we administer the AFS licensing regime and monitor financial services businesses to ensure that they operate efficiently, honestly and fairly. These businesses typically deal in superannuation, managed funds, deposit and payment products, shares and company securities, derivatives and insurance.

ASIC also promotes financial literacy, to ensure investors feel confident when participating in the market, and are able to make sensible and informed financial decisions: see paragraphs 121–133 in Section A for more details on ASIC’s role in financial literacy.

We also work hard to facilitate business in Australia. One of our key priorities is to lift the effectiveness of Australia’s business registration and licensing regimes. This includes overseeing company registration and notifications, the AFS and credit licensing regimes, business names registration and SMSF auditor and liquidator registration: see paragraphs 102–120 in Section A for more details on ASIC’s role in business facilitation.

Origins of financial services regulation in Australia: Efficient markets theory

The economic philosophy that has traditionally underpinned the Australian financial services regulatory regime is that markets drive efficiency and that markets operate most efficiently when there is a minimum of regulatory intervention. This philosophy is often called ‘efficient markets theory’.

Efficient markets theory has been the foundation of Australian financial services regulatory policy since, at least, the Australian Financial System Inquiry of 1981 (the Campbell Inquiry). Its influence continued through to the Financial System Inquiry (Wallis Inquiry).

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3 ‘Australian financial services regulatory regime’ refers primarily to Ch 7 of the Corporations Act. It also includes Chs 5C and 6D, as well as the financial services provisions of the ASIC Act.
Because this approach has shaped the current regulatory regime, understanding its philosophy helps to explain many aspects of the way in which the regime operates today, and ASIC’s role within it.

**How the efficient markets theory has shaped financial services regulation in Australia**

In accordance with efficient markets theory, the Wallis Inquiry found that:

[i]n designing regulatory arrangements, it is important to ensure minimum distortion of the vital roles of markets themselves in providing competitive, efficient and innovative means of meeting customers’ needs.

The basic features of the current financial services regulatory regime were developed following these principles, and favour:

(a) efficient and flexible allocation of risk and resources, and a low cost of capital;
(b) promotion of competition, innovation and flexibility; and
(c) retail investors having access to a wide range of products.

Nevertheless, this underlying philosophy accepts that regulation is necessary to deal with factors that prevent the market operating efficiently (e.g. fraudulent conduct by industry participants, information asymmetries and anti-competitive conduct), as long as such regulation is set at the minimum level necessary to respond to market failures.

**Conduct and disclosure regulation**

The regime’s conduct regulation includes rules designed to ensure industry participants behave with honesty, fairness, integrity and competence. The regime uses a licensing system to control who can operate within the industry, and, if they do not meet conduct standards, exclude them by licence cancellation.

The regime’s disclosure regulation includes rules designed to:

(a) overcome the information asymmetry between industry participants and investors by requiring disclosure of information required to facilitate informed decisions by investors; and
(b) promote transparency in financial markets, through, for example, continuous disclosure by companies of price-sensitive information.

Finally, the regime includes some additional investor protections to help address situations where investors are likely to be in a particular disadvantage relative to industry participants. An example of this is the system of internal and external dispute resolution, which provides a free,
accessible, fair and efficient process for retail investors and financial consumers: see Appendix 2 for more details. This system recognises that retail investors and financial consumers might otherwise find it difficult to resolve market disputes (e.g. through the courts) being non-expert and infrequent disputers with relatively few resources.

**Prudential regulation**

Unlike conduct and disclosure regulation, prudential regulation is designed to ensure (or increase the likelihood) that financial products and institutions do not fail and that promises by financial services or product providers to investors are met.

The Wallis Inquiry accepted that some areas of the financial system require prudential regulation, but recommended that it should only be applied when the systemic risks and the extent of the financial promises, and hence the risk of market failure, are at their most significant, because of the costs imposed on the market.

For this reason, under our financial regulatory system, authorised deposit-taking institutions (ADIs), general and life insurers and large superannuation funds are subject to prudential supervision by APRA, but other financial institutions are not and, unlike APRA, ASIC is not a prudential regulator.

**Compulsory superannuation**

The most significant exception to our regulatory system’s adoption of the efficient markets theory is our system of compulsory superannuation. Premised on the fact that many people have difficulty making long term financial decisions in their own best interests, superannuation has been made compulsory. By making superannuation compulsory, governments have acknowledged that a high degree of regulatory intervention is warranted to promote Australians actively saving for and funding their own retirements.

Against this backdrop, recognition has also been given to the fact that many Australians are only participants in our financial markets by virtue of their compulsory superannuation savings, and would not otherwise be investors; therefore, the superannuation system requires a higher degree of regulatory oversight and investor protection. An example of this enhanced protection is Pt 23 of the SIS Act, which makes provision for financial assistance to superannuation funds regulated by APRA that suffer loss as a result of theft or fraud.

However, once within the compulsory superannuation system, there are relatively few limits placed on the types of investments that people can make, or the risks that may be undertaken. This involves placing significant
reliance on people’s ability to make long-term financial decisions that best address their needs.

While ASIC works to ensure that the gatekeepers and industry participants in the superannuation system uphold their obligations to investors, the risks inherently associated with financial markets mean that it is likely some investors will suffer losses, with sometimes far-reaching consequences for their financial position in retirement.

**Efficient markets and investor losses**

As discussed in paragraphs 52–58 in Section A, as a trade-off for the economic benefits to Australians of open and dynamic financial markets, these regulatory settings mean that some investors will suffer due to a number of factors, including:

(a) market and credit risk;
(b) inappropriate conduct; and
(c) outright criminal misconduct.

Conduct and disclosure regulation does not guarantee that regulated products and institutions will not fail, or misconduct will not occur. Rather, it tries to ensure that investors are well informed about risks before making investment decisions and industry participants maintain appropriate standards of conduct.

However, tensions lie between regulatory efforts to address situations where people are particularly vulnerable in the financial services regulatory system, and the relatively few limits that are placed on the types of investments that can be made, or the types of risks that may be taken (as discussed in the context of superannuation, in paragraphs 168–171).

**ASIC’s role in the financial services regulatory system**

Consistent with the underlying philosophy of the financial services regulatory regime, ASIC’s role is not to control the types of products that are available in financial markets, to prevent investments from failing, or to place checks on investors’ investment decisions.

We understand that, where investors suffer losses, a natural tendency is to question why this has happened, and ask why ASIC has not prevented the losses from occurring. Nevertheless, ASIC’s performance should be assessed in terms of how we fulfil our role in the financial services regulatory system, and not against the benchmark of whether we have been able to prevent all losses suffered by investors.
As discussed in paragraphs 62–70 of Section A, ASIC can, and does, try to minimise the risk of losses occurring. We try to help investors and financial consumers to use financial markets successfully through our work on financial literacy. We set standards for the conduct of industry participants by enforcing compliance with the law. We focus on preventing losses arising out of bad advice, addressing conflicts of interest that could lead to poor outcomes for investors, and detecting and addressing instances of outright fraud and other misconduct.

As outlined below, our ability to do this has been enhanced over time by changes to the regulatory system, which better reflect the way investors think and make decisions than the efficient markets theory. These reforms address systemic market problems identified by ASIC some time ago.

**Evolution of financial regulation in Australia**

Two important changes in financial regulation in Australia have been the implementation of a national consumer credit regulatory regime, and the recent introduction of new requirements for the financial advice industry that are intended to drive long-term improvements in the quality of advice. Both sets of reforms represent regulatory interventions that are designed to improve outcomes for investors and financial consumers.

**National consumer credit regulation**

Australia’s national consumer credit regulatory regime was implemented in 2010, replacing the previous fragmented, less comprehensive state-based and territory-based regulation. The *Submission by ASIC on reforms to the credit industry and ‘low doc’ loans* to the Senate Economic References Committee outlines in more detail the origins and implementation of the regime and its impact, and ASIC’s role.

The credit regime administered by ASIC places ultimate importance on delivering consumer protection outcomes, while still encouraging competition and product innovation through non-prescriptive, flexible laws. Similarly to the financial services regulatory regime, the credit regulatory regime does this through:

(a) *conduct regulation*, including a licensing requirement, rules designed to ensure credit and credit service providers behave with honesty, fairness, integrity and competence, as well as rules relating to the settlement of disputes between providers and consumers; and

(b) *disclosure regulation*, including rules designed to overcome the information asymmetry between providers and consumers by requiring
disclosure of information required to facilitate informed decisions by consumers.

The economic philosophy underlying the credit regulatory regime is that governments should intervene to set protections for individuals from the risk of hardship following inappropriate lending, and for the broader economy from the systemic impacts of defaults on borrowing.

This departs from the historical position, before national credit regulation, where there were no specific restrictions on the amount of credit that could be lent, and the onus generally rested with the borrower.

In relation to individual consumers, the current regulatory regime recognises that the trade-off between accessing credit today, and having fewer available funds in the future when repayment is due, may be difficult for consumers to readily appreciate, and that decision-making tendencies lead people to overvalue immediate gratification relative to future needs. The regulatory regime sets protections to:

(a) prevent irresponsible lending that places consumers at risk of future hardship; and

(b) allow borrowers to seek a variation of their payments where they are suffering a temporary inability to pay.

By setting limits on lending, the regulatory regime also recognises the potentially systemic impacts on the economy of large-scale defaults on borrowing, including on the profitability of the banking sector and on the real economy.

In general, the protections in the credit regime apply at an individual level, such as the assessment of credit suitability performed for each consumer. However, some protections apply in a more systemic way, such as caps on the maximum rate of interest that may be charged that apply across all loans.

**Future of Financial Advice reforms**

From 1 July 2013, advisers have been required to comply with a range of new obligations intended to improve the quality of financial advice, strengthen investor protection and underpin trust and confidence in the financial advice industry. These new obligations were introduced by the Future of Financial Advice (FOFA) package of legislation. Section H outlines in more detail the origins and implementation of the reforms and their potential impact, and ASIC’s role.

Among other things, the FOFA reforms prohibit certain forms of conflicted remuneration that in the past has affected the quality of advice, and require advisers to act in the best interests of their clients when providing personal advice.
These reforms do not alter the balance of risk in the financial services system—investment risk will still necessarily lie with investors. However, by removing some sources of conflicts of interest for financial product advisers and imposing a positive duty for advisers to act in the best interests of the client, the reforms aim to promote better quality advice to ensure that investors make well-informed and appropriate decisions about what investment risk to take on: see Section H for more details.

New approaches to financial regulation

Over time, Australia’s financial regulatory regime has evolved beyond imposing the minimum of regulation to facilitate market efficiency to finding new ways to improve outcomes for investors and financial consumers. It has done this through heightened conduct rules, such as the credit responsible lending obligations or FOFA best interests duty, and structural interventions, such as the prohibition on conflicted forms of remuneration.

Internationally, regulators are looking for a broader toolkit to address market problems, moving beyond traditional conduct and disclosure regulation to design regulatory interventions that address the types of problems investors and financial consumers often experience in financial markets.

FCA’s work to address market problems

In recent years, the United Kingdom has restructured its financial regulatory system, including establishing a new consumer protection and market regulator, the Financial Conduct Authority (FCA). The FCA commenced operation earlier this year.

The FCA will continue a move initiated by its predecessor, the Financial Services Authority, to more proactively intervene to address market problems. It will periodically review particular financial services market sectors and examine how products are being developed, and the governance standards that firms have in place to ensure fairness to investors in the development and distribution of products.

The FCA has also been given a spectrum of temporary ‘product intervention’ powers, to address problems seen in a specific product. These may include rules:

- requiring providers to issue consumer or industry warnings;
- requiring that certain products are only sold by advisers with additional competence requirements;
- preventing non-advised sales or marketing of a product to some types of consumer;
- requiring providers to amend promotional materials;

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FCA’s work to address market problems

• requiring providers to design appropriate charging structures;
• banning or mandating particular product features; and
• in rare cases, banning sales of the product altogether.

Rules could apply to specific products, or a class of products, and may remain in place for 12 months.

The FCA has said that the extent and intrusiveness of the rules it will make will be based on finding the type of intervention best fitted to the problem it identifies. It will look to find a proportionate response to the problem, based on the perceived risk to:
• consumers;
• competition failings; and/or
• market integrity issues.

The FCA has also published a guide, *Applying behavioural economics at the Financial Conduct Authority*. This will support the FCA in taking into account lessons from psychology and behavioural economics in designing effective interventions. This guide indicates that not all such interventions need to be strongly interventionist, and that simple ‘nudges’ (i.e. small prompts in decision making that do not restrict choice) are likely to achieve cost-effective results in many cases.
C  ASIC’s accountability framework

**Key points**

ASIC is accountable to the Parliament and to the wider community. We take our role and responsibilities seriously and seek to provide up-to-date, relevant and transparent information about our work.

We believe that the current accountability mechanisms are robust and work well in practice.

192 As an agent of the Australian Government and the public, ASIC is, and should be, accountable for the way in which we exercise our powers and discretion and for the way in which we expend resources.

193 ASIC is accountable for all aspects of our work, including our financial management, and our regulatory and law enforcement decisions.

194 ASIC is ultimately accountable to the Australian Parliament for our operations and performance. We are also accountable through administrative and judicial review and through the broader scrutiny of the general community.

195 Being accountable is a component of ASIC’s responsibilities in its own right, and demands time and other resources as much as any other task we perform.

196 We believe that the current accountability mechanisms outlined below are robust and work well in practice. ASIC’s accountability framework is extensive, multi-layered, and rigorous.

ASIC’s governance arrangements

ASIC’s Commission

The ASIC Act establishes ASIC’s Commission and sets out its functions and powers as well as the statutory governance requirements for ASIC, including:

(a) the terms and conditions of the appointment of members of the Commission;

(b) provisions governing meetings of the Commission;

(c) delegation by the Commission and its members; and

(d) arrangements for preventing conflicts of interest and misuse of information.
The Commission meets formally once a month to make decisions and discuss matters for the efficient performance of ASIC’s functions. The Commission also meets for special out-of-session Commission meetings, which take place as required and are also of a formal nature. In addition, there are weekly informal meetings of the Commission.

The Commission has established a number of internal committees to assist with its management of ASIC. Examples include:

(a) the Enforcement Committee, which deals with the management of enforcement matters and enforcement-related policy issues;

(b) the Emerging Risk Committee, which identifies and provides advice to the Commission on the management of emerging risks; and

(c) the Regulatory Policy Group, which considers new or revised regulatory policy, law reform and novel applications for relief.

The Commission has also established a number of external committees to provide guidance to ASIC on various issues. These include:

(a) the External Advisory Panel, which assists ASIC in meeting our objectives, including to better understand the market that ASIC regulates and to be more forward-looking in examining issues and assessing systemic risks. The External Advisory Panel channels senior level advice from regulated and unregulated industries operating within the financial system;

(b) the Consumer Advisory Panel, which provides advice to ASIC on current consumer protection issues and gives feedback on ASIC policies and activities. The Consumer Advisory Panel also advises ASIC on key consumer research and education projects;

(c) ASIC’s Audit Committee, which provides independent oversight of, and reporting to, ASIC’s Chairman and the Commission regarding ASIC’s risk management and internal control frameworks. The Audit Committee Chairman, Deputy Chairman and one other member of the Committee are appointed from outside ASIC. An ASIC Commissioner and senior executive from ASIC are also members;

(d) the Market Supervision Advisory Panel, which advises ASIC on our approach to our responsibilities in day-to-day supervision of the Australian market and on broader market developments. Members are from the financial services industry with experience in the legal, compliance, retail and institutional aspects of broking; and

(e) the Registry and Licensing Business Advisory Committee, which advises ASIC on the impact of current and proposed services with an emphasis on small business and registry services.
Disclosure of Commissioners' interests

ASIC’s Commissioners have a statutory obligation to disclose to the Minister certain interests, such as direct or indirect pecuniary interests and any previous, existing or possible new business relationships. The frequency of these disclosures is not specified in the legislation, but the policy adopted by ASIC, in consultation with the Minister, is to have them made every six months.

Commissioners must also disclose any interest they have that could conflict with the proper performance of their functions in determining a particular ASIC matter. Commissioners must make these disclosures as soon as possible after the conflict arises, and there is also a standing item on the agenda of each monthly Commission meeting for Commissioners to make these disclosures.

Disclosure of ASIC staff interests

All ASIC staff are required to disclose and take reasonable steps to avoid any real or apparent conflict of interest in relation to their employment.

ASIC senior executives are required to complete a detailed declaration of interests every six months. Any real or apparent conflict of interest is required to be reported to the Chairman, who is responsible for managing that conflict.

ASIC staff must disclose interests in securities, derivatives, and non-Australian Public Service superannuation funds every six months. Staff are required to report any real or apparent conflict of interest to a senior executive, who is responsible for managing that conflict.

Annual reporting

The ASIC Act requires ASIC to produce an annual report. ASIC’s annual report must, among other things, include:

(a) a description of the specific goals ASIC has pursued and the priorities we have followed during the year, in performing our functions, exercising our powers and pursuing our statutory objectives;

(b) a description of the progress ASIC has made during that year towards achieving those goals;

(c) a description of any matters that, during that year, have adversely affected ASIC’s effectiveness or have hindered ASIC in pursuing any of those goals and objectives; and

(d) a description of the performance indicators used by ASIC and ASIC’s performance against those indicators.
ASIC’s annual report is given to the Ministers responsible for ASIC, tabled in Parliament and available on ASIC’s website.

Corporations Agreement

The Corporations Agreement is an agreement between relevant states and territories and the Australian Government that affects ASIC governance. The Corporations Agreement, entered into in 1990, established a framework for consultation and working with the states and territories following referral of the responsibility for the regulation of corporations from the states and territories to the Commonwealth.

The most important provisions in the Corporations Agreement that affect ASIC’s governance are requirements for:

(a) consultation by the Minister with the states about the appointment of Commissioners;
(b) consultation by ASIC with the relevant State Minister about the appointment of Regional Commissioners;
(c) ASIC to maintain minimum service levels in each state and submit a half-yearly report on our activities and performance within the relevant state to the State Minister;
(d) ASIC to locate and maintain offices in each state capital; and
(e) regional liaison committees to be established in each state for the purposes of regular consultation with the local business community.

ASIC’s regional liaison committee meetings

In the current 2013 calendar year, ASIC has held a total of 24 regional liaison committee meetings.

Regional liaison committee meetings are held in all states and territories.

Oversight of ASIC

Ministers responsible for ASIC

The Minister responsible for ASIC is the Treasurer, assisted by the Assistant Treasurer and the Parliamentary Secretary to the Treasurer. Particular responsibility for the administration of ASIC has been allocated to the Assistant Treasurer.

The Commission reports through ASIC’s annual report and through briefings, submissions and meetings with both the Treasurer and the relevant
Minister. ASIC also meets with, and provides briefings to, officers of Treasury.

The Minister may direct ASIC to investigate a matter and prepare a report about our findings.

Under s12 of the ASIC Act, the Minister may also direct ASIC about policies and priorities in using our powers or performing our functions, but may not direct ASIC about a particular case.

Office of Best Practice Regulation

As a regulatory agency, ASIC is subject to the Government’s Best Practice Regulatory Requirements, set out in the Best practice regulation handbook. These requirements set standards for the development of new regulation, including undertaking appropriate consultation and regulatory impact assessment.

ASIC has been assessed by the Office of Best Practice Regulation (OBPR) as being fully compliant with the requirements of the handbook every year since OBPR’s establishment in 2007. Table 7 indicates the type of work we undertake to comply with the Best Practice Regulatory Requirements, including preparing regulation impact statements (RISs).

Table 7: ASIC’s compliance with Best Practice Regulatory Requirements, 2005–13

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of RISs prepared*</th>
<th>RIS not required†</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005–06</td>
<td>8</td>
<td>N/A</td>
</tr>
<tr>
<td>2006–07</td>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td>2007–08</td>
<td>3</td>
<td>31</td>
</tr>
<tr>
<td>2008–09</td>
<td>11</td>
<td>40</td>
</tr>
<tr>
<td>2009–10</td>
<td>2</td>
<td>43</td>
</tr>
<tr>
<td>2010–11</td>
<td>8</td>
<td>19</td>
</tr>
<tr>
<td>2011–12</td>
<td>8</td>
<td>16</td>
</tr>
<tr>
<td>2012–13</td>
<td>8</td>
<td>21</td>
</tr>
</tbody>
</table>

* This table notes all matters for which ASIC was required to prepare a RIS in the relevant years. All RISs prepared by ASIC were assessed by OBPR as adequate (as opposed to ‘not adequate’). There are no matters for which a RIS was required, but ASIC did not prepare a RIS.

† A RIS is not required when OBPR confirms that a proposal for new regulation is only minor or machinery in nature.
Ministerial Council on Corporations

ASIC attends the Ministerial Council on Corporations, comprising Australian, state and territory government ministers, as an observer and to answer questions about issues relevant to the administration of the corporations and financial services law.

Accountability to the Parliament

Legislative Instruments Act

ASIC can make legally binding rules or regulations. Many of these will be ‘legislative instruments’ and therefore subject to parliamentary scrutiny under the Legislative Instruments Act 2003 (Legislative Instruments Act). The Legislative Instruments Act provides for:

(a) standards for regulators to conduct appropriate, reasonably practical consultations before making legislative instruments (except in limited circumstances); and

(b) parliamentary scrutiny of legislative instruments made by regulators.

Parliamentary Joint Committee on Corporations and Financial Services

The Parliamentary Joint Committee on Corporations and Financial Services (PJC) is established by the ASIC Act. The PJC’s duties are:

(a) to inquire into, and report to both Houses on:

(i) activities of ASIC or the Takeovers Panel, or matters connected with such activities; or

(ii) the operation of the corporations legislation (other than the excluded provisions), or of any other law of the Commonwealth, state or territory, or foreign country, that appears to the PJC to affect significantly the operation of the corporations legislation (other than the excluded provisions);

(b) to examine each annual report that is prepared by a body established by the ASIC Act and to report to both Houses on matters that appear in, or arise out of, that annual report; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

To fulfil this statutory duty, the PJC holds regular public hearings with ASIC and reports its findings to Parliament. The PJC publicises the dates of hearings, and the transcripts of oversight hearings are published on the
Parliament’s website as soon as they are available, as are the PJC’s reports after they are tabled in Parliament.

The Commission and senior executives from ASIC regularly appear before the PJC at the hearings to provide updates on ASIC’s activities and to answer questions.

In addition to appearing before the PJC, ASIC also answers questions on notice. These answers are also made available on Parliament’s website.

ASIC’s appearances at PJC hearings

In the past 12 months, ASIC has appeared at three PJC hearings.

From these hearings, ASIC has also responded to 117 questions on notice over a range of topics, including high-frequency trading, dark pools, auditors, managed investment schemes, financial literacy and law reform proposals.

Senate Standing Committee on Economics

ASIC appears before the Senate Standing Committee on Economics as part of the budget estimates process.

Senate Standing Order 25 provides for the appointment of a legislative and general purpose standing committee on economics. The Economics portfolio includes Treasury, and ASIC falls under the Treasury portfolio.

The purpose of the Legislation Committee is to inquire into, and report on, estimates of expenditure in accordance with Senate Standing Order 26. Bills or draft Bills referred to the Committee by the Senate, annual reports and the performance of departments and agencies allocated to the Committee. The purpose of the References Committee is to inquire into, and report on, other matters referred to it by the Senate.

ASIC’s appearances at estimates hearings of Senate Standing Committee on Economics

Over the course of the 2012–13 Estimates, ASIC has appeared at three estimates hearings of the Senate Standing Committee on Economics.

During this time, we received 445 questions on over 80 distinct topics, including stock market hoaxes, flood insurance, OTC derivatives, audited accounts, self-managed superannuation funds, blocking of websites and FOFA.

Government inquiries

In addition to appearing before the PJC and the Senate Standing Committee on Economics, ASIC also regularly appears before, and participates in, other Government inquiries.
Recent inquiries where ASIC has either appeared and/or made a submission include:

(a) the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity inquiry into the integrity of overseas Commonwealth law enforcement operations;

(b) the PJC inquiry into the Corporations and Financial Sector Legislation Amendment Bill 2013;

(c) the Senate Economics Legislation Committee inquiry into the Corporations Amendment (Phoenixing and Other Measures) Bill 2012;

(d) the Senate Economics Committee inquiry into the post-global financial crisis banking sector;

(e) the PJC inquiry into the collapse of Trio Capital; and

(f) the PJC inquiry into the Corporations Amendment (Future of Financial Advice) Bill 2011 and the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011.

Administrative and judicial review of ASIC’s decisions

The ASIC Act, the Corporations Act and other Commonwealth regulatory legislation confer various powers and discretions on ASIC.

The exercise by ASIC of most of our powers is subject to judicial review (review of the legality of the exercise of the power) and/or merits review (review of whether a decision was the correct decision) by the Federal Court and the Administrative Appeals Tribunal (AAT), respectively.

ASIC’s actions can also be the subject of complaints to the Commonwealth Ombudsman. The Ombudsman can investigate complaints about actions and decisions of Australian Government agencies to see if they are wrong, unjust, unlawful, discriminatory or unfair.

Regulators of regulators

In addition to the OBPR, there are a number of other bodies that oversee regulators such as ASIC. These include Auditors-General and Ombudsmen. By way of example, the Auditor-General, supported by the Australian National Audit Office, audits the financial statements of Commonwealth agencies such as ASIC. The audit report must be included in ASIC’s annual report.
The Auditor-General also conducts performance audits of agencies such as ASIC. Performance audits conducted by the Auditor-General have examined:

(a) the effectiveness of ASIC’s processes for receiving reports of suspected breaches of the Corporations Act; and

(b) the effectiveness and efficiency of ASIC’s implementation of AFS licensing.

Other relevant laws and agreements

There are a number of laws and agreements that affect ASIC. The most common laws and agreements that affect ASIC are discussed below.

Financial Management and Accountability Act

The Financial Management and Accountability Act 1997 (FMA Act) applies to ASIC. The FMA Act sets out the financial management, accountability and audit obligations of agencies that are financially part of the Australian Government, in particular:

(a) for managing public resources efficiently, effectively and ethically; and

(b) for maintaining proper accounts and records of the receipt and expenditure of public money.

All ASIC procurement activities must comply with the Commonwealth Procurement Guidelines issued under the Financial Management and Accountability Regulations. Value for money, open competition, transparency and accountability are the core principles governing Australian Government procurement.

Under the FMA Act, ASIC’s Chairman is responsible for ASIC’s use and management of public money and resources.

Privacy Act

ASIC is subject to the Privacy Act 1988 (Privacy Act).

The Privacy Act sets out 11 Information Privacy Principles that regulate the manner in which an Australian Government agency may collect, store, use and disclose personal information. Personal information is broadly defined as any information about an identifiable individual.
Public Service Act

238 The majority of ASIC’s staff are engaged under the Public Service Act 1999 (Public Service Act). The Public Service Act, among other things, requires all public servants to observe a statutory set of Australian Public Service values and a code of conduct.

239 Under the Public Service Act, ASIC’s Chairman is responsible for the effective and fair employment, management and leadership of Australian public service employees in ASIC.

FOI Act

240 ASIC is subject to the Freedom of Information Act 1982 (FOI Act), which, broadly speaking, gives Australians a right of access to documents held by government agencies.

241 ASIC is generally required to publish documents released under the FOI Act within 10 business days of the applicant being given access to the documents. This publication may be made by providing details of how the information released may be obtained from ASIC. A disclosure log, which lists freedom of information (FOI) request releases, is available on ASIC’s website.

ASIC and FOI requests

From July 2011 to June 2013, ASIC received 545 FOI requests.

Responses to FOI requests are listed on ASIC’s disclosure log, which is published on our website, www.asic.gov.au.

Other legislation to which ASIC is subject

242 ASIC is also subject to other Commonwealth laws that impose obligations covering matters such as employment practices, anti-discrimination and workplace diversity.

Broader public accountability

243 ASIC is accountable to the public, beyond our formal legislative obligations. Some examples of the ways in which we are accountable to the public in this broader sense include our:

(a) stakeholder survey;
(b) Service Charter;
(c) publication of our policies and procedures; and
(d) interaction with the media.
ASIC is also accountable to our industry and other stakeholders. In this respect, we work hard to ensure that we have good working relationships with our diverse range of stakeholders.

**Liaison with industry stakeholders**

In the past 12 months, ASIC has held more than 600 meetings with our industry stakeholders.

**ASIC stakeholder survey**

ASIC has conducted surveys of our stakeholders in 2008, 2010 and 2013.

The 2013 stakeholder survey was conducted by Susan Bell Research. The survey was independent and measured stakeholders’ perceptions of:

(a) the environment in which ASIC operates; and

(b) ASIC’s performance.

The survey findings are an important input into ASIC’s performance measurement and future planning. The survey was structured to provide feedback on stakeholders’ perceptions on each of ASIC’s three strategic priorities:

(a) confident and informed investors and financial consumers;

(b) fair and efficient financial markets; and

(c) efficient registration and licensing.

Encouragingly, the survey found that, overall, stakeholders were positive about ASIC’s performance and most considered ASIC is performing better than, or the same as, two years ago. Among those surveyed, particular strengths were ASIC’s work in:

(a) market supervision;
(b) keeping markets free from insider trading, and ensuring companies provide reliable and timely information to the market;
(c) holding the organisations that are involved in providing financial products and services to account;
(d) holding auditors to account; and
(e) holding market operators to account.

The majority of respondents also found that ASIC:

(a) acts professionally, promotes confidence in Australia’s financial system, and understands the industries and markets it regulates;

(b) is easy to deal with;
(c) demonstrates transparency in enforcement actions;
(d) effectively monitors compliance in industry;
(e) provides guidance to industry to help organisations to comply with the law; and
(f) provides registration and licensing systems that are easy, efficient, timely and cost-effective, accompanied by information that is easy to understand.

The survey also identified areas where stakeholders perceived limitations with ASIC’s work. These findings are an opportunity to either communicate better to correct misperceptions, or improve the way that we do things.

The four limitations identified were:
(a) not acting quickly enough to investigate breaches of the law;
(b) not clearly communicating what ASIC is doing;
(c) not reducing the red tape associated with compliance; and
(d) not being sufficiently resourced to do our job.

**Acting quickly to investigate breaches of the law**

ASIC is committed to an efficient and transparent enforcement approach. For example, we have made significant changes to increase understanding of how we use our enforcement powers.

Our increased transparency extends to processes for decision making on regulatory action and what regulatory actions we take. For example:

(a) In 2012, we published a public enforcement policy on ASIC’s approach to enforcement, which sets out our decision-making framework for enforcement.

(b) We publish twice-yearly enforcement reports that give an overview of ASIC’s enforcement outcomes and achievements in the previous six months.

(c) We recently published Information Sheet 172 Cooperating with ASIC (INFO 172), which explains the benefits of cooperating with investigations and the factors we take into account when assessing cooperation. A cooperative approach can contribute to quicker resolution of the action taken for the misconduct, time and cost savings for ASIC and better outcomes for affected consumers.

While stakeholders identified ASIC’s work holding gatekeepers to account as a strength, some saw the speed of our investigations as a limitation.
To address this feedback, we will:

(a) communicate more about the legal procedures involved in investigations, the increasing complexity of some matters and the time that investigations take;

(b) continue to narrow the focus of our cases early in the investigation;

(c) continually assess the strength of the evidence gathered during the investigation to ensure that cases with limited or no prospect of success are not pursued;

(d) continue to raise with Government potential law reforms concerning our investigation powers and more flexible enforcement tools; and

(e) analyse recently completed matters to work out whether better, cheaper, or quicker outcomes could have been achieved. Where possible, this will involve benchmarking enforcement work against comparable agencies.

Clearly communicating what ASIC is doing

A significant challenge for a regulator like ASIC, with a range of stakeholders and responsibilities, is communicating effectively about what we are doing.

We use a number of tools to deliver our messages, such as media releases (over 300 per year), broadcast interviews (over 100 per year), Twitter (nearly 10,000 followers), YouTube videos (over 200), the ASIC website (over 1.5 million visitors each month), ASIC’s MoneySmart website (over 400,000 visitors each month), and information sheets (148), regulatory guides (215) and enforcement reports (4).

We tailor our communications depending on the message and the intended audience. We are committed to improving transparency and increasing the public’s understanding of how we operate.

The survey findings indicate we are performing well in our financial literacy work, but that we could do more to communicate what we do and why we do it. In response, we will:

(a) undertake a structured program of communication with external stakeholders about ASIC’s financial literacy work. This includes:

   (i) continuing to promote our MoneySmart website and MoneySmart Teaching program;

   (ii) continuing to build the link between the ASIC and MoneySmart brands; and

   (iii) consulting and communicating across all our sectors—government, financial services, education and the community—through our review of the National Financial Literacy Strategy. In doing this,
we will build on an already strong base of financial literacy stakeholders;

(b) continue to promote the MoneySmart website to investors and consumers and key industry and consumer groups. We will shortly release an annual report on ASIC’s financial literacy work;

(c) build our social media presence and use new communication channels for defined audiences; and

(d) review the ASIC website to further improve accessibility and provide stakeholders with more information and useful tools.

Reducing the red tape associated with compliance

260 We are aware of the regulatory burden on business and have introduced measures to make things easier where we can. Initiatives include:

(a) ASIC’s national Business Names Register, which started in May 2012. A business can now register a name online and does not need to register separately in each state or territory. Businesses saved $34 million in fees in the first 12 months of the register;

(b) a booklet to help small businesses comply with their legal obligations, which was released in August. The booklet is the first of a series of resources to make compliance easier for small business;

(c) facilitating business by granting relief from legal requirements where appropriate. In 2012–13, we granted relief in response to 1,585 applications; and

(d) giving industry certainty to gain efficiencies from technology. For example, we have published guidance on delivering online financial services disclosures and on electronic prospectuses.

261 We are committed to cutting red tape and there are more improvements in the pipeline. For example, we will:

(a) consider whether our class orders (and the conditions attached to them) are still necessary, as they sunset (i.e. cease to have effect according to a legislative schedule) in the next four years under the Legislative Instruments Act;

(b) undertake a project to harmonise the market integrity rules for different financial markets; and

(c) continue to help business by easing compliance with regulatory requirements, or advising Government to scrap regulation with no clear purpose. For example, we are considering whether disclosure is the best way to address certain market failures and whether new information channels are more effective.
We will examine further ideas for reducing the red tape associated with regulatory compliance in our submission to any broader financial system inquiry.

**Being sufficiently resourced to do our job**

ASIC’s funding is a matter for the Government. We will continue to be transparent about how we use our resources—for example, by publishing our twice-yearly enforcement reports.

**ASIC Service Charter**

The ASIC Service Charter covers the most common interactions between ASIC and our stakeholders, and sets performance targets for each type of interaction.

Table 8 sets out ASIC’s performance against the key measures outlined in the Service Charter.

<table>
<thead>
<tr>
<th>Table 8: ASIC’s Service Charter results, 2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service</td>
</tr>
<tr>
<td>General telephone queries</td>
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<tr>
<td>General email queries</td>
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<tr>
<td>General correspondence about our public database and registers (including fee waivers)</td>
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<tr>
<td>Registering a company</td>
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<tr>
<td>Updating company information and status</td>
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<tr>
<td>Service</td>
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<tr>
<td>----------------------------------------</td>
</tr>
<tr>
<td>Registering as an auditor</td>
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</tbody>
</table>
| Registering as a liquidator            | We aim to decide whether to register a liquidator or official liquidator within 28 days | • 100% of liquidator applications decided within 28 days (37 of 37 applications)  
• 98% for official liquidators (44 of 45 applications) |
| Applying for or varying an AFS licence | We aim to decide whether to grant or vary an AFS licence within 28 days   | • 79% of licences granted within 28 days (374 of 472 applications)  
• 83% of licence variations decided in 28 days (649 of 784 applications) |
| Registering a managed investment scheme | By law we must register a managed investment scheme within 14 days of receiving a complete application | • 100% registered in 14 days (205 of 205)                                           |
| Applying for or varying a credit licence | We aim to decide whether to grant or vary a credit licence within 28 days | • 83% of all licence applications decided within 28 days (313 of 375)  
• 91% of licence variations decided in 28 days (160 of 175) |
| Applying for relief                    | If you lodge an application for relief from the Corporations Act that does not raise new policy issues, we aim to give an in-principle decision within 21 days of receiving all necessary information | • 71% of in-principle decisions made within 21 days (1,935 of 2,744 applications) |
| Complaints about misconduct by a company or individual | If someone reports alleged misconduct by a company or an individual, we aim to respond within 28 days of receiving all relevant information (target: 70%) | • 76% finalised within 28 days (8,828 of 11,682) |

Publications setting out our policies and procedures

ASIC aims to be as transparent as possible about the work we do and how we do it. We have published a high number of information sheets on our website, including:

(a) Administrative hearings (INFO 1);  
(b) ASIC decisions: Your rights (INFO 9);  
(c) Protection for whistleblowers (INFO 52);  
(d) Applying for relief (INFO 82);  
(e) ASIC Act infringement notices: Your rights (INFO 139);  
(f) ASIC’s compulsory information-gathering powers (INFO 145);  
(g) ASIC’s approach to enforcement (INFO 151);
(h) Public comment (INFO 152);
(i) How ASIC deals with reports of misconduct (INFO 153);
(j) Legal professional privilege (INFO 165); and
(k) Cooperating with ASIC (INFO 172).

To assist users of our website to find regulatory documents and class orders by topic, we have also published subject matter regulatory roadmaps.

Interaction with the media

ASIC seeks to actively engage with the media. Between January 2013 and August 2013, ASIC handled nearly 1,800 media requests. In the same period, ASIC Commissioners participated in 93 interviews and delivered 22 speeches on a broad range of topics. Journalists are also able to register for ASIC’s alert service.

We understand that the media has a strong interest in our work. We are committed to responding to media requests for information in as full and transparent way as possible. In some cases, however, it is not possible or appropriate for ASIC to comment on certain aspects of our work.
ASIC’s collaboration with other regulators and law enforcement bodies

Key points

ASIC’s wide regulatory remit means that many aspects of the work we do touches on, or is affected by, the work of other regulators and law enforcement bodies.

ASIC enjoys close working relationships with both Australian and overseas regulators and law enforcement bodies.

To strengthen ties with other regulators and law enforcement bodies, we encourage secondment opportunities and the sharing of information and regulatory experience.

ASIC and other regulators and law enforcement bodies

269 ASIC has a very wide regulatory remit. As such, many aspects of the work we do touch on, or are affected by, the work of other regulators and law enforcement bodies.

270 ASIC is a member of the Council of Financial Regulators (CFR), the coordinating body for Australia’s main financial regulatory agencies. Other members are APRA, Treasury and the Reserve Bank of Australia (RBA).

271 ASIC also maintains operational and policy relationships with organisations such as the Australian Competition and Consumer Commission (ACCC), the Australian Taxation Office (ATO), the Australian Crime Commission (ACC) and the Australian Federal Police (AFP), as well as with local police authorities.

272 In addition to our relationship with other regulators and law enforcement bodies, ASIC has a close working relationship with Treasury. We hold regular liaison meetings with Treasury, attended by senior officers, as well as more frequent and ongoing contact on particular matters. We provide input to Treasury on the development of new legislation that relates to ASIC’s jurisdiction, and raise with it significant market or regulatory problems we identify.

273 ASIC is also a member of international bodies, including IOSCO. In March 2013, ASIC Chairman, Greg Medcraft, was appointed as the Chair of IOSCO.

274 ASIC has both formal and informal information sharing arrangements in place with other regulators and law enforcement bodies.
We encourage the secondment of staff between organisations and have seconded staff to, or hosted staff from, Australian regulators such as APRA and the ACCC, overseas regulators from China, New Zealand and Canada, and private sector entities.

Each year, ASIC also hosts the ASIC Forum which brings together regulators from around the world as well as industry stakeholders. The 2014 ASIC Annual Forum will be held in Sydney in March and will explore important global developments in financial sector regulation, how they affect Australia and what we can learn from what is happening internationally. The Forum will also examine ideas coming from behavioural economics, and how these can improve regulation. The aim of the Forum is to influence the agenda both domestically and globally.

ASIC Commissioners and senior ASIC staff regularly present at conferences or seminars organised by other regulators and law enforcement bodies, and we encourage information sharing across all staff levels.

**Relationship with Australian financial services regulators**

**Australian Prudential Regulation Authority**

ASIC has a strong working relationship with APRA. Some of the largest entities in ASIC’s regulated population are also regulated by APRA, including authorised deposit-taking institutions (ADIs), superannuation funds and insurers. As a result, the work of one agency in relation to these entities is often directly relevant to the other agency.

ASIC and APRA cooperate in a number of ways, including information exchanges, regular meetings and joint projects. Cooperation and interaction between ASIC and APRA occurs on a formal and informal basis.

The framework for the interaction between ASIC and APRA is set out in the ASIC–APRA memorandum of understanding (MOU) and the joint protocol that sits below this MOU.

The MOU covers regulatory and policy developments, mutual assistance and coordination, international representation and commitments relating to information sharing and unsolicited assistance.

The joint protocol is intended to be read with the MOU. The protocol sets out an overview of the ASIC–APRA liaison structure, including the seniority of attendees and frequency of the meetings. Both agencies meet quarterly for regulatory and enforcement liaison meetings.
The regulatory liaison meetings cover regulatory and policy development matters, thematic issues, operational matters relating to dual regulated entities as well as developments and emerging risks relevant to both agencies. The enforcement liaison meetings include discussions of current projects and enforcement actions relevant to both agencies.

Each agency has two designated liaison officers—one for regulatory matters and one for enforcement matters. Close contact between these officers has assisted with the efficient functioning of the interagency relationship. The liaison officers from each agency are in contact on a regular basis to manage requests for information and to locate relevant contacts for operational matters.

The liaison officers of both agencies are also responsible for fostering awareness of the other agency among their colleagues. This includes publishing internal guidance about information sharing, arranging for interagency presentations and other training opportunities. Additionally, staff have been seconded between APRA and ASIC.

ASIC and APRA both regularly:
(a) consult with each other before taking regulatory action where relevant;
(b) notify each other of relevant supervisory activities; and
(c) discuss which regulator is the most appropriate to investigate matters or take particular action—for example, in relation to:
   (i) shadow banking without a banking licence;
   (ii) unauthorised entities representing themselves as ADIs; or
   (iii) prudential regulation of the non-banking sector.

ASIC has a close strategic relationship with the ATO. ASIC and the ATO signed a new MOU on 24 December 2012, which sets out the high-level parameters by which the agencies work together on areas of common risk.

ASIC and the ATO have established information sharing guidelines to clarify how and when information should be shared. Information is released through one formal channel with a single point of contact at each agency. This approach ensures appropriate record keeping, minimises the risk of a request being missed and allows the liaison staff to develop an enhanced understanding of the needs of the other agency.

ASIC and ATO staff often attend regular and risk-specific working groups to discuss strategic matters and operational risks, and exchange ideas and information to mitigate those risks. Examples include the SMSF working
group; the financial products working group; and the interagency phoenix working group.

ASIC and the ATO hold a National Liaison Committee Meeting every six months where senior staff of both agencies discuss issues of strategic importance, the effectiveness of information exchange, the utility of ongoing working groups and specific operational matters (such as Project Wickenby).

**Australian Transaction Reports and Analysis Centre**

AUSTRAC is Australia’s anti-money laundering regulator and specialist financial intelligence unit. It oversees compliance with the reporting requirements of the *Financial Transaction Reports Act 1988* and compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* by a wide range of financial services providers, the gambling industry and other entities.

The information and reports that AUSTRAC obtains can be extremely useful to ASIC in administering the Corporations Act and identifying high-risk entities. ASIC has entered into an MOU with AUSTRAC. This MOU sets out the basis for collaboration, cooperation and mutual assistance between the agencies.

ASIC and AUSTRAC have both nominated liaison staff responsible for managing the relationship and monitoring referrals of information between the agencies. Regular meetings are held between the agencies to facilitate close cooperation and ensure that the liaison arrangements are working effectively.

**Reserve Bank of Australia**

ASIC has a strong working relationship with the RBA, including through our joint membership of the Council of Financial Regulators (CFR): see paragraphs 325–327. ASIC staff are involved in a number of joint working groups with the RBA and the other CFR agencies, including on financial market infrastructure and over-the-counter (OTC) derivatives. We also hold regular meetings with the RBA and other CFR agency staff to share market intelligence, particularly in times of market volatility.

An aspect of our role that we work on closely with the RBA is our joint responsibility for licensed clearing and settlement facilities. ASIC and the RBA have an MOU under which each informs the other when determining substantive issues of policy with respect to clearing and settlement facilities, and provides an opportunity to comment. We also engage the RBA on issues that affect the operation of clearing and settlement facilities for the financial markets that ASIC regulates.
ASIC and RBA hold quarterly meetings to discuss other areas of mutual interest, as well as more frequent meetings when the need arises.

Relationship with consumer law regulators

Australian Competition and Consumer Commission

ASIC maintains a strong working relationship with the ACCC. ASIC and the ACCC are signatories to an MOU that provides a framework for the exchange of information and mutual assistance.

ASIC and the ACCC share jurisdiction for consumer protection laws. As a result, both agencies have, on occasion, referred powers to each other where it is prudent for matters notionally within one regulator’s jurisdiction to be dealt with by the other regulator.

ASIC and the ACCC have also worked together to provide guidance to consumers. For instance, ASIC has previously collaborated with the ACCC to publish Regulatory Guide 96 Debt collection guideline for collectors and creditors (RG 96). ASIC is currently engaged in discussions with the ACCC to update this guide.

Australian Consumer Law regulators

The Australian Consumer Law regulators include the ACCC, state and territory offices of fair trading, and the New Zealand Commissioner of Trade.

ASIC works with the Australian Consumer Law regulators to identify emerging issues and, where appropriate, coordinate our activities. ASIC is a signatory to an MOU between the ACCC, all state and territory offices of fair trading, and the New Zealand Commissioner of Trade. This MOU sets out a framework for communication, cooperation and coordination between the signatories so that they can collectively and within their own jurisdictions effectively protect and promote fair trading under the Australian Consumer Law.

All Australian Consumer Law regulators have access to ACLINK, an information sharing platform. ACLINK allows ASIC to:

(a) check whether we can draw on other intelligence in our work;
(b) coordinate any enforcement or compliance work with other regulators;
(c) deliver consistent application of the consumer laws in line with other regulators; and
(d) stay up to date with the activities of other Australian Consumer Law regulators.

303 ACLK provides a common platform for regulators to disseminate intelligence and notify each other of key issues, such as compliance activities, national projects and media campaigns.

**Examples of the collaborative working relationship with Australian Consumer Law regulators**

ASIC has worked with other Australian Consumer Law regulators in relation to:

- the insolvency of extended warranty providers, to assist consumers to recover their goods, and also to ensure that retailers observed consumer statutory warranty rights; and

- natural disasters and the financial collapse of airlines, to assist consumers to get information about their insurance.

All Australian Consumer Law regulators are involved in issues relating to Indigenous consumers. ASIC has undertaken joint outreach with the ACCC to Indigenous communities and organisations, and has co-published guidance for store owners on compliance with consumer protection legislation, including the Australian Consumer Law, the ASIC Act and the National Credit Act.

### Relationship with Australian law enforcement agencies

#### Australian Crime Commission

ASIC has a strong relationship with the ACC. The Chairman of ASIC is an ex-officio board member of the ACC and attends ACC board meetings every three months. ASIC is one of only six Australian government agencies represented on the ACC board.

ASIC also participates in cross-agency standing forums coordinated by the ACC, which meet regularly to discuss ongoing matters relating to financial crime. Among these, the Australian Criminal Intelligence Forum (ACIF) is Australia’s premier meeting of heads of intelligence in law enforcement. ASIC is a founding member of ACIF.

<table>
<thead>
<tr>
<th>Type of meeting</th>
<th>Frequency of meeting</th>
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</thead>
<tbody>
<tr>
<td>ACC board meetings (including preliminary bilateral meetings between the ASIC Chairman and the Chief Executive Officer of the ACC)</td>
<td>Four times per year</td>
</tr>
<tr>
<td>Type of meeting</td>
<td>Frequency of meeting</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>ACIF meetings</td>
<td>Four times per year</td>
</tr>
<tr>
<td>Other standing forums</td>
<td>Varies according to forum; approximately four times per year</td>
</tr>
<tr>
<td>Specific joint agency taskforces</td>
<td>Frequency varies according to needs (e.g. monthly)</td>
</tr>
<tr>
<td>Operational meetings</td>
<td>Held on an as needs basis (e.g. could be weekly when the situation dictates)</td>
</tr>
</tbody>
</table>

ASIC and the ACC have seconded officers between them as required by various operations and taskforces. Three ASIC officers are currently seconded to the ACC as part of two ACC projects. The ACC has provided a part-time secondee to ASIC to work on the intelligence nexus between criminal law enforcement and corporate regulation.

ASIC has had several MOUs with the ACC regarding secondments and taskforces. A ‘head of agreement’ MOU, designed to subordinate future specific MOUs as appendices, is being negotiated between the two agencies and should be finalised before the end of 2013.

**Australian Federal Police**

ASIC liaises with the AFP at strategic and operational levels.

ASIC officers work with their AFP counterparts at a number of regular interagency forums, including the Heads of Commonwealth Operational Law Enforcement Agency (HOCOLEA) sponsored working groups (e.g. on carbon pricing), ACIF and the AFP-chaired OPAL group on identity fraud. ASIC also maintains regular contact with the AFP’s Criminal Assets Confiscation Task Force, High Tech Crime Operations and Intelligence units.

ASIC and the AFP routinely refer matters, such as complaints, to one another when the matter falls more appropriately within the other’s jurisdiction, and share intelligence and information on a regular basis. ASIC provides the AFP with access to our Companies Register and the AFP provides intelligence reporting to ASIC when a matter involves company activity.

ASIC has collaborated with the AFP recently in a number of matters, including a project that examined high-risk financial fraud threats and discussions regarding the involvement of ASIC-regulated entities in organised crime and tax fraud.
ASIC recently executed a new MOU with the AFP, which covers our general relationship, information sharing and operational interaction, and clarifies our respective responsibilities in relation to overseas bribery matters.

**Commonwealth Director of Public Prosecutions**

The CDPP’s functions and powers are set out in the *Director of Public Prosecutions Act 1983* and include the responsibility for prosecution of offences against Commonwealth law.

ASIC and the CDPP have established an MOU, which sets out the principles underpinning the relationship between ASIC and the CDPP, and outlines the circumstances in which ASIC refers matters to the CDPP for prosecution.

Although ASIC has the power to cause a prosecution to be begun, in practice, the CDPP subsequently conducts most prosecutions for Commonwealth offences. Consistent with the MOU, ASIC will refer a brief of evidence to the CDPP and obtain its advice before commencing any prosecution for a serious offence. This process is described in more detail in Section F.

ASIC and the CDPP hold regular liaison meetings to discuss the progress of criminal matters. This includes discussions regarding matters which are still being investigated by ASIC, matters that are being assessed by the CDPP, matters for which ASIC is conducting a summary prosecution and matters in various stages of a criminal prosecution.

ASIC and CDPP staff have also conducted and participated in joint training conferences. There have also been secondments of staff between ASIC and the CDPP.

**State and territory police services**

ASIC works closely with the police services in each state and territory.

ASIC currently has MOUs in place with some state police services, such as Victoria Police, South Australia Police and Queensland Police. ASIC intends to initiate discussions with other state and territory police services, with a view to agreeing on an MOU on similar terms to the one we entered into with the AFP.

ASIC has appointed liaison officers who are responsible for managing our relationships with the state and territory police services. In broad terms, these relationships involve the sharing of information, referral of matters, joint operations, and operational and training assistance.

A recent joint operation between ASIC, Queensland Police and the ACC was Operation ‘Juliet Dynamite’. Operation Juliet Dynamite involved the
investigation and disruption of an organised criminal enterprise operating investment frauds on the Gold Coast. ASIC took injunctive action in the Queensland Supreme Court and assisted Queensland Police and ACC officers in the execution of multiple search warrants leading to the arrest of five people.

Relationship with other Australian regulators

ASIC has MOUs with a number of other regulators, including the Clean Energy Regulator and the Australian Financial Security Authority (AFSA).

ASIC and AFSA are in the process of revising the existing MOU between the agencies. The revised MOU sets out the framework in which ASIC and AFSA will operate and includes:

(a) exchange of relevant information;
(b) appropriate referral of matters; and
(c) cooperation in compliance, education and enforcement activities.

ASIC and AFSA hold regular regional and national liaison meetings to discuss operational and policy matters relating to personal and corporate insolvency. ASIC also meets with AFSA’s Registered Debt Agreement Administrators regulators on a quarterly basis to exchange information and discuss matters and issues of mutual importance.

Participation in multi-agency bodies

Council of Financial Regulators

ASIC is a member of the CFR. The CFR is the coordinating body for Australia’s main financial regulatory agencies.

The CFR’s membership comprises the RBA, APRA, Treasury and ASIC. The CFR meets in person quarterly or more often if required. The meetings are chaired by the RBA Governor, with secretariat support provided by the RBA.

The CFR operates under a charter to facilitate cooperation and collaboration between the member agencies. The CFR provides a forum for:

(a) identifying important issues and trends in the financial system, including those that may affect overall financial stability;
(b) ensuring the existence of appropriate coordination arrangements for responding to actual or potential instances of financial instability, and helping to resolve any issues where members’ responsibilities overlap; and
(c) harmonising regulatory and reporting requirements, paying close attention to the need to keep regulatory costs to a minimum.

**Heads of Commonwealth Operational Law Enforcement Agencies**

ASIC is a member of the HOCOLEA. Through HOCOLEA, ASIC engages with the law enforcement community to identify and collaborate on issues where there is jurisdictional overlap.

Currently hosted by the Attorney-General’s Department, the HOCOLEA forum is attended by ASIC’s Chairman/Commissioners and Chief Legal Officer and meets two to three times per year. Through HOCOLEA, ASIC is involved in policy-level discussions and initiatives with a wide range of Australian Government agencies. The membership of HOCOLEA is made up of representatives from:

(a) the Attorney-General’s Department;
(b) the ACCC;
(c) the ACC;
(d) the Australian Border Protection and Customs Service;
(e) the AFP;
(f) APRA;
(g) the ATO;
(h) AUSTRAC;
(i) the Department of Immigration and Citizenship;
(j) CrimTrac; and
(k) the CDPP.

ASIC has been involved in the recent development of several HOCOLEA initiatives, including:

(a) the Organised Crime Compendium;
(b) the Organised Crime Strategic Framework Taskforce;
(c) the HOCOLEA Research Steering Committee and Research Plan; and
(d) the HOCOLEA Working Group on Carbon Pricing.

**Multi-agency consumer law bodies**

ASIC and other Australian Consumer Law regulators participate in a number of committees and forums.
**Consumer Affairs Forum**

332 The Consumer Affairs Forum (CAF) consists of representatives of all Commonwealth, state, territory and New Zealand ministers responsible for fair trading and consumer protection laws. CAF considers consumer affairs and fair trading matters of national significance and, where possible, develops a consistent approach to those issues. Senior ASIC staff attend CAF’s quarterly meetings.

**Consumer Affairs Australia and New Zealand**

333 Consumer Affairs Australia and New Zealand (CAANZ) comprises executive officers of the Australian Consumer Law regulators. ASIC participates in CAANZ and the following subcommittees:

(a) the Compliance and Dispute Resolution Advisory Committee, which deals with compliance, dispute resolution and enforcement activities relating to the Australian Consumer Law;

(b) the Fair Trading Operations Group, which meets monthly to discuss current key issues and investigations;

(c) the Education and Information Advisory Committee, which deals with education and information activities relating to the Australian Consumer Law and consumer issues more generally; and

(d) the Policy and Research Advisory Committee, which considers and develops common policy on national consumer issues.

**Relationship with overseas regulators**

334 ASIC enjoys a good, cooperative working relationship with a number of overseas regulators.

335 ASIC often exchanges information with overseas regulators. Table 10 provides statistics of requests for assistance made to and from overseas agencies and regulators.

**Table 10: Number of overseas regulator assistance requests by and to ASIC, 2009–13**

<table>
<thead>
<tr>
<th>Year</th>
<th>Requests by ASIC</th>
<th>Requests to ASIC</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009–10</td>
<td>Enforcement</td>
<td>312</td>
<td>104</td>
</tr>
<tr>
<td></td>
<td>Research</td>
<td>78</td>
<td>121</td>
</tr>
<tr>
<td></td>
<td>Probity</td>
<td>10</td>
<td>135</td>
</tr>
<tr>
<td></td>
<td>Referrals</td>
<td>11</td>
<td>28</td>
</tr>
<tr>
<td>Year</td>
<td>Requests by ASIC</td>
<td>Requests to ASIC</td>
<td>Total</td>
</tr>
<tr>
<td>----------</td>
<td>------------------</td>
<td>------------------</td>
<td>-------</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>Other</td>
<td>92</td>
</tr>
<tr>
<td>Total</td>
<td>418</td>
<td>473</td>
<td>891</td>
</tr>
<tr>
<td>2010–11</td>
<td>Enforcement</td>
<td>Enforcement</td>
<td>303</td>
</tr>
<tr>
<td></td>
<td>Research</td>
<td>Research</td>
<td>175</td>
</tr>
<tr>
<td></td>
<td>Probity</td>
<td>Probity</td>
<td>170</td>
</tr>
<tr>
<td></td>
<td>Referrals</td>
<td>Referrals</td>
<td>48</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>Other</td>
<td>108</td>
</tr>
<tr>
<td>Total</td>
<td>297</td>
<td>507</td>
<td>804</td>
</tr>
<tr>
<td>2011–12</td>
<td>Enforcement</td>
<td>Enforcement</td>
<td>272</td>
</tr>
<tr>
<td></td>
<td>Research</td>
<td>Research</td>
<td>146</td>
</tr>
<tr>
<td></td>
<td>Probity</td>
<td>Probity</td>
<td>154</td>
</tr>
<tr>
<td></td>
<td>Referrals</td>
<td>Referrals</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>Other</td>
<td>71</td>
</tr>
<tr>
<td>Total</td>
<td>251</td>
<td>429</td>
<td>680</td>
</tr>
<tr>
<td>2012–13</td>
<td>Enforcement</td>
<td>Enforcement</td>
<td>369</td>
</tr>
<tr>
<td></td>
<td>Research</td>
<td>Research</td>
<td>151</td>
</tr>
<tr>
<td></td>
<td>Probity</td>
<td>Probity</td>
<td>211</td>
</tr>
<tr>
<td></td>
<td>Referrals</td>
<td>Referrals</td>
<td>76</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>Other</td>
<td>82</td>
</tr>
<tr>
<td>Total</td>
<td>408</td>
<td>481</td>
<td>889</td>
</tr>
</tbody>
</table>

Note: 'Enforcement' refers to information sought to assist compliance and enforcement action; 'Research' refers to requests for general information—typically information about the regulator and the laws it administers; 'Probity' refers to checks made in relation to licence and other applicants; 'Referrals' refers to instances where ASIC or an overseas regulator provides information about a suspected breach of the law occurring outside its jurisdiction; and 'Other' refers to any information request not fitting within these categories.

In addition to the ability to make requests for assistance to overseas agencies and regulators, ASIC also responds to requests for public and confidential information from overseas agencies. This includes requests for public information and company extracts, as well as confidential information.

The release of confidential information held by ASIC is governed by the provisions of the ASIC Act and Regulatory Guide 103 Confidentiality and release of information (RG 103). The ASIC Act has recently been amended.
to specify that releases to ‘international business regulators’ are an authorised use and disclosure of information.

Where ASIC does not hold the information and is not also investigating the matter, requests are handled consistent with the provisions of the *Mutual Assistance in Business Regulation Act 1992* (MABR Act).

The MABR Act enables ASIC to assist an overseas business regulator in the administration and enforcement of foreign business laws by obtaining documents, information or evidence (material). Following changes in late 2012, ASIC can now obtain material when the overseas regulator’s request relates to the administration (non-investigative purposes) as well as the enforcement of foreign business laws.
E  ASIC’s complaints management policies and practices

Key points

Each year, many potential breaches of the law are brought to our attention. These can come from public tip-offs, whistleblowers, external dispute resolution schemes, referrals from other regulators, and statutory reports from auditors, insolvency practitioners and licensees.

ASIC takes reports of misconduct (complaints) seriously and we assess each report we receive. Last year, we analysed 11,682 reports of misconduct. These ranged from failure to lodge a form to serious criminality.

It is not possible or appropriate for ASIC to launch an investigation into the significant majority of reports we receive. We endeavour at all times to resolve matters, or assist the public in other ways that are often more appropriate and timely compared to an investigation.

340 Each year, ASIC receives thousands of complaints from the public. ASIC refers to these complaints as ‘reports of misconduct’, in order to distinguish them from complaints made about ASIC.

2012 statistics

In 2012–13, ASIC received and assessed 11,682 reports of misconduct. We also received and assessed 6,985 statutory reports (from auditors and liquidators alleging suspicious activity) and 900 breach reports that related to managed investment schemes and AFS licensees.

341 ASIC takes reports of misconduct seriously. They are a source of valuable intelligence to ASIC about conduct occurring in the areas we regulate. Reports of misconduct can also involve serious financial losses or matters of strong concern to the public.

342 We put a significant amount of resources into assessing every report of misconduct we receive. This process is outlined below at paragraphs 352–367. The assessment process allows ASIC to make an informed decision about what we will do in response to each report.

343 We then contact the person who lodged the report of misconduct to tell them of our decision in relation to their report. Where possible, ASIC also provides other useful information, such as services the person can access for further assistance.
Service Charter results, 2012–13

Under ASIC’s Service Charter, we endeavour to deal with 70% of misconduct reports within 28 days. In the 2012–13 financial year, we completed 76% of misconduct report assessments within 28 days. Assessments that are not completed within 28 days generally relate to complex reports that require significant additional work.

We also aim to complete 90% of all assessments in 60 days. In 2012–13, we completed 93% of our initial assessments within 60 days.

Although ASIC has a good record of meeting our Service Charter targets in this area, we are making continual efforts to improve the way we handle reports of misconduct and our communication with persons who have made a report. These efforts include developing easy-to-understand information on our processes and on common topics of complaint for our website. Table 13 contains a summary of ASIC’s recent initiatives to improve the efficiency of our procedures for handling reports of misconduct and our communication with people who have made such reports.

Making a report of misconduct to ASIC

ASIC receives reports of alleged misconduct from a number of sources, including:
(a) the public (including whistleblowers);
(b) industry participants;
(c) Members of Parliament on behalf of their constituents;
(d) external dispute resolution schemes;
(e) consumer groups and organisations such as community legal centres;
(f) other government and law enforcement agencies at the Australian and state and territory government levels; and
(g) ASIC employees.

In 2012, ASIC released Information Sheet 153 *How ASIC deals with reports of misconduct* (INFO 153). INFO 153 provides useful information on how we:
(a) assess reports of misconduct;
(b) communicate with persons who have made a report; and
(c) protect the confidentiality of persons who have made a report.

ASIC’s website also contains a prominent link to a page entitled, ‘How to complain’. Those using the page are directed to select a category of complaint and are provided with more detailed information about the category of complaint.
ASIC’s website also provides information to the public about dispute resolution services.

ASIC’s MoneySmart website contains information on how to report a scam. By clicking on the scam link, consumers are directed back to the ‘How to complain’ link on ASIC’s website.

Channels for making reports of misconduct

Over 40% of the reports of misconduct ASIC receives are made online through our website, which is our preferred way of receiving such reports. The remaining reports of misconduct are made through various other channels, including by email, telephone, facsimile and letter, or in person at ASIC offices around the country.

Misconduct and breach reporting

ASIC’s specialist team, the Misconduct and Breach Reporting (M&BR) team, handles all reports of misconduct at first instance.

The M&BR team also receives and assesses breach notifications from licensees and notifications from auditors, as well as statutory reports from external administrators.

The Misconduct and Breach Reporting team

The M&BR team is a national team that has 90 full-time equivalent staff from a diverse range of backgrounds, including law, arts, accounting, economics, mathematics and business.

How we assess reports of misconduct

The M&BR team records and assesses every report of misconduct received by ASIC. We aim to acknowledge the receipt of every report of misconduct by contacting the person who made the report within three business days, preferably by telephone.

When a report of misconduct is received, we make a range of inquiries and conduct an initial assessment to see whether the alleged misconduct suggests a breach of a law that we administer and whether regulatory action is appropriate.

This initial assessment is an intensive process. As part of the assessment process, we consider (among other things):

(a) the material provided to us by the person who is reporting the alleged misconduct to ASIC (we will ask for more information if required);

(b) previous reports of alleged misconduct received by ASIC;
(c) all publicly available information;
(d) information we may be able to obtain from other agencies;
(e) information from related third parties;
(f) relevant statutory reports (e.g. in matters where external administrators are appointed);
(g) information derived from third parties through compulsory production notices that we may decide to issue;
(h) information provided by our international peer regulators through memoranda of understanding;
(i) market and trading data and information from ASX and other market operators; and
(j) any previous information obtained by ASIC in any of our activities, including surveillances, enforcement actions and investigations.

All reports of misconduct we receive provide us with valuable information, but not every matter brought to our attention merits further action.

When deciding whether regulatory action is appropriate, we will consider:
(a) the strategic significance of the matter;
(b) the benefits to the market or public of pursuing the misconduct;
(c) matter-specific issues, including what evidence is available and what outcomes could be obtained using that evidence; and
(d) whether there is an alternative course of action for dealing with the concern.

**Strategic significance**

ASIC assesses the seriousness of the alleged conduct, including its impact on market integrity and/or on the confidence of investors and financial consumers. We also consider the nature and extent of the harm or loss suffered.

**Benefits of pursuing the misconduct**

Given ASIC’s finite resources, we always consider the regulatory benefits associated with pursuing reports of misconduct. We consider whether the misconduct is widespread or part of a growing trend and whether taking action will send an effective message to the market or whether an alternative approach is more appropriate. We also look at the consequences of the misconduct for individual investors and consumers—for example, we will consider the amount of money lost and the impact of that loss on the individual consumer.
Other issues specific to the case

We consider issues specific to the matter, including:

(a) whether the matter is within ASIC’s jurisdiction, or is in fact a breach of the laws we administer;

(b) whether there is sufficient evidence available that would be admissible in a court to support any proceedings;

(c) the seriousness of the alleged misconduct;

(d) the time since the conduct occurred (e.g. action taken for old misconduct may have a reduced impact on the market or may be time-barred); and

Note: ASIC may only file civil proceedings within six years of the conduct occurring.

(e) whether it was an isolated incident or whether the misconduct is continuing.

In many cases, there may be insufficient evidence (or likelihood of such evidence ever being attainable) to warrant ASIC commencing an investigation or surveillance. In these situations, the report of misconduct will remain on ASIC’s databases and will be reviewed at a later time if further reports are made or additional information or evidence comes to light.

Where we decide not to take action, we will attempt to contact the person who reported the matter to ASIC and inform them of our decision, preferably by telephone.

Alternative courses of action

ASIC is less likely to take action where the substance of the matter would be better addressed by another agency, or by external dispute resolution or other proceedings between those parties involved.

In many cases, ASIC may also decide that it is more effective to deal with a concern through engaging with stakeholders, issuing guidance to the market or using another one of our regulatory tools rather than conducting a surveillance or investigation.

In some cases, ASIC may decide that no further action at all should be taken in relation to a report of misconduct.

ASIC does not generally act for individuals. We do not have the resources to represent or advocate on behalf of every individual who makes a report of misconduct. Where possible, however, we will provide the person who made the report of misconduct with information that may assist them in determining their options for resolving their concern (including using dispute resolution procedures or taking legal action).
Review of decision

A person who is dissatisfied with ASIC’s decision in relation to their report of misconduct may request a review of that decision. An ASIC officer who was not involved in the original decision will conduct the review and will consider any further information that the person provides.

If the person is still unhappy with ASIC’s handling of their report after this process, they may take their complaint to the Commonwealth Ombudsman. ASIC encourages the public to pursue this option if they are unhappy with our original decision and the review process.

Confidentiality of misconduct reports

ASIC treats all reports of misconduct in confidence. We will only reveal the contents of a report if we are required or authorised to do so under law or if the person who made the report gives us permission to do so.

This approach is consistent with ASIC’s obligations under the ASIC Act. This legislation requires ASIC to take reasonable measures to prevent unauthorised use and disclosure of information we receive in confidence in connection with our statutory functions.

We understand that it can be a source of frustration when ASIC cannot discuss matters with third parties, such as other people who have reported misconduct or the media, due to our confidentiality obligations. Nevertheless, preserving the confidentiality of reports of misconduct is important, and provides protection to people giving information to ASIC.

Nature of reports of misconduct

Table 11 breaks down by subject matter the reports of misconduct ASIC received in 2011–12 and 2012–13.

<table>
<thead>
<tr>
<th>Category</th>
<th>2011–12 (%)</th>
<th>2012–13 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporations and corporate governance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to provide books and records or a report as to affairs to an insolvency practitioner</td>
<td>10</td>
<td>11</td>
</tr>
<tr>
<td>Insolvency matters</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Contractual issues (includes concerns about non-provision of goods and services, quality of goods and services)</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Insolvent trading—unlisted</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>Category</td>
<td>2011–12 (%)</td>
<td>2012–13 (%)</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>-------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Insolvency practitioner misconduct</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Other (e.g. directors’ duties, contractual issues, internal disputes)</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>44</strong></td>
<td><strong>41</strong></td>
</tr>
<tr>
<td>Financial services and retail investors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Credit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operating an unregistered managed investment scheme or providing financial services without an AFS licence</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Managed investment schemes</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Potential scam</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Other (e.g. superannuation, insurance, advice, breach of licence conditions, misleading or deceptive conduct, unconscionable conduct)</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>43</strong></td>
<td><strong>42</strong></td>
</tr>
<tr>
<td><em>Market integrity</em>—including insider trading, continuous disclosure, misleading statements, market manipulation</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td><em>Registry integrity</em>—including incorrect address recorded on ASIC’s register or lodging false documents with ASIC</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Other issues</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: ASIC annual reports (2012 and 2013).

Outcomes of reports of misconduct

Table 12 sets out the outcomes of reports of misconduct between 2011 and 2013.

### Table 12: Misconduct reports, by outcome (2011–13)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Report assessments finalised</td>
<td>12,516</td>
<td>11,682</td>
</tr>
<tr>
<td>Referred for compliance, investigation or surveillance</td>
<td>26%</td>
<td>27%</td>
</tr>
<tr>
<td>Resolved</td>
<td>21%</td>
<td>19%</td>
</tr>
<tr>
<td>No jurisdiction</td>
<td>15%</td>
<td>14%</td>
</tr>
<tr>
<td>No breach/offences</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>Analysed and assessed for no further action by ASIC</td>
<td>33%</td>
<td>35%</td>
</tr>
<tr>
<td>Report assessments finalised</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: ASIC annual reports (2012 and 2013).
As shown in Figure 4, misconduct reports can have four broad outcomes—un-actionable, analysed and assessed for no further action by ASIC, resolved, or referred for action by ASIC.

Figure 4: Misconduct reports, by outcome (2011–13)

Un-actionable

As shown in Table 12, approximately 20% of the reports of misconduct received by ASIC each year are un-actionable, because they fall outside ASIC’s jurisdiction or do not suggest that an offence has been committed. Where a report of misconduct falls outside ASIC’s jurisdiction, ASIC staff will seek to redirect the person who made the report to the appropriate government agency or other body.

Analysed and assessed for no further action

For the matters identified as ‘analysed and assessed for no further action’, ASIC made preliminary inquiries into the alleged misconduct reported. However, in nearly two-thirds of cases in this category, there was insufficient evidence available to warrant taking further action (approximately 23% of all matters).
Of the remaining matters in this category, a large number involve circumstances where another agency, law enforcement body or third party (e.g. a liquidator) is already taking action or is better placed to deal with the underlying issues.

There are also matters where ASIC decides, after considering the factors listed in paragraph 356, not to investigate further or take action. These matters are recorded on ASIC’s database and may be considered at a later date if further information becomes available.

Resolved

On average, about 20% of misconduct reports tend to be resolved at first instance by the M&BR team. This can involve referral to an external dispute resolution scheme, ASIC issuing a warning letter to the party that may be in breach of the law, ASIC providing assistance to the person who made the report in the form of guidance and information about how best to resolve the matter themselves, or ASIC taking action to achieve compliance (e.g. by assisting entities to lodge forms or update addresses).

Referred for compliance, investigation or surveillance

Approximately 25% of reports of misconduct are referred to a specialist team within ASIC for further work. In many cases, this will result in ASIC taking regulatory action. The type of regulatory action we will take depends on the specific circumstances. See Section F for a description of the kinds of regulatory action ASIC may take and when such action may be taken.

Improvements to ASIC’s misconduct report management process

Over the past two years, ASIC has developed a customer engagement framework. This framework provides:

(a) a protocol for dealing with reports of misconduct;

(b) clear communication objectives at each stage of the process for handling reports of misconduct (with tools to assist staff to meet these objectives); and

(c) a commitment to providing clear information about reporting misconduct on ASIC’s public website.

A summary of our improvements is set out in Table 13.
Table 13: Initiatives to improve efficiency and communication

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telephone attendance</td>
<td>We make personal telephone contact (or two attempts) with the person who made the report of misconduct to ASIC within three business days of receipt for all reports (except for market matters, to which we respond immediately due to the sensitivities of the matters raised in these reports of misconduct).</td>
</tr>
<tr>
<td>Two new report-handling streams</td>
<td>We have developed two new report-handling streams for matters that can be resolved quickly:</td>
</tr>
<tr>
<td></td>
<td>• <strong>rapid handling</strong>—for matters that are out of ASIC’s jurisdiction or are appropriate for rapid resolution by way of telephone call and targeted information to assist the person who made the report of misconduct; and</td>
</tr>
<tr>
<td></td>
<td>Note: Examples include employers avoiding employee entitlements, contractual issues, managed investment schemes (frozen funds), scams, and sport arbitrage/gambling schemes.</td>
</tr>
<tr>
<td></td>
<td>• <strong>expedited communication</strong>—for matters within our jurisdiction and about which we wish to collect and assess the information, but where ASIC cannot directly resolve the person’s particular concerns. For these matters, we communicate early with the person to ensure that they have an appropriate understanding of what ASIC can do to assist them.</td>
</tr>
<tr>
<td></td>
<td>Note: Examples of matters handled through expedited communication include insolvency in a small proprietary company, disputes within a small proprietary company, disputes with financial services providers or credit service providers that have not been through dispute resolution procedures, and dissatisfaction with external dispute resolution scheme decisions or dispute handling procedures.</td>
</tr>
<tr>
<td></td>
<td>These report-handling streams are supported by documented processes and published information sheets detailing ASIC’s approach and containing relevant information about where to go or what to do (e.g. Information Sheet 161 <em>Disputes about goods and non-financial services</em> (INFO 161)).</td>
</tr>
<tr>
<td>‘How to complain’</td>
<td>We have redesigned the ‘How to complain’ webpage on ASIC’s website. The new webpage includes three steps designed to provide a person with information about ASIC’s role and who they should contact.</td>
</tr>
<tr>
<td>Customer service principles</td>
<td>The M&amp;BR team has adopted customer service principles for the handling of reports of misconduct. ASIC’s customer engagement framework ensures consistency of messages and service outcomes.</td>
</tr>
</tbody>
</table>

**Breach reporting**

382 The Corporations Act requires AFS licensees to tell ASIC in writing within 10 business days about any significant breach (or likely breach) of their obligations. Failure to report a significant breach (or likely breach) in itself is a significant breach.

383 AFS licensees must have clear and well understood processes for identifying and reporting breaches. Responsible entities of managed investment schemes are also subject to specific breach reporting requirements.

384 As part of their breach report, AFS licensees advise how they identified the breach, how long it lasted, what steps they have taken to rectify the breach and what steps they have taken or will take to ensure compliance in the
future. As part of our assessment of the breach report we will consider the steps the licensee has taken and may decide that no action on our part is required.

ASIC also receives breach reports from auditors, where (among other things) they have reasonable grounds to suspect a breach of the Corporations Act in relation to the company to which they are appointed. In 2012–13, we dealt with slightly fewer auditor breach reports and breach reports relating to managed investment schemes and AFS licensees than in 2011–12. In 2012–13, more than half of the reports were finalised by being referred for specialist review within ASIC.

Table 14 and Figure 5 set out the outcomes of breach reports between 2011 and 2013.

**Table 14: Breach reports, by type and outcome (2011–13)**

<table>
<thead>
<tr>
<th>Type</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditor breach reports</td>
<td>350</td>
<td>314</td>
</tr>
<tr>
<td>Breach reports related to AFS licensees and registered entities of managed investment schemes</td>
<td>1,017</td>
<td>900</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Outcome</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referred for compliance, investigation or surveillance</td>
<td>49%</td>
<td>51%</td>
</tr>
<tr>
<td>Resolved</td>
<td>1%</td>
<td>2%</td>
</tr>
<tr>
<td>Analysed and assessed for no further action by ASIC</td>
<td>49%</td>
<td>47%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>
As part of their breach report, licensees advise what steps they have taken to rectify the breach and to ensure compliance in future. ASIC considers the steps taken and may decide that no action by ASIC is required.


The importance of EDR in the financial regulatory system

There are three external dispute resolution (EDR) schemes in Australia that deal with complaints from retail consumers and investors about financial services providers and credit service providers.

They are the Financial Ombudsman Service (FOS), the Credit Ombudsman Service Limited (COSL) and the statutory Superannuation Complaints Tribunal (SCT). Appendix 2 provides more details about the scope and operation of these schemes, as well as Australia’s dispute resolution and compensation framework for financial services and credit services, more broadly.

In the 2011–12 financial year:

(a) FOS received 36,099 disputes and 228,375 telephone calls;
(b) COSL received 2,741 complaints and 15,764 inquiries; and
(c) SCT received 2,619 complaints and 13,901 telephone calls.

By comparison, in the same period, ASIC received 12,516 reports of misconduct.

The EDR schemes provide an important forum for dispute resolution and referral for tens of thousands of Australians each year. By doing so, they promote confidence in the financial and credit systems.
Without the EDR schemes, these consumers would be more likely to:

(a) seek direct assistance from ASIC or other government or community agencies;

(b) seek to pursue legal action if this was economically viable, requiring more resources to be directed to those agencies and the courts; or

(c) abandon their claim altogether.

Importantly, EDR schemes also provide an opportunity to improve industry standards of conduct. The schemes gather data and intelligence about disputes, and, by maintaining close connections with industry, they can assist in improving market conduct, product features and standards of disclosure to reduce the risk of future disputes arising.

The effective functions that the EDR schemes perform in resolving individual matters mean that, consistent with our statutory role, ASIC can focus on broader and systemic issues and serious misconduct. By reporting systemic issues, serious misconduct and data on complaints and disputes to ASIC, the EDR schemes also play a significant role in assisting ASIC to target this work effectively.
ASIC’s approach to compliance and enforcement

**Key points**

ASIC uses a range of regulatory tools to respond to potential breaches of the law.

Enforcement action is one of several regulatory tools available to us. Other regulatory tools that we use include education, guidance and surveillance.

Enforcement action requires admissible evidence and is often complex and resource intensive. Achieving enforcement outcomes takes time. We need to take this into account when thinking about the best way to handle a matter.

ASIC’s regulatory toolkit

As Australia’s corporate, markets, financial services and consumer credit regulator, we strive to ensure that Australia’s financial markets are fair and transparent and supported by confident and informed investors and consumers. We do this by using a range of regulatory tools to enforce, and promote compliance with the laws that ASIC administers, as well as to improve consumer understanding and decision making.

The regulatory tools available to ASIC include the following:

1. **Education**: ASIC undertakes educational activities, including financial literacy work.
2. **Guidance**: ASIC provides guidance to industry about how ASIC will administer the law to provide clarity to industry participants about their obligations under the law. This is achieved by issuing regulatory guides, consultation papers, reports and information sheets.
3. **Surveillance**: ASIC conducts surveillances by gathering and analysing information on a specific entity or range of entities, a transaction, a specific product or issue of concern in the market to test compliance with the laws we administer and look at consumer and investor outcomes. Following a surveillance, we may publish our findings to inform the market or take further action, such as commencing an investigation with a view to carrying out enforcement action.
4. **Enforcement action**: ASIC undertakes investigations, which may lead to enforcement action such as:
   - criminal action;
(ii) civil action, such as civil penalty proceedings (e.g. for breach of directors’ duties), corrective action (e.g. to correct misleading disclosure) and compensatory action (to recover compensation on behalf of consumers); and

(iii) administrative action (e.g. banning or disqualifying persons from the financial services industry).

(c) *Negotiated outcomes*: ASIC pursues negotiated outcomes (which may arise from surveillances or from investigations), including enforceable undertakings. An enforceable undertaking is a written undertaking given to ASIC that an entity or person will operate in a certain way. It is a flexible and effective remedy in improving compliance with the law and may be enforced through the courts. Regulatory Guide 100 *Enforceable undertakings* (RG 100) provides more information on ASIC’s approach to enforceable undertakings.

Section A provides more details on ASIC’s performance in these areas.

The regulatory tool or tools ASIC chooses to use in response to a potential breach of the law will depend on the objectives that ASIC is seeking to achieve. These include:

(a) punishment;

(b) improving compliance;

(c) protecting the public;

(d) compensation for investors; and

(e) deterrence.

These objectives, and the regulatory tools that are used to achieve them, are summarised in Table 15.

**Table 15: Regulatory objectives and the regulatory tools used to achieve them**

<table>
<thead>
<tr>
<th>Objective</th>
<th>Regulatory tools</th>
</tr>
</thead>
<tbody>
<tr>
<td>Punishment</td>
<td>Includes criminal action, civil penalty action and infringement notices</td>
</tr>
<tr>
<td>Improving compliance</td>
<td>Includes surveillance, guidance to industry, targeted campaigns (such as ASIC’s recent campaigns targeting unlicensed credit providers) and education programs (such as the MoneySmart Rookie campaign)</td>
</tr>
<tr>
<td>Protecting the public</td>
<td>Includes ASIC’s administrative powers to make banning orders or cancel or suspend licences, as well as Companies Auditors and Liquidators Disciplinary Board (CALDB) and Markets Disciplinary Panel (MDP) proceedings</td>
</tr>
<tr>
<td></td>
<td>May also include ASIC’s powers to obtain court orders for corrective disclosure (i.e. correcting misleading information that has previously been published) and the use of public warning notices</td>
</tr>
</tbody>
</table>
**Objective** | **Regulatory tools**
--- | ---
Compensation for investors | Includes taking action to recover compensatory damages on behalf of a person, which ASIC is empowered to do if in the public interest
Deterrence | When ASIC chooses to use its regulatory tools, deterrence is always an underlying objective

Note: A negotiated outcome can achieve a similar result to many of the actions outlined above, including, in particular, compensation, punishment and improving compliance.

**ASIC’s approach to achieving effective regulatory outcomes**

398 When potential breaches of the law come to our attention, ASIC carefully considers and assesses each matter and determines which, if any, of the regulatory tools outlined in paragraph 395 to use. This decision is influenced by the evidence and information gathered during our investigations.

399 There appears to be a common misapprehension that ASIC either commences an investigation or takes no action at all.

400 We may have contributed to this misapprehension. Historically, when we were asked whether we were ‘investigating’ a matter, we usually:

(a) chose to make no comment; or
(b) responded by reference to ‘investigations’ only and did not explain the broader activities that were often also being undertaken, including surveillances.

401 We have typically only referred to ASIC as ‘investigating’ where we have commenced an investigation under the ASIC Act or the National Credit Act. Investigations enliven certain additional compulsory information-gathering powers, such as the power to require a person to attend an examination to answer questions under oath.

   Note: See Figure 6 and Figure 7 for an outline of ASIC’s approach to enforcement action, and the steps involved.

402 The view that ASIC either commences an investigation or takes no action at all overlooks the range of regulatory tools that ASIC commonly employs as an alternative to, or before, commencing an investigation, such as the important work carried out by ASIC’s stakeholder and M&BR teams. It also overlooks the often powerful regulatory outcomes that result from our surveillances and other forms of inquiry, such as corrective advertising and enforceable undertakings that require an entity to pay compensation and take action to address ASIC’s concerns.

403 In the absence of an investigation, our non-enforcement teams, including our M&BR team or stakeholder teams, may be engaged in activities that are highly intensive and often involve exercising ASIC’s compulsory
information-gathering powers to inspect books and records, or to compel the production of documents or the disclosure of information.

The following are examples of matters where ASIC has achieved effective regulatory outcomes without commencing an investigation:

(a) In an effort to protect the public and prevent consumer losses before they occur, ASIC may issue public warning notices about individuals and businesses that we have reasonable grounds to suspect are attempting to scam investors. Recent examples include the following matters:

(i) **Dellingworth Pty Ltd**: We issued a public warning notice urging consumers to be wary of this unlicensed financial services business offering investors returns of up to 50%: see Media Release (12-95MR) *Investors warned about dealing with Dellingworth Pty Ltd* (17 May 2012).

(ii) **Connaught Investment Group**: We issued a consumer alert urging customers to be wary of this unlicensed financial services business offering fake investment opportunities: see Media Release (12-121MR) *ASIC issues warning about Connaught Investment Group* (8 June 2012).

(b) ASIC has been monitoring the household goods rental industry because it has been identified as offering high-risk products to consumers who are often not aware of the type of contract they are entering into. ASIC worked with industry in the first instance to effect change to businesses operations. As a consequence of this work, Mr Rental Australia Pty Ltd entered into an enforceable undertaking with ASIC under which it provided refunds in excess of $300,000 to approximately 1,560 consumers: see Media Release (13-022MR) *ASIC accepts enforceable undertaking from Mr Rental* (12 February 2013).

(c) ASIC’s active monitoring of financial services and credit advertising forced companies such as CBA, HSBC Bank Australia, Bankwest and RAMS Financial Group Pty Ltd to change the way they advertise: see Media Release (12-03MR) *CBA to change Wealth Package loan comparison rates* (12 January 2012); Advisory 12-73AD *HSBC to change home loan advertising* (18 April 2012), Media Release (12-110MR) *Bankwest amends credit card advertising following ASIC action* (4 June 2012), and Media Release (12-153MR) *RAMS changes advertising in response to ASIC concerns* (3 July 2012).

Note: See also case study 2 on RHG Mortgage Corporation, case study 6 on Suncorp, and case study 8 on tyre and rim insurance.
Case study 6: Negotiated outcome—Suncorp Group

In 2013, ASIC sought an independent review of Suncorp Group’s compliance systems after it reported a significant number of breaches of the law to ASIC.

Following the independent review of its compliance systems, Suncorp Group agreed to enhance its compliance systems across its life and general insurance businesses. Suncorp Group committed to improving the processes for:

- monitoring and supervising its representatives in its life and general insurance businesses;
- reporting incidents and breaches in its life and general insurance businesses;
- administering insurance policy customer discounts in its general insurance business; and
- training representatives in its general insurance business.

In the period from June 2010 to June 2013, over 849,000 customers were affected by reported breaches, requiring refunds of approximately $23 million.

Suncorp Group reports regularly to ASIC and will continue to do so until the compliance system changes are complete.

See Media Release (13-155MR) Suncorp Group’s life and general insurance businesses to improve compliance systems following independent expert review (27 June 2013).

ASIC is seeking to address the misperception that, if we are not ‘investigating’ we are not actively engaged on a matter, by publicising the results of our regulatory actions, including those that do not involve formal court-based outcomes. For example, when we have significant dealings with firms around compliance issues, or marketing and advertising problems, we now publish a media release announcing what we have done and why.

Note: There will nevertheless be times where it is not possible or appropriate for us to comment about our work. This is because any public comment in relation to an investigation or an enforcement action may adversely affect a person’s right to a fair hearing.

While ASIC’s enforcement teams are generally responsible for undertaking investigations and initiating enforcement actions, ASIC’s enforcement and stakeholder teams work collaboratively on matters from their outset. This holistic approach allows ASIC to consider, at an early stage of a matter, the full breadth of the regulatory tools available, and effectively use the different skills and expertise of ASIC staff. Stakeholder team staff bring relevant market experience to matters, while enforcement staff are involved in case assessment and ensure that relevant information and evidence is obtained at the earliest opportunity.
Surveillance

Surveillance is a key tool, both in its own right, and as a possible precursor to an investigation and enforcement action. We undertake surveillances in respect of corporations, financial services providers, credit service providers, industry participants and various gatekeepers (including auditors and liquidators).

Note: See Table 2 for statistics on ASIC’s potential surveillance coverage of the regulated populations.

ASIC conducts proactive and reactive surveillances. Proactive surveillances are the result of ASIC scanning the regulatory environment for possible problems. These may relate to particular industries, conduct or entities. Reactive surveillances are prompted by a specific complaint, breach report or ‘tip off’ concerning the subject of the surveillance.

Case study 7: Proactive surveillance on term deposits

ASIC undertook a surveillance of the Australian term deposit market, looking at eight authorised deposit-taking institutions (ADIs) which held over 80% of Australia’s total term deposits.

The surveillance found that seven out of the eight ADIs reviewed promoted their term deposits by advertising only the highest term deposit rates, while maintaining lower rates for all other deposit periods. The periods on which the advertised higher rates were offered varied over time. This ‘dual pricing’, coupled with the potential for term deposits to roll over by default if the investor does not take action, creates a risk that a retail investor could inadvertently end up in a term deposit with a much lower interest rate.

ASIC made several recommendations designed to address this risk by maximising the disclosure to investors about what happens when a term deposit matures.

ASIC conducted a follow-up surveillance to assess the implementation of the recommendations by ADIs. This review found improved industry practice and better outcomes for consumers in relation to the automatic rollover of term deposits. Consumer outcomes on rollovers of term deposits had improved by billions of dollars.


Case study 8: Reactive surveillance on tyre and rim insurance

The National Credit Code allows the financing of premiums for only one year. Financing of car insurance premiums for more than one year can lead to customers paying undue interest on premiums and being unfairly locked into longer contracts with one insurer.

In mid-2012, BMW Australia Finance Ltd notified ASIC that it had breached the National Credit Code because it had financed insurance tyre and rim
premiums for more than one year. BMW subsequently refunded a total of $1.4 million to 2,466 customers.

Following this breach report, ASIC conducted an industry-wide review that found that there had been improper financing of tyre and rim insurance premiums by some of Australia’s largest car financiers.

As part of the review, ASIC asked car finance providers to examine their funding of tyre and rim insurance premiums and encouraged them to come forward if they identified breaches of the National Credit Code (and its predecessor, the Uniform Consumer Credit Code). Working with the Australian Finance Conference, ASIC asked businesses to put in place a process for identifying and refunding affected consumers, and procedures and controls to ensure this conduct does not happen again.

This work resulted in a number of major car financiers agreeing to pay back over $15 million to more than 30,000 car owners.

See Media Release (13-231MR) ASIC review prompts car financiers to refund more than $15 million (28 August 2013).

Both ASIC’s surveillance work and investigations can result in entities agreeing to enter into an enforceable undertaking with ASIC. Recent examples of enforceable undertakings include:

(a) an enforceable undertaking from UBS Wealth Management Australia Ltd in which it agreed to modify key aspects of its compliance culture and frameworks and remedy past compliance failures in the provision of financial advice to retail clients (see Media Release (11-52MR ASIC accepts legally enforceable undertaking from UBS Wealth Management Australia (17 March 2011));

(b) an enforceable undertaking from the auditor of Wickham Securities in which he agreed to cancel his registration as an auditor and never reapply for registration as an auditor or perform any duties or functions of an auditor (see Media Release (13-156MR) Wickham auditor removed from industry (27 June 2013)); and

(c) an enforceable undertaking from Nufarm Limited. This enforceable undertaking followed concerns that Nufarm’s financial reporting systems did not produce sufficient up-to-date information about its financial performance and current market conditions. Nufarm Limited paid $66,000 to comply with an infringement notice for an alleged contravention of its continuous disclosure obligations (see Media Release (10-255AD) Nufarm pays penalty and offers enforceable undertaking (1 December 2010)).
to responsible lending and disclosure that it would have had to comply with had it been licensed.

Solar Rentals then entered into an enforceable undertaking which required it to provide appropriate disclosure to affected consumers and then offer those consumers three options:

- termination of the contract with a full refund (and possible removal of the systems);
- outright purchase of the system with the price payable being the retail price less payments already made; or
- termination of the contract and entry into a new compliant contract in relation to the balance of payments owed (subject to the responsible lending obligations).


**Investigations and enforcement action**

In response to a potential breach of the law, ASIC may undertake an investigation that may lead to enforcement action. ASIC can pursue a variety of types of enforcement actions, falling into the broad categories of criminal, civil and administrative action.

Note: Details of these different types of enforcement actions are outlined in paragraphs 432–443.

**Using a combination of tools**

In many cases, ASIC uses a combination of regulatory tools to achieve a number of objectives. The collapse of Opes Prime Stockbroking Limited (Opes Prime) is an example of where a range of regulatory tools were used to achieve a number of objectives, including punishment and deterrence, compensation and improving compliance.

**Case study 10: ASIC’s use of a combination of regulatory tools to address the collapse of Opes Prime**

Opes Prime was a securities lending and equity financing business which collapsed in March 2008 leaving creditors $630 million out of pocket. ANZ and Merrill Lynch were major financiers of Opes Prime.

ASIC’s investigation into the collapse of Opes Prime considered:

- how to maximise the return available to Opes Prime creditors;
- how to improve compliance processes across ANZ; and
- whether Julian Smith, Laurie Emini and Anthony Blumberg had dishonestly breached their duties as directors of Opes Prime.

ASIC also considered wider market integrity issues relating to capital adequacy requirements, substantial shareholder notices and breach reporting.
See Media Release (08-61MR) ASIC launches investigation into Opes Prime (28 March 2008).

Protecting the public
Within a week of ASIC commencing its investigation, ASIC was successful in obtaining orders (by consent) preventing the three directors of Opes Prime from leaving Australia.

Compensation
On 6 March 2009, ASIC announced that it had entered into a settlement which resulted in $253 million being paid to Opes Prime creditors. As part of the settlement process, ASIC agreed to release ANZ and Merrill Lynch from potential claims which, if successful, had the potential to provide compensation for creditors. ASIC initiated the settlement discussions with a view to securing compensation for creditors quickly and without the need for costly and protracted litigation.

Improving compliance
On 6 March 2009, ASIC entered into an enforceable undertaking with ANZ. The enforceable undertaking required ANZ to complete a program to remedy deficiencies in operational procedures across the ANZ Custodian Services business, including its securities lending operations.

Punishment
On 11 January 2010, Mr Smith, Mr Emini and Mr Blumberg were charged with dishonestly breaching their duties as directors of Opes Prime. The charges arose from ASIC’s allegation that, shortly before Opes Prime collapsed, the directors signed financial documentation with ANZ Bank to obtain a loan for Opes Prime and pledged the assets of Opes Prime as security to meet the obligations of a third company, Leveraged Capital (of which Mr Emini and Mr Smith were directors).
Mr Emini and Mr Blumberg each entered into early guilty pleas and, on 27 July 2011, were sentenced to 12 months and six months imprisonment respectively. The case against Mr Smith proceeded to trial in the Victorian Supreme Court and, on 6 September 2013, Mr Smith was found not guilty.
See Advisory (11-145AD) Opes Prime directors plead guilty (19 July 2011).

Wider surveillance
At the same time the investigation into Opes Prime was being conducted, ASIC was examining the business models of other securities lending and equity finance businesses. On concluding our surveillance, we noted that the securities lending and equity financing business operated by Opes Prime was based on a model traditionally used in the wholesale market in which the participants were more sophisticated and had a clear
understanding of their rights and obligations. Of concern to ASIC was that Opes Prime took this model to the retail market, where some retail investors may not have been aware of their rights and obligations.

**ASIC’s enforcement toolkit**

When we suspect that there has been a contravention of a law that ASIC administers, we may commence an investigation under the ASIC Act or the National Credit Act.

Figure 6 summarises how we select matters for investigation and enforcement action. More detail on ASIC’s approach to enforcement is set out in Information Sheet 151 *ASIC’s approach to enforcement* (INFO 151).
Figure 6: ASIC’s approach to investigations and enforcement action

Member of public reports misconduct → Monitoring/surveillance work → Referral from other regulator → Report to ASIC as required by law

Does the potential misconduct fall within our regulatory responsibility?

- YES → Referral to other authority as appropriate
- NO

Assessment of matter
- What is the extent of harm or loss?
- What are the regulatory benefits of pursuing the misconduct, relative to the expense?
- How do other issues, like the type and seriousness of the misconduct and the evidence available, affect the appropriateness and availability of any remedy?

Should a formal investigation be held?

- NO
- YES → Did the investigation find suspected misconduct?

- NO → Other regulatory tools may be more effective (e.g., surveillance or stakeholder engagement)
- YES

Assessment of appropriate remedy
- What is the nature and seriousness of the misconduct?
- What was the post-misconduct behaviour of the offender?
- What is the strength of the case?
- What impact will the remedy have on:
  - the person or entity?
  - the regulated population?
  - the public?
- Are there any mitigating factors?

What are the appropriate remedies?

Punitive, Protective, Preservative, Corrective, Compensation, Negotiated resolution
In deciding which matters to investigate, we carefully review information from a variety of sources, including those outlined at paragraph 354. We also carefully assess the factors explained in paragraphs 356–365, against the information available to us at that point in time.

Sometimes we may consider the impact of a matter on the market is so far-reaching that we must investigate it and take enforcement action that will provide a credible deterrent effect, even though the investigation process is likely to be resource intensive. We are also prepared to pursue a difficult matter if an important legal obligation could be tested and clarified.

**ASIC's investigative powers**

When we commence an investigation, it enlivens various investigative powers, including:

(a) our compulsory information-gathering powers, including those that enable us to require a person to:

(i) attend an examination to answer questions under oath;

(ii) provide us with such assistance as is reasonably requested in relation to the performance of our functions; or

(iii) provide us with documents and information;

Note: Each of these powers is usually exercised by giving a written notice in the form prescribed by law. We can also use (ii) and (iii) when we do not have an investigation in progress, such as where we are conducting a surveillance to ensure compliance with the law.

(b) our power to make an application for a search warrant;

(c) our power to access telecommunications records; and

Note: We may also exercise our power to access telecommunications records when an investigation is not yet in progress, but where such exercise is reasonably necessary for the enforcement of a criminal law or a law imposing a penalty.

(d) our power to make an application for a stored communications warrant.

Note: Stored communications include text messages, emails and voicemail messages sent or received by a person that are held on equipment operated by a carrier and cannot be accessed without the assistance of the carrier.

We use these investigative powers to seek to find out whether there is evidence that a suspected contravention has occurred.

We must use our compulsory powers for a proper purpose. This means that the use of a power must be designed to advance our inquiry. We recognise that we must use these powers responsibly; accordingly, we have safeguards in place to ensure these powers are not misused.

We use these compulsory powers regularly because:

(a) our responsibilities are broad, which means that we conduct a large number of surveillances and investigations—for example, we oversee,
license and regulate a wide range of entities and individuals in the financial services, markets and corporate sectors, including financial advisers, fund managers, financial markets and their participants, insurance brokers, credit service providers, registered managed investment schemes, companies, auditors and liquidators;

(b) the areas regulated by ASIC are often complex—for example, financial transactions are largely document-based and often large scale, and in some cases there are a large number of entities and individuals involved; and

(c) many entities and individuals will not provide documents to ASIC on a voluntary basis because, among other things, they want the statutory protection from a potential breach of confidentiality or other liability that arises when a compulsory request is complied with.

Table 16 sets out the total numbers of notices issued in the exercise of our compulsory powers from 2010 to 2013.

<table>
<thead>
<tr>
<th>Description</th>
<th>2010–11</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notices issued</td>
<td>4,338</td>
<td>5,714</td>
<td>4,359</td>
</tr>
</tbody>
</table>

Note: Includes notices to appear for examination, provide reasonable assistance, disclose information, and provide books and records.

### Search warrants

Although not frequently used, we also have powers to apply for and execute search warrants to obtain documents that may not be available through our other information-gathering powers.

In 2012–13, we applied for 31 search warrants in relation to 10 investigations. Twenty-five warrants were executed.

Search warrants are one of the most effective and powerful investigative tools available to obtain and preserve evidence in an investigation. A search warrant authorises the warrant holder to enter and search private property and to seize evidence—conduct that would otherwise be a trespass upon the privacy and property of another.

While search warrants are an essential tool in ASIC’s investigations, our current search warrant powers have some limitations that diminish their effectiveness. Paragraphs 624–631 in Section I contains ASIC’s recommendations in relation to reforms to ASIC’s search warrant powers.
Telecommunications records and stored communications

ASIC also has the power to obtain disclosure of:

(a) telecommunications records, such as call charge records; and
(b) stored communications, provided we obtain a warrant.

Telecommunications records and stored communications are often important sources of evidence. This is particularly the case in market misconduct matters, such as insider trading, where information is typically exchanged by telephone.

While ASIC can obtain access to these types of telecommunications records, our ability to obtain stored communications is limited because telecommunications carriers are not required to retain these records. Additionally, ASIC cannot access telecommunications intercepts, which are also a vital aspect of modern law enforcement.

Determining whether to take enforcement action

In determining whether ASIC should take enforcement action and, if so, what action this should be, ASIC considers the circumstances of each case. What we decide will depend on what we want to achieve and what we are able to achieve. The latter consideration is heavily influenced by the evidence that is available to establish the case; for this reason, we undertake a careful assessment of the evidence before commencing enforcement action.

Assessment of the evidence

To pursue enforcement action, ASIC must have sufficient credible, reliable and admissible evidence to prove all elements of the alleged contravention to the requisite standard of proof. This means that ASIC must be able to prove the relevant facts of a matter beyond reasonable doubt (for criminal matters) and on the balance of probabilities (for civil matters).

There is less need for admissible evidence in order to pursue administrative proceedings, negotiated settlements or enforceable undertakings because the rules of evidence do not apply. However, findings of fact in administrative proceedings must be made based on material that is relevant, credible and probative.

In assessing the evidence, ASIC must consider whether there is sufficient documentary evidence and whether there are credible and reliable witnesses who are authorised to speak about and produce these documents. The credibility and reliability of witnesses is critical to a successful enforcement action. It may be compromised if the witness:

(a) was involved in the offence;
(b) was subject to actual or perceived conflicts of interest; or
(c) cannot recall particular events or where their recollection of events is inconsistent, vague, imprecise or unreliable. In cases where an investigation deals with events from some time ago, recollections may change or may not match contemporaneous documents.

Types of action we can pursue

We can pursue a range of different types of enforcement action, as outlined in paragraphs 432–443. These fall into the broad categories of criminal action, civil action and administrative action.

Criminal action

ASIC will generally consider criminal action for serious conduct that is intentional, dishonest or highly reckless. Criminal convictions and penalties, including imprisonment, have a powerful deterrent effect on individuals.

Note: Following a conviction for an offence involving dishonesty and punishable by imprisonment for at least three months, or for an offence against the Corporations Act punishable by imprisonment for a period greater than 12 months, an individual is automatically disqualified from managing a corporation.

ASIC has a range of specific criminal investigation and prosecution functions under the ASIC Act, Corporations Act and National Credit Act. All criminal prosecutions arising out of ASIC investigations are commenced by ASIC, but ASIC is not a prosecuting authority.

ASIC can conduct to completion our own prosecution of certain summary matters. These include, but are not limited to:

(a) address offences (e.g. not providing ASIC with correct company office addresses for publication on the register);
(b) the offence of performing a function of an officer of the company while the company is being wound up;
(c) offences of failing to assist a liquidator (e.g. failing to deliver company’s books or provide a report as to a company’s affairs); and
(d) minor regulatory offences under the National Credit Act, including offences:
   (i) of failing to notify ASIC of certain matters;
   (ii) of failing to provide consumers with disclosure; and
   (iii) in relation to content requirements of the disclosure.

Otherwise, for non-summary matters, ASIC obtains advice from the Commonwealth Director of Public Prosecutions (CDPP) before commencing criminal proceedings. For more serious criminal matters:

(a) ASIC’s role as an investigatory agency is to gather witness statements and documentary evidence and compile that material into a brief of evidence; and
(b) The CDPP’s role is to examine the brief of evidence and decide whether a prosecution should be commenced on the basis of the available evidence. This decision is made independently of ASIC in accordance with the Prosecution Policy of the Commonwealth. The CDPP also decides whether to brief counsel and which counsel to brief.

Case study 11: Recent examples of successful criminal prosecutions

In addition to those outlined in case study 4, recent examples of successful criminal prosecutions include:

- the sentencing of Glen Evans to five years imprisonment (with a non-parole period of three years and nine months) for fraudulent conduct that cost investors more than $1.6 million. ASIC’s concerns arose from Mr Evans’s role as a director of Kismet Trading Pty Ltd, during his employment at Bell Potter Securities. Between September 2002 and October 2008, Mr Evans entered into contracts with individuals and self-managed superannuation funds to invest in listed Australian equities and derivatives. ASIC’s investigation found that Mr Evans failed to invest the money as agreed, provided false trading and performance reports, failed to repay the balance of the proceeds to the investors, and in some instances used clients’ money as collateral for his personal trading account without their authorisation (see Media Release (13-118MR) Former Bell Potter adviser sentenced to 5 years jail (23 May 2013)); and

- the sentencing of John Joseph Hartman, a former equities dealer employed by Orion Asset Management Limited, to four years and six months imprisonment on 25 insider trading related charges. Mr Hartman also consented to forfeiture of approximately $1.6 million to the Commonwealth. On appeal, the Court of Criminal Appeal re-sentenced Mr Hartman to an overall term of three years imprisonment (with a single pre-release period of 15 months) (see Advisory (11-285AD) Appeal on sentence upheld for John Hartman (7 December 2011)).

Civil action

ASIC has a range of civil remedies available. ASIC can take civil action on our own or in addition to criminal action. The types of civil actions available to ASIC include civil penalties, injunctive relief, corrective action and compensatory action.

Civil penalties

Civil penalties may be imposed for serious contraventions of the corporations legislation, such as a breach of directors’ duties. Civil penalties include orders of disqualification, compensation and financial penalties. Such penalties have a serious impact on the defendant and act as a deterrent to others.
Case study 12: Recent successful outcomes of civil penalty actions

Recent successful outcomes of civil penalty actions include:

- civil penalty proceedings against Dr Martin Soust, the former chief executive officer of Select Vaccines Limited, for market manipulation. On 31 December 2007, Dr Soust purchased shares in Select Vaccines in his mother’s name, shortly before the close of the market for the calendar year. The purchase increased the company’s share price by 25% and resulted in the payment of a performance bonus to Martin Soust & Co. ASIC obtained declarations that the purchase of shares created an artificial price for trading in Select Vaccines and a false and misleading market regarding the price for trading in Select Vaccine shares. Dr Soust was ordered to pay a pecuniary penalty of $80,000 and was disqualified from managing a corporation for 10 years (see Advisory (10-88AD) ASIC obtains pecuniary penalty and disqualification order against former Select Vaccines director (27 April 2010)); and

- James Hardie Industries Limited in which pecuniary penalties and disqualification orders were made against former non-executive directors and the company secretary in relation to findings that they had breached their duties when the company made statements about its asbestos compensation fund. These penalties were imposed in late 2012 following ASIC’s successful appeal to the High Court. Since the original decision in James Hardie in 2009, ASIC has seen an improvement in board engagement with disclosure issues in corporate Australia generally (see Media Release (12-275MR) Decision in James Hardie penalty proceedings (13 November 2012)).

Injunctive relief

ASIC may take injunctive proceedings to restrain a person or entity from engaging in specific conduct, or to compel compliance with the law to prevent further loss or harm from occurring.

We can obtain urgent injunctive relief to appoint receivers, freeze money and restrict a person’s travel movements in order to protect the interests of others who may have claims under the Corporations Act. A court will only grant this relief if it considers it necessary or desirable to do so for the purpose of protecting a person’s interests. These orders are not obtained routinely. ASIC must have evidence that links the person against whom we wish to obtain orders with transactions or conduct that we suspect has involved a breach of the Corporations Act. We must also show that assets may be dissipated or that the person may leave the country.

Case study 13: Recent examples of injunctive relief obtained by ASIC

Recent examples of injunctive relief obtained by ASIC include:

- action taken after the collapse of Wickham Securities against 10 defendants to preserve assets for the benefit of investors whose funds had been applied to Wickham Securities and other corporate
entities (see Media Release (13-185MR) ASIC extends freezing orders in Wickham Securities Ltd collapse (19 July 2013)); and

- action taken to freeze the assets of LM Investment Management founder Peter Drake and to restrain him from travelling out of Australia (see Media Release (13-266MR) Court orders surrender of LM founder’s passport, freezes assets (27 September 2013)).

Corrective action

ASIC can seek an order from the courts for corrective action if we consider that information is misleading and should be corrected.

Case study 14: Recent example of corrective action taken by ASIC

An example of corrective action was ASIC’s action against City Index Australasia Pty Ltd (CIA) and its director, Blair Jason Travers.

ASIC alleged that, in 2011, CIA (which did not hold an AFS licence) conducted a cold calling scam. The company promoted investments in financial products by cold calling investors who, in turn, were directed to false financial product information contained on a website.

As a result of ASIC commencing injunction proceedings, Mr Travers and CIA were ordered to remove all material used to promote the scam and Mr Travers was barred from the financial services industry for 10 years. Approximately $38,000 of investor funds, frozen following ASIC action, was distributed to investors on a pro-rata basis.

See Media Release (12-137MR) ASIC acts to stop cold calling scam and obtain compensation for investors (25 June 2012).

Compensatory action

ASIC can, if we consider it to be in the public interest, commence a court action to recover damages: see Table 3 in Section A for a list of ASIC’s top 10 compensation outcomes from 2008–13.

Case study 15: Recent successful compensatory outcomes achieved by ASIC

Recent successful compensatory outcomes achieved by ASIC include:

- **Westpoint:** The investors in Westpoint-related financial products had an outstanding total capital invested of $393 million as at January 2006 when the Westpoint Group collapsed. Since November 2007, ASIC has commenced 19 civil actions seeking to recover funds for investors in the majority of companies in the Westpoint Group, including:
  - a claim against KPMG, the former auditors of the Westpoint Group;
  - claims against the directors of nine Westpoint mezzanine companies, and various entities associated with a director;
  - claims against seven financial planners; and
  - a claim against State Trustees Limited.
ASIC subsequently obtained court orders for a global mediation of these actions, resulting in total compensation of $97.2 million.

- **Storm Financial Limited**: We reached a settlement that required CBA to make available up to $136 million as compensation for losses suffered on investments made through Storm Financial. The compensation will be available to many CBA customers who borrowed from the bank to invest through Storm Financial. We alleged that the Storm Financial model of financial advice amounted to the operation of an unregistered managed investment scheme. We also alleged that CBA was knowingly concerned in Storm Financial’s operation of the unregistered managed investment scheme.


### Administrative action

ASIC has a range of administrative actions available to us, including powers to:

(a) ban a person from acting as a director for up to five years;

(b) ban (including permanently ban) a person from providing financial or credit services;

(c) issue a stop order for defective disclosure documents (e.g. prospectuses and Product Disclosure Statements);

(d) give a direction to a market to suspend dealing in a financial product if it is necessary or in the public interest; and

(e) issue infringement notices:

   (i) for engaging in conduct contrary to provisions in the National Credit Act or the ASIC Act; or

   (ii) to a listed entity for breaches of continuous disclosure obligations.

ASIC can also:

(a) refer alleged breaches of the market integrity rules by market participants or operators to the Markets Disciplinary Panel (MDP); and

(b) make an application to the CALDB in relation to the conduct of a registered auditor and liquidator.

### Case study 16: Recent successful administrative outcomes

Recent successful administrative outcomes include:

- the permanent banning of Constantinos Patniotis from engaging in credit activities. ASIC’s investigation found that Mr Patniotis had engaged in unlicensed credit activities, failed to maintain a trust account and deposited lenders’ and borrowers’ funds into his personal account, misused funds from lenders, facilitated loans to borrowers that he knew were poor credit risks and failed to keep proper records (see Media
the banning of James Pearson from providing financial services for three years for market rigging. Mr Pearson was a former client adviser with stockbroking firm DJ Carmichael who had engaged in conduct inconsistent with the orderly operation of a financial market. In particular, between 12 May and 15 July 2011, Mr Pearson placed 20 orders on ASX as part of an on-market buyback of units in the LinQ Resources Fund. ASIC found Mr Pearson’s bids were for a purpose other than giving effect to the buyback. Mr Pearson was found to have placed the orders late in the day, causing the closing share price of the LinQ Resources Fund to be relatively high, thus creating a false or misleading appearance in the price for trading in the stock (see Media Release (13-099MR) ASIC bans Perth financial adviser for three years (6 May 2013));

the payment by City Index Australia Pty Ltd of $13,200 to comply with two infringement notices issued by ASIC under the Australian Consumer Law. ASIC alleged that statements made on City Index’s website were false or misleading representations and misleading conduct in relation to financial services (see Media Release (12-256MR) City Index Australia pays infringement notice penalties (22 October 2012));

the payment by Leighton Holdings Limited of $300,000 to comply with three infringement notices for three separate alleged contraventions of its continuous disclosure obligations. ASIC also accepted an enforceable undertaking from Leighton Holdings, under which the company agreed to review its procedures relating to complying with its continuous disclosure obligations (see Media Release (12-53MR) Leighton Holdings complies with three ASIC infringement notices for alleged continuous disclosure breaches and ASIC accepts compliance enforceable undertaking (18 March 2012));

the payment by BC Iron of $66,000 to comply with an infringement notice issued for an alleged contravention of its continuous disclosure obligations (see Advisory (12-43AD) BC Iron complies with ASIC infringement notice for alleged continuous disclosure breach (8 March 2012));

the payment by Merrill Lynch Equities (Australia) Limited of $120,000 to comply with an infringement notice given to it by the Markets Disciplinary Panel (MDP). The MDP found that Merrill Lynch had failed to ensure that:
  – its automated order processing system had appropriate automated filters, filter parameters and processes to record changes to the filters; and
  – the use of that system did not interfere with the efficiency and integrity of the market (see Media Release (13-129MR) Merrill Lynch Equities (Australia) Limited pays $120,000 infringement notice penalty (31 May 2013)); and

the cancellation of liquidator Mark Levi’s registration following ASIC’s successful application to the CALDB. ASIC alleged that Mr Levi dishonestly used $92,000, belonging to a company of which the firm
Mr Levi worked for was the receiver, to pay two personal tax bills. The CALDB agreed with ASIC and found that Mr Levi was not a fit and proper person to remain registered as a liquidator (see Media Release (13-227MR) ASIC to remove liquidator from industry (23 August 2013)).

The time taken to achieve enforcement outcomes

In investigating and achieving enforcement outcomes in relation to breaches of the laws that we administer, ASIC has to deal with complex products, complex structures, large volumes of material and well-resourced defendants who often challenge ASIC’s powers and processes, and initiate costly appeals.

The time and cost of achieving enforcement outcomes can vary depending on the extent of cooperation ASIC receives, the availability and location of evidence, and the type of outcome pursued.

Together with other law enforcement agencies, ASIC is often criticised for the time we take to achieve enforcement outcomes.

Some commentators have attempted to compare the time it takes ASIC to act with the time taken for overseas regulators. In compiling this submission, ASIC has attempted to obtain data to benchmark our performance with comparable overseas regulators. However, a direct comparison is difficult and problematic for the following reasons:

(a) The jurisdictions of each agency vary, such that:
   (i) published figures may include matters that are outside ASIC’s jurisdiction, such as bribery, anti-corruption or money laundering; and
   (ii) in many overseas jurisdictions, there are multiple regulators who undertake the work that ASIC is responsible for. For example, in the United States, the Securities and Exchange Commission (SEC) is responsible for civil and administrative actions, while the Federal Bureau of Investigation is responsible for, among other things, criminal investigations into securities fraud.

(b) Each agency has a different way of calculating the time taken to achieve regulatory outcomes, making comparisons invalid. For instance, ASIC calculates the average time taken from the start of an investigation through to the last action in that investigation. However, the SEC produces data on the average time from opening a matter under inquiry or an investigation to filing of the first enforcement action, including any injunctive relief, arising out of that investigation.
Time involved in conducting an investigation

Figure 7 sets out the work involved in conducting an investigation and indicates issues that may arise that have an impact on the time taken in investigations. These issues are explained in further detail below.
Figure 7: Steps involved in an investigation

Stage 1: Seek evidence and gather information relevant to investigation

Through which channel does the information come to ASIC?

- Compulsory information-gathering powers
- Persons assist voluntarily
- Search warrant
- Assistance from other bodies
- Intelligence
- Australian Federal Police
- Overseas regulators via mutual assistance request
- Other law-enforcement agencies
- Overseas regulators via MOU
- Growth in volume of electronic evidence may delay production of books
- Legal professional privilege claims may delay provision of information and production of books

Stage 2: Analyse evidence received to determine prospects and, if necessary, obtain further evidence in admissible form (including voluntary witness statements and affidavits)

Stage 3: Decide on next steps

Based on analysis, what is the best course of action?

- Prepare criminal brief of evidence for CDPP
- Prepare brief for counsel for civil proceedings
- Prepare brief for ASIC delegate; issue disqualification, licensing conditions, and/or infringement notice
- MDP proceedings, application to CALDB
- Negotiated outcome
- No further action
Volume of evidence

Changes in technology have led to changes in the way that business is conducted. The volume of information being generated and stored electronically by individuals and entities on multiple computers, mobile devices and a variety of digital storage media, as well as remote back-up servers, has increased significantly.

This has meant that the volume of evidence collected during ASIC’s investigations and surveillances has also increased.

The number of documents obtained during investigations and the volume of electronic information received in recent years are set out in Table 17 and Table 18.

Table 17: Documents obtained, 2010–13

<table>
<thead>
<tr>
<th>Description</th>
<th>2010–11</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of documents obtained</td>
<td>752,459</td>
<td>976,630</td>
<td>2,694,437</td>
</tr>
</tbody>
</table>

Note: This data is indicative only and may underestimate the actual volume of material received.

Table 18: Volume of electronic information obtained, 2008–13

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Number of hard drives</th>
<th>Gigabytes</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008–09</td>
<td>637</td>
<td>117,169</td>
</tr>
<tr>
<td>2009–10</td>
<td>1455</td>
<td>190,302</td>
</tr>
<tr>
<td>2010–11</td>
<td>1467</td>
<td>243,032</td>
</tr>
<tr>
<td>2011–12</td>
<td>848</td>
<td>275,847</td>
</tr>
<tr>
<td>2012–13</td>
<td>739</td>
<td>229,717</td>
</tr>
</tbody>
</table>

Note: This table does not include material produced to ASIC by attaching files to an email or material produced on CDs, DVDs and memory sticks, which is usually processed and is included in the document count in Table 17.

Production of evidence

When ASIC issues a notice requiring a person or entity to provide us with documents, there can be a delay in the production of those documents. This delay may be due to a number of factors, including:

(a) the volume of the material required to be produced—for example, production of electronic material may be delayed while search criteria are formulated;

(b) the location of the documents, particularly in large organisations;
(c) whether the recipient needs time to enforce legal rights to obtain possession of the documents; and

(d) the recipient’s right to obtain legal advice in respect of the notice to produce documents.

**Location of evidence**

453 The impact of globalisation and changes in the structure of corporations, financial services providers and industry participants means that evidence is often located offshore, often in a more than one jurisdiction.

454 ASIC can obtain public information (such as company searches, certified documents and land titles) by request from overseas agencies. However, ASIC cannot obtain confidential information from overseas jurisdictions without the assistance of overseas agencies. Such assistance includes the use, by those agencies, of their compulsory powers.

455 ASIC can make requests of overseas agencies for assistance under:

(a) MOUs agreed with individual overseas agencies;

(b) the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding (MMOU); and

(c) the *Mutual Assistance in Criminal Matters Act 1987*.

456 Obtaining evidence in this manner is resource intensive and can take a long time. There has been an increase in the number of:

(a) requests for assistance made and received by ASIC; and

(b) exchanges of information with our overseas counterparts.

Section D sets out the number of requests made and received by ASIC from overseas regulators in recent years.

**Case study 17: Assistance from overseas regulators on Ponzi scheme**

David Hobbs was the ‘mastermind’ of a large, unlicensed investment fund that targeted Australian investors and self-managed superannuation funds.

The investment fund was facilitated by the set-up and operation of corporate structures and bank accounts in around 15 jurisdictions worldwide, including Anguilla, Australia, the British Virgin Islands, Hong Kong, New Zealand, the Turks and Caicos Islands, the United Kingdom, the United States and Vanuatu. More than $50 million was invested in the fund by more than 500 investors.

In February 2013, Justice Ward in the Supreme Court (NSW) banned Mr Hobbs for life from working in the financial services industry and from managing companies in Australia, and imposed a record pecuniary penalty of $500,000. The matter is currently under appeal.
Pivotal to achieving these outcomes was the evidence obtained with the assistance of around 15 regulators, including the US Commodity Futures Trading Commission, the New Zealand Financial Markets Authority and the Hong Kong Securities and Futures Commission.


**Legal professional privilege**

457 When ASIC issues a notice requiring a person or entity to provide us with documents, those documents must be produced—except those that attract a valid claim of legal professional privilege (LPP). LPP protects confidential communications prepared for the purposes of enabling a client to receive legal advice or in relation to actual or contemplated litigation.

458 Where a person refuses to produce documents on the basis that they are covered by LPP, the recipient must provide ASIC with sufficient information to allow us to make a decision about whether to accept the LPP claim.

459 If ASIC disputes a claim of LPP, the dispute is usually dealt with by court action, which is time consuming and costly.

460 The making and resolution of LPP claims is resource intensive and costly for all involved, even if privilege claims do not proceed to court. These costs include:

(a) time spent (and costs incurred) by the privilege claimant (or their lawyers) in:

(i) filtering documents to be produced to ASIC to identify documents that may be the subject of LPP claims;

(ii) investigating the circumstances in which documents were created to determine whether they are privileged;

(iii) formulating and drafting privilege claims to be provided to ASIC;

(iv) redacting privileged material from documents that contain both privileged and non-privileged material; and

(v) dealing with queries raised by ASIC as to the adequacy of privilege claims; and

(b) time spent by ASIC staff reviewing and assessing the adequacy of privilege claims, including liaising with the privilege claimant (or their lawyers) regarding:

(i) the need to substantiate privilege claims;

(ii) extensions of time for compliance with notices;

(iii) the formulation of protocols for dealing with privileged information/resolving privilege claims; and

(iv) the adequacy of facts relied upon in support of a privilege claim.
In addition to the delays and costs incurred in dealing with LPP claims, the privilege may have an impact on ASIC investigations in other ways. In particular, ASIC may be unable to fully investigate all of the circumstances in which a potential breach of the law occurred—for example:

(a) A board’s justification (or lack thereof) for making a particular decision may be unclear unless regard is had to advice received by the company at the time the decision was made. The presence or absence of legal advice may be the difference between a serious, ‘knowing’ breach of the law on the one hand and an unwitting breach on the other.

(b) It is difficult for ASIC to examine or take statements from people who may hold a mixture of privileged and non-privileged information, such as in-house and external lawyers, company secretaries and board members. There are rarely ‘bright-line’ distinctions between privileged and non-privileged information. People may be discouraged from disclosing any information for fear of straying into ‘privileged territory’.

Ancillary requests

The time taken to achieve enforcement outcomes may also be affected by the receipt of:

(a) requests to release transcripts of examinations and related documents under s25 of the ASIC Act;

(b) requests to release documents under s37(4) of the ASIC Act to a third party, so they can be used in proceedings;

(c) requests to release documents to government departments and agencies under s127(4) of the ASIC Act;

(d) subpoenas for production of documents; and

(e) requests under the FOI Act.

Dealing with such requests is resource intensive and time consuming.

ASIC must consider rules of procedural fairness and consider whether a person should be offered the opportunity to comment on a proposed disclosure that affects their rights, interests or legitimate expectations. Where such requests relate to an ongoing investigation, they can affect that investigation by diverting resources.

Cooperation

Achieving timely enforcement outcomes often depends upon the cooperation of others. Such cooperation can include:

(a) self-reporting misconduct to ASIC;
(b) honestly and completely disclosing all information relevant to the misconduct;
(c) providing voluntary assistance in the course of an investigation;
(d) providing evidence in a form that can be used in court;
(e) pleading guilty to, or admitting, any misconduct that a person committed or was involved in committing; and
(f) offering to enter into an enforceable undertaking with ASIC to address ASIC’s concerns and, where appropriate, to improve processes and procedures.

Case study 18: Bank of Queensland

In April 2013, Bank of Queensland (BOQ) agreed to refund customers after a system error resulted in a failure to link mortgage offset accounts to some eligible home loan accounts over a number of years.

It is estimated that the error affected approximately 6,000 customers, and total refunds will be around $12 million.

After BOQ discovered the problem and reported it to ASIC, it agreed to appoint an independent expert to review its remediation processes to ensure that all affected customers were identified and appropriately compensated, and that its compliance systems were adequate to prevent a similar error occurring in future.

See Media Release (13-070MR) BOQ to refund customers after system error (4 April 2013).

In October 2013, BOQ agreed to expand the scope of a review into its compliance systems and remediation processes. ASIC requested this expansion following further reports of errors in BOQ’s interest rates and fees, resulting in customers being overcharged in fees and underpaid in interest. BOQ confirmed that it would refund a further $34.5 million and pay another $11.5 million to fix these additional errors.

See Media Release (13-286MR) ASIC action sees BoQ extend independent expert review (22 October 2013).

More information on ASIC’s approach to cooperation is set out in Information Sheet 172 Cooperating with ASIC (INFO 172).

Time involved in pursuing enforcement action

The time involved in pursuing various types of enforcement action, including criminal, civil and administrative actions, can vary according to the factors discussed below.
Criminal action

The steps that must be taken in the criminal prosecution process are set out in Figure 8. In summary, these include:

(a) brief assessment by the CDPP;
(b) laying of charges;
(c) committal hearing;
(d) trial;
(e) conviction and sentencing; and
(f) appeal.

Figure 8: Steps in the criminal prosecution process
The average number of weeks taken by the CDPP to assess matters referred to it by ASIC in those cases in which a criminal prosecution is commenced (time between the hand-over date and charges being laid) is 42.6 weeks (42.8 weeks (2010–11), 48.24 weeks (2011–12) and 36.84 weeks (2012–13)). This includes the time taken for ASIC to deal with any requests from the CDPP for further information.

Delay can arise at and between the steps outlined above due to:

(a) difficulties in scheduling trials (the complexity of ASIC matters and the number of witnesses required may require longer periods to be set aside for trial);
(b) backlogs in the court lists generally due to existing caseloads;
(c) availability of witnesses;
(d) adjournments of trial and hearing dates, typically due to:
   (i) case management issues, such as for a plea hearing, to obtain further disclosure or further evidence or where a late application has been made to cross-examine a witness;
   (ii) the parties’ readiness for trial;
   (iii) changes to the legal counsel for the accused or for the accused to obtain legal advice; and
   (iv) judicial processes such as preliminary hearings as to the admissibility of evidence or pre-trial examination of witnesses.

When an accused pleads guilty, ASIC, the CDPP and the courts save significant time and resources. Where a case is not contested, the time taken from charges being laid to sentencing is greatly reduced. This is partly due to the fact that there is no need to find an available period of time in the court list to set the matter down for a full trial. This can be illustrated by comparing the time taken for the courts to deal with different accused in the same matters, where some accused plead guilty at an early stage and others contest the matter.

**Case study 19: Genetic Technologies Limited**

In December 2008, former Genetic Technologies Limited directors Dr Mervyn Jacobson, Tamara Newing and Geoffrey Newing appeared in court on 319, 353 and 192 charges of market manipulation respectively. The committal for each accused was set to commence in the Melbourne Magistrate’s Court on 1 February 2010.

In January 2010, Mr Newing pleaded guilty to five rolled-up charges of market manipulation. In March 2010, Mr Newing was sentenced to a total of 22 months imprisonment and was ordered to serve six months of this sentence before being released on a recognisance release order.

On 4 February 2010, Mrs Newing and Dr Jacobson both entered pleas of not guilty to all charges and were committed to stand trial.
On 18 February 2011, Mrs Newing was sentenced to a term of 21 months imprisonment (to be released on a recognisance release order) following her guilty plea to 10 rolled-up charges of market manipulation.

The trial for Dr Jacobson was set down for 1 August 2011, but was delayed due to applications as to the interpretation of the law. The next court date is in February 2014.


Civil action

The steps taken in civil matters are outlined in Figure 9. The time at and between each step varies according to the number of interlocutory applications and challenges, difficulties in scheduling trials and delays due to backlog in court lists generally.

Figure 9: General steps involved in civil matters and civil penalty proceedings

1. ASIC briefs external legal counsel to advise on prospects and/or appear. Counsel drafts application and pleadings.
2. Proceedings filed and served. Interim relief (injunctions) may be sought.
3. First directions hearing. Orders made as to initial steps of proceedings.
4. Interlocutory applications. Subsequent directions hearings. Orders may be made.
5. Trial
6. Can the matter be resolved through mediation?
   - Yes: Case conference or mediation
   - No: Decision as to penalty and orders (including any orders as to costs)
7. Is there any liability?
   - Yes: Mat matter dismissed and costs awarded
   - No: The decisions about liability, penalty and orders may be appealed by either party
For ASIC matters, the average time taken between proceedings being filed and a decision date (including interim injunctions, consent orders and final orders) is set out in Table 19.

### Table 19: Average number of months between filing proceedings and a decision date, 2010–13

<table>
<thead>
<tr>
<th>Type of civil matter</th>
<th>2010–11</th>
<th>2011–12</th>
<th>2012–13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auditors and liquidators</td>
<td>21.7</td>
<td>no cases</td>
<td>4.44</td>
</tr>
<tr>
<td>Corporations and their officers</td>
<td>13.3</td>
<td>21.7</td>
<td>28.1</td>
</tr>
<tr>
<td>Financial markets</td>
<td>4.5</td>
<td>2.9</td>
<td>9.0</td>
</tr>
<tr>
<td>Financial services and products</td>
<td>19.2</td>
<td>20.5</td>
<td>27.1</td>
</tr>
<tr>
<td><strong>Average across all types of civil matters</strong></td>
<td><strong>16.6</strong></td>
<td><strong>19.6</strong></td>
<td><strong>24.8</strong></td>
</tr>
</tbody>
</table>

**Administrative action**

ASIC has discretionary powers to suspend or cancel AFS licences or credit licences, ban individuals from the financial services industry or engaging in credit activities, disqualify individuals from managing corporations and issue infringement notices to disclosing entities that fail to comply with the continuous disclosure requirements.

Before we make a decision that may be adverse to the interests of a person, ASIC must give the person notice such that they know the issues of concern to us. The person must also have sufficient time to prepare their response.

ASIC must also provide the person with an opportunity to be heard, which includes a right to appear before us and present submissions, either in writing or orally, and evidence that addresses the issues of significance or of concern to us. Generally, ASIC considers that 28 days is adequate time for this to occur.

Decisions made by ASIC’s hearing delegates are based on evidence put to them by ASIC and by the affected person or entity. The decisions of delegates can be reviewed by the Administrative Appeals Tribunal (AAT) and the Federal Court.

Other administrative actions ASIC can take include:

(a) We may commence proceedings before the MDP where a matter involves a breach of the market integrity rules by a market operator or market participant and ASIC considers that an infringement notice is the appropriate regulatory outcome. Before the MDP can make a decision as to whether to issue an infringement notice, ASIC must give the person alleged to have breached the market integrity rules a written
statement that sets out our reasons for believing that the person has breached the market integrity rules and give the person an opportunity to be heard and make submissions. Where an enforceable undertaking is offered as an alternative to an infringement notice, ASIC may refer the decision as to whether an enforceable undertaking is an appropriate outcome to the MDP.

(b) Where ASIC has concerns with the conduct of registered liquidators and auditors, ASIC can make an application to the CALDB. The CALDB will conduct a review of the conduct and, where appropriate, issue sanctions. The respondent in any particular CALDB matter may appeal against a decision of the CALDB to the AAT or the Federal Court.

Cost of achieving enforcement outcomes

The cost of achieving an enforcement outcome varies, depending on factors such as the nature and complexity of the investigation and enforcement action undertaken.

External costs incurred by ASIC during an investigation typically include those associated with:

(a) transcribing interviews conducted by ASIC, which vary depending on the number of interviews and their length;

(b) external forensic accounting services, which vary considerably depending on the scale of the work undertaken;

(c) computer forensic imaging, which vary depending on the total amount of data to be imaged;

(d) expert evidence, which vary depending on the type of expert and the scale of the instructions given to the expert; and

(e) engaging external legal counsel to provide advice, resolve disputes regarding LPP or if there are challenges to the exercise of our powers.

The cost of undertaking enforcement action varies significantly depending on the type of action taken.

Criminal prosecutions generally result in lower costs to ASIC because the prosecution costs are met by the CDPP.

Civil penalty proceedings are generally the most expensive, given:

(a) the need for ASIC to retain counsel (often both senior and junior) to provide advice on ASIC’s evidence and prospects of success, prepare pleadings and appear in court; and
(b) (if ASIC loses) the need for ASIC to pay the defendant’s legal costs—in complex matters, these costs can be significant.

Administrative proceedings can be costly if an individual, who has been disqualified by an ASIC delegate, appeals to the AAT or to the Federal Court. In the case of an appeal, ASIC must retain counsel to prepare for and appear at the hearing on ASIC’s behalf. The AAT is a no-costs jurisdiction, which means that there is no monetary disincentive to a person or entity that has been the subject of an ASIC administrative decision to seek a review of that decision in the AAT. If the application is unsuccessful, ASIC is not entitled to recover costs. Further, if ASIC is unsuccessful in matters before the Federal Court, we will generally be required to pay the costs of the other party.

Negotiated outcomes may be far cheaper than other enforcement actions because they are usually negotiated without resorting to external legal advisers. Further, any costs associated with independent review or expert reports can be dealt with as part of the terms of the undertakings.
G Whistleblowers

Key points

Whistleblowers, by virtue of their relationships or position, are often particularly well placed to provide direct information about corporate wrongdoing.

To ensure we protect and communicate with whistleblowers as effectively as possible, we have enhanced our existing approach to dealing with whistleblowers.

Our enhanced approach has been developed at an organisational level to recognise the importance of whistleblower disclosures, and is not imposed on us by legislation. This enhanced approach adds to the current legislative protections for whistleblowers.

Current legislative protections for whistleblowers

Corporate whistleblower protections

A person working in the private sector who makes a disclosure about a company they work for (a ‘corporate whistleblower’) may be able to access protections under Pt 9.4AAA of the Corporations Act.

The Pt 9.4AAA whistleblower protections include protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure that the whistleblower has made. Part 9.4AAA also includes a prohibition against the victimisation of the whistleblower, and provides a right to seek compensation if damage is suffered as a result of that victimisation. For example, under Pt 9.4AAA, a whistleblower whose employment is terminated, or who suffers victimisation as a result of their disclosure, may commence court proceedings to be:

(a) reinstated to their job or to a job at a comparable level; and
(b) compensated for any victimisation or threatened victimisation.

Access to these protections is only available where the whistleblower is a current officer, employee or contractor of the company about which they are making a disclosure, and where the disclosure is made to one or more of:

(a) ASIC;
(b) the company’s auditor or audit team;
(c) a director, secretary or senior manager of the company; or
(d) a person authorised by the company to receive whistleblower disclosure.

Furthermore, the protections only apply where:

(a) the whistleblower reveals their identity in making their disclosure;

(b) the disclosure is made in good faith; and

(c) the disclosure relates to a suspected contravention by the company or its officers of the Corporations Act, ASIC Act or associated regulations.

Similar protections are available to a whistleblower in possession of information relating to contraventions of banking, insurance and superannuation legislation, under the Banking Act 1959, the Insurance Act 1973, the Life Insurance Act 1995 and the SIS Act.

Where a report of misconduct is made outside of these requirements (e.g. where the report is made anonymously), no statutory protection is available to the whistleblower.

**ASIC whistleblower protections**

ASIC greatly values receiving reports of misconduct from members of the public and others with connections to companies and entities we regulate, including whistleblowers. These reports provide us with important information about the activities and culture of the companies and other entities we regulate. In every case, we treat reports of misconduct seriously and confidentially, and give them our full consideration.

Whistleblowers are often particularly well placed to provide direct information about corporate wrongdoing by virtue of their relationships or position. We recognise that, in approaching ASIC, a whistleblower may have taken particular risks to make their disclosure and have greater interest in the matter due to their specific and personal connection to the matter they report.

To ensure we continue to protect and communicate with whistleblowers as effectively as possible, we have enhanced our existing approach to dealing with whistleblowers, as outlined in paragraphs 497–501. This approach has been developed at an organisational level to recognise the importance of whistleblower disclosures, and is not imposed on us by legislation.

The whistleblower protections in Pt 9.4AAA operate to protect and provide remedies for whistleblowers against third parties rather than mandating any particular conduct of ASIC. These protections do not deal with how ASIC is to treat whistleblowers and documents relating to whistleblowers. The ASIC Act requires ASIC to protect any information provided to us in confidence, from all reports of misconduct, whether or not the confidential information is received from a whistleblower or any other person. In protecting this
information, we adopt the same approach to all individuals as outlined in paragraphs 509–516.

Where a whistleblower seeks to rely on the statutory protections against third parties, they will generally have to enforce their own rights or bring their own proceedings under the relevant legislation to access any remedy. The legislation does not provide ASIC with a direct power to commence court proceedings on a whistleblower’s behalf.

While ASIC takes all reasonable measures to prevent the unauthorised use or disclosure of information that people provide to us (including whistleblowers), the legislation does not provide additional protections for documents containing whistleblower information, including information that could reveal a whistleblower’s identity. ASIC has had past difficulty in resisting applications for the production of such documents during litigation, as discussed in paragraphs 509–516.

How ASIC works with whistleblowers

Our general approach

Whistleblowers are in a unique position to provide particularly useful ‘inside’ information for ASIC in our regulatory work, with such reports providing an important avenue by which potential misconduct is identified at an early stage. We understand that added sensitivities surround reports received from potential whistleblowers, with such persons being more vulnerable to reprisal or victimisation, or suffering damage to their long-term career prospects.

In the last financial year, ASIC received 845 reports of misconduct from current employees or officers who could potentially be considered whistleblowers. This figure does not include reports from people seeking payment of an outstanding debt, such as creditors, who might otherwise fall within the definition of a whistleblower. Table 20 outlines the outcomes of these matters.

Table 20: Outcome of potential whistleblower reports, 2012–13

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal referral for further action (compliance, investigation or surveillance)</td>
<td>129</td>
</tr>
<tr>
<td>Resolved</td>
<td>105</td>
</tr>
<tr>
<td>Not within ASIC’s jurisdiction</td>
<td>115</td>
</tr>
</tbody>
</table>
Outcome | Number
--- | ---
No breach or offence | 23
Analysed and assessed for no further action | 371
Ongoing activities | 10
Merged activities* | 92

* ‘Merged activities’ refers to the circumstance where multiple reports of misconduct raise the same or similar issues, and are merged for further consideration and action.

ASIC has undertaken a review and updated our existing approach to dealing with whistleblowers, in light of the Commonwealth Financial Planning Limited (CFPL) matter, to improve the way we identify and communicate with potential whistleblowers.

This enhanced approach seeks to ensure that ASIC:

(a) has appropriate training and expertise in all stakeholder and enforcement teams for the handling of whistleblower reports;
(b) maintains a coordinated, centralised procedure for the tracking and monitoring of all whistleblower reports;
(c) gives appropriate weight to the inside nature of the information provided by whistleblowers in our assessment and ongoing handling of the matter;
(d) provides prompt, clear and regular communication to whistleblowers to the extent possible and appropriate during our investigations; and
(e) maintains the confidentiality of whistleblowers within the applicable legal framework.

ASIC’s enhanced approach to whistleblowers encompasses our dealings with ‘insiders’ who seek to provide information to us but who are not corporate whistleblowers (e.g. because they are no longer an employee of the company involved at the time they make the disclosure or because they do so anonymously). This extended group may also provide uniquely useful information for ASIC’s regulatory work and have similar characteristics to, and face many of the same issues as, those who fall within the statutory definition.

**Communication with whistleblowers**

Whistleblowers who seek to assist ASIC with information in circumstances where they might fear reprisals have a strong and legitimate interest in what is done with that information and in appropriate outcomes and remedies being obtained. However, whistleblowers are not themselves subject to
confidentiality obligations and they may have different or additional motives to those of ASIC.

503 As we acknowledged in our initial submission to the inquiry, in the CFPL matter, ASIC could have and should have spoken to the whistleblowers earlier, sought more information from them and, within the limitations noted, provided them with some assurance that ASIC was interested and active in the matter, that their report was being dealt with seriously and that something was being done.

504 We have updated our approach to dealing with whistleblowers to ensure that communication with whistleblowers is consistent and regular, while maintaining the confidentiality requirements that ASIC operates under. In this regard, we have systems in place to alert us when a person lodging a report of misconduct may meet the Corporations Act criteria for being considered a whistleblower. These systems flag a report as being related to a potential whistleblower where the person making the report of misconduct discloses they are a current employee or current officer of the subject company.

505 These systems ensure that we communicate with the people who may fall within the whistleblower definition through their private address and contact details, rather than by addressing any correspondence for their attention at the subject company. The systems also ensure that we obtain the whistleblower’s consent before communicating with other parties.

506 Nevertheless, while we endeavour to communicate clearly with whistleblowers, there will always be limitations in the information that ASIC can provide to them. In many cases, ASIC will be constrained in what we can share by confidentiality requirements, or the need to ensure the appropriate administration of justice.

507 There is likely to be information ASIC cannot share with a whistleblower, which could include the details of what we know, what we are doing and why a particular regulatory approach has been adopted in relation to a matter that has been reported. In these circumstances, whistleblowers are likely to feel frustrated or conclude that nothing is being done.

508 This is a difficulty common to all law enforcement agencies, as highlighted below.

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**Limitations in information that a regulator can disclose to a whistleblower**

The UK Office of the Complaints Commissioner was initially established to investigate complaints about the former Financial Services Authority (FSA), and will now investigate complaints about the new Financial Conduct Authority (FCA) and Prudential Regulatory Authority (PRA). It will also investigate complaints about the Bank of England in respect of its oversight of the banking clearing houses and payment schemes.
Limitations in information that a regulator can disclose to a whistleblower

The Commissioner’s 2012–13 annual report describes some of the difficulties and limitations in disclosing information to whistleblowers, stating (at page 10):

The Commissioner has received a number of complaints from both whistleblowers and consumers who have contacted the FSA to alert it to what they perceive to be failures by a regulated firm to adhere to the FSA’s rules. As they have not been informed by the FSA of what action it has taken against the firm they often contact the Commissioner’s office alleging that the FSA has failed to act upon the information they provided.

Given the referral it is quite reasonable that any complainant will then pose the question ‘well what exactly did the Regulator do when supervising the firm with a view to safeguarding my interests as a consumer or employee as a result of the information I presented to it?’ In answering those questions however Parliament has imposed tough restrictions upon both the FSA and the Commissioner by the imposition of Section 348 of the Act as to how those questions can be answered in the case of a complainant.

In summary, Parliament, by virtue of Section 348 of the Act, imposes upon the FSA, as the regulator, a ruling of confidentiality in the context of disclosing its response or position when acting in the discharge of its functions as the relevant regulator. This means that, other than in limited circumstances, the FSA is unable to disclose any information about what action it did or did not take against a firm or individual (and the reasons for that decision) following the receipt of information from the consumer or whistleblower.

The Commissioner has the power to delve more deeply into such matters to enable him to be satisfied as to the propriety of what the FSA has done in that he is not constrained by Section 348. Although he can do this, he is however limited, in most cases, as to the full disclosure of the details that he is informed about. He is therefore unable, directly, to answer the questions that many complainants have posed. It is noteworthy that the effect of Section 348 has been continued in a similar provision in the 2012 Act.

Confidentiality of whistleblower reports and information

ASIC’s practice is to keep all reports of misconduct we receive confidential, and this is not limited to whistleblowers. This includes misconduct reports from people who fall within the statutory definition of whistleblowers and misconduct reports from people who do not fall within this definition.

Generally, we will not disclose to any third party:

(a) that we have received reports of misconduct about particular entities;
(b) the details of any reports of misconduct that we have received; or
(c) the identity of any person who makes a report of misconduct.

This does not extend to de-identified statistical reporting in ASIC’s annual report.

We will disclose specific information about reports of misconduct where:

(a) we are compelled to by operation of law, such as under the FOI Act or court order (e.g. subpoena);
(b) we have received the consent of the person who made the report; or
(c) the disclosure is authorised under s127 of the ASIC Act.

512 For the last two instances, our decision to disclose will depend on whether we consider it necessary to do so for the appropriate handling of the matter. This may include gaining the consent of the person who made the report to discuss the issues with the subject of the report, or where we form a view that we should disclose the information (or receive a request to disclose the information) to a more appropriate regulatory or law enforcement agency.

513 When we receive freedom of information (FOI) requests or court subpoenas, we process these in accordance with the relevant legislation, such as the FOI Act. This may include considering whether any provisions may apply to exempt from release documents relating to a whistleblower matter, including the agency operations exemption in s37 of the FOI Act or public interest immunity.

514 Reliance on these exemptions can be subject to court review, such as in case study 20.

Case study 20: ASIC’s efforts to protect whistleblower identities in the Multiplex case

In 2006, ASIC accepted an enforceable undertaking from Multiplex Limited in relation to the company’s failure to disclose a material change in profit on the Wembley National Stadium project in London.

Subsequently, a class action was launched by investors in the company. As part of this litigation, the group issued a subpoena requiring ASIC to produce documents obtained in the course of our investigations, for their use in the proceedings against Multiplex. ASIC considered that public interest immunity should apply to some of these documents, meaning that they ought not to be produced. ASIC took this view because the documents would reveal the identity of a person whose information had led to ASIC commencing our investigations.

At first instance, a single judge of the Federal Court rejected ASIC’s objections to producing the document (P Dawson Nominees Pty Ltd v Multiplex Limited [2007] FCA 1659). His Honour regarded as critical the fact that the identity of the informer was already known to some within the company.

On appeal, the Full Federal Court granted ASIC’s appeal, finding that the decision required a balancing between the public interest in not deterring future whistleblowers from coming forward, and that of ensuring that the litigation could proceed, and the court could have access to all relevant evidence (Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd [2008] FCAFC 123).

ASIC was subsequently involved in further litigation concerning the production of the documents, after the identity of an informer was revealed in media reports. This ultimately led to the Federal Court ordering the production of some documents, although it upheld ASIC’s claims to public
interest immunity on others (P Dawson Nominees Pty Ltd (ACN 004 743 408) v Australian Securities and Investments Commission (No. 3) [2009] FCA 779).

515 Generally, we will seek the consent of the person who made the report of misconduct before releasing information. We do this in order to afford natural justice and procedural fairness to the person who made the report. We may determine not to seek consent where factors in favour of release outweigh these concerns. We follow the consultation process set out in the FOI Act where relevant.

516 ASIC’s report of misconduct form allows a person to provide their consent for ASIC to disclose information in their report to third parties.
ASIC’s response to market problems in the financial advice industry

Key points

Over the past 15 years, ASIC has identified broad problems in the quality of retail financial advice arising from embedded conflicts of interest and compounded by weaknesses in the regulatory system.

ASIC has sought to take a strategic approach to addressing these problems, using existing regulatory tools as well as discussing issues publicly and calling for reform.

The FOFA reforms are designed to address these problems, and to improve the quality of financial advice.

ASIC’s monitoring and surveillance work

The inquiry’s terms of reference do not specifically include the financial advice industry; however, ASIC’s work in this area is nevertheless very relevant, as one of the inquiry’s starting points was an examination of how ASIC handled the Commonwealth Financial Planning Limited (CFPL) matter. Poor financial advice practices were at the heart of the problems in CFPL.

ASIC has long been concerned about the quality of financial advice provided to consumers and about conflicts of interest in the financial advice industry. Our concerns arose as a result of our monitoring and surveillance work, reports of misconduct, and market intelligence, and were strongly reinforced by the results of our shadow shopping exercises in 1998, 2003, 2006 and 2011.

ASIC’s concerns were not limited to a few ‘bad apples’ in the industry, or even a few bad firms. Instead, they reflected broad systemic problems with the financial advice industry, driven by conflicted remuneration structures and compounded by weaknesses in the regulatory system.

ASIC has sought to identify and understand the nature and size of the problems through both our shadow shopping surveillances and our more traditional surveillance work.

In 2003, ASIC and the then Australian Consumers Association conducted a survey of the quality of advice provided by financial product advisers: see Report 18 Survey on the quality of financial planning advice (REP 18). As part of this work, industry experts were asked to judge real financial product
advice provided to retail clients who sought comprehensive financial plans from advisers.

Overall, the quality of advice provided to consumers was disappointing, with 27% of financial plans judged to be poor or very poor, and a further 14% judged to be borderline. Only half of the advisers provided a financial plan that was judged to be clearly acceptable when measured against industry’s good practice standards and the client’s request for a comprehensive plan.

A common observation by several judges was that clients’ interests did not appear to be the sole factor in the financial plan strategy or product selection. They characterised this practice as ‘commission-driven product selling, not impartial advice’.

In 2006, we released the results of a third shadow shopping study, conducted during the first seven months of superannuation choice: see Report 69 Shadow shopping survey on superannuation advice (REP 69). The key findings from this survey were that:

(a) 16% of advice was clearly not reasonable, given the client’s needs (as required to be addressed by law), and a further 3% was probably not reasonable;

(b) where consumers were advised to switch funds, a third of this advice lacked credible reasons and risked leaving the consumer worse off;

(c) unreasonable advice was three to six times more common where the adviser had an actual conflict of interest over remuneration (e.g. commissions for recommending products); and

(d) investors were rarely able to detect bad advice.

In response to the survey, ASIC conducted specific follow-up action with 14 AFS licensees where the most significant problems were detected—however, compliance problems were noted across a wide range of firms.

In 2011, we conducted further shadow shopping research, looking at financial advice about retirement. We published the results of this research in March 2012: see Report 279 Shadow shopping study of retirement advice (REP 279). The examples of advice seen in this research were generally not of a sufficiently high standard:

(a) over a third of the advice examples were poor in quality (39%);

(b) there were only two examples of good-quality advice (3%); and

(c) the majority of advice examples reviewed (58%) were adequate.

Where advice was poor, common problems included:

(a) inadequately assessing or addressing the client’s personal circumstances, needs or objectives;
(b) conflicted remuneration structures (e.g. product commissions and percentage asset-based fees) affecting the type of advice and recommendations, and the quality of advice given; and

(c) failing to provide adequate justification for recommendations, particularly when advising a client to switch products, where the new product was sometimes less advantageous to the client.

ASIC’s other regular surveillance work has reinforced our concerns about poor-quality and inappropriate advice, and about the role of conflicts of interest in driving those problems. It has also confirmed our belief in the need to raise professional and training standards in the industry.

**Conflicted remuneration structures**

At the time the CFPL matter arose, most financial advisers were remunerated by product issuers paying them a commission for selling financial products to clients.

Commission payments create real conflicts of interest. Conflicts of interest can generate real or potential harm by:

(a) encouraging advisers to sell products rather than give strategic advice (e.g. advice to the client that they should pay off their mortgage), even if this strategic advice would be low risk and in the best interests of the client; and

(b) influencing the choice of products recommended by advisers to their clients.

The payment of commissions tends to generate a strong sales culture rather than a culture of providing prudent and strategic advice. The regulatory system contained no prohibition on advisers receiving commissions.

**Standard of care for advisers**

Additionally, the Corporations Act did not contain provisions requiring a financial adviser to act in the best interests of their client or to give priority to the interests of the client when providing advice. As long as the advice met the lower standard of being ‘appropriate’, and the necessary disclosures had been made, the adviser was not prohibited by the Corporations Act from giving advice that benefited the adviser rather than, and in preference to, the client.
ASIC’s strategic approach to these problems

Given the very widespread nature of the concerns we had, ASIC sought to take a strategic approach to trying to achieve change in the industry. This involved:

(a) liaison with and provision of guidance to industry;
(b) risk-based surveillance with targeted work on individual firms;
(c) negotiated settlements, including major long-term enforceable undertakings, administrative bannings and enforcement action; and
(d) the provision of information for the users of financial advice.

One element of that strategic approach was to have a significant focus on the larger players in the industry that had the greatest number of authorised representatives. In our view, if their practices and culture could be improved, it would benefit the large number of investors obtaining advice through them.

This was one of the drivers for ASIC undertaking major financial advice surveillance projects in relation to three of the largest industry participants: CFPL, AMP and Professional Investment Services. As explained in our initial submission, as a result of that strategy we were already heavily engaged with CFPL at the time that the whistleblowers approached us (the surveillance project in relation to CFPL having commenced in February 2007).

Each of these surveillance projects found significant problems. They also found sufficient evidence of the problems to convince the management of the firms of the need for change. As a result, ASIC obtained detailed enforceable undertakings from all three firms. The enforceable undertakings were designed to address past problems, change the firms’ practices and lift the quality of advice: see Media Release (06-251MR) ASIC accepts a legally enforceable undertaking from AMP financial planning (27 July 2006), Advisory (10-275AD) ASIC accepts enforceable undertaking from Professional Investment Services Pty Ltd (20 December 2010) and Media Release (11-229MR) ASIC accepts enforceable undertaking from Commonwealth Financial Planning (26 October 2011).

More recent regulatory actions undertaken in the financial advice sector include:

(a) entering into enforceable undertakings with:
   (i) Macquarie Equities Limited (see 13-010MR);
   (ii) UBS Wealth Management Australia Ltd (see Media Release (11-52MR) ASIC accepts legally enforceable undertaking from UBS Wealth Management Australia (17 March 2011)); and
(iii) Wealthsure (see Media Release (13-240MR) ASIC accepts enforceable undertaking from Wealthsure Pty Ltd, Wealthsure Financial Services Pty Ltd and their former CEO (2 September 2013));

(b) cancelling the AFS licences of AAA Financial Intelligence and AAA Shares (in liquidation) (see Media Release (13-019MR) ASIC cancels licences of national financial planning business (6 February 2013)), Morrison Carr Financial Services (see Media Release (12-183MR) ASIC cancels licences of Morrison Carr and permanently bans sole director (2 August 2012)) and Addwealth Financial Services Pty Ltd (see Media Release (13-050MR) ASIC cancels the licence of Addwealth Financial Services (15 March 2013));

(c) imposing additional AFS licence conditions on Australian Financial Services Limited (see Media Release (11-243MR) ASIC imposes licence conditions on Australian Financial Services Limited (7 November 2011)) and Moneywise Securities (see Media Release (13-259MR) ASIC imposes licence condition on Moneywise Securities (17 September 2013)); and

(d) negotiating improved practices with Anne Street Partners (see Media Release (13-248MR) ASIC concerns prompt Anne Street Partners to change their financial advice practices (5 September 2013)), and AMP Horizons Group (see Media Release (12-326MR) AMP Horizons improves compliance measures following ASIC concerns (20 December 2012)).

We have also undertaken a risk-based surveillance of the 50 largest AFS licensees that provide advice to retail clients. We have released two public reports, Report 251 Review of financial advice industry practice (REP 251) and Report 362 Review of financial advice industry practice: Phase 2 (REP 362). To address issues we had found through our surveillance, our reports recommended that licensees:

(a) ensure that they effectively manage conflicts of interest in their business models;

(b) continue to give training a high priority as this lessens the risk of poor advice being provided to consumers;

(c) ensure their advisers comply with their stated procedures;

(d) check references of new advisers to exclude ‘bad apples’ (advisers who provide inappropriate advice to clients);

(e) report breaches and demonstrate that remediation plans are in place;

(f) retain access to client records at all times;

(g) educate clients about risk and return so that their expectations are more realistic;
handle complaints well; and

ensure that their compensation arrangements (including professional indemnity (PI) insurance) adequately cover all the products and services they advise on.

In addition to our surveillance work, we have also undertaken a significant amount of work to better understand the financial advice industry and the drivers of poor advice, and to work with industry to try to improve the quality of advice provided to consumers. Some examples of this work include:

(a) In 2002, we reviewed primary production managed investment schemes: see Report 17 Compliance with advice and disclosure obligations: Report on primary production schemes (REP 17) (released in February 2003). REP 17 examined the findings of a nationwide surveillance campaign where we reviewed 92 offer documents of 131 managed investments schemes operated by 103 licensed responsible entities. We also reviewed 301 client adviser files and conducted interviews with more than 100 investors. One of the findings of our work was that there was a correlation between primary production scheme promoters paying high commissions to advisers and those advisers providing inappropriate financial advice when they recommended those products to clients.

(b) In late 2004 and early 2005, we reviewed the advice given by financial advisers to more than 260 people thinking of switching superannuation funds: see Report 50 Superannuation switching surveillance (REP 50) (released in August 2005). One of our findings was that there was a strong tendency among advisers to recommend switching to a fund related to the licensee. We cautioned that, in these cases, there was an inherent conflict of interest that must be carefully managed to avoid the perception that the advice is inappropriate or not given on a reasonable basis, or that the interests of the licensee are placed above those of the client.

(c) In 2007, we worked closely with industry and Standards Australia on a voluntary reference-checking handbook, which was designed to encourage industry to seek and provide reference-checking information. Media Release (07-267 MR) ASIC teams with industry on reference-checking initiative for financial advisers (11 October 2007) publicised the reference-checking handbook as well as alerting industry to problems associated with dishonest, incompetent or unethical financial advisers.

(d) In 2010, we undertook a comprehensive study of access to financial advice in Australia, including examining the barriers to accessing financial advice: see Report 224 Access to financial advice (REP 224) (released in December 2010). One of our findings was that some
consumers did not trust financial planners to provide them with unbiased, professional advice and were reticent to seek advice.

While ASIC has not always been as public about the work done to address such problems as we are today, we did speak publicly on a number of occasions about our concerns about the quality of financial advice, including through our shadow shopping reports and in a number of public reports: see paragraph 539.

In ASIC’s submission to the 2009 PJC Inquiry into Financial Products and Services in Australia (Ripoll Inquiry), we publicly expressed serious concerns about commission payments and we said that these risked distorting the quality of advice provided to clients.

The Ripoll Inquiry considered a variety of issues associated with a number of corporate collapses, including Storm Financial and Opes Prime. In its report, the Inquiry stated a number of concerns about the financial advice industry and how it was regulated at the time, including about conflicts of interest and the standard of care required of financial advisers. Subsequently, a number of reforms were introduced to address these concerns. These are generally referred to as the ‘Future of Financial Advice’, or FOFA, reforms.

Overview of the FOFA reforms

The FOFA legislation was passed by Parliament on 25 June 2012 and commenced on 1 July 2012. For the first 12 months, compliance with the reforms was optional. Compliance has been mandatory from 1 July 2013. Two key FOFA reforms are:

(a) a duty for financial advisers to act in the best interests of their clients and to give priority to the interests of their clients; and

(b) a prospective ban on conflicted remuneration structures, including commission and volume-based payments.

Best interests duty

Advisers are now subject to the ‘best interests duty’. This means that when an adviser is providing personal advice to a client, the adviser must act in the best interests of the client in relation to that advice: s961B(1) of the Corporations Act.

ASIC has provided guidance on meeting the best interests duty in Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure (RG 175). We have indicated that, when assessing whether an adviser has complied with the best interests duty, we will consider whether a reasonable
advice provider would believe that the client is likely to be in a better position if the client follows the advice.

**Prioritising clients’ interests**

In addition to complying with the best interests duty, an advice provider must prioritise the interests of the client in giving advice where there is a conflict between the interest of the client and the interests of the advice provider, their licensee, associates and others.

In RG 175, we have explained that, in complying with this obligation, advice providers should consider what a reasonable advice provider without a conflict of interest would do.

**Ban on conflicted remuneration**

The FOFA reforms also implement a prospective ban on conflicted remuneration structures relating to the distribution of, and advice about, a range of retail investment products.

‘Conflicted remuneration’ is any benefit given to an AFS licensee, or its representative, that provides financial product advice to retail clients that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence:

(a) the choice of financial product recommended to clients by the AFS licensee or representative; or
(b) the financial product advice given to clients by the AFS licensee or representative (s963A).

There is a presumption that volume-based benefits—benefits that are wholly or partly dependent on the total number or value of financial products recommended by an AFS licensee or representative to clients, or acquired by clients to whom an AFS licensee or representative provides financial product advice—are conflicted remuneration: s963L.

The ban will not apply to some products and advice services. Appendix 1 of Regulatory Guide 246 *Conflicted remuneration* (RG 246) provides a detailed summary of benefits that are exempt from the ban on conflicted remuneration.

Additionally, the FOFA legislation allows a number of benefits to be ‘grandfathered’, so that the conflicted remuneration provisions do not apply to them. Whether a benefit is grandfathered depends on who is giving the benefit. The effect of the grandfathering provisions is that the conflicted remuneration provisions will not apply in many situations—either to pre-
existing arrangements with advisers or to benefits given through new arrangements before 1 July 2014.

ASIC’s role in implementing the FOFA reforms

ASIC has undertaken a significant program of work to prepare industry for the commencement of the FOFA reforms. ASIC actions include:

1. Facilitative compliance approach to FOFA reforms

ASIC has adopted a facilitative compliance approach for FOFA until 1 July 2014 (i.e. for 12 months after the mandatory start date of 1 July 2013). We have chosen this approach as we recognise that the FOFA reforms will require businesses to undertake major work in a number of areas. Our facilitative compliance approach during this period means that:

• consistent with our stance during the introduction of other major policy reforms, such as the national credit laws, we will work with industry participants to assist them comply with the new laws; and

• we will adopt a measured approach where inadvertent breaches arise or systems changes are underway, provided industry participants are making reasonable efforts to comply. Where, however, we find deliberate and systemic breaches we will take stronger regulatory action.

2. FOFA-specific webpage

ASIC has created a FOFA page on our website. This webpage is regularly updated and contains current information about the FOFA reforms and ASIC’s implementation approach. It also provides an email address for FOFA queries. To date, we have responded to over 135 FOFA queries.

3. FOFA workshops (roadshows)

ASIC held a series of public FOFA workshops in Brisbane, Sydney, Melbourne, Hobart, Adelaide and Perth in early 2013. The workshops focused on practical advice about the implementation of FOFA. At the workshops, senior staff from ASIC’s Financial Advisers team provided an overview of the legislation, and detailed ASIC’s approach to FOFA, including enforcement and ASIC’s facilitative approach. The audience was able to ask questions and be involved in an interactive panel on the practical application of ASIC policy. The interactive panel featured leading industry participants.

4. Practical guidance about how to comply with the FOFA reforms

Table 21 provides a summary of guidance ASIC has provided to industry on complying with the FOFA reforms.

Table 21: Summary of ASIC guidance on complying with some of the key FOFA reforms

<table>
<thead>
<tr>
<th>FOFA reform</th>
<th>ASIC guidance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Best interests duty</td>
<td>Regulatory Guide 175 <em>Licensing: Financial product advisers—Conduct and disclosure</em> (RG 175) has been updated to include guidance about ASIC’s expectations for meeting the best interests duty.</td>
</tr>
<tr>
<td>Scaled advice</td>
<td>New Regulatory Guide 244 <em>Giving information, general advice and scaled advice</em> (RG 244) provides guidance about meeting the best interests duty when giving scaled advice.</td>
</tr>
</tbody>
</table>
Conflicted remuneration | New Regulatory Guide 246 *Conflicted remuneration* (RG 246) assists industry to understand the practical operation of the ban on conflicted remuneration and how ASIC will administer the ban.

**How the FOFA reforms would have affected the problems in CFPL**

The FOFA reforms are intended to address the kinds of problems we saw in the CFPL matter. These problems included a sales-driven culture based on a conflicted remuneration structure and an environment where, in some cases, advisers failed to act in their clients’ best interests. In a post-FOFA world, advisers must act in the best interests of their clients and place the interests of their clients above their own interests. There is also a prospective ban on conflicted remuneration structures relating to the distribution of, and advice about, a range of retail investment products.

While the FOFA reforms are intended to raise the quality of financial advice, fully achieving the standards the reforms envisage relies on:

(a) advisers being sufficiently competent to provide appropriate recommendations to clients; and

(b) financial advice businesses having the right systems, processes and people in place to adequately monitor and supervise the advice being provided to clients.

The FOFA reforms have been an important step in transforming the financial advice sector from a sales-driven culture to a professional services industry. However, we have also identified some regulatory gaps, which are discussed further in Section I. We have raised these gaps (e.g. on adviser competence) over the past few years in our public reports, consultation papers and submissions.
Options for change to address regulatory barriers and gaps

Key points

This section outlines issues we regard as barriers to fulfilling our legislative responsibilities and obligations, and proposals for overcoming these barriers to allow us to achieve better outcomes for investors and financial consumers.

These relate to:

- regulating the quality of financial advice;
- protecting whistleblowers;
- ensuring we can take all relevant factors into account when making a licensing decision;
- investigating potential breaches of the law; and
- achieving effective enforcement outcomes that act as a genuine deterrent to future misconduct.

In this section, we have outlined proposals that, if implemented, would improve ASIC’s ability to deliver on our legislative responsibilities and increase our effectiveness, to allow us to achieve better outcomes for investors and financial consumers. Through our regulatory activities ASIC seeks to identify any barriers to fulfilling our legislative responsibilities and obligations, and we raise these issues in appropriate forums—including with Treasury, our Ministers, and through government and parliamentary inquiries.

Many aspects of ASIC’s role are complex and difficult. This includes the process of achieving compliance with and enforcing the law in the markets we regulate, as outlined in Section F. However, while this is an inevitable aspect of modern regulation and law enforcement that ASIC accepts, this section focuses on issues we regard as being genuine barriers to fulfilling our role. We have also proposed options for regulatory change for consideration by the Government, which we think are likely to promote tangible and long-term changes.

These proposals relate to:

(a) regulating the quality of financial advice;
(b) protecting whistleblowers;
(c) ensuring we can take all relevant factors into account when making a licensing decision;
(d) investigating potential breaches of the law; and
(e) achieving effective enforcement outcomes that act as a genuine deterrent to future misconduct.

Regulating the quality of financial advice

The FOFA reforms should go a considerable way in improving the long-term quality of advice provided to investors, including by removing some of the key conflicts of interest that may result in investors receiving poor-quality advice.

We consider, however, that there are still some regulatory gaps that, if implemented, would facilitate ASIC’s ability to promote high standards in the financial advice industry.

Ultimately, such gaps negatively affect the public’s perception of the financial advice industry, and reduce ASIC’s ability to fulfil our mandate of promoting confidence in the financial system. We are concerned that, in our most recent stakeholder survey, less than a quarter of respondents (23%) agreed that financial advisers act with integrity.

Our proposals in this section relate to:

(a) the competency of advisers—the current system for training and assessing advisers is inadequate and pitched at too low a level. The competency of advisers has a significant impact on the quality of advice provided to investors. We are currently consulting on enhancing the training standards for advisers. We also think a national examination for advisers should be introduced;

(b) the current ability of ‘bad apple’ advisers, who have not otherwise come to ASIC’s attention, to freely move within the financial advice industry due to insufficient controls and poor reference-checking practices. We think that mandated and prescriptive reference checking is required as well as an employee register; and

(c) the fact that the AFS licensing regime focuses on entities to the exclusion of their managing agents (e.g. manager or directors). This means ASIC can have difficulty in removing these managing agents from the financial advice industry, even in circumstances where there is a strong argument that it is warranted.

We have also highlighted these issues in our previous reports, papers and submissions to other inquiries.
Adviser competence

In ASIC’s view, the competence and training of financial advisers requires significant improvement. This was also a conclusion of the Ripoll Inquiry. Only well-trained, competent advisers can provide good-quality advice.

Current training standards

The Corporations Act requires AFS licensees to ensure that their representatives are adequately trained and are competent to provide financial services.

However, ASIC surveillances have consistently found that many advisers are not adequately trained or competent to deliver financial advice to investors. This can lead to poor advice outcomes for investors.

ASIC provides guidance on our expectations regarding training standards in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146). The training standards in RG 146 are minimum standards and vary depending on the adviser’s advice activities. That is, they vary depending on whether the adviser gives general or personal advice and what products the adviser gives advice on. Advisers who provide advice on Tier 1 (broadly speaking, more complex) products must meet the standards at a different educational level from those advisers who provide advice on Tier 2 products (simpler products).

At present, there are numerous and fragmented approaches to interpreting and implementing the requirements in RG 146 and training courses vary significantly in terms of content and quality. There is no consistent measure of adviser competency.

ASIC has proposed a number of measures to improve adviser competency: see paragraphs 569–575.

ASIC’s work to lift the training standards

In 2011, ASIC released Consultation Paper 153 *Licensing: Training and professional development framework for financial advisers* (CP 153). CP 153 proposed introducing a mandatory, national exam for all new and existing advisers on Tier 1 products, mandatory monitoring and supervision of new advisers, and a mandatory online knowledge update review for all advisers every three years.

In 2011–12, ASIC engaged an expert to conduct a Cognitive Task Analysis (CTA). The research identified the desirable knowledge and skills for competent providers of quality financial advice and compared those research findings to the current training standards in RG 146. The CTA identified that
a national exam is an important component of the standardising and raising the training and development of advice providers.

In June 2013, ASIC released Consultation Paper 212 *Licensing: Training of financial product advisers—Update to RG 146* (CP 212). CP 212 proposed increasing the mandatory minimum training standards for all individuals authorised to provide general and personal advice to retail clients.

### CP 212: Proposed changes to training standards

At present, the education level required in RG 146 for providing advice on Tier 1 products is broadly equivalent to a Diploma (AQF 5 in the Australian Qualifications Framework). The education level for Tier 2 products is set at AQF 3, which is broadly equivalent to Certificate III.

CP 212 proposes increasing the minimum training standards for Tier 1 advisers in two stages. From 1 January 2015, the mandatory minimum standard would be broadly equivalent to Advanced Diploma level (AQF 6). From 1 January 2019, the mandatory minimum standard would be at a Bachelor Degree level (AQF 7).

Based on the findings of the CTA research, CP 212 also proposed changes to the RG 146 requirements on:

- generic knowledge;
- specialist knowledge for advising on securities, superannuation and for financial planning; and
- adviser skills.

The changes proposed in CP 212 would apply only to new entrants and to existing Tier 1 advisers who change their advice activities such that they require additional training. Submissions on CP 212 closed on 30 September 2013.

### New framework for the assessment and professional development of advisers

Regardless of any changes to the training standards that are implemented as a result of ASIC’s current consultation in CP 212, ASIC considers that an objective process is required to determine whether advisers have met a minimum standard of competency, and the most transparent and effective way to achieve this is through a national examination model.

Under a national examination model, advisers would need to successfully pass the examination before being able to give personal advice on Tier 1 products. In addition to an entry examination, advisers should complete regular knowledge updates to ensure they maintain their competency once they have passed the examination.

The national examination proposal would require amendments to the general obligations for AFS licensees in the Corporations Act to stipulate that representatives must have passed the national examination to be deemed competent.
Some practical advantages of a national examination include:

(a) **consistent competency standards:** all advisers would be required to sit and pass the same examination, ensuring investors have access to competent advisers;

(b) **assistance to industry:** a single, nationally consistent standard, coupled with a national register, would greatly assist AFS licensees in complying with their obligations to ensure their advisers are adequately trained;

(c) **mutual recognition:** the United States, the United Kingdom, Canada, Singapore and Hong Kong all have national examination approaches to adviser competency. Implementing a national examination in Australia would then facilitate mutual recognition arrangements with these countries on adviser competency, potentially allowing Australian advisers to advise clients in those countries and vice versa; and

(d) **greater transparency:** a national examination coupled with an enhanced register of employee representatives (see paragraphs 584–593) would create greater transparency and assist investors in better assessing their adviser’s skills and competency; it should also lead to increased investor confidence in advisers.

**Mandated reference checking**

There is a real and significant problem with ‘bad apples’ in the financial advice industry. These bad apples typically change employment when they are identified, moving from one AFS licensee to another. In many cases, the new licensee is unaware of their bad apple status because either:

(a) the new licensee failed to conduct a proper reference check; or

(b) the former licensee failed to provide accurate and honest feedback on the adviser or did not agree to provide feedback at all, sometimes out of apprehension of liability for making defamatory statements.

ASIC has tried to address the issue of reference checking through guidance. In 2007, ASIC and Standards Australia co-published a reference-checking handbook for the financial services industry, *HB 322–2007 reference checking in the financial services industry*. The handbook details how to conduct thorough reference checks and is available on ASIC’s website.

One of the key aims of the reference-checking handbook was to assist licensees in conducting proper reference checks so that bad apples would be unable to move from one licensee to another without their previous conduct coming to light.

In 2011, we decided to revisit our reference-checking work because we were aware that bad apple advisers continued to work in the financial services
industry and move between licensees. We spoke to a number of AFS licensees about their reference-checking procedures. We asked licensees for feedback on whether the reference-checking process was working and, if not, why not. Responses from licensees indicated that reference checking is very inconsistently applied, and difficult for them to carry out due to the variable quality of information they receive from referees.

Case study 21: Poor reference-checking practices

We have received reports from a number of AFS licensees indicating that they have not been able to conduct proper reference checks on prospective employees because the former licensee has a policy of not providing reference check information. This makes it impossible for new licensees to determine whether they are getting a 'bad apple' when they hire a new employee adviser. There are very real business risks and costs associated with taking on a bad apple.

To overcome the current problems associated with poor or non-existent reference checking, mandated reference checking should apply to all advisers who provide personal advice on Tier 1 products—that is, the more complex products, in relation to which quality of advice is particularly important.

Mandated reference checking could be achieved by introducing a legislative requirement for licensees to:

(a) conduct reference checks on prospective employees: ASIC could provide guidance on what a proper reference check involves or reference could be made to Australian Standard AS 4811-2006 Employment screening (although this standard is not specific to either the financial advice or credit industries);

(b) provide honest and full feedback when asked to provide a reference: we are aware that some AFS licensees do not currently provide this information because they are keen to move bad apples on or because they have entered into non-disparagement agreements with departing employees;\(^5\) and

(c) have in place appropriate policies and procedures for maintaining accurate and comprehensive employment records.

The advantages of mandated reference checking include that:

(a) it would aid transparency and efforts to improve standards in the financial advice industry;

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\(^5\) We note that any modification to the law could potentially be drafted to give qualified privilege to breaches of confidence in such situations.
(b) the process of reference checking would be more efficient and certain for those licensees affected;

(c) bad apples would be identified earlier and more quickly removed from the financial services industry, by allowing ASIC to better target our surveillances towards higher risk advisers;

(d) investors would benefit from increased protection from dishonest, incompetent or unethical advice;

(e) industry would benefit by not receiving as many claims for bad advice; and

(f) the overall reputation of the financial services industry would be enhanced.

ASIC recommends mandated reference checking, including a model where licensees are required to ask, and to respond to, a prescribed set of reference checking questions. ASIC, in consultation with industry, could develop the prescribed set of reference checking questions.

Enhanced register of employee adviser representatives

Under the current financial services regulatory regime, authorised representatives must be registered with ASIC; however, there is no central register for employee representatives. This means that ASIC has no direct oversight of employee adviser representatives, including those who provide personal advice, and must rely on licensees to ensure the competence and integrity of these representatives. This can result in very real difficulties in ASIC’s ability to locate and take action against bad apples in the financial services industry.

Note: An ‘authorised representative’ is a natural person or corporate entity to which an AFS licensee gives an authorisation to provide financial services on its behalf. An authorised representative may be structured as a separate business from the licensee. ‘Representative’ is a broader term, incorporating all persons that act on a licensee’s behalf, including employees, directors and authorised representatives.

ASIC has had considerable practical difficulties in tracking problem advisers, following the collapses of several financial planning businesses. Where the advisers have moved to new financial planning businesses as employee representatives, we are unable to track them because they do not appear on our register.

ASIC should be given legislative power to extend its current financial services registers to include all individuals authorised to give personal advice on Tier 1 products, not just AFS licensees and authorised representatives. We think that the current authorised representatives register should be expanded to:

(a) cover those employee advisers who provide financial advice about Tier 1 products; and
(b) include a comprehensive competence and employment history.

587 Given the complexities of the financial services industry, it is important that ASIC can emphasise certain consumer messages. One of our traditional messages has always been that investors should only obtain advice from properly licensed or authorised advisers. Before the commencement of the Financial Services Reform Act 2001, we could tell investors that before dealing with a purported adviser, they should check the person’s name on the licensees and representatives register.

588 This simple message is no longer possible. Investors cannot easily check whether someone holding themselves out as a financial adviser is properly able to do so. They may be an employee of a licensee and the only person that can verify that is the relevant licensee.

589 ASIC’s Consumer Advisory Panel and relevant industry bodies—in particular, the Australian Shareholders Association and the Australian Investors Association—have consistently raised the need for an ASIC register to cover all advisers who provide personal financial advice and have expressed concern over the diminished consumer protections resulting from the reductions to the register after the introduction of financial services regulation.

590 We expect that an enhanced public register would provide a real opportunity for investors to more effectively shop around when looking for a financial adviser. Seeing information about how long an adviser has been in the industry, how often they have moved from licensee to licensee, any disciplinary action against the adviser, and their training and competency records could provide powerful information for investors.

591 A public register for all advisers who advise on Tier 1 products would significantly improve transparency by:

(a) providing a centralised repository of current and relevant data relating to competency, employment and any potential misconduct by individual advisers;

(b) enabling ASIC to streamline compliance activities and act expeditiously where problems are identified;

(c) assisting industry to address risk where bad apples are concerned; and

(d) supporting industry’s efforts to lift standards in a transparent and public way.

592 Limiting the new register to Tier 1 products would appropriately balance regulatory efficiency and transparency with the compliance burden.

593 ASIC recommends the implementation of a register of employee adviser representatives in Australia. Most international jurisdictions, including the
United States and the United Kingdom, currently administer or are moving towards individual disclosure and accountability of regulated advisers.

**Preventing a person from managing a financial services business or credit business**

ASIC is concerned that there are gaps in our current licensing and enforcement powers that limit our ability to remove persons from operating within the financial services industry.

Some of these problems were highlighted in the Commonwealth Financial Planning Limited (CFPL) matter. The introduction of the FOFA reforms, providing ASIC with new powers to apply civil penalties or administrative sanctions to AFS licensees and representatives who accept conflicted forms of remuneration or do not act in the best interests of their clients, has improved this situation. However, limitations remain, particularly in ASIC’s ability to regulate individuals who do not themselves provide financial services, but are integral to the operation of a financial services business.

While the initial licensing process is important as the point of entry to the financial services industry and credit industry, it is also critical for ASIC to have sufficient powers to remove persons from operating within each industry where warranted. However, a difficulty that ASIC faces is that the regime focuses on entities to the exclusion of their managing agents (such as managers or directors). This means ASIC can have difficulty removing those managing agents from the industry in circumstances where there is a strong argument that it is warranted.

While ASIC has powers to cancel an AFS licence or credit licence, or ban a person from providing financial services or credit services, a missing element is a power to prevent a person from having a role in managing a financial services business or credit business.

**Case study 22: Phoenixing in the financial services industry**

ASIC has seen instances where we cancel the AFS licence of an advisory business due to poor practices or other misconduct, but those responsible for managing the business move to another licensee’s business, or apply for a new licence with new responsible managers.

If such managers are not themselves directly providing financial services or credit services in that new role, ASIC may not be able to prevent them from continuing to operate in the industry, even where there were serious failings in the previous business.

ASIC recommends amending the law to provide ASIC with the power to ban a person from managing a financial service business or credit business.
Table 22: Further reform options for the financial advice industry

<table>
<thead>
<tr>
<th>Key issues</th>
<th>ASIC’s activities</th>
<th>Regulatory change options for consideration by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>The current system for training and assessing advisers is inadequate and standards need to be lifted.</td>
<td>ASIC will continue to administer the AFS licensing regime, including applying training standards for financial product advisers.</td>
<td>Adviser competence through a national examination—a system, under which advisers would need to successfully pass a national examination before being able to give personal advice on Tier 1 products</td>
</tr>
<tr>
<td>There are currently insufficient controls on ‘bad apple’ advisers in the financial services industry.</td>
<td>ASIC will continue to identify and ban problem individuals in the financial services industry, to the extent that our powers allow.</td>
<td>Mandatory reference checking—introducing a requirement for mandatory reference checking procedures in the financial advice industry</td>
</tr>
<tr>
<td>While we can ban a person from directly providing financial services or credit services, we cannot ban them from managing a financial services business or credit business.</td>
<td></td>
<td>Employee adviser register—requiring the establishment of a register of employee representatives providing personal advice on Tier 1 products</td>
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<td></td>
<td></td>
<td>Controlling who manages the business—allowing ASIC to ban a person from managing a financial services business or credit business</td>
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Whistleblowers

While ASIC will continue to do all we can to improve our communications with whistleblowers and assess whistleblower reports with efficiency and care, our efforts to do so would be facilitated by overcoming certain current limitations in the law.

Contrary to public expectation, the whistleblower protections in Pt 9.4AAA of the Corporations Act do not require ASIC to treat whistleblowers or the information they provide in any particular way.

As was highlighted in the Multiplex litigation (see case study 20), while ASIC endeavours to keep whistleblower reports confidential, particularly where they may contain information that could reveal the identity of a whistleblower, the lack of a presumption that ASIC should not be required to produce such information means that ASIC may need to undertake significant litigation in order to preserve this confidentiality.

There are other gaps in the current corporate whistleblower protections in Pt 9.4AAA of the Corporations Act that mean they are out of step with commonly held expectations about their scope and coverage. These gaps relate to:

(a) the definition of who is a corporate ‘whistleblower’; and
(b) the range of issues the disclosure of which trigger corporate whistleblower protections.

Who qualifies for protection as a corporate whistleblower

While public perception of who is a ‘whistleblower’ appears to be far broader, the corporate whistleblower protections are currently only available to officers, employees or contractors of a company. Nevertheless, there may be strong arguments for extending Pt 9.4AAA to cover those who are not currently officers, employees or contractors of a company, but are nevertheless likely to be bound by a duty of confidence to the company, or in a position where they may be vulnerable to victimisation.

This includes:

(a) former employees of the company;
(b) financial services providers and other advisers of the company, such as accountants and auditors;
(c) unpaid workers (e.g. volunteers or those undertaking unpaid work experience); and
(d) the company’s business partners.

People falling in these groups are all likely to be in a position where they are bound by confidentiality agreements and, by working closely with the company, or in the same industry, are likely to be exposed to the risk of victimisation. These people can be distinguished from people who come across evidence in some other capacity (e.g. members of the public who unintentionally come across evidence of misconduct), who are not in such a vulnerable position.

ASIC recommends extending the current definition of a ‘whistleblower’ in Pt 9.4AAA of the Corporations Act to include a company’s former employees, financial services providers, accountants and auditors, unpaid workers and business partners. This would ensure the whistleblower protections are available for all those likely to require them.

What issues can be disclosed under the corporate whistleblower protections

Currently, the corporate whistleblower protections in Pt 9.4AAA of the Corporations Act apply to information that indicates that a company may have contravened a provision of the corporations legislation, the key elements of which are the Corporation Act and ASIC Act and related regulations. The protections do not apply where the information suggests that there is a breach of other legislation under which ASIC may investigate—for example, state criminal legislation.
Enforcement outcomes under state criminal legislation (i.e. matters relating to misappropriation, theft or fraud) form a significant part of ASIC’s work.

ASIC recommends extending the corporate whistleblower protections in Pt 9.4AAA to information indicating a contravention of any legislation that ASIC can investigate, rather than simply the corporations legislation.

**When ASIC must produce documents revealing a whistleblower’s identity**

Part 9.4AAA of the Corporations Act does not currently provide sufficiently clear guidance on when it is appropriate for a court to restrain the production of documents revealing a whistleblower’s identity.

While litigants have a legitimate interest in the production of documents that are essential to their case, and courts must often balance the competing interests of parties when documents are sought during proceedings, there is a strong public interest in setting a presumption that whistleblowers’ identities should be protected as far as possible, to encourage people to come forward to ASIC with information that may help enforce the law. The risk of having their identities disclosed in future proceedings may discourage whistleblowers from coming forward.

ASIC’s view is that Pt 9.4AAA of the Corporations Act should be amended to set a presumption that ASIC is not required to produce documents that would reveal a whistleblower’s identity, unless ordered to do so by a court or tribunal. This not only recognises the public interest in protecting whistleblowers, but sets the onus on the party requiring production of the documents to establish why the presumption should be overturned (this party being best placed to argue about the impact on its case of withholding the information sought).

There are parallels in other legislation for protecting confidential information provided to a regulator. For example, s157B of the *Competition and Consumer Act 2010* states that the ACCC is not required to produce a document containing information about a cartel unless ordered to do so by a court or tribunal. The legislation also sets out matters the court or tribunal must take into account in making this decision, including:

(a) the protection or safety of the informant; and

(b) whether the disclosure could discourage informants from giving protected cartel information in the future.

The corporate whistleblower protections should be similarly amended to state that ASIC cannot be required to produce a document revealing a whistleblower’s identity unless a court or tribunal finds that an applicant has
established that the significance of the documents to their case outweighs the public interest in keeping the documents confidential.

Table 23: Further reforms options for the whistleblower protections

<table>
<thead>
<tr>
<th>Key issues</th>
<th>ASIC’s activities</th>
<th>Regulatory change options for consideration by the Government</th>
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<tbody>
<tr>
<td>The corporate whistleblower protections in Pt 9.4AAA of the Corporations Act have gaps that limit their effectiveness:</td>
<td>ASIC has enhanced our approach to dealing with whistleblower reports. This includes:</td>
<td>Expanding the definition—expanding the definition of whistleblower in Pt 9.4AAA of the Corporations Act to include a company’s former employees, financial services providers, accountants and auditors, unpaid workers and business partners</td>
</tr>
<tr>
<td>• the definition of ‘whistleblower’ does not cover all of the people who may require whistleblower protections;</td>
<td>• appropriate training and expertise in all stakeholder and enforcement teams for the handling of whistleblower reports;</td>
<td>Expanding the scope—expanding the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate</td>
</tr>
<tr>
<td>• the whistleblower protections do not cover information relating to all of the types of misconduct ASIC may investigate;</td>
<td>• a coordinated, centralised procedure for the tracking and monitoring of all whistleblower reports;</td>
<td>Protecting whistleblower information—amending the legislation so that ASIC cannot be required to produce a document revealing a whistleblower’s identity unless ordered by a court or tribunal, following certain criteria</td>
</tr>
<tr>
<td>• the whistleblower protections are not sufficiently clear on when ASIC may resist the production of documents that could reveal a whistleblower’s identity.</td>
<td>• giving appropriate weight to the inside nature of the information provided by whistleblowers in our assessment and ongoing handling of the matter;</td>
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<td></td>
<td>• providing prompt, clear and regular communication to whistleblowers to the extent possible and appropriate during our investigations; and</td>
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<td></td>
<td>• maintaining the confidentiality of whistleblowers within the applicable legal framework.</td>
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ASIC’s licensing toolkit: Licensing tests

It is essential that the financial services and credit industries, including the advice sector, are made up of businesses and individuals that warrant public trust. ASIC needs robust licensing powers to prevent those that do not warrant such trust from operating within the industry. The licensing process should provide an effective screening process to exclude persons who do not have the appropriate skills, experience and qualifications to provide services
with honesty and integrity, or who are not of good character, from operating within the financial services and credit industries.

ASIC’s AFS licensing powers have recently been enhanced by legislative amendments made through the FOFA legislation, including an amendment to the licensing test. Before the amendments, ASIC could only refuse a licence if there was a reason to believe that a licensee ‘will not comply’ with its obligations, which was very difficult for us to satisfy. The new licensing test allows ASIC to refuse a licence if we determine an applicant ‘is not likely to comply’ with its obligations in future.

Note: These changes were introduced by the Corporations (Future of Financial Advice) Act 2012.

Nevertheless, while ASIC welcomes these changes, as we have previously highlighted in submissions to the Ripoll Inquiry and the PJC inquiry into the collapse of Trio Capital, further reforms could be made to better allow ASIC to use the licensing process as a screening to facilitate investor and consumer confidence.

A particular difficulty that ASIC still faces is that the current licensing tests still set a relatively low bar to entry. Some of the issues we face with the AFS licensing regime are outlined in paragraphs 619–621.

ASIC must grant an AFS licence if we have no reason to believe that the applicant is likely to contravene the AFS licensee obligations: s913B(1)(b) of the Corporations Act. This represents a negative assurance test, with the presumption that ASIC will grant a licence unless there is material before us that would form the basis for ASIC having the necessary belief about future misconduct by the applicant.

The legislation does not provide significant guidance to allow us to take into account all relevant factors in coming to this belief about the applicant. An important aspect of our licensing assessment involves consideration of whether the applicant and its responsible officers are of ‘good fame or character’. Section 913B(3) sets out some of the matters that are relevant to considering whether an applicant is of good fame or character. While a non-exhaustive list, it nominates convictions, suspensions or cancellations of a licence or banning or disqualification order against the person as being relevant to consider.

However, often we may have concerns about an applicant that do not relate to recorded convictions, cancellations or banning orders, but to their past conduct more broadly, particularly their involvement in financial services businesses where misconduct has occurred—for example, as an employee representative with a significant role in the business, or otherwise as a manager, director or officer of the licensee. Nevertheless, without the legislation indicating an intent that such matters are relevant for
consideration in the licensing process, our decision to refuse a licence according to such criteria may be more likely to be reversed on merits review.

622 Very similar tests apply in the credit licensing regime: s37 of the National Credit Act.

623 We suggest that changes could be considered to strengthen these tests, to ensure that ASIC can take into account all relevant factors when making a licensing decision. For example:

(a) the ‘no reason to believe’ test could be amended to a requirement that ASIC grant a licence where it is ‘satisfied’ that the applicant would not be likely to contravene the AFS or credit licensee obligations. This would place the onus on applicants to provide ASIC with sufficient material to satisfy us that they will have appropriate people, systems and resources at their disposal in order to ensure that they will provide financial services or credit services efficiently, honestly and fairly, and otherwise comply with their obligations as licensees. This change would provide greater facility to ASIC to refuse applicants where these elements of the business are not up to standard;

(b) the licensing test could be amended to add additional criteria to the good fame and character test—for example, whether ASIC has a reasonable belief that the applicant held a material role in the management of a financial services business:

(i) the licence of which has been cancelled; and

(ii) that did not pay determinations made by an approved EDR scheme of which it was a member;

(c) granting ASIC a broad discretion in licensing by amending the primary licensing provision in s913B to ‘ASIC may grant a licence’ (rather than ‘ASIC must’) if certain criteria are met. A similar, but alternative approach would be to provide a residual ‘catch-all’ discretion to broaden the circumstances in which ASIC may refuse a licence (e.g. ‘ASIC must grant a licence if the following conditions are met … unless there is any other reason which in ASIC’s reasonable opinion justifies the refusal of the application’).
Table 24: Adequacy of licensing toolkit

<table>
<thead>
<tr>
<th>Key issues</th>
<th>ASIC activities</th>
<th>Regulatory change options for consideration by Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>The licensing process should set a higher bar to entry to ensure that only businesses and individuals that warrant public trust operate within the financial services industry and credit industry</td>
<td>ASIC will continue to assess licence applicants using a risk-based approach</td>
<td>Changing the licensing tests—Changing the licensing tests in s913 of the Corporations Act and s37 of the National Credit Act to ensure that ASIC can take all relevant factors into account in making a licensing decision</td>
</tr>
</tbody>
</table>

ASIC’s investigative toolkit: Search warrant powers

624 As described in Section F, corporate and financial investigations are increasingly complex, and may involve collecting significant amounts of information from numerous parties.

625 ASIC’s investigative powers were established in the Corporations Act and ASIC Act over a decade ago. Since then, financial services and markets have expanded rapidly and grown significantly in complexity. Technology has allowed the development of new types of markets and trading. Despite the rapidity of these changes, ASIC’s investigative powers have not kept pace.

626 An important part of modern corporate and financial investigations involves piecing together complex information to reconstruct events and establish that misconduct has occurred. Search warrants are an important tool to allow ASIC to attend the premises where information is stored, and ensure it cannot be destroyed in any attempt to remove evidence.

627 ASIC has access to search warrant powers under both the Commonwealth Crimes Act 1914 (Crimes Act) and the ASIC Act. However, neither is entirely satisfactory:

(a) the ASIC Act powers only authorise a limited range of search activities (e.g. entering premises and taking possession of ‘particular’ books, which ASIC must attempt to name in applying for a warrant), posing significant practical difficulties for ASIC; and

(b) by contrast, the Crimes Act authorises a far larger range of search activities (e.g. examining electronic equipment at the searched premises). However, the Crimes Act only authorises searches relating to suspected criminal offences, where the ASIC Act allows for searches relating to all of the provisions under ASIC’s jurisdiction, including civil penalty provisions and administrative remedies.
The execution of warrants typically occurs at an early stage of an investigation, before it is known whether or not there will be sufficient evidence to commence:

(a) criminal prosecution and civil penalty proceedings;
(b) a civil penalty proceeding only; or
(c) some alternative form of enforcement action.

In practical terms, the difficulties posed by the gaps in ASIC’s search warrant powers could mean that the early choice of which type of search warrant to obtain could ultimately determine what type of enforcement action can be taken, rather than this being determined by considering the relative merits of each type of action for that matter.

A simple but effective change would be to expand the search warrant powers in the ASIC Act, so that they are:

(a) as procedurally broad as those in Crimes Act; but
(b) allow ASIC to collect information that could ultimately be used as evidence in any of the types of enforcement action ASIC may take.

This reform would not provide ASIC with access to a greater range of evidentiary material than it currently enjoys or impose any greater burdens on persons or entities under investigation by ASIC. It would merely remove the current technical difficulties involved in the use of our existing search warrant powers outlined above.

**Table 25: Adequacy of investigative toolkit**

<table>
<thead>
<tr>
<th>Key issues</th>
<th>ASIC’s activities</th>
<th>Regulatory change options for consideration by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC’s investigative toolkit is lacking in relation to our search warrant powers, leading to inefficiencies and delays, and is not adequate to meet the complexity of modern corporate and financial investigations.</td>
<td>As outlined in Section F, we will continue to use our current investigative toolkit in as efficient and effective manner possible to achieve enforcement outcomes.</td>
<td>Search warrants—including a general power to issue search warrants in the ASIC Act</td>
</tr>
</tbody>
</table>

**ASIC’s enforcement toolkit: Penalties**

An essential part of ASIC’s enforcement toolkit is having access to a broad range of criminal, civil and administrative sanctions that adequately cover the typical range of corporate and financial misconduct, and a corresponding range of penalties that are set at an appropriate level, having regard to the nature of the misconduct and the type of entity likely to be involved.
Where there are gaps in this toolkit, this presents a barrier to ASIC taking an optimal enforcement response, because the appropriate remedy is not available to us. This can risk undermining confidence in the financial regulatory system.

Penalties in the corporations legislation have been in place for extended periods, and either not reviewed at all since they were enacted, or reviewed only in a piecemeal way. This has led to shortcomings in the consistency or size of penalties, which create gaps between community expectations of the appropriate regulatory response to a particular instance of misconduct and what ASIC can do in practice.

A stronger penalty regime would allow ASIC to deliver better market outcomes. It would improve the cost-effectiveness of our enforcement actions by maximising their impact and deterrent effect.

**Inconsistencies in criminal penalties**

Criminal penalties in the corporations legislation have been reviewed in a piecemeal way since they were enacted in 2001. This has resulted in inconsistencies across the suite of criminal penalties available in the legislation.

The Attorney-General’s Department’s *Guide to framing Commonwealth offences, infringement notices and enforcement powers* states that penalties ‘should be consistent with penalties for existing offences within the legislative scheme and other comparable offences in Commonwealth legislation’. Inconsistencies have developed over time between the penalties available for comparable criminal offences in the corporations legislation, depending on where they are located in the legislation.

For example, in 2010, the maximum penalties available for market manipulation and insider trading offences were increased, with the maximum imprisonment term doubling and pecuniary penalties being significantly raised. However, these elements are not currently available for offences relating to managed investment schemes, or other aspects of the financial services regime outside market misconduct.

**Inadequacies in civil penalties**

The civil penalties in the Corporations Act have not been raised since they were enacted in 2001, when the maximum penalty for an individual was set at $200,000. In 2004, they were extended to include bodies corporate, with a maximum penalty for a body corporate of $1 million. These amounts have not kept pace with inflation and, in any case, are proportionately low given the seriousness and impact of civil penalty matters.
Civil penalties under the National Credit Act are set significantly higher than under the Corporations Act.

This lack of proportionality is also highlighted by a comparison with civil fines that have been applied in other jurisdictions, such as the United Kingdom and the United States.

### Case study 23: JP Morgan

A recent example involving JP Morgan demonstrates a sharp contrast between the Australian corporate civil penalty regime and the civil fines available for comparable misconduct in other jurisdictions.

JP Morgan was fined heavily for losses of over $6 billion on the so-called ‘London Whale trades’ affair. The fines amounted to: £138 million by the UK FCA; US$200 million by the US SEC; US$200 million by the US Federal Reserve; US$309 million by the US Consumer Finance Protection Bureau; and US$300 million by the US Office of the Comptroller of the Currency. In addition, JP Morgan will pay compensation to affected customers.

In contrast, under the Corporations Act, the maximum civil penalty payable by a corporation for an offence is $1 million. Due to the ‘totality principle’, multiple offences arising out of the same course of conduct will not usually give rise to a substantially greater penalty than a single offence. Accordingly, multiple offences cannot attract remotely comparable civil penalties in Australia, even assuming that the maximum penalty is applied.

In general, the Corporations Act does not include large civil penalties for corporations or individuals, leading to anomalies. For example, there is a gap in the penalties relating to the financial services provisions of the Corporations Act, where there are criminal offences, but no civil penalties sitting alongside the offence provisions as there are for similar offences in other ASIC-administered legislation. This means some types of misconduct do not attract civil penalties in the Corporations Act, yet comparable misconduct does attract civil penalties under the National Credit Act or ASIC Act.

The Corporations Act offences are harder to prove (being criminal offences) than civil penalty provisions applying to comparable misconduct under other legislation. Nevertheless, as the civil penalty amounts in other legislation are higher, the penalties applying to these criminal offences are relatively low. These inconsistencies lead to some perverse outcomes and can limit the responsiveness of ASIC’s enforcement approach. For example, among other things, we consider the market impact of the action and the available evidence when considering whether to take civil penalty action, and one of the components of market impact is the size of the penalty that could potentially be obtained. If only a low civil penalty would be available, this might be one factor weighing against taking this kind of action.
As a result, we suggest that civil penalty amounts in the Corporations Act should also be set significantly higher (as they are under other legislation we administer) and should enable any benefit attributable to the commission of the offence to be removed. This last element is a common feature of civil regimes in the United Kingdom and the United States known as ‘disgorgement’. For example, in the United Kingdom, the total amount payable by a person subject to enforcement action may be made up of two elements:

(a) disgorgement of the benefit received as a result of the breach; and
(b) a financial penalty reflecting the seriousness of the breach.

**Unlicensed conduct**

Providing unlicensed financial services attracts a significantly lower maximum penalty than does providing unlicensed credit services.

The offence of providing unlicensed financial services is a criminal offence with a maximum penalty of 1000 penalty units for a corporation and/or two years imprisonment.

Note: A penalty unit is currently set at $170: Crimes Act, s4AA.

The comparable provision in the National Credit Act relating to unlicensed credit services is both a criminal offence and a civil penalty offence attracting 10,000 penalty units for a corporation.

As a result, a corporate unlicensed financial services provider could be left unaccountable for its conduct because the evidence needed to prove criminal intention makes it difficult to obtain a conviction. Even if it were convicted, the maximum penalty available is $170,000.

In contrast, an unlicensed credit provider could potentially be ordered to pay a civil penalty of $1.7 million.

Historically, the courts have tended to apply civil penalties well below the maximum possible, reducing their impact and creating gaps between the level of sanction the community expects should be handed down and what is given in practice. The reasons for this are complex and vary from one case to another (in itself reducing consistency), but often discounts are applied or the seriousness of the matter is not considered as warranting the maximum penalty (although it is unclear what level of seriousness would warrant the maximum penalty).

**Broader infringement notice regime**

ASIC requires a broad effective range of enforcement remedies to enable us to respond to the full range of types of misconduct, from less grave to more serious breaches.

In many cases, when an AFS licensee does not comply with its obligations, ASIC’s only available enforcement remedy is to suspend or cancel an AFS
licence. Such a remedy is not appropriate for the vast majority of cases where misconduct is of low to medium severity, and where suspending or cancelling a licence would have significant adverse consequences for the licensee, its clients, employees and other representatives, and would be disproportionate with the nature of the breach. This means that ASIC does not have the means to respond effectively and in a timely manner to less serious misconduct, which could escalate into more serious breaches.

Infringement notices provide a prompt and visible means of enforcing the law. However, while available for breaches of the market integrity rules or continuous disclosure obligations, they are not currently available to ASIC for breaches of the financial services and managed investments provisions of the Corporations Act, among others.

Introducing a broader infringement notice regime alongside existing remedies would provide a useful enforcement tool to respond to less serious misconduct where:

(a) a higher volume of cases is expected, relative to instances of more serious misconduct;
(b) an assessment of whether misconduct has occurred depends on relatively straightforward and objective criteria; and
(c) a penalty must be imposed as soon as possible in order to be effective.

This would allow ASIC to target misconduct at the lower end of the scale, while retaining other remedies for egregious conduct at the higher end.

**Review of penalties**

ASIC suggests a broad review of penalties across the corporations legislation, which, among other things, could consider:

(a) the consistency of criminal penalties, and whether some comparable offences currently attract inconsistent penalties;
(b) the range of civil penalty provisions that would promote consistency with other civil penalties for corporations;
(c) the level of civil penalty amounts, and whether the legislation should provide for the removal of any financial benefit in the civil penalty regime; and
(d) infringement notices, and whether they should be available for a broader range of breaches and their amounts adjusted to increase their deterrent effect.

Undertaking a holistic review of penalties across the corporations legislation would be more effective than previous discrete reviews. This would ensure that the range of penalties is set proportionately and consistently to provide
an effective ‘enforcement pyramid’, with sanctions of greater or lesser severity depending on the type of misconduct addressed by them and enabling a more calibrated enforcement approach.

ASIC is currently undertaking an analysis of sanctions, which will assist any broad review undertaken by Government. We intend to publish this analysis in early 2014.

Table 26: Adequacy of enforcement toolkit

<table>
<thead>
<tr>
<th>Key issues</th>
<th>ASIC’s activities</th>
<th>Regulatory change options for consideration by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>The penalties available in the corporations legislation have not been comprehensively reviewed for over a decade, and, in many cases, do not meet community expectations.</td>
<td>As outlined in Section F, we will continue to use our current enforcement toolkit in as efficient and effective manner possible to achieve enforcement outcomes.</td>
<td>Review of penalties—a holistic review considering criminal and civil penalties, and the broader availability of infringement notices</td>
</tr>
</tbody>
</table>
Appendix 1: Responses to issues raised in submissions

ASIC provides the following responses to some of the key issues raised by submissions to the inquiry, as published on the inquiry’s website. The issues we have responded to in this appendix relate directly to our role as a regulator.

Other submissions to the inquiry have raised issues that relate more generally to the regulatory regime. These issues are dealt with in the main body of the submission.

Table 27: Responses to issues raised in submissions to the inquiry

<table>
<thead>
<tr>
<th>Issue</th>
<th>ASIC’s response</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC did not act on issues related to ‘low doc’ or ‘no doc’ loans</td>
<td>ASIC took over the regulation of consumer credit on 1 July 2010 under the National Credit Act. Before 1 July 2010, consumer credit was primarily regulated by the states and territories under the Uniform Consumer Credit Code (UCCC). During this time, ASIC’s role was relatively limited in scope, with jurisdiction confined to administering broad standards of conduct for the credit industry. Nevertheless, we actively monitored the credit industry and took appropriate action where available. We also publicly expressed concerns about the practices involved, and raised issues surrounding the effectiveness of the regulatory system in place at the time. See the Submission by ASIC on reforms to the credit industry and ‘low doc’ loans to the Senate Economic References Committee.</td>
</tr>
<tr>
<td>ASIC does not protect consumers or respond to complaints</td>
<td>ASIC takes reports of misconduct (complaints) seriously and we assess each report we receive. In the 2012–13 financial year, we analysed 11,682 reports of misconduct. These reports ranged from failure to lodge a form to serious criminality. In all cases, we make a range of inquiries and assess whether the alleged misconduct suggests a breach of a law that we administer and whether regulatory action is appropriate. It is not possible or appropriate for ASIC to escalate and launch an investigation into every matter we receive, but we endeavour at all times to resolve matters or assist the public in other ways, which may be more appropriate and timely compared to an investigation. See Section E on ASIC’s complaints management policies and practices for further information.</td>
</tr>
<tr>
<td>ASIC is captive to industry</td>
<td>ASIC is an independent Commonwealth Government body and we apply the law without fear or favour. We regularly take action against larger players in the industry, including the banks—for example, entering into enforceable undertakings with Macquarie Equities Limited and UBS Wealth Management Australia Ltd. ASIC staff have a diverse background (e.g. financial services, accounting, legal, academic, government, and consumer groups), with many employees having invaluable industry experience. This experience means they understand the practices of, and issues facing, industry, which therefore enhances ASIC’s ability to regulate the industry.</td>
</tr>
<tr>
<td>Issue</td>
<td>ASIC’s response</td>
</tr>
<tr>
<td>-------</td>
<td>-----------------</td>
</tr>
<tr>
<td>ASIC fails to adequately assess financial products in the market</td>
<td>It is not ASIC’s role to review or approve all disclosure documents. ASIC takes a risk-based approach to the review of documents and to the surveillance of providers. ASIC also cannot prevent failures of investments. See Section F on ASIC’s approach to compliance and enforcement.</td>
</tr>
<tr>
<td>ASIC should be made accountable</td>
<td>ASIC is accountable for all aspects of our work to the Australian Parliament and to the wider community. We take our work seriously and seek to provide up-to-date, relevant and transparent information about our work. See Section C on ASIC’s accountability framework.</td>
</tr>
<tr>
<td>ASIC-approved EDR schemes are ineffective</td>
<td>ASIC considers that efficient and effective dispute resolution and compensation mechanisms are integral to promoting the confident and informed participation of consumers in the Australian financial services system. ASIC maintains the ongoing approval of the EDR schemes by reference to six key principles—namely, accessibility, independence, fairness, accountability, efficiency and effectiveness. Some existing limitations regarding EDR schemes relate to the reliance on professional indemnity (PI) insurance as a means of investor compensation. See Appendix 2 for more details on EDR schemes.</td>
</tr>
</tbody>
</table>
| ASIC has not been monitoring financial markets | ASIC took over responsibility for supervision of real-time trading on Australia’s domestic licensed markets on 1 August 2010. Report 366 ASIC supervision of markets and participants: January to June 2013 (REP 366) highlights the significant volume of market and participant-related outcomes achieved in the first half of this year. Key outcomes include:  
- 20,938 trading alerts produced;  
- 94 market inquiries conducted;  
- 35 matters referred for further investigation;  
- 45 risk-based assessment visits conducted;  
- 88 surveillances completed;  
- 19 instances of pre-emptive supervision action;  
- 5 enforcement outcomes for insider trading offences; and  
- 2 infringement notices issued by the Markets Disciplinary Panel.  
In March 2013, we published Report 331 Dark liquidity and high-frequency trading (REP 331), following an extensive internal analysis and consultation with industry. This resulted in the release of market integrity rules and guidance designed to improve the transparency and integrity of crossing systems and strengthen the requirements for market participants to deter market manipulation.  
See Media Release (13-213MR) ASIC makes rules on dark liquidity, high-frequency trading (12 August 2013). |
Issue | ASIC's response
----|-------------------
ASIC should not have intervened in the settlement between Storm Financial investors and Macquarie Bank | Under the settlement, around 315 investors who funded the class action would be reimbursed their legal costs and also compensated for approximately 42% of their losses (as estimated by Levitt Robinson), while around 735 Macquarie Bank borrowers would only get back about 18% of their losses (as estimated by Levitt Robinson).

Several submissions suggest that ASIC should not have intervened in the settlement between investors in Storm Financial (represented by the law firm Levitt Robinson) and Macquarie Bank.

ASIC appealed the decision of the Federal Court to approve the settlement on the basis that the differential distribution of the settlement funds resulted in a lack of fairness to the majority of the members of the class (or group).

The Full Court of the Federal Court upheld ASIC’s appeal, deciding that the settlement sum was not fair and reasonable to all class members. It said that the unfairness arose in two ways:

- the lack of opportunity afforded to class members who were not clients of Levitt Robinson to share in the premium proposed to be paid to those funding the class action; and
- the inappropriate calculation of the premium by reference to success fees obtained by commercial litigation funders.

Appendix 2: Compensation and dispute resolution requirements for the financial services industry and credit industry

The importance of accessing compensation for financial loss

656 Having efficient and effective dispute resolution and compensation mechanisms is integral to promoting the confident and informed participation of consumers in the Australian financial services system (one of ASIC’s key objectives in s1 of the ASIC Act).

657 ASIC has played a key role in establishing and shaping the dispute resolution system for the financial services industry and credit industry. It is widely regarded as one of the best systems in the world, and has responded effectively to incidents ranging from the global financial crisis to natural disasters. ASIC’s dispute resolution policy reflects an oversight role spanning 15 years.

658 Consumer research commissioned by ASIC’s Consumer Advisory Panel and published in Report 240 Compensation for retail investors: The social impact of monetary loss (REP 240) highlights the social impacts of retail investors not being fully compensated for monetary loss suffered as a result of their licensee’s misconduct.

659 The key findings of the research were that:

(a) investors who suffered the most had invested all their money, had not diversified or went into debt as part of their investment strategy;

(b) most investors’ losses were associated with an underlying product that was either frozen or collapsed;

(c) the impact of the monetary loss was immediate on investors without a financial buffer, while for others the first six months from when they discovered their loss were critical. Most investors received none or only a few cents in the dollar back;

(d) investors had little knowledge of existing avenues of redress, such as their financial services provider’s internal dispute resolution (IDR) system or the external dispute resolution (EDR) scheme they belonged to;

(e) investors were reluctant to commence legal action to recover their monetary loss, particularly when they blamed themselves;

(f) some investors suffered ‘catastrophic loss’ as their loss was ‘so significant their life will never be the same’. Some felt prolonged anger, uncertainty, worry and depression; and
(g) investors who suffered monetary loss lacked confidence in the Australian financial system, financial advisers, the Government and regulators.

Possible avenues for obtaining compensation

REP 240 identifies the different avenues investors and financial consumers can use to seek compensation when they suffer monetary loss as a result of the misconduct of their financial services provider or credit service provider: see Table 28.

Table 28: Avenues for obtaining compensation

<table>
<thead>
<tr>
<th>Avenue</th>
<th>Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal dispute resolution (IDR)</td>
<td>Investors and financial consumers can approach the financial services provider or credit service provider directly to seek a resolution.</td>
</tr>
<tr>
<td>The Superannuation Complaints Tribunal (SCT) and ASIC-approved external dispute resolution (EDR) schemes</td>
<td>SCT</td>
</tr>
<tr>
<td></td>
<td>Investors can complain to the SCT—a statutory body established under the Superannuation (Resolution of Complaints) Act 1993.</td>
</tr>
<tr>
<td></td>
<td>The SCT can review decisions and the conduct of superannuation providers, including trustees of regulated superannuation funds and approved deposit funds, retirement savings account providers and life companies providing annuity policies.</td>
</tr>
<tr>
<td></td>
<td>Investors can make a complaint free of charge to the SCT and there is no limit on the monetary value of any claim.</td>
</tr>
<tr>
<td>ASIC-approved EDR schemes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>There are currently two ASIC-approved EDR schemes—the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service Limited (COSL).</td>
</tr>
<tr>
<td></td>
<td>Investors and financial consumers can make a complaint free of charge to either scheme, although monetary caps and limits apply. Currently, both FOS and COSL can make maximum monetary awards of up to $280,000 for most banking, insurance and advice-related complaints.</td>
</tr>
<tr>
<td></td>
<td>Whether an investor or financial consumer can complain to either FOS or COSL depends on which scheme the financial services provider or credit service provider has joined.</td>
</tr>
<tr>
<td>Self-initiated private action</td>
<td>The investor or financial consumer can sue the financial services provider or credit service provider in court or attempt to obtain an outcome through private negotiation, mediation or arbitration.</td>
</tr>
</tbody>
</table>

6 For more information about the SCT, see www.sct.gov.au.
7 For more information about FOS, see www.fos.org.au.
8 For more information about COSL, see www.cosl.com.au.
Join a private class action

The investor or financial consumer can start or join a class action where others who have suffered loss from the same type of misconduct bring a group action. Such an action may be on a ‘no-win, no-fee’ basis.

Through the winding-up process of a financial services provider (administrator/liquidator)

Where a company may no longer be a viable business, an administrator or liquidator may be appointed to wind up the company. In doing so, the administrator or liquidator will generally assess the liabilities/debt, assets and income of the company to work out whether the company can recover, should be sold or needs to be wound up.

If the company is wound up, the administrator/liquidator will decide which creditors are paid out of the remaining assets or funds. Creditors with secured interests (such as banks) will usually have first priority in being paid out.

ASIC action

ASIC can take action through:

• negotiations with the AFS licensee;
• legal action or other enforcement action; or
• a s50 ASIC Act class action—where ASIC runs a group action to obtain compensation for investors or financial consumers who suffered loss from the same type of misconduct. ASIC has to consider whether it is in the ‘public interest’ to do so.

The dispute resolution and compensation framework for financial services and credit

The dispute resolution and compensation framework for financial services and credit includes requirements for licensees to have in place:

(a) a dispute resolution system that complies with the relevant legislative requirements; and

(b) adequate compensation arrangements in the form of professional indemnity (PI) insurance.

The requirement to have a compliant dispute resolution system

All AFS licensees (including fund managers and financial advisers), credit licensees, and credit representatives that provide services to retail clients and consumers, must have a compliant dispute resolution system as a general obligation of their licence. This dispute resolution system must be able to cover complaints about the licensee’s authorised representatives.9

9 The requirement to have a compliant dispute resolution system applies even to product issuers and product providers that deal with retail clients, but do not require an AFS licence for various reasons (e.g. a legislative licensing exemption).
663 The dispute resolution system must consist of both:
(a) an IDR procedure that meets ASIC’s approved standards and requirements; and
(b) membership of an ASIC-approved EDR scheme.

664 Table 29 sets out the legislative requirements for IDR and EDR, and Table 30 sets out ASIC’s current policy and guidance on those requirements.

### Table 29: Dispute resolution requirements under the Corporations Act and National Credit Act

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Details</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>Financial services providers and credit service providers must have a dispute resolution system that covers complaints by retail clients and consumers. The dispute resolution system must consist of: • an IDR procedure that complies with standards and requirements made or approved by ASIC; and • membership of one or more EDR schemes approved by ASIC, where the SCT does not cover complaints about the products/services provided.</td>
<td>See s912A(1)(g), 912A(2) and 1017G of the Corporations Act; s47(1)(h)–(i) of the National Credit Act.</td>
</tr>
<tr>
<td>IDR procedures</td>
<td>When considering whether to make or approve standards or requirements relating to IDR procedures, ASIC must take into account: • Australian Standard AS ISO 10002–2006 Customer satisfaction—Guidelines for complaints handling in organizations (AS ISO 10002–2006); and • any other matter ASIC considers relevant.</td>
<td>See regs 7.6.02(1) and 7.9.77(1)(a) of the Corporations Regulations; reg 10(1) of the National Credit Regulations.</td>
</tr>
<tr>
<td>EDR schemes</td>
<td>When deciding whether to approve an EDR scheme, ASIC must take into account the following matters: • the accessibility of the scheme; • the independence of the scheme; • the fairness of the scheme; • the accountability of the scheme; • the efficiency of the scheme; • the effectiveness of the scheme; and • any other matter ASIC considers relevant.</td>
<td>See regs 7.6.02(3) and 7.9.77(3) of the Corporations Regulations; reg 10(3) of the National Credit Regulations.</td>
</tr>
</tbody>
</table>

### Table 30: Summary of ASIC’s current policy on dispute resolution

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Details</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>IDR procedures</td>
<td>Financial services providers and credit service providers must have IDR procedures that: • cover the majority of complaints retail clients and consumers make; • adopt the definition of ‘complaint’ in AS ISO 10002–2006; • satisfy the Guiding Principles of Section 4 of AS ISO 10002–2006</td>
<td>Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165)</td>
</tr>
</tbody>
</table>
and the following sections of AS ISO 10002–2006:
- Section 5.1—Commitment;
- Section 6.4—Resources;
- Section 8.1—Collection of information; and
- Section 8.2—Analysis and evaluation of complaints;

• provide a ‘final response’ within 45 days (or give reasons for the delay); and

• appropriately document IDR procedures.

Note: A ‘final response’ is a written response setting out the final outcome offered at IDR, the right to complain to EDR, and the name and contact details of the relevant EDR scheme. A final response is not required in limited circumstances where complaints are resolved to the customer's complete satisfaction by the end of the fifth business day after the complaint is received and the customer has not requested a response in writing.

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Details</th>
<th>Reference</th>
</tr>
</thead>
</table>
| Membership of approved EDR schemes | Financial services providers and credit service providers must:  
- belong to one or more EDR schemes approved by ASIC; and  
- have appropriate links between their IDR procedures and EDR scheme (including a system for informing complainants about the availability of EDR and how to access it). | RG 165                       |
| Requirements of approved EDR schemes | An EDR scheme must satisfy us that it meets the initial and ongoing requirements that ASIC must take into account when approving a scheme.  
These requirements include:  
- that the scheme maintains its independence by having certain governance structures (including an equal representation of industry and consumer representatives on its board);  
- that complainants are able to access the scheme for free;  
- that the EDR scheme reports:  
  - systemic issues and serious misconduct;  
  - general complaints information; and  
  - information about complaints received and closed with an indication of the outcome against each scheme member in their annual report;  
- that the scheme has adequate coverage in terms of:  
  - the types of complainants who can complain to the scheme (at a minimum the scheme should cover ‘retail clients’ within the meaning of the Corporations Act and ‘consumers’ within the meaning of the National Credit Act);  
  - the vast majority of types of complaints in the relevant industry (or industries) the scheme members belong to; and  
  - the amount of monetary compensation the scheme can award;  
- that the scheme operates a compensation cap that is consistent over time with the nature, extent and value of investor or financial consumer transactions in the relevant industry or industries; and  
- that scheme awards are binding on members when complainants accept the scheme outcome in full and final settlement of their | Regulatory Guide 139 Approval and oversight of external dispute resolution schemes (RG 139) |
Internal dispute resolution

665 Effective and timely IDR procedures are the first element of an effective dispute resolution system, as the AFS licensee or credit licensee is generally best placed to deal with complaints from its own retail clients and consumers. A licensee’s IDR procedures must comply with standards or requirements made by ASIC.

666 ASIC has set out its standards for IDR in RG 165. This draws on AS ISO 10002–2006, and stresses the need for timeliness and good communication with clients and consumers.

667 In addition to resolving client or consumer complaints in a timely manner, IDR provides licensees the opportunity to:

(a) consider emerging business risks or product/service problems;
(b) manage and maintain ongoing customer relationships; and
(c) resolve matters before incurring further costs at an EDR scheme.

External dispute resolution

668 AFS licensees and credit licensees must be a member of one or more ASIC-approved EDR schemes that covers, or together cover, complaints made by retail clients or consumers in relation to the financial services and credit services provided (other than complaints that may be dealt with by the SCT).

669 ASIC provides detailed guidance on the dispute resolution requirements and our approval of EDR schemes in RG 165 and RG 139. The principles we apply when approving schemes are addressed further in paragraphs 670–676.

ASIC’s approval of EDR schemes

670 EDR schemes provide a relatively cost-effective and more accessible alternative to going to court where a dispute about financial services or credit services cannot be resolved by the parties.

671 EDR schemes in the financial services sector were initially developed by industry in recognition of the fact that complainants faced considerable barriers to pursuing disputes through the court system, given the significant costs and the asymmetry in information and resources that generally exist between financial services providers and credit service providers and their
clients and consumers. In many cases, legal action would be uneconomic for investors and financial consumers, because of the amount of the losses claimed.

ASIC has had a statutory role to approve EDR schemes since 1998. To date, ASIC has approved eight EDR schemes, although only two currently remain in existence—FOS and COSL— as a result of the merger or consolidation of predecessor schemes.

ASIC-approved EDR schemes operate independently of ASIC. Each approved EDR scheme has its own constitution and rules. The rules of each scheme establish the scheme’s jurisdiction, operational procedures and decision-making processes.

ASIC’s initial and ongoing approval of the schemes is achieved by reference to six key principles—namely:

(a) accessibility;
(b) independence;
(c) fairness;
(d) accountability;
(e) efficiency; and
(f) effectiveness.

Note: These principles are set out in the Corporations Regulations and the National Credit Regulations, and are directly based on the principles in the Benchmarks for industry based customer dispute resolution schemes, published in August 1997 by the then Consumer Affairs Division, Department of Industry, Science and Tourism. These benchmarks are subject to a current review by the Commonwealth Consumer Affairs Advisory Council (CCAAC).

ASIC has reviewed our approval guidelines a number of times since 1998. This has happened in response to changes in ASIC’s jurisdiction and the broader financial services market, and our regulatory experience in overseeing the dispute resolution system.

Key approval requirements that ASIC has imposed under the statutory principles since inception include that approved EDR schemes:

(a) are free of charge to investors and financial consumers (this operates in tandem with scheme rules which allow disputes that are frivolous or vexatious, or lacking in substance, to be excluded at any stage in the dispute resolution process);

(b) have independent governance arrangements and independent processes for establishing and revising scheme rules and procedures (while still

---

providing an opportunity for both industry and financial consumer interests to be represented on the governing boards);

(c) collect and report to ASIC complaints data and systemic and serious misconduct issues; and

(d) commission an independent review of their operations and procedures (three years after initial approval by ASIC and every five years after that).

### FOS independent review

FOS is currently undergoing an independent review in accordance with ASIC policy in RG 139. The independent review will assess FOS’s operations and procedures against the principles in RG 139 of accessibility, independence, fairness, accountability, efficiency and effectiveness, among other things. ASIC will be actively engaging in the review process.

The terms of reference for the review and an issues paper developed by the reviewer are available on the FOS website.

### EDR scheme remedies

677 The remedies available to EDR schemes are not limited to making awards for financial compensation. For example, in resolving a dispute a scheme can require:

(a) the payment of a financial award in accordance with the scheme’s rules;
(b) the waiver, variation or repayment of a fee or interest rate on a loan;
(c) the forgiveness or variation of a debt or release of a security;
(d) the reinstatement or rectification of a contract;
(e) the payment, variation or review of a claim under an insurance policy; or
(f) amendments to policy wordings, disclosure documents or advertising materials.

### Financial Ombudsman Service

678 On 16 May 2008, ASIC approved FOS as an EDR scheme under the Corporations Act. FOS is also approved under the National Credit Act as a scheme for consumer credit.

679 FOS was formed by the merger of five pre-existing ASIC-approved schemes:

(a) the Insurance Ombudsman Service (IOS);
(b) the Banking and Financial Services Ombudsman (BFSO);
(c) the Financial Industry Complaints Services Limited (FICS);
(d) the Insurance Brokers Disputes Limited (IBDL); and
(e) the Credit Union Dispute Resolution Centre (CUDRC).

Together, these schemes covered banks, credit unions, general and life insurers, stockbrokers, financial advisers, fund managers and insurance brokers.

In December 2009, ASIC approved FOS’s single terms of reference, which replaced the five separate terms of reference or rules of its predecessor schemes. The new terms of reference commenced operation on 1 January 2010.

The FOS terms of reference form part of the contract between FOS and its members. It also sets out how complainants will be treated as part of the FOS complaints handling processes. FOS has issued operational guidelines, which assist understanding of the terms of reference and provide further detail about how FOS resolves disputes.

FOS’s annual review details its operations, and collates scheme data on a number of different metrics, including the volume of disputes FOS has received and resolved, and the outcomes of those disputes: see Table 31.

Table 31: Total disputes received by the Financial Ombudsman Service, 2009–12

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>% increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009–10</td>
<td>23,790</td>
<td>6%</td>
</tr>
<tr>
<td>2010–11</td>
<td>30,283</td>
<td>27%</td>
</tr>
<tr>
<td>2011–12</td>
<td>36,099</td>
<td>19%</td>
</tr>
</tbody>
</table>


The increase in dispute numbers that FOS recorded over this period was most likely affected by factors including

(a) an increase in jurisdiction (i.e. including credit);
(b) rising numbers of households in financial difficulty as a result of external economic factors;
(c) the natural disasters that struck Australia in 2010–12; and
(d) growing awareness of FOS in the community.

---

FOS is currently reporting a reduction in the rate of disputes received across most sectors.

The vast majority of disputes at FOS are resolved by communication between the investor or financial consumer and the financial services provider or credit service provider directly, or through early conciliation, negotiation or assessment facilitated by FOS.

Some disputes are finalised by FOS without resolution (e.g. disputes outside the FOS terms of reference or because the investor or financial consumer chooses to discontinue the dispute).

Only 8% of the disputes resolved or finalised by FOS in the 2011–12 financial year were resolved by a written decision of FOS. This is the final stage in the formal dispute resolution process. Complaints that proceed to a written decision are generally matters of greater complexity or where the respective positions of the parties cannot be resolved in the process of negotiation or conciliation. Of those matters, the split in determinations is approximately 40% in favour of the investor or financial consumer and around 50% in favour of the member. In around 10% of cases, an Ombudsman determination affirms an award equal to a previously proposed settlement offer from the member.

These resolution breakdown figures are relatively consistent over time and suggest that the schemes deliver balanced outcomes for the parties. Table 32 shows the outcomes of disputes resolved by a FOS decision over the past three financial years.

### Table 32: Outcomes of disputes received by the Financial Ombudsman Service and resolved by decision, 2009–12

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Disputes resolved by FOS decision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2009–10 (no.)</td>
</tr>
<tr>
<td>Decision in favour of investor or financial consumer</td>
<td>1,019</td>
</tr>
<tr>
<td>Decision in favour of member</td>
<td>1,601</td>
</tr>
<tr>
<td>Decision confirming provider’s offer/action</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>2,620</td>
</tr>
</tbody>
</table>

Credit Ombudsman Service Limited

COSL was first established as the Mortgage Industry Ombudsman Service Limited on 18 June 2003, and commenced operations on 1 July 2003. It adopted its current name on 17 February 2004.

COSL has over 16,500 scheme members operating in a variety of financial services sectors, including credit unions, building societies, non-bank lenders, mortgage and finance brokers, financial planners, investment managers, debt services, and other financial services and product providers.

As with FOS, COSL’s membership has expanded significantly since 2009 (see Table 33), principally as a consequence of the credit reforms and the winding up of another scheme, the Financial Co-operative Dispute Resolution Scheme (FCDRS), members of which joined either FOS or COSL.

Table 33: Membership of the Credit Ombudsman Service Limited, 2009–12

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>% increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009–10</td>
<td>12,724</td>
<td>N/A</td>
</tr>
<tr>
<td>2010–11</td>
<td>15,535</td>
<td>22%</td>
</tr>
<tr>
<td>2011–12</td>
<td>16,979</td>
<td>9%</td>
</tr>
</tbody>
</table>


Together with its expanding membership, COSL has also seen a significant increase in the volume of complaints the scheme receives: see Table 34.

Table 34: Total complaints received by the Credit Ombudsman Service Limited, 2009–12

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>% increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009–10</td>
<td>1,154</td>
<td>N/A</td>
</tr>
<tr>
<td>2010–11</td>
<td>1,983</td>
<td>72%</td>
</tr>
<tr>
<td>2011–12</td>
<td>2,741</td>
<td>38%</td>
</tr>
</tbody>
</table>


In terms of the outcomes of complaints that fall within the scheme’s jurisdiction, COSL resolve more than a third of disputes by mutual agreement between the financial services provider or credit service provider and the investor or financial consumer, as demonstrated in Table 35.
Table 35: Outcomes of complaints received by the Credit Ombudsman Service Limited and resolved by decision, 2009–12

<table>
<thead>
<tr>
<th>Outcome</th>
<th>2009–10*</th>
<th>2010–11</th>
<th>2011–12</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of complaints</td>
<td>% complaints dealt with*</td>
<td>No. of complaints</td>
</tr>
<tr>
<td>Mutually acceptable resolution</td>
<td>170</td>
<td>24%</td>
<td>278</td>
</tr>
<tr>
<td>Resolution in favour of complainant</td>
<td>138</td>
<td>20%</td>
<td>268</td>
</tr>
<tr>
<td>Not substantiated (i.e. resolved in favour of member)</td>
<td>140</td>
<td>20%</td>
<td>304</td>
</tr>
</tbody>
</table>

* Percentage of the overall number of complaints that fell within COSL’s jurisdiction and that it could deal with. Does not include complaints that were not within the scheme’s jurisdiction.


The requirement to have adequate compensation arrangements (PI insurance)

AFS licensees and credit licensees must have adequate arrangements for compensating retail clients and consumers for loss or damage due to breaches of the financial services or credit laws.

The Corporations Regulations and National Credit Regulations mandate that the key form of compensation a licensee must have is an acceptable contract of PI insurance.

Regulatory Guide 126 Compensation and insurance arrangements for AFS licensees (RG 126) and Regulatory Guide 210 Compensation and insurance arrangements for credit licensees (RG 210) discuss the key features a PI insurance policy must have for it to be ‘adequate’ (and that ASIC may approve other alternative compensation arrangements and how the licensee may approach ASIC to do so).

Generally, licensees’ PI insurance cover must:

(a) be adequate, having regard to the licensee’s business (the volume of business, the number and kinds of clients or consumers, the kind of business and the number of representatives) and the maximum liability to compensation claims that realistically might arise;

(b) cover EDR scheme awards;
(c) cover fraud or dishonesty by directors, employees, other representatives and other agents of the licensee; and

(d) have a limit of at least $2 million for any one claim and in the aggregate for licensees with total revenue from financial services or credit services provided to retail clients and consumers of $2 million or less.

The limitations of PI insurance

Given the role PI insurance plays in the Australian dispute resolution and compensation framework for the financial services industry and credit industry, it is important to recognise its limitations as a consumer protection mechanism. PI insurance is designed to protect licensees against business risk, and not to provide compensation directly to investors and financial consumers. It is a means of reducing the risk that a licensee cannot pay claims because of insufficient financial resources, but has some significant limitations, including where there are insolvency issues, or multiple claims against a single licensee.

Gaps in, and caps on, PI insurance cover will also inevitably remain a problem, given the limits on ASIC’s capacity to compel commercial providers of the product to adapt it to a purpose different from and beyond the purpose for which it was designed.
### Key terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning in this document</th>
</tr>
</thead>
<tbody>
<tr>
<td>13-010MR (for example)</td>
<td>An ASIC media release (in this example numbered 13-010MR)</td>
</tr>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ACC</td>
<td>Australian Crime Commission</td>
</tr>
<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
</tr>
<tr>
<td>ACIF</td>
<td>Australian Criminal Intelligence Forum</td>
</tr>
<tr>
<td>ACLINK</td>
<td>Australian Consumer Law Intelligence Network Knowledge</td>
</tr>
<tr>
<td>ADI</td>
<td>Authorised deposit-taking institution—has the meaning given in s5 of the <em>Banking Act 1959</em></td>
</tr>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
</tr>
</tbody>
</table>
| AFS licence        | An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services.  
Note: This is a definition contained in s761A. |
| AFS licensee       | A person who holds an AFS licence under s913B of the Corporations Act  
Note: This is a definition contained in s761A. |
<p>| AFSA               | Australian Financial Security Authority                                                                                                                                 |
| ANZ                | Australia and New Zealand Banking Group Limited                                                                                                                                 |
| APRA               | Australian Prudential Regulation Authority                                                                                                                                 |
| ASIC               | Australian Securities and Investments Commission                                                                                                                                 |
| ASIC Act           | <em>Australian Securities and Investments Commission Act 2001</em>                                                                                                                                 |
| ASIC Annual Forum  | ASIC’s annual conference exploring key topics in global financial regulation                                                                                                                                 |
| ASIC Connect       | ASIC’s online portal for accessing ASIC’s registers                                                                                                                                 |</p>
<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning in this document</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC stakeholder survey</td>
<td>The regular independent survey of ASIC’s stakeholders commissioned by ASIC. To date, ASIC has commissioned surveys to be undertaken in 2008, 2010 and 2013</td>
</tr>
<tr>
<td>ASIC’S Service Charter</td>
<td>ASIC’s policy on our service delivery targets for our most common interactions with the community</td>
</tr>
<tr>
<td>ASX</td>
<td>ASX Limited or the exchange market operated by ASX Limited</td>
</tr>
<tr>
<td>ATO</td>
<td>Australian Taxation Office</td>
</tr>
<tr>
<td>AUSTRAC</td>
<td>Australian Transaction Reports and Analysis Centre</td>
</tr>
<tr>
<td>Australian Consumer Law</td>
<td>Cooperative legislation implemented through the Council of Australian Governments and set out in Sch 2 of the <em>Competition and Consumer Act 2010</em></td>
</tr>
<tr>
<td>authorised representative</td>
<td>A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee</td>
</tr>
<tr>
<td>Note: This is a definition contained in s761A.</td>
<td></td>
</tr>
<tr>
<td>best interests duty</td>
<td>The duty to act in the best interests of the client when giving personal advice to a client as set out in s961B(1) of the Corporations Act</td>
</tr>
<tr>
<td>BOQ</td>
<td>Bank of Queensland</td>
</tr>
<tr>
<td>Business Names Register</td>
<td>The register of business names established and maintained under s22 of the <em>Business Names Registration Act 2011</em></td>
</tr>
<tr>
<td>CAANZ</td>
<td>Consumer Affairs Australia and New Zealand</td>
</tr>
<tr>
<td>CAF</td>
<td>Consumer Affairs Forum</td>
</tr>
<tr>
<td>CALDB</td>
<td>Companies Auditors and Liquidators Disciplinary Board</td>
</tr>
<tr>
<td>Campbell Inquiry</td>
<td>Australian Financial System Inquiry (1981)</td>
</tr>
<tr>
<td>CBA</td>
<td>Commonwealth Bank of Australia</td>
</tr>
<tr>
<td>CDPP</td>
<td>Commonwealth Director of Public Prosecutions</td>
</tr>
<tr>
<td>CFPL</td>
<td>Commonwealth Financial Planning Limited</td>
</tr>
<tr>
<td>CFR</td>
<td>Council of Financial Regulators</td>
</tr>
<tr>
<td>Chi-X</td>
<td>Chi-X Australia Pty Limited or the exchange market operated by Chi-X Australia Pty Limited</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning in this document</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| conflicted remuneration       | A benefit given to an AFS licensee, or a representative of an AFS licensee, who provides financial product advice to clients that, because of the nature of the benefit or the circumstances in which it is given:  
• could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to clients; or  
• could reasonably be expected to influence the financial product advice given to clients by the licensee or representative.  
In addition, the benefit must not be excluded from being conflicted remuneration by the Corporations Act or Corporations Regulations                                               |
<p>| corporate whistleblower       | A person who qualifies for the protections available in Pt 9.4AAA of the Corporations Act                                                                                                                                 |
| Corporations Act              | <em>Corporations Act 2001</em>, including regulations made for the purposes of that Act                                                                                                                                          |
| Corporations Agreement        | An agreement between the Australian and state and territory governments that sets out ASIC’s governance arrangements                                                                                                    |
| Corporations Regulations      | Corporations Regulations 2001                                                                                                                                                                                             |
| COSL                          | Credit Ombudsman Service Limited                                                                                                                                                                                          |
| CP 209 (for example)          | An ASIC consultation paper (in this example numbered 209)                                                                                                                                                               |
| credit licence                | An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities                                                                                     |
| credit licensee               | A person who holds a credit licence under s35 of the National Credit Act                                                                                                                                                |
| Crimes Act                    | <em>Crimes Act 1914</em>                                                                                                                                                                                                        |
| EDR                           | External dispute resolution                                                                                                                                                                                              |
| FCA                           | Financial Conduct Authority (UK)                                                                                                                                                                                          |
| FOFA                          | Future of Financial Advice                                                                                                                                                                                               |
| FOI                           | Freedom of information                                                                                                                                                                                                   |
| FOI Act                       | <em>Freedom of Information Act 1982</em>                                                                                                                                                                                         |
| FOS                           | Financial Ombudsman Service                                                                                                                                                                                             |</p>
<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning in this document</th>
</tr>
</thead>
<tbody>
<tr>
<td>FSA</td>
<td>Financial Services Authority (UK)</td>
</tr>
<tr>
<td>FSAP</td>
<td>Financial Sector Assessment Program</td>
</tr>
<tr>
<td>HOCOLEA</td>
<td>Heads of Commonwealth Operational Law Enforcement Agencies</td>
</tr>
<tr>
<td>IDR</td>
<td>Internal dispute resolution</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>INFO 153 (for example)</td>
<td>An ASIC information sheet (in this example numbered 153)</td>
</tr>
<tr>
<td>IOSCO</td>
<td>International Organization of Securities Commissions</td>
</tr>
<tr>
<td>JORC Code</td>
<td>Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, prepared by the Joint Ore Reserves Committee of the AusIMM, AIG and Minerals Council of Australia</td>
</tr>
<tr>
<td>Legislative Instruments Act</td>
<td><em>Legislative Instruments Act 2003</em></td>
</tr>
<tr>
<td>low doc loans</td>
<td>Loans where the lender does not collect documents to verify the financial position of the borrower</td>
</tr>
<tr>
<td>LPP</td>
<td>Legal professional privilege</td>
</tr>
<tr>
<td>M&amp;BR team</td>
<td>ASIC’s Misconduct and Breach Reporting team</td>
</tr>
<tr>
<td>MDP</td>
<td>Markets Disciplinary Panel</td>
</tr>
<tr>
<td>MoneySmart</td>
<td>ASIC’s website for consumers and investors (<a href="http://www.moneysmart.gov.au">www.moneysmart.gov.au</a>)</td>
</tr>
<tr>
<td>MoneySmart Rookie</td>
<td>A financial literacy campaign launched by ASIC targeting first-time, real-life events for young people aged 15–25 years</td>
</tr>
<tr>
<td>MoneySmart Teaching</td>
<td>An ASIC program for the provision of consumer and financial literacy education materials to young people in schools and tertiary education</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of understanding</td>
</tr>
<tr>
<td>National Credit Act</td>
<td><em>National Consumer Credit Protection Act 2009</em></td>
</tr>
<tr>
<td>National Credit Code</td>
<td>Sch 1 of the National Credit Act</td>
</tr>
<tr>
<td>National Credit Regulations</td>
<td>National Consumer Credit Protection Regulations 2010</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning in this document</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>National Financial Literacy Strategy</td>
<td>A strategy published by ASIC in 2011 to promote a national approach to improving the financial wellbeing and literacy of all Australians</td>
</tr>
<tr>
<td>OPAL group</td>
<td>The Operational Identity Crime Forum</td>
</tr>
<tr>
<td>OTC</td>
<td>Over the counter</td>
</tr>
<tr>
<td>PDS</td>
<td>Product Disclosure Statement</td>
</tr>
<tr>
<td>PI insurance</td>
<td>Professional indemnity insurance</td>
</tr>
<tr>
<td>PJC</td>
<td>Parliamentary Joint Committee on Corporations and Financial Services</td>
</tr>
<tr>
<td>PRA</td>
<td>Prudential Regulation Authority (UK)</td>
</tr>
<tr>
<td>Privacy Act</td>
<td>Privacy Act 1988</td>
</tr>
<tr>
<td>Product Disclosure Statement</td>
<td>A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act</td>
</tr>
<tr>
<td></td>
<td>Note: See s761A for the exact definition.</td>
</tr>
<tr>
<td>Project Wickenby</td>
<td>A cross-agency taskforce established to prevent people from promoting or participating in the use of secrecy havens for the purposes of tax evasion, avoidance or crime</td>
</tr>
<tr>
<td>Public Service Act</td>
<td>Public Service Act 1999</td>
</tr>
<tr>
<td>Pt 9.4AAA (for example)</td>
<td>A part of the Corporations Act (in this example numbered 9.4AAA), unless otherwise specified</td>
</tr>
<tr>
<td>RBA</td>
<td>Reserve Bank of Australia</td>
</tr>
<tr>
<td>reg 7.6.02 (for example)</td>
<td>A regulation of the Corporations Regulations (in this example numbered 7.6.02), unless otherwise specified</td>
</tr>
<tr>
<td>regional liaison committee</td>
<td>A committee established in a state or territory under the Corporations Agreement for the purpose of briefing representatives of the local business community on ASIC’s work</td>
</tr>
<tr>
<td>REP 240 (for example)</td>
<td>An ASIC report (in this example numbered 240)</td>
</tr>
<tr>
<td>RG 148 (for example)</td>
<td>An ASIC regulatory guide (in this example numbered 148)</td>
</tr>
<tr>
<td>Ripoll Inquiry</td>
<td>PJC Inquiry into Financial Products and Services in Australia (2009)</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning in this document</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>s961B (for example)</td>
<td>A section of the Corporations Act (in this example numbered 961B), unless otherwise specified</td>
</tr>
<tr>
<td>SCT</td>
<td>Superannuation Complaints Tribunal, established under the Superannuation (Resolution of Complaints) Act 1993</td>
</tr>
<tr>
<td>SEC</td>
<td>Securities and Exchange Commission (US)</td>
</tr>
<tr>
<td>SIS Act</td>
<td>Superannuation Industry (Supervision) Act 1993</td>
</tr>
<tr>
<td>SMSF</td>
<td>Self-managed superannuation fund</td>
</tr>
<tr>
<td>SMSF auditor</td>
<td>The auditor of an SMSF responsible for the financial and compliance audit of the fund’s operation</td>
</tr>
<tr>
<td>Storm Financial</td>
<td>Storm Financial Limited</td>
</tr>
<tr>
<td>Stronger Super reforms</td>
<td>Reforms implemented in response to the Super System Review and contained in the following Acts (and associated regulations):</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Auditor Registration Imposition Act 2012</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Act 2012</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Legislation Amendment (Stronger Super) Act 2012</td>
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<tr>
<td></td>
<td>• Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012</td>
</tr>
<tr>
<td></td>
<td>• Superannuation Supervisory Levy Imposition Amendment Act 2012</td>
</tr>
<tr>
<td>Takeovers Panel</td>
<td>A peer review body established by the ASIC Act that regulates corporate control transactions in widely held Australian entities</td>
</tr>
<tr>
<td>terms of reference</td>
<td>The document that sets out an EDR scheme’s jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances, these might also be referred to as the scheme’s ‘rules’</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning in this document</td>
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<tr>
<td>----------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Tier 1 products</td>
<td>All financial products except those defined in Regulatory Guide 146 <em>Licensing: Training of financial product advisers</em> (RG 146) as Tier 2 products (i.e. general insurance products, except for personal sickness and accident (as defined in reg 7.1.14); consumer credit insurance (as defined in reg 7.1.15); basic deposit products; non-cash payment products; and first home saver accounts) Note: See RG 146 for more details.</td>
</tr>
<tr>
<td>UCCC</td>
<td>Uniform Consumer Credit Code</td>
</tr>
<tr>
<td>unconscionable conduct</td>
<td>Conduct that is prohibited by s12CA and 12CB of the ASIC Act</td>
</tr>
<tr>
<td>Westpoint</td>
<td>The Westpoint group of companies, which collapsed in January 2006</td>
</tr>
</tbody>
</table>