



**ASIC**

Australian Securities & Investments Commission

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# ASIC enforcement outcomes: January to June 2018

Report 585

August 2018

## About this report

This report outlines the enforcement outcomes achieved by ASIC during the period from 1 January to 30 June 2018 (relevant period). The report provides a high-level overview of some of our enforcement priorities and highlights some important cases and decisions during this period.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

## Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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# Overview

## ASIC's role and the scope of this report

ASIC investigates and enforces the law to give effect to our vision to ensure a fair, strong and efficient financial system for all Australians. We do this by using all our regulatory tools to:

- change behaviours to drive good consumer and investor outcomes;
- act against misconduct to maintain trust and integrity in the financial system;
- promote the strong and innovative development of the financial system; and
- help Australians to be in control of their financial lives.

Our vision reflects the objectives of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

This report provides a high-level overview of our enforcement activities and outcomes achieved during the period 1 January to 30 June 2018 (relevant period).

This report covers:

- our enforcement objectives;
- the key enforcement outcomes in the relevant period;
- a summary of enforcement outcomes by enforcement area; and
- case studies of key actions we have taken to enforce the law and support our priorities.

[Previous ASIC enforcement outcomes reports](#) are available on our website.

## Enforcement objectives

ASIC's enforcement teams are committed to addressing the key risks outlined in [ASIC's Corporate Plan 2017–18 to 2020–21: Focus 2017–18](#) (Corporate Plan).

The Corporate Plan sets out our vision, long-term challenges, key risks and strategy for the period from 2017–18 to 2020–21.

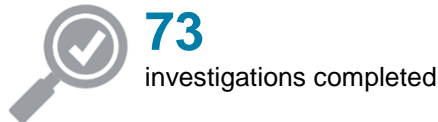
The key risks identified in the Corporate Plan are:

- poor culture and conduct in financial services and credit, resulting in poor outcomes for investors and consumers;
- poor culture and conduct in markets, undermining market integrity;
- financial vulnerability of consumers at key decision points;
- misalignment of retail product design and distribution with consumer needs;
- inadequate risk management of technological change, including digital disruption and cyber threats; and
- cross-border businesses, services and transactions in a continually evolving regulatory environment.

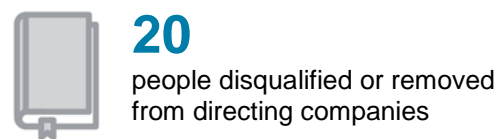
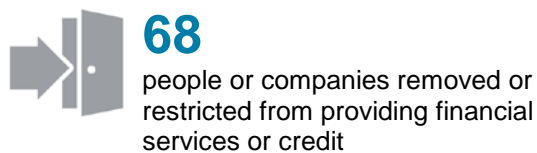
## Summary of key outcomes

Figure 1: Summary of key enforcement outcomes

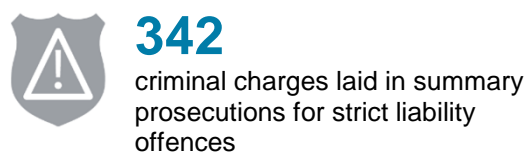
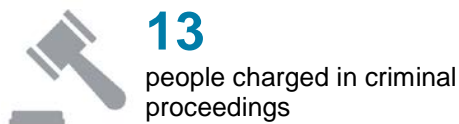
### Investigations



### Bannings and disqualifications



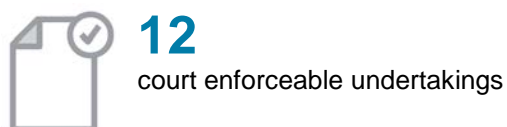
### Prosecutions



### Civil penalties



### Infringement notices, compensation and court enforceable undertakings



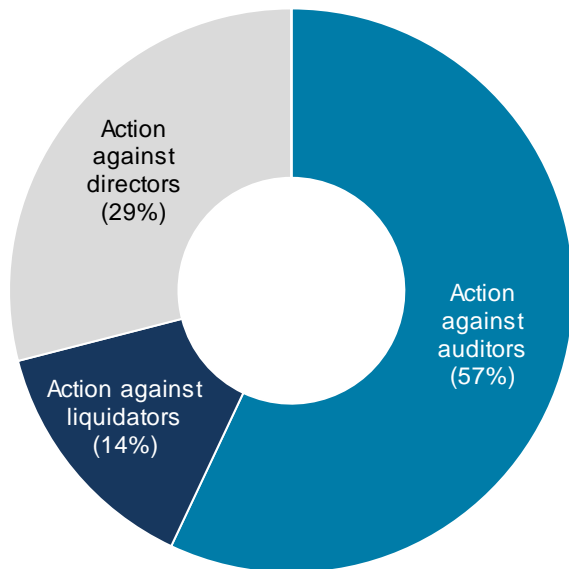
# Corporate governance

Our work in corporate governance ensures that public companies are properly accountable to their investors by regulating disclosure by and conduct of corporations and their officers in Australia. Where there are practices that undermine market integrity and investor outcomes, we take enforcement action to protect investors and consumers.

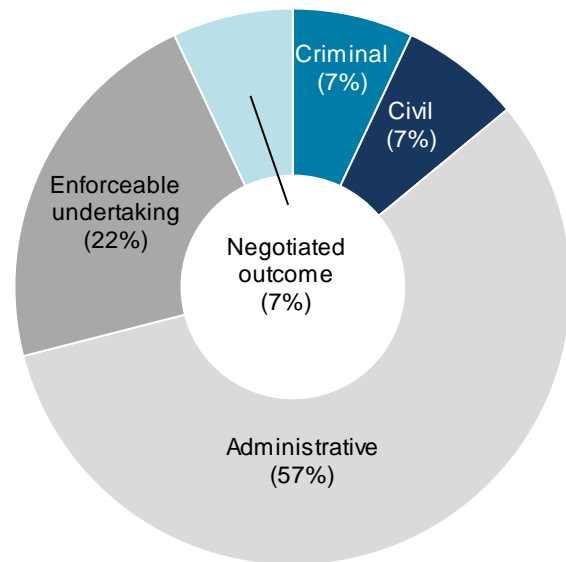
## Enforcement outcomes

Figure 2 and Figure 3 provide a summary of corporate governance related enforcement outcomes in the relevant period.

**Figure 2: Corporate governance outcomes by misconduct type**



**Figure 3: Corporate governance outcomes by remedy type**



Note: See Table 5 for the data shown in these two figures (accessible version).

Table 1 outlines the number of defendants in criminal and civil matters pending before the courts.

**Table 1: Pending corporate governance matters as at 1 July 2018**

Misconduct type	Criminal	Civil
Action against liquidators	0	4
Action against directors	11	22
Insolvency	1	0
Other corporate governance misconduct	2	3
<b>Total</b>	<b>14</b>	<b>29</b>

Note: These matters have yet to achieve a final result because the court or tribunal has determined liability but has not yet decided the penalty or made the final orders, a plea has been entered but a decision on conviction or sentence has yet to be made, or the court has yet to determine whether a breach of the law or an offence has been committed.

## Area of focus

### Holding gatekeepers to account

Company directors and officers, auditors, insolvency practitioners and business advisers are important gatekeepers who hold positions of responsibility and trust, and who are required to lawfully discharge the obligations that these positions carry.

#### Case study: Daniel Panrucker

Our investigations into Daniel Panrucker, which began in May 2014, found that he had used his company, Ava Securities Pty Ltd (Ava Securities), to offer capital raising services to start businesses in mining and exploration.

Temple Resources Pty Ltd (Temple), Thracian Resources Pty Ltd (Thracian Resources) and Thracian Resources Australia Pty Ltd (Thracian Australia) were mining companies raising seed capital from the public. Mr Panrucker, via Ava Securities, had promoted the seed capital raising for Temple, Thracian Resources and Thracian Australia.

ASIC records showed that Mr Panrucker was also a director of Temple and Thracian Resources. This meant that he was a director of companies on both sides of various transactions relating to seed capital raising.

We were concerned that Mr Panrucker did not act with care and due diligence in the performance of his role as a director or company officer by:

- failing to disclose the conflict of interest to potential investors;
- providing financial services without having an Australian financial services (AFS) licence or being an authorised representative;
- failing to segregate investors' money from Ava Securities' money;
- failing to keep sufficient documents recording purported commission and loan arrangements;
- issuing false, misleading or deceptive information memoranda to potential investors; and
- making unauthorised payments to himself or Ava Securities.

On 18 January 2018, Mr Panrucker entered into a court enforceable undertaking with ASIC that will see him and his deregistered company, Ava Securities, banned from the financial services industry for 10 years. Mr Panrucker is also prevented from managing a corporation for seven years and is required to complete a course for directors before being eligible to manage an Australian corporation.

## Summary of outcomes relating to SMSF auditors since 2013

Self-managed superannuation fund (SMSF) auditors perform an important role in promoting confidence and sound practices in the SMSF sector. As gatekeepers, they are expected to adhere to the highest standards in the performance of their role.

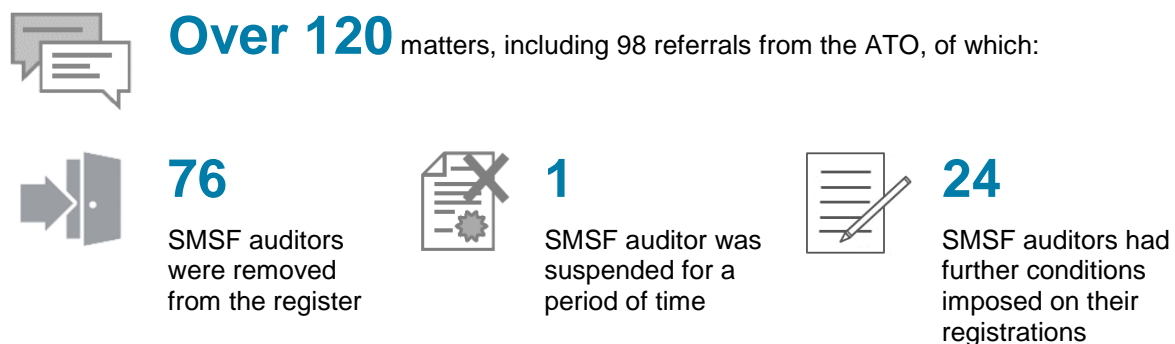
Since 1 July 2013, the *Superannuation Industry (Supervision) Act 1993* (SIS Act) requires all auditors of SMSFs to be registered with ASIC. Under the SIS Act, ASIC also has responsibility for setting competency standards and imposing any administrative standards. This is to ensure that all SMSF auditors meet the required standards of competency and expertise.

We work closely with the Australian Taxation Office (ATO) as co-regulators of SMSF auditors. The ATO monitors the conduct of these auditors and may refer compliance matters to ASIC as the registration body. Where, following our review, we determine that the SMSF auditor has been non-compliant, we may:

- impose or vary conditions on the SMSF auditor's registration;
- accept a court enforceable undertaking;
- cancel the SMSF auditor's registration; or
- disqualify or suspend the auditor from being an approved SMSF auditor.

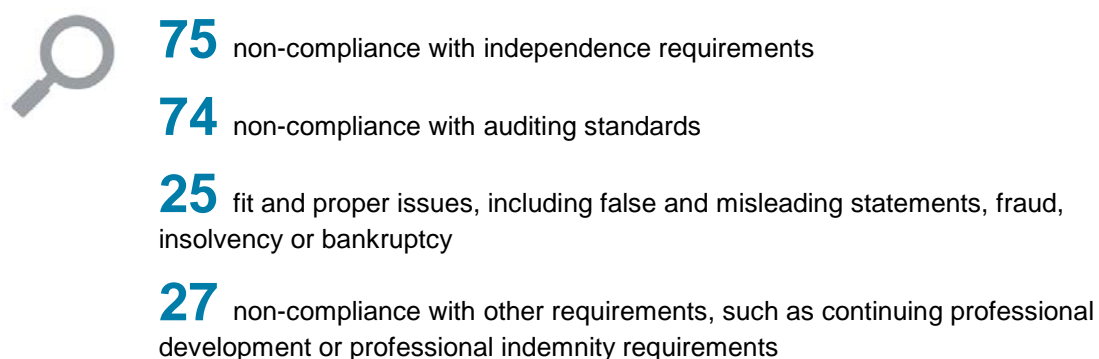
Figure 4 and Figure 5 set out our enforcement work relating to SMSF auditors since becoming a co-regulator in 2013.

**Figure 4: Enforcement actions in relation to SMSF auditors since 2013**



Note: Of the 76 SMSF auditors removed from the register, 47 were voluntary cancellations.

**Figure 5: Areas considered for the enforcement actions**



Note: An SMSF auditor may be referred to ASIC for more than one reason.



## Case study: Paul Tattersall

On 26 February 2018, we made an order to disqualify Paul Tattersall from being an approved SMSF auditor. The disqualification followed an investigation that found Mr Tattersall had breached independence requirements.

We found that Mr Tattersall had breached the auditor independence requirements of [APES 110 Code of ethics for professional accountants](#) by auditing his own fund, his spouse's fund and another fund that had its financial statements prepared by his spouse.

Before our investigations, three of Mr Tattersall's SMSF audits had been reviewed by the ATO as part of its ongoing compliance monitoring program. In December 2017, the ATO referred its findings to ASIC and we obtained a further response from Mr Tattersall.

## Looking ahead

We will continue to focus on the conduct of gatekeepers—company directors and officers, auditors, insolvency practitioners and business advisers—to ensure that they meet the standards of conduct required by law. Where necessary, we will take action against those who fail to meet these standards.

Over the next six months, we will have a particular focus on:

- companies with poor corporate governance;
- undisclosed associations and substantial holdings in shares in public companies (including beneficial ownership tracing and corporate fraud);
- related party transactions involving public companies;
- poor financial reporting by listed companies and other public interest entities;
- the quality of audits of listed companies and other public interest entities;
- insolvency practitioners and others who facilitate serious illegal phoenix activity and improper transactions in the face of insolvency;
- debenture issuers and other companies exposed to risk as a result of a declining property market; and
- company directors and officers who fail to stop their companies making illegal payments to officials of overseas governments.

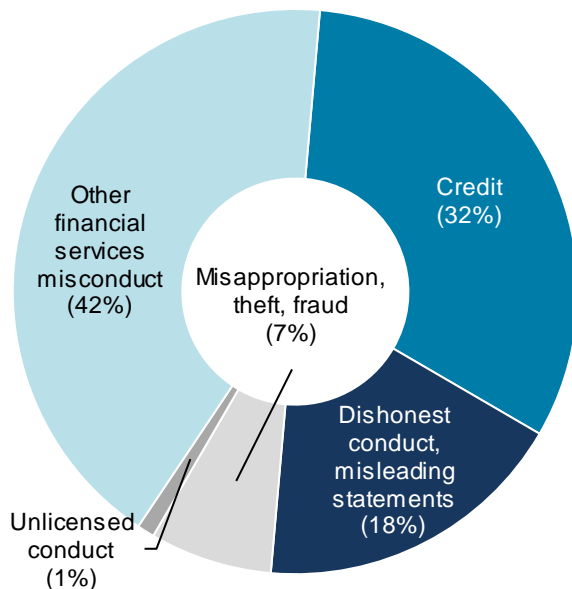
## Financial services

Our work in financial services is focused on improving consumer outcomes by regulating the conduct of financial services and credit providers. Where there are practices that result in consumer harm or create a risk of harm, particularly for vulnerable consumers, we take enforcement action to protect the public.

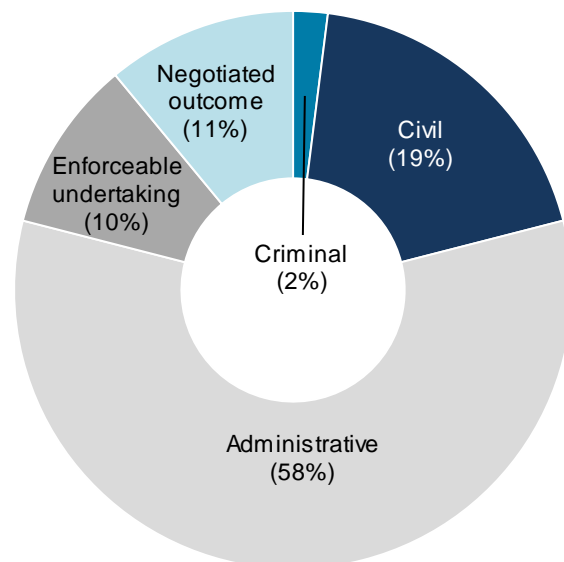
### Enforcement outcomes

Figure 6 and Figure 7 provide a summary of financial services related enforcement outcomes in the relevant period.

**Figure 6: Financial services outcomes by misconduct type**



**Figure 7: Financial services outcomes by remedy type**



Note: See Table 6 for the data shown in these two figures (accessible version).

Table 2 outlines the number of defendants in criminal and civil matters pending before the courts.

**Table 2: Pending financial services matters before the courts as at 1 July 2018**

Misconduct type	Criminal	Civil
Credit	3	1
Dishonest conduct, misleading statements	11	18
Misappropriation, theft, fraud	2	10
Other financial services misconduct	0	27
<b>Total</b>	<b>16</b>	<b>56</b>

Note: These matters have yet to achieve a final result because the court or tribunal has determined liability but has not yet decided the penalty or made the final orders, a plea has been entered but a decision on conviction or sentence has yet to be made, or the court has yet to determine whether a breach of the law or an offence has been committed.

**Area of focus**  
**Consumer credit**

Credit providers must comply with their responsible lending obligations, irrespective of whether a loan application is submitted by a broker.

**Case study: Esanda—ANZ**

On 28 February 2018, the Federal Court ordered Australia and New Zealand Banking Group Ltd (ANZ) to pay a penalty of \$5 million for breaches of the responsible lending provisions of the *National Consumer Credit Protection Act 2009* (National Credit Act) by its former car finance business, Esanda.

In the civil penalty proceedings, the court found that in respect of 12 car loan applications from three brokers, ANZ had failed to take reasonable steps to verify the income of the consumer and had inappropriately relied solely on documents which appeared to be payslips.

The court's judgment sets out why ANZ had reason to doubt the reliability of the payslips provided with the 12 applications. This included the fact that one of the brokers had previously been investigated for fraud.

Income is one of the most important components in the assessment of a consumer's financial situation and their ability to repay a loan. The statement of facts sets out that reasonable steps to verify a consumer's income would have included requesting a bank statement from the consumer showing the history of salary deposits or substantiating salary deposits in ANZ bank accounts for an existing customer.

*'The obligation to verify a consumer's income is important in ensuring that lenders and consumers do not enter into contracts that may be unsuitable.'*

– Middleton J  
*Australian Securities and Investment Commission v  
Australia and New Zealand Banking Group Limited [2018] FCA 155 at [32(4)]*

## Area of focus

## Unconscionable and misleading and deceptive conduct

Unconscionable and misleading and deceptive conduct by those providing financial advice or financial services undermines trust and confidence in the financial services industry.

## Case study: Malouf Group Enterprises and Jordan Malouf

On 26 April 2018, the Federal Court ordered credit repair business, Malouf Group Enterprises Pty Ltd (Malouf Group), to pay a pecuniary penalty of \$400,000 and its sole director, Jordan Francis Malouf, to pay a penalty of \$100,000.

The court found that Mr Malouf and the Malouf Group had breached the Australian Consumer Law during the period from 1 January 2014 to 31 December 2015 by making false and misleading representations and by engaging in unconscionable conduct. The conduct involved:

- making false representations on websites operated by Malouf Group as to its standing as a credit repair company;
- displaying false testimonials on the Malouf Group websites;
- making false representations as to the Malouf Group's ability to clean up a consumer's credit history; and
- making false representations in sales scripts about the work Malouf Group had done for the consumer before the payment of fees.

In determining the penalties, the court took into account a court enforceable undertaking in which the respondents will refund a total of \$1.1 million to consumers who did not have any negative listings on their credit files when they entered into contracts with Malouf Group during 2014–15.

The respondents were also ordered to pay \$100,000 towards ASIC's costs.

*'Those tactics identified in those instances are both disturbing and unconscionable, and the methodology engaged in by Malouf Group Enterprises was both cynical and calculated to secure the payment of substantial fees from potential customers in the full knowledge that the services which might be provided were rather limited.'*

– Derrington J  
*Australian Securities & Investments Commission v  
 Malouf Group Enterprises Pty Ltd [2018] FCA 808*

### Case study: Spaceship Financial Services and Tidswell Financial Services

In April 2018, Spaceship Financial Services Pty Ltd (Spaceship) and Tidswell Financial Services (Tidswell) each paid a \$12,600 penalty for infringement notices issued by ASIC.

The infringement notices were issued following concerns that promotional statements made in relation to Spaceship Super Fund's 'GrowthX' portfolio (Spaceship Fund) had prioritised marketing over accurate disclosure. During 2017, statements published on Spaceship Fund's website told prospective members that:

*'We will fight to get you the very best assets in your portfolio ... We will measure companies in our portfolio based on their ability to provide defensibility of profits and high levels of product differentiation.'*

ASIC was concerned that these statements misled prospective members of Spaceship Fund, because, at the time, 79% of the fund was invested in index-tracking funds which involved no qualitative analysis of the underlying companies.

ASIC considers the promotion of a fund to be unlawful if investors are required to find their way through misleading representations in a Product Disclosure Statement. Trustees of superannuation funds have a responsibility to supervise the promotion of the fund.

Tidswell is the trustee of the fund and Spaceship is the promoter. In response to the concerns raised, Spaceship and Tidswell have since removed the statements from the Spaceship Fund's website.

### Financial advice bannings from the Wealth Management Project

Since its commencement in October 2014, ASIC's Wealth Management Project (the Project) has focused on the conduct of Australia's largest financial advice firms: AMP, ANZ, the Commonwealth Bank of Australia (CBA), Macquarie, National Australia Bank Limited (NAB) and Westpac Banking Corporation (Westpac).

An important area of focus for the Project is banning financial advisers who provide poor advice to retail clients. Our banning outcomes are important in terms of improving the standards across the financial advice industry, so that consumers can confidently access advice that is appropriate and beneficial for them.

The Project will continue its investigations and surveillance in pursuing a range of regulatory outcomes.

Figure 8 sets out key outcomes relating to financial advisers as part of the Project since October 2014.

#### Figure 8: Key outcomes from the Wealth Management Project since October 2014



**50** financial advisers banned from the industry



**2** civil penalty proceedings commenced against AMP and Westpac



**1** director removed from the industry



**3** court enforceable undertakings relating to financial advisers

## Looking ahead

Over the next six months, we will continue to focus on enforcing higher standards in the financial services and advice industry, paying particular attention to:

- responsible lending practices requiring credit licensees to make reasonable inquiries about a customer's financial situation, including verifying customer information in the assessment of suitability for a loan;
- the responsibility of AFS licensees to monitor and supervise the advice of their financial advice representatives to ensure that the services covered by the licence are provided efficiently, honestly and fairly;
- the obligation of financial services firms to ensure that clients are provided services for which they are charged—for more information, see [Report 499](#) *Financial advice: Fees for no service* (REP 499); and
- the scope of the conflicted remuneration obligations on financial licensees and authorised representatives when they are providing financial advice—for more information, see [Regulatory Guide 246](#) *Conflicted and other banned remuneration* (RG 246).

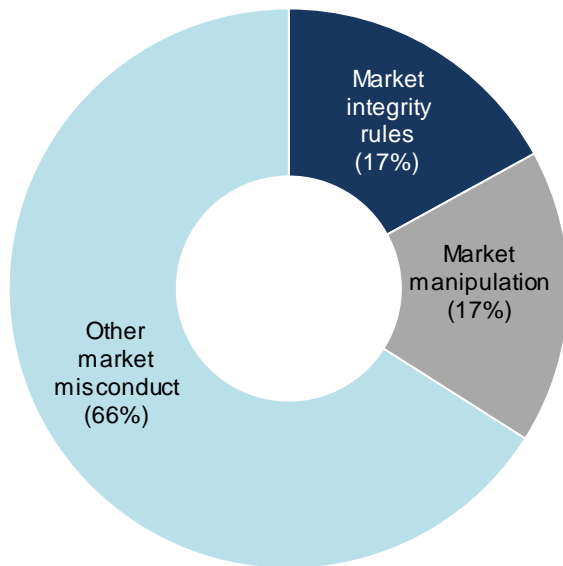
# Market integrity

Robust market integrity ensures Australia’s financial markets are fair and efficient, so that firms can thrive and investors can participate with confidence. We undertake investigations and take enforcement action where misconduct threatens market integrity and investor confidence.

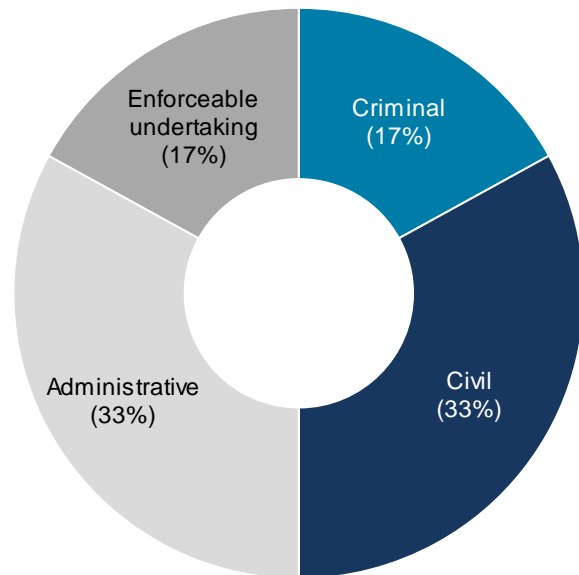
## Enforcement outcomes

Figure 9 and Figure 10 provide a summary of enforcement outcomes for market integrity in the relevant period.

**Figure 9: Market integrity outcomes by misconduct type**



**Figure 10: Market integrity outcomes by remedy type**



Note: See Table 7 for the data shown in these two figures (accessible version).

Table 3 outlines the number of defendants in criminal and civil matters pending before the courts.

**Table 3: Pending market integrity matters before the courts as at 1 July 2018**

Misconduct type	Criminal	Civil
Continuous disclosure	0	6
Insider trading	4	0
Market integrity rules	0	1
Market manipulation	3	3
Other market misconduct	4	3
<b>Total</b>	<b>11</b>	<b>13</b>

Note: These matters have yet to achieve a final result because the court or tribunal has determined liability but has not yet decided the penalty or made the final orders, a plea has been entered but a decision on conviction or sentence has yet to be made, or the court has yet to determine whether a breach of the law or an offence has been committed.

## Area of focus Financial benchmarks

Financial benchmarks are critical to market integrity because they are used as the reference price for a wide range of financial products. Manipulation of benchmarks can undermine their reliability and damage trust and confidence in Australia's financial markets.

### Case study: BBSW—CBA and Westpac

#### Commonwealth Bank of Australia

On 30 January 2018, we commenced legal proceedings in the Federal Court against CBA alleging unconscionable conduct and market manipulation in relation to CBA's involvement in setting the bank bill swap reference rate (BBSW) in 2012.

On 21 June 2018, the Federal Court imposed pecuniary penalties totalling \$5 million on CBA for attempting to engage in unconscionable conduct in relation to the BBSW.

The penalties were imposed after CBA admitted to:

- attempting to seek to affect where the BBSW was set on five occasions in the period 31 January 2012 to 15 June 2012;
- failing to do all things necessary to ensure that the financial services covered by its AFS licence were provided efficiently and fairly; and
- failing to ensure that its traders were adequately trained to provide financial services.

In imposing the penalties, the court noted the terms of the court enforceable undertaking, where CBA will pay \$15 million towards the benefit of the community and \$5 million towards ASIC's investigation and legal costs. CBA will also engage an independent expert to assess changes made to its policies and procedures in relation to prime bank bills trading.

The court enforceable undertaking was accepted by ASIC on 9 July 2018.

#### Westpac

On 24 May 2018, the Federal Court found that Westpac engaged in unconscionable conduct in breach of the ASIC Act by its involvement in setting the BBSW on four occasions over the period from 6 April 2010 to 6 June 2012. On these occasions, Westpac traded with the dominant purpose of influencing yields of traded prime bank bills and setting the BBSW in a way that was favourable to its rate set exposure.

The court also found that Westpac had breached its obligations as an AFS licensee under s912A of the *Corporations Act 2001* (Corporations Act), by failing to have adequate procedures and training in place.

A further hearing on penalty and relief will be held on 12 October 2018.

*'CBA's conduct was engaged in for the purpose of profiting CBA in circumstances where CBA knew that if successful, it may have gained at the expense of others who were vulnerable.'*

– Beach J  
*Australian Securities and Investments Commission v  
Commonwealth Bank of Australia [2018] FCA 941*



*‘Westpac’s conduct was against commercial conscience as informed by the normative standards and their impact valued enshrined in the text, context and purpose of the ASIC Act specifically and the Corporations Act generally.’*

– Beach J  
*Australian Securities and Investments Commission v  
 Westpac Banking Corporation (No. 2) [2008] FCA 751*

**Summary of outcomes relating to BBSW conduct of ANZ, CBA, NAB and Westpac**

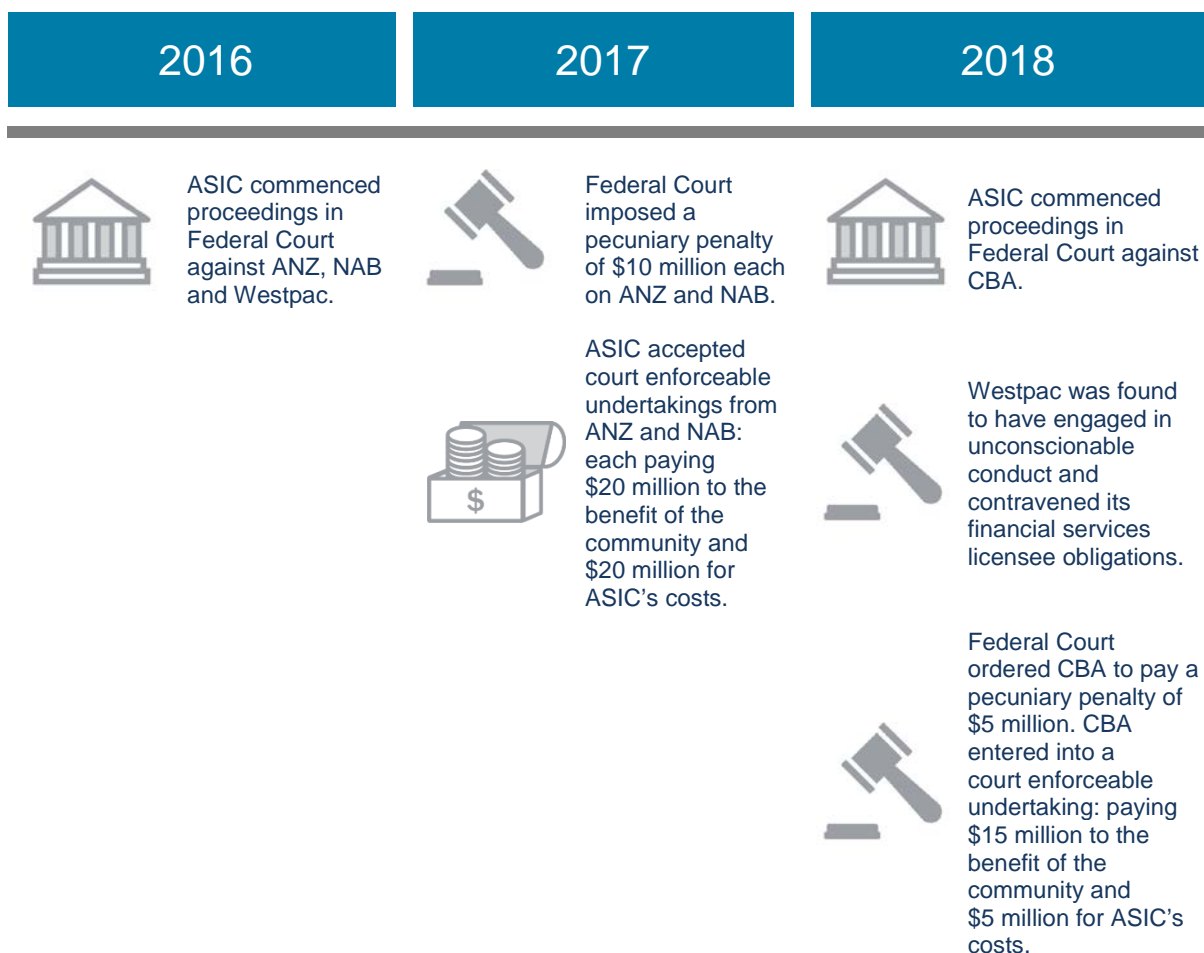
The BBSW is the primary interest rate benchmark used in the Australian financial markets. The purpose of the BBSW is to provide an independent and transparent reference rate for the pricing and revaluation of Australian dollar derivative instruments, securities and commercial loans.

Poor conduct by financial institutions in relation to the benchmarks can mean that it does not accurately reflect the underlying interests it measures. This can adversely affect market confidence and inflict losses on clients of financial institutions.

Since 2016, we have taken enforcement action against ANZ, CBA, NAB and Westpac in relation to their BBSW conduct.

Figure 11 outlines our enforcement outcomes relating to BBSW conduct of ANZ, CBA, NAB and Westpac.

**Figure 11: Outcomes relating to BBSW conduct of ANZ, CBA, NAB and Westpac**



## Area of focus Market manipulation

There are different types of market manipulation that we investigate, including when a person engages in activity that is likely to have the effect of creating an artificial price for trading in financial products on a financial market, and when a person carries out transactions in financial products that create a false or misleading appearance of active trading in those products. This conduct undermines fair, orderly and transparent markets.

### Case study: Stefan Boitcheff

On 4 April 2018, the District Court of South Australia sentenced Stefan Mark Boitcheff to one year and nine months imprisonment after he pleaded guilty to two market manipulation related charges under section 1041A and section 1041B of the Corporations Act. Mr Boitcheff was released immediately upon entering into a recognisance to be of good behaviour for two years.

Our investigation into Mr Boitcheff's trading in contracts for difference (CFDs) found that between 3 January 2013 and 16 July 2013, he carried out 112 transactions in CFDs relating to Anteo Diagnostics Limited (ADO) shares which had the effect of creating an artificial price for the trading of these shares on ASX. He also carried out four transactions in ADO CFDs and ADO shares between 8 May 2013 and 7 January 2014 which had the effect of creating a false or misleading appearance of active trading in ADO shares on ASX.

A CFD is an agreement between an investor and a CFD issuer which allows a trader to speculate on future price movements in a financial product, such as shares in this case, without the investor acquiring ownership of the underlying shares. The value of a CFD roughly corresponds to the price of the underlying financial product.

Mr Boitcheff traded the CFDs through a Direct Market Access (DMA) account. Under the DMA model, the CFD issuer hedges its exposure to a client's trading position which results in an equivalent position being taken in the underlying shares on ASX.

This matter was prosecuted by the Commonwealth Director of Public Prosecutions.

## Area of focus Protecting investors

Investor trust and confidence in Australia's financial markets is vital to driving economic growth. To promote fair and efficient markets we address misconduct that threatens to create market uncertainty and erode investor confidence.

### Case study: AGM Markets, OT Markets and Ozifin

On 12 February 2018, we obtained interim orders in the Federal Court against AGM Markets Pty Ltd (AGM Markets), OT Markets Pty Ltd (OT Markets) and Ozifin Tech Pty Ltd (Ozifin) following concerns that these entities were providing unlicensed personal financial product advice to retail investors.

The interim orders have the effect of:

- restraining the entities from removing their assets from Australia and disposing of their property, and freezing money in two specified bank accounts; and
- preventing two individuals involved with AGM Markets and OT Markets from leaving Australia without the consent of the court.

Additional orders were obtained on 9 March 2018 against AGM Markets, OT Markets and Ozifin that had the effect of:

- freezing money held in additional bank accounts;
- extending the period preventing a director of AGM Markets from leaving Australia without the consent of the court to 18 April 2018; and
- vacating the orders previously made preventing the director of OT Markets from leaving Australia.

The injunctions were sought to protect investor funds while our investigation is continuing.

On 16 April 2018, AGM Markets notified its corporate authorised representatives, OT Markets and Ozifin that AGM Markets was terminating its respective agreements with each of those entities effective as at that date.

Our investigations into AGM Markets, OT Markets and Ozifin is ongoing.

## Area of focus

### Listing standards

ASIC has been actively reviewing the listing standards in our listed equities market. We expect market operators, and issuers and their advisers to preserve the integrity of our listed markets when bringing new companies to market.

### Case study: Mark Kawecki

On 20 June 2018, we banned Mark Damion Kawecki from providing financial services for seven years. The banning follows an ASIC investigation into Mr Kawecki's conduct when applying for shares under the initial public offerings (IPOs) of companies that subsequently listed on ASX between 2015 to 2017.

A company must meet the 'minimum spread requirement' (a minimum number of unrelated shareholders in the company) under the ASX Listing Rules before its shares can be quoted and traded on ASX. The purpose of the minimum spread requirement is to demonstrate that there is sufficient investor interest in the company to justify its listing. This operates to ensure some level of liquidity at the time the company is initially listed and keeps poorer quality applicants that are not able to attract sufficient investor interest to meet the minimum spread requirement from being admitted to the ASX official list.

The investigation found that Mr Kawecki had provided false addresses and misrepresented beneficial holders in relation to applications he submitted for shares for at least three IPOs. We found that Mr Kawecki engaged in this conduct to ensure that the share applications he submitted would count towards meeting the minimum spread requirement, and that he was paid a fee per application he submitted.

Following a hearing, the ASIC delegate found that Mr Kawecki had failed to comply with a financial services law by knowingly engaging in conduct that was likely to mislead, in contravention of s1041H(1) of the Corporations Act.

Our investigation into Mr Kawecki and related conduct concerning the provision of spread through artificial means is ongoing.

## Looking ahead

Conduct risk and the integrity of financial benchmarks remain a high priority. We are committed to addressing market abuse (e.g. insider trading and market manipulation) and failures to meet disclosure obligations through enforcement action.

Over the next six months, we will continue to focus on conduct risk. We will also pay particular attention to:

- poor conduct in fixed income, commodities and currency (FICC) markets;
- misconduct in relation to initial coin offerings and cryptocurrency markets;
- serious and organised market misconduct with a focus on cross-border transactions;
- technology-enabled offending, including cyber-related market misconduct; and
- financial benchmark integrity—by making sure the banks adhere to court enforceable undertakings. This will ensure the adequacy and robustness of the systems and controls in their bank bill trading and foreign exchange businesses.

## Small business

Our work in small business compliance and deterrence is focused on helping small businesses understand and comply with their legal obligations under the Corporations Act. We do this by:

- engaging with small businesses, industry groups and associations, and other government agencies; and
- providing information and guidance to small businesses.

We also help protect small business by working to level the playing field through surveillance, enforcement and policy work. Where necessary, we may take administrative, civil or criminal action against companies, directors and other officeholders who fail in their duties.

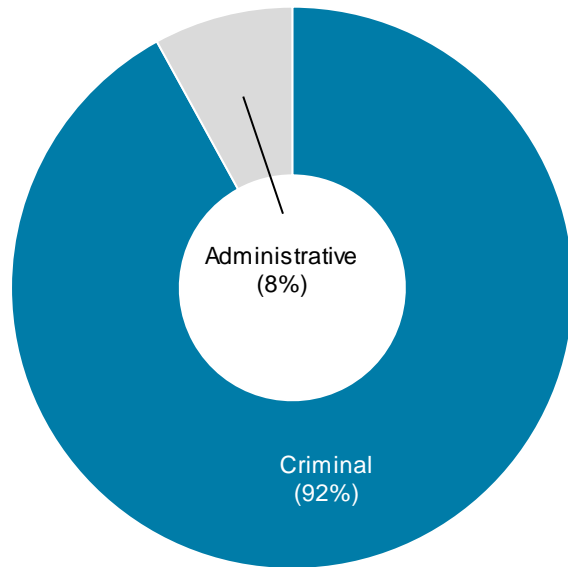
### Enforcement outcomes

Figure 12 and Figure 13 provide a summary of enforcement outcomes for the protection of small business in the relevant period.

**Figure 12: Small business outcomes by misconduct type**



**Figure 13: Small business outcomes by remedy type**



Note: See Table 8 for the data shown in these two figures (accessible version).

Table 4 outlines the number of defendants in criminal and civil matters pending before the courts.

**Table 4: Pending small business matters before the courts as at 1 July 2018**

Misconduct type	Criminal
Action against persons	101
Efficient registration and licensing	18
<b>Total</b>	<b>119</b>

Note: These matters have yet to achieve a final result because the court or tribunal has determined liability but has not yet decided the penalty or made the final orders, a plea has been entered but a decision on conviction or sentence has yet to be made, or the court has yet to determine whether a breach of the law or an offence has been committed.

**Area of focus****Illegal phoenix activity**

Illegal phoenix activity occurs when a company suffers financial distress and cannot (or is simply unwilling to) pay its debts, and the directors transfer assets to a new company for little or no consideration before an external administrator's appointment. This means that creditors cannot access assets or recover debts, the company avoids paying tax or employee entitlements, and the liquidator is left to see what they can recover.

**Case study: Amy Timko**

On 10 April 2018, Amy Timko was convicted and sentenced to two months imprisonment by the Court of Petty Sessions in Hobart after pleading guilty to two counts of fraudulent conduct. The sentence was wholly suspended on the condition that she not reoffend for 12 months.

Ms Timko was the former director of A Twisted Little Company Pty Ltd (in liquidation) (the Company) which operated four Noodle Box franchises in northern Tasmania. As a consequence of her conviction, she was automatically disqualified from managing a corporation for five years.

Our investigations found that Ms Timko had engaged in illegal phoenix activity by selling the assets of the Company to a related company called AATTBK Pty Ltd (AATTBK), of which her de facto partner was the sole director.

In 2014, Ms Timko sought advice from a business adviser who recommended that she restructure the Company by selling its assets and placing it into liquidation. The business adviser arranged for the Company's assets to be valued and drafted a bill of sale for \$30,000 to AATTBK.

Around the time the assets were being sold, Ms Timko closed the four Noodle Box stores. The stores were then reopened soon after the assets were sold to AATTBK and traded under the name Asian Wok Box.

On 28 April 2014, Ms Timko resolved that the Company be wound up and liquidators be appointed. The liquidator lodged a report with ASIC claiming that the Company had an estimated deficiency owing to creditors in the amount of \$1,066,775 and that there were uncommercial transactions.

The effect of the transfer of the assets and reassignment of the leases meant that creditors of the Company may have been denied access to the Company's assets.

The matter was prosecuted by the Commonwealth Director of Public Prosecutions.

**Looking ahead**

Over the next six months, we will continue to focus on small business issues that affect the regulatory environment, and support compliance programs that inform credit providers of obligations to lodge documents.

We will have a particular focus on:

- unfair contract terms in small business contracts;
- credit lenders who do not lodge annual compliance certificates in accordance with the National Credit Act; and
- illegal phoenix activity—addressing this activity and minimising its effects on companies suffering financial distress.

# Law and policy

## Guidance on the duties of directors of mutual companies

In March 2018, we released [Information Sheet 231](#) *Guidance on the duties of directors of mutual companies* (INFO 231), which outlines the obligations that directors of mutual companies are expected to comply with under the Corporations Act.

The Corporations Act imposes a number of duties on directors and officers of mutual companies, including to:

- act in good faith and in the interests of the company;
- act with care and diligence;
- not improperly use their position or information obtained through their position; and
- disclose conflicts of interest.

[INFO 231](#) outlines the criminal offences that directors of mutual companies can be charged with under the Corporations Act. Directors must not:

- allow the mutual company to operate while it is insolvent; or
- be reckless or intentionally dishonest by failing to exercise their powers and failing to comply with their duties as a director—to act in good faith and in the best interests of the mutual company.

## Investigation costs recovery

[Information Sheet 204](#) *Recovery of investigation expenses and costs* (INFO 204) states that, wherever possible, we will seek to recover investigation expenses and costs from persons who have caused those expenses and costs to be incurred.

Under s91 of the ASIC Act and s319 of the National Credit Act, ASIC has the power to make an order to recover our costs where, as a result of an investigation, a person is convicted, a judgment is awarded, or a declaration or other order is made.

The types of costs we can recover include:

- salary costs for our staff who have worked on the investigation;
- travel expenses associated with the investigation, such as to interview witnesses;
- the costs of external legal counsel;
- the costs of employing an expert to perform an analysis; and
- investigation expenses and costs, other than litigation costs, that may be awarded by a court.

Our approach is to consider making an order for the recovery of our investigation expenses and costs in each case where the legislative requirements are met.

For example, in May 2018, we made an order requiring Thorn Australia Pty Ltd (Thorn) to pay investigation costs of \$40,000 after the Federal Court found that Thorn's Radio Rentals had contravened its responsible lending obligations under the National Credit Act. Thorn had failed to make the necessary inquiries to verify customers' financial situations and failed to conduct proper assessments of suitability. This was in addition to a further \$200,000 for our legal costs incurred in the proceedings.

## Appendix: Summary of enforcement outcomes

**Table 5: Corporate governance—outcomes by misconduct and remedy type**

Type of misconduct	Criminal	Civil	Admin	Court enforceable undertaking	Negotiated outcome	Total (misconduct)
Action against auditors	0	0	7	0	1	8 (57%)
Action against liquidators	0	1	1	0	0	2 (14%)
Action against directors	1	0	0	3	0	4 (29%)
<b>Total (remedy)</b>	<b>1 (7%)</b>	<b>1 (7%)</b>	<b>8 (57%)</b>	<b>3 (22%)</b>	<b>1 (7%)</b>	<b>14 (100%)</b>

Note: This table sets out the data in Figure 2 and Figure 3.

**Table 6: Financial services—outcomes by misconduct and remedy type**

Type of misconduct	Criminal	Civil	Admin	Court enforceable undertaking	Negotiated outcome	Total (misconduct)
Credit	0	6	16	2	3	27 (32%)
Dishonest conduct, misleading statements	1	2	12	0	0	15 (18%)
Misappropriation, theft, fraud	0	2	4	0	0	6 (7%)
Unlicensed conduct	1	0	0	0	0	1 (1%)
Other financial services misconduct	0	6	17	6	6	35 (42%)
<b>Total (remedy)</b>	<b>2 (2%)</b>	<b>16 (19%)</b>	<b>49 (58%)</b>	<b>8 (10%)</b>	<b>9 (11%)</b>	<b>84 (100%)</b>

Note 1: One criminal matter and one administrative remedy in the 'dishonest conduct, misleading statements' category are currently under appeal.

Note 2: This table sets out the data in Figure 6 and Figure 7.

**Table 7: Market integrity—outcomes by misconduct and remedy type**

Type of misconduct	Criminal	Civil	Admin	Court enforceable undertaking	Total (misconduct)
Market integrity rules	0	0	1	0	1 (17%)
Market manipulation	1	0	0	0	1 (17%)
Other market misconduct	0	2	1	1	4 (66%)
<b>Total (remedy)</b>	<b>1 (17%)</b>	<b>2 (33%)</b>	<b>2 (33%)</b>	<b>1 (17%)</b>	<b>6 (100%)</b>

Note: This table sets out the data in Figure 9 and Figure 10.

**Table 8: Small business—outcomes by misconduct and remedy type**

Type of misconduct	Criminal	Admin	Total (misconduct)
Action against persons	176	17	193 (97%)
Efficient registration and licensing	7	0	7 (3%)
<b>Total (remedy)</b>	<b>183 (92%)</b>	<b>17 (8%)</b>	<b>200 (100%)</b>

Note: This table sets out the data in Figure 12 and Figure 13.



## Key terms

<b>AFS licence</b>	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.
<b>AFS licensee</b>	A person who holds an AFS licence under s913B of the Corporations Act
<b>ANZ</b>	Australian and New Zealand Banking Group Limited
<b>ASIC</b>	Australian Securities and Investments Commission
<b>ASIC Act</b>	<i>Australian Securities and Investments Commission Act 2001</i>
<b>ASX</b>	ASX Limited or the exchange market operated by ASX Limited
<b>ATO</b>	Australian Taxation Office
<b>Australian Consumer Law</b>	Sch 2 to the <i>Competition and Consumer Act 2010</i>
<b>BBSW</b>	Bank bill swap reference rate
<b>best interests duty</b>	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
<b>CBA</b>	Commonwealth Bank of Australia
<b>Corporate Plan</b>	<i>ASIC's Corporate Plan 2017–18 to 2020–21: Focus 2017–18</i>
<b>Corporations Act</b>	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
<b>court enforceable undertaking</b>	A court enforceable undertaking that may be accepted by ASIC under reg 7.2A.01 of the Corporations Regulations
<b>enforcement outcome</b>	Any formal action to secure compliance about which ASIC has made a public announcement
<b>financial service</b>	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
<b>INFO 204</b> (for example)	An ASIC information sheet (in this example numbered 204)
<b>market integrity rules</b>	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
<b>NAB</b>	National Australia Bank Limited
<b>National Credit Act</b>	<i>National Consumer Credit Protection Act 2009</i>
<b>prime bank bills</b>	Eligible securities comprised of negotiable certificates of deposit (NCDs) and bank accepted bills (BABs) issued or accepted by a bank which entitles the holder to be paid a specified sum on the date that it matures
<b>relevant period</b>	1 January 2018 to 30 June 2018
<b>REP 499</b> (for example)	An ASIC report (in this example numbered 499)
<b>RG 246</b> (for example)	An ASIC regulatory guide (in this example numbered 246)
<b>s912</b> (for example)	A section of the Corporations Act (in this example numbered 912), unless otherwise specified
<b>SMSF</b>	A self-managed superannuation fund
<b>Westpac</b>	Westpac Banking Corporation

## Related information

### Legislation

ASIC Act, s91

*Competition and Consumer Act 2010, Sch 2*

Corporations Act, s912A, 1041A, 1041B, 1041H(1)

National Credit Act, s319

SIS Act

### Other documents

[APES 110](#) *Code of ethics for professional accountants*

[Corporate Plan](#)

[INFO 151](#) *ASIC's approach to enforcement*

[INFO 204](#) *Recovery of investigation expenses and costs*

[INFO 231](#) *Guidance on the duties of directors of mutual companies*

[REP 499](#) *Financial advice: Fees for no service*

[RG 246](#) *Conflicted and other banned remuneration*