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Australian Securities &  
Investments Commission

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16 April 2024

Senator Andrew Bragg  
Chair  
Senate Economics References Committee  
PO Box 6100  
CANBERRA ACT 2600

By email to: [Economics.Sen@aph.gov.au](mailto:Economics.Sen@aph.gov.au)

## **ASIC SUBMISSION TO THE INQUIRY INTO ASIC INVESTIGATION AND ENFORCEMENT**

Dear Chair,

Please find enclosed ASIC's further submission to the Inquiry into ASIC Investigation and Enforcement.

This submission sets out our enforcement record and shows that we have been, and continue to be, an active and effective law enforcement agency and litigator. We are a vastly different regulator than a decade ago and we continue to build on our effectiveness under the renewed organisational structure.

Given the evidence, I reject assertions made during the inquiry that ASIC is not a strong corporate regulator. ASIC's leadership and people are dedicated to building a positive, ambitious and constructive culture and continue to drive strong regulatory and enforcement outcomes.

We have been as open and transparent with the Inquiry as possible, given the sensitive nature of our work. We have provided extensive information to the Inquiry through our initial and now five supplementary submissions, as well as responses to over four hundred questions on notice.

While we have only had the opportunity to appear at one public hearing to date, we would be pleased to attend further hearings if requested. If there are confidential and sensitive matters the Committee would like us to address, we reiterate our offer to appear before the committee in camera.

Yours sincerely





**ASIC**  
Australian Securities &  
Investments Commission

# **Inquiry into Australian Securities and Investments Commission investigation and enforcement**

## **Supplementary submission by the Australian Securities and Investments Commission**

April 2024

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## Executive summary

- 1 The Australian Securities and Investments Commission (ASIC) has the significant job of ensuring that Australia is a fair and trustworthy place to do business. ASIC's leadership and people are dedicated to producing strong regulatory and enforcement outcomes to achieve this purpose.
- 2 Throughout this Inquiry into Australian Securities and Investments Commission investigation and enforcement (Inquiry), we have sought to explain ASIC's role and purpose as Australia's financial and corporate conduct regulator. We continue to be an active and effective law enforcement agency.
- 3 We have been listening carefully to the evidence provided to the Inquiry and reflecting on areas for improvement. We recognise there is always more that can be done to improve our work. We are uplifting our approach to whistleblowers and strengthening our liaison to ensure informative engagement with key professional organisations.
- 4 Given the evidence we have outlined throughout our submissions and responses to questions on notice, we reject assertions and criticisms that ASIC is a weak corporate regulator. Our approach to investigation and enforcement has fundamentally changed in the last decade. Our enforcement outcomes speak for themselves.

### **We are an active and effective law enforcement agency and litigator**

- 5 As we have emphasised throughout this Inquiry, we continue to be an active law enforcement agency. Enforcement is at the heart of what we do. Closely linked with ASIC's regulatory and supervisory work, it supports Australia's unquestionably strong financial system and markets.
- 6 The evidence we have provided to this inquiry shows that we have been, and continue to be, an active and effective law enforcement agency and litigator. Our outcomes show that we pursue cases where we find evidence of serious misconduct and we are not afraid to take on difficult cases where the outcome is not guaranteed.
- 7 Our new organisational structure came into effect on 1 July 2023. One of its core intentions was to shorten the timeframes between information becoming available to ASIC and an assessment or early inquiries being undertaken to determine whether an investigation (with a view to enforcement action) was appropriate. It allows us to apply an early 'enforcement lens' in analysing information about potential misconduct, and streamline and reduce handover

points in a matter from receipt to investigation. This allows us to act quicker and respond more effectively to potential breaches of the law.

- 8 We are a significantly different regulator now than we were a decade ago. We are committed to using new laws and powers that we have received since the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission), to pursue the higher penalties now available through the courts, to strategically take on enforcement cases where the outcome is not guaranteed, and to test the bounds of the law where it is uncertain or open to interpretation.

## **ASIC is not a complaint handling body - our focus is on making strategic choices about matters we investigate and enforce**

- 9 We have been criticised for the proportion of reports of alleged misconduct that are progressed to formal investigation and enforcement. This criticism misunderstands the nature of our regulatory task. ASIC is not a complaint resolution body; its purpose is not to resolve individual consumer disputes and complaints. ASIC's purpose is to gather information from many sources, across the range of entities that we regulate, and use it to make strategic decisions about when to intervene and how to do so. Clearly investigation and enforcement is a key part of this work. A significant proportion of ASIC resources and attention are focused in this area. The results of this enforcement work are transparently available and occur on a daily basis.
- 10 As described in our initial submission to this Inquiry (dated February 2023), ASIC's obligation is to maximise regulatory impact by making good choices to ensure a strong, fair and efficient financial services market for Australian consumers. This is because, as for all regulators, there is a finite set of resources to apply in our regulatory and enforcement work. We exercise complex judgement, using our expertise and experience in assessing the available (and often limited) information we receive to weigh up a broad range of considerations before making decisions. We accept there is inherent uncertainty and risk in our decisions and the choices we must make.

## **We are committed to improving our engagement with key professional stakeholders and whistleblowers**

- 11 We have listened and reflected carefully on the evidence provided to the Inquiry. We acknowledge the feedback from a range of stakeholders that we need to better explain how we handle reports of alleged misconduct. We have taken steps to improve our communications with key professional associations and whistleblowers in relation to reports of alleged misconduct we receive from them.

- 12 We recognise that people who have inside knowledge are often well-placed to provide accurate and informative material to ASIC about potential misconduct. We are strengthening training and resources across teams that deal with whistleblowers. This will be complemented with a dedicated staff resource for enforcement matters that will uplift our practices and assist teams to communicate in the best way possible with whistleblowers.

## Cooperation with the inquiry

- 13 We reiterate that we have been as open and transparent as possible, given the sensitive nature of our work.
- 14 We have provided extensive information to the Inquiry through our initial and four previous supplementary submissions (see Appendix 1), as well as responses to over 400 questions on notice.
- 15 While we have only had the opportunity to appear at one public hearing to date, we would be pleased to attend further hearings if requested. If there are confidential and sensitive matters the Committee would like us to address, we reiterate our offer to appear before the committee in camera.
- 16 As noted in our second supplementary submission to this inquiry (dated August 2023), we have always understood and acknowledged the important oversight role of Parliament and its committees over the affairs of ASIC, and its powers to conduct inquiries into matters of concern, to require the production of documents and to take evidence.
- 17 We appreciate the Committee accepting our ongoing concerns regarding the impact of making public information and documents provided to ASIC in confidence.

## Our approach to this submission

- 18 This submission provides further information in response to questions posed by the Inquiry's [Terms of Reference](#) in paragraphs (c), (d), (e) and (f):
- The scale and effectiveness of ASIC's enforcement, including in the areas on which the Committee focused—insider trading, illegal phoenix activity, agricultural lending and unlicensed financial advice (see Sections A and G).
  - How ASIC progresses and prioritises matters raised through reports of misconduct (see Section B).
  - ASIC's approach to communicating with professional bodies and industry associations (see Section C).

- ASIC’s engagement with reporters of misconduct and whistleblowers (see Section D).
- The appropriateness of ASIC’s remit (see Section E).
- ASIC’s governance (see Section F).

19 As noted in our initial submission to this Inquiry, ASIC’s regulatory work is broader than its investigation and enforcement functions, and includes consumer and investor protection, proactive engagement on industry risks through surveillance and supervision, licensing, regulatory guidance, and consumer and investor education through ASIC’s Moneysmart program. A full assessment of ASIC’s effectiveness necessarily requires consideration of this work as well as the enforcement and investigative work.

20 Paragraph (c) of the Terms of Reference poses the question of whether ASIC is meeting government, business and community expectations. As noted in our initial submission, there is no accepted method of measuring a qualitative assessment of this nature. However, ASIC continues to produce strong enforcement outcomes and we regularly report publicly about these and our other work. This reporting sets standards and provides general deterrence and accountability. Our updated data on enforcement outcomes is set out in Section A. ASIC is also subject to a range of accountability mechanisms for our work, as set out in Section D of our initial submission.

21 This submission updates the data provided in our initial submission. Appendices 2–6 contain data up to the end of the 2022–23 financial year related to handling of reports of alleged misconduct and our investigations and enforcement activities. We reiterate that while such data can provide a sense of trends over time, it does not fully capture the complexity of our work, nor does it measure our regulatory impact.

22 As noted in our initial submission, paragraphs (a), (b) and (g) of the Inquiry’s Terms of Reference are questions of policy and are best directed to Government. These references suggest there is a moral hazard associated with dispute resolution and compensation schemes, such as the Government’s recently introduced Compensation Scheme of Last Resort (CSLR).

23 ASIC does not accept that consumer dispute resolution and compensation schemes disincentivise ASIC enforcement. To assist the Inquiry to consider these issues, in Section F of our initial submission we set out ASIC’s role in the consumer complaints framework and how our role complements that of the Australian Financial Complaints Authority (AFCA).



## A The scale and effectiveness of ASIC's enforcement

### Key points

We continue to be an active law enforcement agency and achieve strong enforcement outcomes across our regulatory remit.

Our new organisational structure came into effect on 1 July 2023. This new structure is supporting us to streamline enforcement decision making, improve timeliness and bring a whole-of-ASIC approach to issues of concern.

### Our recent enforcement outcomes

Figure 1: 2022–23 enforcement activities



24

We continue to achieve strong enforcement outcomes across our regulatory remit. In 2022–2023, our enforcement activities resulted in outcomes including:

- 32 individuals being charged by the Commonwealth Director of Public Prosecutions (CDPP) in criminal proceedings with a total of 306 criminal charges;
- 35 criminal convictions (21 custodial sentences and 14 non-custodial sentences);
- 245 individuals charged with strict liability offences in internal summary prosecutions with a total of 622 summary charges;

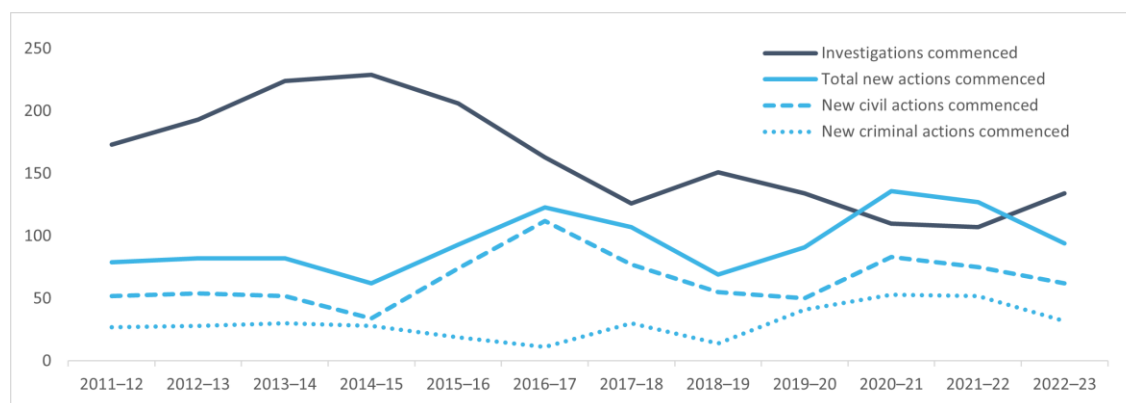
- 210 individuals prosecuted for strict liability offences, resulting in \$1.6 million in fines;
- 26 civil proceedings commenced (involving actions against 62 defendants);
- \$185.4 million in civil penalties imposed by the courts;
- 77 individuals or companies removed or restricted from providing financial services and 28 removed or restricted from providing credit; and
- 32 individuals disqualified or removed from directing companies, with 4 related to illegal phoenix activity.

Note 1: See [ASIC Annual Report: 2022–23](#), October 2023, and [Summary of enforcement outcomes: January to June 2023](#).

Appendix 4 contains further information on the outcomes of ASIC’s civil and criminal actions over the past 11 years.

- 25 In the past five years, we have increasingly focused enforcement resources to address serious examples of consumer harm. This has included conducting investigations into and taking enforcement action against major financial institutions, including matters that were considered by the Financial Services Royal Commission, and conduct targeting financially vulnerable consumers. Our markets enforcement work is integral to ensuring fair, orderly and transparent markets and promoting investor confidence and financial wellbeing of all consumers.
- 26 In the last two years we have set enforcement priorities to further target our enforcement resources.
- 27 While the number of formal investigations commenced under s13 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) generally declined over the period 2011–12 to 2022–23, the number of civil and criminal actions commenced has increased over the same period. This reflects an increasing proportion of ASIC’s enforcement resources being dedicated to resource-intensive court-based action during this period. While noting the trend is cyclical, overall we achieved materially higher court-based outcomes over the past three years, compared to outcomes achieved in 2015: see Figure 2.

**Figure 2: Investigations, civil actions and criminal actions—2012–13 to 2022–23**



28 The number of formal investigations (commenced under s13 of the ASIC Act) is not a complete measure of ASIC enforcement action because it does not reflect the full range of ASIC’s enforcement outcomes and interventions. Product intervention orders, stop orders, Australian financial services (AFS) licence cancellations and bannings are all enforcement outcomes that may be achieved without the need for commencement of a formal investigation.

29 Our enforcement teams prioritise investigations aligned with ASIC’s enforcement priorities, which are directed at those areas of harm that the Commission has identified as having the broadest impact and the broadest potential detriment to consumers, investors and market integrity. Through our business planning process, we often set targets for how many matters teams may look at for each priority. However, we assess each matter on its own merits and we do not have a fixed quota of how many cases may be escalated.

30 Section G outlines our enforcement activities in specific areas raised throughout the Inquiry, including insider trading and illegal phoenix activity.

## Our new organisational structure

31 In 2023, we decided on a new organisational structure, which came into effect on 1 July 2023.

32 The new organisational structure is designed to support ASIC to achieve our strategic and operational ambitions. In particular, we wanted to improve:

- our timeliness in decision making;
- collaboration and coordination across the organisation and to bring a whole-of-ASIC approach to issues of concern; and
- how we align our strategic priorities with resource allocation.

33 Our new structure includes an Enforcement and Compliance Group that brings together our enforcement and compliance functions. We formed this

new group to facilitate streamlined decision making by reducing the time it takes for matters to progress to a compliance or enforcement outcome. Matters are now directly referred from the point they enter ASIC (which can be the Misconduct and Breach Reporting team or any team that gathers or receives data on potential misconduct) to the Enforcement and Compliance Group. This replaces our previous structure in which some reports of alleged misconduct were referred to a supervisory team for initial consideration and information gathering, before being discussed with an enforcement team for possible referral for a formal investigation under s13 of the ASIC Act.

## **Our effectiveness cannot be measured from the proportion of reports that are referred for further action**

- 34 There has been significant focus by the Committee on the proportion of reports of alleged misconduct that are assessed by ASIC as matters on which no further action will be taken at that time, compared with the proportion of reports that are referred for further action or result in a formal investigation.
- 35 Such criticisms misunderstand the nature of our regulatory task. As described above, and in our initial submission, ASIC is not a clearing house for consumer complaints or a consumer complaints handling body. ASIC's purpose is to ensure that markets and financial services operate fairly and efficiently to promote confidence and participation in Australia's financial system. Our task is to make informed choices about the matters we progress to investigation and enforcement to maximise our regulatory impact. This is because, like all regulators, we can only progress a finite number of actions. Further, some of our regulatory outcomes are achieved without the need to commence a formal investigation. We do not seek to act on a fixed proportion of reports of alleged misconduct that we receive.
- 36 We use a combination of quantitative and qualitative indicators to measure our own performance. As noted in our initial submission, while data can provide a sense of trends over time, it does not fully capture the complexity of our work, nor does it measure our regulatory impact. Analysis that focuses only on quantitative metrics of our actions is oversimplified and superficial. This is why we included two case studies in our initial submission to demonstrate how we address issues that can cause significant consumer detriment by drawing on information in reports of alleged misconduct and flexibly applying our regulatory and enforcement toolkit. We also included case studies in our recent annual report to better demonstrate the impact and effectiveness of our regulatory interventions, in addition to the volume and results of our surveillance and enforcement activities.

Note: See [ASIC Annual Report: 2022–23](#), October 2023.

- 37 Our approach in using both quantitative and qualitative measures of performance is consistent with that adopted by the Financial Regulator Assessment Authority (FRAA), which was established in response to a recommendation of the Financial Services Royal Commission and tasked with assessing the effectiveness and capability of APRA and ASIC. The FRAA has developed a [draft financial system and regulator metrics framework](#). The framework was developed following consideration of various performance assessment initiatives globally and consultation with a broad range of stakeholders. In consulting on the framework, the FRAA noted that quantitative metrics alone do not adequately convey a regulator's effectiveness and capability. They need to be considered collectively, together with qualitative assessment of the actions undertaken, relevant supporting narratives and consideration of other factors that provide appropriate context.

## Comparison with other regulators

- 38 In 2022–23, ASIC assessed a total of 17,503 reports of alleged misconduct, of which 14% were referred for further action. This proportion of reports of alleged misconduct that we refer for further action is comparable to those of other regulators and law enforcement agencies that receive reports of alleged misconduct from the public. Over the same period we commenced 134 formal investigations.

Note: See, for example, Answer to Question on Notice Tutton & Brand-001 *Misconduct reports from the public*.

- 39 We have conducted a brief desktop review of the most recent publicly available data from a selection of international securities and financial services regulators regarding their enforcement activities. That review indicated that ASIC is one of the most active agencies when it comes to the number of new investigations it commenced in the most recent reporting period. While regulators have different definitions of what constitutes an investigation, the majority of regulators reviewed appeared to have commenced between 14 and 136 investigations during the reporting period.

Note: This relates to financial services regulators in the Netherlands, Germany, New Zealand, South Africa, Belgium, Singapore, Hong Kong, Gibraltar and Jamaica. As far as we are aware, the United States and United Kingdom regulators do not report the number of investigations commenced.

## Updates to our strategic and enforcement priorities

- 40 As detailed in our initial submission, we use a risk-based approach to select and target our enforcement actions to address the areas of greatest harm to

consumers, investors and markets within our remit. We determine those areas after considerable analysis of the external environment, and following engagement with industry and stakeholders, including consumer groups, small business representatives, industry associations and our several consultative panels. We also review the issues and areas of focus by our international peers, and reflected on global emerging themes and the domestic economy.

41 Our strategic and enforcement priorities inform how we handle reports of alleged misconduct, conduct surveillance and take enforcement action. No regulator can investigate every instance of alleged misconduct that comes to its attention.

42 In August 2023, we released [ASIC Corporate Plan 2023–27: Focus 2023–24](#). Our current external strategic priorities, consistent with those identified the previous year, are to target the most significant threats and harms in our regulatory environment by:

- reducing the risk of harm caused by poor product design, distribution and marketing;
- supporting market integrity and efficiency through supervision and enforcement of current governance and disclosure standards in relation to sustainable finance;
- protecting consumers as they undertake retirement decision making; and
- focusing on the impacts of technology risks in financial markets and services, driving good cyber-risk and operational resilience practices, and acting to address digitally enabled misconduct.

Our updated Corporate Plan will be released in August 2024.

43 In November 2023, we also released our [enforcement priorities for the 2024 calendar year](#): see Figure 3.

Figure 3: ASIC enforcement priorities—2024

## Enforcement priorities

Enforcement action targeting poor design, pricing and distribution of financial products	Misleading conduct in relation to sustainable finance including greenwashing	Misconduct involving high risk products including crypto assets	Combating and disrupting investment scams
Protecting financially vulnerable consumers	Misleading and deceptive conduct relating to investment products	Misconduct in the superannuation sector	Failures by providers of general insurance
Misconduct that involves misinformation through social media	Governance and directors' duties failures	Manipulation in energy and commodities derivatives markets	Unfair contract terms

## Statement of expectations

44 In November 2023, the Treasurer announced that the Australian Government will set a new statement of expectations for ASIC.



## B How ASIC progresses and prioritises matters raised through reports of misconduct

### Key points

We prioritise and assess reports of alleged misconduct and identify matters for investigation and enforcement action using risk-based criteria.

As part of our new structure, we have introduced a centralised whole-of-organisation decision-making process about what action ASIC should take in response to reports of alleged misconduct. We will continue to develop this work.

We accept that some degree of uncertainty or risk exists in every decision we make about what matters to progress and what matters are closed. Ultimately, a degree of judgement is required. ASIC's Commission, senior executive and staff have many decades of experience in making such judgements.

We consider a significant volume of reports of alleged misconduct. Given this, there will inevitably be instances of reports of alleged misconduct where, in hindsight and with more complete information, we can discern a different decision may have been warranted. The mere existence of such examples does not mean that we are ineffective as a law enforcement agency.

Matters must be considered in the context of a holistic assessment of our enforcement record and our overall regulatory impact on the most serious harms to consumers and markets within our remit. As noted in the FRAA's Effectiveness and Capability Review dated July 2022, 'ASIC is not expected to prevent all risks to consumers and regulated entities.'

- 45 We have listened carefully to the evidence provided to the Inquiry that many stakeholders wish to better understand how we strategically select matters to progress to enforcement. We acknowledge that this is critical to maintaining confidence in ASIC as a credible and effective law enforcement agency.
- 46 In Section C of our initial submission, we set out how we prioritise and assess reports of alleged misconduct and identify matters for investigation and enforcement action.
- 47 We have set out in this section additional details about how we assess and prioritise matters for further action.



## Our case selection criteria

- 48 In assessing which matters to progress, we are guided by our strategic and enforcement priorities. We use our experience, expertise and judgement to weigh up a broad range of factors using the information available to us at the relevant time.
- 49 We have provided a high-level outline the factors we generally take into account in assessing reports of alleged misconduct: see in Section C of our initial submission. These include factors such as the seriousness of the alleged conduct, the amount of loss suffered and the number of consumers affected.
- 50 This approach is in line with other Australian regulators and with our published position in Information Sheet 151 *ASIC's approach to enforcement* ([INFO 151](#)) and Information Sheet 153 *How ASIC deals with reports of misconduct* ([INFO 153](#)).
- 51 In undertaking our assessment of specific matters, we consider issues such as:
- the strategic significance of the matter, particularly its alignment with our strategic or enforcement priorities and the regulatory objectives or harms to be addressed;
  - the features of the matter that point to the public interest in ASIC taking action, including if the matter involves an untested legal issue that requires clarification or if the alleged misconduct is systemic;
  - the features of the alleged misconduct, such as whether it involves deliberate conduct, whether it is repeated or ongoing, and how widespread it is;
  - whether reliable evidence is likely to be available to prove the alleged misconduct, such as whether key witnesses are likely to be available, credible and willing to cooperate with ASIC, the likely existence of any documentary evidence, and any jurisdictional issues that are likely to arise;
  - the likely resources required to progress an investigation and any enforcement action (compared with the likely regulatory impact of any action);
  - how we have handled similar matters in the past; and
  - any alternatives to a formal investigation or enforcement action that may be available, including action by another agency or the use of another regulatory tool by ASIC.
- 52 These considerations inform our risk-based prioritisation criteria that guide us in making an evaluative assessment of each report, rather than taking a rigid check-the-box approach.

- 53 We exercise our judgement and expertise when initially assessing a report of alleged misconduct, as well as throughout the life of the matter as we gather additional information and as the external environment evolves (e.g. to take into account emerging harms).
- 54 The information available to ASIC when we make decisions is often incomplete or uncertain. We do not, and cannot, conduct in-depth inquiries into every report of alleged misconduct. No agency can be resourced to do so.
- 55 We accept that some degree of uncertainty or risk exists in every decision we make about which matters to progress and which matters to close. We consider significant volumes of reports of alleged misconduct. This means that there will inevitably be instances of reports of alleged misconduct where, in hindsight and with more complete information, we can identify that a different decision may have been warranted. The mere existence of such examples does not mean that we are ineffective as a law enforcement agency. They have to be considered in the context of a holistic assessment of our enforcement record and our overall regulatory impact on the most serious harms to consumers and markets within our remit.

'ASIC is not expected to prevent all risks to consumers and regulated entities.'

Financial Regulator Assessment Authority  
Effectiveness and Capability Review  
July 2022

## Process under new organisational structure

- 56 Our processes are designed to support ASIC to make what are often difficult choices based on limited or incomplete information. They help us focus our resources on assessing and progressing higher risk-rated matters.
- 57 In Section C of our initial submission, we set out our processes for prioritising and assessing reports of alleged misconduct. While the factors considered in our risk-based prioritisation criteria remain the same, the organisational review we undertook in 2023 presented an opportunity to make some improvements in the quality of decisions and time taken for reports to be progressed to enforcement action.
- 58 Our new organisational structure adopts a centralised whole-of-organisation approach to improve our decisions on reports of misconduct.

This approach involves joint decision making by senior and highly experienced leaders from ASIC’s intelligence, supervision and enforcement teams.

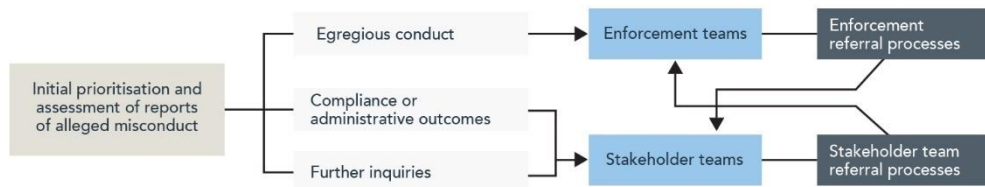
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The approach is designed to:

- reduce double-handling of matters by different teams;
- better enable certain reports of egregious conduct to be progressed directly to our enforcement and compliance teams;
- draw on a wider range of expertise in decision making;
- promote consistency of decisions across ASIC’s remit about what action ASIC should take in response to reports of misconduct;
- incorporate an intelligence-driven approach to patterns of conduct; and
- ensure cross-agency accountability for enforcement decisions based on reports of misconduct.

**Figure 4: Decision-making process on reports of alleged misconduct—Before and after organisation redesign**

**Pre organisational redesign**



**Post organisational redesign**



60

Regardless of whether a decision is made to progress a matter for enforcement or compliance action, the intelligence value we capture from reports of misconduct will continue to inform our supervisory activities—for example, in the identification of issues for thematic reviews across an industry sector.

## C ASIC's approach to communicating with professional bodies and industry associations

### Key points

When assessing reports of alleged misconduct from industry associations, for reasons of efficiency, objectivity and independence we apply the same case criteria as are applied to reports of misconduct from the public.

However, we recognise that these bodies often represent a broader sector or professional group, and we acknowledge there is scope for improvement in how we engage with key industry and professional associations about reports of alleged misconduct that they provide to ASIC. We have improved our internal coordination and information sharing to facilitate more meaningful engagements on matters these bodies have raised with ASIC.

### Reports from industry associations and professional bodies

- 61 We receive reports of alleged misconduct from industry associations and professional bodies through a variety of channels. Most commonly, they are sent by the relevant professional body to their regular contact point at ASIC and then forwarded internally to the Misconduct and Breach Reporting team for registration and assessment. Some reports are lodged through our website.
- 62 For reasons of efficiency, objectivity and independence, we assess these reports by applying the same case criteria as we would to reports from the public, while taking into account the fact that the source of the report is a body which represents a broader sector or professional group. This may mean, for example, that:
- we are more likely to identify the alleged misconduct as having a greater impact on consumers or investors and that there are greater public benefits from taking enforcement action in relation to the alleged misconduct; and
  - the reports are more likely to contain detailed, specific and credible information about the alleged misconduct and likely sources of evidence.
- 63 Not all reports from industry associations warrant further action; in each case we assess the specific circumstances of the alleged misconduct that is reported to ASIC.
- 64 We do, however, acknowledge that there is significant scope for improvement in how we engage with industry and professional associations

about the reports of alleged misconduct that they provide to ASIC, including where these identify broader or thematic issues in the relevant sector. See further at paragraphs 76–79.

### **Our experience with reports of misconduct from industry associations and professional bodies**

- 65 From 2021–22 to date, we have received 40 reports of alleged misconduct from four professional bodies that have disciplinary functions: Australian Restructuring Insolvency and Turnaround Association (ARITA), the Tax Practitioners Board, the Mortgage and Finance Association of Australia and the Financial Advice Association Australia (FAAA) (formerly the Financial Planning Association). Of these reports, five are still under assessment.
- 66 These reports provided intelligence on a variety of topics, including unlicensed financial advice, scams, information about members of the regulated population, including registered liquidators and mortgage brokers, and issues falling outside of ASIC’s powers.
- 67 In relation to the reports we have finalised, we made further inquiries or took action in relation to 13 reports. These reports provided new and specific information about a regulatory issue within a current strategic or enforcement priority. In appropriate instances, we issued warning letters reminding subjects of the requirement to be licensed or authorised to provide financial advice or services within Australia.
- 68 The balance of the reports were assessed and recorded for intelligence purposes. We did not take further action for a range of reasons, including:
- the information related to breaches outside of ASIC’s jurisdiction;
  - the report alerted ASIC to publicly available information;
  - the subject had disciplinary action taken against them, were no longer in the industry and ASIC action was not warranted; or
  - the report provided no new information to ASIC involving a matter already investigated.
- 69 We note the reports being discussed in this section are those we receive directly from the relevant association or body, as distinct from the large number of reports of alleged misconduct that we receive from individual members of these groups—including liquidators, financial advisers and other professionals—which can come to ASIC as initial or supplementary statutory reports, breach reports or reports of misconduct from the public. Our handling of those types of reports of alleged misconduct is covered in Section D and in our initial submission.

## Notices from a professional body regarding suspected misconduct by liquidators

- 70 Any professional body may lodge with ASIC a notice ('industry notice') relating to possible grounds for disciplinary action in relation to a registered liquidator: see s40-100 of Sch 2 to the *Corporations Act 2001* (Corporations Act).
- 71 We receive these industry notices through a dedicated email address. Since our recent organisational restructure, this is monitored by an Enforcement and Compliance team. We assess these reports by applying the same considerations described in paragraph 62 in relation to reports of alleged misconduct from industry associations.
- 72 We are required to consider the industry notice and, if we decide to take no action, we must notify the industry body within 45 business days. We are not required to inform the industry body if we determine that we will take action, until after the matter concludes.
- 73 In practice, however, we acknowledge that failure to respond in writing to a notice from a professional body in these circumstances can create a perception that either the notice was not received or that ASIC is not taking any action in response. Since March 2022, we have adopted a practice of responding in writing to all notices within 45 business days to improve our communication with professional bodies.
- [Our practice is to respond in writing to all notices within 45 business days to improve our communication with professional bodies.](#)
- 74 Between 1 March 2017 and 29 February 2024, we received seven such notices. The outcomes of these notices are as follows:
- One notice resulted in a referral to a disciplinary committee after a show cause notice was issued.
  - One notice resulted in ASIC being satisfied that remedial action taken by the liquidator at ASIC's request did not require additional action to be taken.
  - Two notices resulted in ASIC surveillances, but did not reveal sufficient evidence to enable ASIC to take any action.
  - Two notices related to the same matter, on which ASIC had already commenced taking action.
  - In relation to one notice, charges have been laid against the registered liquidator (following a referral from ASIC to the CDPP) for other conduct.
- 75 We note there has been evidence before the Inquiry which suggest ASIC has 'lost paperwork' associated with notices submitted by ARITA. This is not

correct. In each case we spoke or corresponded with ARITA about matters raised. However, we acknowledge we can improve our engagement and avenues for efficiently raising concerns.

## **Improving our engagement with industry and professional bodies**

- 76 We have reflected on how we can improve our engagement with industry and professional associations about reports of alleged misconduct that they provide to ASIC.
- 77 The Inquiry has received evidence from Consumer Action Law Centre, Financial Counselling Australia and the Financial Rights Legal Centre to this inquiry which highlight how our enforcement activities are addressing egregious business practices impacting vulnerable consumers, including a number of matters which arose from reports of alleged misconduct provided by those groups to ASIC.
- 78 In contrast, ARITA and FAAA provided evidence that was critical of our engagement with them about reports of alleged misconduct that they had provided and their experience that we did not adequately consider serious concerns.
- 79 We have undertaken a review of our liaison points with professional bodies such as ARITA and FAAA and have improved our internal coordination and information sharing in order to ensure meaningful engagement on matters these bodies have raised with ASIC.

## D ASIC's engagement with whistleblowers and other reporters of alleged misconduct

### Key points

We are committed to improving our engagement with whistleblowers and industry associations in relation to reports of alleged misconduct from them to ASIC.

This approach reflects our recognition that whistleblowers and industry associations have higher than normal interest in being informed about what ASIC does with the information they provide and the concerns that they raise. We do not, and cannot, request further information or provide a detailed personalised response on every report of misconduct we receive.

### Engagement with reporters of alleged misconduct

- 80 We acknowledge the evidence provided to the Inquiry from reporters of alleged misconduct about a lack of responsiveness from ASIC in relation to their reports. The Inquiry has heard experiences of reporters who felt that their serious concerns were not acted on by ASIC, that we were not responsive to the information they provided, and that they were not being informed about what we are doing with their report and why.
- 81 We have reflected on this feedback and are committed to improving our engagement with industry associations and whistleblowers in particular. This focus reflects the reality that, given the significant number of reports of alleged misconduct that we receive each year, we are simply unable to provide individualised responses to each reporter. Nor are we able to meaningfully process voluminous material from each and every reporter. We must target requests for further information where this is needed to complete our assessment, consistent with a risk-based approach.
- 82 We are often constrained in the information we can share with reporters of misconduct where our inquiries do progress to investigation. For example:
- some investigative steps, such as search warrants, may require ASIC to keep even the fact that we have commenced an investigation confidential;
  - in conducting inquiries and investigations, we seek to obtain information from many sources including, wherever possible, directly from the original source. For example, for corporate records we may decide to obtain such material directly from the entity using ASIC's compulsory information-gathering powers rather than request such



records from the reporter of misconduct. We are constrained in disclosing this to the reporter so as not to prejudice our enquiries or investigations;

- through exercising ASIC’s compulsory information-gathering powers, we often collect highly sensitive and personal information about the subjects of our investigation and related parties. It would often not be appropriate for ASIC to disclose such information to a reporter of alleged misconduct, even when this information formed a critical part of our assessment and decision making; and
- we may also be constrained in the detail we are able to share about why we have decided not to take certain action so as not to prejudice our enforcement work in the future.

## General communications with reporters

83 As a result of changes recently introduced to better set expectations for reporters of misconduct, we have strengthened our public advice that we will only contact reporters if we need more information. This is reiterated in responses to reporters of misconduct after they lodge a report of misconduct with ASIC.

84 Members of the public who lodge reports of misconduct with ASIC via our website receive a system-generated response:

- acknowledging their report;
- providing clear and concise information on ASIC’s role and how we use information from reports of misconduct; and
- providing next steps, including advising that we will only be in contact again if we require further information.

85 We do not request further information or provide a detailed personalised response on every report of misconduct we receive. We prioritise high-risk reports and misconduct with potentially widespread impact, relating to our strategic or enforcement priorities. This approach is in line with other Australian regulators and with our published position in [INFO 151](#) and [INFO 153](#). We are not a dispute resolution body or a complaints-handling service like AFCA.

86 We note and acknowledge feedback we have received from various stakeholders that previous information on our website was outdated and could be clearer. On 3 July 2023, we published updated web pages and information sheets about how we handle reports of misconduct, and ASIC’s role as regulator, ASIC’s remit and the limits of that remit, and how we use information from reports of misconduct. The updated information makes it clear that ASIC does not intervene in disputes, give legal advice or act on

behalf of individuals. We will continue to monitor and refine the messages and layout of our website to improve user experience and understanding of what we do.

## Reports from whistleblowers

- 87 We recognise that whistleblowers may:
- through their position, be able to provide particularly useful information and we need to give appropriate weight to the information they provide in our assessment and ongoing handling of a case;
  - need information or guidance on the statutory whistleblower rights and protections that may be available to them; and
  - have an understandably higher than normal interest in being informed about what ASIC does with the information they provide and the concerns that they raise.
- 88 We note that the Inquiry has sometimes referred to individuals as ‘whistleblowers’ when those people do not appear to meet the definition of an ‘eligible whistleblower’ in the Corporations Act. This definition requires the whistleblower to have a connection to the entity, such as holding a position as an employee or officer of that entity: see s1317AAA of the Corporations Act.
- 89 Our policy is to treat as whistleblowers those who:
- identify themselves as whistleblowers (whether or not they do in fact appear to fall within the definition of an ‘eligible whistleblower’); and
  - don’t claim to be whistleblowers but appear to fall within the definition.
- 90 Noting the strong confidentiality protections for whistleblowers, we can provide the following high-level information about the whistleblower reports that ASIC receives and our approach to assessing these reports for further action:
- Many whistleblower disclosures relate to internal company disputes, which are reports of misconduct from directors or shareholders in small companies about management issues within the company. ASIC has a long-standing published position that it does not intervene or take action in relation to these types of disputes—see Information Sheet 162 *Disputes between officeholders and/or members of small proprietary companies* ([INFO 162](#)).
  - Where reports occur in the context of an employment dispute, ASIC will consider the alleged misconduct rather than focus on the employment dispute—see Information Sheet 239 *How ASIC handles whistleblower reports* ([INFO 239](#)).

- A proportion of whistleblower disclosures do not fall within ASIC's jurisdiction or no actionable breach is disclosed.
- In appropriate cases, we refer the matter to another agency, law enforcement body, or third party (such as a liquidator) that is better placed to deal with the issue or is already taking action.

91 Policy changes directed towards encouraging whistleblowers to come forward and protections for them, including financial incentives for whistleblowers, are a matter for Government.

## Communications with whistleblowers

92 The Inquiry has heard evidence of instances where our communications with whistleblowers about reports of alleged misconduct they provided to ASIC, including where those reports resulted in an investigation, have fallen short of expectations. We are committed to improving our communications with whistleblowers.

93 Having reflected on the evidence presented to the Inquiry, we are in the process of undertaking a review of our approach to whistleblowers.

94 We have reviewed and updated our internal training which is mandated for staff who engage with whistleblowers through their work with ASIC. This training focuses on how ASIC identifies whistleblowers and ensures our staff are aware of ASIC's processes for protecting and using the information provided appropriately.

95 This will be complemented with a dedicated staff resource for enforcement matters that will uplift our practices and assist teams to communicate in the best way possible with whistleblowers. As part of this, we will:

- focus on uplifting the practices and skills of our enforcement teams in engaging with whistleblowers on individual reports of misconduct and investigations; and
- engage a dedicated staff resource to manage our enforcement approach to engaging with whistleblowers. This staff resource will also be available more widely across ASIC to assist in managing and engaging with whistleblowers.

## Statutory reports from liquidators

96 In the evidence provided to the Inquiry, there have been numerous references to the use of artificial intelligence (AI) to assess statutory reports from liquidators.

- 97 We do not use AI to assess statutory reports from liquidators. As described in our initial submission, we assess initial statutory reports (ISRs) using a digital tool that scores responses to determine whether to request a supplementary report from the liquidator.
- 98 The tool contains a conditional logic framework to automatically score a range of different factors depending on the conduct being reported by the liquidator. The criteria for the tool is determined using our experience and reflects a risk-based approach to help ASIC, and the liquidators, to focus resources so that more time is spent on considering higher risk-rated matters. Comparisons between our automated scoring tool and Robodebt are misconceived.
- 99 Not all ISRs allege misconduct. In 2022–23, we received 5,084 ISRs that alleged misconduct. We requested supplementary reports in relation to 778 of these (19%). In 2021–22 we received 3,767 such ISRs and requested 593 supplementary reports (16%). Similarly, in 2020–21 we received 3,810 such ISRs, and requested supplementary reports in relation to 704 (19%). We must strike an appropriate balance between imposing an additional burden on the liquidator to prepare a more fulsome report (at a cost to creditors), and what we are realistically able to action given our resources.

**Figure 5: ISRs and supplementary reports—2020–21 to 2022–23**



- 100 If ASIC does not request a supplementary report, a liquidator nevertheless can submit a supplementary report for ASIC to consider (particularly if they find evidence of misconduct).
- 101 Supplementary reports are an important source of intelligence for our enforcement work and can form the basis of a range of actions, including warnings, bannings and litigation. For example, in the last three financial years, ASIC has banned 127 directors based on liquidators' supplementary reports (44 directors banned in 2020–21, 56 in 2021–22 and 27 in 2022–23).
- 102 As noted in our initial submission, we manually assess supplementary reports in the same way as reports of misconduct from the public. We apply the same considerations as outlined in paragraphs 48–55—noting that, in general, these reports are more likely to be able provide specific and credible information about the alleged misconduct and the likelihood of locating evidence. In recent years, we have generally referred a higher proportion of supplementary reports for further action, compared to reports of misconduct received from the public.
- 103 We note the recommendations of the Parliamentary Joint Commission Inquiry into Corporate Insolvency in Australia for a comprehensive review of Australia's insolvency framework, including consideration of the current statutory reporting obligations for insolvency practitioners. In the meantime, we are consulting on updates to Regulatory Guide 16 *External administrators: Reporting and lodging* ([RG 16](#)) to reflect changes to how statutory reports about alleged misconduct by external administrators and receivers or managing controllers are lodged with ASIC.

## E The appropriateness of ASIC's remit

### Key points

There have been various suggestions for splitting ASIC's remit. These suggestions have previously been considered by a number of inquiries and have not been adopted.

Suggestions for detaching parts of ASIC's enforcement function to a separate agency run counter to the significant shift in our enforcement culture and activities since the Financial Services Royal Commission. The result of those efforts is reflected in our strong enforcement record.

The transfer of discrete parts of ASIC's regulatory remit to another agency or regulatory body would involve major legislative and practical change, and requires careful consideration.

### Suggestions for splitting ASIC's remit

- 104 There have been various suggestions presented to the Inquiry for splitting ASIC's remit. These can be broadly summarised as
- creating a separate enforcement agency, to ensure complete separation of enforcement from ASIC's regulatory, supervisory and policy work. There has also been an alternative suggestion of establishing a specialist financial fraud investigative arm within the Australian Federal Police (AFP);
  - creating a separate civil litigation agency, to ensure independent consideration of the public interest in commencing proceedings and to develop specialised expertise;
  - moving consumer protection provisions in the ASIC Act to the Australian Competition and Consumer Commission (ACCC) to enforce; and
  - giving specific components of ASIC's remit to a dedicated, industry-specific regulatory agency (e.g. insolvency).
- 105 These suggestions do not acknowledge the significant changes we have made to our enforcement culture and activities since the Financial Services Royal Commission. The changes include forming a whole-of-ASIC enforcement strategy to drive better prioritisation, governance and accountability for our most strategically important cases. We have pursued complex litigation matters against defendants ranging from large financial institutions to predatory lenders. We take targeted, strategic litigation to

pursue wrongdoers, change behaviours and to clarify legal obligations within our remit. Our recent enforcement record speaks for itself.

106 Our recent restructure further enhances our ability to respond to misconduct. It enables ASIC to apply an early ‘enforcement lens’ in analysing information about potential misconduct, streamline and reduce handover points in a matter from investigation to enforcement action. This allows ASIC to act quicker and respond more effectively to potential breaches of the law.

107 All this is part of our cultural shift towards being a confident and ambitious modern law enforcement agency.

108 Suggestions for detaching parts of ASIC’s enforcement function to a separate agency run counter to these efforts. We achieve our greatest impact when we take targeted and proportionate enforcement actions in close coordination with our regulatory and surveillance functions to change behaviour. Examples include our regulatory interventions against greenwashing, predatory lending, and high-risk retail over the counter (OTC) derivatives. These interventions have involved a combination of guidance, product intervention orders, surveillance activities and enforcement action.

109 A separate agency introduces additional handover points which can lead to delay. Issues of fragmentation, overlap and coordination can create new regulatory risks. To the extent that criticisms have been directed at ASIC’s investigative capabilities, any separate litigation agency will still rely on ASIC as the investigating agency to refer misconduct to it for assessment.

110 There are significant benefits in one integrated regulator administering both consumer protection and market integrity functions, as well as administering the financial services and credit licensing regimes. This is because there are many detailed conduct and consumer protection rules across the legislation ASIC administers that are in addition to the general consumer protection laws in the ASIC Act. An integrated regulator is also able to use licensing and administrative action against a regulated entity to address consumer protection problems.

111 The transfer of discrete parts of ASIC’s regulatory remit (such as insolvency) to another agency or regulatory body would involve major legislative and practical change, and requires careful consideration of the costs and benefits. For example, in relation to suggestions for a separate, dedicated insolvency regulator, consideration ought to be given to questions such as:

- Would the establishment of such a regulator diminish or increase the size of the tasks which have to be performed (taking into account areas of potential duplication and the need for coordination), and how would



this impact the overall resource demand in regulating corporate and personal insolvency?

- Would the regulator be responsible for investigating all misconduct related to corporate insolvency (including by companies, directors, officers and registered liquidators), and, in the event the regulator is not ASIC, how would this relate to ASIC's jurisdiction?

## Consideration of these suggestions by other inquiries

- 112 These suggestions of splitting ASIC's remit have previously been considered by a number of inquiries and the Financial Services Royal Commission, and have not been adopted.

### **Inquiry into Corporate Insolvency in Australia**

- 113 The Parliamentary Joint Committee's Inquiry into Corporate Insolvency in Australia has recommended that the Australian Government commission a comprehensive and independent review of Australia's insolvency law, including the design and implementation of a single insolvency law and regulatory scheme.

### **Financial Services Royal Commission**

- 114 The Financial Services Royal Commission considered, and did not adopt, suggestions for detaching (at least some) consumer protection provisions administered by ASIC from ASIC's remit and requiring the ACCC to take responsibility for their administration. The Financial Services Royal Commission acknowledged that certain core functions of the conduct regulator under Australia's twin peaks model should be kept together, which included preventing consumer detriment from inappropriate products and contracts and enforcing the relevant law. The Royal Commission also noted that shifting responsibilities between agencies does not diminish the size of the tasks that have to be performed and does not change the overall resource demand.
- 115 The Financial Services Royal Commission also considered, and did not adopt, suggestions for establishing a specialist civil enforcement agency. It recognised that the removal of a regulatory tool as important as civil penalty litigation would have other effects for ASIC's work which would need to be properly understood before taking such a significant step. More importantly, ASIC should be given time to demonstrate that changes to its enforcement culture could be made and that such changes are durable. Since the Royal Commission, we have made demonstrable changes to our enforcement culture: see Section A. These changes are reflected in the increased number



of civil proceedings we have commenced, and the significantly higher civil penalties we have obtained in recent years.

### **Inquiry into the Performance of ASIC**

- 116 The Senate Inquiry into the Performance of ASIC considered, but did not recommend, that a Serious Fraud Office be established in Australia to address the overlap in responsibilities between ASIC and the AFP and to give white collar crime cases sufficient attention from specialist staff. The Committee noted such a proposal would require the entire law enforcement institutional framework to be carefully considered, including the following issues:
- Fragmented and unclear arrangements can create further overlaps in jurisdiction and undermine established acceptable principles associated with prosecutions, requiring appropriate protocols and frameworks for sharing expertise and staff between agencies.
  - The problems identified with the current framework that relate to the resources and priorities of the existing agencies are not issues that the creation of an additional agency would solve.
- 117 In considering whether ASIC's growing remit has negatively affected its performance, the Committee considered the following options:
- transferring ASIC's corporate and business name registry functions to another government agency, or privatising these functions;
  - splitting ASIC into smaller regulators along the lines of its broad business areas; and
  - transferring responsibility for consumer protection to the ACCC or creating a new consumer protection agency.
- 118 In relation to the consumer protection responsibility, the Committee noted the conclusion of the Wallis Inquiry that, as distinct to prudential regulation, '[t]he tasks of consumer protection, market integrity and corporations regulation are more complementary than conflicting.' The Committee also noted at that time recent reforms in the United Kingdom and the United States, which were contrary to an approach of taking responsibility for financial services consumer protection from the securities regulator and giving them to the general consumer protection agency. In the United Kingdom, such responsibility was transferred from the Office of Fair Trading to the Financial Conduct Authority. In the United States, administration of federal consumer financial protection laws was consolidated into the Consumer Financial Protection Bureau (from various other agencies such as the Federal Trade Commission).

- 119 The Committee ultimately recommended that the Australian Government examine future ownership options for ASIC’s registry function and that ASIC’s funding arrangements be replaced with a ‘user pays’ model.

### **Financial System Inquiry**

- 120 The Financial System Inquiry accepted there are synergies between functions—such as market supervision, insolvency and consumer protection—that would be lost if these functions were moved to other agencies.
- 121 It also considered and did not recommend giving the ACCC sole responsibility for consumer protection. It saw value in an integrated consumer regulator for financial services and that these powers are an important part of ASIC’s enforcement toolkit.

## F ASIC's governance

### Key points

Our aim has been to strive to be a modern, ambitious and confident regulator.

Our governance structure, statutory objectives and the industry funding model are designed to support ASIC's independence and effectiveness. Any changes to these policy aspects are matters for the Australian Government.

### Our aim is to be a modern, ambitious and confident regulator

- 122 We have undergone significant organisational change in recent years, including the material shift in our enforcement posture and culture after the Financial Services Royal Commission and more recently our organisational review.
- 123 All this is to strive towards our ambition of being a modern, ambitious and confident regulator. We will continue to be an active litigator against misconduct, and take strong and targeted action to protect consumers and investors from harm.
- 124 Looking forward, we need to continue our significant investment in technology so that we can be a leading digitally enabled and data-informed regulator. This technology and capability uplift is required, among other things, to support ASIC to effectively triage and review reports of misconduct and to direct resources to where the most serious harms may be occurring. This will be increasingly critical as the volume of data we receive continues to grow, and as technology reshapes the industry and markets we regulate. It will be important for ASIC to be adequately resourced to meet these challenges.

### Our governance structure

- 125 The Inquiry has received suggestions for changes to our governance and accountability arrangements and our statutory objectives.
- 126 ASIC is a body corporate established under the ASIC Act. ASIC is made up of Commissioners who are appointed by the Governor-General on nomination of the Minister. Under the ASIC Act, Parliament has conferred

- functions and powers on the Commission and Chair of ASIC. ASIC's functions and powers are also drawn from the laws we administer.
- 127 The Commission is ASIC's governing body and is responsible for achieving ASIC's statutory objectives set out in the ASIC Act. It acts as a strategic non-executive body focusing on high-level regulatory and statutory decision making and stakeholder management and provides support to the Chair on organisational oversight. It makes important regulatory decisions, sets ASIC's strategy and oversees ASIC's delivery and performance against the strategy.
- 128 In addition, the Chair is ultimately responsible for the duties of the Accountable Authority contained in the *Public Governance Performance and Accountability Act 2013* (PGPA Act), which forms part of the executive responsibilities of governing ASIC.
- 129 The legislative framework that establishes the roles of the Commission and Accountable Authority is consistent with the framework for a number of other statutory agencies. Overall, ASIC considers this framework to have operated effectively over a significant period of time.
- 130 ASIC's Governance and Accountability Framework (Framework) was established in 2019 following the Financial Services Royal Commission, and has been reviewed and refined since that time. This reflects the legislative framework within which ASIC operates, consistent with ASIC being an independent Commonwealth agency created as a statutory body corporate. The objective of the Framework is to promote effective, efficient and impartial decision making at ASIC and articulate clear accountabilities. The Framework seeks to ensure we act strategically, with integrity and effectively deliver on ASIC's statutory objectives.
- 131 The Framework separately identifies decision making in relation to governance matters and regulatory functions. It supports the Commission to exercise its functions and powers and oversee delegated matters. The Framework is consistent with the governance arrangements adopted by ASIC's peer regulators such as the ACCC. Overall, we consider our current governance arrangements to be effective.
- 132 [Information about the Framework and our internal governance and accountability structures and processes](#) are published on our website.
- 133 ASIC Commissioners are not employees of ASIC. Consistent with other statutory appointees, ASIC Commissioners are independent statutory appointees, appointed by the Governor-General on the nomination of the Minister, under s9 of the ASIC Act. Commissioners hold office for such term as is specified in their instrument of appointment.

- 134 The ASIC Chair is appointed in the same way, and in addition has the role of being the Accountable Authority under the PGPA Act. As such, the Chair has ultimate responsibility for the governance and management of ASIC. Each Commissioner including the Chair has duties as an official under the PGPA Act. This includes the duty to report certain interests to the Minister.
- 135 ASIC and its Commissioners are accountable to the Minister, and to the Parliament through its committees and Commissioners are subject to the ASIC Code of Conduct under s126B of the ASIC Act.
- 136 The Minister and Treasury are responsible for administering the ASIC Act (which establishes ASIC), other legislation administered by ASIC, and dealing with ASIC. This includes overseeing Commissioners' statutory office arrangements—including, for example, approvals to take leave.
- 137 This framework has worked effectively without significant issues for many years, and is similar to frameworks that apply in other independent statutory agencies such as APRA and the ACCC.
- 138 We note that our governance arrangements have been the subject of numerous reviews in recent years, including:
- FRAA, Effectiveness and Capability Review of the Australian Securities and Investments Commission, July 2022;
  - Parliamentary Joint Committee on Corporations and Financial Services, Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament, March 2022, Chapter 2 'ASIC's governance framework';
  - Dr Vivienne Thom AM, *Report on the review of ASIC governance arrangements*, January 2021;
  - Financial Services Royal Commission, February 2019, Volume 1, Part 7; and
  - ASIC Capability Review, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015.

## Industry funding model

- 139 The Inquiry has heard evidence criticising ASIC's industry funding model and the levies imposed on various industry sectors.
- 140 The design and structure of ASIC's industry funding model is a matter for the Australian Government. The model has recently been the subject of a Government review. In June 2023, the Government released the [Review of the Australian Securities and Investments Commission industry funding model: Final report](#). The review found that the settings of ASIC's industry

funding model remain broadly appropriate and substantial changes to the model should not be made. The report suggested some refinements be made by the Australian Government.

141 We provide information about how we calculate industry levies in our annual [Cost recovery implementation statements](#).

## G Specific enforcement areas of Committee interest

### Key points

This section outlines ASIC's approach to specific enforcement areas of Committee interest:

- Insider trading
- Illegal phoenix activity
- Agricultural lending
- Unlicensed financial advice.

### Insider trading

- 142 Insider trading is an important and enduring priority for ASIC, as it can undermine market integrity and public confidence in our financial markets. We have a strong track record of enforcing insider trading laws and evidence shows Australia is one of the cleanest markets.
- 143 Insider trading can impact investor returns, can increase the cost of capital for Australian businesses and perpetuate the notion that markets are rigged in favour of those with privileged access to inside information. Left unchecked, it can damage Australia's reputation as a regional financial hub.
- 144 The evidence shows that enforcing insider trading laws reduces the cost of capital for listed companies. The Australian equity market has a strong record of being cleaner than its major peers.
- 145 Independent research by SS&C Intralinks and the University of London Business School showed that Australia is the cleanest market in terms of mergers and acquisition leaks among a sample of major markets over the decade to 2019 (averaging 3.5% deal leaks compared to the sample average of 7.8%).
- 146 ASIC periodically assesses market cleanliness metrics, which measure the level of information asymmetry in our markets. We found in 2019 that there had been sustained improvement in the cleanliness of Australia's listed equity market over the past decade. Our more recent analysis indicates this is still the case.

Note: See [2020 M&A Leaks Report: A study by SS&C Intralinks and The M&A Research Centre at The Business School \(formerly Cass\), City, University of London](#)

(PDF 386 KB), October 2020 and Report 623 *Review of Australian equity market cleanliness: 1 November 2015 to 31 October 2018* ([REP 623](#)).

147 We have a strong and consistent record of prosecuting individuals for insider trading. Since 2009, 44 people have been criminally convicted of insider trading following ASIC investigation. The individuals prosecuted include senior managers, CFOs, CEOs and chairs of publicly listed corporations. Some examples of ASIC's recent enforcement action include:

- In February 2023, former CEO of Big Un Limited Richard Evans was charged with insider trading involving the communication of inside information about Big Un to a shareholder on or around 10 January 2017. Subsequently, in June 2023, former CFO of Big Un Limited Andrew Corner was also charged with insider trading in relation to Big Un shares.
- In March 2023, former Tesla Motors Australia Pty Ltd director Kurt Schlosser was sentenced following his guilty pleas to two insider trading offences. Mr Schlosser was sentenced to two years and six months imprisonment, to be released immediately on entering into a recognizance, on the condition that he be of good behaviour for two years and six months.
- In May 2023, ex-Vocus Group Limited Chairman Vaughan Bowen was indicted on two counts of insider trading.
- In March 2024, former corporate advisor Cameron Waugh was sentenced for insider trading in relation to Genesis Minerals Limited shares. Mr Waugh was sentenced to two years imprisonment, with release after nine months, upon entry into a recognizance to be of good behaviour for 15 months.

Note: We have provided statistics about our insider trading inquiries, investigations and outcomes in response to questions on notice Set 1 Question 5.

148 Insider trading has long been recognised as being hard to detect due to the nature of the suspicious trading patterns, information passing through personal relationships and technology increasingly facilitating unrecorded communications. We continue to invest in our insider trading detection technology which is award winning and world class.

Note: See [ASIC's insider trading detection project wins data award](#) (22 May 2023).

149 Insider trading cases are complex. They involve expert evidence to establish the inside information was material and not generally available. Securing evidence of the tipping or possession of insider trading is challenging. The majority of insider trading investigations involve the execution of search warrants, which are resource intensive, and require coordination across various agencies (including the AFP or state police). In 2022–23, we executed 24 search warrants. A significant proportion of the search warrants ASIC executes relate to insider trading investigations.



150 Deciding whether to prosecute insider trading is a serious matter that requires ASIC to determine whether there is sufficient evidence to substantiate a criminal legal action. Nor is it our decision alone. Once we refer a brief of evidence to the CDPP, the CDPP looks independently at the evidence in deciding whether to bring criminal charges.

## Illegal phoenix activity

151 We continue to focus on illegal phoenix activity and are committed to using our regulatory tools of engagement and enforcement to identify, disrupt and act against those who engage in this conduct. There is no legal definition of ‘illegal phoenix activity’ and no single specific criminal offence that covers such misconduct. The conduct may manifest itself as contravention of directors’ duties, fraudulent concealment and dissipation of assets (including creditor defeating dispositions) and other dishonesty offences.

152 We recognise the significant harm to creditors and the Australian economy posed by persons that engage in illegal phoenix activity and those that facilitate this conduct.

153 It is a challenging crime type to prove to the criminal standard, because:

- conduct is often first reported to ASIC several years after it has occurred;
- there is often a lack of credible witnesses to the illegal phoenix activity because the only witnesses available are often all involved in the misconduct;
- lengthy, complex, resource-intensive financial reconstructions are required;
- the lack of books and records kept by insolvent companies; and
- lesser or more narrowly-defined allegations may have greater prospects of success, without seeking to prove phoenixing. Examples of such allegations include failure to pay employee benefits and making false or misleading statements in documents lodged with ASIC.

154 In 2022–23, we disqualified four directors from managing corporations as a result of our investigations relating to illegal phoenix activity. To date in 2023–24 we have disqualified seven directors from managing corporations.

155 For example, in March 2023, ASIC disqualified former construction company director Roxanne Cornell for five years due to her involvement in the failure of three companies which went into liquidation, owing a combined total of over \$6 million to creditors. ASIC found that Ms Cornell acted improperly and failed to meet her obligations as a director. This included engaging in phoenix activity by transferring and operating a

business using new entities to sustain a lossmaking business and to intentionally avoid paying creditors. Other concerns ASIC had included Ms Cornell making improper payments from the entities to herself and others, causing detriment to the companies, and not assisting the liquidators appointed to the entities.

Note: See Media Release ([23-073MR](#)) *ASIC disqualifies former construction industry director for five years after engaging in illegal phoenix activity* (21 March 2023).

156 In September 2023, we disqualified Philip Whiteman from managing corporations for the maximum period of five years. This was due to his involvement in the failure of five companies involved in business advisory services, including pre-insolvency, legal, tax and accounting advice. At the time of ASIC's decision, the companies owed a combined total of \$17 million, including approximately \$15.2 million owed to the Australian Taxation Office (ATO). ASIC was concerned that Mr Whiteman improperly used his position as a director, failed to act in good faith in the best interests of the companies, failed to exercise care and diligence and failed to meet statutory lodgement requirements to the ATO and keep written financial records.

Note: See Media Release ([23-259MR](#)) *ASIC disqualifies Philip Whiteman from managing corporations for maximum five years after engaging in illegal phoenix activity* (25 September 2023)

157 We provide further details about our work in combatting illegal phoenix activity in Appendix 5.

## **Agricultural lending**

158 We recognise and acknowledge the difficulties that small businesses and farmers have experienced in the past in relation to agricultural loans. The issues raised in relation to the matter during the inquiry are addressed in detail in Section 1 of our supplementary submission to this Inquiry dated 22 December 2023.

## **Unlicensed financial conduct, including unlicensed advice**

159 The Inquiry has been interested in the extent of unlicensed conduct, particularly unlicensed financial advice in Australia. As the Inquiry has heard, there is no reliable way to measure or estimate this. Unlicensed financial advice and other unlicensed conduct often manifests in a fraud against the victims, and state police agencies also have jurisdiction to investigate and bring perpetrators to court.

160 We target our actions against unlicensed conduct by using a range of our regulatory tools (including administrative action and criminal prosecutions) to send a strong deterrent message. This is complemented by public messages to encourage investors to deal only with licensed entities. We review reports of misconduct and intelligence about unlicensed conduct carefully. As explained above, we do not and are unable to undertake further inquiries or take action in relation to every instance of potential unlicensed conduct, including unlicensed financial advice that is brought to our attention.

161 Where there is sufficient evidence that actionable unlicensed financial advice may have been provided or unlicensed conduct undertaken, we have taken a range of actions, including enforcement action. We have permanently banned 18 individuals involved in unlicensed financial conduct from providing financial services since July 2022. Some examples of our recent enforcement action include:

- In April 2024, former financial adviser of NSW David Valvo was charged with 12 counts of dishonest conduct in the course of carrying on a financial services business. ASIC alleges Mr Valvo acted dishonestly when he submitted adviser fee withdrawal forms for 12 of his clients' superannuation accounts for amounts totalling approximately \$110,000, knowing that the forms were not genuine.
- In February 2024, Aryn Hala of Queensland was charged with nine offences of carrying on a financial services business without a licence. Conduct investigated by ASIC included promises of annual returns of at least 10-20% in investments that included crypto-assets in a company directed by him. Mr Hala encouraged consumers to establish a self-managed superannuation fund (SMSF), to roll over their existing superannuation into this SMSF, and invest it with Mr Hala's company.
- In April 2023, the Federal Court made permanent injunctions against social media influencer Tyson Scholz for carrying on a financial services business without a financial services licence. The injunctions prohibited him from carrying on a financial services business in Australia in contravention of the Corporations Act.
- In February 2023, ASIC banned former mortgage broker and property spruiker Christine Childs, of Queensland, from providing financial services for eight years, for carrying on an unlicensed financial services business in recommending clients buy property through their superannuation, including through newly created SMSF.
- In January 2023, former financial adviser John Wertheimer was convicted and sentenced in the Perth District Court for providing a financial service on behalf of a person who carries on a financial services business while unauthorised to do so and for engaging in dishonest conduct in relation to a financial service.

- In July 2022, Nizi Bhandari of Victoria was charged with engaging in dishonest conduct in the course of carrying on a financial services business and providing unlicensed personal financial product advice. The trial has not yet commenced.
- In May 2022, Walter Yaolong Guan, of New South Wales, was banned from providing financial services for five years after ASIC found his AFS licence authorisation did not permit him to trade shares on or operate managed discretionary accounts.

Note: Mr Guan has appealed ASIC's decision. The appeal is ongoing.

- In November 2021, following ASIC's investigation and enforcement action, the Federal Court found Melissa Caddick and her company, Maliver Pty Limited carried on an unlicensed financial services business.

## Appendix 1: ASIC's prior submissions to the Inquiry

### **Initial Submission by ASIC** ([PDF 3758 KB](#)).

This submission covered:

- our approach to regulation,
- how we identify misconduct
- how we assess and prioritise matters
- our enforcement record and toolkit
- data and technology
- matters relating to CSLR and dispute resolution
- appendices with data

### **ASIC Supplementary Submission 1** ([PDF 231 KB](#))

This submission related to the PwC matter

### **ASIC Supplementary Submission 2** ([PDF 576 KB](#))

This submission covered alleged misconduct matters raised in hearings and ASIC's response to the inquiry and concern about sensitive material requested

### **ASIC Supplementary Submission 3** ([PDF 381 KB](#))

This submission covered alleged misconduct matters raised in hearings and ASIC's engagement with professional bodies

### **ASIC Supplementary Submission 4** ([PDF 353 KB](#))

This submission covered alleged misconduct matters raised in hearings

## Appendix 2: ASIC handling of reports of alleged misconduct

- 162 This appendix sets out data on finalised reports of alleged misconduct from the last 11 years.
- 163 A report of alleged misconduct is considered ‘finalised’ when its assessment is complete and it has an assessment outcome.

### Total number of reports finalised

- 164 Table 1 shows the total number of reports of alleged misconduct finalised over the last 11 years.
- 165 The reportable situations regime commenced on 1 October 2021:
- in 2021–22, we received 14,038 reportable situation notifications from licensees and 137 from licensees about another licensee; and
  - in 2022–23, we received 28,493 reportable situation notifications from licensees and 160 from licensees about another licensee.
- 166 The ‘reportable situations (previously breach reports)’ number for 2021–22 includes:
- the number of breach reports finalised in 2021–22 (i.e. before the reportable situations regime commenced); and
  - the number of initial assessments of reportable situation notifications completed by ASIC’s Misconduct and Breach Reporting team.
- 167 The ‘reportable situations (previously breach reports)’ number for 2022–23 includes the number of initial assessments of reportable situation notifications completed by ASIC’s Misconduct and Breach Reporting team.
- 168 We use the reports to both immediately assess the particular concerns and to more broadly consider the trends and issues arising from the collective information. Reportable situations are also considered by ASIC’s supervisory and enforcement teams.

**Table 1: Total reports of alleged misconduct finalised**

Report of alleged misconduct type	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Reports of misconduct from the public and AFCA notifications	12,516	11,682	10,530	9,669	9,751	9,011	9,567	10,249	12,355	10,711	8,688	8,149
Reportable situations (previously breach reports)	1,017	900	996	1,137	1,172	1,201	1,394	2,173	2,721	2,435	1,969	1,313
Auditor breach reports	350	314	392	498	482	508	491	705	1,172	1,174	1,393	1,968
Statutory reports (initial and supplementary)	11,404	10,244	10,522	9,450	10,630	8,989	8,807	8,621	8,560	5,083	4,645	6,073
<b>Total reports of alleged misconduct finalised</b>	<b>25,287</b>	<b>23,140</b>	<b>22,440</b>	<b>20,754</b>	<b>22,035</b>	<b>19,709</b>	<b>20,259</b>	<b>21,748</b>	<b>24,808</b>	<b>19,403</b>	<b>16,695</b>	<b>17,503</b>

Note 1: The total number of auditor breach reports shown separately in the table is included in the total number of breach reports finalised figure in ASIC's annual reports.

Note 2: Statutory reports (initial and supplementary)—statutory reports (initial) from a liquidator are automatically triaged and assessed using digital tools, and we may request a further statutory report (supplementary).

Note 3: ASIC's [Annual Report 2017–18](#) indicated that a total of 9,754 statutory reports (initial and supplementary) were finalised, comprising 8,823 statutory reports (initial) and 931 statutory reports (supplementary). The table above reflects the amended figures of 8,807 statutory reports (initial and supplementary) finalised, comprising 8,207 statutory reports (initial) and 600 statutory reports (supplementary). See also ASIC's [Annual Report 2018–19](#) for further details on this correction (page 284).

Note 4: 818 reports of the 'Reportable situations (previously breach reports)' figure for 2021–22 relate to the initial assessment of reportable situation notifications completed by ASIC's Misconduct and Breach Reporting team.

Note 5: 1,275 reports of the 'Reportable situations (previously breach reports)' figure for 2022–23 relate to the initial assessment of reportable situation notifications completed by ASIC's Misconduct and Breach Reporting team.

## Assessment outcomes

- 169 Table 2–Table 4 set out the assessment outcomes of our finalised reports of alleged misconduct which include reports of misconduct from the public, AFCA notifications, reportable situations (previously breach reports) and statutory reports (supplementary) over the past 11 years. The outcomes are categorised as follows:
- referred for action by ASIC—the report of alleged misconduct is referred to an enforcement team, supervisory team, Small Business and Engagement Compliance team or other teams for further evaluation. The matters we take into account when deciding whether or not to commence a formal investigation are set out in more detail in [INFO 151](#);
  - resolved—this can involve ASIC providing information to the reporter about the EDR scheme, issuing a warning letter to the party that it may be in breach of the Corporations Act, providing assistance to the reporter in the form of guidance and information about how best to resolve the matter themselves or taking action to achieve compliance;
  - analysed and assessed for no further action—with these matters, we have made preliminary inquiries and may have requested further information, and then determined that no further action is required. This is usually due to insufficient evidence or another reason, such as that another agency, law enforcement body or third party (e.g. a liquidator) is better placed to appropriately deal with the underlying issues or is already taking action;
  - no jurisdiction—where relevant, we direct reporters to the appropriate agency or solution; and
  - no breaches or offences.



**Table 2: Reports of misconduct from the public and AFCA notifications finalised—by outcome (percentage distribution)**

Outcome	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Referred for action by ASIC	26%	27%	28%	29%	25%	25%	21%	21%	19%	15%	13%	14%
Resolved	21%	19%	16%	13%	11%	15%	12%	12%	10%	9%	11%	8%
Analysed and assessed for no further action	33%	35%	39%	42%	49%	46%	53%	54%	61%	65%	66%	63%
No jurisdiction	15%	14%	11%	10%	11%	10%	10%	9%	8%	9%	9%	14%
No breaches or offences	5%	5%	6%	6%	4%	4%	4%	4%	2%	2%	1%	1%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Note: We merge reports about the same entity and issue (such that one finalised referral for action may represent multiple initial reports of misconduct received).

**Table 3: Reportable situations (previously breach reports) finalised—by outcome (percentage distribution)**

Outcome	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Referred for action by ASIC	49%	52%	51%	42%	36%	39%	38%	22%	18%	11%	10%	7%
Resolved	1%	2%	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Analysed and assessed for no further action	50%	46%	49%	58%	64%	61%	62%	78%	82%	89%	90%	93%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Note: Includes assessment outcomes for auditor breach reports.

**Table 4: Statutory reports (supplementary) finalised—by outcome (percentage distribution)**

Outcome	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Referred for action by ASIC	29%	25%	19%	17%	19%	18%	15%	24%	23%	18%	20%	34%
Analysed and assessed for no further action	71%	75%	81%	83%	81%	82%	85%	76%	77%	82%	80%	66%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Note 1: No assessment outcomes have been attributed to Statutory reports (initial). For reporting purposes, outcomes are recorded for statutory reports (supplementary) finalised. We may request supplementary statutory reports following receipt of an initial statutory report.

Note 2: ASIC's [Annual Report 2017–18](#) indicated in error that 87% of initial statutory reports were analysed and assessed for no further action and 13% were referred for action by ASIC when these statistics related to supplementary statutory reports. Further, the table above reflects updated outcome percentages for statutory reports (supplementary) in 2017–18 based on our current records.

## Reports referred for further action

170 Table 5 sets out, for the total number of finalised reports of alleged misconduct that we have referred for action over the past 11 years, the percentage distribution by the team the matter was referred to.

Note 1: 'Other' team primarily comprises the Chief Legal Office and, to a much lesser extent, the Licensing, Property and Unclaimed Monies teams.

Note 2: Following a change to ASIC's systems in 2017, where reports of alleged misconduct referred were previously recorded as 'Existing surveillance or investigation', these are now reported in the 'Enforcement team', 'Small Business Engagement and Compliance team' and 'Supervisory team' numbers directly.

Note 3: The figures have been derived using a data source that is different from that of Table 1–Table 4.

**Table 5: Total reports of alleged misconduct finalised and referred for action by ASIC—by team (percentage distribution)**

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Enforcement team	1%	2%	1%	1%	2%	1%	4%	5%	7%	13%	9%	15%

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Small Business Engagement and Compliance team	46%	47%	50%	52%	54%	54%	56%	61%	57%	44%	49%	50%
Supervisory team	24%	24%	23%	19%	19%	20%	24%	25%	24%	34%	32%	33%
Existing surveillance or investigation	23%	21%	18%	18%	15%	11%	4%	3%	2%	0%	0%	0%
Other	0%	0%	0%	0%	0%	0%	0%	0%	1%	1%	1%	2%
Registry	5%	7%	8%	10%	10%	13%	11%	6%	10%	9%	10%	0%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Note 1: In April 2021, ASIC Registry staff and functions moved to the Australian Business Registry Services (ABRS) within the Australian Taxation Office through a machinery of government change. Direct referrals continued to Registry as the transition of functions progressed through 2021-22. In 2022–23, new processes were implemented and direct referrals ceased.

Note 2: The sum of the 'Team' percentages may not total to 100% due to rounding of figures in the table.

## Finalisation rate

171 We aim to finalise our consideration of 70% of reports of misconduct from the public within 28 days of receiving all relevant information. Table 6 sets out our finalisation rate over the past 11 years.

**Table 6: ASIC finalisation rate of reports of misconduct from the public**

Outcome	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Consideration of reports of misconduct finalised within 28 days	72%	76%	69%	71%	68%	70%	72%	73%	79%	73%	65%	72%

## Appendix 3: Investigations

172 This appendix sets out data on the investigations we commenced in the past 11 years. ‘Investigations’ for these purposes meet the definition in s13 of the ASIC Act and/or s247 of the *National Consumer Credit Protection Act 2009*.

### Investigations commenced and completed

173 Table 7 sets out the investigations we commenced and completed between 2011–12 and 2022–23.

Note 1: ASIC’s [Annual Report 2016–17](#) and [Annual Report 2015–16](#) separately present the total investigations commenced and completed by the reporting priorities ‘Investor and consumer trust and confidence’ and ‘Fair and efficient markets’.

Note 2: ASIC’s [Annual Report 2014–15](#) separately presents the total investigations commenced and completed by the reporting priorities ‘Investor and financial consumer trust and confidence’ and ‘Fair, orderly, transparent and efficient markets’.

**Table 7: Total number of investigations commenced and completed**

Investigation status	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Investigations commenced	173	193	224	229	206	163	126	151	134	110	107	134
Investigations completed	183	186	238	231	175	157	124	126	103	132	158	139

Note 1: ASIC’s [Annual Report 2019–20](#) indicated, in error, that 126 new investigations were commenced in the previous year (2018–19). The correct number of new investigations commenced in 2018–19 is 151.

Note 2: ASIC’s [Annual Report 2018–19](#) indicated, in error, that 103 investigations were completed in 2018–19. The correct number of investigations completed in 2018–19 is 126.

Note 3: ASIC’s [Annual Report 2013–14](#) and [Annual Report 2012–13](#) indicated, in error, that 187 investigations were completed in 2012–13. The correct number of investigations completed in 2012–13 is 186.

## Referral sources

174 Table 8–Table 9 set out the referral sources for the investigations we commenced between 2011–12 and 2022–23, by number and percentage. In these tables, the referral sources are categorised as follows:

- enforcement initiated—these investigations are commenced without a referral from a report of alleged misconduct or a supervisory team;
- referred from a report of alleged misconduct—‘reports of alleged misconduct’ includes reports of misconduct from the public, AFCA notifications, reportable situations (previously breach reports) and statutory reports (supplementary); and
- referred from a supervisory team—some referrals from a supervisory team may have arisen from surveillances which were prompted by a report of alleged misconduct or because of a pattern or series of reports.

**Table 8: Referral sources of investigations commenced**

Referral source	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Enforcement initiated	10	11	9	25	9	16	6	22	33	7	8	12
Referred from a report of alleged misconduct	59	55	44	46	62	41	44	41	41	50	35	56
Referred from a supervisory team	104	127	171	158	135	106	76	88	60	53	64	66
<b>Total investigations commenced</b>	<b>173</b>	<b>193</b>	<b>224</b>	<b>229</b>	<b>206</b>	<b>163</b>	<b>126</b>	<b>151</b>	<b>134</b>	<b>110</b>	<b>107</b>	<b>134</b>

Note 1: Referred from a report of alleged misconduct—this may be the result of multiple initial reports of alleged misconduct received that have been merged as they relate to the same entity and issue.

Note 2: In 2018–19 and 2019–20, ASIC commenced a number of new investigations that were referred from the Financial Services Royal Commission.

**Table 9: Referral sources of investigations commenced (percentage distribution)**

Referral source	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Enforcement initiated	6%	6%	4%	11%	4%	10%	5%	15%	25%	6%	7%	9%
Referred from a report of alleged misconduct	34%	28%	20%	20%	30%	25%	35%	27%	31%	45%	33%	42%
Referred from a supervisory team	60%	66%	76%	69%	66%	65%	60%	58%	45%	48%	60%	49%
<b>Total investigations commenced</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Note: The sum of the 'Referral source' percentages may not total to 100%, due to rounding of figures in the table.

## Appendix 4: Litigated enforcement actions and outcomes

175 This appendix sets out our litigated enforcement actions and outcomes over the past 11 years (e.g. civil, criminal and summary prosecutions for strict liability offences).

Note 1: ASIC's [Annual Report 2016–17](#) and [Annual Report 2015–16](#) separately present the civil and criminal actions or outcomes by the reporting priorities 'Investor and consumer trust and confidence' and 'Fair and efficient markets'.

Note 2: ASIC's [Annual Report 2014–15](#) separately presents the civil and criminal actions or outcomes by the reporting priorities 'Investor and financial consumer trust and confidence' and 'Fair, orderly, transparent and efficient markets'.

### Civil

**Table 10: Total number of civil actions commenced**

Civil action	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
New civil actions commenced	52	54	52	34	74	112	77	55	50	83	75	62

**Table 11: Civil outcomes**

Civil penalties	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Total dollar value of civil penalties	\$30,000	\$817,500	\$2.700m	\$18.975m	\$1.275m	\$5.264m	\$42.165m	\$12.690m	\$24.900m	\$189.430m	\$229.923m	\$185.4m

Note: Values presented may differ marginally from those indicated in ASIC's annual reports because of number rounding in the annual reports.

## Criminal

**Table 12: Total number of criminal actions commenced**

Criminal action	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
New criminal actions commenced	27	28	30	28	19	11	30	14	41	53	52	32

Note: ASIC's [Annual Report 2021–22](#) indicated that 50 new criminal actions were commenced in 2021–22. This figure has been amended to 52 in the above table and in ASIC's [Annual Report 2022–23](#), to include two further criminal actions commenced that were omitted due to delays in record keeping at the end of financial year.

**Table 13: Criminal outcomes**

Outcome	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
People and/or companies convicted	27	22	30	23	22	20	22	27	30	29	34	35
Custodial sentences (including fully suspended)	20	17	23	18	18	13	13	14	22	10	13	21
Non-custodial sentences and/or fines	8	5	7	5	4	7	13	16	8	19	21	14
Total dollar value of fines	\$34,000	\$180,000	\$85,000	\$50,000	\$123,500	\$40,500	\$15,100	\$266,050	\$731,650	\$151,100	\$2.111m	\$189,640

Note 1: ASIC's [Annual Report 2021–22](#) and its [initial submission](#) to this inquiry, indicated that there were 20 Non-custodial sentences and/or fines in 2021–22. This figure has been amended to 21 in the above table and in ASIC's [Annual Report 2022–23](#), to include a result that was omitted due to delays in record keeping at the end of financial year.

Note 2: ASIC's [Annual Report 2021–22](#) indicated that a total of 33 people and/or companies were convicted in 2021–22. This figure has been amended to 34 in the above table and in ASIC's [Annual Report 2022–23](#), to include a further criminal conviction that was omitted due to delays in record keeping at the end of financial year.

Note 3: In 2015–16, the reporting outcome 'Custodial sentences (including fully suspended)' in ASIC's annual report changed from previous years (for 'number of imprisonments') to take into account custodial sentences that have been fully suspended. As a result, previous year figures for 'Custodial sentences (including fully suspended)' and 'Non-custodial sentences and/or fines' (from 2012–13 to 2014–15) were adjusted in ASIC's [Annual Report 2015–16](#) and these adjustments are reflected in the table above.

Note 4: Values presented may differ marginally from those indicated in ASIC's annual reports because of number rounding in the annual reports.



## Summary prosecutions

**Table 14: Summary prosecutions for strict liability offences completed**

Outcome	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Number of defendants in summary prosecutions for strict liability offences completed	402	528	314	355	410	438	398	369	248	224	181	210

Note: Summary prosecutions for strict liability offences predominantly arise from reports of alleged misconduct that are referred to the Small Business Engagement and Compliance team.

## Appendix 5: Illegal phoenix enforcement activities

176 In the period 2019–20 to 2022–23, as a result of ASIC investigations relating to illegal phoenix activity:

- 25 persons were disqualified from managing companies;
- one registered liquidator had conditions imposed on their registration; and
- nine people were convicted of criminal offences.

177 Table 15–Table 16 show the overall administrative and criminal enforcement actions we have taken in relation to illegal phoenix activity for the period 2015–16 to 2022–23.

Note: The Phoenix Taskforce was established in 2014 and prior to that time, ASIC’s systems did not record which enforcement actions were related to illegal phoenix activity.

**Table 15: Number of administrative actions/outcomes related to illegal phoenix activity**

Actions/outcomes	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Director disqualification	7	4	4	7	10	3	8	4
Criminal court—Director disqualification	N/A	N/A	2	4	2	1	1	N/A
Registered liquidators—Conditions imposed	N/A	N/A	N/A	N/A	1	N/A	N/A	N/A
<b>Total actions/outcomes</b>	<b>7</b>	<b>4</b>	<b>6</b>	<b>11</b>	<b>13</b>	<b>4</b>	<b>9</b>	<b>4</b>

Note 1: ‘Criminal court—Director disqualification’ is distinct from a director disqualification. This type of disqualification happens when a criminal conviction automatically disqualifies a person from managing corporations.

Note 2: ASIC’s [Annual Report 2022–23](#) at page 61, indicated that in 2022–23, there were three director disqualifications related to illegal phoenix activity. This figure has been revised to four in the above table as a result of an update to our records.

**Table 16: Number of criminal actions/outcomes related to illegal phoenix activity**

Actions/outcomes	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Company—Non-custodial sentences	N/A	N/A	2	N/A	N/A	N/A	N/A	N/A
Director—Non-custodial sentences	N/A	N/A	2	4	1	2	2	N/A

<b>Actions/outcomes</b>	<b>2015–16</b>	<b>2016–17</b>	<b>2017–18</b>	<b>2018–19</b>	<b>2019–20</b>	<b>2020–21</b>	<b>2021–22</b>	<b>2022–23</b>
Director—Custodial sentences (including fully suspended)	N/A	N/A	1	2	1	N/A	1	N/A
Pre-insolvency adviser—Custodial sentences (including fully suspended)	N/A	N/A	N/A	N/A	2	N/A	N/A	N/A
<b>Total actions/outcomes</b>	<b>N/A</b>	<b>N/A</b>	<b>5</b>	<b>6</b>	<b>4</b>	<b>2</b>	<b>3</b>	<b>N/A</b>

## Appendix 6: ASIC staff levels

- 178 We have set out the total ASIC employee numbers across the last 11 years by team (see Table 17) and level (see Table 18). Employee numbers in this appendix are presented as full-time equivalents (FTE), rather than individuals. They are also averaged FTE on a business-as-usual FTE basis (i.e. including FTE working on capital projects), such that sub-totals and totals may not add up due to rounding. The figures exclude contractors and secondments from other agencies.
- 179 The total employee numbers and employee numbers within team classifications may deviate from those previously indicated in ASIC's annual reports due to changes to the organisation's structure and reporting systems, as well as updates to employee records across the 11-year timespan. Please note the following changes to our organisation structure:
- Markets group:
    - Emerging Mining and Resources—this team merged with other teams within the Markets Group from 2016–17
    - Investment Banks—this team merged with other teams within the Markets Group from 2016–17;
  - Financial Services and Wealth (FSW) group:
    - Credit and Banking—until 2018–19, this team operated with Insurers under the former team named 'Deposit Takers, Credit and Insurers' (within FSW Group)
    - Data Analytics—this team was established in 2018–19 as part of the restructure of the FSW Group's functions
    - Strategy and Operations—this team was established in 2018–19 as part of the restructure of the FSW Group's functions
    - Institutional Supervision—this team was created in 2018–19 for close and continuous monitoring of large financial services institutions
    - Insurers—until 2018–19, this team operated with Credit and Banking under the former team named 'Deposit Takers, Credit and Insurers' (within FSW group)
    - Investment Managers—until 2017–18, this team operated with Superannuation under the former team named 'Investment Managers and Superannuation' (within FSW group)
    - Superannuation—until 2017–18, this team operated with Investment Managers under the former team named 'Investment Managers and Superannuation' (within FSW group);

- Registry—in April 2021, Registry staff and functions moved to the Australian Business Registry Services within the ATO through a machinery of government change;
- Operations—after 1 July 2022, includes the Misconduct and Breach Reporting team, which was previously part of the now defunct Assessment and Intelligence division;
- Statutory Bodies—Superannuation Complaints Tribunal operations were discontinued in December 2020;
- Enforcement Special Account (ESA)—the ESA was established to fund the costs arising from the investigation and litigation of matters of significant public interest. Prior to 2021–22, ASIC employees engaging with these matters resided within the ESA cost centre. Thereafter, these employees transitioned to ‘business-as-usual’ cost centres while ESA casework continues; and
- Modernising Business Registers—this program commenced in 2019–20, broadly coinciding with the transfer of Registry functions to the ATO.

**Table 17: Average total number of ASIC employees (FTE)—by team**

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Markets Group—Financial Reporting and Audit	33	36	34	32	30	29	29	28	29	28	27	21
Markets Group—Corporations	35	36	36	33	33	43	43	49	50	43	44	44
Markets Group—Market Infrastructure	28	26	32	26	26	31	29	31	31	32	33	30
Markets Group—Market Operations	N/A	N/A	N/A	N/A	N/A	N/A	18	22	12	12	13	12
Markets Group—Market Supervision	58	69	76	69	68	74	64	67	79	83	82	69
Markets Group—Registered Liquidators	23	24	24	21	21	24	23	24	23	25	25	24
Markets Group—Emerging Mining and Resources	17	14	13	13	11	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Markets Group—Investment Banks	25	23	24	20	18	N/A	N/A	N/A	N/A	N/A	N/A	N/A
<b>Markets Group total</b>	<b>219</b>	<b>227</b>	<b>238</b>	<b>214</b>	<b>206</b>	<b>200</b>	<b>205</b>	<b>222</b>	<b>225</b>	<b>224</b>	<b>224</b>	<b>200</b>
FSW Group—Financial Advisers	34	29	31	35	30	38	49	44	47	48	46	47
FSW Group—Credit and Banking	61	66	68	60	60	68	82	76	55	57	61	49

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
FSW Group—Data Analytics	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1	19	13	12	9
FSW Group—Strategy and Operations	N/A	N/A	N/A	N/A	N/A	N/A	N/A	3	14	13	11	6
FSW Group—Institutional Supervision	N/A	N/A	N/A	N/A	N/A	N/A	N/A	9	20	22	24	23
FSW Group—Insurers	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	29	35	34	30
FSW Group—Investment Managers	44	46	47	44	41	52	64	51	35	37	35	32
FSW Group—Licensing	39	32	30	38	42	32	28	23	28	32	30	32
FSW Group—Superannuation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	11	32	34	36	32
<b>FSW Group total</b>	<b>178</b>	<b>172</b>	<b>176</b>	<b>177</b>	<b>173</b>	<b>190</b>	<b>222</b>	<b>217</b>	<b>277</b>	<b>293</b>	<b>288</b>	<b>260</b>
Markets Enforcement Group—Corporations and Corporate Governance	70	59	54	48	47	55	52	49	47	58	59	53
Markets Enforcement Group—Markets Enforcement	51	54	58	59	49	48	46	50	65	71	67	60
Markets Enforcement Group—Enforcement WA	20	23	23	20	21	25	31	36	43	57	61	40
<b>Markets Enforcement Group total</b>	<b>142</b>	<b>135</b>	<b>135</b>	<b>128</b>	<b>117</b>	<b>129</b>	<b>128</b>	<b>135</b>	<b>155</b>	<b>187</b>	<b>186</b>	<b>153</b>

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
<b>Financial Services Enforcement</b>	<b>135</b>	<b>113</b>	<b>118</b>	<b>107</b>	<b>107</b>	<b>111</b>	<b>115</b>	<b>115</b>	<b>138</b>	<b>241</b>	<b>251</b>	<b>230</b>
Registry	259	323	280	229	212	198	189	198	184	147	0	0
Chief Legal Office	53	54	54	53	52	55	60	67	80	86	86	82
Commission	16	15	15	11	11	11	18	22	17	14	22	23
Strategy	46	48	53	46	48	54	69	68	73	72	69	66
Chief Operating Officer	190	204	195	172	182	186	193	202	238	243	210	223
Operations	474	494	487	431	422	458	452	434	474	527	585	565
Statutory bodies	43	44	48	41	35	31	35	43	41	8	N/A	N/A
ESA	N/A	43	19	33	98	70	39	38	79	29	0	0
Modernising Business Register	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	3	20	26	29
<b>Total staff</b>	<b>1,755</b>	<b>1,872</b>	<b>1,817</b>	<b>1,642</b>	<b>1,662</b>	<b>1,692</b>	<b>1,725</b>	<b>1,761</b>	<b>1,983</b>	<b>2,088</b>	<b>1,947</b>	<b>1,831</b>

Note: There was a significant increase in average total employee numbers in 2019–20 following additional funding received by ASIC to implement the recommendations of the Financial Services Royal Commission.

**Table 18: Average total number of ASIC employees (FTE)—by level**

Level	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
<b>Chair</b>	1	1	1	1	1	1	1	1	1	1	1	1
<b>Deputy Chair</b>	1	1	1	1	1	1	1	2	2	1	2	2



Level	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
<b>Member</b>	3	3	3	3	3	2	2	4	4	3	3	2
<b>Senior Executive Service (SES)</b>	44	44	45	43	43	39	37	43	52	60	58	57
<b>ELS</b> Note: This staff level was introduced in 2020–21.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1	12	15
<b>Exec 2</b>	453	491	494	463	477	496	517	561	616	652	714	683
<b>Exec 1</b>	412	431	428	378	381	407	441	424	470	494	484	470
<b>ASIC 4</b>	346	357	346	324	317	319	330	326	380	417	410	365
<b>ASIC 3</b>	244	270	239	208	220	212	203	213	269	290	191	175
<b>ASIC 2</b>	222	237	230	192	192	192	172	167	172	152	63	54
<b>ASIC 1</b>	29	37	30	29	27	22	21	20	18	17	9	7
<b>Total staff</b>	<b>1,755</b>	<b>1,872</b>	<b>1,817</b>	<b>1,642</b>	<b>1,662</b>	<b>1,692</b>	<b>1,725</b>	<b>1,761</b>	<b>1,983</b>	<b>2,088</b>	<b>1,947</b>	<b>1,831</b>

Note: ASIC's [Annual Report 2021–22](#) and its [initial submission](#) to this inquiry indicated that for 2021–22, the average total Exec 2 and ASIC 2 employees were 713 and 64, respectively. These figures have been amended in the above table and at ASIC's [Annual Report 2022–23](#) for rounding/calculation reasons.

180 Table 19 presents the total number of ASIC employees undertaking enforcement work in the last 11 years. Enforcement team structures changed across the period. The figures include enforcement support and legal counsel provided by the Operations team and Chief Legal Office, as well as employees residing in the ESA cost centre prior to 2021–22.

**Table 19: Average total number of ASIC enforcement employees (FTE)**

<b>Enforcement employees</b>	<b>2011–12</b>	<b>2012–13</b>	<b>2013–14</b>	<b>2014–15</b>	<b>2015–16</b>	<b>2016–17</b>	<b>2017–18</b>	<b>2018–19</b>	<b>2019–20</b>	<b>2020–21</b>	<b>2021–22</b>	<b>2022–23</b>
Average total number of enforcement employees	398	405	389	374	422	420	390	395	502	597	578	517

