



**ASIC**  
Australian Securities &  
Investments Commission

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

## **Submission by the Australian Securities and Investments Commission**

February 2023

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## Overview

- 1 The Australian Securities and Investments Commission (ASIC) welcomes the opportunity to make a submission to the *Inquiry into Australian Securities and Investments Commission investigation and enforcement* (Inquiry).
- 2 Enforcement is a critical part of our statutory objectives. We dedicate significant expertise, resources and time to detecting, disrupting, investigating and responding to unlawful conduct. In doing so, our focus is on maximising our regulatory impact in reducing harm to consumers and markets.
- 3 Criticism is made of ASIC from time to time that specific issues that come to our attention, including through reports of misconduct, do not proceed to enforcement outcomes. Since the Financial Services Royal Commission, we have carefully reflected on our enforcement culture and activities. We have formed a whole-of-ASIC enforcement strategy to drive better prioritisation, governance and accountability for our most strategically important cases, and we have pursued complex litigated matters against large financial institutions. We will continue to maintain a strong enforcement focus and look for ways to improve how we do our work.
- 4 The scale of our regulatory task, which covers the activities of many thousands of entities and a vast number of transactions, means we cannot progress every potential matter to investigation and enforcement. Like all regulators, we need to make careful, well-founded choices. We can only undertake a fraction of the potential regulatory and enforcement actions we identify through our own surveillance, reports of alleged misconduct and other data and intelligence. This is particularly true of court-based enforcement action which, though our most powerful tool, is also the most resource intensive form of regulatory action.
- 5 To maximise our regulatory impact, our task is to make good choices about the matters we progress to investigation and enforcement. This is inherent to the role of all regulators and law enforcement agencies. We have sophisticated processes to support us in making those choices: at a macro level, these processes help us set strategic priorities and formulate a corporate plan; at a micro level, they guide our assessments of individual matters, including reports of alleged misconduct.
- 6 Our task also involves making choices about the balance between committing resources to identified corporate plan priorities and ensuring resources are available to address issues that arise through the year, including through reports of alleged misconduct. We make these forward-looking judgements based on information available to us at the time. Sometimes, with the benefit of hindsight and with more complete information, we can learn that a

different decision was warranted. We reflect and learn from those experiences. We use them as an opportunity to improve our processes and decision making. Our focus on uplifting our digital and data analytics capabilities is part of our strategy to continuously improve our decision making.

7 Maximum regulatory impact cannot be achieved by acting on a fixed quota of reports of alleged misconduct or undertaking a specific number of enforcement actions. It requires us to carefully assess information and intelligence in order to make decisions—sometimes difficult decisions—about where, when and how to take regulatory action.

8 This Inquiry has been established to examine ASIC’s capacity and capability to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct. To address this question, we explain how we detect misconduct, including through reports of alleged misconduct, and how we identify matters for investigation and enforcement action to target the areas of greatest harm to consumers and markets.

### **We use a broad range of sources to detect misconduct across our remit**

9 We detect misconduct using data and intelligence from a broad range of sources. We seek out intelligence and encourage reporting of concerning conduct as this provides critical information that informs our work.

10 Each year, we receive a significant volume of reports and other information that can point us to possible misconduct across our remit. In 2021–22, we finalised our consideration of 8,688 reports of misconduct from the public and the Australian Financial Complaints Authority (AFCA), 4,645 reports from registered liquidators, 1,969 breach reports from Australian financial services and credit licensees, and 1,393 reports of suspected contraventions from auditors. In the same year, we received 14,175 notifications in the first nine months of the new reportable situations regime (which replaced the breach reporting regime). Collectively, we refer to these as ‘reports of alleged misconduct’ in this submission.

11 We also obtain information and intelligence that can point to possible misconduct through our supervisory and surveillance activities. For example, we conduct targeted reviews and surveillance of the firms and markets we regulate, and monitor financial markets for insider trading and other market misconduct. We also receive intelligence from other domestic and international regulators and law enforcement agencies.

12 Given our broad regulatory remit, the information we obtain and receive is extensive. In 2021–22, our regulated population included 24,036 unlisted public companies and 1,841 listed companies; 16,621 financial advisers, 4,720 credit licensees and 39,711 credit representatives; 51 licensed domestic and overseas financial markets; and 646 registered liquidators.

## **We strategically select matters for investigation and enforcement, targeting the areas of greatest harm**

- 13 No regulator can be resourced to do everything. As noted above, given our large remit, we do not and cannot investigate every instance of possible misconduct that comes to our attention.
- 14 We must therefore use a risk-based approach to regulation, where we target our investigations and enforcement actions at the areas of greatest harm.
- 15 This means that, in general, we apply more resources in considering and progressing matters that are more likely to involve the most serious conduct and cause the most widespread harm.
- 16 Our approach draws on our extensive experience, is supported by well-accepted regulatory theory and is consistent with the approach taken by our domestic and international peers.

### **Setting priorities**

- 17 To ensure we address the most harmful conduct, we set strategic and enforcement priorities. These priorities guide how we handle reports of alleged misconduct and the regulatory and enforcement action we take. Our priorities also enable us to coordinate our enforcement activities with our regulatory activities, such as guidance and consumer warnings, to maximise our impact on the identified area of risk or harm.
- 18 Our strategic planning process identifies areas of the most significant threat and harm to consumers and markets. This process draws on a range of information, including insights from our own surveillance activities, consultation with our external ASIC Consultative Panel and ASIC Consumer Consultative Panel, Treasury and other regulators, and information captured from reports of alleged misconduct. The identified threats and harms then inform the development of our priorities.
- 19 To ensure transparency, we publish our strategic priorities, as set out in the [ASIC Corporate Plan 2022–26](#) and our [enforcement priorities](#). We monitor emerging threats and harms throughout the year and remain flexible to adapt to such developments.

### **Assessing reports of alleged misconduct**

- 20 We triage reports of alleged misconduct using both technology-based and manual methods to identify those likely to give rise to the greatest consumer or market risk. Higher risk-rated matters are subject to more detailed assessments.

- 21 The outcome of an assessment can include a referral to our supervisory teams for further consideration and possible surveillance, referral to an enforcement team for investigation, or no further action.
- 22 When conducting a surveillance, supervisory teams will often engage with the entity and obtain further evidence to determine whether formal investigation is warranted, or whether a better regulatory outcome would be achieved by other means.
- 23 Even though we do not and cannot action every report, we capture any valuable intelligence from these reports to inform our future work. For example, a pattern of reports may lead us to conduct a surveillance of a particular entity or about a particular issue. Or we might commence an investigation which is informed by a specific report of alleged misconduct from the public as well as concerns about similar practices in the industry, as observed through our own supervisory and surveillance work. The intelligence from reports of alleged misconduct also informs how we set and review our priorities.
- 24 The case studies included in this submission are examples of how we draw on intelligence from reports of alleged misconduct to inform our actions to protect consumers from harm, including surveillances, product intervention orders, enforcement action and the pursuit of other strategies to deter or prevent misconduct.

### **Making decisions about investigations and enforcement**

- 25 When deciding which investigations and enforcement actions to pursue, we are guided by our priorities and the nature of the matter.
- 26 We use our expertise and experience to assess factors such as:
- (a) whether our actions will address a significant harm to consumers or markets;
  - (b) the broader regulatory benefits of taking enforcement action;
  - (c) issues specific to the case, such as the likelihood of obtaining admissible evidence and the time since the misconduct occurred or whether it is continuing; and
  - (d) whether there are any appropriate alternatives to formal enforcement action that would, on balance, be more effective and efficient.
- 27 We consider a range of data sources available to us, including a person or entity's regulatory history, company and licensing registers, open-source information, information from other regulators, market trading data and insights from our own surveillance work and reports of alleged misconduct.
- 28 Given they are resource intensive, our formal investigations are necessarily targeted at the most serious misconduct and where enforcement action is likely to have broader public benefit by deterring future misconduct or clarifying important legal obligations.

## **We take strong enforcement action to deter misconduct**

29 We consistently achieve strong enforcement outcomes. In 2022, our enforcement activity led to 42 individuals charged in criminal proceedings with a total of 312 criminal charges and \$222.1 million in civil penalties imposed by the courts.

30 We pursue litigated outcomes and substantive penalties, where supported by the available evidence, to hold to account those who contravene the law and to deter similar misconduct in the future.

31 In addition to litigation, we use a range of enforcement tools to respond to instances of misconduct in a proportionate and targeted way. To extend our impact, we address less serious conduct through less time-consuming and less costly enforcement tools and outcomes.

32 Our enforcement work is visible to the public through our publication of reports and media releases regarding our activities, as well as formal accountability mechanisms. We engage with a variety of stakeholders including government, industry and the community to inform our strategic and enforcement priorities and gather intelligence about concerning conduct in the industries we regulate.

## **We use technology to be more efficient and effective**

33 We operate in a complex, evolving environment and we regularly reflect on, and seek to improve, how we do our work. We are currently undertaking an organisational review which will result in a new structure that supports us to achieve our strategic and operational ambitions in the years to come.

34 We are also making significant progress in enhancing our digital capabilities to achieve our aim of being a leading digitally enabled, data-informed regulator.

35 We use technology to analyse and draw valuable insights from the large volume of data we have, which includes data on reports of alleged misconduct.

36 The volume of data and intelligence we receive continues to increase with the introduction of the reportable situations regime. We will also soon start receiving data from financial firms under the internal dispute resolution (IDR) data reporting framework.

37 Our data strategy includes continued investment in data capabilities that will provide us with access to advanced data analytics tools. We have a range of work underway to improve our capacity and effectiveness to analyse reports of alleged misconduct and to investigate digitally enabled misconduct.

## Consumer complaints, dispute resolution and compensation

- 38 Access to effective means of resolving financial disputes is critical for ensuring consumers are treated fairly and promoting trust and confidence in the financial system. Providing consumers with access to internal and external dispute resolution (EDR) processes are longstanding obligations of licensees and an important element of the financial services consumer protection framework. These processes return many millions of dollars in compensation to individual consumers and small businesses each year.
- 39 ASIC and AFCA have distinct and complementary roles to play in the dispute resolution framework. AFCA is an independent complaints resolution body that assists consumers and small businesses to reach agreements with financial firms about how to resolve their complaints. For example, in 2021–22, AFCA received 72,358 complaints and reported 67 systemic issues and 23 contraventions to regulators. ASIC is not a dispute resolution body. Our role in dispute resolution is to oversee the effective operation of the dispute resolution system. This includes setting the standards and requirements for financial firms' IDR processes and providing oversight of AFCA. Where appropriate, we advise consumers about their rights under these established resolution processes. Our broader role in responding to breaches of the law, influencing behaviour and deterring misconduct through enforcement and other regulatory action, is complementary to AFCA's resolution of individual disputes.

## Our approach to this submission

- 40 Having regard to the Inquiry's [Terms of Reference](#), our submission focuses on our investigation and enforcement work rather than the full breadth of our regulatory work—which also includes surveillance and supervision, licensing, regulatory guidance, and consumer and investor education through ASIC's Moneysmart program.
- 41 This submission addresses questions posed by the Inquiry's Terms of Reference, in particular paragraphs (c), (d), (e) and (f). To address these questions, it is necessary to explain:
- (a) our risk-based approach to regulation and enforcement, which directs our resources to the areas we identify as having the greatest actual or potential for harm to consumers, investors and markets (as reflected in our priorities) (see Section A);
  - (b) how we identify misconduct and how we engage with people who make reports of alleged misconduct (see Section B);
  - (c) how we strategically identify matters for investigation and enforcement actions, including from reports of misconduct, and our processes for prioritising and assessing such reports (see Section C);



- (d) our enforcement outcomes, the regulatory toolkit we use to deter misconduct and achieve behavioural change, and our mechanisms for meeting government, industry and community expectations (see Section D); and
- (e) our use of technology to enhance our own efficiency and effectiveness, including to assess and draw insights from reports of alleged misconduct and to support our enforcement activities (see Section E).

42 To further assist the Inquiry, with this submission we have provided a range of data relating to our handling of reports of alleged misconduct and our investigations and enforcement activities. As requested, we have further provided additional data which are contained in appendices to this submission. While this 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 (which, as noted above, is our focus). We have included two case studies to demonstrate how we address issues that can cause significant consumer detriment by drawing on information in reports of misconduct from the public and other sources of information and flexibly applying our regulatory and enforcement toolkit.

43 Paragraph (c) of the Terms of Reference poses the question of whether ASIC is meeting government, business and community expectations. While there is no accepted method of measuring expectations, we regularly provide public information about our enforcement outcomes. ASIC is also subject to a range of accountability mechanisms that enable us to gain insights and perspectives and continually adjust our enforcement approach. We provide details about our enforcement outcomes and these accountability mechanisms in Section D.

44 Paragraphs (a), (b) and (g) of the Inquiry's Terms of Reference are questions of policy and are best directed to Government. To assist the Inquiry to consider these issues, in Section F we have set out ASIC's role in the consumer complaints framework and how our role complements that of AFCA.

## A Our approach to regulation

### Key points

To address the questions posed by the Inquiry's Terms of Reference, it is necessary to explain our risk-based approach to regulation and enforcement. This approach underpins our decision making and directs our resources to areas having the greatest actual or potential for harm to consumers, investors and markets.

We regulate a significant number of entities across a broad range of financial services, corporate sectors and markets.

We focus our regulatory and enforcement activities on the areas that we identify as likely to cause the greatest harm to consumers, investors and the market, which are reflected in our strategic and enforcement priorities.

These priorities are determined by considering insights from our own surveillance activities, consulting with our external panels and other regulators, and analysing information from reports of alleged misconduct.

Our priorities guide our decisions about where to direct our resources. Our priorities also inform how we handle reports of alleged misconduct to identify matters for further action.

### Our mandate

- 45 ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator and is established under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- 46 The ASIC Act states that we have the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system and the payments system.
- 47 It requires that ASIC strives to:
- (a) maintain, facilitate and improve the performance of the financial system and entities within it in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
  - (b) promote confident and informed participation by investors and consumers in the financial system;
  - (c) administer the law effectively and with minimal procedural requirements;
  - (d) receive, process and store—efficiently and quickly—the information we receive;
  - (e) make information about companies and other bodies available to the public as soon as practicable; and
  - (f) take whatever action we can, and which is necessary, to enforce and give effect to the law.

## Our remit

- 48 We regulate a significant number of entities across a broad range of financial services, corporate sectors and markets. In 2021–22, our regulated population included 24,036 unlisted public companies and 1,841 listed companies, 16,621 financial advisers, 6,288 Australian financial service (AFS) licensees, 4,720 credit licensees and 39,711 credit representatives, 420 responsible entities, 51 licensed domestic and overseas financial markets, 1,183 securities dealers, 115 retail OTC derivatives issuers, 646 registered liquidators and 90 superannuation trustees. Compared to our domestic and international peers, our remit is one of the largest in the world.
- 49 We select and target our regulatory and enforcement actions to ensure we have the greatest impact on the most serious harms within our remit. We investigate and take enforcement action to hold to account those who contravene the law. By doing so, we deter misconduct and improve standards and behaviours within our regulated population, thereby reducing the risk of harm to consumers and investors while promoting fair and efficient markets. We complement this enforcement work with a broad range of regulatory activities such as guidance, supervision and consumer education.
- 50 We work cooperatively with other regulators where there is joint or overlapping jurisdiction. We also regularly share intelligence with, and refer matters to, other regulators.

## A risk-based approach

- 51 We use a risk-based approach to direct our resources to address the areas of greatest harm to consumers, investors and markets. We do not, and cannot, investigate every instance of alleged misconduct that comes to our attention—no regulator can be resourced to do so.
- 52 We prioritise the areas of greatest harm and the most important problems within our regulatory remit. We draw from our broad regulatory toolkit to take targeted and proportionate action to deter or punish misconduct.

### **Strategic regulation theory and the harms-based approach**

- 53 Our approach to regulation and enforcement is informed by the theory of ‘strategic regulation’ (also known as ‘responsive regulation’) developed by Professor Ian Ayres and John Braithwaite.
- 54 The theory is an influential model that has informed key design features of the regulatory framework for corporate and financial services regulation in Australia. Its key premise is that since no regulator can respond to every breach of the law, people need to be encouraged to voluntarily comply.

55 According to the theory, when responding to instances of misconduct, an effective regulator should have available a range of enforcement options to respond to the different motivations of different actors. Less coercive methods such as persuasion and education are made more effective when the regulator pursues credible sanctions of escalating severity to enforce the law. This is because the threat of such sanctions would generally be sufficient to motivate compliance.

56 This structure of sanctions of escalating severity is generally referred to as the ‘enforcement pyramid’, culminating in the most severe sanctions which should be reserved for the most egregious misconduct, at the apex of the pyramid. An example of an enforcement pyramid is shown in Figure 1.

Note: The key regulatory theories that underpin the legislative framework in Australia are discussed in some detail in the final report of the [Senate Inquiry into the Performance of ASIC](#), June 2014 and in [Principled Regulation: Federal Civil and Administrative Penalties in Australia \(ALRC Report 95\)](#).

**Figure 1: Example of an enforcement pyramid**



Note: See Table 21 in Appendix 6 for the information presented in this figure (accessible version).

Source: G Gilligan, H Bird & I Ramsay, ‘Civil Penalties and the Enforcement of Directors’ Duties’, *UNSW Law Journal*, vol. 22(2), 1999, pp. 417–461 at p. 428.

57 Our approach is also informed by the harms-based, or problem-oriented, approach to regulation described by Professor Malcolm Sparrow. This approach directs regulators to identify, understand and control the most important risks and harms within their remit.

Note: For more information, see *The Character of Harms: Operational challenges in control*, Cambridge University Press, Cambridge, 2008.

58 Both the strategic regulation theory and harms-based approach provide a framework that assists regulators to make choices about where and how to focus their attention (which are decisions that regulators have always implicitly made).

59 Approaches consistent with both frameworks have been adopted by comparable regulators domestically and internationally, including the [Australian Competition and Consumer Commission \(ACCC\)](#), [UK Financial Conduct Authority](#), [Dutch Authority for the Financial Markets \(AFM\)](#) and [Hong Kong Securities and Futures Commission \(HK SFC\)](#).

## Our strategic and enforcement priorities

60 Our strategic and enforcement priorities focus our efforts on addressing significant harms. They also inform how we handle reports of alleged misconduct, conduct surveillance and take enforcement action.

### Developing our priorities

61 Our priorities are determined annually (and later reviewed) through an organisation-wide strategic planning process. This process begins with an environmental assessment to identify the key threats and harms to consumers, investors and markets by drawing on a broad range of internal and external inputs. These inputs include internal regulatory insights, data sources such as intelligence from reports of alleged misconduct received by ASIC and licensing data, and consultation with our external ASIC Consultative Panel and ASIC Consumer Consultation Panel, Treasury and other regulators.

62 The identified threats and harms inform the development of our priorities, which in turn guide our business planning.

63 We monitor threats and harms, including emerging threats and harms, throughout the year, adapting and responding to these developments, and reassessing our priorities if required.

64 Our processes in strategic prioritisation, planning and decision making were reviewed by the Financial Regulator Assessment Authority (FRAA) in 2022 and were found to be effective in supporting our operations and our ability to make risk-based decisions about our areas of focus.

## Our current priorities

- 65 Our current external strategic priorities are set out in the [ASIC Corporate Plan 2022–26](#) (PDF 2 MB). These priorities target the most significant threats and harms in our regulatory environment by:
- (a) reducing the risk of harm caused by poor product design and distribution;
  - (b) supporting market integrity by proactive supervision and enforcement of governance, transparency and disclosure standards in relation to sustainable finance;
  - (c) protecting consumers as they undertake retirement decision-making; and
  - (d) 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, including scams.
- 66 As stated in the corporate plan, we will use all our regulatory tools to deliver on these priorities, including by taking enforcement action.
- 67 We have also identified [enforcement priorities](#). These priorities comprise:
- (a) *specific priorities for 2023* to address emerging risks of misconduct and important law reforms that are reshaping the financial system; and
  - (b) *enduring priorities* that target types of egregious misconduct—these will remain as priorities for ASIC into the future.

## B How we identify misconduct

### Key points

To address the Inquiry's Terms of Reference, this section outlines:

- the sources from which we obtain reports and other intelligence about alleged misconduct; and
- our processes for responding to reports of alleged misconduct including from members of the public.

We identify and detect possible misconduct by:

- analysing reports of alleged misconduct, including from whistleblowers;
- conducting our own proactive supervisory activities (i.e. monitoring and surveillance); and
- analysing intelligence received from other agencies and regulators.

The data and intelligence that we draw from these sources inform how we identify and prioritise misconduct that is likely to cause the greatest harm to consumers and markets.

We have published various resources to assist individuals and entities to understand how to make a report of alleged misconduct and how we handle those reports.

### Sources for identifying misconduct

68 We detect misconduct using extensive data and intelligence from a range of sources. We seek out intelligence and encourage reporting of concerning conduct as this provides critical information that informs our work.

69 Our main sources for identifying misconduct are:

- (a) reports of alleged misconduct, including reports from whistleblowers;
- (b) our own proactive supervisory activities; and
- (c) intelligence received from other agencies and regulators.

### Reports of alleged misconduct

70 In this submission, 'reports of alleged misconduct' include:

- (a) *reports of misconduct that we receive from members of the public (including other agencies and industry) who believe that a company or individual has not complied with the laws we administer, including reports from whistleblowers and requests to wind up abandoned companies ('reports of misconduct from the public');*

- (b) *notifications from AFCA*, including those relating to systemic issues or serious contraventions;
- (c) *reports from registered liquidators*;
- (d) *reports by auditors about contraventions and suspected contraventions*; and
- (e) *reports of reportable situations (previously known as breach reports)* by Australian financial services licensees and credit licensees (pursuant to the reportable situations regime which commenced on 1 October 2021).

71 Given our broad regulatory remit, we receive a wide range of reports. These include allegations of insider trading, inappropriate financial advice, the offering of unlicensed financial services or credit, misleading and deceptive conduct or disclosure about financial products, harmful lending practices, poor insurance claims handling, director misconduct and investment scams.

72 We receive and assess a significant volume of reports of alleged misconduct each year. In 2021–22, we finalised our consideration of 8,688 reports of misconduct from members of the public and AFCA, 4,645 reports from liquidators, 1,969 breach reports and 1,393 reports of suspected contraventions from auditors.

73 Also in 2021–22, we received 14,175 notifications in the first nine months of the new reportable situations regime (which replaced the breach reporting regime).

### **Reports from whistleblowers**

74 Whistleblowers play a valuable role in uncovering misconduct that may cause serious harm to consumers and investors.

75 We record and track every whistleblower report received and have published two information sheets for whistleblowers about their rights under the law. See [Information Sheet 238](#) *Whistleblower rights and protections* (INFO 238) and [Information Sheet 239](#) *How ASIC handles whistleblower reports* (INFO 239).

Note: ASIC does not determine who is or is not a whistleblower. Only a court can determine whether a person who claims whistleblower status meets the requirements under the law. We categorise reports as whistleblower disclosures for reporting and communication purposes based on the information reported.

### **Supervisory activities and other intelligence**

76 We also identify possible misconduct from our own proactive supervisory activities, such as targeted reviews involving specific entities, thematic reviews involving a broader issue across numerous entities in the market,



and monitoring of financial markets for insider trading and other misconduct. We receive intelligence from other domestic and international regulators and law enforcement agencies.

## Engaging with people who report misconduct

- 77 We acknowledge receipt of all reports of misconduct (except for anonymous reports) and provide reporters with a reference number.
- 78 The [ASIC Service Charter](#) sets out our commitment to handling 70% of reports of misconduct from the public within 28 days of receiving all relevant information. Our [annual reports](#) describe how we have performed against this measure. See also Table 7 in Appendix 1.
- 79 We have published various resources to assist individuals and entities who report alleged misconduct. These include:
- (a) information on how to provide a report and supporting material to ASIC, together with guidance on matters that are not within our jurisdiction, see [Complaints about companies, organisations or people](#);
  - (b) public guidance on how we handle reports of misconduct from the public, see [Information Sheet 153 How ASIC deals with reports of misconduct](#) (INFO 153); and
  - (c) information for AFS licensees and credit licensees about the reportable situations regime, see [Reportable situations for AFS and credit licensees](#).
- 80 Reporters of alleged misconduct determine how much or how little they wish to tell us, and they often provide extensive information when additional material is requested. We are not prescriptive and appreciate that some people prefer to report misconduct anonymously. Where we require additional information to fully assess the allegations, we ask the reporter to provide further specific details. Given the volume of reports received, we are unable to conduct follow-up enquiries in every case.

## C How we identify matters for investigation and enforcement

### Key points

To address our capacity and capability to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct (including the resourcing allocated to such action to ensure it progresses in a timely manner as raised by paragraph (f) of the Terms of Reference), we set out below how we prioritise and assess reports of alleged misconduct, identify matters for investigation and enforcement action and resource them.

We make careful decisions in identifying matters for further action, including investigation and enforcement action, to ensure we use our resources effectively to target the highest risk or most harmful misconduct. Our processes require us to exercise complex judgement using our expertise and experience in assessing a broad range of factors and information.

We triage reports of alleged misconduct to prioritise reports that are likely to relate to our strategic or enforcement priorities, involve the most serious conduct and may cause the most widespread harm. Higher risk-rated matters are subject to more detailed assessments.

Assessment outcomes include:

- referrals to our supervisory teams for further action (which may lead to further surveillance, warnings to a particular entity or to industry, remediation, or a subsequent referral to an enforcement team for investigation);
- immediate referrals to an enforcement team for formal investigation; or
- no further action.

While we consider all reports of alleged misconduct, we do not conduct in-depth inquiries into every report. This is because some reports do not give ASIC clear, actionable cases that should be prioritised and assessed in detail.

Even though we do not and cannot progress every report we receive for formal investigation, we capture valuable intelligence from these reports that informs our future work: see case studies.

Our formal investigations are necessarily directed at the most serious matters, including matters that align with our enforcement priorities and where enforcement action is likely to have a broader impact in the market or to protect a range of consumers.

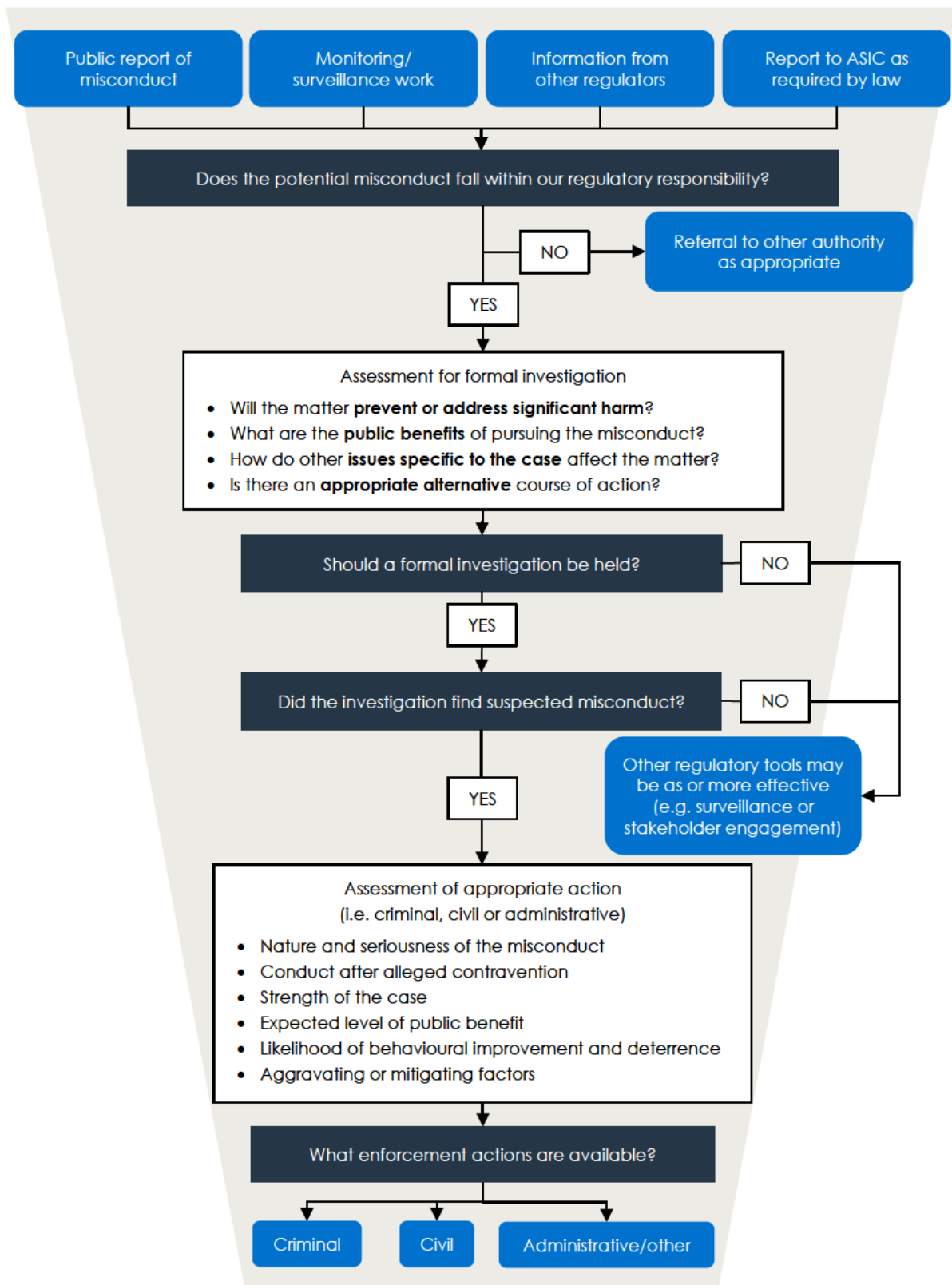
## What we consider when assessing matters

- 81 When assessing reports of alleged misconduct and deciding which reports to examine in detail, which apparent breaches to investigate and what enforcement action to take, we consider a range of factors to ensure that we direct our resources effectively.
- 82 While our specific processes can vary depending on the nature of the matter and the circumstances in which it came to our attention, in general we consider the following four factors together with our strategic and enforcement priorities:
- (a) preventing or addressing significant harm to consumers, markets or the financial system;
  - (b) the benefits to the public from enforcement, including where there is significant public interest or concern;
  - (c) whether there are issues specific to the case that warrant us pursuing action (such as whether the matter is within ASIC’s jurisdiction; the nature, impact and age of the misconduct; whether the misconduct is repeated or continuing, and whether reliable evidence is likely to be available to prove the alleged misconduct); and
  - (d) whether there are any appropriate alternatives to formal enforcement action or investigation that would, on balance, be more efficient—such as engagement with stakeholders, surveillance, guidance and education.

Note: These factors are set out in [Information Sheet 151](#) *ASIC’s approach to enforcement* (INFO 151).

- 83 We can only undertake a fraction of the potential regulatory and enforcement actions that come to our attention. Our focus is on choosing the regulatory and enforcement actions that will maximise our regulatory impact in reducing harm to consumers and markets.
- 84 Figure 2 is a flowchart setting out our general approach to taking enforcement action taking into account the factors set out in [INFO 151](#). Matters can progress from initial reports of alleged misconduct to surveillances and/or to investigations. Throughout this process, we apply risk-based processes and tools to make ongoing assessments about what matters to take forward. Our strategic and enforcement priorities, which are regularly updated to reflect current concerns, provide a further high-level framework that guides our decisions on what matters should be investigated or subject to enforcement action.

**Figure 2: ASIC’s approach to investigation and enforcement**



Note: See Table 22 in Appendix 6 for the process shown in this flowchart (accessible version).

## Prioritising and assessing reports

- 85 We have processes in place to enable us to:
- (a) methodically and consistently prioritise reports for assessment; and
  - (b) apply the factors set out at paragraph 82 to assess and identify matters for investigation and enforcement action.
- 86 Given the high volume of reports of alleged misconduct we receive, we use both technology-based and manual methods to prioritise reports that are likely to relate to our strategic or enforcement priorities, involve the most serious conduct and may cause the most widespread harm. Higher risk-rated matters are subject to more detailed assessments.
- 87 Our specific processes for prioritising reports of alleged misconduct vary depending on the type of report. For example:
- (a) *reports of misconduct from the public* are manually triaged to assign each report with a risk rating that determines the level of assessment that will be undertaken. A higher risk rating indicates the case is more likely to relate to our strategic or enforcement priorities, concern egregious, widespread or harmful conduct and should be subject to a more comprehensive assessment. During triage, information is identified and captured, including a description of the allegations, related persons and entities and whether they are licensed by ASIC;
  - (b) *initial statutory reports from liquidators* are automatically triaged. We use digital tools to make an initial assessment, using a conditional logic framework that takes into account a range of different factors depending on the conduct being reported by the liquidator. We use the responses to automated questions to determine whether a supplementary report is requested from the liquidator. We also provide information from initial statutory reports made by registered liquidators to the Australian Taxation Office (ATO) to help identify illegal phoenix activity;
  - (c) *supplementary statutory reports from liquidators* are manually triaged and assessed in the same way as reports of misconduct from the public; and
  - (d) *reportable situations from lodgements* (previously breach reports) are automatically ‘risk-scored’ and selectively reviewed according to the risk-score and other criteria. We also use data analytics tools to interrogate data from all reportable situation notifications, to understand thematic or sector-specific issues aligned with ASIC’s priorities.
- 88 We consider each report alongside a broad range of data sources available to us at the time, including the subject/person/entity’s regulatory history, open-source information, EDR data, information from other regulators and market trading data. We also take into account whether there are multiple reports about the same type of conduct or the same entity.

89 Not all reports of alleged misconduct give ASIC clear, actionable cases that should be prioritised and assessed in detail (such as those relating to matters outside of ASIC’s jurisdiction, where there is no allegation of a breach of the law, in some cases where the alleged conduct occurred long before it was reported, or matters that have already been litigated). Thus, while we consider every report, we do not conduct in-depth inquiries in relation to every report of alleged misconduct.

## Assessment outcomes

90 Table 1 contains the possible outcomes of our assessment.

**Table 1: Reports of alleged misconduct—assessment outcomes**

Outcome	What this means
<b>Referred for action by ASIC</b>	<p>When reports are referred for further action, they are referred to a supervisory team, an enforcement team or the Small Business Engagement and Compliance team (SBE&amp;C).</p> <p><b>Referral to supervisory team:</b></p> <p>Many reports of alleged misconduct are referred to a supervisory team who are subject matter experts on the sector of the alleged misconduct. Work by these teams may lead to surveillance (see below), remediation, rectification to improve industry compliance, warnings to specific entities, industry or the general public or a subsequent referral for an enforcement investigation.</p> <p><b>Surveillance:</b> This involves the review of an entity, individual, product, practice, set of transactions or industry sector, to identify misconduct or harm, understand and influence behaviours, and drive compliance. The activity usually entails engaging with relevant entities and obtaining further evidence via compulsory notices and other means to form a view whether formal investigation is warranted, or whether a better regulatory outcome would be achieved by other means. Surveillance outcomes include improved compliance, consumer remediation or other redress, administrative action such as banning, licence suspension or cancellation.</p> <p><b>Referral to enforcement team or SBE&amp;C:</b></p> <p>This generally refers to formal investigations commenced under s13 of the ASIC Act or s247 of the <i>National Consumer Credit Protection Act 2009</i> (National Credit Act).</p> <p>The SBE&amp;C team conducts surveillance, investigates and takes enforcement actions directed at protecting small businesses and their creditors from harm.</p>
<b>Resolved</b>	<p>This can involve ASIC providing information to the reporter of misconduct about external dispute resolution through AFCA, 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.</p>



Outcome	What this means
<b>Analysed and assessed for no further action</b>	We have made preliminary enquiries and may have requested further information and determined that no further action is required. This is usually due to insufficient evidence or another reason, such as another agency or 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.
<b>No jurisdiction</b>	If a report is not within our jurisdiction, where relevant we direct reporters to the appropriate agency or solution.
<b>No breaches or offences</b>	The issues raised do not give rise to actionable breaches under the legislation we administer (e.g. poor service from a financial institution).

### Ongoing monitoring

- 91 It's important to note that when we receive reports from the public about concerning conduct, we may not always be able to pursue regulatory action at that first or initial stage. However, we continue to monitor reports, and this helps us identify systemic patterns of conduct (see, for example, Case Study 1).

### Individual complaints

- 92 We often receive reports of alleged misconduct from consumers and investors about their individual disputes. When consumers or small businesses complain to ASIC, we register the complaint and consider whether it raises underlying regulatory issues.
- 93 Generally, we do not act for individuals and only take action when it will result in a greater impact in the market and benefit the general public more broadly. We will advise the complainant of their right to take their complaint to either the firm's IDR process or to AFCA to pursue a remedy, as appropriate. It is for each complainant to decide whether to take this action. See also Section F for more information on consumer complaints, dispute resolution and compensation.

### Requesting a review of ASIC's assessment

- 94 For reports of misconduct from the public, reporters can request that we conduct an internal review of our initial assessment of the report. Further to this review mechanism, reporters may also escalate concerns regarding ASIC's handling of their report to the Commonwealth Ombudsman.

## Capturing the intelligence value of reports

- 95 Even though we do not and cannot action every report, reports of alleged misconduct provide valuable intelligence that assists to identify trends and patterns in behaviour, broader issues in the market or serious misconduct.
- 96 We capture specific data from all reports of alleged misconduct to assist ASIC to:
- (a) identify the firms, people and problems troubling consumers, investors and creditors, which informs how we set and review our priorities and develop priorities for future years;
  - (b) identify potential future targets for surveillance activity and onsite or audit inspections;
  - (c) select future cases for possible enforcement action;
  - (d) inform other agencies of misconduct relating to their regulated populations or remit; and
  - (e) inform our public communications, warnings and guidance.
- 97 For example, a pattern of reports may lead us to conduct a surveillance of a particular entity or about a particular issue. Or, we might commence an investigation against an entity for certain conduct which is informed by a specific report of alleged misconduct from the public, concerns about similar practices in the industry observed through our own supervisory and surveillance work and where we have also received a number of other reports of alleged misconduct about other conduct of that entity.
- 98 We have provided two case studies in this submission. These illustrate how we draw on intelligence from reports of alleged misconduct, together with our own surveillance activities, to inform regulatory, enforcement and other actions directed at protecting consumers from harm: see Case Study 1 and Case Study 2.
- 99 As illustrated in Case Study 1, while we were initially unable to take action in relation to reports of misconduct from the public, the intelligence gained from those reports about ongoing consumer harm, together with our own surveillance activities, allowed us to ultimately take action against Cigno's evolving business model.
- 100 Case Study 2 illustrates how reports of misconduct from the public can inform us about emerging harms and contribute to our strategies for scam prevention.



## Case study 1: ASIC actions against lending practices involving Cigno

### CASE SUMMARY

In 2016, we started receiving reports about Cigno Pty Ltd (Cigno).

Cigno managed the loans for credit provider Gold Silver Standard Finance Pty Ltd (GSSF), which relied on the s6(1) exemption in the National Credit Code relating to short term credit facilities to avoid regulation under the National Credit Act.

Reports indicated that consumers were being charged high fees for short term loans. As more reports were received, we became concerned about systemic patterns of conduct targeted at vulnerable consumers.

Drawing on information from ongoing reports about Cigno and from our own surveillance activities, we applied a range of regulatory and enforcement tools.

Our actions ultimately resulted in [product intervention orders \(PIOs\) for short term and continuing credit products](#), thereby protecting consumers with limited borrowing options. Such consumers are a target for lending companies that profit from borrower vulnerability by charging high fees.

### CASE DETAILS

#### First reports of high fees for short term loans

*September–December 2016:* We receive and assess four reports of alleged misconduct about Cigno and GSSF regarding high fees charged for servicing short term credit facilities.

We decide to take no action because of failed 2015 litigation against the same lending model (see *Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648) but continue to monitor reports.

#### ASIC commences surveillance

*June 2017:* Now with 15 reports received, we become increasingly concerned about a pattern of conduct aimed at vulnerable consumers. One of our supervisory teams commences a surveillance of Cigno and GSSF.

#### ASIC contacts Cigno, considers regulatory options

*November 2017:* We write a letter of concern to Cigno. In reply, Cigno claims no breach, as the National Credit Act does not apply to its activities. ASIC continues to consider regulatory options ahead of the pending [product intervention powers](#). Reports of misconduct about Cigno continue.

#### Product intervention powers commence

*April 2019:* The new product intervention powers commence, allowing ASIC to make PIOs that temporarily ban financial products risking consumer detriment.

*July 2019:* Public consultation on the proposed PIO for short term credit facilities results in 33 submissions in favour of the proposed PIO, including one from a Melbourne community legal centre about its homeless clients being charged a total of [up to 700% of their original loans](#). We receive more reports about Cigno after this consultation.

*September 2019:* ASIC makes an industry wide short term credit PIO which applies to Cigno's business model and

carries criminal and civil penalties if breached. Cigno applies for judicial review of the PIO, which the Federal Court and Full Federal Court rejects.

#### Cigno starts a new business model

*September 2019:* Cigno and a new company, BHF Solutions Pty Ltd (BHFS), begin operating a new business model offering a credit product under the exemption in s6(5) of the Credit Code, *continuing credit contracts*. In July 2022, we make a new continuing credit PIO that applied to this new business model (see note for more information).

*February 2020:* An ASIC enforcement team commences an investigation into the new Cigno business model for a breach of the National Credit Act regarding engaging in unlicensed credit activities.

#### ASIC takes legal action for unlicensed activity

*September 2020:* We [commence](#) legal action in the Federal Court against Cigno and BHFS in relation to the continuing credit lending model and apply for interim and permanent injunctions.

*June 2021:* Our application [is dismissed](#) by the Federal Court.

*July 2022:* ASIC [is successful on appeal](#) to the Full Federal Court (see *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2022] FCAFC 108), after which Cigno and BHFS apply for special leave to appeal to the High Court.

*December 2022:* The High Court [dismisses](#) Cigno and BHFS's special leave applications. The Federal Court is yet to determine the relief ASIC sought against Cigno and BHFS.

**Note:** Regarding the new product, ASIC consulted in July 2020 (and again in November 2020), proposing to make a new PIO. In November 2020 we identified possible legal limitations in our power to make PIOs and paused this action. In June 2021 the limitation was addressed by a legislative amendment to the product intervention powers in the Corporations Act. We commenced a further consultation in December 2021 and made a short term credit PIO and a new continuing credit PIO in July 2022 (addressing both the past and current Cigno lending models).

## Case study 2: How ASIC engaged with Google to change their advertising policy

### CASE SUMMARY

During the early stages of the COVID-19 pandemic, ASIC saw a spike in the volume of reports of misconduct received from scam victims.

Many reports appeared to be about unlicensed investments gone wrong. Common to many reports was victims sourcing their 'investment opportunities' through online searches and social media advertisements.

Our strategy against scams is to disrupt them because most scammers operate from overseas and beyond ASIC's jurisdiction.

We established three internal working groups that focused their expertise on scam prevention, unlicensed conduct and advertising regulation. This enabled us to respond quickly to the pattern of concerning conduct and protect consumers.

Google's new financial services advertising policy is an example of how ASIC employs a variety of regulatory tools in response to reports of misconduct, including influencing and liaising with industry.

Generally, consumers have lost money, sometimes in significant amounts, before they report this type of misconduct to us. We saw potential for the financial services advertising policy being implemented in Australia to benefit Australian consumers; by reducing their exposure to potentially harmful, targeted advertisements, they are prevented from falling victim to scams in the first place.

### CASE DETAILS

#### Scam reports rise during COVID-19

*Early to mid-2020:* We observe an increase in reports of investment scams advertised through online searches and social media.

*June 2020:* ASIC publishes a warning to providers of financial products and services, noting their [advertiser obligations and ASIC's expectations](#). We use the opportunity to announce our new working groups and their focus on predatory behaviour and misleading or deceptive conduct. We also provide a reminder about guidance on good practices for advertisers.

#### Investigations commence

*Late 2020 to early 2021:* We commence investigations into several scams involving financial products and services and continue to monitor incoming reports. We scan social media and advertising platforms for problematic advertising. We also issue various public warnings about scams and publish related consumer-focused content on the [ASIC Moneysmart website](#). Our communications about scams at this time include details about reporting suspected investment scams to ASIC.

We continue to see a rise in reports of misconduct about investment scams. Based on our findings, including analysis of the reports of misconduct we had received, we decide to actively pursue engagement with major digital platforms as an important aspect of our strategy to disrupt scams.

**Note:** We reported details about our scam investigations and the enforcement actions taken during this time in the following media releases—[20-244MR](#), [20-256MR](#) and [21-010MR](#).

#### Liaison with digital platforms

*May 2021:* ASIC commences meetings with digital platforms to relay our concerns about scams and better understand how the platforms contribute to monitoring advertising and scams that may cause significant consumer harm.

*August 2021:* Google implements a new advertising policy in the UK requiring financial products and services advertisers to demonstrate that they were suitably authorised by the UK Financial Conduct Authority. In July 2022, *The Times (UK)* reports that since the new advertising policy had begun, no TSB Bank account holders had fallen victim to scams advertised through Google.

*June 2021–May 2022:* We engage with Google about similarly amending its advertising policy in Australia.

#### Google announces new requirements

*June 2022:* Google announces its [new verification requirements for certain financial services advertisers](#) for Australia. Effective from 30 August 2022, a financial services advertiser has had to hold an AFS licence and/or Australian credit licence (or an exemption) to advertise on Google's platforms.

We continue to engage with other digital platforms about similar changes to their advertising policies, and other avenues for reducing harmful conduct.

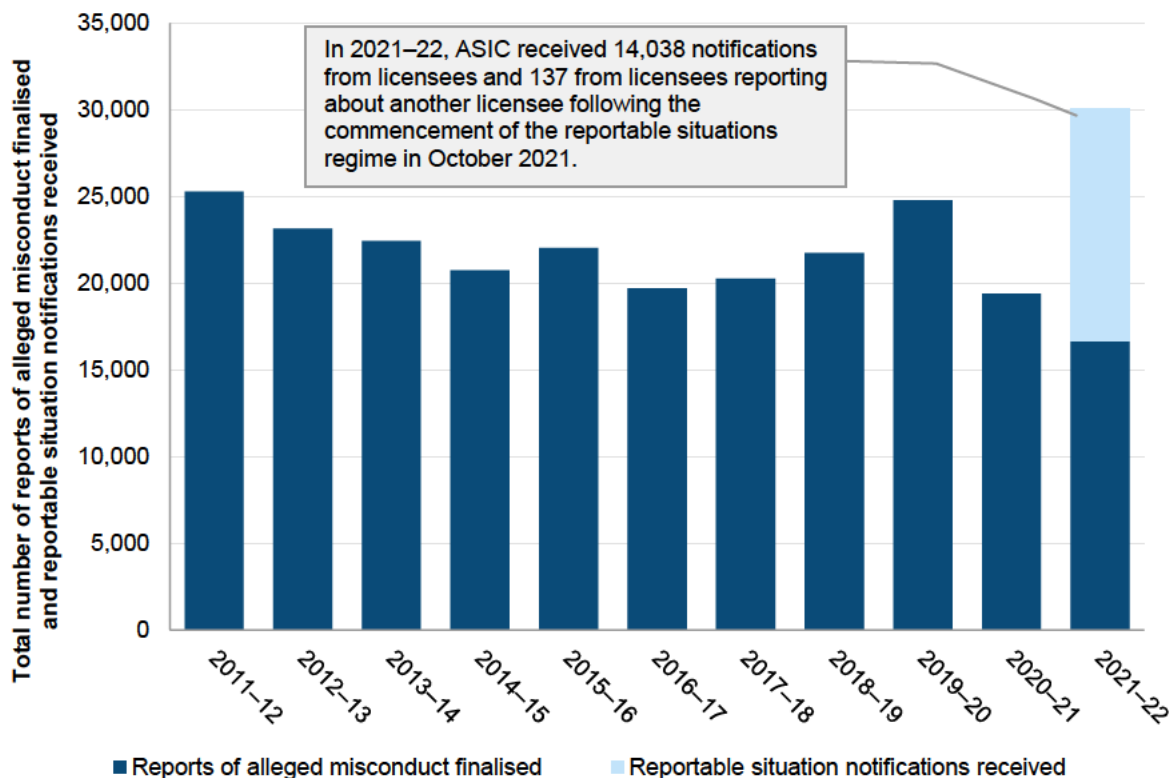
## Reports finalised between 2011–12 and 2021–22

101 To assist the Inquiry and address the Terms of Reference, we provide data below on our assessment of reports of alleged misconduct from the last 10 years. While this data can provide a sense of trends over time, it does not capture the complexity of our work, nor does it measure our regulatory impact, as can be seen from the case studies. As we have explained above, in many cases reports of alleged misconduct may not directly lead to an investigation or enforcement action, but instead form part of the range of information that might ultimately inform our decision to commence an investigation or take enforcement action.

102 Figure 3 shows the number of reports of alleged misconduct finalised by ASIC each year for the last 10 years and the reportable situation notifications received in 2021–22 (see Table 2 and paragraph 190 in Appendix 1 for underlying data).

103 A report of alleged misconduct is classified as ‘finalised’ when its assessment is complete and it has been referred to a supervisory team, an enforcement team, SBE&C or other team for further action, resolved, or assessed as requiring no further action. We merge reports about the same entity and issue (such that one finalised referral for investigation or surveillance may represent multiple initial reports of misconduct received) and reports may be assessed as requiring no further action if a surveillance or enforcement action is already on foot on substantially the same issues.

**Figure 3: Total number of reports of alleged misconduct finalised and reportable situation notifications received (2011–12 to 2021–22)**



Note: See Table 2 in Appendix 1 for an accessible version of this figure.

- 104 Table 3–Table 5 in Appendix 1 set out the assessment outcomes of the reports of alleged misconduct finalised over the last 10 years. In 2021–22, 13% of reports of misconduct from the public and AFCA notifications were referred for action, 11% were resolved and 66% were analysed and assessed for no further action. 10% of breach reports and 20% of supplementary statutory reports were referred for further action, with the balance analysed and assessed for no further action.
- 105 Table 6 in Appendix 1 shows the distribution by team for reports that were referred for further action. In 2021–22, 9% of reports of alleged misconduct that were referred for action were referred to an enforcement team, 32% to supervisory teams and 49% to the SBE&C team.
- 106 We expect the volume of reports of alleged misconduct that we receive to continue to grow. For example, while we received 14,175 notifications under the reportable situations regime, only 6% of the licensee population lodged a report under that regime during its first nine months. Further work is underway to improve the regime’s operation. For a detailed overview, see [Media Release \(22-295MR\) Breach reporting: ASIC publishes insights from the reportable situations regime \(27 October 2022\)](#). The notifications received have already substantially broadened the information available about licensee conduct.

## Investigations

- 107 Formal investigations are investigations commenced under s13 of the ASIC Act or s247 of the *National Consumer Credit Protection Act 2009* (National Credit Act). We carefully consider which formal investigations to pursue as these are resource intensive. We commence only a small number of formal investigations each year, directed at the most serious matters.

### Sources of investigations

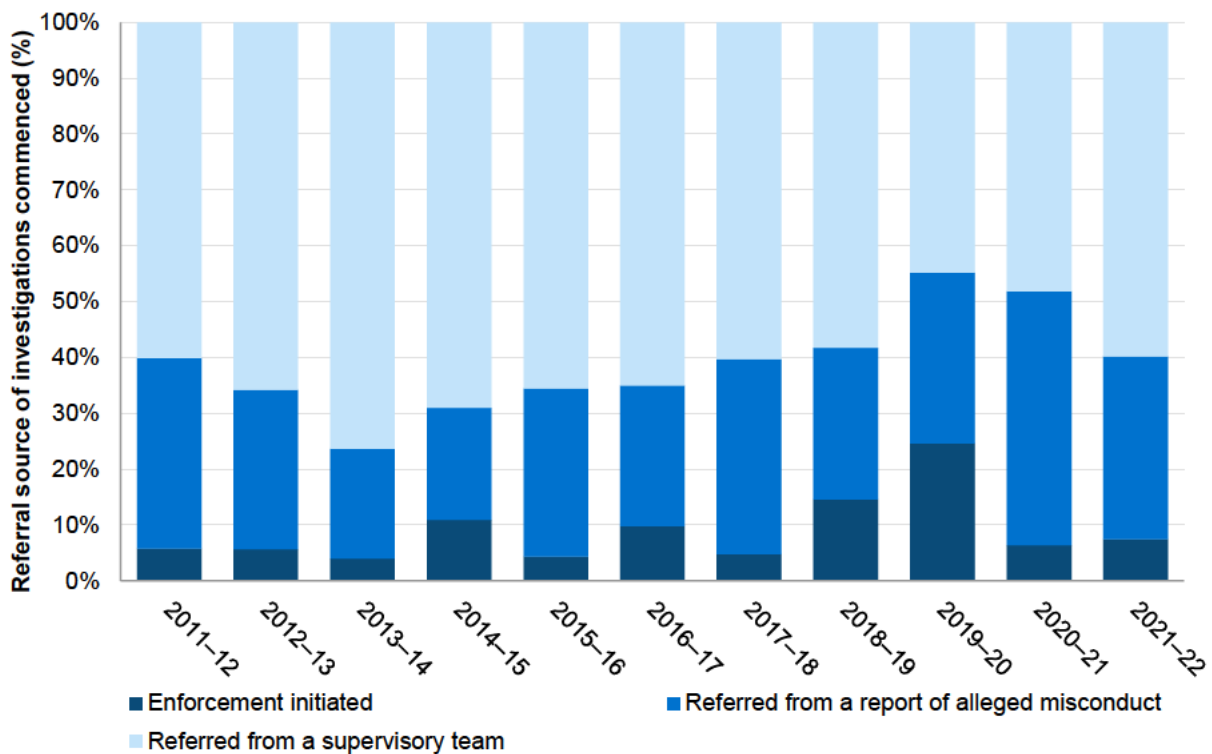
- 108 A large proportion of our investigations arise from referrals by ASIC supervisory teams following surveillance activity, including surveillance activity arising from reports of alleged misconduct.
- 109 Surveillance activity may also result in ASIC achieving outcomes such as improved compliance by entities, remediation or other forms of consumer redress, administrative action such as bannings (which prevent a person from engaging in specified conduct), licence suspension or cancellation, or issuing stop orders and product intervention orders, without a referral to an enforcement team for investigation.

110 Figure 4 shows the sources of enforcement investigations commenced over the past 10 years (see Table 9–Table 10 in Appendix 2 for underlying data). In 2021–2022, ASIC’s enforcement teams commenced 107 investigations, of which:

- (a) 35 (33%) arose directly from reports of alleged misconduct;
- (b) 64 (60%) were referred from supervisory teams (some referrals from supervisory teams may have arisen from surveillances which were prompted by a report of alleged misconduct, or because of a pattern or series of reports); and
- (c) 8 (7%) were initiated by our enforcement team, without a referral from a report of alleged misconduct or a supervisory team.

Note: Table 8 in Appendix 2 contains the total number of investigations commenced and completed over the past 10 years.

**Figure 4: Referral sources of investigations commenced (2011–2012 to 2021–2022)**



Note: See Table 10 in Appendix 2 for an accessible version of this figure.

### Sources of successful litigated enforcement actions

111 We have reviewed the source of successful litigated enforcement actions we achieved in 2021–2022. Of the 34 successful criminal actions, two-thirds (68%) originated from a report of alleged misconduct and one third (32%) originated from surveillance or data collection.



112 Of the 61 successful civil actions, almost half (49%) originated from surveillance or data collection, 33% originated from a report of alleged misconduct and 18% originated from self-reported breaches by entities.

113 These numbers do not necessarily capture whether matters raised in a report of alleged misconduct were referred to a supervisory team for further action before being referred to enforcement (due to changes in our case management systems over time).

### **Resourcing and timeliness of investigations**

114 Our resources are primarily directed at identifying and acting against misconduct. In general, supervisory teams (which supervise specific subsectors of our regulated population) are responsible for conducting surveillances and using regulatory tools such as working with industry to improve compliance through rectifying their processes, licence suspension and cancellations, stop orders and product intervention orders. Enforcement teams are responsible for investigating and pursuing enforcement action that is generally court based. Appendix 5 contains information on the number of ASIC staff and enforcement staff (including support teams) over the past 10 years.

115 A broad range of considerations can inform how individual investigations are resourced and progressed. These include:

- (a) the type of enforcement action(s) contemplated which informs the relevant evidentiary standards that need to be met (administrative, civil or criminal);
- (b) the scope of the investigation including timeframe and breadth of the alleged misconduct under investigation, and the number of suspects and witnesses;
- (c) the volume of electronic or documentary evidence required to be processed and reviewed;
- (d) alignment with our strategic and enforcement priorities as well as factors such as risk of ongoing harm and objective characteristics of the seriousness of the misconduct; and
- (e) considerations about whether resources should be directed to taking on new investigations or focusing on progressing existing matters in a timely manner.

116 We recognise the importance of investigations being conducted thoroughly and efficiently and to deliver timely enforcement outcomes that carry a strong regulatory message of deterrence and public denunciation. We need to carefully obtain evidence in admissible form before we can intervene. This can take time given the complex factual situations and the breadth of possible misconduct we often see, involving numerous parties and large numbers of transactions over extended time periods.

## Use of coercive powers

117 We use a range of compulsory information-gathering powers to assess whether there is evidence that a suspected contravention of the law has occurred. Some powers, such as those requiring the production of documents or to disclose information, do not require a formal investigation to be on foot and are also used by our supervisory teams in undertaking surveillance activities. The type and number of times we exercise our powers depends on the nature, breadth and complexity of each investigation.

Note: ASIC has provided information about our use of coercive powers in a [response](#) to questions on notice (see Set 1 Question 6).

## D Enforcement actions

### Key points

To address our capacity and capability to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct, and the specific issues raised in paragraphs (c), (d) and (e) of the Terms of Reference, in this section we provide details of our enforcement actions. We also provide general information about the enforcement tools available to us, including court proceedings, to enforce penalty offence provisions.

Note: Paragraphs (c), (d) and (e) of the Terms of Reference relate to whether ASIC is meeting expectations with respect to regulatory action and enforcement; the range, use and effectiveness of regulatory tools; and the offences from which penalties can be considered.

We consistently achieve strong enforcement outcomes, including court-based outcomes, to address misconduct. In 2022, our enforcement activity led to 42 individuals charged in criminal proceedings with a total of 312 criminal charges and \$222.1 million in civil penalties imposed by the courts.

We pursue litigated outcomes and substantial penalties, where supported by the available evidence, to hold to account those who contravene the law and to deter similar misconduct in the future.

In addition to litigation, we use a broad range of enforcement tools to respond to instances of misconduct in a proportionate and targeted way. We address less serious conduct through less time-consuming and less costly tools to extend our impact.

Our enforcement work is visible to the public through our own proactive publication of information regarding our activities, as well as formal accountability mechanisms. We engage with a variety of stakeholders including government, industry and the community to inform our strategic and enforcement priorities and gather intelligence about concerning conduct in the industries we regulate.

We are subject to a range of formal and informal accountability mechanisms that enable us to gain insights on how we are meeting government, industry and community expectations.

### Our enforcement record

- 118 We consistently demonstrate strong enforcement outcomes. In 2022, our enforcement activity included a high volume of litigated matters and resulted in a broad range of outcomes including:
- (a) 42 individuals being charged in criminal proceedings with a total of 312 criminal charges;
  - (b) 14 custodial sentences and 19 non-custodial sentences;
  - (c) 167 defendants prosecuted for strict liability offences;



- (d) 18 civil penalty cases commenced;
- (e) \$222.1 million in civil penalties imposed by the courts; and
- (f) 84 individuals removed or restricted from providing financial services or credit and 40 individuals disqualified or removed from directing companies.

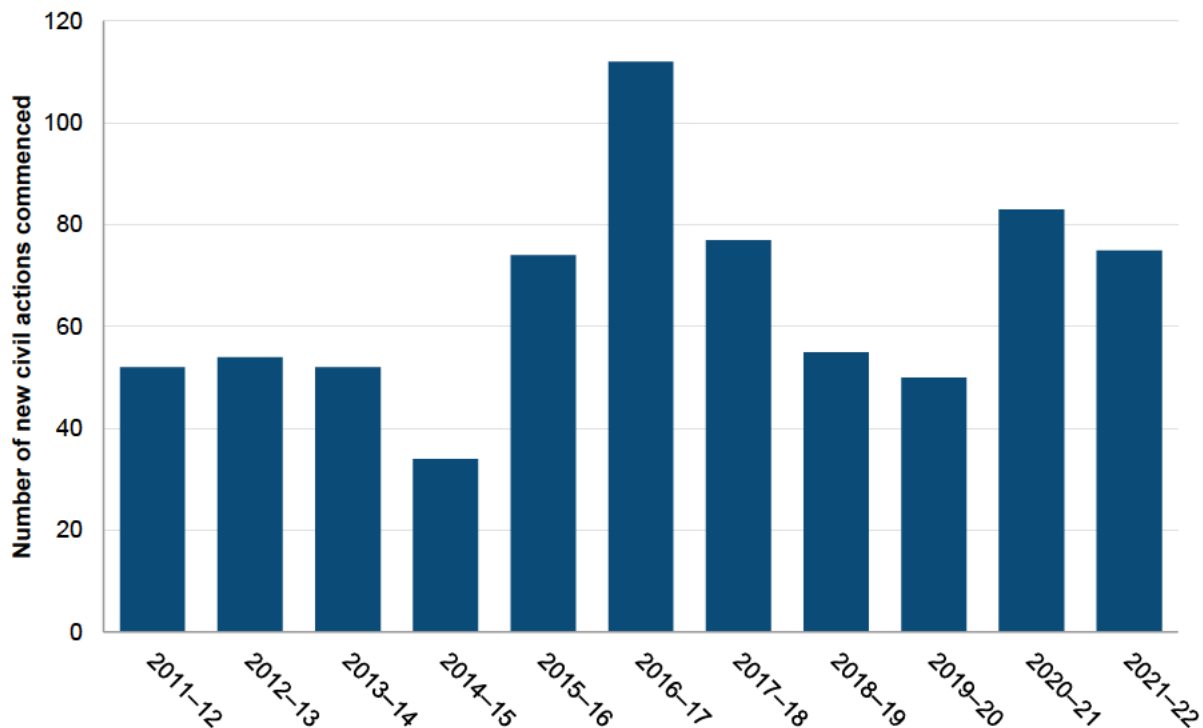
Note: See [Summary of enforcement outcomes: January to June 2022](#) and [Summary of enforcement outcomes July to December 2022](#).

119 Our actions are directed at both individuals and corporations across our regulatory remit including insurance, credit, superannuation, financial advice, managed investments, markets and auditing sectors.

120 In recent years, we have made submissions to the court that much higher penalties should be applied for contraventions of the legislation we administer. As shown in Table 12 in Appendix 3, since 2019 the total value of civil penalties obtained by ASIC has significantly increased to around \$229.9 million in 2021–2022 (much of which were penalties obtained under the previous, lower maximum penalty levels: see paragraph 133).

121 Figure 5 shows the total number of new civil actions commenced by ASIC each year over the past 10 years (see Table 11 in Appendix 3 for underlying data).

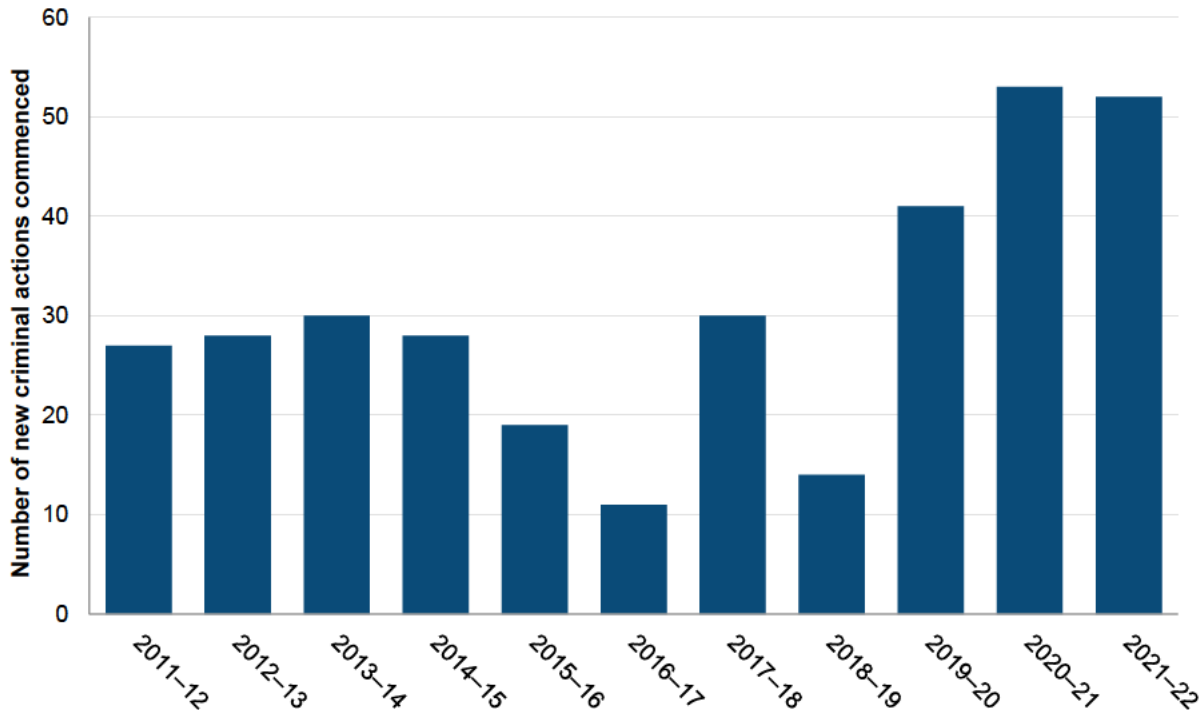
**Figure 5: Civil actions commenced (2011–12 to 2021–22)**



Note: See Table 11 in Appendix 3 for an accessible version of this figure.

122 Figure 6 shows the total number of new criminal actions commenced by ASIC over the past 10 years (see Table 13 in Appendix 3 for underlying data).

**Figure 6: Criminal actions commenced (2011–12 to 2021–22)**



Note: See Table 13 in Appendix 3 for an accessible version of this figure.

123 Appendix 3 contains further information on the outcomes of ASIC’s civil and criminal actions over the past 10 years. Appendix 4 contains information about our enforcement outcomes related to illegal phoenix activity and our approach to offences related to creditor defeating dispositions which were introduced in 2020.

Note: We have also provided information about our investigations and enforcement outcomes relating to potential illegal phoenix activity and insider trading in a [response](#) to questions on notice (see Set 1 Questions 4 and 5).

## Enforcement and regulatory toolkit

124 We use a broad enforcement toolkit in a targeted and proportionate way to reduce the risk of misconduct in the markets and sectors we regulate. Our capacity to take forceful enforcement action when the circumstances warrant it lies at the heart of our effectiveness as a regulator.

125 The range of enforcement options enable us to calibrate our regulatory response to the circumstances of each case. We will often use a combination of regulatory tools to stem harm or disrupt misconduct.

## Continued focus on court-based outcomes

- 126 Litigation will always be an important part of our enforcement toolkit. Litigated outcomes send a strong message denouncing particular conduct and deter the contravener and others from engaging in misconduct in the future. We pursue litigated outcomes and substantial penalties where this is supported by the available evidence. According to the strategic regulation theory discussed at paragraphs 53–56, our demonstrated willingness to escalate to the most serious kind of enforcement action where required also enhances the effectiveness of less coercive tools that we use to encourage compliance. Even unsuccessful legal action plays an important role in clarifying what conduct is and is not permitted under the law.
- 127 We balance litigating the most egregious and harmful conduct with addressing less serious conduct using less time-consuming and less costly enforcement tools. Non-court-based outcomes can serve important protective purposes and deter or prevent serious misconduct from occurring in the first place.
- 128 We consider the circumstances of each case in deciding which enforcement action to pursue. [INFO 151](#) sets out some factors that we may take into account in determining the appropriate action to pursue, including:
- (a) nature and seriousness of the suspected misconduct;
  - (b) conduct of the person or entity after the alleged contravention, such as whether the misconduct was self-reported or what remedial steps have been taken;
  - (c) strength of our case;
  - (d) expected public benefit in taking enforcement action;
  - (e) likelihood of behavioural improvement and deterrence from our enforcement action; and
  - (f) any aggravating or mitigating factors such as whether the misconduct was deliberate or inadvertent.
- 129 Non-court-based outcomes can also complement litigation. For example, to address the harm posed by certain risky retail derivative products to consumers, we have made product intervention orders imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients. See [Media Release \(21-060MR\) ASIC's CFD product intervention order takes effect](#) (29 March 2021). We have also taken a range of licensing, banning and civil penalty action for misconduct by various entities and individuals involving such products.
- 130 Case Study 1 is a further example of where we have used both litigation and product intervention orders to reduce the risk of consumer harm and significant detriment as a result of high-cost lending products and services which target vulnerable consumers. In each of these cases, the regulatory

impact of our actions cannot be adequately captured by focusing solely on metrics relating to the number of reports of alleged misconduct that were referred for investigation or the number of enforcement actions we achieved in a given year.

### **Penalty offences and nature of liability**

- 131 The laws administered by ASIC carry a broad range of potential criminal, civil and administrative consequences for contraventions. These include:
- (a) *terms of imprisonment or fines* imposed by a court after conviction for criminal offences;
  - (b) *civil pecuniary penalties* imposed by a court after civil proceedings for contravention of civil penalty provisions. A court may also make orders including injunctions restraining certain conduct, adverse publicity orders, orders requiring the disgorgement of profits and/or payment of compensation;
  - (c) *automatic disqualification* from managing a corporation if a person is convicted on indictment of certain offences; and
  - (d) *protective administrative actions* that may be taken by ASIC, such as issuing infringement notices, stop orders, product intervention orders, banning orders, imposing licence conditions, cancelling or suspending licences, or accepting court enforceable undertakings.
- 132 Many provisions in these laws provide for ‘dual-track’ and sometimes ‘tri-track’ regulation, by which the same conduct may be subject to a fault-based criminal offence, civil penalty liability, and/or a strict liability criminal offence. For example, insider trading can be prosecuted as a criminal offence or as a civil penalty contravention.
- 133 In 2019, changes were made to the penalties available under ASIC-administered legislation. This was to ensure that the penalty regime remained adequate for addressing serious misconduct and to act as a credible deterrent to misconduct. The changes included:
- (a) increases to maximum terms of imprisonment for the most serious offences;
  - (b) significantly higher maximum civil penalties for both individuals and corporations; and
  - (c) an expansion of civil penalties to apply to a greater range of misconduct.
- 134 We may also seek court orders in the nature of asset preservation orders, orders appointing receivers to particular property or businesses or the winding up of a company or scheme.

- 135 Criminal prosecutions require a higher standard of proof (‘beyond reasonable doubt’) than is required in civil matters (‘balance of probabilities’). However, the court must be satisfied to a higher degree in civil penalty proceedings (‘*Briginshaw* principle’) than in other civil matters.
- 136 [INFO 151](#) sets out further details about the range of enforcement actions available to ASIC.
- 137 The broad range of criminal, civil and administrative sanctions and associated penalties available to ASIC is consistent with the strategic regulation theory and ‘enforcement pyramid’ outlined at paragraphs 53–56. It enables us to calibrate our response, applying sanctions of greater or lesser severity commensurate with the misconduct.

## Our transparency and accountability mechanisms

- 138 We are transparent about our enforcement activities and are subject to a range of formal and informal accountability mechanisms which enable us to gain insights and perspectives on how we are meeting government, business and community expectations. We provide details of these processes below to assist the Inquiry consider paragraph (c) of the Terms of Reference.
- 139 Our enforcement work is visible to the public through our media releases, public reports and updates. We consistently report on our enforcement activities through quarterly enforcement updates. We issue media releases in relation to all of our enforcement outcomes, and these can be found by searching on our website by topic of interest.
- 140 Our enforcement work and how this is carried out is regularly overseen and scrutinised by the courts and tribunals (for example, in the course of litigation commenced by ASIC and challenges by individuals and entities to our use of our powers) and the public (for example, through freedom of information requests and media reports).
- 141 We outline our core external and internal priorities in our [corporate plan](#) and list the actions we are taking to give effect to those priorities. In November 2022, we released our [enforcement priorities for 2023](#). We have also published [INFO 151](#), which sets out our approach to enforcement.
- 142 Our yearly performance statement in the [annual report](#) shows a range of qualitative and quantitative indicators about our performance against our strategic priorities and ongoing work, including our enforcement outcomes. Our annual report also meets ASIC’s statutory reporting obligations, including under the *Public Governance, Performance and Accountability Act 2013*.

- 143 We are accountable for achieving our mandate through parliamentary and regulatory oversight mechanisms. These include:
- (a) the Parliamentary Joint Committee on Corporations and Financial Services, which has oversight of ASIC and the Corporations legislation. In addition to regular hearings, this committee frequently conducts inquiries on specific topics, including enforcement;
  - (b) the Senate Economics Legislation Committee Budget Estimates;
  - (c) the House of Representatives Standing Committee on Economics, which reviews our annual reports and activity generally;
  - (d) the House of Representatives Standing Committee, and the Senate Economics References Committee, which makes inquiries into ASIC's conduct and specific matters;
  - (e) the FRAA, which assesses and reports on the effectiveness and capability of ASIC; and
  - (f) Ministerial oversight.

Note: ASIC's [Statement of Intent](#) sets out how ASIC will meet the Government's [Statement of Expectations](#).

- 144 More broadly, we publish a Cost Recovery Implementation Statement (CRIS) for consultation each year. The CRIS describes the estimated costs incurred in undertaking our regulatory activities and how these will be recovered as industry levies under the industry funding model.

### **Industry and community expectations**

- 145 Understanding industry and community expectations is an important part of our approach to enforcement. Engaging with the public and with key stakeholders informs our strategic and enforcement priorities and allows us to gather intelligence about concerning conduct in the industries we regulate.

- 146 We have long-standing mechanisms in place to engage with industry and community stakeholders to understand different perspectives across the financial system. These include meetings with industry groups, consumer representatives and other stakeholders, and consultation reports that help us understand priorities for industry and other stakeholders, and to provide clear guidance to industry about meeting their obligations under the law. This engagement is highly beneficial to inform our regulatory activities.

- 147 We consult on our priority threats and harms and strategic priorities before finalising them for the corporate plan. We will continue to enhance our engagement with external stakeholders to harness these benefits.

- 148 We coordinate six external panels across our remit that consult on proposed reforms, identify emerging threats and harms, and obtain feedback on ASIC's actions and developments in the market.

Note: The six panels are the ASIC Consultative Panel, ASIC Consumer Consultative Panel, Corporate Governance Consultative Panel, Cyber Consultative Panel, Financial Advisers Consultative Panel and Markets Consultative Panel.

- 149 The ASIC Consultative Panel, for example, consists of senior representatives from the academic, consumer, industry, legal and regulatory sectors. The panel enables us to consult on proposed regulatory changes and provides intelligence on the external environment, including market conditions, which can assist us to identify threats and harms in the markets we regulate.
- 150 The ASIC Consumer Consultative Panel consists of representatives of consumers across our regulatory remit (such as self-managed superannuation, shareholders of public companies and consumers experiencing vulnerability). We hear from members of this panel on current and emerging consumer issues in the sectors we regulate and proposed regulatory changes and the impact of our regulatory actions. We use this feedback in the development and delivery of our strategic and operational objectives and investigation and enforcement activities.



## E Digital and data capabilities

### Key points

To address the Inquiry's Terms of Reference as to our capabilities, in this section we set out how we are using technology to enhance our efficiency and effectiveness, including to assess and draw insights from reports of alleged misconduct and to support our enforcement activities.

We aim to be a leading digitally enabled, data-informed regulator and we have embarked on a digital transformation program to make greater use of data analytics, automation and advanced technologies.

We operate in a complex, evolving environment and we regularly reflect on and seek to improve how we do our work.

### Using technology to become more effective and efficient

- 151 Technology is reshaping the industry and markets regulated by ASIC, as well as the expectations of ASIC. We aim to be a leading digitally enabled, data-informed regulator, increasingly using data in our supervisory and enforcement roles to make our work more effective and efficient.
- 152 We are currently undertaking an organisational review that will result in a new structure that supports us to achieve our strategic and operational ambitions in the years to come. This includes bringing a strong focus to our intelligence-gathering function (including from reports of alleged misconduct) and allowing our intelligence about individual matters to flow more quickly to enforcement teams. In turn, this will allow us to analyse information about potential misconduct more efficiently and act earlier to address potential breaches where they come to our attention.
- 153 We have embarked on an organisation-wide digital transformation program. Our digital transformation program includes continued investment in a data management platform (ASIC's Data Lake) that will provide us with access to advanced data analytics tools, including artificial intelligence. While we are limited by the funding available to uplift our technology and capabilities, we have made significant advances in the way in which we triage and review reports of misconduct, surface harms and conduct our enforcement activities.
- 154 We use technology to assist with triaging reports of alleged misconduct. This helps us to efficiently direct resources to where the most serious harms may be occurring. As the volume of data we receive continues to grow, this will be increasingly critical, particularly with the ongoing implementation of the reportable situations regime where we are already using artificial intelligence to help improve our decision making and processes.



- 155 As an example, from 28 February 2023, we will start receiving recurrent data from financial firms under the IDR data reporting framework. After full implementation, this IDR data will likely contain information about millions of complaints made to firms from consumers and small businesses, forming an important source of intelligence. The use of advanced data analytics will enable us to draw valuable insights about consumer issues in financial services (noting that not all consumer complaints will involve allegations of unlawful conduct) and to do so efficiently. Another example is in the insurance context, where we are undertaking work jointly with the Australian Prudential Regulation Authority (APRA) on granular insurance policy and claims data collections from industry. By integrating this data with reportable situations, and IDR and EDR data, we will have a comprehensive view of firms' performance in customer outcomes. This will further inform the development of effective strategies and targeted actions to ensure insurance products are meeting consumer needs.
- 156 In our enforcement work, we process, analyse and review growing volumes of electronic data as part of our investigations each year. Emerging trends involving scams, crypto-assets, blockchain technology and cyber resilience will continue to test our capabilities to take effective action against digitally enabled misconduct, while still allowing innovation to occur.
- 157 As an example of our innovation to address these trends, in 2022 ASIC worked with other regulators and a third-party service provider to disrupt investment scams that we identified through, in part, proactive searching for targeted scam investment and phishing websites and related email attacks. This initial activity removed 861 scam investment and phishing websites over a three-week period which severely disrupted scammers' business models. This stopped links to such websites in fraudulent emails and other communications to consumers from working. We will continue to explore such the use of disruptive measures like this to prevent loss and harm to consumers.

## F Consumer complaints, dispute resolution and compensation

### Key points

To assist the Inquiry to consider paragraph (a) of the Inquiry’s Terms of Reference (the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action), in this section we set out our role in the framework for consumer complaints, dispute resolution and compensation for consumers, and how our role complements that of AFCA.

Financial firms must have a dispute resolution system that consists of:

- an IDR procedure that meets the standards or requirements made or approved by ASIC; and
- membership of the Australian Financial Complaints Authority (AFCA), which is the single statutory-based financial services EDR scheme.

Effective dispute resolution—at both IDR and EDR—is critical for consumer protection and promoting trust and confidence in the financial system. IDR and EDR requirements have been mandatory under the financial services licensing framework for over 20 years.

We oversee the effective operation of the dispute resolution system. This includes setting the standards and requirements for financial firms’ IDR processes and providing oversight of AFCA, a role ASIC has performed in relation to predecessor EDR schemes since 1999.

ASIC and AFCA have distinct but complementary roles to play. AFCA is an independent EDR scheme responsible for resolving consumer and small business complaints (that firms cannot resolve at IDR) in a timely, fair and effective way.

Our role is to take enforcement action where there is misconduct or breaches of the law. We do not have a role in resolving individual complaints or disputes between consumers and financial firms.

### The dispute resolution framework in Australia

158 In 2017, Professor Ian Ramsay led a broad and comprehensive review of the financial system’s EDR and complaints framework ([Ramsay Review, May 2017](#)). The review recognised that access to effective means of resolving consumer complaints is critical for consumers, to ensure their fair treatment and to promote trust and confidence in the financial system.

159 The financial services dispute resolution framework in Australia (IDR and EDR) has been in place for more than 20 years, legislated in the *Financial*

*Services Reform Bill 2001*, which followed the recommendations of the Financial System Inquiry (Wallis Inquiry).

160 We have played an important role in setting IDR and EDR standards since 1999. We have overseen the approval and subsequent consolidation of seven industry-based EDR schemes to the single AFCA scheme in place today.

Note: Following the Ramsay Review, the Government established AFCA which replaced the Financial Ombudsman Service Limited (FOS), Credit and Investments Ombudsman (CIO) and the statutory Superannuation Complaints Tribunal (SCT). The statutory Superannuation Complaints Tribunal (SCT) was established in 1994.

161 The dispute resolution framework comprises:

- (a) IDR—where a firm has the first opportunity to resolve complaints directly with their customers; and
- (b) EDR scheme (AFCA)—which deals with complaints that firms cannot resolve at IDR.

162 To hold an AFS or credit licence, firms must have IDR procedures that comply with standards and requirements made or approved by ASIC. They must also be a member of AFCA. Implemented in 2021, our updated regulatory guidance for IDR significantly lifted IDR standards, see [Regulatory Guide 271 Internal dispute resolution \(RG 271\)](#), reducing timeframes for complaints handling and requiring firms to take a more systemic approach to complaints. ASIC is currently implementing the legislated IDR data reporting framework.

Note: The current IDR standards and requirements are set out in RG 271 and are given effect by [ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#). RG 271 applies to complaints received on or after 5 October 2021.

163 The vast majority of consumer and small business complaints in the financial sector are resolved by firms themselves at IDR, with only a minority of consumer complaints escalating to AFCA for resolution. This means that data that will be provided to ASIC under the IDR data reporting obligation will give visibility to ASIC and the public of where harms may be occurring across the financial system and down to the firm level. As noted in the previous section, IDR data reporting will also be a key component in our use of enhanced data analytics.

164 The statutory architecture for the AFCA scheme is built on longstanding EDR principles and practice in Australia. These principles (accessibility, independence, fairness, accountability, efficiency and effectiveness) are expressed in the legislative design of the scheme and endorse the longstanding role that independent EDR schemes play as more informal, cost-efficient and timely forums to resolve consumer and small business complaints than courts and tribunals.

## AFCA and ASIC's respective roles

165 Effective dispute resolution—at both IDR and EDR—are critical for consumer protection and promoting trust and confidence in the financial system. ASIC and AFCA have distinct but complementary roles to play.

### AFCA's role

166 AFCA is an independent complaints resolution body. It is AFCA's role to deal with consumer and small business complaints, including determining whether any compensation should be awarded. Data from AFCA shows that since the scheme commenced in 2018, AFCA has dealt with 270,637 complaints, and awarded over \$819 million in direct compensation to consumers. This is supplemented by AFCA's systemic issues work (see paragraph 170).

Note: See [Year at a glance, Australian Financial Complaints Authority \(AFCA\)](#).

167 AFCA also has its own independent governance framework. The AFCA Board is responsible for ensuring the scheme meets statutory requirements, any ministerial conditions and regulatory requirements administered by ASIC.

### Reporting requirements

168 AFCA is required to report certain matters to regulators (ASIC, the Commissioner of Taxation and APRA). These requirements are set out in [Regulatory Guide 267 Oversight of the Australian Financial Complaints Authority](#) (RG 267) and include requirements that AFCA report serious contraventions and other breaches, and systemic issues.

169 The primary purpose of these reporting requirements is for AFCA to give information to a regulator so that a regulator may consider whether regulatory action—beyond the resolution of any underlying complaints—is necessary.

170 AFCA reported 67 systemic issues and 23 serious contraventions to regulators in 2021–2022 (60 out of 67 reports were made by AFCA to ASIC, the remaining seven reports were made to other regulators). In this period, AFCA's systemic issues work resulted in the remediation of over 167,033 consumers and secured more than \$18.3 million in refunds to consumers. Overall, between financial year 2018–19 and financial year 2021–22, AFCA's systemic issues work has resulted in more than \$260 million in refunds to more than 1.2 million consumers.

171 AFCA's work on systemic issues complements and supplements licensees' remediation obligations. If licensees engage in misconduct or other failures when providing financial services or credit activities and cause consumer loss, they must initiate a remediation. ASIC has issued guidance for industry

on consumer remediation in [Regulatory Guide 277](#) *Consumer remediation* (RG 277) and published a field guide for practical tips on how to conduct effective remediations in [Making it right: How to run a consumer-centred remediation](#). In some cases we will oversee financial firms' remediation process where they are directly related to regulatory concerns being dealt with by ASIC.

172 AFCA's reporting also supplements the reportable situations regime in helping to bring to our attention potential breaches of the law, noting that complaints are a lagging indicator of issues that have occurred in the past and so any action by ASIC will most likely be after misconduct has occurred and/or consumers have suffered losses. Reports from AFCA are of significant value to ASIC, whether they relate to conduct by financial firms that we did not know about, or to conduct known to us. Even in the latter case, AFCA reports may often provide new evidence, analysis and perspective.

### **Engagement with ASIC**

173 Senior ASIC and AFCA staff currently meet on a monthly basis, typically to focus on emerging issues or trends identified by AFCA in its complaints handling work that are relevant to the legislation ASIC administers, or that relate to the conduct of a specific licensee that may be the subject of ASIC regulatory interest. ASIC and AFCA staff may also meet as required to discuss specific issues or matters. This engagement is supported by information-sharing arrangements in both the AFCA Rules and the ASIC Act where it will enable or assist AFCA to perform any of its functions or powers.

Note: For further information on the information sharing arrangements, see s127(4)(aa) of the ASIC Act, and rA.11 of the AFCA Rules.

174 Senior ASIC and AFCA staff also meet on a quarterly basis to discuss reports about financial firm members and any regulatory or enforcement action that is of mutual interest. These meetings provide a further opportunity to consider or explore issues raised in AFCA reports.

175 ASIC also uses data published by AFCA to inform our understanding of issues across financial services sectors, and we can request specific data from AFCA using our compulsory powers, where necessary and appropriate.

### **ASIC's role**

176 We are responsible for setting regulatory standards and overseeing the effective operation of the dispute resolution system, which includes setting the standards and requirements for financial firms' IDR processes and oversight of the AFCA scheme.

- 177 Details about ASIC’s powers and how we approach our oversight role are set out in [RG 267](#). In the performance of our oversight role, we respect the operational independence of AFCA to deliver independent, timely, and fair decisions for consumers and financial firms.
- 178 Our powers in respect of AFCA are aimed at ensuring the AFCA dispute resolution scheme is operating in compliance with mandatory requirements (under the Corporations Act), and is consistent with the Minister’s authorisation and conditions. We have powers to issue regulatory requirements and directions to AFCA on limited matters of AFCA’s operations (see RG 267.29), and to ensure compliance with these directions. We also have the power to approve material changes to the AFCA scheme. Importantly, ASIC’s powers do not include reviewing AFCA determinations in individual complaints or reviewing other AFCA operational decisions (see RG 267.30).
- 179 Our role is to take enforcement action where there is misconduct or breaches of the law. In 2021–22, of the 60 systemic issues reports made to ASIC by AFCA (see paragraph 170), ASIC took further action on six reports, either by conducting further surveillance, commencing enforcement action or engaging with the relevant licensee. ASIC was already taking regulatory action on the underlying conduct in a further six reports. The remaining systemic issues reports for that period are part of the body of intelligence that ASIC uses in understanding issues in the financial system or particular sectors, and informing our actions and our priorities.
- 180 Cooperation by AFCA members with AFCA is a fundamental obligation of licensees and essential in ensuring that Australia’s financial dispute resolution system remains efficient and effective. In April 2019, reforms introduced as recommended by the Financial Services Royal Commission mean that a failure to take reasonable steps to cooperate with AFCA or to pay an AFCA determination can result in significant civil penalties: see *Corporations Regulations 2001*, reg 7.6.03C and *National Consumer Credit Protection Regulations 2010*, reg 11A(2).
- 181 ASIC has obtained enforcement outcomes against a number of financial firms and directors for failing to cooperate with AFCA or pay an AFCA determination. These outcomes include:
- (a) three financial firms and their directors being ordered to pay civil penalties totalling \$370,000; and
  - (b) three individuals removed or restricted from providing financial services or credit.
- 182 We consider reports from AFCA and reports of misconduct from the public in accordance with the approach set out in Section C to identify matters for further investigation and enforcement action. This approach does not change because consumers have access to IDR processes or the AFCA scheme.

183 ASIC has no role in resolving individual complaints between consumers and financial firms, which is the proper role of the firm at IDR in the first instance, and AFCA for those complaints unresolved at IDR. Where consumers or small businesses lodge a report with ASIC, we record the report and consider whether it raises underlying regulatory issues. We will also advise the reporter of their right to take their complaint to either the firm's IDR process or to AFCA to pursue a remedy, as appropriate. It is for each reporter to decide whether to take this action. Other than guiding reporters to pursue individual remedies that may be available to them through AFCA, we do not refer matters to AFCA for its consideration or action, given it is a dispute resolution body and does not have a regulatory remit as ASIC does.

## Compensation scheme of last resort

184 ASIC has long supported the introduction of a compensation scheme of last resort (CSLR) that responds to unpaid EDR determinations, that is, where an EDR scheme has awarded consumer compensation that remains unpaid, typically because of firm insolvency. Unpaid determinations represent a gap in the framework that compromises consumer trust and confidence in the financial system and the effectiveness of AFCA in providing access to justice and redress to consumers and small businesses.

185 Legislation to establish a CSLR has been introduced by successive governments in 2021 and 2022. This follows the Ramsay Review's recommendation for a CSLR, which was also supported by the [Final Report of the Financial Services Royal Commission](#).

186 The design of the CSLR remains a matter for Government. The legislation as introduced to Parliament in both 2021 and 2022 envisages a similar oversight role for ASIC in relation to the CSLR to our current oversight role of AFCA. Beyond the public benefit in ensuring that consumers affected by financial firm misconduct receive the compensation they have been awarded following the IDR and AFCA processes, a CSLR has no bearing on ASIC's risk-based regulatory or enforcement approach. The existence of a CSLR will provide strong incentives for industry participants to inform ASIC about misconduct that they see in the market.

Note: Proposed legislation to introduce the CSLR was removed from the Financial Sector Reform Bill 2022 on 1 December 2022, before it was passed, to enable the Government to consult further on implementation of the scheme without delaying other measures in the Bill: see *Financial Sector Reform Bill 2022* and the [Supplementary Explanatory Memorandum relating to sheet PM145](#).

## Appendix 1: ASIC handling of reports of alleged misconduct

- 187 This appendix sets out data on finalised reports of alleged misconduct from the last 10 years.
- 188 A report of alleged misconduct is considered ‘finalised’ when its assessment is complete and it has an assessment outcome: see possible outcomes at paragraph 90.

### Total number of reports finalised

- 189 Table 2 (on the following page) shows the total number of reports of alleged misconduct finalised over the last 10 years.
- 190 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. The ‘reportable situations (previously breach reports)’ number for 2021–22 includes:
- (a) the number of breach reports finalised in 2021–22 (i.e. before the reportable situations regime commenced); and
  - (b) the number of initial assessments of reportable situation notifications completed by ASIC’s Misconduct and Breach Reporting team in 2021–22.
- 191 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 2: 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
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
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
Auditor breach reports	350	314	392	498	482	508	491	705	1,172	1,174	1,393
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
<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>

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.

## Assessment outcomes

- 192 Table 3–Table 5 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 10 years. The outcomes are categorised as follows:
- (a) 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](#);
  - (b) 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;
  - (c) 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;
  - (d) no jurisdiction—where relevant, we direct reporters to the appropriate agency or solution; and
  - (e) no breaches or offences.

**Table 3: 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
Referred for action by ASIC	26%	27%	28%	29%	25%	25%	21%	21%	19%	15%	13%
Resolved	21%	19%	16%	13%	11%	15%	12%	12%	10%	9%	11%
Analysed and assessed for no further action	33%	35%	39%	42%	49%	46%	53%	54%	61%	65%	66%
No jurisdiction	15%	14%	11%	10%	11%	10%	10%	9%	8%	9%	9%
No breaches or offences	5%	5%	6%	6%	4%	4%	4%	4%	2%	2%	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>

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 4: 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
Referred for action by ASIC	49%	52%	51%	42%	36%	39%	38%	22%	18%	11%	10%
Resolved	1%	2%	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%
<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>

Note: Includes assessment outcomes for auditor breach reports.

**Table 5: 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
Referred for action by ASIC	29%	25%	19%	17%	19%	18%	15%	24%	23%	18%	20%
Analysed and assessed for no further action	71%	75%	81%	83%	81%	82%	85%	76%	77%	82%	80%
<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>

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

193 Table 6 sets out, for the total number of finalised reports of alleged misconduct that we have referred for action over the past 10 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 2–Table 5 above.

**Table 6: 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
Enforcement team	1%	2%	1%	1%	2%	1%	4%	5%	7%	13%	9%
Small Business Engagement and Compliance team	46%	47%	50%	52%	54%	54%	56%	61%	57%	44%	49%
Supervisory team	24%	24%	23%	19%	19%	20%	24%	25%	24%	34%	32%
Existing surveillance or investigation	23%	21%	18%	18%	15%	11%	4%	3%	2%	0%	0%
Other	0%	0%	0%	0%	0%	0%	0%	0%	1%	1%	1%
Registry	5%	7%	8%	10%	10%	13%	11%	6%	10%	9%	10%
<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>

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

## Finalisation rate

194 We aim to finalise our consideration of 70% of reports of misconduct from the public within 28 days of receiving all relevant information. Table 7 sets out our finalisation rate over the past 10 years.

**Table 7: 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
Consideration of reports of misconduct finalised within 28 days	72%	76%	69%	71%	68%	70%	72%	73%	79%	73%	65%

## Appendix 2: Investigations

195 This appendix sets out data on the investigations we commenced in the past 10 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

196 Table 8 sets out the investigations we commenced and completed between 2011–12 and 2021–22.

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 8: 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
Investigations commenced	173	193	224	229	206	163	126	151	134	110	107
Investigations completed	183	186	238	231	175	157	124	126	103	132	158

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

197 Table 9–Table 10 set out the referral sources for the investigations we commenced between 2011–12 and 2021–22, by number and percentage. In these tables, the referral sources are categorised as follows:

- (a) enforcement initiated—these investigations are commenced without a referral from a report of alleged misconduct or a supervisory team;
- (b) 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
- (c) 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 9: 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
Enforcement initiated	10	11	9	25	9	16	6	22	33	7	8
Referred from a report of alleged misconduct	59	55	44	46	62	41	44	41	41	50	35
Referred from a supervisory team	104	127	171	158	135	106	76	88	60	53	64
<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>

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 2018–20, ASIC commenced a number of new investigations that were referred from the Financial Services Royal Commission.



**Table 10: 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
Enforcement initiated	6%	6%	4%	11%	4%	10%	5%	15%	25%	6%	7%
Referred from a report of alleged misconduct	34%	28%	20%	20%	30%	25%	35%	27%	31%	45%	33%
Referred from a supervisory team	60%	66%	76%	69%	66%	65%	60%	58%	45%	48%	60%
<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>

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

## Appendix 3: Litigated enforcement actions and outcomes

198 This appendix sets out our litigated enforcement actions and outcomes over the past 10 years (e.g. civil, criminal and summary prosecutions for strict liability offences).

Note: 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: 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 11: 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
New civil actions commenced	52	54	52	34	74	112	77	55	50	83	75

**Table 12: 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
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

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

## Criminal

**Table 13: 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
New criminal actions commenced	27	28	30	28	19	11	30	14	41	53	52

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 to include two further criminal actions commenced that were omitted due to delays in record keeping at the end of financial year.

**Table 14: 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
People and/or companies convicted	27	22	30	23	22	20	22	27	30	29	34
Custodial sentences (including fully suspended)	20	17	23	18	18	13	13	14	22	10	13
Non-custodial sentences and/or fines	8	5	7	5	4	7	13	16	8	19	20
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

Note 1: 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 to include a further criminal conviction that was omitted due to delays in record keeping at the end of the financial year.

Note 2: 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.

## Summary prosecutions

**Table 15: 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
Number of defendants in summary prosecutions for strict liability offences completed	402	528	314	355	410	438	398	369	248	224	181

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 4: Illegal phoenix enforcement activities

- 199            Illegal phoenix activity occurs when a new company, for little or no value, continues the business of an existing company that has been liquidated or otherwise abandoned. This is to avoid paying outstanding debts, which can include taxes, creditors and employee entitlements.
- 200            Illegal phoenix activity can result in employees not being paid their wages or other entitlements, such as superannuation and leave. It can result in the non-payment of suppliers and sub-contractors that provide goods or services. It also places other businesses that operate lawfully at a severe competitive disadvantage when competing for work. Directors that engage in illegal phoenix activity often avoid paying tax, which can deny the community of revenue that is used to fund essential public services such as hospitals and education.
- 201            We work with other regulatory and enforcement agencies to combat illegal phoenix activity. ASIC is a member of taskforces, led by the ATO, that are focused on the regulation of, and enforcement action against, illegal phoenix activity. These are:
- (a) the Serious Financial Crime Taskforce (made up of nine agencies); and
  - (b) the Phoenix Taskforce (made up of 40 agencies).
- 202            Within the remit of these taskforces, we participate in joint operations involving entities that are of interest to member agencies. We also share intelligence and information with the ATO as part of the Data Fusion Project (otherwise known as HELIO) to detect and disrupt illegal phoenix activity.
- 203            There are a number of provisions within the Corporations Act that ASIC may use to address illegal phoenix activity, such as those relating to breaches of directors' duties and voidable transactions. We have pursued both criminal and administrative actions against those involved in illegal phoenix activity. Registered liquidators may also address illegal phoenix activity by taking a variety of actions to seek to recover assets for the benefit of creditors, and reporting misconduct to ASIC.
- 204            In the period 2019–20 to 2021–22, as a result of ASIC investigations relating to illegal phoenix activity:
- (a) 21 persons were disqualified from managing companies;
  - (b) one registered liquidator had conditions imposed on their registration; and
  - (c) nine people were convicted of criminal offences.

Note 1: Our response to questions on notice included 'Criminal court—Director disqualifications' under 'Director disqualifications' which were underreported for

2019–20 and 2021–22 (as nil): see ASIC, [Questions on notice to Senate Economics References Committee: Set 1](#) (PDF 495 KB), November 2022, Question 4. Table 16 below reflects the revised figures from ASIC’s updated records.

Note 2: Our response to questions on notice indicated that in 2019–20, there were two (2) Non-custodial sentences and two (2) Custodial sentences (including fully suspended): see ASIC, [Questions on notice to Senate Economics References Committee: Set 1](#) (PDF 495 KB), November 2022, Question 4. Table 17 below shows revised figures differentiated by entity type (e.g. Director, Company, Pre-insolvency adviser) based on a review of our records.

205 Table 16–Table 17 show the overall administrative and criminal enforcement actions we have taken in relation to illegal phoenix activity for the period 2015–16 to 2021–22.

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 16: 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
Director disqualification	7	4	4	7	10	3	8
Criminal court—Director disqualification	N/A	N/A	2	4	2	1	1
Registered liquidators—Conditions imposed	N/A	N/A	N/A	N/A	1	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>

Note: ‘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.

**Table 17: 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
Company—Non-custodial sentences	N/A	N/A	2	N/A	N/A	N/A	N/A
Director—Non-custodial sentences	N/A	N/A	2	4	1	2	2
Director—Custodial sentences (including fully suspended)	N/A	N/A	1	2	1	N/A	1
Pre-insolvency adviser—Custodial sentences (including fully suspended)	N/A	N/A	N/A	N/A	2	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>

## Our approach to offences relating to creditor-defeating dispositions

- 206 The Inquiry has asked us to address in this submission, our approach to offences relating to creditor-defeating dispositions.
- 207 Potential misconduct relating to illegal phoenix activity, including creditor-defeating dispositions, primarily comes to our attention through statutory reports lodged by registered liquidators with ASIC. We consider these reports using the process outlined at paragraph 87. Where applicable, liquidators may be requested to lodge a supplementary statutory report about director misconduct that may include offences relating to creditor-defeating dispositions.
- 208 New laws to supplement existing provisions to combat illegal phoenix activity came into effect from 18 February 2020. They target ‘creditor-defeating dispositions’ where company property is disposed of:
- (a) for consideration payable to the company that is less than the lesser of the market value of the property and the best price reasonably obtainable in the circumstances; and
  - (b) with the effect of preventing, hindering or significantly delaying the property from becoming available for the benefit of creditors in the winding-up of the company.
- 209 The laws prohibit directors and other company officers from engaging in conduct that results in a company making a creditor defeating disposition and others from encouraging the making of a creditor-defeating disposition. Civil or criminal penalties may be imposed under these provisions.
- 210 ASIC has some powers to make orders requiring those who have received company property to return the property or its value to the company. We may make these orders either on our own initiative or following a request from a liquidator. Courts can also make orders in respect of these dispositions. The court’s powers to make these orders are significantly wider than ASIC’s powers.
- 211 In general terms, before penalties can be imposed or orders made for undoing a creditor defeating disposition, the disposition must have occurred when the company was insolvent; caused it to become insolvent or have taken place within 12 months of the start of the external administration of the company. Furthermore, the legislative reforms relating to creditor defeating dispositions can only be used or enlivened after a company which enters into such a disposition has been placed into liquidation.



- 212 In October 2021, ASIC published [Information Sheet 261](#) *ASIC orders about creditor-defeating dispositions* (INFO 261):
- (a) setting out how a liquidator can lodge a request with ASIC to make orders in relation to a creditor-defeating disposition and providing a template request form; and
  - (b) outlining the factors we will consider when deciding to make orders.
- 213 In addition, ASIC conducted information sessions for liquidators and lawyers regarding requests to make orders ‘undoing’ creditor defeating dispositions.
- 214 When ASIC receives a request from a liquidator to make an order undoing the effect of a creditor-defeating disposition, we consider that request in accordance with the approach outlined in [INFO 261](#).
- 215 We may also become aware of potential misconduct relating to creditor-defeating dispositions through such requests by liquidators.
- 216 If information we receive, including information from liquidators’ requests for orders, reveals potential misconduct, we may commence our own investigations into suspected offences relating to creditor-defeating dispositions. These investigations may then lead to enforcement action. In determining whether to commence an investigation, we consider the factors outlined in [INFO 151](#) and as set out at paragraph 82.
- 217 Where the eligibility criteria are met, liquidators can apply to ASIC for Assetless Administration Funding to enable them to undertake additional investigations in respect of illegal phoenix activity including reporting offences and taking action to recover assets for creditors such as seeking court orders relating to creditor-defeating dispositions. The eligibility criteria include that the liquidator has, or believes they can obtain, sufficient evidence, and the company in liquidation is an ‘assetless’ administration as defined in the relevant Assetless Administration Fund grant guidelines.
- 218 Since 18 February 2020, ASIC has received seven requests from liquidators to make orders under the new provisions and we have made orders relating to one application. Several applications by liquidators for Assetless Administration Funding have been approved for the purpose of obtaining evidence of creditor-defeating dispositions. The COVID-19 pandemic may have had an impact on the number of requests received from liquidators due to the lower number of external administrations

## Appendix 5: ASIC staff levels

- 219 We have set out the total ASIC employee numbers across the last 10 years by team (see Table 18) and level (see Table 19). 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.
- 220 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 10-year timespan. Please note the following changes to our organisation structure:
- (a) Markets group:
    - (i) Emerging Mining and Resources—this team merged with other teams within the Markets Group from 2016–17
    - (ii) Investment Banks—this team merged with other teams within the Markets Group from 2016–17;
  - (b) Financial Services and Wealth (FSW) group:
    - (i) Credit and Banking—until 2018–19, this team operated with Insurers under the former team named 'Deposit Takers, Credit and Insurers' (within FSW Group)
    - (ii) Data Analytics—this team was established in 2018–19 as part of the restructure of the FSW Group's functions
    - (iii) Strategy and Operations—this team was established in 2018–19 as part of the restructure of the FSW Group's functions
    - (iv) Institutional Supervision—this team was created in 2018–19 for close and continuous monitoring of large financial services institutions
    - (v) Insurers—until 2018–19, this team operated with Credit and Banking under the former team named 'Deposit Takers, Credit and Insurers' (within FSW group)
    - (vi) Investment Managers—until 2017–18, this team operated with Superannuation under the former team named 'Investment Managers and Superannuation' (within FSW group)

- (vii) Superannuation—until 2017–18, this team operated with Investment Managers under the former team named ‘Investment Managers and Superannuation’ (within FSW group);
- (c) Registry—in April 2021, Registry staff and functions moved to the Australian Business Registry Services within the ATO through a machinery of government change;
- (d) Operations—after 1 July 2022, includes the Misconduct and Breach Reporting team, which was previously part of the now defunct Assessment and Intelligence division;
- (e) Statutory Bodies—Superannuation Complaints Tribunal operations were discontinued in December 2020;
- (f) 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
- (g) Modernising Business Registers—this program commenced in 2019–20, broadly coinciding with the transfer of Registry functions to the ATO.

**Table 18: 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
Markets Group—Financial Reporting and Audit	33	36	34	32	30	29	29	28	29	28	27
Markets Group—Corporations	35	36	36	33	33	43	43	49	50	43	44
Markets Group—Market Infrastructure	28	26	32	26	26	31	29	31	31	32	33
Markets Group—Market Operations	N/A	N/A	N/A	N/A	N/A	N/A	18	22	12	12	13

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22
Markets Group—Market Supervision	58	69	76	69	68	74	64	67	79	83	82
Markets Group—Registered Liquidators	23	24	24	21	21	24	23	24	23	25	25
Markets Group—Emerging Mining and Resources	17	14	13	13	11	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
<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>
FSW Group—Financial Advisers	34	29	31	35	30	38	49	44	47	48	46
FSW Group—Credit and Banking	61	66	68	60	60	68	82	76	55	57	61
FSW Group—Data Analytics	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1	19	13	12
FSW Group—Strategy and Operations	N/A	N/A	N/A	N/A	N/A	N/A	N/A	3	14	13	11
FSW Group—Institutional Supervision	N/A	N/A	N/A	N/A	N/A	N/A	N/A	9	20	22	24
FSW Group—Insurers	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	29	35	34
FSW Group—Investment Managers	44	46	47	44	41	52	64	51	35	37	35
FSW Group—Licensing	39	32	30	38	42	32	28	23	28	32	30

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22
FSW Group— Superannuation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	11	32	34	36
<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>
Markets Enforcement Group—Corporations and Corporate Governance	70	59	54	48	47	55	52	49	47	58	59
Markets Enforcement Group—Markets Enforcement	51	54	58	59	49	48	46	50	65	71	67
Markets Enforcement Group—Enforcement WA	20	23	23	20	21	25	31	36	43	57	61
<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>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>
Registry	259	323	280	229	212	198	189	198	184	147	0
Chief Legal Office	53	54	54	53	52	55	60	67	80	86	86
Commission	16	15	15	11	11	11	18	22	17	14	22
Strategy	46	48	53	46	48	54	69	68	73	72	69
Chief Operating Officer	190	204	195	172	182	186	193	202	238	243	210
Operations	474	494	487	431	422	458	452	434	474	527	585

Team	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22
Statutory Bodies	43	44	48	41	35	31	35	43	41	8	N/A
ESA	N/A	43	19	33	98	70	39	38	79	29	0
Modernising Business Register	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	3	20	26
<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>

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 19: 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
Chair	1	1	1	1	1	1	1	1	1	1	1
Deputy Chair	1	1	1	1	1	1	1	2	2	1	2
Member	3	3	3	3	3	2	2	4	4	3	3
Senior Executive Service (SES)	44	44	45	43	43	39	37	43	52	60	58
ELS	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1	12
Note: This staff level was introduced in 2020–21.											
Exec 2	453	491	494	463	477	496	517	561	616	652	713
Exec 1	412	431	428	378	381	407	441	424	470	494	484

Level	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22
ASIC 4	346	357	346	324	317	319	330	326	380	417	410
ASIC 3	244	270	239	208	220	212	203	213	269	290	191
ASIC 2	222	237	230	192	192	192	172	167	172	152	64
ASIC 1	29	37	30	29	27	22	21	20	18	17	9
<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>

221 Table 20 presents the total number of ASIC employees undertaking enforcement work in the last 10 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 20: Average total number of ASIC enforcement employees (FTE)**

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



## Appendix 6: Accessible versions of figures

222 This appendix is for people with visual or other impairments. It provides the underlying information for Figure 1 and Figure 2.

**Table 21: Example of an enforcement pyramid**

Level	Measure
7 (base)	Persuasion & education
6	Negotiation & settlement
5	Investigations, inspections & examinations
4	Letters of warning and penalty notices
3	Remedial civil law based remedies
2	Pecuniary criminal & civil penalties
1 (highest)	Incapacitative criminal & civil penalties & other management banning orders

Note: This table presents the information in Figure 1.

**Table 22: ASIC’s approach to investigation and enforcement**

Step	Explanation
1	<p>Start of process: ASIC receives information through:</p> <ul style="list-style-type: none"> <li>• a public report of misconduct</li> <li>• monitoring or surveillance work</li> <li>• other regulators</li> <li>• a report to ASIC as required by law.</li> </ul> <p><i>Go to Step 2.</i></p>
2	<p>Decision: Does the potential misconduct fall within our regulatory responsibility?</p> <ul style="list-style-type: none"> <li>• <i>If no, go to Step 3.</i></li> <li>• <i>If yes, go to Step 4.</i></li> </ul>
3	<p>If the answer at Step 2 was no, ASIC refers the misconduct to another authority as appropriate.</p> <p><i>End of process.</i></p>

Step	Explanation
4	<p>If the answer at Step 2 was yes, ASIC assesses the matter for formal investigation:</p> <ul style="list-style-type: none"> <li>• Will the matter prevent or address significant harm?</li> <li>• What are the public benefits of pursuing the misconduct?</li> <li>• How do other issues specific to the case affect the matter?</li> <li>• Is there an appropriate alternative course of action?</li> </ul> <p><i>Go to Step 5.</i></p>
5	<p>Decision: Should a formal investigation be held?</p> <ul style="list-style-type: none"> <li>• <i>If yes, go to Step 6.</i></li> <li>• <i>If no, go to Step 7.</i></li> </ul>
6	<p>If the answer at Step 5 was yes, did the investigation find suspected misconduct?</p> <ul style="list-style-type: none"> <li>• <i>If no, go to Step 7.</i></li> <li>• <i>If yes, go to Step 8.</i></li> </ul>
7	<p>If the answer at Steps 5 or 6 was no, other regulatory tools may be as or more effective (e.g. surveillance or stakeholder engagement). <i>End of process.</i></p>
8	<p>If the answer at Step 6 was yes, ASIC will assess the matter for the appropriate action (i.e. criminal, civil or administrative):</p> <ul style="list-style-type: none"> <li>• Nature and seriousness of the misconduct.</li> <li>• Conduct after alleged contravention.</li> <li>• Strength of the case.</li> <li>• Expected level of public benefit.</li> <li>• Likelihood of behavioural improvement and deterrence.</li> <li>• Aggravating or mitigating factors.</li> </ul> <p><i>Go to Step 9.</i></p>
9	<p>Decision: What enforcement actions are available?</p> <ul style="list-style-type: none"> <li>• Criminal.</li> <li>• Civil.</li> <li>• Administrative and/or other.</li> </ul> <p><i>End of process.</i></p>

Note: This table presents the process in Figure 2.

## Key terms

Term	Meaning in this document
AFCA	Australian Financial Complaints Authority—the EDR scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC Consultative Panel	A panel consisting of senior representatives from the academic, consumer, industry, legal and regulatory sectors
ASIC Consumer Consultative Panel	A panel consisting of representatives of consumers across ASIC’s regulatory remit (such as self-managed superannuation, shareholders of public companies and consumers experiencing vulnerability)
ATO	Australian Taxation Office
banning order	A written order by ASIC that prohibits a banned person from engaging in one or more of the types of conduct set out in s920B of the Corporations Act or s81 of the National Credit Act
compensation scheme of last resort	A scheme that provides compensation to consumers and small businesses for financial losses where external dispute resolution (EDR) scheme determinations remain unpaid
complaint (RG 271)	An expression of dissatisfaction made to or about an organisation—related to its products, services, staff or the handling of a complaint—where a response or resolution is explicitly or implicitly expected or legally required  Note: This is the definition given in AS/NZS 10002:2014.
consumer or complainant (RG 271)	A person or small business, which includes, at a minimum: <ul style="list-style-type: none"> <li>• an individual consumer or guarantor;</li> <li>• a superannuation fund member or third-party beneficiary eligible to make a complaint to AFCA under s1053, or taken to be a member of a regulated superannuation fund or approved deposit fund, or a holder of an RSA, as provided for by s1053A; and</li> <li>• a ‘small business’ as defined in modified s761G of the Corporations Act</li> </ul>

Term	Meaning in this document
Corporate Governance Consultative Panel	A panel consisting of ASIC senior leaders, company directors, industry association representatives, institutional investors and academics
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
custodial	Refers to a term of imprisonment imposed by the court following conviction of a person for a criminal offence
Cyber Consultative Panel	An independent group of senior members from the financial services industry that advises ASIC on its supervisory approach for the cyber resilience of financial services and markets
dispute	Has the same meaning as complaint
dispute resolution	A means of addressing a consumer complaint efficiently and fairly without recourse to the courts
EDR	External dispute resolution
enforcement team	An ASIC team that conducts investigations under s13 of the ASIC Act or s247 of the National Credit Act
finalised	A report of alleged misconduct is considered finalised when its assessment is complete and the case generated for that report in the ASIC case workflow system has been closed on that system
Financial Advisers Consultative Panel (FACP)	Members of the FACP are practising financial advisers that provide ASIC with views on a broad range of issues relating to their industries
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FRAA	Financial Regulator Assessment Authority
IDR	Internal dispute resolution
IDR procedures (or IDR processes)	The internal dispute resolution procedures that meet the requirements and standards made and approved by ASIC under <a href="#">RG 271</a> and <a href="#">ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98</a>
INFO 151 (for example)	An ASIC information sheet (in this example numbered 151)
Inquiry	Inquiry into Australian Securities and Investments Commission investigation and enforcement

Term	Meaning in this document
investigation	In this submission, has the meaning in s13 of the ASIC Act and s247 of the National Credit Act
investor	In relation to an AFS licensee, includes an existing, potential or prospective client
Markets Consultative Panel	An independent group of senior members from the financial services industry that advises ASIC on its approach to its responsibilities for day-to-day supervision of the Australian market and on broader market developments
National Credit Act	<i>National Consumer Credit Protection Act 2009</i> , including regulations made for the purposes of that Act
offence	A breach of a provision of the laws ASIC administers, in particular the Corporations Act or National Credit Act, which attracts criminal liability and penalties such as imprisonment and/or fines
product intervention order	An order by ASIC under Pt 7.9A of the Corporations Act, or Pt 6-7A of the National Credit Act, relating to a specific product or class of products, made to prevent significant consumer detriment
Pt 7.7A (for example)	A part of the Corporations Act (in this example numbered 7.7A), unless otherwise specified
reg 7.6.03C (for example)	A regulation of the <i>Corporations Regulations 2001</i> (in this example numbered 7.6.03C), unless otherwise specified
reg 11A (for example)	A regulation of the <i>National Consumer Credit Protection Regulations 2010</i> (in this example numbered 11A), unless otherwise specified
remediation	A process, large or small, to investigate the scope of the misconduct or other failure and, if appropriate, return consumers who have suffered loss as a result of the misconduct or other failure to the position they would have otherwise been in, as closely as possible
reportable situations regime	The obligation and related specific requirements of AFS and credit licensees to self-report misconduct and breaches to ASIC under s912D of the Corporations Act or s50A of the National Credit Act
report of alleged misconduct	A report of misconduct made to ASIC including: <ul style="list-style-type: none"> <li>• reports made by a member of the public, other government agency or industry;</li> <li>• notifications from AFCA;</li> <li>• reports made by registered external administrators and auditors; and</li> <li>• reports made under the reportable situations regime</li> </ul>

Term	Meaning in this document
representative (of a credit licensee)	Has the meaning given in s5 of the National Credit Act
representative (of an AFS licensee)	Means: <ul style="list-style-type: none"> <li>• an authorised representative of the licensee;</li> <li>• an employee or director of the licensee;</li> <li>• an employee or director of a related body corporate of the licensee; or</li> <li>• any other person acting on behalf of the licensee</li> </ul> <p>Note: This is a definition contained in s910A of the Corporations Act.</p>
retail client	Has the meaning given in s761G and 761GA of the Corporations Act
RG 271 (for example)	An ASIC regulatory guide (in this example numbered 271)
s13 (for example)	A section of the ASIC Act (in this example numbered 13), unless otherwise specified
SBE&C	ASIC's Small Business Engagement and Compliance team
small business	Has the meaning given in the modified s761G of the Corporations Act
supervisory team	An ASIC team that supervises specific subsectors of our regulated population
stop order	An administrative mechanism that allows ASIC to prevent offers being made under a disclosure document where we believe any of the following situations exist: <ul style="list-style-type: none"> <li>• the disclosure document contains a misleading or deceptive statement</li> <li>• the disclosure document contains an omission of information required to be provided under the legislation, or</li> <li>• a new circumstance has arisen since the disclosure document was lodged</li> </ul>
surveillance	An activity where ASIC reviews an entity, individual, product, practice, set of transactions or industry sector, to identify misconduct or harm, understand and influence behaviours, and drive compliance
whistleblower	A discloser who has made a disclosure that qualifies for protection under the Corporations Act <p>Note: See s1317AA, 1317AAA, 1317AAC and 1317AAD. Also see s14ZZT, 14ZZY and 14ZZV of the <i>Taxation Administration Act 1953</i> for a discloser that qualifies for protection under that Act.</p>