

John Adams
Principal Economic Analyst
Adams Economics
E-mail [REDACTED]

30 December 2022

Committee Secretary
Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Committee Secretary,

Australian Securities and Investment Commission Investigation and Enforcement

1. Thank you for the official invitation I received on 3 November 2022 to make a submission to the current Senate Economics References Committee inquiry into the investigation and enforcement performance of the Australian Securities and Investment Commission (ASIC).
2. As acknowledged by journalists Shane Wright from the Sydney Morning Herald¹ and Alex Turner-Cohen from news.com.au², the Australian Senate established the current inquiry on Thursday, 27 October 2022 into ASIC as a result of two independent reports which I published regarding ASIC's handling and processing of reports of alleged misconduct on 6 and 24 October 2022 respectively.
3. My two reports, which I would like to officially submit for the inquiry's consideration, can be found at **Attachment A** (the Adams Primary Report) and **Attachment B** (the Adams Supplementary Report).
4. In essence, these reports point to an alarming decline in ASIC's standard of performance over the period FY 11-12 to FY 21-22 with respect to:
 - a. how ASIC handles and processes reports of alleged misconduct; and
 - b. ASIC's propensity to commence official investigations into potential criminal and civil contraventions of Commonwealth and/or state/territory law.
5. I suggest the inquiry should pay close attention to both:
 - a. annual statistics (especially the annual performance statistics recorded for FY 21-22) relating to ASIC's management of reports of alleged misconduct from members of the Australian public, Australian Financial Service Licence holders, auditors and registered liquidators recorded by ASIC via their annual reports; and
 - b. the trends in ASIC's annual performance documented over the past 11 financial years (i.e., FY 11-12 to FY 21-22).

¹ <https://www.smh.com.au/politics/federal/corporate-watchdog-to-be-grilled-over-its-handling-of-complaints-20221027-p5bte7.html>

² <https://www.news.com.au/finance/business/other-industries/asic-slammed-for-investigating-just-1-per-cent-of-alleged-breaches-according-to-new-report/news-story/18478b55984ae852b3d9ce6d4d4e7afb>

6. Specifically, the inquiry should interrogate:
 - a. why, on average, does ASIC commence official investigations in only approximately 1% of cases when reports of alleged misconduct are received;
 - b. the dramatic rise in the number and percentage of reports of alleged misconduct (especially reports from members of the Australian public and breach reports³) which have resulted in no further action (NFA);
 - c. the material decline (or trend) in the number of new official ASIC investigations commenced since July 2015 (both in nominal terms as well as a ratio relative to the total number of reports of alleged misconduct received by ASIC);
 - d. why, on average, 91% of whistleblower disclosures since July 2015 have resulted in NFA; and
 - e. how does ASIC make judgements of which reports of alleged misconduct are selected for official investigation.
7. As part of this interrogation, I would draw the inquiry's attention to recent testimony provided on 14 December 2022 by Mr Michael Brereton, President of the Australian Restructuring Insolvency & Turnaround Association, to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into corporate insolvency in Australia (at **Attachment C**).

Mr Brereton provided evidence that in late 2022, he, as a practicing registered liquidator, lodged a liquidator report with ASIC containing allegations of misconduct and received a NFA notification within 45 seconds after lodgement.

This claim is both staggering and extraordinary and would suggest, if confirmed to be true, that ASIC is failing to perform any adequate assessment of reports of alleged misconduct to the detriment of the Australian public interest and the administration of justice.

My Direct Experience with ASIC

8. The genesis for my two independent reports as noted above in paragraphs 2 and 3 was based on my personal experience in preparing and lodging a substantial report of alleged misconduct with ASIC.
9. From June 2021 to April 2022, I conducted my own self-funded full-time investigation into systemic criminal corporate fraud (the 'Adams Investigation') resulting in my legal representative and I lodging a substantial formal 608-page report of alleged misconduct with ASIC on 6 April 2022.
10. Specifically, this report comprised of the following:
 - a. 3-page cover letter;
 - b. 53-page report of alleged misconduct which outlined our case theory including our specific allegations, established facts and associated supporting analysis; and
 - c. 103 exhibits of evidence.
11. The 9-month Adams Investigation incurred direct costs of approximately \$AUD 50,000 (and approximately \$150,000 in opportunity costs/lost income) and required the utilisation of professional

³ Note that breach reports are now called 'reportable situations'.

expertise including solicitors, barristers, consultants with direct ASIC expertise, accountants, auditors and subject matter experts.

12. My report to ASIC alleged that at least 15 contraventions of Commonwealth and state/territory laws had been committed by the offending group of companies and associated company directors and personnel.
13. These allegations are of such consequential importance in terms of the potential number of Australians and the quantum of capital impacted that my report of alleged misconduct was addressed and submitted directly to ASIC's Chairman, Mr Joseph Longo.
14. Fortunately, even though the probability of triggering an official ASIC investigation is approximately 1% or less (see analysis in **Attachments A and B**), officials from ASIC's Office of Enforcement confirmed in July 2022 via email communication to me that an official section 13⁴ investigation had commenced into my report of alleged misconduct.
15. Subsequent correspondence sent by ASIC on 25 November 2022 to my legal representative confirmed that this official investigation remains ongoing.
16. The Adams Investigation and subsequent submitted report of alleged misconduct required significant time, financial resources and professional expertise in order to meet ASIC's assessment criteria and evidentiary threshold.
17. As an economist with no legal or investigative training, qualifications or experience, the Adams Investigation was by far the most challenging and financially risky undertaking of my professional career.

The task of assembling a sufficient quantum of evidence using a variety of investigative techniques and then marrying this evidence with specific criminal and civil statutes to articulate specific well-reasoned legal allegations was particularly challenging.

This was because that there was no guarantee as how the investigation would evolve and that at any point in time, my case theory could potentially collapse resulting in a complete loss of time and money dedicated to the Adams Investigation.

18. Given paragraph 17, it is my view that the ability of other Australians, especially unsophisticated retail investors, to replicate my effort in terms of:
 - time;
 - resources;
 - the ability to collect the sufficient quantities of legally admissible evidence;
 - assembling a high-quality team of knowledgeable experts; and
 - leading the private investigation;

is extremely arduous if not impossible.

19. My direct experience in being able to trigger an official investigation by ASIC suggested to me that access to financial justice for ordinary average Australian retail investors who are victims of improper activity is extremely remote. In my view, the lengths that I was forced to go through in triggering an official ASIC investigation should be the exception and not the rule.

⁴ Section 13 of the *Australian Securities and Investments Commission Act 2001*.

20. Thus, the overlay of my longitudinal analysis and my direct experience with ASIC forms the basis for my call for this current inquiry.

Case Studies

21. Beyond my direct experience with ASIC, it is important for the inquiry to note that behind ASIC's investigation and enforcement performance statistics are real case studies involving Australian businesses and individuals with a direct story to tell about their engagement with ASIC with respect to reports of alleged misconduct.
22. In instances where ASIC has failed to perform to the expectations of the Federal Parliament (as the law-making branch of the Commonwealth and the legal authority overseeing ASIC) and the Australian public, I believe that the current inquiry will hear two categories of case studies. These categories are where ASIC:
- a. failed to take appropriate investigative or enforcement action in a timely fashion (or in many cases took no action at all); or
 - b. took either inappropriate or disproportionate action for either minor infractions or against innocent parties based on factually incorrect information or wrongful assessments.
23. In considering these categories, it is important to note that:
- in the case of the former, the inquiry's focus will be largely on the activities of ASIC's Misconduct and Breach Reporting team; and
 - while in the case of the latter, the inquiry's focus will be on what is now ASIC's Office of Enforcement (prior to July 2019, the Office of Enforcement did not exist and ASIC's enforcement function operated under different governance arrangements).
24. Importantly, many of these case studies will involve a significant volume of information and detail as well as technical legal complexities which require close forensic examination by the inquiry to form judgements regarding ASIC's performance and any identifiable contributing factors.
25. Given the significant nature of some of these case studies, I implore the inquiry to dedicate adequate time and resources to this task.

Previous Examinations of ASIC's Performance

26. It is also important for the inquiry to appreciate the significant pent-up frustration which exists across the Australian community with respect to ASIC's performance and that this frustration has been building since the 2008 Global Financial Crisis.
27. Over the past 15 years, ASIC has been subjected to intense scrutiny via multiple reviews, parliamentary inquiries and the 2018-19 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Through these various processes, ASIC's performance has repeatedly been found to be inadequate relative to the expectations of the Federal Parliament and the Australian community.

28. Moreover, ASIC's repeated performance missteps have been chronicled by both academics and journalists in various publications, including, for example, journalist Adele Ferguson's 2019 book, *"Banking Bad"*⁵.
29. Despite this scrutiny, not only has ASIC failed to demonstrate any discernible improvement, but, as noted above in paragraph 6, is actually getting worse. Given this, it is easy to understand why some stakeholders are despondent and have resigned themselves to the proposition that genuine reform at ASIC is unattainable.
30. Thus, in order to restore confidence that the Commonwealth's corporate and financial legal frameworks will be robustly and accurately enforced, it is paramount that the Senate Economics References Committee demonstrates to all interested stakeholders why this inquiry process will lead to real change at ASIC and will not be simply a 'go through the motions' exercise.

Supplementary Submission & Public Hearings

31. Lastly, I am foreshadowing, via this submission, the possibility that I may come forward with a supplementary submission with respect to my report of alleged misconduct resulting from the Adams Investigation prior to the deadline for inquiry submissions of 3 February 2023.
32. Moreover, given the importance of the matters raised in my two independent reports (as noted in paragraph 3 above), I would be happy, during the course of the inquiry, to appear at a public hearing and take questions from the committee.
33. Thank you once again for the opportunity to contribute to the important work of the Senate Economics References Committee.

Yours Sincerely,

John Adams

⁵ Ferguson, A., (2019), *"Banking Bad"*, Harper Collins Publishers Australia, Sydney, Australia, (see the following link: <https://www.adeleferguson.com.au/banking-bad>)

2022

Handling of Reports of Alleged Misconduct by the Australian Securities and Investments Commission

PROPOSED PUBLIC INQUIRY - PARLIAMENTARY JOINT
COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES
ADAMS ECONOMICS

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This report has been prepared by independent economist and public policy practitioner John Adams of Adams Economics.
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For further information, contact John Adams at www.adamseconomics.com.au or john@adamseconomics.com

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1. Executive Summary

- Every year thousands of Australians become victims of corporate and financial misconduct. The impact of this improper conduct can be devastating and carry serious detrimental life-long impacts.
- In many instances, these victims turn to the Australian Securities and Investments Commission (ASIC) when seeking justice and to ensure that others do not suffer similar harm.
- This report seeks to explore and analyse ASIC's handling of reports of alleged misconduct drawing upon both quantitative data from ASIC's published annual reports as well as qualitative and anecdotal observations from ASIC stakeholders with direct first-hand experience.
- These reports of alleged misconduct which ASIC receives are drawn from three primary sources, namely from:
 - the Australian public;
 - breach reports submitted either by auditors or holders of Australian Financial Services Licenses; and
 - registered liquidators via statutory liquidator reports.
- On 23 August 2022, the Chairman of ASIC, Mr Joseph Longo stated the following in a speech to the Committee for Economic Development of Australia¹ (emphasis added):

*“Ultimately it is ASIC’s capacity, when the circumstances warrant it, to take forceful enforcement action that lies at the heart of its effectiveness as a regulator. **Our appetite to take on matters has not diminished.** Where we see egregious misconduct, we will act. Our action will be targeted, timely and proportionate.”*
- However, despite heavy criticism of ASIC's performance over the past decade, this report finds that ASIC's response to reports of alleged misconduct is getting worse not better. This is despite ASIC benefitting from a real increase in staffing and financial resources, especially in the wake of the 2018-19 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
- Specifically, the key findings of this report, which considers the period of FY 11-12 to FY 20-21 are as follows:
 - the rate of reports of alleged misconduct from the Australian public that result in no further action increased from **33%** to **65%** (paragraph 46) or in nominal terms 4,130 reports in FY 11-12 to 6,912 reports in FY 20-21 (paragraph 51);
 - the rate of breach reports that result in no further action increased from **50%** to **89%** (paragraph 56) or in nominal terms 684 breach reports in FY 11-12 to 3,212 breach reports in FY 20-21 (paragraph 72);
 - the average annual ratio of investigations to total reports of alleged misconduct (i.e., the average over the decade of official investigations relative to the total reports of alleged misconduct submitted to ASIC) was only **1.27%** (paragraph 92);

¹ <https://asic.gov.au/about-asic/news-centre/speeches/looking-ahead-asic-s-priorities/>

- the annual ratio of investigations to total reports of alleged misconduct peaked in FY 14-15 and then fell to a low of only **0.74%** in FY 20-21 (paragraph 94);
 - on average since July 2015, 91% of whistleblower disclosures resulted in no further action (paragraph 144);
 - the level of staff within the ASIC Office of Enforcement grew by **52%** from 371 (total net FTE) in FY 18-19 to 563 (total net FTE) in FY 20-21 while the annual ratio of investigations to the total reports of alleged misconduct fell to a low of **0.74%** in FY 20-21 (paragraphs 181 and 184); and
 - ASIC's website (including other digital tools and services) does not provide stakeholders (including members of the Australian public) with an easy-to-follow experience when submitting reports of alleged misconduct.
- Importantly, these trends commenced prior to the establishment of the 2018-19 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the COVID-19 pandemic.
 - Moreover, this report cannot find any evidence that the:
 - added matters resulting from the Royal Commission which ASIC was required to address; or
 - COVID-19 pandemic;contributed to these trends.

- The recent report by Four Corners journalist Caro Meldrum-Hanna in a program titled: *"The Wolf of Woy Woy"*², which was broadcasted by the Australian Broadcasting Corporation on 29 August 2022, demonstrated the real-life devastating impact of when reports of alleged misconduct and whistleblower disclosures are inappropriately assessed and mishandled by ASIC over an extended period of time. The outcome can allow for misconduct to flourish unabated and for an ongoing trail of unsophisticated and vulnerable Australians to be ensnared into a web of white-collar crime leaving the victims in financial and emotional destitution for many years.
- The author of this report met with senior ASIC officials on 8 September 2022 where broad contextual themes and background related to ASIC's handling of reports of alleged misconduct was discussed. A number of the discussed themes prompted additional research which has been incorporated into this report³.
- The discussed themes and additional research found that:
 - several official investigations were historically not triggered from reports of alleged misconduct, but rather from other sources and activities, including market intelligence and ASIC's surveillance function. This implies that the annual ratio of investigations to the total reports of alleged misconduct is actually lower than what is presented above; and
 - each year, several matters which are worthy of official investigation are not resourced for investigation due to operational and financial limitations.

² <https://www.abc.net.au/4corners/the-wolf-of-woy-woy/14036314>

³ All views expressed in this report are solely of the author and no attribution is to be given to any other individual or organisation, including ASIC.

- Importantly, even though prompted to complete additional research, no empirical evidence that objectively explained, via a cohesive rationale, the trends outlined in this report could be identified.
- Given this context, this report calls on the Parliamentary Joint Committee on Corporations and Financial Services (or an alternative appropriate parliamentary committee) to hold a public inquiry to explore the trends and observations documented in this report, to identify possible causes and to consider and recommend required remedies.
- This report also proposes a comprehensive set of terms of reference for Parliament’s consideration.
- Such an inquiry would not duplicate or overlap the assessment and review work recently completed by the Financial Regulator Assessment Authority (which considered other matters) as per its submitted *“Effectiveness and Capability Review of the Australian Securities and Investments Commission”* report to the Commonwealth Assistant Treasurer the Hon. Stephen Jones MP on 29 July 2022.
- Moreover, the proposed inquiry coupled with appropriate reforms have the ability to enhance consumer and investor outcomes, in particular for unsophisticated and vulnerable investors. Such enhanced outcomes would align with the ASIC Corporate Plan 2022-26.

2. Introduction

1. Australia is beset by corporate and financial crimes to such an extent that the former Chairman of the Australian Securities and Investments Commission (ASIC), Greg Medcraft, referred to Australia as a 'paradise' for white collar crime⁴.
2. Corporate and financial misconduct imposes each year significant economic, financial and social costs on Australia at large as well as on impacted individuals. In some cases, these costs can result in extreme adverse personal mental, emotional and physical health costs on individual Australians.
3. In many instances when alleged corporate and financial misconduct occurs, thousands of Australians each year turn to ASIC when seeking justice and to ensure that public harm resulting from alleged misconduct can be minimised. Moreover, ASIC receives annually thousands of reports of potential corporate and financial misconduct from AFS licensees, auditors and liquidators through both breach reports and statutory liquidator reports.

4. According to the Chairman of ASIC, Mr Joseph Longo, who stated on 23 August 2022 the following in a speech to the Committee for Economic Development of Australia⁵ (emphasis added):

*“Ultimately it is ASIC’s capacity, when the circumstances warrant it, to take forceful enforcement action that lies at the heart of its effectiveness as a regulator. **Our appetite to take on matters has not diminished.** Where we see egregious misconduct, we will act.*

Our action will be targeted, timely and proportionate. Rather than attempting to be ‘everywhere’, we must prioritise the areas of greatest harm and take action to protect vulnerable people. Being a regulator is all about choices, so we must be targeted in the way we deploy resources.”

5. However, the overwhelming majority of reports to ASIC are not actioned, with the bulk of them officially deemed as “No Further Action” (NFA).
6. Over the past 10 years from FY 11-12 to FY 20-21 (i.e., from July 2011 to June 2021), only 1.27% of the total reports of alleged misconduct (resulting from reports from either the Australian public, breach reports or supplementary statutory liquidator reports) has resulted in a formal investigation as defined by Section 13 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and Section 247 of the *National Consumer Credit Protection Act 2009* (NCCP Act) (i.e., 1,709 official investigations from a total of 134,542 reports).
7. The legislative provisions under Section 13 (ASIC Act) or Section 247 (NCCP Act) are displayed at **Attachment A**⁶.
8. Concerningly, reports of alleged misconduct from both members of the Australian public and breach reports, in particular, that result in NFA or does not trigger a Section 13 (ASIC Act) or Section 247 (NCCP Act) investigation have gotten progressively worse over the past 10 years.

⁴ <https://www.afr.com/companies/australia-a-paradise-for-white-collar-crime-20141021-11blo5>

⁵ <https://asic.gov.au/about-asic/news-centre/speeches/looking-ahead-asic-s-priorities/>

⁶ Note that section 14 of the ASIC Act and section 248 of the NCCP Act respectively provide the Minister with the power to direct ASIC to commence an official investigation. For the purposes of this report, these provisions are ignored given that there is no evidence that the Minister utilised these legal powers in the period examined in this report.

9. ASIC's high rate of non-action in response to reports of alleged misconduct has caused, and continues to cause, significant levels of frustration across Australia, and especially among directly affected individuals.
10. This frustration is compounded by the observed (in many instances) slow responsiveness by ASIC when it does decide to take action.
11. This frustration has already caused a loss of confidence in Australia's corporate and financial regulatory frameworks and the enforcement thereof. Furthermore, as noted by Justice Kenneth Hayne⁷, a lack of enforcement of the law sends the wrong signal to those within corporate Australia who wish to obtain a financial advantage through improper conduct.
12. This frustration was on full display in a recent program by Four Corners journalist, Caro Meldrum-Hanna, titled: "*The Wolf of Woy Woy*"⁸, which was broadcasted by the Australian Broadcasting Corporation (ABC) on 29 August 2022.
13. This program documented the vast white-collar criminal history of Edward Lancaster (dating back to the 1970s in New Zealand) who has allegedly left a trail of financial devastation in Australia over the past decade (which coincides approximately with the period examined in this report) via two Australian companies: Greywolf Resources NL and Lithium-Gold Mines Australia Pty Ltd.
14. The program detailed a series of purported victims of Greywolf Resources NL who lodged a series of reports of alleged misconduct with ASIC over the course of approximately a decade only for, according to a statement provided by ASIC to the ABC, all of them, bar one report, resulting in NFA.
15. Moreover, the program aired the comments of purported victims who suggested that ASIC displayed a lack of interest or engagement with their claims that they were victims of financial crime. This was supported by the comments of Mr Daniel Flett, the former Chief Financial Officer of Greywolf Resources NL and a purported eligible whistleblower, who indicated that:
 - he had not received any form of communication; and
 - no action had been takenafter he blew the whistle through the "proper channels".
16. The direct inference to be drawn from the Four Corners program is that ASIC mishandled a series of reports of alleged misconduct and whistleblower disclosures and thus allowed for misconduct to flourish unabated resulting in an ongoing trail of unsophisticated (including vulnerable) Australians being ensnared into a web of white-collar crime leaving them in financial and emotional destitution for many years⁹.

⁷ See Final Report - Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (See the following link: <https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-1-final-report.pdf>).

⁸ <https://www.abc.net.au/4corners/the-wolf-of-woy-woy/14036314>

⁹ Interestingly, a similar story was told by British investigative program, BBC Panorama, which was broadcasted on 16 August 2022 titled: "*The Billion Pound Savings Scandal*". This program documented the mishandling of reports of alleged misconduct submitted to the British financial regulator, the Financial Conduct Authority (or FCA).

See the following link: <https://www.bbc.co.uk/programmes/m001b7jh>

17. In the past decade, ASIC's performance has been subject to heavy and direct criticism including via the:
 - 2014 Senate Economics References Committee inquiry into ASIC's performance¹⁰ (2014 ASIC Inquiry);
 - 2018-19 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry¹¹ (Banking Royal Commission); and
 - 2021 Senate Economics References Committee inquiry into the collapse of Sterling First¹².
18. Despite these criticisms, ASIC's performance, as noted in paragraphs 6 and 8, is getting worse not better.
19. Moving forward, it is likely that ASIC will receive a larger volume of reports of alleged misconduct given that credit licensees were, for the first time, required from October 2021 to report breaches of their licence obligations to ASIC as part of the reforms enacted by the Parliament of Australia via the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*.
20. This report argues that ASIC can and should do better, both in terms of its effectiveness and efficiency, when receiving and processing reports of alleged misconduct from members of the Australian public, licence holders, auditors and liquidators.
21. Enhanced performance by ASIC within this context is likely to deliver substantial benefits for Australia's financial system and its participants, particularly unsophisticated and vulnerable retail investors. Such benefits would align with ASIC's priorities as stated in the ASIC Corporate Plan 2022 - 26¹³.

Basis and Preparation of this Report

22. On 6 April 2022, Mr John Adams (the author of this report) submitted a 608-page report of alleged misconduct to ASIC alleging serious contraventions of Commonwealth and State law.
23. The experience in both preparing the report of alleged misconduct and how ASIC received and managed it provided Mr Adams first-hand insights into the potentially serious deficiencies within ASIC's handling and management procedures, including as it relates to whistleblowers¹⁴.
24. Mr Adams also drew on statistics of ASIC's handling of reports of alleged misconduct from members of the Australian public, breach reports and statutory liquidator reports contained in ASIC's annual reports. These statistics are presented at **Attachment B**.
25. Moreover, Mr Adams also drew on ASIC's annual reports to analyse the number of annual whistleblower disclosures received by ASIC and how they are processed. These statistics are presented at **Attachment C**.

¹⁰ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC

¹¹ <https://www.royalcommission.gov.au/banking>

¹² https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SterlingIncomeTrust

¹³ <https://download.asic.gov.au/media/v3vhdqiw/asic-corporate-plan-2022-26-focus-2022-23-published-22-august-2022.pdf>

¹⁴ Whistleblower disclosures are a particular subset of reports of alleged misconduct (i.e., they form part of the report). Eligible whistleblowers are defined in section 1317AAA of the *Corporations Act 2001*.

26. In addition, Mr Adams examined multiple reports, academic papers, media articles and books which, over the past decade, have examined or commented on ASIC and its performance. This includes the various ASIC Enforcement update publications as well as the Financial Regulator Assessment Authority (FRAA) report titled "*Effectiveness and Capability Review of the Australian Securities and Investments Commission*"¹⁵ (FRAA report) which was submitted by the FRAA to the Commonwealth Assistant Treasurer the Hon. Stephen Jones MP on 29 July 2022.
27. Mr Adams also consulted widely with former ASIC employees, members of the legal and accounting professions, impacted retail investors, industry stakeholders and public policy and digital information technology experts, who also contributed to this paper by sharing their perspectives.
28. The author of this report met with ASIC on 8 September 2022 where broad contextual themes and background related to ASIC's handling of reports of alleged misconduct was discussed. A number of the discussed themes prompted additional research which has been incorporated into this report.
29. All views expressed in this report are solely of the author and no attribution is to be given to any other individual or organisation, including ASIC.

Data Methodology and Data Sources

30. The period of FY 11-12 to FY 20-21 was selected for examination because:
 - (a) it is after the introduction of the NCCP Act (note that the original version of the NCCP Act was enacted by the Parliament of Australia on 15 December 2009¹⁶); and
 - (b) ASIC's FY 10-11 annual report does not contain any data relating to breach reports.
31. The statistical data used in this report was drawn from each ASIC annual report of the corresponding financial year. The specific page reference from ASIC's annual reports for each statistic used in this report is documented at **Attachment D**.
32. Data relating to whistleblower disclosures to ASIC is only available in ASIC's annual reports from FY 15-16 through to FY 20-21.
33. With respect to ASIC's staffing levels:
 - From FY 11-12 to FY 20-21, ASIC's staffing head count is presented on an average net FTE basis;
 - From FY 14-15 to FY 20-21, ASIC staffing for the handling and processing of reports of alleged misconduct are presented as "Assessment and Intelligence"; and
 - Enforcement staffing levels are presented for only FY 18-19 to FY 20-21 as this data is presented in the format of the "Office of Enforcement".

¹⁵ This report was published in August 2022, see the following link:
https://www.apf.gov.au/Parliamentary_Business/Tabled_Documents/192

¹⁶ https://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4180

34. Financial data used in this report includes:

- appropriations and cash payments provided to ASIC from ordinary annual services, special appropriations (or equity injections) as well as financial capital contained within various special accounts under ASIC's jurisdiction. This, as noted in the ASIC Annual Report 2020-21, is referred to as "Total Resourcing (A+B+C+D)";
- data drawn from ASIC's Cash Flow Statement and the accompanying notes such as the "Administered Reconciliation Schedule"; and
- cost recovery levy revenue drawn from the Cost Recovery Implementation Statements: ASIC Industry Funding Model for the period FY 17-18 through to FY 20-21.

3. ASIC’s Handling and Management Process of Reports of Alleged Misconduct

35. As noted above in paragraph 3, this report considers reports of alleged misconduct received by ASIC from the following sources:

- members of the Australian public;
- breach reports; and
- statutory liquidator reports¹⁷.

36. Moreover, according to paragraph 2.7 of the FRAA report, ASIC has one of the broadest statutory mandates amongst its international peers, thus the breath of alleged contraventions which could be potentially contained within reports of alleged misconduct are also likely to be extremely broad.

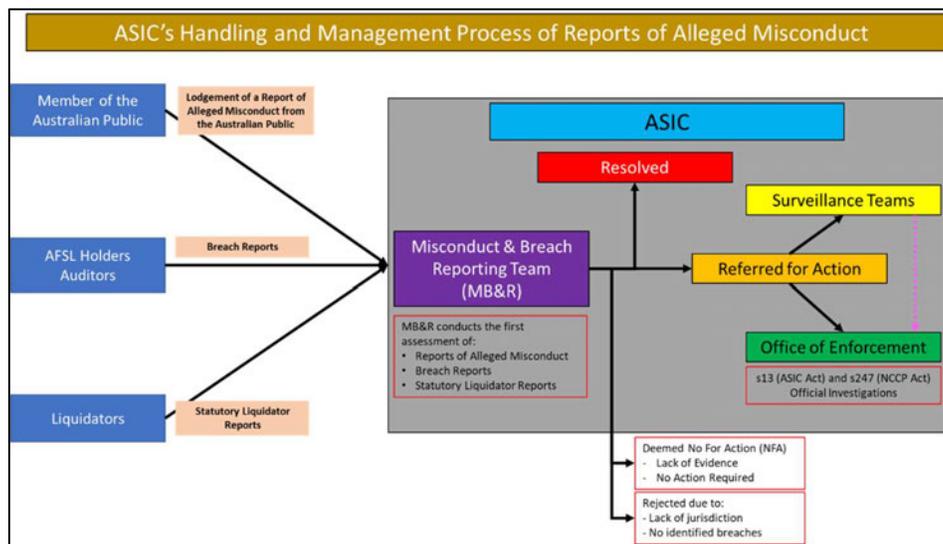
37. Upon receipt, reports of alleged misconduct are assessed within ASIC’s Misconduct and Breach Reporting (MB&R) team. Upon assessment, MB&R can:

- refer the report for action within ASIC (either to the surveillance team or the Office of Enforcement);
- deem the report for NFA; or
- reject the report because of a lack of legal jurisdiction or because no breaches could be identified.

38. MB&R currently sits within the Operations Division of ASIC’s organisational structure.

39. ASIC’s handling and management of reports of alleged misconduct is illustrated in Diagram 1¹⁸.

Diagram 1: ASIC’s Handling and Management Process of Reports of Alleged Misconduct



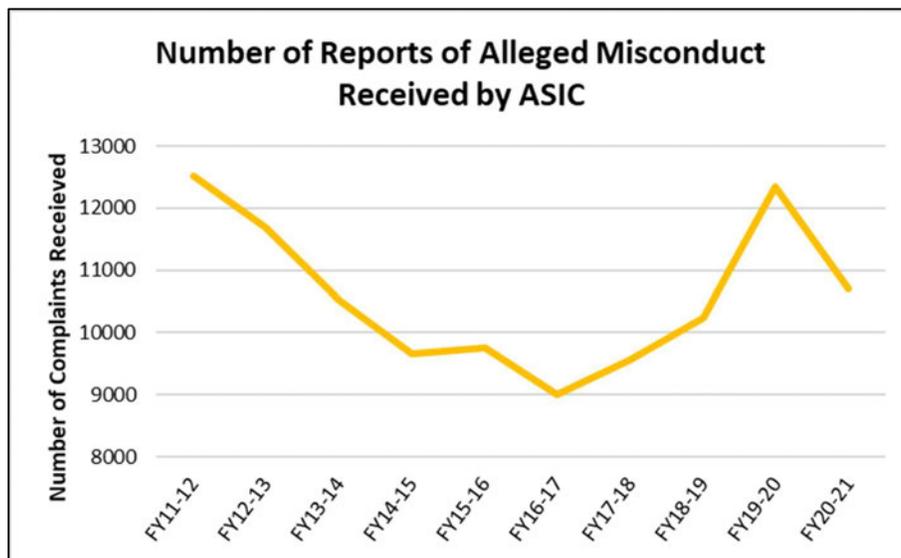
¹⁷ As noted below in paragraphs 81 and 82, ASIC reviews liquidator reports and where warranted, requests supplementary liquidator reports. These supplementary reports are then referred for action where necessary.

¹⁸ It is important to note that Diagram 1 includes a pink dotted line from the ASIC’s surveillance teams to the Office of Enforcement. This is to signify that either official section 13 (ASIC Act) or section 247 (NCCP Act) investigations may be a result of a referral from ASIC’s surveillance teams or from market intelligence sources.

Reports of Alleged Misconduct Received by ASIC from the Australian Public (Source 1 of 3)

40. Over the past 10 years from FY 11-12 to FY 20-21, ASIC, according to their annual reports, each year receives an average of 10,064 reports of alleged misconduct from members of the Australian public (see Diagram 2)¹⁹.
41. During this period (i.e., the available data), ASIC experienced a peak in the number of reports of alleged misconduct it received from the Australian public in FY 11-12 with 12,516 reports. This peak was followed by two years of above average receipt of such reports. These years include:
- FY 12-13, with 11,682 reports of alleged misconduct; and
 - FY 19-20, with 12,355 reports of alleged misconduct.
42. The high number of reports of alleged misconduct received by ASIC in FY 11-12 coincides with the financial harm experienced in the aftermath of the 2008 Global Financial Crisis.

Diagram 2: Number of Reports of Alleged Misconduct Received by ASIC from the Australian Public



43. Reports of alleged misconduct from the members of the Australian public can be submitted to ASIC by:
- ASIC's online web form²⁰;
 - physical letter; or
 - phone call.

¹⁹ Importantly, ASIC does not distinguish between reports and matters in its annual reports, thus it is difficult to assess whether each of the reports made to ASIC by members of the Australian public relate to separate and independent matters or whether multiple reports relate to the one matter.

For example, it is conceivable that a collapsed managed investment scheme with hundreds of investors would trigger multiple reports of alleged misconduct to ASIC.

²⁰ It can be accessed via the following link:
<https://asic.gov.au/about-asic/contact-us/how-to-complain/>

44. Approximately 60% of reports from the Australian public are submitted via ASIC’s online web form, 35% by physical letter and the remainder by telephone. ASIC encourages members of the Australian public to use the online web form as this provides ASIC with structured information which can then be appropriately assessed.
45. Reports of alleged misconduct are classified by ASIC, within its annual reports²¹, as follows:
- referred for action by ASIC²²;
 - resolved²³;
 - analysed and assessed for NFA²⁴;
 - rejected due to a lack of jurisdiction; or
 - rejected because no breaches or offences can be identified.
46. The average rate by which reports of alleged misconduct have been classified by ASIC from FY 11-12 to FY 20-21 (i.e., the average over the 10-year period) is outlined in Table 1²⁵.

Table 1: Average Annual ASIC Classification Rate of Reports of Alleged Misconduct from Members of the Australian Public

	Referred for Action	Resolved	Analysed and Assessed for NFA	No Jurisdiction	No Breach or Offences
Average Annual % Classification From FY 11-12 to FY 20-21	23.60%	13.80%	47.70%	10.70%	4.20%

47. Importantly, and as it will be elaborated upon below, only a small fraction of the reports from members of the Australian public that are referred for action result in an official section 13 (ASIC Act) or section 247 (NCCP Act) investigation.
48. Rather, the overwhelming majority of reports referred for action are instead referred to ASIC’s surveillance teams for additional monitoring amongst other non-investigative activities. These other activities may include the creation or upgrading of ASIC’s market guidance and/or educational material.
49. In some instances, reports of alleged misconduct submitted by members of the Australian public may be a lag indicator in that they generally are submitted after a company or scheme has collapsed and the investor has experienced financial losses.

²¹ ASIC publishes these classification outcomes by percentage within their annual reports.

²² ‘Action’ may include ASIC commencing an official investigation via Section 13 (ASIC Act) or Section 247 (NCCP Act) official investigations. It may also include that the report of alleged misconduct is referred to ASIC’s surveillance teams for additional monitoring. As noted at paragraph 4.5 of the FRAA report, ASIC’s surveillance teams in FY 21-22 absorbs 25% of ASIC’s total staff and 21% of ASIC’s total funding and thus is a major function within ASIC’s overall operations.

²³ Explanation of ‘resolved’ is provided below at paragraph 60.

²⁴ NFA means that ASIC, after preliminary inquiries, will take no further action and the report matter becomes closed.

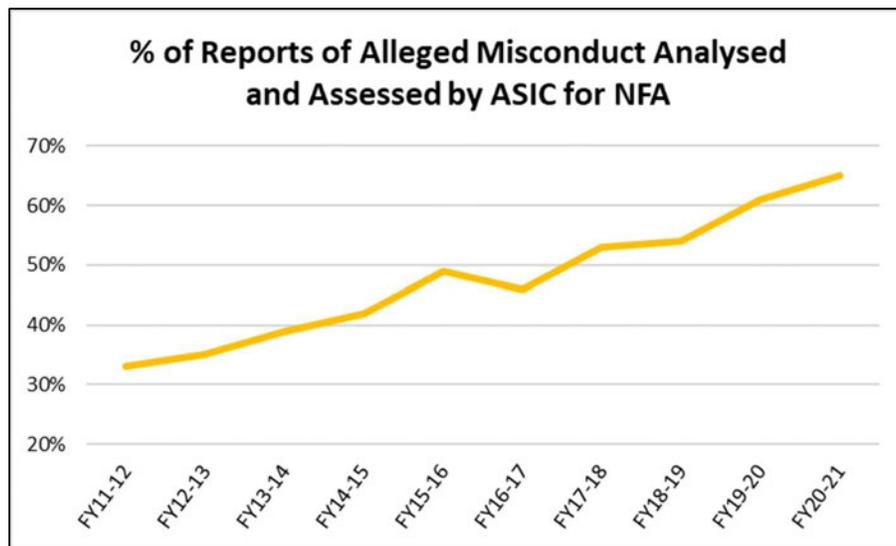
²⁵ The averages calculated in Table 1 were calculated by taking the percentages of each classification (as per footnote 21) from each ASIC annual report and then taking an average of the percentages.

For example, the percentage rate of reports of alleged misconduct ‘referred for action’ for each of the 10 years between FY 11-12 to FY 20-21 were listed in a spreadsheet and then each of the percentages were tallied up and divided by 10.

Reports of Alleged Misconduct Resulting in No Further Action (NFA)

50. Over the 10 years from FY 11-12 to FY 20-21, 50,413 reports of alleged misconduct from members of the Australian public out of a total of 106,041 received have been analysed and assessed (or deemed) by ASIC as NFA. In average terms over the 10-year period examined, ASIC’s annual NFA to reports of alleged misconduct from the Australian public ratio is 47.7%
51. Concerningly, over this period, the rate of reports of alleged misconduct from members of the Australian public resulting in NFA has grown, both consistently and rapidly from 33% in FY 11-12 to 65% in FY 20-21. This trend is illustrated in Diagram 3.

Diagram 3: Percentage of Reports of Alleged Misconduct Analysed and Assessed for No Further Action



52. In nominal terms, the number of reports of alleged misconduct from members of the Australian public that resulted in NFA grew from 4,130 reports in FY 11-12 to 6,962 reports in FY 20-21. The nominal number of reports from the members of the Australian public which resulted in NFA peaked in FY 19-20 at 7,537 reports.
53. According to classifications within ASIC’s annual reports from FY 17-18 to FY 20-21²⁶, ASIC may classify a report of alleged misconduct as NFA because it deemed that there was either “insufficient evidence” or “no action” required.
54. From FY 17-18 to FY 20-21, 17,949 reports of alleged misconduct resulted in NFA because of insufficient evidence. However, and most critically, ASIC provides no public guidance or objective criteria to potential complainants as to the:
- nature and type of evidence ASIC requires; and
 - quantum of evidence sufficient for ASIC to refer the report for action.

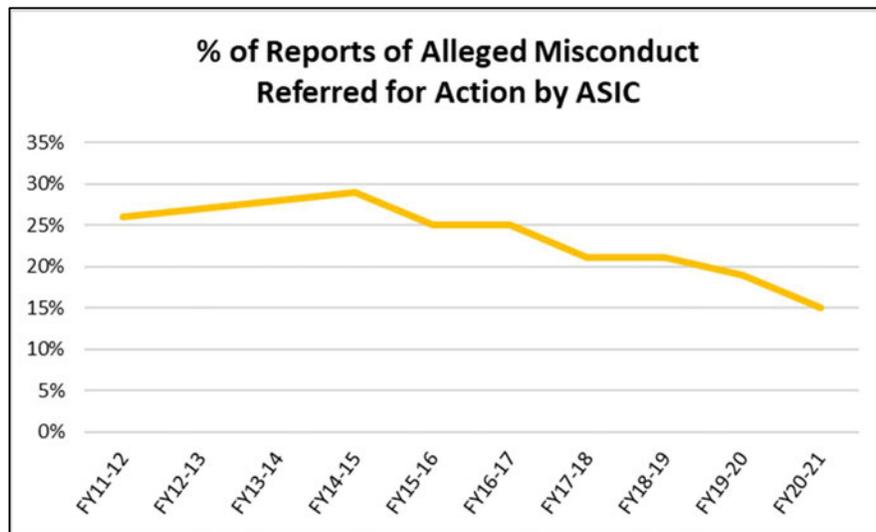
²⁶ ASIC’s Annual Reports prior to FY 17-18 does not provide a NFA statistical breakdown between ‘insufficient evidence’ and ‘no action’.

55. The lack of public guidance or objective (both quantitative and qualitative) criteria provides a major stumbling block for members of the Australian public to submit sufficiently robust and detailed reports to ASIC for their consideration.
56. While ASIC’s information sheet INFO 151 – “ASIC’s Approach to Enforcement” outlines four broad criteria²⁷ in their decision-making process regarding whether to investigate or not, this criterion is extremely broad and lacks both quantitative or qualitative specificity.

Reports of Alleged Misconduct Referred by ASIC for Action

57. In contrast to the increasing rate by which reports of alleged misconduct from members of the Australian public (source 1 of 3) to ASIC attract an NFA classification, the percentage of reports that ASIC instead refers for action has, in essence, consistently declined. After peaking at 29% in FY 14-15, it has steadily fallen to only 15% in FY 20-21. This trend is illustrated in Diagram 4.

Diagram 4: Percentage of Reports of Alleged Misconduct which are Referred for Action by ASIC



Reports of Alleged Misconduct which are Resolved

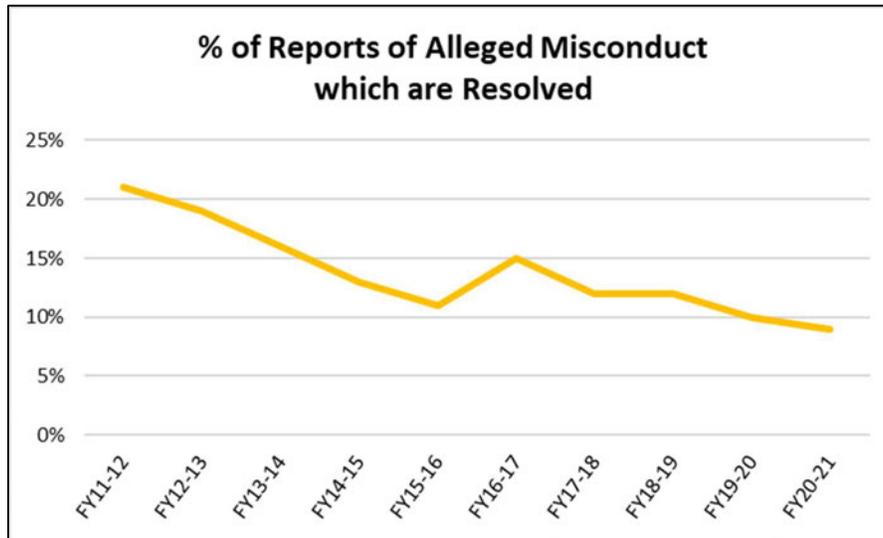
58. The percentage of reports of alleged misconduct that ASIC from members of the Australian public resolves has also, in essence, consistently declined over the last decade, falling from 21% in FY 11-12 to only 9% in FY 20-21 (See Diagram 5).
59. In nominal terms, the number of reports of alleged misconduct from members of the Australian public which have been resolved has fallen by over 63% from 2,628 reports in FY 11-12 to only 964 reports in FY 20-21.

²⁷ This broad criterion includes: (1) areas of significant harm, (2) broader public benefit, (3) issues specific to the case and (4) alternatives to formal investigation.

60. According to the ASIC Annual Report 2020-21²⁸, a report of alleged misconduct that is resolved by ASIC can:

“...involve referral to an external dispute resolution scheme, ASIC issuing a warning letter to the party that may be in breach of the Corporations Act, ASIC providing assistance to the reporter in the form of guidance and information about how best to resolve the matter themselves, or ASIC taking action to achieve compliance.”

Diagram 5: Percentage of Reports of Alleged Misconduct which are Resolved



Reports of Alleged Misconduct which Lack Jurisdiction or have No Breaches

61. Over the same period (i.e., FY 11-12 to FY 20-21), reports of alleged misconduct submitted to ASIC that were outside of ASIC’s jurisdiction (as a share of the total reports received from members of the Australian public in the financial year) fell from 15% in FY 11-12 to 9% in FY 20-21.
62. In nominal terms, ASIC saw a 49% fall in the number of submitted reports which was outside of ASIC’s jurisdiction from 1,877 reports in FY 11-12 to 964 reports in FY 20-21.
63. Alternatively, reports of alleged misconduct submitted to ASIC that did not identify a contravention of law (as a share of the total reports received from members of the Australian public in the financial year) fell from 5% in FY 11-12 to 2% in FY 20-21.
64. In nominal terms, ASIC saw a 65% fall in the number of submitted reports not identifying a contravention of law from 626 reports in FY 11-12 to 214 reports in FY 20-21.
65. These trends do suggest that, over the 10-year period examined in this report, significantly fewer erroneous reports of alleged misconduct were being submitted to ASIC. Despite this welcomed outcome

²⁸ See page 211 of the ASIC Annual Report 2020-21

(of time and resources saved, assisted purportedly through concerted efforts by ASIC²⁹), this outcome does also carry worrisome implications for the annual ratio of investigations to total reports of alleged misconduct which is mentioned further below.

66. Importantly, while these trends do, to a minor extent, explain why the NFA rate has risen as illustrated in Diagram 3, they do not explain the reason why in nominal terms more reports of alleged misconduct from the Australian public resulted in NFA over the period examined.
67. The causes for why a greater number of reports of alleged misconduct from members of the Australian public was deemed NFA remains unknown. No empirical evidence could be found during the preparation of this report that explains this phenomenon.
68. Moreover, no comment can be made as to the nature or seriousness of these reports that have been deemed NFA, how many matters do they relate to and whether they have been appropriately processed.
69. Although, as noted in paragraphs 12 to 16 above, purported victims of alleged financial crime and an eligible whistleblower have alleged on Australian national television that at least some of these reports deemed NFA have been inappropriately assessed by ASIC.

Breach Reports^{30,31} (Source 2 of 3)

70. A second source of information that indicates to ASIC that a contravention of the law may have occurred involves breach reports. According to the ASIC Annual Report 2020-21³²:

“The Corporations Act requires AFS licensees to tell us in writing within 10 business days about any significant breach (or likely breach) of their obligations. We also receive breach reports from auditors who have reasonable grounds to suspect a breach of the Corporations Act by the company, managed investment scheme or AFS licensee that they are appointed to audit.”

71. From FY 11-12 through to FY 20-21, ASIC experienced a significant increase in the annual number of breach reports received. This increase was more than 160% in FY 20-21 (3,609 breach reports) relative to FY 11-12 (1,367 breach reports). This is illustrated in Diagram 6.

²⁹ ASIC has made concerted efforts over recent years to reduce the volume of reports arising in instances where it was not appropriate to bring the matter to its attention. An example cited was where the relationship between directors of a company had broken down (typically in instances of small business).

³⁰ Note that the breach reporting regime was overhauled by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* which achieved royal assent on 17 December 2020. As part of the reforms, the breach reporting regime was strengthened for financial services licensees and new breach reporting requirements have now been imposed for credit licensees.

The reforms came into effect by 1 October 2021 which is after the period analysed in this report.

See the following link:

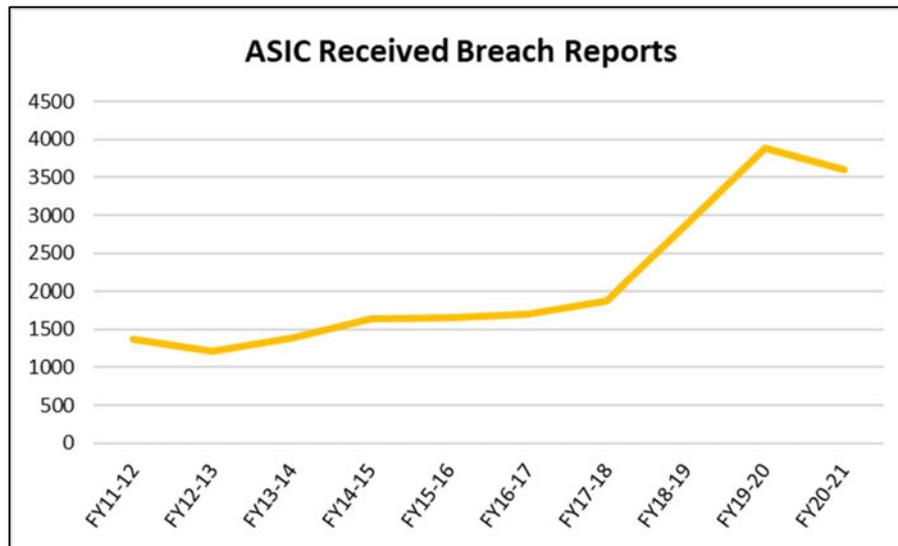
https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6630

³¹ As noted on the ASIC website, as from 1 October 2021 breach reporting is now called “reportable situations” and AFS licensees and Australian credit licensees are required to submit notifications about ‘reportable situations’ to ASIC within 30 calendar days (no longer 10 days) via the ASIC regulatory portal.

See the following link: <https://asic.gov.au/regulatory-resources/financial-services/financial-advice/running-a-financial-advice-business/reportable-situations-previously-breach-reporting/>

³² See page 211 of the ASIC Annual Report 2020-21.

Diagram 6: Annual Number of Breach Reports Received by ASIC



72. Alarming, the number of these breach reports deemed by ASIC as NFA also increased significantly over the corresponding period from 50% in FY 11-12 to 89% in FY 20-21. This is illustrated in Diagram 7^{33,34}.
73. In nominal terms, the number of breach reports which resulted in NFA grew from 684 reports in FY 11-12 to 3,212 reports in FY 20-21. This growth has occurred in consecutive years from FY 12-13.
74. The causes for the phenomenon described above remain unknown. No empirical evidence could be found during the preparation of this report which explains why an increasing number of breach reports (both in nominal and percentage terms) have resulted in NFA.
75. Moreover, no comment can be made as to the nature or seriousness of these reports that have been deemed NFA, the number or type of matters they relate to, and whether they have been appropriately processed.

³³ This trend should be concerning given historical criticism of the breach reporting regime and the outcomes that this regime delivers. For example, in her book “Banking Bad”, journalist Adele Ferguson stated on page 53:

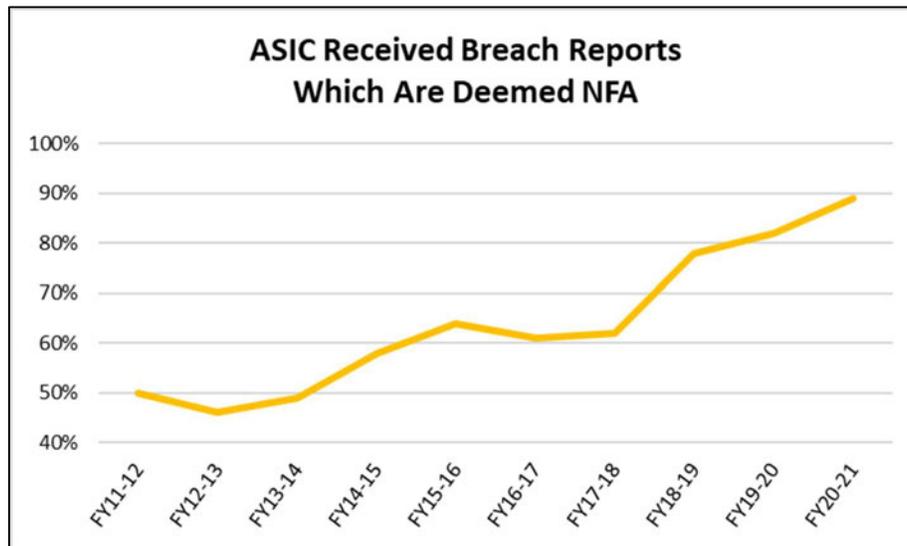
“Where any breach of a regulation was detected, companies were expected to own up to the relevant regulator by sending it a breach notice. Rather than a fine, this usually resulted in a negotiated settlement, often involving a donation to a charity or community cause, or an enforceable undertaking, whereby the company simply agreed to implement a set of changes to rectify the problem. It was light-regulation indeed.”

See further reference: Ferguson, A., (2019), “Banking Bad”, Harper Collins, Sydney, Australia.

³⁴ It is particularly concerning when one considers that the reporters here are sophisticated industry specialists or experts (i.e., AFS licensees and auditors) and not just lay people from the general public. The time and resources of such expertise should not be being wasted by either:

- overly-dismissive regulatory behaviour;
- overly-cautious reporting obligations (or behaviour – i.e., submit a report just to be really safe);
- unclear reporting guidelines; or
- a combination thereof.

Diagram 7: Annual % of Breach Reports which ASIC deems NFA



Liquidator Reports (Source 3 of 3)

76. The third source of information that alleges to ASIC that a contravention of the law has occurred involve statutory reports from registered liquidators. As noted in the ASIC Annual Report 2020-21³⁵:

“The Corporations Act requires registered liquidators to report to ASIC if it appears that company officers are guilty of an offence. Liquidators (except in the case of a simplified liquidation) must also report if the return to unsecured creditors may be less than 50 cents in the dollar.”

77. Over the period of FY 11-12 to FY 20-21, the number of initial statutory liquidator reports submitted to ASIC has progressively fallen (by 60%) from 11,404 reports in FY 11-12 to only 4,566 reports in FY 20-21. This is illustrated in Diagram 8.

78. The data included in Diagram 8 includes the total number of initial statutory liquidator reports received by ASIC in each financial year over the period examined.

79. Interestingly, ASIC through its annual reports includes a breakdown of those initial statutory liquidator reports that allege misconduct as opposed to those that do not.

80. For the period FY 11-12 through to FY 20-21, an average of 81.2% of initial statutory liquidator reports submitted to ASIC alleged some form of misconduct (ranging from 74.8% in FY 11-12 to 83.4% in FY 20-21). During this period, however, the peak of initial statutory liquidator reports alleging misconduct reached 89.2% in FY 18-19. (These data points, including percentages, are shown at **Attachment B.**)

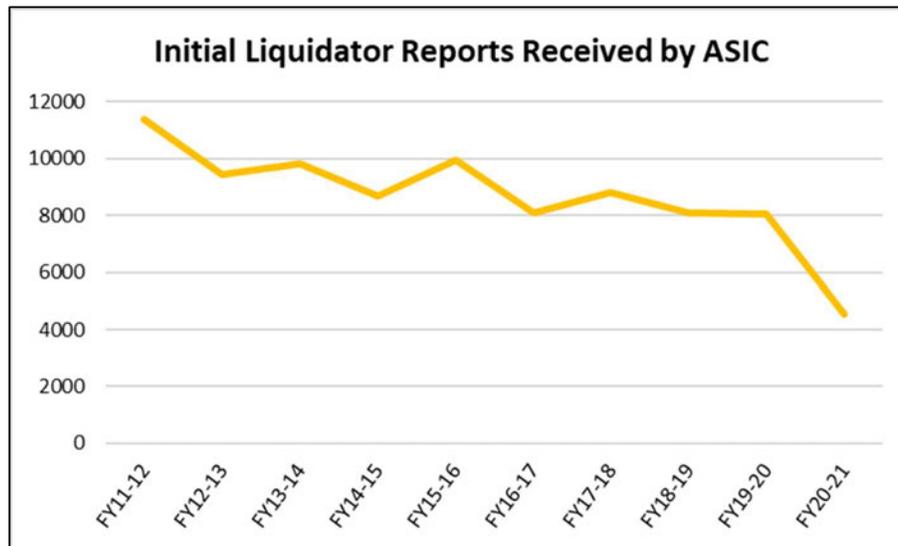
81. Upon receipt and review of these initial statutory liquidator reports, ASIC then requests supplementary reports in select instances. According to the ASIC Annual Report 2020-21³⁶:

“These supplementary reports typically set out the results of the registered liquidator’s inquiries and the evidence to support the alleged offences.”

³⁵ See page 212 of the ASIC Annual Report 2020-21.

³⁶ See footnote 28.

Diagram 8: Total Number of Initial Liquidator Reports Received by ASIC



82. Received finalised supplementary statutory liquidator reports are then assessed by ASIC and either referred for compliance, investigation or surveillance action or are deemed NFA.
83. For the period FY 11-12 through to FY 20-21, ASIC requested, on average, supplementary statutory liquidator reports in only 10.6% of instances where the initial statutory liquidator report alleged misconduct. As a percentage of the total number of initial statutory liquidator reports received (i.e., also including those reports where misconduct was not alleged), ASIC requested supplementary statutory liquidator reports in only 8.5% instances on average. (These data, including percentages, are shown at **Attachment B.**)
84. In similar fashion to the number of initial statutory liquidator reports received by ASIC, the annual number of finalised supplementary reports submitted to ASIC has also fallen from 921 such reports in FY 11-12 to only 517 in FY 20-21 (or 43.9%). This is shown in Diagram 9.
85. Despite large falls in report numbers from FY 11-12 to FY 20-21, the number of finalised supplementary statutory liquidator reports received by ASIC and deemed NFA remained stubbornly high (and broadly rose from FY 11-12). From FY 13-14 to FY 20-21, the annual average number of finalised supplementary reports deemed NFA was 81% (i.e., occurring between a range of 76% and 87% over this period illustrated in Diagram 10³⁷).
86. For the purposes of this report and its focus on ASIC’s propensity to commence section 13 (ASIC Act) and section 247 (NCCP Act) official investigations, this report has focused on ASIC’s handling and management of finalised supplementary (as opposed to initial) statutory liquidator reports (see section 4 of this report below).

³⁷ As with the concerns raised above in footnote 30, an average annual NFA rate of 81% for finalised supplementary reports from these different experts (i.e., licenced liquidators) raises similar concerns about regulation optimality.

Diagram 9: Number of Finalised Supplementary Reports Submitted to ASIC

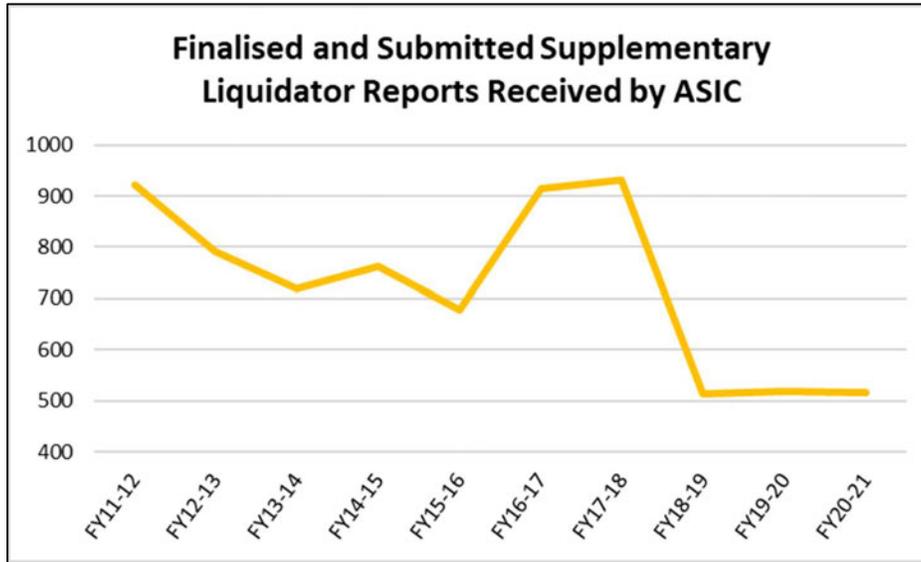
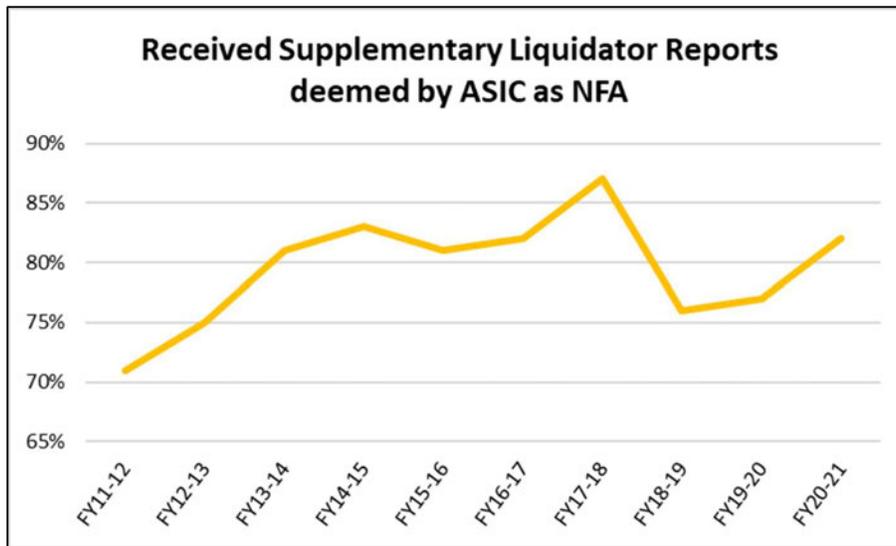


Diagram 10: Number of Finalised Supplementary Reports deemed by ASIC as NFA



87. For completeness, for the period FY 11-12 to FY 20-21, the percentage of all initial statutory liquidator reports submitted to ASIC that ultimately get referred for action is on average only 1.7%. Over the same period, of those initial statutory liquidator reports that allege misconduct, only 2.1% on average are referred for action. These statistics are presented at [Attachment B](#).
88. No comment can be made as to the nature or seriousness of the misconduct alleged in the initial statutory liquidator reports, nor whether they have been appropriately assessed and processed.

4. Commencement of Section 13 and Section 247 Investigations

89. Both the Parliament of Australia and members of the Australian public expect that the laws, will or intent of Parliament are complied with. Moreover, both expect that instances of improper criminal and/or civil conduct are addressed swiftly to ensure that financial harm to individuals and the Australian economy as a whole is minimised.

90. Indeed, according to paragraph (1)(2)(g) of the ASIC Act, ASIC must strive to (emphasis added):

*“take **whatever action** it can take, and is necessary, in order to **enforce and give effect to the laws of the Commonwealth** that confer functions and powers on it.”*

91. As noted by Justice Kenneth Hayne, on pages 424 - 425 of the 2019 Final Report – *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019 Banking Royal Commission Final Report):

“Compliance with the law is not a matter of choice. The law is, in that sense, coercive and its coercive character can be neither hidden nor ignored. Negotiation and persuasion, without enforcement, all too readily leads to the perception that compliance is voluntary. It is not.”

92. Over the past 10 years from FY 11-12 to FY 20-21, the average annual percentage of total:

- reports of alleged misconduct from members of the public;
- breach reports from licensees and auditors; and
- supplementary statutory reports from registered liquidators;

relative to formal section 13 (ASIC Act) or section 247 (NCCP Act) investigations (i.e., the “annual ratio of investigations to the total report of alleged misconduct”) was only 1.27%. In total, over this period, ASIC commenced 1,709 separate section 13 (ASIC Act) or section 247 (NCCP Act) official investigations³⁸.

³⁸ Importantly, it is difficult to understand the nature of these investigations and who is the subject of these investigations.

For example, do the investigations examine serious breaches of law or do they involve minor strict liability offences, such as failure by a corporation or a holder of an Australian Financial Services Licence to meet reporting obligations such as submitting a form on time?

Moreover, are the bulk of these investigations targeted at the small business community or at large corporates? With respect to corporate or investment scheme collapses, are these investigations commenced before or after the collapse? (Note that investigations commenced and actions taken before a collapse is likely to minimise the public harm suffered by investors).

The lack of clarity with respect to the questions above underscores why there was a significant gap in perceptions, as noted in the December 2015 report, *“Fit for the Future – A capability review of the Australian Securities and Investments Commission – A Report to Government”*, between ASIC’s leadership team and external stakeholders with respect to:

- ‘ASIC is consistent in its decision making’ (47% gap in perception); and
- ‘ASIC is transparent in the way it operates’ (39% gap in perception)

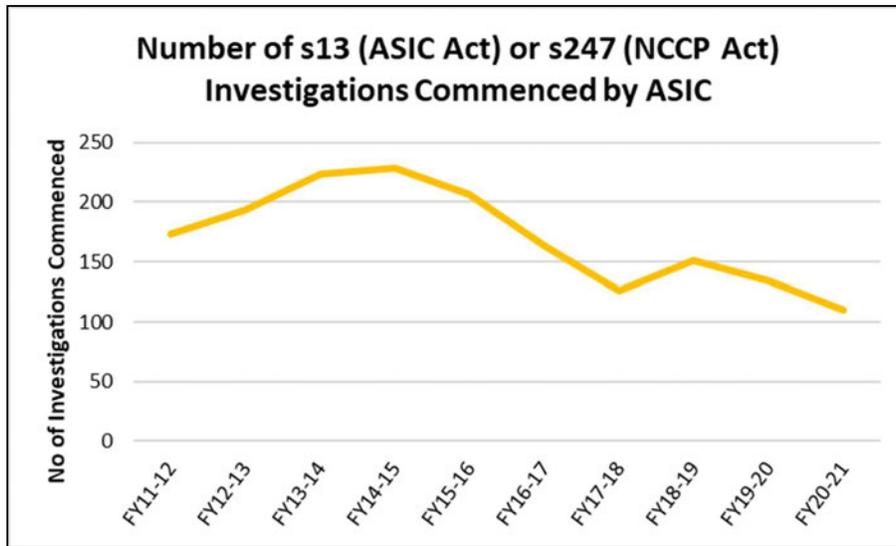
with ASIC’s leadership team holding more positive views. See page 9 of *“Fit for the Future – A capability review of the Australian Securities and Investments Commission – A Report to Government”*.

<https://treasury.gov.au/sites/default/files/2019-03/ASIC-Capability-Review-Final-Report.pdf>

93. Over this period of time, the annual number of new section 13 (ASIC Act) or section 247 (NCCP Act) official investigations commenced by ASIC peaked in FY 14-15 at 229 separate investigations.

From this peak, this statistic has steadily declined reaching a low of only 110 new official investigations in FY 20-21. The number of newly commenced Section 13 (ASIC Act) or Section 247 (NCCP Act) investigations is illustrated in Diagram 11^{39,40}.

Diagram 11: No. of Section 13 (ASIC Act) or Section 247 (NCCP Act) ASIC Investigations Commenced



94. Alarming, the annual ratio of ASIC official investigations commencing relative to received:

- reports of alleged misconduct from members of the public;
- breach reports from licensees and auditors; and
- supplementary statutory reports from registered liquidators;

has experienced continual decline since it peaked in FY 14-15 at 1.90%. FY 20-21 saw the lowest annual ratio of investigations to the total reports of alleged misconduct in the past 10 years at just 0.74%. The annual ratio of investigations to the total reports of alleged misconduct for the period FY 11-12 to FY 20-21 is illustrated in Diagram 12.

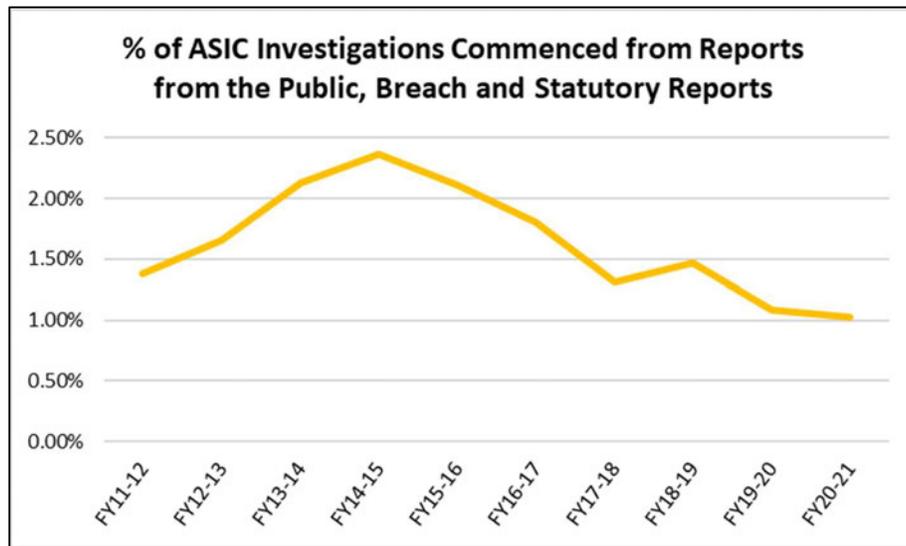
95. Of most concern is that ASIC’s annual ratio of investigations to the total reports of alleged misconduct experienced no improvement after the release of the 2019 Banking Royal Commission Final Report in February 2019 where ASIC received criticism over its approach to enforcement with respect to the banking, superannuation and financial services industries.

³⁹ It is important to note when considering ASIC’s workload that many investigations are not strictly confined to a single financial year and thus at the beginning of each financial year ASIC’s Office of Enforcement (or its enforcement function prior to 1 July 2019) will have a number of live investigations ongoing. ASIC does not publish the number of live investigations it is managing at the start of each financial year and thus no specific comments can be made with respect to this.

⁴⁰ The impact of the 2019 Banking Royal Commission on ASIC’s investigation workload is discussed below in section 11 of this report.

96. Interestingly, discussions with ASIC revealed that several official section 13 (ASIC Act) or section 247 (NCCP Act) investigations have historically not been triggered by reports of alleged misconduct but rather by market intelligence or surveillance activities. Given the lack of specific public figures with respect to this claim it is difficult to assess the degree by which this phenomenon manifests at ASIC.
97. Nevertheless, the concerning implications of paragraph 96 is that the percentage of reports of alleged misconduct ratio that actually trigger an official formal section 13 (ASIC Act) or section 247 (NCCP Act) investigation is less than what is described in the above paragraphs or illustrated in Diagram 12.

Diagram 12: Percentage of Reports of Alleged Misconduct which resulted in an official Section 13 (ASIC Act) or Section 247 (NCCP Act) ASIC Investigation



98. The continual and sustained fall in the annual ratio of investigations to the total reports of alleged misconduct should be of significant cause for concern for Federal Parliamentarians and members of the Australian public, particularly noting paragraphs 93 - 95 above. Such a trend would suggest either an unwillingness or an inability by ASIC to effectively enforce the laws and will of the Parliament of Australia.
99. Critically, as noted on page 432 of the 2019 Banking Royal Commission Final Report, Justice Hayne stated:

“Litigation of the kind now under consideration is the exercise of public power for public purposes. It is litigation by a public authority to enforce the law. A private plaintiff can always choose not to pursue, to abandon or to compromise that plaintiff’s private rights. A private plaintiff may take any of these steps for any reason or no reason. But altogether different considerations arise in connection with the public enforcement of the law.

“Breach of the law carries consequences. Parliament, not the regulators, sets the law and the consequences... the starting point for consideration is, and must always be, that the law is to be obeyed and enforced. The rule of law requires no less. And, adequate deterrence of misconduct depends upon visible public denunciation and punishment.”

100. The criteria upon whether reports of alleged misconduct result in section 13 (ASIC Act) or section 247 (NCCP Act) investigations is outlined in ASIC's information sheet INFO 151 – *"ASIC's Approach to Enforcement"*. Nothing within this information sheet provides any insights as to why the annual ratio of investigations to the total reports of alleged misconduct has more than halved (fallen by more than 60%) from FY 14-15 to FY 20-21.

101. Although, ASIC does take several factors into consideration before a decision is made to declare an official section 13 (ASIC Act) or section 247 (NCCP Act) including:

- the timeframe and age of when the purported offence was supposed to have taken place;
- the nature of evidence required to prove the purported offence; and
- the likelihood of securing the evidence.

102. Importantly, ASIC has adequate legislative power to investigate potential contraventions of law that it administers. As noted in paragraph 16.6 of the 2014 ASIC Inquiry report:

"The Rule of Law Institute of Australia was of the view that ASIC's investigative powers were 'more than adequate' and there could be 'no excuse of lack of powers'. In its view:

The problem is not a lack of power by ASIC. The various pieces of legislation empower ASIC, yet it is the failure to exercise them properly that has given rise to the issues [that are] the subject of the Inquiry."

103. Given paragraphs 100 and 102, it is an important consideration as to the degree and extent of discretion that ASIC exercises within the confines of INFO 151 when deciding whether to commence an official section 13 (ASIC Act) or section 247 (NCCP Act) investigation or to pursue an alternative course of action.

104. It is also important to consider how this discretion is exercised within ASIC and to what extent are ASIC's internal operating procedures prescriptive and whether internal decisions are objectively and transparently recorded and scrutinised.

105. As noted by regulatory specialist and Harvard University Professor Malcom Sparrow⁴¹:

"Too little discretion produces legalistic, nit-picky behaviour and denies regulators the means to tailor their responses to local or particular circumstances. Too much discretion creates opportunities for corruption and discrimination and opens a regulatory agency to capture by the regulated community."

106. To the public at large, the manner in which ASIC exercises its discretion with respect to official investigations is opaque and a 'black box'. This, coupled with ASIC's perceived closeness to entities that it regulates, has been raised as a point of concern.

107. For example, the Senate Economics References Committee noted on page 179 of its 2014 ASIC Inquiry report⁴²:

"ASIC has shown that it is reluctant to actively pursue misconduct within CFPL and FWL; rather, it appears to accept the information and assurances the CBA provides without question."

⁴¹ Sparrow, M., (2000), *"The Regulatory Craft"*, The Brookings Institute, Washington DC, USA, p238.

⁴² See footnote 4.

108. Moreover, as noted by Justice Hayne in the 2018 Banking Royal Commission Interim Report⁴³:

“When misconduct was revealed, it either went unpunished or the consequences did not meet the seriousness of what had been done. The conduct regulator, ASIC, rarely went to court to seek public denunciation of and punishment for misconduct.”

109. Importantly, as noted in paragraph 3.89 of the FRAA report, only 63% of respondents of ASIC’s staff survey *“agreed to understanding how decisions are made at ASIC”*. It is unclear to what extent this staff survey response was relevant to the decision of whether to commence an official section 13 (ASIC Act) or section 247 (NCCP Act) investigation.

110. Thus, the question as to whether the nature and manner in which discretion is exercised at ASIC has contributed to the declining trend of new section 13 (ASIC Act) or section 247 (NCCP Act) official investigations (as shown above in Diagrams 11 and 12) is worthy of public examination and analysis.

111. Lastly, it was noted with the author of this report that, each year, several matters worthy of official investigation are not resourced for investigation by ASIC due to operational and financial limitations. No comment can be made about such matters given that there is no publicly available information. However, both the number and nature of such matters are also worthy of public examination and analysis.

⁴³ See Executive Summary of the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (September 2018), <https://www.royalcommission.gov.au/banking/interim-report>

5. ASIC's Reports of Alleged Misconduct Processing Times

112. While, as noted above in paragraphs 91 and 99, the willingness to commence official investigations is a critical factor in the enforcement of Australia's laws so too is the speed in which reports of alleged misconduct are assessed and official investigations are declared and commenced.

113. ASIC acting with urgency can, in critical situations, play an instrumental role in minimising harm experienced by individual consumers or investors, the broader market as well as Australia's overall financial system and economy.

114. However, the speed in which ASIC acts in response to reports of alleged misconduct has historically been a point of criticism. For example, as noted by journalist Adele Ferguson⁴⁴ in the case of Storm Financial:

"Sadly, the regulator had been too slow to act. At least two months before Storm collapsed, ASIC had been told the company was in serious trouble and that investors faced heavy losses... But ASIC didn't start an investigation until December 2008. By then the markets had plummeted further, CBA had called in its margin loans, and it was too late to help Storm investors."

115. Moreover, as noted in the December 2015 *"Fit for the Future – A capability review of the Australian Securities and Investments Commission – A Report to Government"*, there is a 14% gap between the perspectives of ASIC's leadership team and external stakeholders regarding whether *"ASIC acts quickly to investigate potential breaches of the law"*, with ASIC's leadership team holding more positive views⁴⁵.

116. Although, according to Information sheet INFO 153⁴⁶, ASIC strives to achieve the following:

"We record every report of misconduct that we receive. We make preliminary inquiries and conduct an initial assessment of your report to see whether we should escalate the report to a specialist team. Our goal is to finalise our initial assessment within 28 days."

117. However, unfortunately, the time it takes ASIC to process reports of alleged misconduct via its MB&R team and, importantly, for official investigations under section 13 (ASIC Act) or section 247 (NCCP Act) to be declared, is beyond the scope of this report as this data is not publicly published by ASIC (nor is it clear whether this data is even collected by ASIC).

118. ASIC's processing times may be influenced by the level of information provided in the initial report and the degree to which additional information is sought from ASIC to either clarify or substantiate allegations made. To what frequency ASIC requests such information is unclear given the lack of available public information.

119. However, as per paragraph 1(2)(e) of the ASIC Act, ASIC must strive to (emphasis added):

*"receive, **process** and store, **efficiently and quickly**, the **information given to ASIC** under the laws that confer functions and powers on it."*

⁴⁴ Ferguson, A., (2019), *"Banking Bad"*, Harper Collins, Sydney, Australia (see page 79).

⁴⁵ See page 8 of *"Fit for the Future – A capability review of the Australian Securities and Investments Commission – A Report to Government"*, <https://treasury.gov.au/sites/default/files/2019-03/ASIC-Capability-Review-Final-Report.pdf>

⁴⁶ <https://asic.gov.au/about-asic/contact-us/how-to-complain/how-asic-deals-with-reports-of-misconduct/>

120. As discussed below, the one key factor that may influence (bring forward) ASIC's processing time is whether the report of alleged misconduct includes a disclosure from an eligible whistleblower consistent with section 1317AAA of the *Corporations Act 2001*.
121. As noted in ASIC's information sheet INFO 239, eligible whistleblowers are able to make either public interest or emergency disclosures if specific circumstances were to arise, but not before written notice is given to ASIC. The ability to make such disclosures came after the passage and enactment of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, which came into effect from 1 July 2019.
122. In the case of public interest disclosures, eligible whistleblowers are able to make a disclosure to a parliamentarian or journalist after 90 days, if the whistleblower has reasonable grounds to believe that ASIC has not taken action in response to the disclosure (paragraph 1317AAD(1)(c) of the *Corporations Act 2001*).
123. Alternatively, in the case of emergency disclosures, eligible whistleblowers are able to make a disclosure to a parliamentarian or journalist if their report includes "*substantial and imminent danger to the health or safety of one or more people or to the natural environment*".
124. Importantly, in reports of alleged misconduct that do not include disclosures from eligible whistleblowers, there are no triggers (or added urgencies) that would incentivise ASIC to prioritise such reports.
125. While ASIC's processing times of reports of alleged misconduct is beyond the scope of this specific report, it is worthy of public examination and analysis.

6. ASIC's Technology and Database Platforms

126. An important consideration in examining ASIC's handling and management performance of reports of alleged misconduct is to consider the extent to which ASIC's internal processes, technology and database platforms drive decision-making and performance.

127. With respect to the latter, this issue drew critical commentary from Dr Wilson Sy, who previously served at ASIC as a research analyst within ASIC's financial licensing division.

128. Specifically, Dr Sy in 2019 noted⁴⁷:

"Over the years, numerous victims of fake regulation have made copious complaints to the regulators, particularly to ASIC, but the information has been trapped in their databases, which are inescapable black holes. ASIC has few clues even on a statistical basis about the many thousands of complaints."

"The regulators pretended that they knew about the complaints, whereas they do not because the sheer volume of data requires high expertise and enormous computer resources to analyse".

129. Such commentary is also supported by the findings contained within the FRAA report at paragraphs 3.28 and 6.7 respectively. These findings stated:

"During this review the FRAA has noted long-term underinvestment in ASIC's data and technology capability. The FRAA understands that historically this may have been driven by undue focus on day-to-day regulatory concerns at the expense of longer term structural and strategic considerations."

"ASIC has a comparatively lower annual technology spend than some other domestic public sector agencies and international market conduct regulators."

130. The question of whether superior and fit-for-purpose technologies can assist ASIC in better managing reports of alleged misconduct from the Australian public as well as breach and statutory liquidator reports by collating statistical data that provides a stronger evidentiary basis for reports to be referred for official investigation is worth considering.

131. This is particularly so given the finding stated at paragraph 4.96 of the FRAA report (emphasis added):

*"Improved use of data and technology would enable ASIC to systematically and proactively detect emerging threats, **address misconduct** and minimise harm."*

ASIC's Website & Consumer Facing Digital Services

132. Beyond concerns regarding ASIC's technology and database platforms, consideration should also be given to ASIC's website and its digital services and whether these provides complainants with an easy to navigate digital pathway to lodging a high-quality report of alleged misconduct.

133. Given ASIC's wide mandate and policy functions (including regulator and law enforcement functions), ASIC's website contains many webpages of highly complex legalistic content. This content is often dense, vague and its sheer volume makes it hard to navigate for complainants to understand how to submit a report of alleged misconduct which is useful to ASIC.

⁴⁷ Sy, W., (2019), *"The Farce of Fake Regulation: Royal Commission Exposed"*, Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3375629

134. ASIC's website is designed to specifically guide and assist stakeholders to webpages relative to their areas of concern that would facilitate the lodgement of effective reports of alleged misconduct.
135. However, and importantly, the author of this report consulted with Mr Luke Williamson, a noted expert in digital customer interaction and the former digital customer practice lead for federal government with EY and a former executive responsible for the establishment of Medicare Australia's "web channel". Mr Williamson considered ASIC's consumer facing digital services and website and concluded that it does not:
- meet the Commonwealth's digital standards;
 - support assistive technologies; and
 - offer a contemporary experience to the consumer of its services.
136. Given this, it is worth considering whether ASIC is able to improve its digital user experience through an enhancement of its website and consumer facing digital services.

7. Additional Observations

137. The preparation and lodgement of the Adams' report of alleged misconduct (as noted in paragraph 22) and ASIC's subsequent consideration thereof has allowed Mr Adams to witness a number of critical observations. These observations identified several difficulties with ASIC's lodgement, handling and assessment reports of alleged misconduct processes, these include:

- ASIC does not explicitly detail their expectations as to what a report of alleged misconduct should include. For example, does ASIC expect or require:
 - that reports include an assessment against the criteria contained in information sheet INFO 151?
 - that the complainant explicitly details the breaches or offences which are alleged to have been committed? If so, what level of understanding of the law does ASIC expect members of the Australian public to hold?⁴⁸
 - that reports explicitly address why ASIC has jurisdiction over the matters raised?
 - multiple case studies of impacted stakeholders? If so, how many case studies are sufficient?
 - that witness statements (draft or otherwise) be provided in order to support a report? What format (including any specific words or phrases) should these witness statements be drafted in?
 - that supporting material or exhibits submitted as part of a report conform with the rules of evidence? Does ASIC expect supporting documents to be in admissible form?
 - any and all legal assumptions to be explicitly explained? Does ASIC expect these legal assumptions to be validated by a solicitor or barrister?
 - that reports include assessments or opinions by independent qualified experts such as lawyers, accountants, auditors, etc on technical matters?
 - that reports are prepared and signed off by practising solicitors and/or barristers?
- ASIC does not have explicit procedures for detailed reports of alleged misconduct that include numerous attachments or exhibits of evidence that cannot be submitted through the ASIC online portal.

With detailed and technically complex reports, ASIC does not indicate whether those reports should be submitted in hardcopy or USB thumb drive format.

- ASIC has not published an explicit format or template for how whistleblower disclosures are to be prepared and submitted (see below for further discussion of issues relating to whistleblowers).
- ASIC does not articulate how it responds to reports concerning entities or investment schemes that are/remain going concerns as opposed to those that have already collapsed or been put into liquidation or administration.

⁴⁸ Or should it be reasonable that members of the Australian public provide ASIC with facts and evidence and leave it to ASIC to determine which specific breaches of law have occurred.

- ASIC does not have an explicit hotline for reports of alleged misconduct where questions (as raised in paragraph 137 – 1st dot point above) can be asked and resolved prior to lodgement.
- ASIC does not provide any guidance as to how much and what nature of evidence it requires for a report of alleged misconduct to be referred for action.
- ASIC does not have published key performance indicators or guidance as to how long, on average, consideration of a report of alleged misconduct by the MB&R team is expected to take.
- Of those reports of alleged misconduct referred for action, ASIC does not articulate which ones are prioritised for investigation through any objective quantitative or qualitative risk framework. For example, are reports prioritised for investigation where:
 - i. potential or actual financial losses meet a particular financial threshold?
 - ii. unsophisticated or vulnerable investors are involved?
 - iii. the case involves disputed or uncertain areas of law?
 - iv. the case has a higher likelihood of a successful investigative outcome (i.e., strict liability offences are easier to investigate than complex corporate fraud cases)?
- It appears ASIC does not utilise the knowledge and expertise of complainants (or their legal representatives) through follow-up - either face-to-face or continual dialogue - to enable ASIC to consider matters before them more efficiently.

For example, in the case of the Adams' report of alleged misconduct, which includes significant nuance and complexity, ASIC did not take up the offer to receive a presentation from Mr Adams and his legal representatives that would have expedited their understanding and consideration of the report⁴⁹.

Furthermore, in the 21 weeks since receiving the report, ASIC did not pose any questions to Mr Adams or his legal representatives regarding the veracity of the allegations or the integrity of the evidence which a 608-page complaint should naturally invite.

This phenomenon was also observed in paragraph 4.76 of the FRAA report which stated:

"Market operators observed that ASIC often provided limited feedback regarding referrals of possible misconduct".

⁴⁹ This practice is different to other corporate regulators in international jurisdictions. For example, when Harry Markopolos lodged a report of misconduct into the activities of Bernie Madoff in 25 October 2005, Mr Markopolos was invited by the Boston Branch Chief of the US Securities and Exchange Commission, Mr Mike Garrity, to present his evidence, analysis and findings.

Markopolos was also given an earlier opportunity to meet SEC officials in May 2000 regarding an earlier report of alleged misconduct submitted against Bernie Madoff.

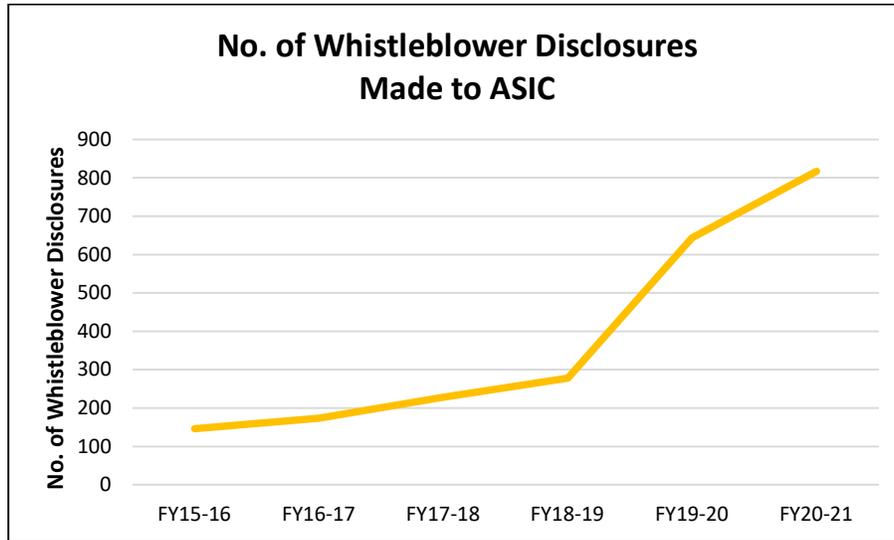
See Markopolos, H., (2010), *"No one would listen"*, John Wiley & Sons, New Jersey, USA, Page 62 and 136

8. Management of Whistleblowers

138. Corporate whistleblowers play a critical role in bringing to the attention of ASIC and other government law enforcement bodies instances of potential criminal and civil misconduct. Such disclosures are critical to ensuring that ongoing contraventions of law stop and that public harm (including financial loss) is minimised.
139. As noted by Australian Broadcasting Corporation business journalist Nassim Khadem in her 14 June 2022 article, titled: *“Labor government urged to drop prosecutions against whistleblowers and ramp up protections,”*⁵⁰, there remains serious deficiencies within Australia’s corporate whistleblower regime as defined by the *Corporations Act 2001*.
140. These deficiencies carry serious implications with respect to whether:
- whistleblowers have confidence to make their disclosure to government law enforcement bodies (which includes ASIC); and
 - whistleblower disclosures are handled appropriately and acted upon efficiently (and in good faith).
141. As noted above in paragraph 32, data contained within ASIC’s annual reports relating to whistleblower disclosures are only available from FY 15-16. From FY 15-16 to FY 20-21, ASIC received in total 2,287 whistleblower disclosures, of which 63.9% (or 1,461 disclosures) were received in FY 19-20 and FY 20-21.
142. This phenomenon of a sharp increase in received corporate whistleblower disclosures coincides with parliamentary reforms to Australia’s whistleblower regime via the enactment and assent of *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* in March 2019.
143. The annual number of whistleblower disclosures received by ASIC from FY 15-16 to FY 20-21 is illustrated in Diagram 13.
144. Alarming, despite the sharp increase in received whistleblower disclosures as illustrated in Diagram 13, the average number of these whistleblower disclosures over the period FY 15-16 to FY 20-21 deemed as NFA is 91%.
145. Specifically, the number of whistleblower disclosures deemed as NFA rose from 80% in FY 15-16 through to over 90% in FY 16-17 and has remained at this level ever since. Thus, only 189 whistleblower disclosures out of 2,287 were referred for action over this period.
146. The percentage of whistleblower disclosures received by ASIC deemed as NFA from FY 15-16 to FY 20-21 is illustrated in Diagram 14.
147. Note that the number of whistleblower disclosures deemed as NFA fell from 95% in FY 17-18 to 91% in FY 20-21 at the same time that the number of annual whistleblower disclosures rose from 228 in FY 17-18 to 817 in FY 20-21. This resulted in the annual number of whistleblower disclosures being referred for action rising from 11 disclosures in FY 17-18 to 74 disclosures in FY 20-21.

⁵⁰ <https://www.abc.net.au/news/2022-06-14/labor-prosecutions-against-whistleblowers-laws-protections/101140464>

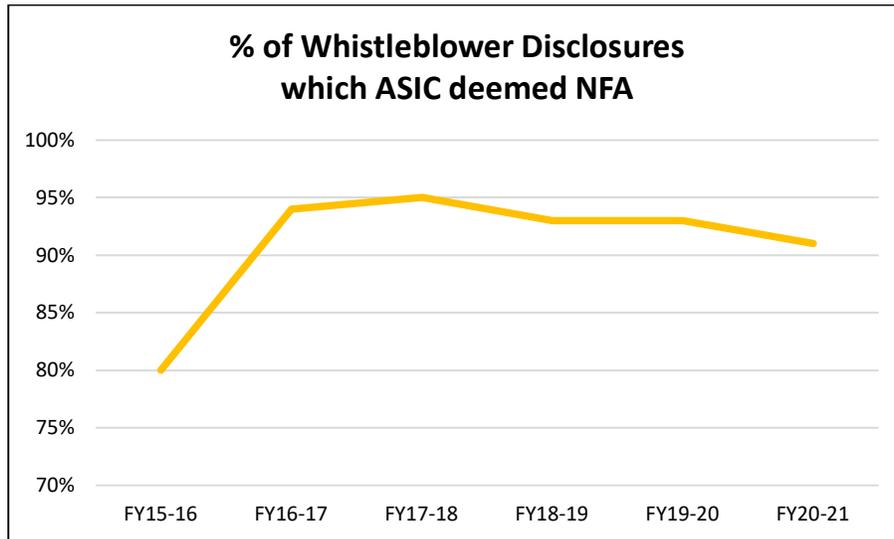
Diagram 13: Annual Number of Whistleblower Disclosures Submitted to ASIC



148. The high rate of NFA in response to whistleblower disclosures carries the risk that whistleblowers may:

- not understand how to make an effective disclosure to ASIC;
- be discouraged that their disclosure will be given due respect and consideration by ASIC⁵¹; and
- in future, be discouraged to make further disclosures.

Diagram 14: % of Whistleblower Disclosures deemed by ASIC as NFA



⁵¹ Particularly in light of the recent program by 4 Corners journalist Caro Meldrum-Hanna (see paragraph 15 above).

149. These risks have also been noted in other comparable jurisdictions such as the United States of America. For example, in his book about exposing Bernie Madoff, Harry Markopolos noted the following;

“Without the support of the SEC it was simply too dangerous for my whistleblowers to blow any whistles. They might very well have lost their jobs and been placed on the industry’s blacklist. It just wasn’t fair to these brave men and women or their families that they would have to suffer severe financial hardship just because the government agency charged with being the industry’s watchdog was deaf, blind, and mute.”⁵²

150. Moreover, Harry Markopolos emphasised the critical importance of corporate whistleblower management in ensuring that corporate and financial regulation is adhered to:

“The only chance the SEC had to even the playing field was the extensive use of whistleblowers. The agency needed people on the inside to expose corruption, but it offered no incentives to encourage those people to come forward. This isn’t true only in the SEC, it’s pervasive through-out government agencies and private industry. People who come forward to expose corruption risk their jobs, their personal relationships, and even their lives. Rather than being celebrated for their honesty and integrity, too often they end up alone and embittered. The sad truth is that in too many cases whistleblowers have gotten badly screwed.”⁵³

151. This report suggests that there are a number of policy and legal issues with respect to corporate whistleblowers that require public examination. These problems are outlined in Table 2.

Table 2: Identifiable problems with Australia’s Corporate Whistleblower Regime

No	Problem	Description
1	Eligible Whistleblowers	ASIC’s information sheet INFO 239 states: <i>“We do not decide who is and who is not a whistleblower... If there is a dispute about whether you satisfy this definition, it can only be determined by a court.”</i> Thus, in some instances, individuals who make a disclosure to ASIC may place themselves at legal risk without a declaration from a relevant court. This risk acts as a preventative barrier for whistleblowers to make their disclosure given the significant financial cost required to obtain a court determination.
2		Without a court determination, it is unclear whether ASIC will accept that a disclosure from an individual is a disclosure from an eligible whistleblower – especially if that whistleblower is anonymous.
3		ASIC does not communicate with whistleblowers as to whether they accept their claims of eligibility.
4	Anonymous Whistleblowers	ASIC does not provide any practical guidance as to how eligible whistleblowers should make an anonymous disclosure which allows them to maintain their anonymity.
5		ASIC does not provide any practical guidance as to how an anonymous whistleblower is to establish a communication channel with ASIC.

⁵² Markopolos, H., (2010), *“No one would listen”*, John Wiley & Sons, New Jersey, USA, Page 127

⁵³ Markopolos, H., (2010), *“No one would listen”*, John Wiley & Sons, New Jersey, USA, Page 64

No	Problem	Description
6	Public Interest Disclosures	<p>Under paragraph 1317AAD(1)(c) of the <i>Corporations Act 2001</i>, an eligible whistleblower is able to make a public interest disclosure after 90 days if (emphasis added):</p> <p><i>“the discloser does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the previous disclosure related”</i></p> <p>However, the word ‘action’ is not defined in the <i>Corporations Act 2001</i> and whistleblowers have no guidance either from Parliament or the courts as to what sufficient action by ASIC would prevent a public interest disclosure from being made.</p>
7		<p>There is an inherent unresolved conflict between:</p> <ul style="list-style-type: none"> the whistleblower’s right to know if action has been taken in response to their disclosure (as per paragraph 1317AAD(1)(c) of the <i>Corporations Act 2001</i>); versus ASIC’s operational requirement to keep its regulatory and enforcement activities confidential so as to not undermine ASIC’s regulatory, investigative or enforcement processes or prejudice impacted parties (as described in ASIC’s information sheet INFO 152⁵⁴).
8		<p>As stated in ASIC’s information sheet INFO 238, eligible whistleblowers are required to give ASIC notice that they plan to make a public interest disclosure before doing so. However, ASIC provides no guidance as how such notice is to be submitted to ASIC in terms of:</p> <ul style="list-style-type: none"> what format must the notice be in; and who within ASIC should the notice be submitted to.

⁵⁴ <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/public-comment-on-asic-s-regulatory-activities/>

9. Parliamentary and Public Criticism of ASIC

152. Problems with ASIC’s management of reports of alleged misconduct are not solely isolated to this report, but rather have been identified by other stakeholders in other forums.

153. For example, in paragraph 4.105 of the Senate Economics References Committee report into the collapse of the Sterling Income Trust⁵⁵, the committee made the following observation of ASIC (emphasis added):

*“That said, the committee also has serious concerns about the performance of ASIC with respect to the Sterling Group matter, including its **under-assessment of the gravity of the risks, the timeliness of its response, and its failure to act proactively**. The committee is mindful of the requirements for ASIC to obtain proper evidence and follow due process before undertaking investigations and enforcement actions. The committee is also conscious that ASIC’s regulatory role does not involve preventing all consumer losses or ensuring compensation for consumers in all cases where losses arise. However, in this instance the committee believes that ASIC had sufficient evidence and grounds for concern in 2017 to refer the matter to its enforcement division for investigation.”*

154. Moreover, ASIC’s handling and management processes of reports of alleged misconduct was heavily criticised during the 2014 ASIC Inquiry⁵⁶. Several references from the inquiry report are documented in Table 3.

Table 3: Criticisms of ASIC from the 2014 Senate Economics References Committee Inquiry Report

No	Inquiry Report Paragraph Reference Number	Inquiry Report Quote
1	15.2	<i>“Many witnesses to the inquiry were of the view, however, that ASIC does not deal with all the complaints it receives adequately; rather they argued ASIC ignores grassroots warnings of impending collapses and crisis. The committee has already cited two cases as particular examples of where, without any effective form of early intervention, an emerging problem was allowed to develop causing harm to many retail consumers and investors.”</i>
2	15.12	<i>“As a specific concern, the Institute of Chartered Accountants similarly identified the amount of time that it takes ASIC to act and respond to a complaint or information.”</i>
3	15.13	<i>“The Australian Shareholders’ Association was concerned about ASIC’s complaints management policies and practices, which to the interested or affected party, appear to be reactive and not alert to potential problems. It gained the impression that overseas regulators were able to act more quickly to assess a situation, take action and reach a conclusion compared to Australia where it seemed litigation, or the threat of such, delayed these steps.”</i>
4	15.15	<i>“Indeed, the Commonwealth Ombudsman noted that one of the most frequent complaints about ASIC lodged with his office was that the regulator had not investigated and/or taken enforcement action in relation to a report of misconduct or breach of legislation.”</i>

⁵⁵ See the relevant reference at paragraph 17 of this report.

⁵⁶ See the relevant reference at paragraph 17 of this report.

No	Inquiry Report Paragraph Reference Number	Inquiry Report Quote
5	15.18	<p><i>“Ms Anne Lampe [former ASIC employee and journalist], also questioned ASIC’s management of complaints. While working at ASIC’s media unit, she became aware that ASIC received frequent complaints about ‘dodgy and suspect investment schemes as well as lost investments in failed companies’. Ms Lampe found that the complaints were ‘dutifully logged and filed’; their recording was methodical; and records well kept. Her concern was that action stalled with the recording and filing of the reports and that ‘too many complaints remained buried in the archives’. She explained further:</i></p> <p><i>“It was only when the volume of complaints and losses about a particular scam reached tsunami level, or investors with losses contacted a member of parliament, or triggered a media inquiry that ASIC seemed to spring into action.”</i></p>
6	15.22	<p><i>“But there were many other submitters who wrote about their experiences of ASIC’s inaction... They recounted their own personal experiences of making a complaint or reporting a possible breach of the law, or cited cases where ASIC should have paid attention to early alarm bells. They raised concerns that ASIC ignores or fails to take corrective action on early or advanced warning signs of dubious practices.”</i></p>
7	15.23	<p><i>“One such witness stated that in his particular case, he believed the company was trading while insolvent:</i></p> <p><i>“ASIC appear to have ignored complaints made by numerous injured individuals as well as the findings (however preliminary) of professionals such as the company’s administrator and latterly its liquidator. This is despite mounting evidence in support of the original complaints made and despite the fact the evidence gathering and investigation of the companies’ affairs has been the result of other parties unrelated to ASIC and submitted to them in good faith.”</i></p>
8	15.38	<p><i>The committee received many other complaints that are too numerous to detail here about ASIC’s supposedly inadequate response to complaints or reports of corporate misconduct.”</i></p>

10. ASIC Resourcing

155. As evidenced by Table 3, ASIC has a long history of receiving significant and harsh criticism over its performance by both members of the public, professional organisations as well as former employees. One of the consistent justifications put forward by ASIC for performance mishaps and shortcomings is a lack of resources.

156. This justification, for example, was put forward by then ASIC Chairman Mr Medcraft and was reported by the Australian Financial Review on 22 October 2014:

“Mr Medcraft admitted ASIC had made mistakes, but said its capacity to oversee, investigate and pursue corrupt financial advisers had been curtailed by lack of resources.

“If we want to react faster then having more resources to be able to do it is important,” he said.”⁵⁷

157. Moreover, the constant citing of a lack of resources was noted by Senator O’Neill at the first public hearing of the Senate Economics References Committee’s inquiry into the collapse of the Sterling Income Trust on 16 November 2021. Specifically, Senator O’Neill noted:

“I’ve heard previously over the years: ‘There are not enough resources for us to go ahead and do litigation, so we don’t advance things. We are very careful with how we spend the public money.’”⁵⁸

158. Indeed, ASIC, in the case of the Sterling Income Trust, cited resources as a critical factor as to why it did not respond promptly to material concerns of potential misconduct raised by the Western Australian Department of Mines, Industry, Regulation and Safety. Specifically, in its submission to the inquiry, ASIC stated:

“Our finite resources, as well as those of the prosecuting authorities and courts, mean that we cannot pursue all possible breaches of the law. While not perfect, we are satisfied that the judgements we made were generally reasonable in the circumstances with the information and understanding we had at the relevant times.”⁵⁹

159. Importantly, it is beyond doubt that ASIC has a broad set of legal and regulatory responsibilities which continues to evolve, and in some cases expand, with rapid and constant changes to Australia’s economy and financial system.

160. ASIC’s primary responsibilities (first among them is as a law enforcement agency) and the scope of its regulatory mandate are important considerations for the Australian Government and the Parliament of Australia when the Federal Budget is proposed, debated and enacted through annual appropriation bills.

⁵⁷ <https://www.afr.com/companies/australia-a-paradise-for-white-collar-crime-20141021-11blos>

⁵⁸ See page 24 of the Official Committee Hansard, Senate Economics Reference Committee, Sterling Income Trust, Tuesday, 16 November 2021 via the following link:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SterlingIncomeTrust/Public_Hearings

⁵⁹ ASIC (2021), *“Senate Inquiry into Sterling Income Trust – Submission by the Australian Securities and Investments Commission.”*, ASIC, Sydney, Australia.

161. Any comprehensive analysis of ASIC's resources profile should encompass both quantitative and qualitative elements. While the quantum of available financial resources and staffing play a critical role in ASIC's ability to meet its regulatory outcomes, so too does the knowledge, skills and abilities of ASIC staff as well as the quality of ASIC's leadership and management and overall organisational culture.

162. Alarming, as noted in paragraphs 4.38 and 4.45 of the FRAA report respectively:

"Many ASIC staff members commented that teams operate in silos within ASIC and information is rarely shared effectively between teams."

"Stakeholder survey respondents were less positive, with only 13% agreeing that ASIC staff have the right skills and capabilities to make regulatory decisions."⁶⁰

163. An analysis of the qualitative features of ASIC's resourcing profile and overall organisational culture are beyond the scope of this report, given that there is little public information available to draw reasonable inferences and conclusions. However, given the criticisms made of ASIC:

- in Table 3 above;
- at the Banking Royal Commission; and
- within the FRAA report (as noted above in paragraph 162);

this paper is of the view that qualitative features of ASIC's resourcing profile are worthy of public examination and analysis (especially as they relate to the matters contained within this report).

164. With respect to the quantitative aspects of ASIC's resourcing profile, this paper will examine ASIC's staffing profile and available financial resources.

165. Within this context, it is important to note that ASIC's resourcing profile saw a significant boost in March 2019 in the wake of the Banking Royal Commission with an announcement by the then Commonwealth Treasurer, the Hon. Josh Frydenberg MP⁶¹. (The flow-on consequences of the Banking Royal Commission are discussed in Section 11 of this report.)

166. In this announcement the Australian Government announced that ASIC would receive over \$AUD 404 million over 4 years (or a 25% uplift in its annual funding compared to 2017-18) in order to support:

- an accelerated enforcement strategy;
- expanded regulation of financial services in accordance with the Royal Commission recommendations – specifically, in relation to credit, financial advice and insurance;
- enhanced on-site supervision of larger institutions;
- ASIC's expanded role as the primary conduct regulator for superannuation; and
- ASIC's new role in administering a conduct-focused accountability regime.

167. This additional funding is critical to understanding the phenomenon illustrated below.

⁶⁰ As noted in footnote 103 of the FRAA report, 58% of stakeholder survey respondents disagreed that ASIC staff have the right skills and capabilities to make regulatory decisions.

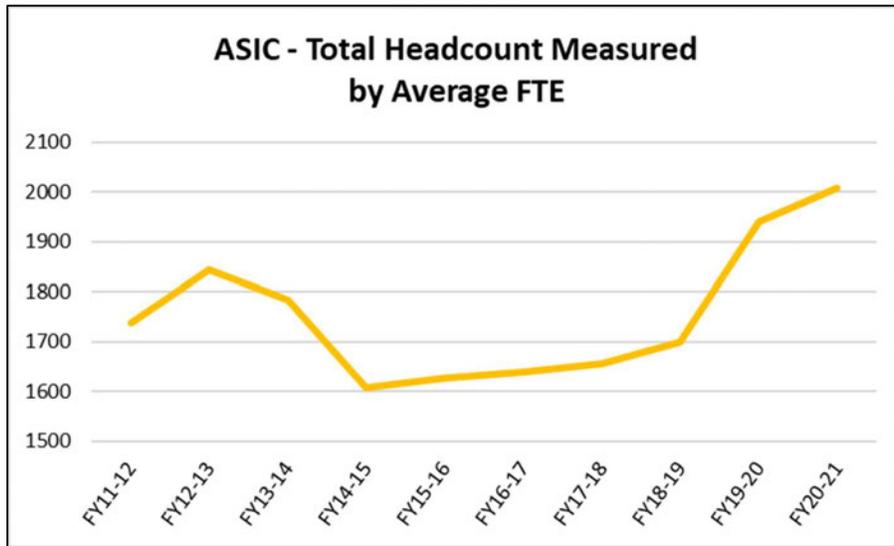
⁶¹ <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/record-funding-and-resources-asic-and-apra-help>

ASIC's Staffing Profile

168. With respect to ASIC's headcount as measured by average full-time equivalent (FTE), ASIC's headcount dropped from 1,844 average FTE in FY 12-13 to 1,609 average FTE in FY 14-15. From July 2015, ASIC's headcount has grown by 24.8% to 2,008 average FTE in FY 20-21.

169. ASIC's total annual headcount as measured by average FTE is illustrated in Diagram 15.

Diagram 15: ASIC Headcount as measured by Average FTE



170. The annual cash spend on ASIC's employees (as recorded in ASIC's cash flow statement contained within its annual financial statements) saw ASIC's annual spend fall from \$AUD 238.5 million in FY 13-14 to \$AUD 202.1 million in FY 16-17 and then increased to \$AUD 283.1 million over four financial years to June 2021. This is illustrated in Diagram 16.

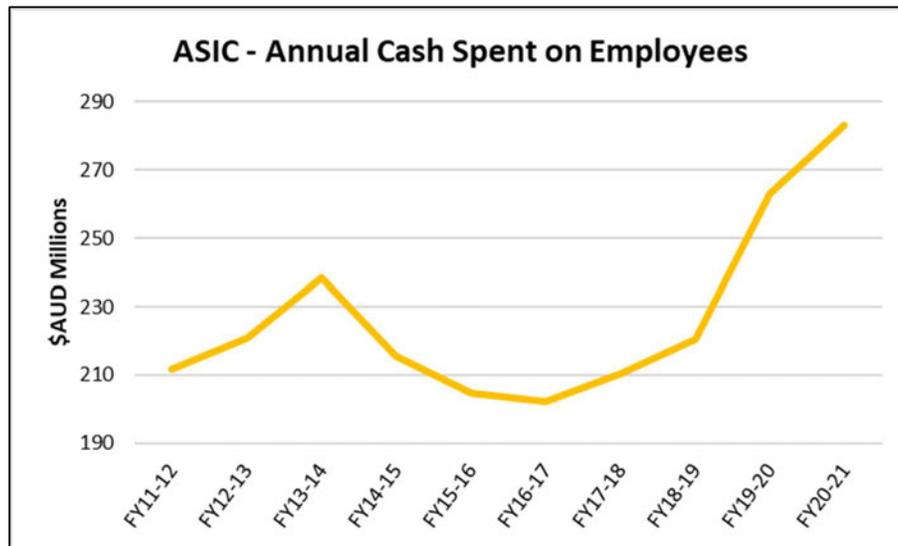
171. Importantly, ASIC's total head count does not take into consideration the additional headcount (measured by average FTE) which ASIC utilises through outsourcing activities. For example, on page 135 of ASIC's Annual Report 2020-21, ASIC spent \$AUD 70.03 million during FY 20-21 on legal and forensics as well as consultants and specialist services. If the equivalent financial spend and outsourced activities were brought in-house this would increase ASIC's total headcount.

172. Nevertheless, given ASIC's wide scope of regulatory responsibilities and operations, ASIC's total headcount profile may give a distortive view as the majority of ASIC's staff do not handle and assess reports of alleged misconduct.

173. The staffing profile of the MB&R team as well as the Office of Enforcement are likely to be the most relevant quantitative metrics to determine whether ASIC has sufficient resources to adequately process the thousands of reports of alleged misconduct and to commence official section 13 (ASIC Act) or section 247 (NCCP Act) investigations.

174. Unfortunately, ASIC does not, in its annual reports, give a consistent breakdown of its staffing profile over the 10 years examined in this report.

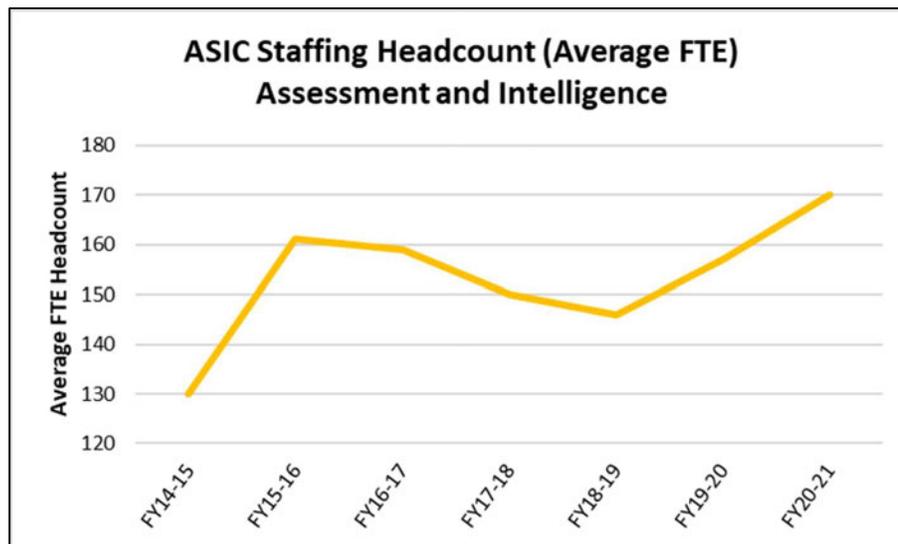
Diagram 16: Annual Cash Spent on ASIC Employees



175. From FY 14-15 through to FY 20-21, the most relevant staffing unit relative to the handling and processing of reports of alleged misconduct is the “Assessment and Intelligence” teams. Importantly, while this is the most relevant staffing unit to consider, ASIC staff assigned to intelligence work are likely to sit outside the MB&R team.

176. ASIC’s ‘Assessment and Intelligence’ annual headcount as measured by average FTE is illustrated in Diagram 17.

Diagram 17: ASIC ‘Assessment and Intelligence’ Headcount as measured by Average FTE



177. The other relevant staffing unit to consider is ‘enforcement’, given that the number of ASIC investigators will indicate what capacity ASIC has to take on new investigations. In a similar vein as noted above in

paragraph 174, staffing data relating to ASIC's enforcement activities is inconsistent across the 10 years examined in this report.

178. Moreover, ASIC's enforcement function went through major reform in the wake of the Banking Royal Commission. This reform included the establishment of the 'Office of Enforcement'. As noted in the ASIC Annual Report 2018-19:

"We resolved to establish an Office of Enforcement in February 2019 and the Office became operational on 1 July 2019. The principal purpose of the Office is to strengthen ASIC's enforcement effectiveness and our decision making and capabilities. The Office is responsible for carrying out ASIC's enforcement activities.

"It will operate under the following principles:

- *a single enforcement strategy for ASIC*
- *strengthened governance structures across all of ASIC's enforcement functions*
- *collective prioritisation and accountability for delivery of the most strategically important enforcement matters across ASIC*
- *flexibility in resource allocation across specialist enforcement teams within the Office*
- *collective accountability for enforcement capability building, including for enforcement training and the use of technology and data across the Office*
- *ensuring that proper consideration is given to possible criminal and civil litigation outcomes by applying the 'Why not litigate?' operational self-discipline."*

179. The Office of Enforcement coincided with an expansion of ASIC's legal toolkit coupled with harsh civil and criminal penalties for misconduct⁶².

180. Even though technically ASIC's Office of Enforcement commenced at the start of FY 19-20, ASIC's staffing profile was presented in its FY 18-19 annual report which showed its total enforcement staffing resources that aligned with the Office of Enforcement structure. Thus, in this paper we are able to consider ASIC's enforcement staffing profile on a consistent basis for 3 years from July 2018 to June 2021.

181. During this period of time, ASIC's enforcement headcount on an average FTE basis rose from 371 in FY 18-19 through to 563 in FY 20-21 (or 52%). Importantly, these figures include:

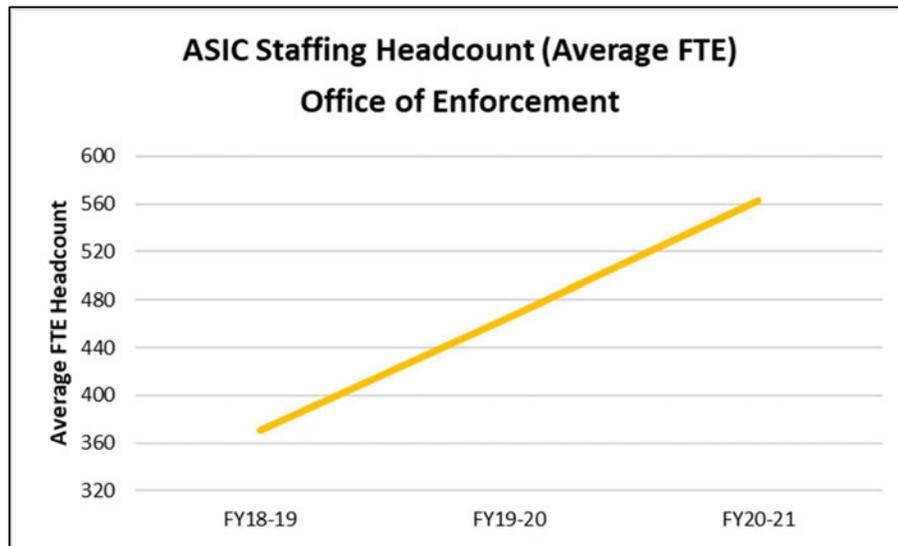
- FTE staff employed to work on Enforcement Special Account (or ESA)⁶³ matters; and
- FTE staff providing enforcement support services and legal counsel.

182. ASIC's 'Office of Enforcement' annual headcount as measured by average FTE staff is illustrated in Diagram 18.

⁶² See ASIC update: September 2019 to February 2020 via the following link:
<https://download.asic.gov.au/media/5475302/asic-update-published-27-february-2020.pdf>

⁶³ As noted on page 156 of the ASIC Annual Report 2020-21: *"the Enforcement Special Account (ESA) is a departmental special account which was established by a determination of the Finance Minister on 23 August 2016 to fund the costs of ASIC arising from the investigation and litigation of matters of significant public interest."*

Diagram 18: ASIC 'Office of Enforcement' Headcount as measured by Average FTE



183. Importantly, what we are able to draw from the above staffing data is that that ASIC has increased both its overall headcount and the headcount of its assessment and intelligence teams since FY 14-15 as measured by average FTE. Moreover, ASIC's Office of Enforcement staffing profile has seen a significant uplift over the 3 years from July 2018.

184. Yet despite the uplift in staffing, the annual number of new official section 13 (ASIC Act) and section 247 (NCCP Act) investigations and the annual ratio of official investigations relative to the total number of reports of alleged misconduct submitted to ASIC have continued to fall. Importantly, this fall has occurred even after the formation of ASIC's Office of Enforcement.

185. ASIC's staffing statistics are presented at Attachment C.

ASIC's Financial Resources Profile

186. With respect to the financial resources available to ASIC, it is important to note that over the 10-year period under examination in this report, ASIC's funding sources went through dramatic reform.

187. This includes the material event that ASIC, as noted by journalist Lenore Taylor⁶⁴, lost \$AUD 120 million in funding from the then Abbott Government resulting from the 2014-15 Federal Budget.

188. Subsequently, recommendation 29 of the Financial System Inquiry Final Report⁶⁵ (published in December 2014) stated:

"Introduce an industry funding model for the Australian Securities and Investments Commission (ASIC) and provide ASIC with stronger regulatory tools."

⁶⁴ <https://www.theguardian.com/australia-news/2016/apr/20/asic-funding-boost-to-restore-abbott-era-cuts-and-enhance-surveillance>

⁶⁵ <https://treasury.gov.au/publication/c2014-fsi-final-report>

189. In response to this recommendation, the Turnbull Government introduced an industry funding model for ASIC from 1 July 2017⁶⁶ via the *ASIC Supervisory Cost Recovery Levy Act 2017* which received royal assent on 19 June 2017⁶⁷ and the *ASIC Supervisory Cost Recovery Levy Regulations 2017*⁶⁸. This industry funding model replaced the existing Market Supervision Cost Recovery Regime.

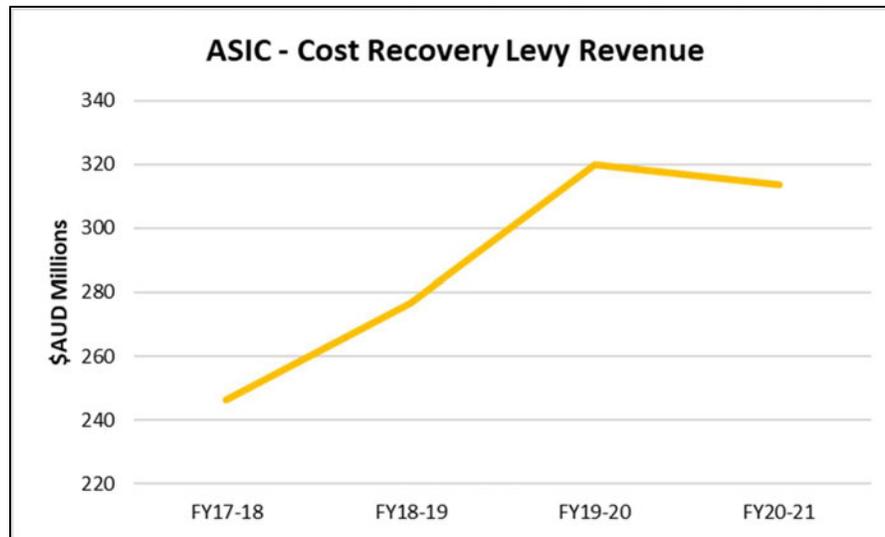
190. Given this change in ASIC’s funding source, there are multiple sources of financial information contained within ASIC’s annual reports to ascertain the quantum of money available to ASIC to finance its operational and investment activities. These sources include:

- ASIC’s annual financial statements (i.e., statement of comprehensive income, statement of financial position and cashflow statement);
- ASIC’s agency resources statements; and
- ASIC’s cost recovery implementation statements.

191. Given the introduction of the new industry funding model in July 2017, we are able to see that ASIC has been able to generate a substantial rise in cost recovery levy revenue from \$AUD 246.4 million in FY 17-18 to \$AUD 313.5 million in FY20-21 (this data is presented at **Attachment C**).

192. This substantial rise in cost recovery levy revenue is illustrated in Diagram 19.

Diagram 19: ASIC Revenue generated from Cost Recovery Levies



193. Given that the purpose of industry cost recovery levies is to cover ASIC’s costs, it is instructive to analyse to what extent have ASIC’s operating and investing activities (defined in cash terms) are covered by industry cost recovery levies since the implementation of the new industry funding model in July 2017.

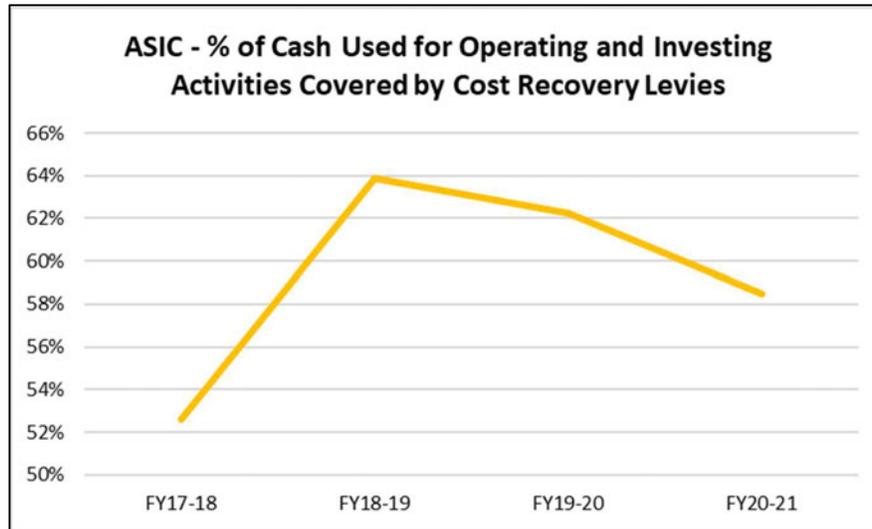
⁶⁶ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-218mr-industry-funding-next-steps-for-industry/>

⁶⁷ <https://www.legislation.gov.au/Details/C2021C00336>

⁶⁸ <https://www.legislation.gov.au/Details/F2022C00364>

194. As illustrated in Diagram 20, we see that industry funding since July 2018 has covered appropriately 60% of ASIC’s operating and investing activities (defined in cash terms)⁶⁹. This is significant in the sense that ASIC has two primary stakeholders who have very different interests – meaning that even though the Parliament of Australia provides ASIC with its law enforcement mandate and its legal powers, the business community is funding the majority of ASIC’s operational and investment costs⁷⁰.

Diagram 20: % of Cash Used for Operating and investing Activities covered by Cost Recovery Levies



195. According to the Commonwealth Department of Finance⁷¹, portfolio budget statements and agency resource statements:

- “provide the basis for the appropriation of Commonwealth money to an entity;
- articulate the intended results, activities and target group of the entity; and
- provide the basis for assessing and reporting on the performance of the entity and the programs it delivers”.

⁶⁹ Data of ASIC’s operating and investing activities is drawn from the cashflow statement in ASIC’s annual financial statements.

⁷⁰ Note that the current Assistant Treasurer Stephen Jones MP announced on 8 August 2022 a review into ASIC’s industry funding model to be led by Treasury in consultation with ASIC, the Department of Finance and the Department of the Prime Minister and Cabinet. See the following link: <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/review-asic-industry-funding-model>

A discussion paper concerning ASIC’s industry funding model was released by the Assistant Treasurer on 28 September 2022, see the following link: <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/asic-industry-funding-model-discussion-paper-released>

⁷¹ <https://www.finance.gov.au/government/managing-commonwealth-resources/managing-money-property/managing-money/annual-appropriations/outcome-statement-policy-and-approval-process>

196. Moreover, as noted by other Commonwealth agencies such as the Murray Darling Basin Authority⁷² and the Workplace Ombudsman⁷³:

Murray Darling Basin Authority

“The agency resource statement has been designed to allow agencies to reconcile the final usage of all resources in cash terms, by declaring the actual appropriation for ... (including carried forward cash balances and further adjustments such as section 75 transfers under the Public Governance, Performance and Accountability Act 2013 and advances to the Finance Minister), and comparing this to the actual payments made.”

Commonwealth Workplace Ombudsman

“The Agency Resource Statement (Table 1.1) details the total available appropriation available to an agency from all sources. For departmental operating appropriations (outputs) this includes carry-forward amounts as well as amounts appropriated at Budget. As agencies incur and are funded for future liabilities, generally depreciation and employee entitlements, the total amount of departmental operating appropriation available to an agency is unlikely to be fully utilised in the Budget year. The difference between the agency resource statement and the sum of all payments made at the departmental outputs level is the expected carry-forward amount of resources for the 2009-10 Budget year, including amounts related to meeting future obligations to maintain the agency’s asset base and to meet employee entitlement liabilities.”

197. Contained with ASIC’s agency resource statements includes:

- actual available appropriations; and
- cash payments made.

198. Financial data from ASIC’s agency resource statements are presented at **Attachment C**.

199. According to ASIC’s agency resource statements, over the past 10 years from FY 11-12 to FY 20-21, the Parliament of Australia has increased its annual appropriation to ASIC by 65.3% from \$AUD 471.3 million in FY 11-12 to \$AUD 779.1 million in FY 20-21 as measured by “Total Resourcing (A+B+C+D)”⁷⁴.

200. This 65.3% increase is more than the rate of inflation for this period which according to the Australian Bureau of Statistics was 19.8%⁷⁵, meaning that Parliament has given ASIC a substantial real increase in its annual appropriation.

201. The actual annual appropriation which the Parliament of Australia appropriates for ASIC is illustrated in Diagram 21.

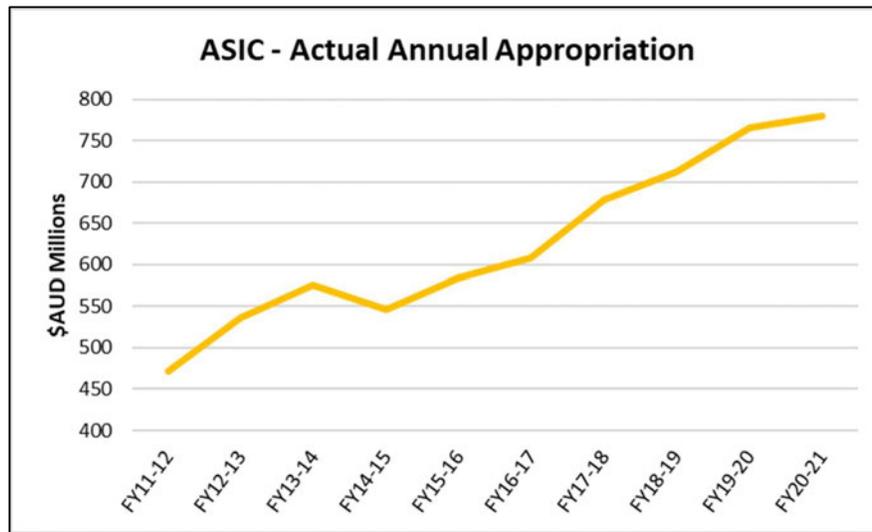
⁷² <https://www.mdba.gov.au/node/3490>

⁷³ 2008-09 Commonwealth Workplace Ombudsman Budget Statement – Overview and Resources

⁷⁴ As noted in paragraph 34 of this report, these figures include ordinary annual services, special appropriations (or equity injections) as well as financial capital contained within various special accounts under ASIC’s jurisdiction.

⁷⁵ This rate of inflation was calculated by taking the percentage difference of the Consumer Price Index (All Groups - Australia) for the June quarter 2011 (99.2) to the June quarter 2021 (118.8). See Table 1 at the following link: [Consumer Price Index Australia March 2022 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/australian-bureau-of-statistics/price-index-australia-march-2022).

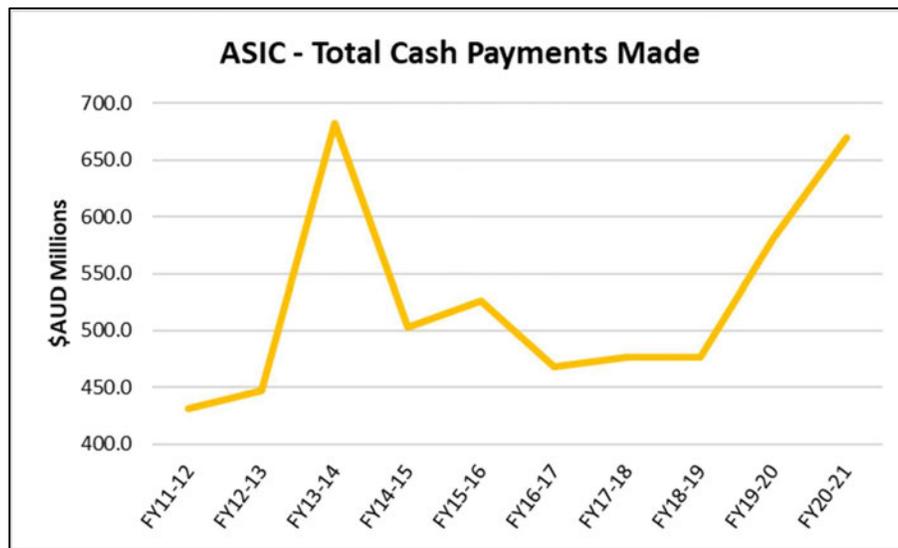
Diagram 21: ASIC's Actual Annual Appropriation



202. Surprisingly, even though the Federal Parliament has provided ASIC with significant additional real levels of resourcing, ASIC's spending profile has not grown in unison.

203. For example, after its spending of cash on all its activities peaked at \$AUD 682.6 million in FY 13-14, ASIC's spending of cash actually fell to \$AUD 467.8 million in FY 16-17 before rising back to \$AUD 670.3 million in FY 20-21. ASIC's spending of cash is illustrated in Diagram 22⁷⁶.

Diagram 22: Cash Payments Made by ASIC



⁷⁶ Note these figures include cash spent out of dedicated special accounts within ASIC's purview and control.

204. In the context of FY 19-20 and FY 20-21, it is worth considering whether the utilisation of ASIC’s resourcing profile was impacted by the onset of the COVID-19 pandemic, especially in the context of extended government lockdowns in Victoria and NSW in particular.
205. A review of ASIC’s FY 19-20 and FY 20-21 annual reports finds no specific comment by ASIC which would suggest that the COVID-19 pandemic materially impacted its handling and management processes of reports of alleged misconduct and its ability to commence official section 13 (ASIC Act) or section 247 (NCCP Act) investigations – although, the ability of ASIC staff to travel around Australia was, in some instances, curtailed⁷⁷.
206. From the discussion above of ASIC’s resourcing profile both in terms of what it receives versus what it utilises, the following can be deduced:
- even with a dramatic uplift in spending (in cash terms) and additional headcount since FY 18-19 in the wake of the Banking Royal Commission, ASIC’s ability to utilise reports of misconduct has materially waned during FY 19-20 and FY 20-21 – this suggests that the trends shown above are not necessarily a function of resources; and
 - no evidence can be cited which suggests that the trends witnessed in Diagrams 3, 4, 5, 7, 11 and 12 for FY 19-20 and FY 20-21 respectively were materially influenced by the onset of the COVID-19 pandemic.

ASIC’s Dual Mandate?

207. Within the context of considering ASIC’s resourcing profile, it is worth considering the fact that ASIC is a materially large net revenue contributor to the Australian Government. This is facilitated through transfers of cash to and from the “Official Public Account” (OPA), which according to the Department of Finance⁷⁸ is:
- “The Commonwealth’s central bank account. The OPA is one of a group of linked bank accounts, referred to as the Official Public Account Group of Accounts. OPAs are maintained with the Reserve Bank of Australia (RBA), as required by subsection 53(3) of the PGPA Act.”⁷⁹*
208. Confirming this is on page 130 of the ASIC Annual Report 2020-21, money from and to the OPA is classified as “Transfers (to)/from the Australian Government”.
209. ASIC transfers to and from the OPA from FY 11-12 to FY 20-21 are presented at **Attachment C**. This data is derived from the Administered Reconciliation Schedule contained within the notes of ASIC’s financial statements. ASIC’s net financial capital transfers to the OPA over the same period are illustrated to Diagram 23.
210. From the data illustrated to Diagram 23, one can observe that ASIC’s net transfers to the OPA have grown from \$AUD 632.5 million in FY 13-14 to \$AUD 1.67 billion in FY 20-21.

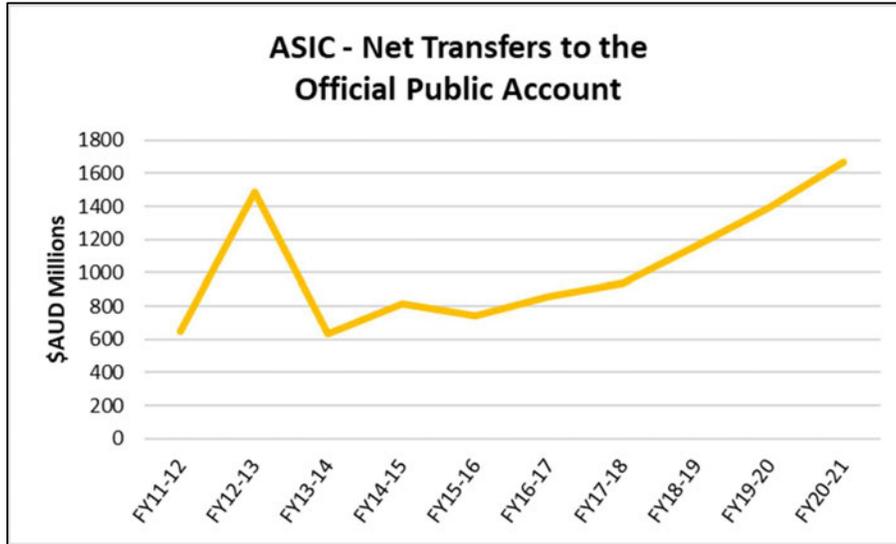
⁷⁷ ASIC notes in footnote 1 on page 33 of the ASIC annual report 2019-20 that it had to suspend onsite supervisory activities in March 2020 due the onset of the COVID-19 pandemic.

⁷⁸ <https://www.finance.gov.au/about-us/glossary/pgpa/term-official-public-account-opa>

⁷⁹ PGPA Act refers to the *Public Governance, Performance and Accountability Act 2013*.

211. Importantly, ASIC’s net transfer of financial capital has not been without public scrutiny and criticism. For example, journalist Anthony Klan wrote on 5 March 2022 in the Klaxon an article titled: *“Failing ASIC delivers Gov’t \$1 billion profit”*⁸⁰, arguing that ASIC is generating substantial fee revenue from the small business community without providing adequate service and value for those fees.

Diagram 23: ASIC’s Net Financial Capital Transfers to the Official Public Account



212. Given the data above and the broader market commentary, it is an important question to ask whether ASIC has an unofficial dual mandate of law enforcement versus revenue generation. Arguably, given the significant scale of ASIC’s revenue generation activities, which is above and beyond its financial operational requirements, ASIC may have a conflict of priorities that impacts on its law enforcement operations.

213. It is a matter for policy makers to examine and consider whether ASIC’s operational performance would be enhanced if it had a pure singular focus.

⁸⁰ [Failing ASIC delivers Gov’t \\$1 billion profit — The Klaxon](#)

11. Banking Royal Commission

214. There can be no doubt that the Banking Royal Commission and its aftermath had a significant impact on ASIC. A relevant question to consider is to what extent, if any, did the Banking Royal Commission contribute to the phenomenon and trends highlighted in this report.

215. For example, ASIC was able to obtain a raft of new legal powers resulting from legislative changes enacted by the Federal Parliament. This included, for example, giving ASIC the legal power to intervene in the design and distribution of all financial and credit products⁸¹.

216. Moreover, as noted in paragraphs 165 and 166, ASIC received a dramatic uplift in financial resources to:

*“...strengthen and intensify their approach to enforcement and take on expanded responsibilities to stamp out misconduct in our financial sector”.*⁸²

217. In terms of added workload, the Banking Royal Commission referred 13 cases to ASIC for investigation. Moreover, an additional 32 case studies presented at the Royal Commission were examined by ASIC (i.e., 45 matters in total⁸³).

218. As noted by ABC journalist Daniel Ziffer⁸⁴ and Australian Financial Review journalist John Kehoe⁸⁵ in separate respective articles, of the:

- 13 referrals - six referrals resulted in civil cases being filed, two referrals were prosecuted by the Commonwealth Director of Public Prosecutions (CDPP) and the remaining five referrals resulted in NFA; and
- 32 case studies, 12 civil cases were filed, four criminal cases were prosecuted by the CDPP, one criminal brief was referred to the CDP and the remaining 15 case studies resulted in NFA.

219. The last case resulting from the Royal Commission launched by ASIC was in December 2021, meaning that moving forward from the commencement of calendar year 2022, ASIC’s investigative workload can no longer be attributed to matters resulting from the Banking Royal Commission.

⁸¹ See the 4 April 2019 joint press release by the then Commonwealth Treasurer Frydenberg and the then Assistant Treasurer Robert - <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/062-2019>

⁸² <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/record-funding-and-resources-asic-and-apra-help>

⁸³ ASIC did not in its FY 18-19, FY 19-20 or FY 20-21 annual reports, indicate whether the 45 Banking Royal Commission matters resulted in an official section 13 (ASIC Act) or section 247 (NCCP Act) investigation.

⁸⁴ See Ziffer on 21 December 2021 via the following link: <https://www.abc.net.au/news/2021-12-09/banking-royal-commission-report-asic-court-action-customers/100686336>

⁸⁵ See Kehoe on 20 January 2022 via the following link: <https://www.afr.com/companies/financial-services/banking-royal-commission-must-have-legacy-says-asic-head-20211220-p59iy1>

12. Financial Regulator Assessment Authority

220. Importantly, given the findings made about ASIC and the Australian Prudential Regulation Authority (APRA) at the Banking Royal Commission, Justice Hayne recommended that the FRAA be established via recommendations 6.13 and 6.14. of the 2019 Banking Royal Commission Final Report.
221. Established via the *Financial Regulator Assessment Authority Act 2021* in June 2021, the FRAA's role is to assess and report on the effectiveness and capability of ASIC and APRA every two years.
222. The FRAA can also prepare ad-hoc reports on matters related to ASIC and APRA's effectiveness and capability at the request of the Minister.
223. The first FRAA assessment of ASIC commenced in 2021. In this assessment⁸⁶, FRAA conducted a targeted assessment of ASIC's:
- effectiveness and capability in strategic prioritisation, planning and decision-making;
 - surveillance function; and
 - licensing function.
224. The first FRAA report into ASIC was submitted to the Commonwealth Assistant Treasurer the Hon. Stephen Jones MP on 29 July 2022. The FRAA report was tabled with the Australian Senate on 25 August 2022⁸⁷.
225. Importantly, the matters considered in this report with respect to ASIC's handling of reports of alleged misconduct and the commencement of official section 13 (ASIC Act) or section 247 (NCCP Act) investigations were not directly examined by the FRAA.

⁸⁶ https://fraa.gov.au/sites/fraa.gov.au/files/2021-11/226579_ASIC_assessment_scope.pdf

⁸⁷ https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/192

13. Case for a Public Inquiry

226. Given the analysis and commentary above, this report argues that there are sufficient grounds for the Parliament of Australia to hold an inquiry into ASIC's handling and processing management of:

- reports of alleged misconduct from the Australian public;
- breach reports from licensees and auditors; and
- statutory reports from registered liquidators.

This is particularly so given that ASIC's own performance statistics shows a sustained:

- a. decline by more than 60% of the annual ratio of investigations to the total reports of alleged misconduct since FY 14-15;
- b. significant and consecutive increase in the percentage of reports of alleged misconduct that result in NFA; and
- c. 91% average NFA rate in response to whistleblower disclosures since July 2015.

227. This report argues that despite criticism levelled at ASIC by the 2014 ASIC Inquiry and the 2019 Banking Royal Commission Final Report, ASIC has shown no discernible improvement in its handling and management processes regarding reports of alleged misconduct it receives, but instead its performance appears to have worsened over time. Despite ASIC experiencing an increased workload resulting from the Banking Royal Commission, ASIC received a dramatic uplift in financial and staffing resources to accommodate this workload.

228. ASIC's performance over the period examined in this report should be cause for significant concern among policy makers, ASIC's regulated population and members of the Australian public at large.

229. This report further argues that ASIC's resourcing profile does not provide a justifiable excuse for the poor diagnostics and strike rates around how ASIC handles, processes and manages reports of alleged misconduct. This paper suggests that the answer is deeper and is due for resolution.

230. As such, this report is of the view that an inquiry into ASIC may be able to draw out a range of practical and implementable solutions that would assist ASIC to improve its handling and management processes of reports of alleged misconduct. At a minimum, an inquiry could draw out what makes a successful report to ASIC, so that members of the Australian public, licence holders, auditors and liquidators are provided with guidance that, in the future, wastes less time, resources and expertise of complainants and ASIC staff alike.

231. This report suggests that the most appropriate body to hold such an inquiry is the Parliamentary Joint Committee on Corporations and Financial Services⁸⁸, with a terms-of-reference outlined at **Attachment E**.

232. Such an inquiry would not overlap or duplicate the existing targeted assessment recently undertaken and completed by the FRAA as noted above in paragraph 225.

⁸⁸ Although, Parliament may decide that another parliamentary committee maybe more appropriate such as the Senate Economics References Committee.

14. Conclusion

233. This report calls out a number of glaring problems with ASIC's handling, processing and management of reports of alleged misconduct. These problems suggest that:

- a. reports of alleged misconduct (especially from members of the public and breach reports from industry practitioners) are increasingly being ignored by ASIC and that they are not resulting in pro-active enforcement of Commonwealth and State/Territory law through the commencement of official investigations; and
- b. ASIC may not be utilising public (and industry) resources effectively.

234. To ensure that:

- Commonwealth and State/Territory law is enforced sufficiently and appropriately; and
- members of the public have or maintain confidence that ASIC is best serving the public interest,

this paper concludes that there are sufficient grounds for the Parliamentary Joint Committee on Corporations and Financial Services (or an alternative appropriate parliamentary committee) to hold a public inquiry into ASIC's handling and management processes of reports of alleged misconduct from the Australian public as well as from breach and statutory liquidator reports.

235. Such an inquiry has the ability to determine the root causes of the trends outlined in this report and to recommend reforms, where deemed appropriate. Such reforms could enhance ASIC's performance and deliver substantial benefits for Australia's financial system and its participants, particularly unsophisticated and vulnerable retail investors. Such benefits would closely align with the priorities stated in the ASIC Corporate Plan 2022-26.

Attachment A

CRITICAL LEGISLATIVE REFERENCES

Section 13 – Australian Securities and Investments Commission Act 2001

13 General powers of investigation

(1) ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions) where it has reason to suspect that there may have been committed:

(a) a contravention of the corporations legislation (other than the excluded provisions); or

(b) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that:

(i) concerns the management or affairs of a body corporate or managed investment scheme; or

(ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.

(2) Where ASIC has reason to suspect that unacceptable circumstances within the meaning of Subdivision B of Division 2 of Part 6.10 of the Corporations Act have, or may have, occurred, ASIC may make such investigation as it thinks expedient:

(a) for the purposes of determining whether or not to make an application under section 657C of that Act; or

(b) otherwise for the due administration of the corporations legislation (other than the excluded provisions).

(3) If ASIC has reason to suspect that a registered liquidator: (a) has not, or may not have, faithfully performed his or her duties; or (b) is not, or may not be, faithfully performing his or her duties

ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions).

(6) If ASIC has reason to suspect that a contravention of a provision of Division 2 of Part 2 may have been committed, ASIC may make such investigation as it thinks appropriate.

(7) If a consumer contract or a small business contract is: (a) a financial product; or (b) a contract for the supply, or possible supply, of services that are financial services; ASIC may make such investigations as it thinks expedient into the terms of the contract for the purposes of determining whether or not to make an application to the Court under section 12GND.

(8) Expressions used in subsection (7) that are defined in Division 2 of Part 2 have the same meaning as in that Division.

Section 247 – National Consumer Credit Protection Act 2009

247 General powers of investigation

(1) ASIC may make such investigation as it considers expedient for the due administration of the Commonwealth credit legislation if it has reason to suspect that there may have been committed:

(a) a contravention of the credit legislation; or

(b) a contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:

(i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or

(ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease.

Attachment B

ASIC REPORTS OF ALLEGED MISCONDUCT AND INVESTIGATION STATISTICS

	FY17-18		FY18-19		FY19-20		FY20-21	
Total Complaints from the Australian Public*	9567	100%	10249	100%	12355	100%	10711	100%
Referred for action by ASIC	2009	21%	2152	21%	2347	19%	1607	15%
Resolved	1148	12%	1230	12%	1236	10%	964	9%
Analysed and Assessed for No Further Action (NFA)	5071	53%	5534	54%	7537	61%	6962	65%
No Jurisdiction	957	10%	922	9%	988	8%	964	9%
No Breach or Offences	383	4%	410	4%	247	2%	214	2%
Breach Reports from Licensees and Auditors#	1885	100%	2878	100%	3893	100%	3609	100%
Referred for Action	716	38%	633	22%	701	18%	397	11%
Analysed and Assessed for No Further Action (NFA)	1169	62%	2245	78%	3192	82%	3212	89%
Initial Statutory Reports from Registered Liquidators	8823		8106		8040		4566	
Supplementary Reports Finalised^	931	100%	515	100%	520	100%	517	100%
Supplementary Reports (NFA)	810	87%	391	76%	400	77%	424	82%
Supplementary Reports (Referred for Action)	121	13%	124	24%	120	23%	93	18%
Total Complaints Received by ASIC (* + # + ^)	12,383		13,642		16,768		14,837	
Official s13 or s247 Investigations Commenced	126	1.02%	151	1.11%	134	0.80%	110	0.74%

	FY13-14		FY14-15		FY15-16		FY16-17	
Total Complaints from the Australian Public*	10530	100%	9669	100%	9751	100%	9011	100%
Referred for action by ASIC	2948	28%	2804	29%	2438	25%	2253	25%
Resolved	1685	16%	1257	13%	1073	11%	1352	15%
Analysed and Assessed for No Further Action (NFA)	4107	39%	4061	42%	4778	49%	4145	46%
No Jurisdiction	1158	11%	967	10%	1073	11%	901	10%
No Breach or Offences	632	6%	580	6%	390	4%	360	4%
Breach Reports from Licensees and Auditors#	1388	100%	1635	100%	1654	100%	1709	100%
Referred for Action	708	51%	687	42%	595	36%	667	39%
Analysed and Assessed for No Further Action (NFA)	680	49%	948	58%	1059	64%	1042	61%
Initial Statutory Reports from Registered Liquidators	9804		8688		9951		8075	
Supplementary Reports Finalised^	718	100%	762	100%	679	100%	914	100%
Supplementary Reports (NFA)	582	81%	632	83%	550	81%	749	82%
Supplementary Reports (Referred for Action)	136	19%	130	17%	129	19%	165	18%
Total Complaints Received by ASIC (* + # + ^)	12,636		12,066		12,084		11,634	
Official s13 or s247 Investigations Commenced	224	1.77%	229	1.90%	206	1.70%	163	1.40%

	FY11-12		FY12-13	
Total Complaints from the Australian Public*	12516	100%	11682	100%
Referred for action by ASIC	3254	26%	3154	27%
Resolved	2628	21%	2220	19%
Analysed and Assessed for No Further Action (NFA)	4130	33%	4089	35%
No Jurisdiction	1877	15%	1635	14%
No Breach or Offences	626	5%	584	5%
Breach Reports from Licensees and Auditors#	1367	100%	1214	100%
Referred for Action	684	50%	656	54%
Analysed and Assessed for No Further Action (NFA)	684	50%	558	46%
Initial Statutory Reports from Registered Liquidators	11404		9452	
Supplementary Reports Finalised^	921	100%	792	100%
Supplementary Reports (NFA)	654	71%	594	75%
Supplementary Reports (Referred for Action)	267	29%	198	25%
Total Complaints Received by ASIC (* + # + ^)	14,804		13,688	
Official s13 or s247 Investigations Commenced	173	1.17%	193	1.41%

Table Notes

1. For FY 14-15 - Official investigations commenced under priority 1 was 77 (see page 6 of ASIC's 2014 - 2015 Annual Report) and official investigations commenced under priority 2 was 152 (see page 8 of ASIC's 2014 - 2015 Annual Report). Therefore, $77 + 152 = 229$
2. For FY 15-16 - Official investigations commenced under priority 1 was 93 (see page 32 of ASIC's 2015 - 2016 Annual Report) and official investigations commenced under priority 2 was 113 (see page 58 of ASIC's 2015 - 2016 Annual Report). Therefore, $93 + 113 = 206$.
3. For FY 16-17 - Official investigations commenced under priority 1 was 68 (see page 31 of ASIC's 2016 - 2017 Annual Report) and official investigations commenced under priority 2 was 95 (see page 37 of ASIC's 2016 - 2017 Annual Report). Therefore, $68 + 95 = 163$.
4. The following table provides a breakdown of the initial statutory liquidator reports as to which reports (and what percentage) allege misconduct and those which do not. A percentage analysis of supplementary liquidator reports finalised relative to the:
 - initial statutory liquidator reports alleging misconduct; and
 - total initial statutory liquidator reports;
 are also presented.

Year	Total Initial Statutory Liquidator Reports (Column A)	Total Initial Statutory Liquidator Reports Alleging Misconduct (Column B)	Total Initial Statutory Liquidator Reports Not Alleging Misconduct (Column C)	Column B /Column A	Finalised Supplementary Statutory Liquidator Reports (Column D)	Column D /Column B	Column D /Column A
FY 11-12	11,404	8,528	2,876	74.8%	921	10.8%	8.1%
FY 12-13	9,452	6,985	2,467	73.9%	792	11.3%	8.4%
FY 13-14	9,804	7,509	2,295	76.6%	718	9.6%	7.3%
FY 14-15	8,688	6,892	1,796	79.3%	762	11.1%	8.8%
FY 15-16	9,951	8,258	1,693	83.0%	679	8.2%	6.8%
FY 16-17	8,075	6,915	1,160	85.6%	914	13.2%	11.3%
FY 17-18	8,823	6,840	1,983	77.5%	931	13.6%	10.6%
FY 18-19	8,106	7,227	879	89.2%	515	7.1%	6.4%
FY 19-20	8,040	7,163	877	89.1%	520	7.3%	6.5%
FY 20-21	4,566	3,810	756	83.4%	517	13.6%	11.3%
Average	8,691	7,013	1,678	81.2%	727	10.6%	8.5%

5. The following table provides a percentage analysis of the:
 - total number of initial statutory liquidator reports; and
 - number of initial statutory liquidator reports alleging misconduct;
 which have been referred for action.

Year	Total Initial Statutory Liquidator Reports (Column A)	Total Initial Statutory Liquidator Reports Alleging Misconduct (Column B)	Finalised Supplementary Statutory Liquidator Reports Referred for Action (Column C)	Column C / Column A	Column C / Column B
FY 11-12	11,404	8,528	267	2.3%	3.1%
FY 12-13	9,452	6,985	198	2.1%	2.8%
FY 13-14	9,804	7,509	136	1.4%	1.8%
FY 14-15	8,688	6,892	130	1.5%	1.9%
FY 15-16	9,951	8,258	129	1.3%	1.6%
FY 16-17	8,075	6,915	165	2.0%	2.4%
FY 17-18	8,823	6,840	121	1.4%	1.8%
FY 18-19	8,106	7,227	124	1.5%	1.7%
FY 19-20	8,040	7,163	120	1.5%	1.7%
FY 20-21	4,566	3,810	93	2.0%	2.4%
Average	8,691	7,013	148	1.7%	2.1%

Attachment C

ASIC WHISTLEBLOWER DISCLOSURE AND HANDLING STATISTICS

Year	No. of Whistleblower Disclosures	No. of Whistleblower Disclosures which result in NFA
FY 15-16	146	80%
FY 16-17	174	94%
FY 17-18	228	95%
FY 18-19	278	93%
FY 19-20	644	93%
FY 20-21	817	91%

ASIC HEADCOUNT STAFFING STATISTICS

Year	Total Headcount (Average FTE)	Assessment and Intelligence (Average FTE)	Office of Enforcement (Average FTE)
FY 11-12	1738		
FY 12-13	1844		
FY 13-14	1785		
FY 14-15	1609	130	
FY 15-16	1627	161	
FY 16-17	1640	159	
FY 17-18	1656	150	
FY 18-19	1701	146	371
FY 19-20	1940	157	465
FY 20-21	2008	170	563

ASIC ANNUAL CASH SPENT ON EMPLOYEES (CASH FLOW STATEMENT)

Year	Annual Cash Spent on Employees
FY 11-12	\$AUD 211.9 million
FY 12-13	\$AUD 221.0 million
FY 13-14	\$AUD 238.5 million
FY 14-15	\$AUD 215.4 million
FY 15-16	\$AUD 204.6 million
FY 16-17	\$AUD 202.1 million
FY 17-18	\$AUD 210.2 million
FY 18-19	\$AUD 220.6 million
FY 19-20	\$AUD 263.0 million
FY 20-21	\$AUD 283.1 million

ASIC COST RECOVERY LEVY REVENUE DATA

Year	Cost Recovery Levy Data
FY 17-18	\$AUD 246.4 million
FY 18-19	\$AUD 276.7 million
FY 19-20	\$AUD 319.8 million
FY 20-21	\$AUD 313.5 million

ASIC AGENCY RESOURCE STATEMENT STATISTICS

Year	Actual Annual Appropriation (Total Resourcing A+B+C+D)	Total Cash Payments Made (Total Resourcing A+B+C+D)
FY 11-12	\$AUD 471.3 million	\$AUD 431.1 million
FY 12-13	\$AUD 536.8 million	\$AUD 447.2 million
FY 13-14	\$AUD 575.7 million	\$AUD 682.7 million
FY 14-15	\$AUD 545.8 million	\$AUD 503.1 million
FY 15-16	\$AUD 583.7 million	\$AUD 526.6 million
FY 16-17	\$AUD 607.8 million	\$AUD 467.8 million
FY 17-18	\$AUD 678.7 million	\$AUD 477.0 million
FY 18-19	\$AUD 711.8 million	\$AUD 476.9 million
FY 19-20	\$AUD 765.3 million	\$AUD 580.8 million
FY 20-21	\$AUD 779.1 million	\$AUD 670.3 million

ASIC TRANSFERS TO AND FROM THE OFFICAL PUBLIC ACCOUNT

Year	Transfer to the Official Public Account	Transfer from the Official Public Account	Net Transfers to the OPA
FY 11-12	\$AUD 691.8 million	\$AUD 41.2 million	\$AUD 650.7 million
FY 12-13	\$AUD 1.561 billion	\$AUD 72.5 million	\$AUD 1.489 billion
FY 13-14	\$AUD 957.2 million	\$AUD 324.7 million	\$AUD 632.5 million
FY 14-15	\$AUD 986.2 million	\$AUD 172.5 million	\$AUD 813.7 million
FY 15-16	\$AUD 876.7 million	\$AUD 135.5 million	\$AUD 741.2 million
FY 16-17	\$AUD 948.6 million	\$AUD 92.9 million	\$AUD 855.7 million
FY 17-18	\$AUD 1.013 billion	\$AUD 76.3 million	\$AUD 936.7 million
FY 18-19	\$AUD 1.233 billion	\$AUD 72.7 million	\$AUD 1.160 billion
FY 19-20	\$AUD 1.459 billion	\$AUD 66.1 million	\$AUD 1.393 billion
FY 20-21	\$AUD 1.767 billion	\$AUD 97.6 million	\$AUD 1.669 billion

Attachment D

REFERENCES OF ASIC RAW DATA CITED IN ATTACHMENTS A AND B

No	Year	Reference and Page Number
1	FY 20-21	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act is drawn from Table 2.2.1 on page 32. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 127. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 130. ASIC's staffing data is drawn from Table 6.1.3 on page 196 and Table 6.1.7 on page 200. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from Table 6.2.2 on page 210. Data relating to received breach reports from licensees and auditors is drawn from Table 6.2.3 on page 211. Data relating to received statutory reports from registered liquidators is drawn from Table 6.2.4 page 212. Data relating to the management of whistleblower disclosures is drawn from page 213. ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement outcomes in Table 6.3.1 on pages 214-215. Cost recovery levy revenue for FY 20-21 is drawn from page 162 - Cost Recovery Implementation Statement: ASIC industry funding model (2021-22)
2	FY 19-20	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is drawn from Table 2.2.1 on page 34. Data relating to the management of whistleblower disclosures is drawn from page 115. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 139. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 142. ASIC's staffing data is drawn from Table 8.1.3 on page 207 and Table 8.1.5 on pages 208-209. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from Table 8.2.2 on page 218. Data relating to received breach reports from licensees and auditors is drawn from Table 8.2.3 on page 219. Data relating to received statutory reports from registered liquidators is drawn from Table 8.2.4 on page 220.

No	Year	Reference and Page Number
2	FY 19-20	<ul style="list-style-type: none"> ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement outcomes in Table 8.3.1 on pages 221-222. Cost recovery levy revenue for FY 19-20 is drawn from page 165 - Cost Recovery Implementation Statement: ASIC industry funding model (2020-21)
3	FY 18-19	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is drawn from Table 2.2.1 on page 40. Data relating to the management of whistleblower disclosures is drawn from page 138. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 167. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 170. ASIC's staffing data are drawn from Table 8.1.3 on page 228 and Table 8.1.5 on pages 230-231. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from Table 8.2.2 on page 239. Data relating to received breach reports from licensees and auditors is drawn from Table 8.2.3 on page 240. Data relating to received statutory reports from registered liquidators is drawn from Table 8.2.4 on page 241. ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement outcomes in Table 8.3.1 on pages 252-253. Cost recovery levy revenue for FY 18-19 is drawn from page 169 - Cost Recovery Implementation Statement: ASIC industry funding model (2019-20)
4	FY 17-18	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is drawn from Table 3.2.1 on page 37. Data relating to the management of whistleblower disclosures was drawn from page 92. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 117. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 120. ASIC's staffing data are drawn from Tables 8.1.3 and 8.1.5 on pages 169 and 170. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from Table 8.2.2 on page 174. Data relating to received breach reports from licensees and auditors is drawn from Table 8.2.3 page 175. Data relating to received statutory reports from registered liquidators is drawn from Table 8.2.4 page 176.

No	Year	Reference and Page Number
4	FY 17-18	<ul style="list-style-type: none"> ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement outcomes in Table 8.3.1 on pages 183-184. Cost recovery levy revenue for FY 17-18 is drawn from page 163 - Cost Recovery Implementation Statement: ASIC industry funding model (2018-19).
5	FY 16-17	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is the FY16-17 ASIC Annual Report is split by outcome 2.1 and 2.2. The total number is derived by adding the investigations commenced published on page 31 (for outcome 2.1) and on page 37 (for outcome 2.2). ASIC's intelligence and assessment staffing data is drawn from page 19. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from section 3.5.1 on page 91. Data relating to received breach reports from licensees and auditors is drawn from section 3.5.2 on pages 92-93. Data relating to received statutory reports from registered liquidators is drawn from section 3.5.3 on page 94. Data relating to the management of whistleblower disclosures was drawn from page 95. ASIC's staffing data is drawn from section 4.1 on page 108 - 109. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 129. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 131. ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement outcomes in Table 6.4.1 on pages 180-181.
6	FY 15-16	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is the FY15-16 ASIC Annual Report is split by outcome 2.1 and 2.2. The total number is derived by adding the investigations commenced published on page 32 (for outcome 2.1) and on page 58 (for outcome 2.2). ASIC's intelligence and assessment staffing data is drawn from page 19. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from section 2.5.2 on page 92. Data relating to received breach reports from licensees and auditors is drawn from section 2.5.2 on pages 93-94. Data relating to received statutory reports from registered liquidators is drawn from section 2.5.3 on pages 94-95. Data relating to the management of whistleblower disclosures was drawn from page 96. ASIC's staffing data is drawn from section 3.1 on page 108-109. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 127.

No	Year	Reference and Page Number
6	FY 15-16	<ul style="list-style-type: none"> Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 129. ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement outcomes in Table 5.4.1 on pages 184-185.
7	FY 14-15	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is the FY14-15 ASIC Annual Report is split by priority 1 and priority 2. The total number is derived by adding the investigations commenced published on page 6 (for priority 1) and on page 8 (for priority 2). ASIC's intelligence and assessment staffing data are drawn from page 25. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from section 2.5 on page 74. Data relating to received breach reports from licensees and auditors is drawn from section 2.5.2 on page 75. Data relating to received statutory reports from registered liquidators is drawn from section 2.5.3 on page 76-77. ASIC's staffing data is drawn from section 3.1 on page 86 – 87. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 107. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 110. ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement in Table 5.4.1 on pages 165-166.
8	FY 13-14	<ul style="list-style-type: none"> The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is drawn from the Major enforcement outcomes table on page 7. Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from the Assessing Misconduct and Other Reports section on page 61. Data relating to received breach reports from licensees and auditors is drawn from section 2.4.2 on pages 62-63. Data relating to received statutory reports from registered liquidators is drawn from section 2.4.3 on pages 63-64. ASIC's staffing data is drawn from section 3.1 on page 74 – 75. Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 91. Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 95. ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement in Table 5.4.1 on pages 159-160.

No	Year	Reference and Page Number
9	FY 12-13	<ul style="list-style-type: none"> • The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is drawn from the major enforcement outcomes table on page 18. • Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from the Assessing Misconduct and Other Reports section on page 56. • Data relating to received breach reports from licensees and auditors is drawn from pages 57-58. • Data relating to received statutory reports from registered liquidators is drawn from pages 58-59. • ASIC's staffing data is drawn from the ASIC employees by location table on pages 70-71. • Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 87. • Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 91. • ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement on page 150.
10	FY 11-12	<ul style="list-style-type: none"> • The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act) is drawn from the major enforcement outcomes table on page 151. • Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from the Assessing Misconduct and Other Reports section on page 47. • Data relating to received breach reports from licensees and auditors is drawn from page 49. • Data relating to received statutory reports from registered liquidators is drawn from page 49. • ASIC's staffing data is drawn from the ASIC employees by location table on pages 58-59. • Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 75. • Financial flow data to and from the Official Public Account is drawn from the Administered Reconciliation Schedule within ASIC's financial statements on page 79. • ASIC's actual available appropriation and cash payments made are drawn from ASIC's Portfolio Budget Statement on page 142-143.

Attachment E

Parliamentary Joint Committee on Corporations and Financial Services Proposed Terms of Reference

It is proposed that the Parliamentary Joint Committee on Corporations and Financial Services undertakes an inquiry into the Australian Securities and Investments Commission's (ASIC's) processes for the handling of reports of alleged misconduct.

The inquiry is to receive evidence and examine the following:

- the volume and quality of reports of alleged misconduct submitted and received by ASIC;
- ASIC's processes in receiving and managing reports of alleged misconduct;
- ASIC's technology and database platforms used to receive, process and manage reports of alleged misconduct;
- ASIC's resourcing requirements of its reports of alleged misconduct management processes;
- the effectiveness of ASIC's public communication regarding its reports of alleged misconduct handling process (including information sheets INFO 151 and INFO 153);
- the reasons why large numbers of reports of alleged misconduct result in no further action (NFA) and why the NFA rate both in nominal and percentage terms has been rising over FY 11-12 to FY 20-21;
- the process by which ASIC seeks to validate the allegations made and evidence submitted;
- ASIC's processing times of reports of alleged misconduct;
- the small and declining number of reports of alleged misconduct which result in an official investigation (either by section 13 of the ASIC Act or section 247 of the NCCP Act);
- the nature and type of official investigations initiated by ASIC (including those investigations not instigated by reports of alleged misconduct);
- the number and nature of reports of alleged misconduct which are worthy of an official investigation, but do not result in an official investigation;
- the decision-making process (including the discretion exercised within ASIC) as to how reports of alleged misconduct are managed and resolved including as to whether a report of alleged misconduct results in the commencement of a section 13 (ASIC Act) or section 247 (NCCP Act) investigation;
- ASIC's management of whistleblowers including:
 - the identification of eligible whistleblowers;
 - the management of anonymous whistleblowers;
 - communication protocols with eligible whistleblowers; and
 - the legal regime surrounding public interest and emergency disclosures;

- the appropriateness of the current level of disclosure of data in ASIC's annual reports to enable a proper assessment of ASIC's effectiveness in dealing with reports of alleged misconduct, by members of the public, parliamentary committees and other regulatory oversight bodies; and
- Australian and international best practices in reports of alleged misconduct handling and whistleblower management.

2022

Handling of Reports of Alleged Misconduct by the Australian Securities and Investments Commission (Supplementary Report)

PROPOSED PUBLIC INQUIRY – PARLIAMENT OF AUSTRALIA
ADAMS ECONOMICS

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This report has been prepared by independent economist and public policy practitioner John Adams of Adams Economics.
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For further information, contact John Adams at www.adamseconomics.com or john@adamseconomics.com

1. Introduction

1. On 6 October 2022, Mr John Adams of Adams Economics officially published a 71-page independent report into the handling and management of reports of alleged misconduct by the Australian Securities and Investments Commission (ASIC) (the “Primary Adams Report”).
2. The Primary Adams Report outlined a range of concerning trends with ASIC’s performance over the period July 2011 to June 2021 and called on the Parliament of Australia, through the appropriate parliamentary committee, to establish a parliamentary inquiry to investigate the identified trends in ASIC’s performance.
3. The Primary Adams Report was sent to over 30 Federal Australian Parliamentarians for their consideration including the members of the following parliamentary committees:
 - Parliamentary Joint Committee on Corporations and Financial Services;
 - Senate Economics References Committee; and
 - House of Representatives Standing Committee on Economics.
4. Subsequent to the publication of the Primary Adams Report, ASIC published its Annual Report 2021-22 on 14 October 2022¹.
5. This supplementary report (the “Supplementary Adams Report”) now considers ASIC’s performance in FY 21-22 as described in the ASIC Annual Report 2021-22 in the same fashion as the analysis of the Primary Adams Report.
6. To avoid needless duplication, the Supplementary Adams Report does not repeat the analysis or traverse the same ground as the Primary Adams Report. Thus, this supplementary report should be read in conjunction with the Primary Adams Report.

Basis and Preparation of this Supplementary Report

7. Mr Adams has drawn on statistics of ASIC’s handling of reports of alleged misconduct from members of the Australian public, reportable situations (i.e., breach reports) and statutory liquidator reports contained in the ASIC Annual Report 2021-22. These statistics are presented at **Attachment A**.
8. Moreover, Mr Adams also drew on the ASIC Annual Report 2021-22 to analyse the number of annual whistleblower disclosures received by ASIC and how they are processed. These statistics are presented at **Attachment B**.

Data Methodology and Data Sources

9. Moreover, this supplementary report utilises the same methodology as utilised in the Primary Adams Report. The specific page reference from the ASIC 2021-22 Annual Report for each statistic used in this Supplementary Adams Report is documented at **Attachment C**.

¹ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-276mr-asic-releases-2021-22-annual-report/>

2. Overview of Main Findings

10. In the 'Chair's Report' (published on pages 6 – 8 of the ASIC Annual Report 2021-22), ASIC's Chairman Mr Joseph Longo stated:

"We continue to be a strong and targeted law enforcement agency, and an active litigator against misconduct... We are committed to using our full, expanded regulatory toolkit to take action against misconduct and reduce the risk of harm to consumers."

11. However, in FY 2021-22, ASIC recorded several key data points/statistics that worsened the already concerning trends established (in the period examined) by the Primary Adams Report. They included:
- the rate of no further action (NFA) on reports of alleged misconduct from members of the Australian public reached an all-time high in FY 21-22 at 66% (1 percentage point (ppt) higher than FY 20-21);
 - the rate of reports of alleged misconduct from members of the Australian public referred for action reached an all-time low of 13% (2 ppts lower than FY 20-21);
 - the rate of NFA on reportable situations (i.e., breach reports) reached an all-time high in FY 21-22 at 90% (1 ppt higher than FY 20-21);
 - 87.3% of the total number of initial statutory liquidator reports alleged misconduct and of these, only 1.8% were referred for action (down from 2.4% in FY 20-21);
 - 91% of whistleblower disclosures in FY 21-22 resulted in NFA which is consistent with the average since 2015; and
 - the number of new official investigations as defined either by section 13 of the *Australian Securities and Investment Act 2001* or section 247 of the *National Consumer Credit Protection Act 2009* fell to an all-time low of only 107².
12. Only in some minor categories did ASIC improve its performance in FY 21-22 relative to FY 20-21. These categories include:
- the annual ratio of investigations to the total reports of alleged misconduct, which rose to 0.86% from 0.74% (but through fewer reports of alleged misconduct being received, not through more investigations being initiated); and
 - the percentage of supplementary statutory liquidator reports referred for action rose from 18% to 20%.
13. No empirical evidence – or explanations that help contextualise and allay concerns - could be found regarding the trends of worsening performance by ASIC in handling and processing reports of alleged misconduct identified over the (now, as of October 2022) last 11 years of ASIC's annual reports.
14. The results of ASIC's performance in handling reports of alleged misconduct in FY 21-22 only adds to the case for establishing a stand-alone parliamentary inquiry, as outlined in the Primary Adams Report.

² This is the lowest annual number of new official investigations since July 2011 (i.e., period of available data).

3. ASIC's Handling of Reports of Alleged Misconduct

Reports of Alleged Misconduct Received by ASIC from the Australian Public (Source 1 of 3)

15. In FY 21-22, ASIC received 8,688 reports of alleged misconduct from members of the Australian public, which is the lowest annual level for the period July 2011 to June 2022 (see Diagram 1)³.

Diagram 1 Number of Reports of Alleged Misconduct Received by ASIC from the Australian Public



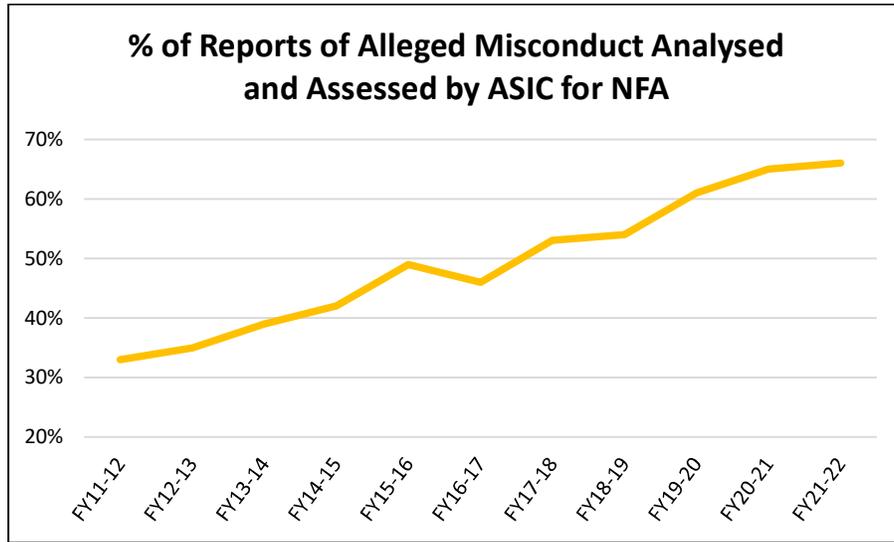
Reports of Alleged Misconduct Resulting in No Further Action (NFA)

16. The rate at which reports of alleged misconduct from members of the Australian public resulting in NFA continued its growth pattern as illustrated in the Primary Adams Report, growing from 33% in FY 11-12 to now 66% in FY 21-22 (up 1 ppt higher than FY 20-21). This trend is illustrated in Diagram 2.
17. In nominal terms, the number of reports of alleged misconduct from members of the Australian public that resulted in NFA in FY 21-22 was 5,734. While this is 1,228 reports fewer than FY 20-21, it is still 1,604 reports higher than FY 11-12.
18. Of these 5,734 reports deemed NFA (as outlined in paragraph 17), 3,736 of these reports were due to insufficient evidence.

³ Importantly, ASIC does not distinguish between reports and matters in its annual reports, thus it is difficult to assess whether each of the reports made to ASIC by members of the Australian public relate to separate and independent matters or whether multiple reports relate to the one matter.

For example, it is conceivable that a single collapsed managed investment scheme with hundreds of investors would trigger multiple reports of alleged misconduct to ASIC.

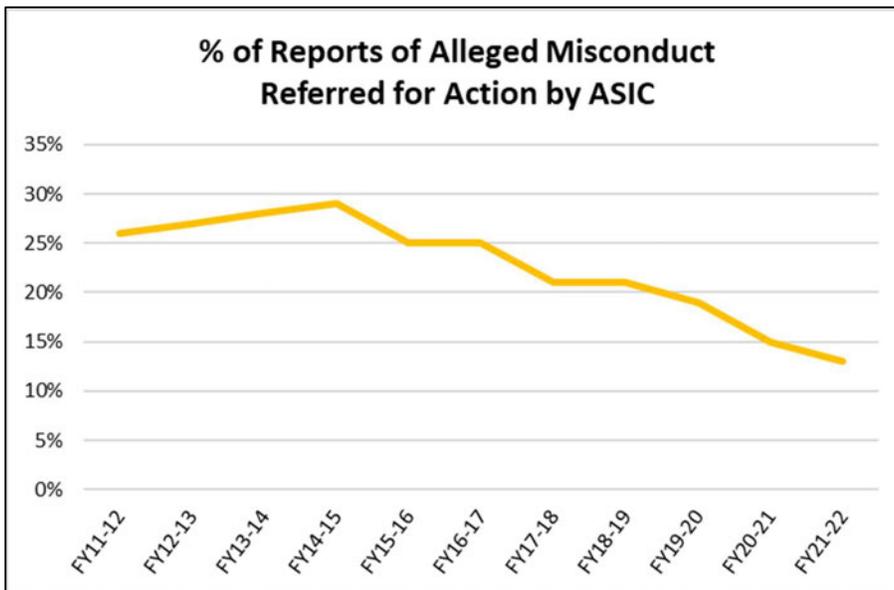
Diagram 2: Percentage of Reports of Alleged Misconduct Analysed and Assessed for No Further Action



Reports of Alleged Misconduct Referred by ASIC for Action

19. In contrast to the increasing rate by which reports of alleged misconduct from members of the Australian public (source 1 of 3) to ASIC attract an NFA classification, the percentage of reports that ASIC instead referred for action has continued the declining trend documented in the Primary Adams Report. After peaking at 29% in FY 14-15, it has steadily fallen to a new low of only 13% in FY 21-22. This trend is illustrated in Diagram 3.
20. In nominal terms, only 1,129 reports of alleged misconduct from members of the Australian public were referred for action in FY 21-22. This is the lowest nominal amount during the period examined (FY 11-12 to FY 21-22).

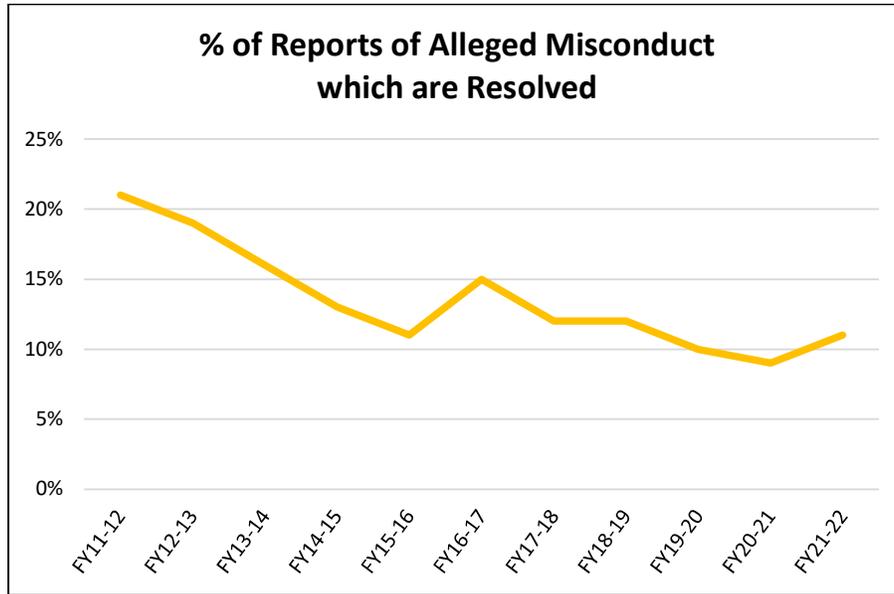
Diagram 3: Percentage of Reports of Alleged Misconduct which are Referred for Action by ASIC



Reports of Alleged Misconduct which are Resolved

21. The percentage of reports of alleged misconduct that ASIC received from members of the Australian public and then resolved saw a slight improvement relative in FY 21-22, rising to 11%, up from 9% in FY 20-21. This is illustrated in Diagram 4.
22. In nominal terms, the number of reports of alleged misconduct from members of the Australian public which were resolved fell to an all-time low of 956 reports. This outcome is in part a function of the phenomenon as described above at paragraph 15.

Diagram 4: Percentage of Reports of Alleged Misconduct which are Resolved



Reports of Alleged Misconduct which Lack Jurisdiction or have No Breaches

23. During FY 21-22, reports of alleged misconduct submitted to ASIC that were outside of ASIC's jurisdiction (as a share of the total reports received from members of the Australian public in that financial year) remained steady at 9%.
24. In nominal terms, the number of reports of alleged misconduct from members of the Australian public which were outside of ASIC's jurisdiction fell to an all-time low of 782 reports. This outcome is in part a function of the overall decline in reports of alleged misconduct from members of the Australian public as described above at paragraph 15.
25. Alternatively, reports of alleged misconduct submitted to ASIC that did not identify a contravention of law (as a share of the total reports received from members of the Australian public in that financial year) fell to an all-time low of just 1% in FY 21-22.
26. The outcome identified in paragraph 25 is a continuation of the declining trend since FY 11-12 where, back then, 5% of reports of alleged misconduct from members of the Australian public did not identify a contravention of law.

27. Moreover, this was also true in nominal terms with ASIC receiving just 87 reports of alleged misconduct that did not identify a contravention of law.

Reportable Situations (i.e., Breach Reports) (Source 2 of 3)

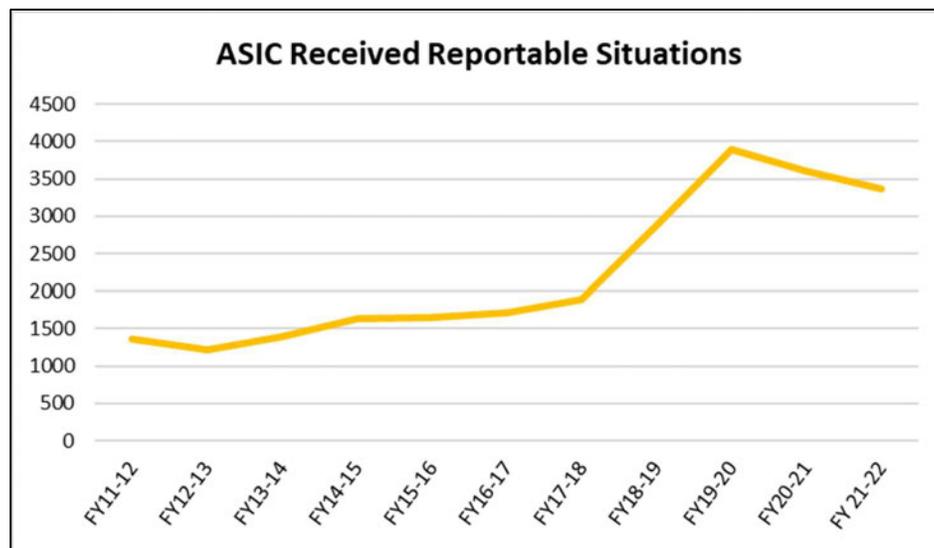
28. As noted in footnote 31 of the Primary Adams Report, in FY 21-22, breach reports were renamed as “reportable situations”⁴.

29. Moreover, from 1 October 2021:

- Australian credit licensees were required to submit notifications about ‘reportable situations’ to ASIC for the first time; and
- AFS licensees and Australian credit licensees are required to submit notifications about ‘reportable situations’ to ASIC within 30 calendar days (no longer 10 days) via the ASIC regulatory portal.

30. During FY 21-22, ASIC received 3,362 notifications of reportable situations which is 531 notifications fewer than the peak of FY 19-20 (or 13.6% lower), but 1,995 notifications higher than FY 11-12 (or 146% higher). This is illustrated in Diagram 5.

Diagram 5: Annual Number of Reportable Situations (Breach Reports) Received by ASIC



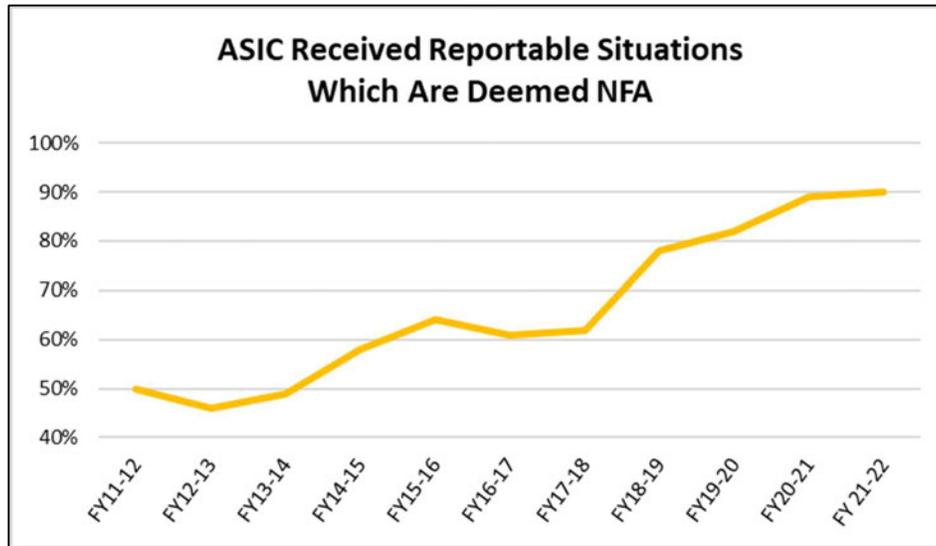
⁴ On pages 23-24 of the ASIC Annual Report 2021-22, it states:

“Breach reporting (now called reportable situations) reforms commenced on 1 October 2021 to improve the consistency, clarity and timeliness of reporting across the industry. Australian financial services (AFS) licensees must now lodge reports about reportable situations to ASIC through the ASIC Regulatory Portal. The changes in reporting obligations have resulted in a more expansive reporting regime for AFS licensees and also clearer reporting obligations.

In September 2021, ASIC released regulatory guidance to help credit and AFS licensees meet the new breach reporting obligations (Regulatory Guide 78 Breach reporting by AFS licensees and credit licensees)”.

- 31. Alarming, the number of these reportable situations deemed by ASIC as NFA continued to rise reaching an all-time high of 90% in FY21-22 (1 ppt higher than in FY 20-21). This is illustrated in Diagram 6.

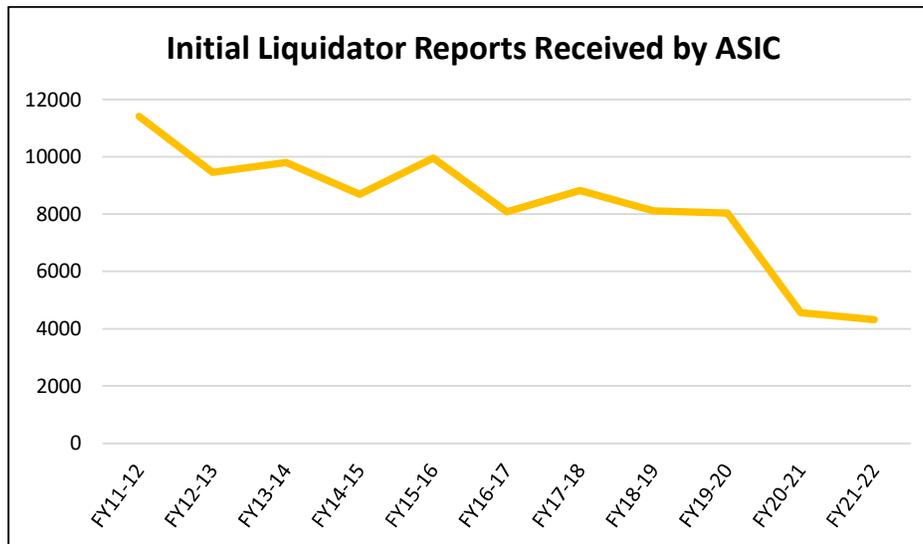
Diagram 6: Annual % of Reportable Situations (Breach Reports) which ASIC deemed NFA



Liquidator Reports (Source 3 of 3)

- 32. During FY 21-22, the number of initial statutory liquidator reports submitted to ASIC continued to fall to its lowest level in the period FY 11-12 to FY 21-22 to 4,313 reports. This is illustrated in Diagram 7.

Diagram 7: Total Number of Initial Liquidator Reports Received by ASIC



33. Of the initial statutory liquidator reports submitted in FY 21-22, 87.3% alleged misconduct (or in nominal terms 3,767 reports), which exceeded the average rate of the period FY 11-12 to FY 21-22. (These data points, including percentages, for FY 21-22 are shown at **Attachment B**.)
34. During FY 21-22, supplementary statutory liquidator reports were requested by ASIC in 8.8% of instances where those initial statutory liquidator reports submitted to ASIC alleged misconduct. As a percentage of the total number of initial statutory liquidator reports received (i.e., also including those reports where misconduct was not alleged), ASIC requested supplementary statutory liquidator reports in only 7.7% in FY 21-22. (These data points, including percentages, for FY 21-22 are shown at **Attachment B**.)
35. In similar fashion to the number of initial statutory liquidator reports received by ASIC as described above in paragraph 32, the annual number of finalised supplementary reports submitted to ASIC also fell to an all-time low (of only 332) in FY 21-22. This is shown in Diagram 8.
36. The number of finalised supplementary statutory liquidator reports received by ASIC deemed NFA was 80% in FY 21-22. This was better than the average over the period examined and a slight improvement from the 82% recorded in FY 20-21. This is shown in Diagram 9.
37. For completeness, for the period FY 21-22, the percentage of all initial statutory liquidator reports submitted to ASIC that ultimately were referred for action was only 1.5% (lower than the 1.7% average in the period examined – i.e., FY 11-12 to FY 21-22). Similarly, in FY 21-22, of those initial statutory liquidator reports that alleged misconduct, only 1.8% were referred for action (lower than the 2.1% average in the period examined – i.e., FY 11-12 to FY 21-22). These statistics are presented at **Attachment B**.

Diagram 8: Number of Finalised Supplementary Reports Submitted to ASIC

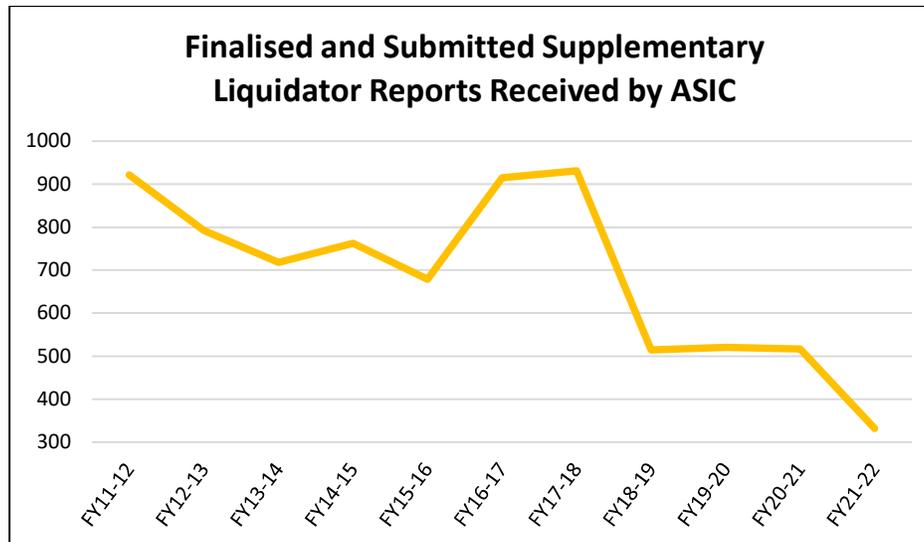
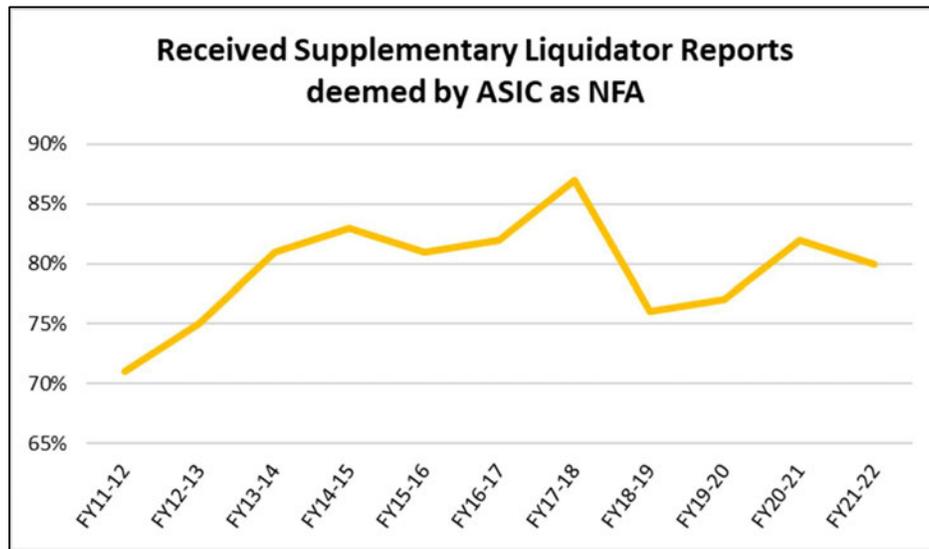


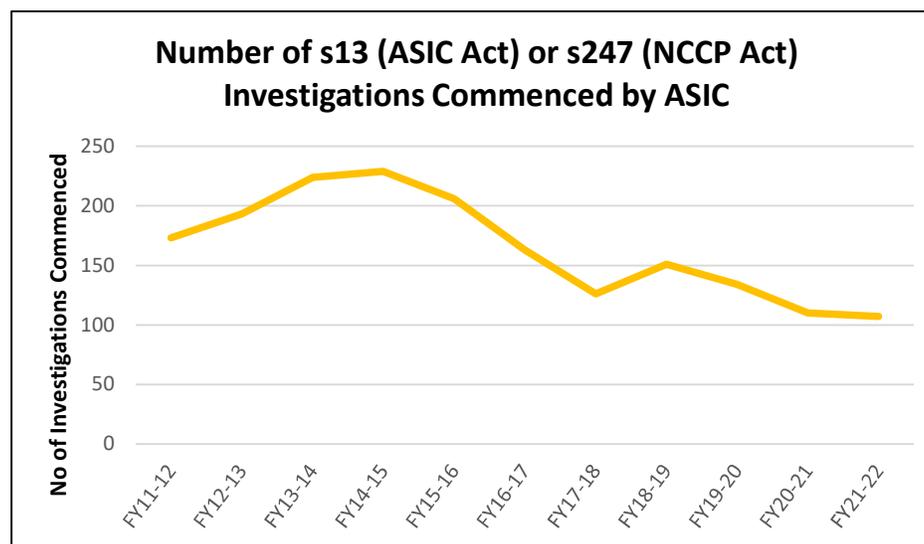
Diagram 9: Number of Finalised Supplementary Reports deemed by ASIC as NFA



4. Commencement of Section 13 and Section 247 Investigations

38. With respect to commencing new section 13 (ASIC Act) or section 247 (NCCP Act) official investigations, ASIC's aptitude (at least on the face of it) continued to falter in FY 21-22.
39. Concerningly, in FY 21-22, ASIC only commenced 107 official investigations which is an all-time low in the period FY 11-12 to FY 21-22, and down from the peak of 229 separate investigations in FY 14-15. This is illustrated in Diagram 10⁵.

Diagram 10: No. of Section 13 (ASIC Act) or Section 247 (NCCP Act) ASIC Investigations Commenced

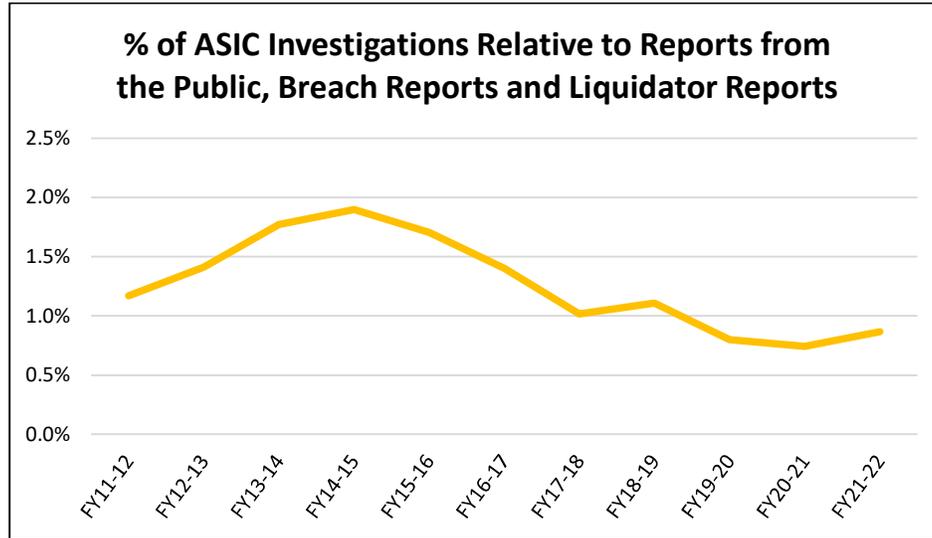


40. In FY 21-22, the annual ratio of ASIC official investigations commencing relative to received:
- reports of alleged misconduct from members of the public;
 - reportable situations (i.e., breach reports) from licensees and auditors; and
 - supplementary statutory reports from registered liquidators;
- slightly improved from 0.74% recorded in FY 20-21 to 0.86% in FY 21-22. This is illustrated in Diagram 11.
41. However, and concerningly, this annual ratio of investigations to the total reports of alleged misconduct remains lower than:
- the peak of 1.90% recorded in FY 14-15; and
 - the period prior to the 2018-19 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry⁶.

⁵ Importantly, as noted on page 25 of the ASIC Annual Report 2021-22: "all of ASIC's Royal Commission investigations are now complete, with seven proceedings still before the courts".

⁶ The average annual ratio of investigations to the total reports of alleged misconduct for the period July 2011 to June 2019 was 1.43%.

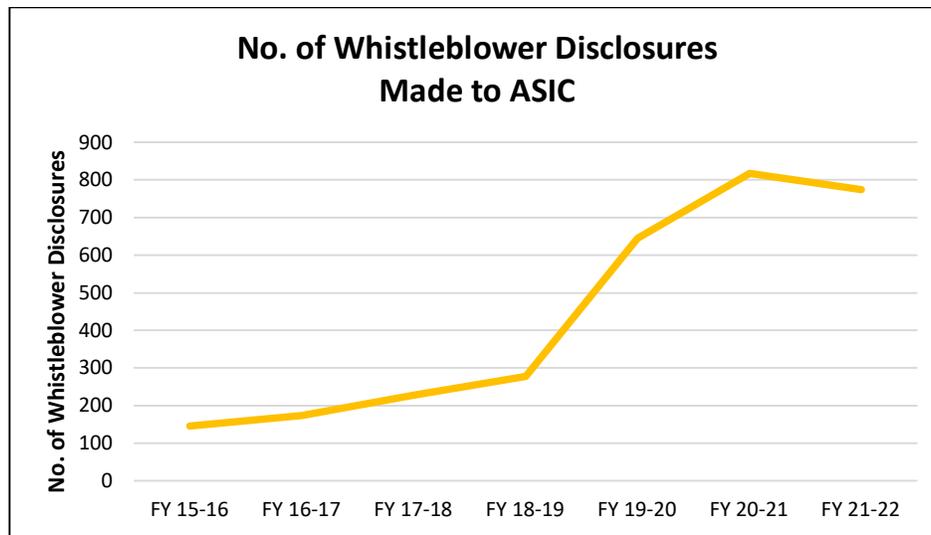
Diagram 11: Percentage of Reports of Alleged Misconduct which resulted in a Section 13 (ASIC Act) or Section 247 (NCCP Act) ASIC Investigation



5. Management of Whistleblowers

42. The annual number of whistleblower disclosures received by ASIC in FY 21-22 was 774, which was 43 fewer than the peak of 817 disclosures received in FY 20-21 (and the second highest number since July 2015 - i.e., when such statistics were reported by ASIC in their annual reports). This is illustrated in Diagram 12.
43. Concerningly, the percentage of whistleblower disclosures deemed as NFA in FY 21-22 was 91%⁷, which is equivalent to the average over the period July 2015 to June 2022. This means that only 70 whistleblower disclosures were referred for action in FY 21-22⁸, which is down from 74 disclosures in FY 20-21.
44. Overall, for the period July 2015 to June 2022, ASIC referred 259 whistleblower disclosures out of 3,061 in total for action (or just 8.5%).

Diagram 12: Annual Number of Whistleblower Disclosures Submitted to ASIC



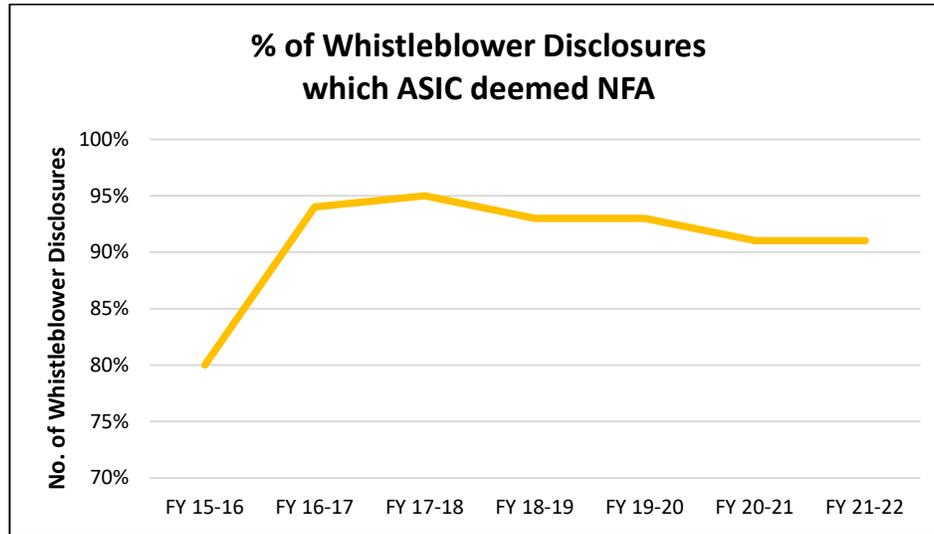
45. The percentage of whistleblower disclosures received by ASIC deemed as NFA from FY 15-16 to FY 21-22 is illustrated in Diagram 13.

⁷ Page 235 of the ASIC Annual Report 2021-22 states:

“Following our preliminary inquiries, we assessed approximately 91% of disclosures as requiring no further action by ASIC due to insufficient evidence, no actionable breach being disclosed, or the breach being in the jurisdiction or remit of other regulators. In a number of cases, we referred the matter to another agency, law enforcement body, or third party (such as a liquidator) that was better placed to deal with the issue or was already taking action”.

⁸ Note that action does not necessarily mean an official investigation (see discussion in the Primary Adams Report).

Diagram 13: % of Whistleblower Disclosures deemed by ASIC as NFA

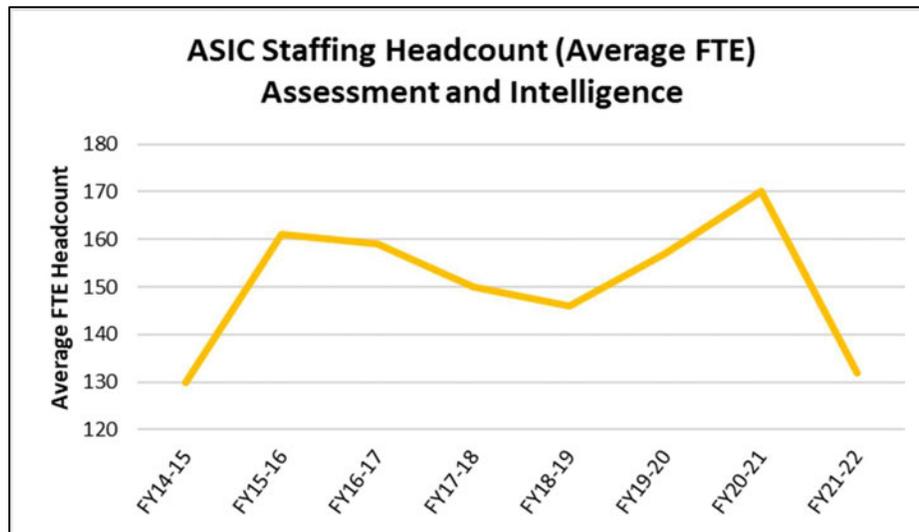


6. ASIC Resourcing

ASIC's Staffing Profile

46. ASIC's headcount dropped by 61 average full-time equivalent (FTE) in FY 21-22 to 1,947 average FTE relative to the 2,008 average FTE recorded in FY 20-21. From July 2015, ASIC's headcount has grown by 21.0% to June 2022.
47. The annual cash spend on ASIC's employees (as recorded in ASIC's cash flow statement contained within its annual financial statements) fell by \$AUD 13.1 million in FY 21-22 to \$AUD 270.0 million (or 4.6% lower).
48. As noted in the Primary Adams Report, the most relevant staffing unit for handling and processing reports of alleged misconduct is the "Assessment and Intelligence" teams (although, as noted in the Primary Adams Report, this unit is likely to include staff outside of the Misconduct and Breach Reporting team). In FY 21-22, ASIC's "Assessment and Intelligence" teams fell by 38 average FTE relative to FY 20-21, to 132 (or 22.4% lower).
49. Unlike previous annual reports, the ASIC Annual Report 2021-22 provides a breakdown of the Assessment and Intelligence teams by sub-units. Specifically, the ASIC Annual Report 2021-22 shows that in FY 21-22:
 - 97 average FTE was employed in the Misconduct and Breach Reporting team; and
 - 35 average FTE was employed in the Small Business Engagement and Compliance team.
50. ASIC's 'Assessment and Intelligence' annual headcount, as measured by average FTE, is illustrated in Diagram 14.

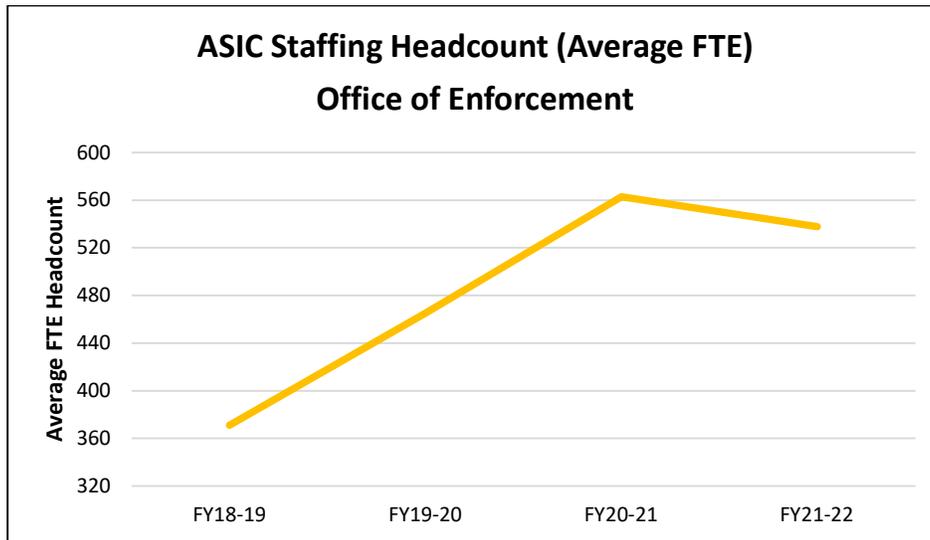
Diagram 14: ASIC 'Assessment and Intelligence' Headcount as measured by Average FTE



51. As noted in the Primary Adams Report, ASIC's capacity to commence new official investigations is dependent on the staffing levels within ASIC's Office of Enforcement.

- 52. In FY 21-22, ASIC's enforcement headcount fell by 25 (on an average FTE basis) from FY 20-21 to 538 (or a decline of 4.4%). However, it remained 45% higher than the 371 average FTE staff headcount recorded in FY 18-19.
- 53. ASIC's 'Office of Enforcement' annual headcount, as measured by average FTE, staff is illustrated in Diagram 15.

Diagram 15: ASIC 'Office of Enforcement' Headcount as measured by Average FTE



7. Comparative Analysis

54. If a comparison of ASIC's performance between FY 20-21 and FY 21-22 were to occur, one may be tempted to conclude that with fewer total reports of alleged misconduct and fewer resources (both staff headcount and cash spent on employees), the performance statistics presented in the ASIC Annual Report 2021-22 may not been so profound – and especially in the context of fewer, new official (or initiated) section 13 (ASIC Act) or section 247 (NCCP Act) investigations.
55. However, the context to ASIC's FY 21-22 performance is not dissimilar to FY 17-18 given that, in that financial year, ASIC received 12,383 total reports of alleged misconduct, whereas in FY 21-22 ASIC received, 12,382 total reports (i.e., the cumulative total when considering report sources 1, 2 and 3).
56. Yet, despite the similarities as outlined in paragraph 55, ASIC in FY 21-22:
- commenced fewer new official investigations (107 in FY 21-22 compared with 126 in FY 17-18);
 - had a lower annual ratio of investigations to the total reports of alleged misconduct of 0.86%, compared with 1.02% in FY 17-18;
 - recorded a higher NFA rate on reports of alleged misconduct received from the Australian public of 66%, compared with 53% in FY 17-18;
 - recorded a higher NFA rate on notifications of reportable situations - of 90%, compared with 62%, in FY 17-18;
 - only 8.8% of initial statutory liquidator reports alleging misconduct resulted in a finalised supplementary statutory liquidator report being submitted to ASIC compared with 13.6% in FY 17-18;
 - only 1.8% of initial statutory liquidator reports alleging misconduct were referred for action which was equivalent to that in FY 17-18; and
 - achieved its current year performance with far more resources in terms of both average FTE headcount (1,947 total average FTE in FY 21-22 compared with 1,656 in FY 17-18) and cash spent on employees (\$AUD 270.0 million spent in FY 21-22 compared with \$210.2 million in FY 17-18).

8. Considering “No Jurisdiction” Reports

57. Since the publication of the Primary Adams Report on 6 October 2022, an occasional response (including from one federal parliamentary stakeholder) was to question whether it was fair or appropriate to include reports of alleged misconduct from members of the Australian public (Source 1 of 3) deemed by ASIC to be outside its jurisdiction (classified in ASIC’s annual reports as “no jurisdiction” reports) when calculating the annual ratio of investigations to the total number of reports of alleged misconduct.

Methodological Consideration

58. As noted in the Primary Adams Report, each year ASIC considers a large volume of reports of alleged misconduct from members of the Australian public. In some cases, ASIC deems that another Commonwealth or State Government agency is more appropriate to consider the report. Such agencies may include:

- the Australian Competition and Consumer Commission;
- the Australian Financial Complaints Authority;
- the Australian Federal Police;
- state police forces; and
- state consumer protection bodies (e.g., NSW Fair Trading).

59. Specifically, on page 223 of the ASIC Annual Report 2021-22, ASIC defines “no jurisdiction” to mean:

“Where relevant, ASIC directs reporters to the appropriate agency or solution”.

60. Feedback received from former ASIC employees during the research of the Primary Adams Report suggested that, in many instances, ASIC exercises its significant discretion when making such determinations in ways that are not clear cut – meaning that, in several instances, ASIC could have legally considered and acted on certain reports if it wanted to.

61. Given the:

- feedback as per paragraph 60; and
- lack of public data regarding “no jurisdiction” reports and the number that could have conceivably been (but weren’t) acted upon by ASIC;

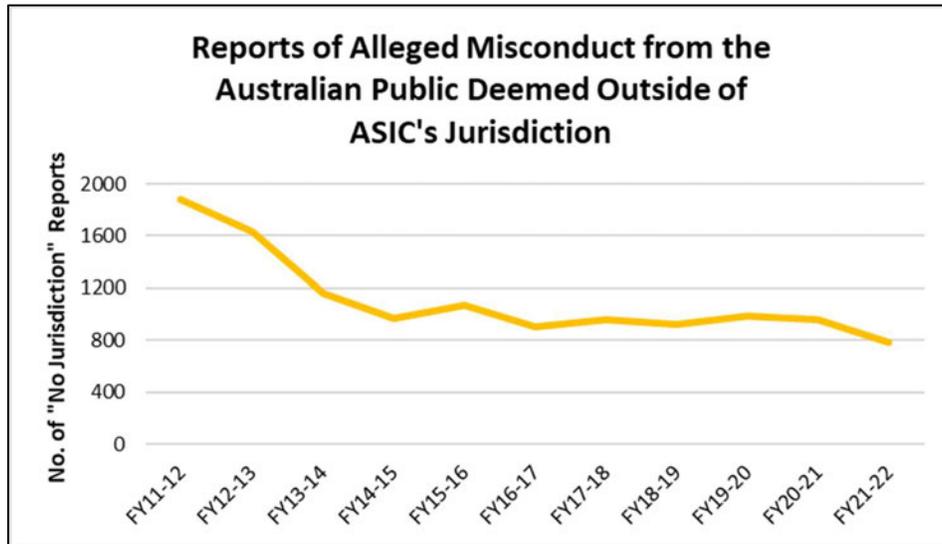
a methodological decision was made in preparing the Primary Adams Report to include “no jurisdiction” reports in the denominator when calculating the annual ratio of investigations to the total number of reports of alleged misconduct.

Statistical Significance of “No jurisdiction” Reports

62. The question to consider now is whether the methodological decision as outlined in paragraph 61 was statistically significant and had a distortive impact on the annual ratio of investigations to the total number of reports of alleged misconduct, as calculated and published in the Primary Adams Report.
63. As noted in paragraph 61 of the Primary Adams Report, “no jurisdiction” reports (from Source 1 of 3 – i.e., from members of the Australian public alleging misconduct) fell from 15% in FY 11-12 to only 9% in FY-20-21. Moreover, as noted in paragraph 23 above in this supplementary report, this statistic remained steady at 9% in FY 21-22.

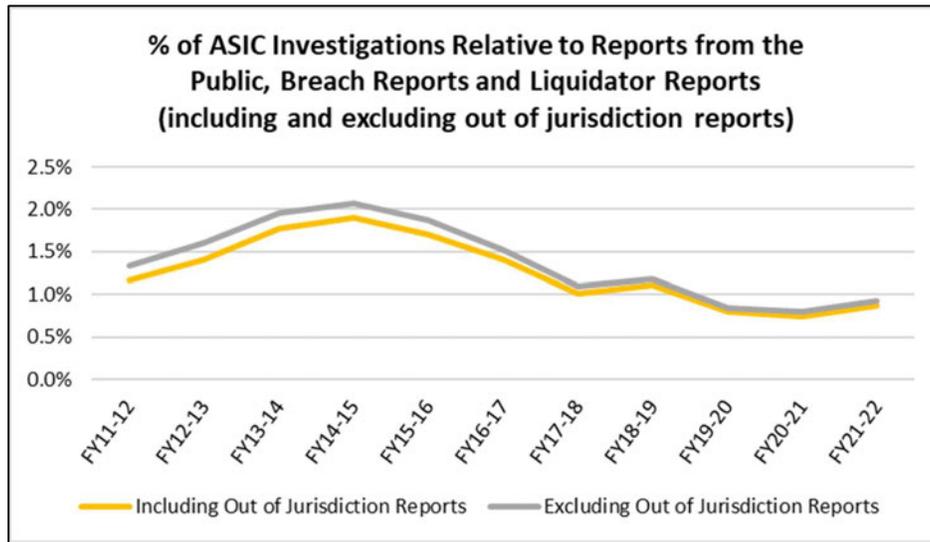
64. In nominal terms, “no jurisdiction” reports fell from 1,877 reports in FY 11-12 to only 782 reports in FY 21-22. This trend is illustrated in Diagram 16.

Diagram 16: Number of Reports of Alleged Misconduct from Members of the Australian Public deemed Outside of ASIC’s Jurisdiction (i.e., “No Jurisdiction” reports)



65. When “no jurisdiction” reports are excluded from the annual ratio of investigations to the total number of reports of alleged misconduct calculation for the period FY 11-12 to FY 21-22 (i.e., making the denominator smaller), we find that the ASIC investigation ratio did not materially increase.
66. For example, at its peak in FY 14-15, the annual ratio of investigations to the total number of reports of alleged misconduct when excluding reports lacking jurisdiction (as deemed by ASIC) is 2.06% (instead of 1.90%), whereas at its lowest point in FY 20-21, the ratio is 0.79% (instead of 0.74%) (The full set of statistics are presented at [Attachment A](#)).
67. A comparative illustration of the annual ratio of investigations to the total number of reports of alleged misconduct with and then without ‘no jurisdiction’ reports is illustrated in Diagram 17. As can be seen, the inclusion or exclusion of “no jurisdiction” reports make no material difference to the story of ASIC’s performance.

Diagram 17: Percentage of Reports of Alleged Misconduct which resulted in an official section 13 (ASIC Act) or section 247 (NCCP Act) ASIC Investigation with, and then without, “no jurisdiction” reports included



9. Conclusion

68. This supplementary report builds on the Primary Adams Report by analysing the ASIC Annual Report 2021-22 that was officially released on 14 October 2022.
69. This report finds that several concerning trends documented in the Primary Adams Report continued, and even worsened in FY 21-22 regarding ASIC's handling of reports of alleged misconduct. Specifically, fewer new official investigations and higher NFA rates underscores the concerns around whether ASIC is:
- adequately responding to reports of alleged misconduct;
 - enforcing the laws of the Parliament of Australia;
 - meeting the expectations of the Australian public; and
 - sending a strong enough signal of deterrence to corporate Australia.
70. Relative to FY 17-18 (for example), ASIC's performance in FY 21-22 looks, on the face of it, far less productive and efficient – as it took a higher degree of regulatory enforcement action in FY 17-18 with a materially lower resourcing profile. Thus, any claims that ASIC's FY 21-22 performance was a function of operational or resourcing limitations is (on the face of it) highly questionable.
71. The analysis contained in the Supplementary Adams Report further confirms the need for a parliamentary inquiry into ASIC's handling and management of reports of alleged misconduct. Both the Primary and Supplementary Adams Reports argue that such a parliamentary inquiry should be a stand-alone inquiry for the following reasons:
- the handling and management of reports of alleged misconduct (including the management of whistleblower disclosures) is a complex and highly detailed subject which requires focused and in-depth attention that is unlikely to be afforded through regular oversight hearings of the Parliament of Australia;
 - a stand-alone inquiry would require ASIC to provide a detailed written submission that would induce or draw out evidence that cannot be ascertained through verbal examination of ASIC officials via a standard committee hearing (similar to what occurred in the Sterling Income Trust inquiry);
 - a stand-alone inquiry would afford ASIC's external stakeholders (i.e., investors, consumers, industry professionals, legal practitioners and other experts) the opportunity to provide the Parliament of Australia with detailed case studies of reports of alleged misconduct that have been inappropriately handled and assessed by ASIC;
 - only through the examination of such accounts can the Parliament of Australia come to a balanced assessment as to whether ASIC is exercising its significant discretion appropriately when it assesses and makes decisions on reports of alleged misconduct and whistleblower disclosures;
 - a stand-alone inquiry would give the Parliament of Australia an ability to test ASIC's current position and evidence through public hearings that gives witnesses the ability to make comments in response to any information or evidence provided by ASIC to the Parliament; and
 - a stand-alone inquiry would allow the Parliament of Australia to hear from a range of experts who would be able to draw to the Parliament's attention current deficiencies in Commonwealth law.

Attachment A

ASIC REPORTS OF ALLEGED MISCONDUCT AND INVESTIGATION STATISTICS

FY21-22		
Total Complaints from the Australian Public*	8688	100%
Referred for action by ASIC	1129	13%
Resolved	956	11%
Analysed and Assessed for No Further Action (NFA)	5734	66%
No Jurisdiction	782	9%
No Breach or Offences	87	1%
Breach Reports from Licensees and Auditors#		
Referred for Action	336	10%
Analysed and Assessed for No Further Action (NFA)	3026	90%
Initial Statutory Reports from Registered Liquidators		
Supplementary Reports Finalised^	332	100%
Supplementary Reports (NFA)	266	80%
Supplementary Reports (Referred for Action)	66	20%
Total Complaints Received by ASIC (* + # + ^)		
Total Complaints Received by ASIC (* + # + ^)	12,382	
Official s13 or s247 Investigations Commenced	107	0.86%

Table Notes

1. The following table provides a breakdown of the initial statutory liquidator reports as to which reports (and what percentage) allege misconduct and those which do not. A percentage analysis of supplementary liquidator reports finalised relative to the:

- initial statutory liquidator reports alleging misconduct; and
- total initial statutory liquidator reports;

are also presented.

Year	Total Initial Statutory Liquidator Reports (Column A)	Total Initial Statutory Liquidator Reports Alleging Misconduct (Column B)	Total Initial Statutory Liquidator Reports Not Alleging Misconduct (Column C)	Column B /Column A	Finalised Supplementary Statutory Liquidator Reports (Column D)	Column D /Column B	Column D /Column A
FY 21-22	4,313	3,767	546	87.3%	332	8.8%	7.7%

Annual Ratio of Investigations to the Total Reports of Alleged Misconduct (Including and Excluding “Out of Jurisdiction” Reports)

Year	Official s13 or s247 Investigations Commenced (including “no jurisdiction” reports)	Official s13 or s247 Investigations Commenced (excluding “no jurisdiction” reports)
FY 11-12	1.17%	1.34%
FY 12-13	1.41%	1.60%
FY 13-14	1.77%	1.95%
FY 14-15	1.90%	2.06%
FY 15-16	1.70%	1.87%
FY 16-17	1.40%	1.52%
FY 17-18	1.02%	1.10%
FY 18-19	1.11%	1.19%
FY 19-20	0.80%	0.85%
FY 20-21	0.74%	0.79%
FY 21-22	0.86%	0.92%

Attachment B

ASIC WHISTLEBLOWER DISCLOSURE AND HANDLING STATISTICS

Year	No. of Whistleblower Disclosures	No. of Whistleblower Disclosures which result in NFA
FY 21-22	774	91%

ASIC HEADCOUNT STAFFING STATISTICS

Year	Total Headcount (Average FTE)	Assessment and Intelligence (Average FTE)	Office of Enforcement (Average FTE)
FY 21-22	1947	132	538

ASIC ANNUAL CASH SPENT ON EMPLOYEES (CASH FLOW STATEMENT)

Year	Annual Cash Spent on Employees
FY 21-22	\$AUD 270.0

Attachment C

REFERENCES OF ASIC RAW DATA CITED IN ATTACHMENTS A AND B

No	Year	Reference and Page Number
1	FY 21-22	<ul style="list-style-type: none">• The number of official investigations (either s13 of the ASIC Act or s247 of the NCCP Act is drawn from Table 2.2.1 on page 29.• Cash used in operating and investment activities and cash spent on employees are drawn from ASIC's Cashflow Statement on page 150.• ASIC's staffing data is drawn from Table 7.1.4 on page 219 and Table 7.1.8 on page 223.• Data relating to how ASIC's received and processed reports of alleged misconduct (including outcomes) is drawn from Table 7.2.2 on page 232 - 233.• Data relating to received reportable situations (i.e., breach reports) from licensees and auditors is drawn from Table 7.2.3 on page 234.• Data relating to received statutory reports from registered liquidators is drawn from Table 7.2.4 page 235.• Data relating to the management of whistleblower disclosures is drawn from page 235.



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND
FINANCIAL SERVICES

Corporate Insolvency in Australia

(Public)

WEDNESDAY, 14 DECEMBER 2022

SYDNEY

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If you're there as a general administrator, your duties are to all creditors—and you should be reporting to all creditors, not just to FEG as an additional creditor. FEG have clearly taken the view they are entitled to ask for additional information. Once you've been trading a business for a while, you provide your reports to creditors as a whole—so that information should be generally available anyway. I don't think it's necessary that they should be getting additional information.

Senator SCARR: Understood. In recommendation 36, you propose:

FEG Recoveries Branch must be required to act as a model litigant in all circumstances.

That, to me, suggests you have practical experience where FEG has potentially not acted as a model litigant. I'm wondering if you can draw out the reasons for that recommendation.

Mr Winter: There is a particular commentary in our submission where we talk about the fact that FEG take this approach where they will try and use an administrator to test the law; they want those test cases that Senator O'Neill was talking about. Part of being a model litigant under the federal government requirements is that you shouldn't be leaning on other individuals to re-determine the law. Our suggestion is quite clearly that that's not the approach that should be taken. If FEG are looking for legislative clarity, they should be seeking that the parliament clarify sections 556 and 561.

Senator SCARR: Understood. I want to move to another topic now that I don't think we've covered yet—when registered liquidators lodge their reports with ASIC and potentially lodge reports with respect to unlawful activity or the appearance of unlawful activity, and how ASIC responds to those reports. The concern seems to be it's a bit of a black box—that there's an algorithm which ASIC applies but there's no visibility or transparency with respect to how that algorithm applies.

Mr Brereton: I'll give you a practical example.

Senator SCARR: I like your practical examples, Mr Brereton!

Mr Brereton: We've recently lodged a report with ASIC. Within 45 seconds we got a 'no further action' response from ASIC—so, clearly, they've got an AI system in the background that's automated that reviews the reports, and you get an instantaneous response that no further action is being undertaken in relation to that particular report.

Mr Winter: Some years ago—this is prior to the current team running ASIC's liquidator team—we said to them: 'Look, we are concerned there are 10,000 reports going to you a year of director malfeasance. There are very few outcomes. What can we do in terms of assisting liquidators to use the right language to draw your attention to what we see as very serious matters that require ASIC's attention?' We were told there was no way ASIC would disclose that, because that might allow people to game the system.

CHAIR: You said 10,000. Some of the evidence said 20,000 of these reports going in—very, very few. We'll have some questions for ASIC about this. You're telling us, basically, you put in the paperwork and it's all over.

Ms Ferrier: Yes.

CHAIR: But you've done the paperwork.

Mr Brereton: We've lodged a report—

CHAIR: How much time does it take to do that?

Mr Brereton: You've got to do the investigations and the report—it takes a bit of time.

CHAIR: What's the cost?

Mr Brereton: It's going to cost at least \$5,000 or something like that.

CHAIR: So \$5,000 to put together a report, stick it in and, within seconds—

Mr Winter: Plus the investigation time—that's the whole thing. If you're uncovering the director malfeasance, there could be tens of thousands of dollars, hundreds of thousands of dollars, worth of investigation before you make that recommendation to ASIC, and yet 40 seconds later you get a rejection.

Senator SCARR: Mr Brereton, have there been examples where you've lodged a report, you've received the 'no action' response and you've actually gone back to ASIC and said, 'Look, do you really understand the serious nature of this? This really is something that should be pursued, based on my years of experience as a registered practitioner in the area'?

Mr Brereton: That's actually very difficult to do.

Senator SCARR: To get to speak to someone in ASIC who will look at it? What's the difficulty? Do you understand what I'm saying?

CHAIR: Tell us how it works or doesn't work.

Mr Brereton: The system is designed so that you submit your report through the electronic portal and you get a response back via email. The system is not designed for you to then contact someone at ASIC to discuss particular reports. Yes, that happens in the background at times but that's not the way ASIC is designed.

Senator SCARR: I just want to drill down on this point. Have there been situations, in your experience, when you've lodged these reports, you've got these action letters and you've been surprised or alarmed that there's been director malfeasance at such a level that you would have reasonably expected the regulator to want to pursue it?

Mr Brereton: I think that's a common theme across all liquidators.

Senator SCARR: It's a common theme across all liquidators?

Mr Brereton: It's a common theme that liquidators have issued reports to ASIC, identified misconduct by directors and got a 'no further action' letter from ASIC.

Senator SCARR: What's the next step? There are breaches of the Corporations Act that might occur at a lower level with respect to amounts that are de minimis or minor. On a technical level, you need to say, 'There's been director malfeasance' or, 'I can't find the books of records, but it might be a mum-and-dad company, so they obviously didn't have the expertise.' On the other hand, there can be issues relating to more significant companies where investors and creditors have been duped or there's clearly been malfeasance at a different order of magnitude. I'm trying to get at whether or not there have been instances falling in the second category, where members of the profession have received these responses and been genuinely surprised the regulator has not taken action.

Mr Brereton: Absolutely. From a liquidator's perspective, it's not clear that there's a different response from ASIC in the two categories you've mentioned. You can issue a report specifying all sorts of serious misconduct and you'll still get a similar response from ASIC in most cases. There are occasions when they ask for supplementary reports, but as a rule the general theme from most liquidators is they're surprised at the low level of activity and response from ASIC in terms of reports that are submitted.

Senator SCARR: Okay. Ms Ferrier?

Ms Ferrier: I was just going to talk about the contrast between ASIC and AFSA. With AFSA, if you have misconduct that you believe you've uncovered and wish to report, AFSA actively encourages practitioners to ring them and discuss putting in offence reports. So you know, before you go to the effort of putting in that report, if the regulator has, shall we say, an interest in looking at that matter.

With ASIC and corporate matters, liquidators are required to put in a report for any misconduct. As Senator Scarr mentioned, it could be a lack of maintaining books and records, which is a common instance across pretty much every appointment. You have to put in that report to ASIC. Unless you're paying more than 50c in the dollar, you are required to lodge that report. So the magnitude of reports going through ASIC is significantly more than in the corporate space. And you're reporting a misconduct issue without the regulator knowing if there are books and records to support that possible misconduct as well. So there's the magnitude, and you don't have the ability to have that discussion with the regulator prior to doing the work and putting in the report.

Senator SCARR: Summarising this issue, we seem to have a situation where there's this imposition of reporting obligations on the registered liquidators. In many cases it's not necessarily productive or leading to dealing with any material issues that are going to lead anywhere for the benefit of creditors. So there's a question as to whether it should be imposed at all in certain situations. But then, on the other hand, in examples where there has been serious director malfeasance and a response is warranted, there's a lack of response from the regulator in taking action upon these reports which are being lodged. Is that a correct summary of the situation?

Mr Winter: It is. Bringing together your essential point that you were asking about, where there are high-profile matters, ASIC will be there. If it's a very big company failure, ASIC will be there. But, going to some of your questions yesterday around the ATO and phoenixing, the majority of phoenixing, which is costing the economy billions of dollars a year, happens at the small to medium end of the economy. That's where these 10,000 reports a year are largely focused. That's the malfeasance you're looking at, and that's what gets no action letter in 40 seconds.

CHAIR: Many of those businesses would be construction type companies, frequently in regional economies, which have incredibly destructive cascading effects through a local economy.

Mr Winter: You're absolutely right.

CHAIR: So are you telling us that this should be core business for ASIC—

Mr Winter: That's absolutely what we're saying.

CHAIR: because the economy is suffering and individuals are suffering, and we've got this phoenixing behaviour. Are director identification numbers going to be enough to address the phoenixing issue that we've just described? I suspect not. But I want to get your response on that before I go to Ms Mascarenhas.

Mr Winter: As was mentioned yesterday in some of the testimony, the director identification numbers came from Professor Helen Anderson. It's an idea that we took up in 2014. It's an idea that the Productivity Commission then endorsed. We believe that it's an essential string in the bow. What it does is it stops Fido being registered as a director, or John Winters rather than John Winter. It means that there is a single source of truth so that liquidators can pursue those who are phoenixing businesses. It gets rid of straw directors and all that sort of stuff. It is not a silver bullet, but it's an incredibly important tool in the shed.

CHAIR: So, if ASIC tells us that the director identification number process has resolved this issue, you would say that is definitely not the case.

Mr Winter: The situation we're at with the director IDs at the moment is that everybody's meant to get a director ID, but right now it is not correlated to your directorship of a business. So all you have is a director ID number. Michael's got his director ID for his ARITA chairmanship, but I can't record that anywhere. The pieces are not together. There is work in train, which has still got some years to go, through the Modernising Business Registers process, but right now it's not even 20 per cent of the way there in terms of its capacity to deliver—

CHAIR: We can probably go down a rabbit hole there, but I'm going to go to Ms Macarenhas—

Mr Brereton: Can I just make a quick comment. As a registered liquidator, if I want to investigate a director, I can't at the moment say, 'This is Mr A's director ID number, and he's the director of other companies.' That second step is not yet linked. I can't access a database of the director ID numbers.

CHAIR: Ms Mascarenhas, over to you.

Ms MASCARENHAS: I'm interested in outcomes, and I'm wondering which country or countries have best-practice insolvency laws and, following on from that, whether those countries have indicators of positive benefits. That might be at a high level, from growing GDP or increased national productivity, or the next level closer to business, which might be an increased number of creditors being paid out or, better still, an increased number of businesses that are restructured and then stay financially viable.

Mr Winter: Thank you for that question. I don't think there is one country that has it perfectly right, but there are clearly examples that we can take from various jurisdictions that can improve our regime. As part of that answer I would say that our voluntary administration regime, for example, is absolutely global best practice. Yes, we can do some updates to it, but as a concept, when you think about it, it swiftly and effectively delivered the turnaround of Virgin, and it delivered the turnaround of Arrium and saved the town of Whyalla. Our voluntary administration regime is excellent for that sort of purpose.

When you look at other jurisdictions—and yesterday Canada was mentioned as an example—where you have a more streamlined system, that delivers them some better outcomes. I note that some discussion was had around the comparatives, and I'll hand over to Dr Mundy on this because it's his expertise. But some of the comparisons show that we are sitting in the middle of the field, as Dr Mundy said before. So we can take examples out of the UK and we can take examples out of Canada.

But Australia also has its own unique bias. Part of your questioning yesterday was around the debtor-in-possession versus creditor rights models. Australia has a very heavy focus on creditor rights. If you think about every collapse that happens, the newspaper reports, first and foremost, talk about creditors who are left out of the money. That's culturally where we sit. It's very different to the US, where it's all about how you keep that company going and creditors just have to wear that grief. Our entire system of trade credit is based on that. If we're going to shift that thinking, we're going to have to shift the way we do business entirely. So Australia has its own unique approach, and that means we do need an element of our unique answers as well.

CHAIR: To be clear about your evidence there, Mr Winter, you're not suggesting that we begin the process of lowering Australians' expectations about creditor response—

Mr Winter: Not at all.

CHAIR: I just want to be clear that that is our cultural expectation. Despite the fact that 13 out of 14 businesses deregister rather than use chapter 5, and 92 per cent of unsecured creditors get zero per cent returns, that is our reality. We have still not lost sight culturally of our aspiration to have a better system to make sure businesses keep trading and people get paid.

Mr Winter: To pull you to those two statistics, Senator—because they are telling—the 13 out of 14 says that our system is not fit for purpose, because the wholesale avoidance by deregistration shows that people are either