



Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
Question No.	083
Topic	Criminal vs civil
Reference	Spoken, 30 April 2024, Hansard page 20
Committee member	Senator O'NEILL

Question

Senator SCARR: Thank you very much. I'd like to go to table 4, on page 44. Table 4 provides detailed data in relation to the current status of briefs referred to the CDDP. The figure in the last column for the total number of briefs referred to the CDDP stands out somewhat. For the nine months to 31 March in the current year we're at seven, which, on a proportionate basis, is materially different from the previous year. I just want to check that figure to see whether or not it's right and, if it is right, what the reasons for it might be.

Mr Mullaly: Yes, the figure is right, and we acknowledge that it's lower than in past years. There are a number of factors that need to be considered in relation to that. One is somewhat of a timing issue. My teams are aware of the need to ensure that we have matters referred to the DPP, so I think over the course of the next few months there'll be some work done to make sure that we do increase that figure.

The other thing to consider in relation to referrals is the nature of the work that we're undertaking and the priorities that we've set ourselves. One of the things—and it goes to some of the earlier discussions that we've had—that we took out of the royal commission was the view that we should be litigating more and litigating more against the big end of town: the banks, the insurance companies et cetera. And we've done that. Prior to the royal commission there were not many matters that we'd taken against any of the four major banks, or insurance companies et cetera. Subsequent to that we've have any number of matters against those entities, and we continue to do that.

What that does, though, is to prioritise our resources towards civil matters, as opposed to criminal matters. As Chair Longo said earlier, those civil matters can sometimes take quite a while to resolve through the courts, but our resources that are working on them are caught up dealing with those matters on a day-to-day basis. While they're doing that, they're not able to work on new matters or work on criminal matters as much.

The other aspect is to consider our priorities. Our priorities were not set with this in mind. In terms of the matters that we're looking to do, whether it be greenwashing or taking action in relation to DDO, a lot of them are civil by nature as opposed to criminal. So we're aware of that. We're aware of the need to ensure a consistent and, to the extent that we can, growing level of outcomes, both civil and criminal, to get the right balance there. At the moment, that balance is probably skewed more towards civil than criminal, but the team and I are aware of that and we're looking to do what we can to address it.

...

CHAIR: Senator Scarr, can I just ask a question on notice? Could you give consideration to what you think a better balance might look like and your rationale for that, Mr Mullaly, and provide that on notice?

Mr Mullaly: We can give consideration to it. Setting numbers and targets can skew good enforcement action. What I mean by that is that, if we were to say, 'We need to take X number of greenwashing matters,' we would tie up resources thinking and looking for those matters. Then some important fraud matter comes through the door, and we don't have the resources available to it. Or, if we say to ourselves, 'We need to do X number of these sorts of criminal matters,' and there is a significant misleading deceptive conduct matter that comes through the door, it's difficult to be able to have the resourcing agility to move them to there. So setting numbers can sometimes skew approaches. That

said, we recognise that we need to set ourselves some KPIs internally to be able to stretch ourselves, and we can look at that and see what we can do to provide an answer to that question.

Answer

Based on our updated figures provided to the Committee on 20 May 2024, we referred nine briefs to the CDPP by 31 March of financial year 2023-24. We are currently finalising a number of other briefs that we expect to be referred to the CDPP shortly.

We are continually reflecting on our work and how to best prioritise matters that involve the most serious misconduct and risk of widespread harm. As set out in our submission to this Inquiry, each year we undertake a strategic planning process to identify areas of greatest potential harm to consumers and markets and these inform the development of our strategic priorities and enforcement priorities, and in turn the matters prioritised for action by the Regulatory Triage Committee (RTC). Each change to our strategic and enforcement priorities affects the type of misconduct we prioritise for action, and therefore the types of outcomes available.

While criminal action will always be a core focus of our work, in many areas of serious consumer and market harm, criminal sanctions may not be available or appropriate. The action we take necessarily depends on the evidence available, including whether the evidence available is likely to meet the higher burden of proof required for a criminal prosecution. If it does not, we will always consider whether it meets the somewhat lower standard of a civil penalty action or an alternative remedy.

As part of continuing to reflect on the balance of matters we prioritise, we are in the process of developing our business plans for the financial year 2024-25. As part of this process, we are looking at how to best use our resources to support a balanced spread of cases and a range of compliance, administrative, civil and criminal outcomes.

We believe this will provide a more balanced range of enforcement outcomes in line with our strategic direction.