Chapter 17

ASIC's enforcement decisions

17.1 The previous chapter considered how ASIC responds to and investigates reports of potential contraventions. This chapter examines the next step in the process: enforcement action. Concerns about ASIC's enforcement record and approach to enforcement were raised throughout the evidence received by the committee. Among other things, this chapter considers issues that may influence what enforcement remedy ASIC decides to pursue, the perceptions created by ASIC's decisions and how effective ASIC's enforcement action ultimately is.

ASIC's overall enforcement record

17.2 The following two tables present a statistical overview of ASIC's enforcement activities. Table 17.1 provides statistics on outcomes achieved over several financial years. Table 17.2 provides statistics on enforcement outcomes achieved in each of ASIC's broad areas of responsibility.[1]

Table 17.1: ASIC's aggregate enforcement outcomes, 2006–07 to 2012–13

Type of action	*2006–07*	*2007–08*	*2008–09*	*2009–10*	*2010–11*	*2011–12*	*2012–13*
Litigation completed (total)	430	280	186	156	202	179	144
Litigation completed successfully	97%	94%	90%	91%	90%	92%	95%
New litigation commenced	148				130	134	149
Investigations commenced					175	173	193
Investigations completed					184	183	187
Criminal proceedings completed	51	52	39	22	26	28	25
Number of people convicted	42	49	34	22	25	27	22
Number of people jailed	21	23	19	12*	16	20	9
Non-custodial sentences/fines					9	8	13
Civil proceedings completed	76	44	35	30	34	24	15
Illegal schemes shut down or other action taken	105	80			30	1	39
People disqualified or removed from directing companies	110	66	49	90	72	84	72
People/companies banned from financial services or consumer credit	35	49	47	22	64	54	88

1 These statistics are only publicly available from 1 July 2011 onwards, following the first biannual enforcement report released by ASIC in March 2012.

Action against auditors/liquidators	12				5	7	7
Number of enforceable undertakings					14	22	20
Negotiated outcomes					24	17	17
Recoveries, costs compensation, fines or assets frozen (nearest $million)	$140m	$146m	$28m	$302m	$113m	$20m	$222m

* Includes the jailing of an individual for contempt of court (civil action).
Note: Outcomes for which data are not available are left blank.
Sources: ASIC annual reports, various years.

Table 17.2: ASIC's aggregate enforcement outcomes by stakeholder area, 1 July 2011 to 31 December 2013

Area of enforcement	*Criminal*	*Civil*	*Administrative remedies*	*Enforceable undertakings/ negotiated outcomes*	*Public warning notices*	*Total*
Market integrity	**29**	**3**	**32**	**4**	**-**	**68**
Insider trading	26	1	-	-	-	27
Market manipulation	3	-	1	1	-	5
Continuous disclosure	-	1	11	1	-	13
Market integrity rules	-	-	20	-	-	20
Other misconduct	-	1	-	2	-	3
Corporate governance	**36**	**18**	**10**	**15**	**1**	**80**
Action against directors	34	14	2	2	1	53
Insolvency	1	1	2	-	-	4
Action against liquidators	1	3	6	4	-	14
Action against auditors	-	-	-	8	-	8
Other misconduct	-	-	-	1	-	1
Financial services	**51**	**50**	**132**	**76**	**5**	**314**
Unlicensed conduct	2	7	-	-	-	9
Dishonest conduct, misleading statements, unconscionable conduct	28	28	27	19	1	103
Misappropriation, theft, fraud	15*	2	17	5	-	39
Credit	5	3	51#	19	3	81
Other misconduct	1	10	37	33	1	82
Small business compliance and deterrence	**1,172**	**57**	**167**	**-**	**-**	**1,396**
Action against directors	1,144	-	164^	-	-	1,308
Efficient registration and licensing	28	57	3	-	-	88
Total	**1,288**	**128**	**341**	**95**	**6**	**1,858**

Notes: * Includes one outcome under appeal (as at January 2014); # Includes two outcomes under appeal (as at January 2014); ^ Includes 10 credit related outcomes.

Sources: ASIC, *ASIC enforcement outcomes: January to June 2013*, Report 360, July 2013, pp. 38–39; *ASIC enforcement outcomes: July to December 2013*, Report 383, January 2014, pp. 41–42.

17.3 As Table 17.1 indicates, ASIC has sustained a high success rate in its litigation. It is, however, worth considering the meaning and utility of this type of statistic. As litigants subject to heightened obligations that reflect community expectations, government agencies should be expected to maintain a high success rate. But what rate should be considered ideal for a regulator and law enforcement body such as ASIC? Statistics on overall litigation success can be interpreted and viewed in conflicting ways. While a low success rate would clearly attract criticism, a very high success rate may also be questionable: it could suggest a risk averse or even timid agency, one that only takes cases it is extremely confident it will win.[2] Related to this, litigation success rates also do not provide information on the types of cases being undertaken. For example, the statistic does not indicate whether relatively straightforward breaches are being pursued or if the regulator is testing more complex matters. It also is silent on the number of cases taken (and win–loss record) against major entities compared to those against less well-resourced individuals and entities, potentially disguising the agency's inclination or ability to take on large corporations. Regulators may also pursue matters where the law is untested or unclear, which could also have implications for their litigation success rate.

Overview of ASIC's enforcement toolbox and criteria for taking action

17.4 Following an investigation that indicates a breach or more serious misconduct, the options available to ASIC include punitive action (prison sentences, criminal or civil monetary penalties); protective action (such as disqualifying orders); preservative action (such as court injunctions); corrective action (such as corrective advertising); compensation action; and negotiated resolution (such as enforceable undertakings). ASIC can also issue infringement notices for certain alleged contraventions.

17.5 ASIC has published guidance on the factors it takes into account when deciding which enforcement remedy to use. Table 17.3 provides an extract of this guidance.

2 Such an outcome has been suggested about other regulators—soon after he commenced in the role, the current ACCC chairman, Mr Rod Sims, observed that the ACCC's success rate in first instance litigation of almost 100 per cent 'is frankly too high'. Mr Sims suggested that the ACCC may have been too risk averse and should 'take on more cases where we see the wrong but court success is less assured'. Rod Sims, 'ACCC: Future Directions', Address to the Law Council Competition and Consumer Workshop 2011, 28 August 2011, www.accc.gov.au/speech/accc-future-directions, pp. 5, 6 (accessed 2 September 2013).

Table 17.3: Factors ASIC may consider when deciding which enforcement remedy to pursue

Factors	*Examples*
Nature and seriousness of the suspected misconduct	• Whether there is evidence that the contravention involved dishonesty or was intentional, reckless or negligent • The amount of any benefit and detriment caused as a result of the contravention • The impact of the misconduct on the market, including potential loss of public confidence • The amount of any loss caused to investors and consumers • Whether the conduct is continuing • Whether the misconduct indicates systemic compliance failures • Whether the subject has a poor compliance record (e.g. the subject has previously engaged in the misconduct)
Conduct of the person or entity after the alleged contravention	• When and how the breach came to the attention of ASIC • The level of cooperation with our investigation • Whether remedial steps have been taken
The strength of ASIC's case	• What evidence is available or is likely to become available, to prove the alleged misconduct • The prospects of the case
The expected level of public benefit	• Whether the case is likely to clarify the law and help participants in financial markets to better understand their obligations • The length and expense of a contested hearing and the remedies available compared with other remedies that may be available more quickly (e.g. improved compliance under an enforceable undertaking)
Likelihood that: • the person's or entity's behaviour will change in response to a particular action • the business community is generally deterred from similar conduct through greater awareness of its consequences	• The compliance history of the person or entity • Whether behaviour (of an entity or broader industry) is more likely to change if the person or entity suffers imprisonment or a financial penalty • Whether the compliance of the person or entity will improve if they give ASIC a public enforceable undertaking • Whether the behaviour is systemic or part of a growing industry trend
Mitigating factors	• Whether the misconduct relates to an isolated complaint and consumers have generally not suffered substantial detriment • Whether the misconduct was inadvertent and the person undertakes to cease or correct the conduct

Source: ASIC, *ASIC's approach to enforcement*, Information Sheet 151, pp. 8–9.

17.6 Certain features of Australia's legal system and government enforcement policies influence ASIC's approach to court action and prevent some matters from proceeding further. They include the following:

- ASIC is bound by the government's Legal Services Directions. The Directions, which do not cover criminal prosecutions and related proceedings unless expressly stated,[3] require ASIC to act as a model litigant and not start legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (and then only after receiving written legal advice that there are reasonable grounds for starting the proceedings).
- Although ASIC conducts the investigation, criminal prosecutions are generally conducted by the Commonwealth Director of Public Prosecutions (CDPP).[4] The *Prosecution Policy of the Commonwealth* provides guidelines on decision-making in the institution and conduct of prosecutions. The CDPP must be satisfied that there is sufficient evidence to prosecute the case and that it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.[5] Under its MOU with the CDPP, ASIC is also obliged to consult with the CDPP before making an application for a civil penalty order.[6]
- In cases where ASIC has not taken action, access to justice may still be provided by private actions or representative proceedings (commonly referred to as class actions). In a journal article on class actions and investor protection, Jason Harris and Michael Legg noted the following relevant comments made by Finkelstein J in the Centro class action on the role investor class actions can perform in the regulatory framework:

  > It is often said that these actions promote investor confidence in the integrity of the securities market. They enable investors to recover past losses caused by the wrongful conduct of companies and deter future securities laws violations. According to the United States Supreme Court, they provide 'a most effective weapon in enforcement' of the securities laws and are a 'necessary supplement to [Securities Exchange] Commission action'.[7]

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3 Legal Services Directions 2005, schedule 1, part 4.

4 With the exception of 'some minor regulatory offences'. ASIC, *ASIC's approach to enforcement*, Information Sheet 151, February 2012, p. 5.

5 See www.cdpp.gov.au/Publications/ProsecutionPolicy.

6 ASIC and CDPP, *Memorandum of Understanding*, 1 March 2006, www.asic.gov.au (accessed 17 October 2013), paragraph 4.1.

7 *Kirby v Centro Properties Ltd* (2008) 253 ALR 65; [2008] FCA 1505 at [8] citing *Bateman Eichler, Hill Richards Inc v Berner* 472 US 299, 310 (1985) and *J I Case Co v Borack* 377 US 426, 432 (1964); cited in Jason Harris and Michael Legg, 'What price investor protection? Class actions vs corporate rescue', *Insolvency Law Journal* 17:4 (2009): 190.

General observations about ASIC's approach to enforcement

17.7 Of the many objections put to the committee about ASIC's enforcement record, the most frequently recurring complaint was related to ASIC's discretion not to take enforcement action. Many aggrieved individuals argued that ASIC should have taken enforcement action in a particular matter. For example, Mr Ian Painter detailed boiler room scams operating out of Thailand that have 'fleeced Australians of many millions in the past and continue to do so due to the lack of action by not only ASIC but relevant authorities throughout the world'. Mr Painter argued Australia will continue to be 'ripe pickings' for criminals operating these scams unless action is taken.[8] Ms Anne Lampe, a former ASIC employee and journalist, advised that although ASIC received frequent complaints about investment schemes and other lost investments, 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'.[9] This perception was commented on in relation to the Commonwealth Financial Planning (CFPL) matter, where it was observed that ASIC's enforcement activity stepped up when the story broke in the media.[10]

17.8 When ASIC did take enforcement action, submissions questioned the particular case that ASIC chose to pursue. For example, the committee received submissions about various managed investment schemes that had Wellington Capital Ltd was their responsible entity. ASIC has taken court action against Wellington Capital in relation to the Premium Income Fund, a matter that is currently before the High Court.[11] However, a submitter questioned why ASIC had decided to take action on behalf of those investors but not on behalf of investors in other managed investment schemes for which Wellington Capital was the responsible entity.[12]

17.9 A significant number of submissions referred to various aspects of ASIC's actions following the collapse of Storm Financial.[13] A key area of complaint was ASIC's last minute settlement with the CBA instead of pursuing court proceedings; one submission characterised this act as 'the mother of all back-flips'.[14] Another submission, from a husband and wife who requested that their name not be made public, stated that they feel 'ASIC has let us down when they worked a deal with the CBA without allowing the case to be shown for all of the facts'.[15] ASIC's intervention

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8 Mr Ian Painter, *Submission 167*, p. [8].

9 Ms Anne Lampe, *Submission 106*, p. [2].

10 *Proof Committee Hansard*, 10 April 2014, p. 70.

11 *Wellington Capital Ltd v Australian Securities & Investments Commission*, S275/2013.

12 See Mr Dennis Chapman, *Submission 249*.

13 *Submissions 18*, *41*, *42*, *44*, *82*, *84*, *87*, *88*, *90*, *106*, *149*, *172*, *236*, *256*, *278*, *301* and *387*.

14 Mr Lucas Vogel, *Submission 41*, p. 4.

15 Name withheld, *Submission 18*, p. 1.

in an $82.5 million settlement between former Storm Financial investors and Macquarie Bank brought about by a class action was also came under criticism.[16] Further, investors were curious as to why ASIC initiated compensation proceedings against the Bank of Queensland, Senrac and Macquarie on behalf of two investors but not other clients:

> They managed to make a deal with Macquarie for their client (Doyles) which ensured that no precedent was set for other investors who were treated equally poorly by Macquarie Bank. They (ASIC) then had the hide to appeal a decision, approved by the Federal Court, that saw a similar successful negotiation by the Class Action against Macquarie Bank overturned because ASIC believed that deal to be unfair. ASIC did not consider fairness when it negotiated a deal for the Doyles which left every other Storm Financial (Macquarie Bank) investor out of any consideration for compensation even though they suffered a similar fate to the Doyles.[17]

17.10 The prolonged nature of enforcement action was another subject raised. For example, Ms Dianne Mead advised that although ASIC issued a stop order against a prospectus issued by Neovest Ltd in 2005, an order to wind up the company was only obtained in February 2008. Ms Mead's October 2013 submission to this inquiry noted that the company was still being wound up and the assets were being 'squandered away on legal and liquidator's fees'.[18]

17.11 Submissions expressed disappointment at the penalties ASIC achieved. For example, a Darwin accountant, Mr David Pemberton, criticised at length ASIC's investigation of Carey Builders Pty Ltd, a company that went into liquidation in March 2010. Mr Carey received a three month sentence for managing a company while disqualified, however, Mr Pemberton noted that this was a concurrent sentence with a three year sentence given to Mr Carey for being an unlicensed builder.[19]

17.12 ASIC's enforcement priorities and the speed and urgency with which ASIC takes enforcement action was questioned. Ms Anne Lampe contrasted ASIC's response to Storm Financial and CFPL to the action it took following a hoax media release distributed by Mr Jonathan Moylan in January 2013:[20]

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16 Mr Peter Dunell, *Submission 90*, p. 1.

17 Name withheld, *Submission 88*, p. 4.

18 Ms Dianne Mead, *Submission 240*, p. 2.

19 Mr David Pemberton, *Submission 279*.

20 On 7 January 2013, Mr Jonathan Moylan distributed a fake media release purported to be from the ANZ. The media release was titled 'ANZ divests from Maules Creek Project' and advised that the bank had withdrawn a $1.2 billion loan from Whitehaven Coal. On 9 January 2013 it was reported that ASIC had seized Mr Moylan's computer and mobile phone. On 25 January 2013 the *Australian Financial Review* reported that ASIC had interviewed Mr Moylan. See Jake Mitchell, 'ASIC questions Whitehaven hoaxer', *Australian Financial Review*, 25 January 2013, p. 10.

> By contrast to its inadequate and far too late attention to Storm's gigantic loss scam, and the rogue CBA Financial Planning expose, ASIC sprang to action and manned all its guns when a young anti mining activist, Jonathan Moylan, put out a mischievous press release in relation to funding withdrawal for a Whitehaven Coal development. The mischievous release fooled the market for a few minutes and Whitehaven shares fell briefly before recovering.
>
> The only people hurt by this face [sic] press release were speculators who sold at the short-lived lower price. Investors who did nothing suffered no loss.
>
> Yet ASIC went ballistic and felt compelled to throw the rule book at Moylan. Moylan is an easy target as he has no funds to defend himself, and because he admitted sending out the release. Moylan is an easy head on a stick for ASIC. It has his admission, has the press release and has on record the brief market movement.
>
> The result is that Moylan faces expensive court proceedings, a criminal record, a possible 10 year jail term and a fine of half a million dollars. Well done ASIC. Moylan will have his head spiked on a stick, but it's the wrong head. I could nominate 50 more suitable heads for a public spiking. But of course that would be a harder task for ASIC. The press release was a prank, but not one that lost billions of dollars of investors' or retirees' funds. Unlike rogue advisors and fund managers that have faced no charges, Moylan didn't gain from the prank, earned no bonus, hasn't thieved investors' money, didn't misappropriate or gamble with large chunks of retiree savings, didn't lend any investor money to himself or his own companies. Nonetheless he is being dealt with as if he had committed a capital offence, far more severely than any Storm advisor or director, or any rogue CBA advisors allowed to quietly resign.[21]

Does ASIC take on the 'big end of town'?

17.13 Various concerns were expressed and assertions made about ASIC's enforcement record against large companies or well-resourced individuals. It is evident that a perception that ASIC is reluctant to investigate and take action against big business exists. It was suggested that:

- ASIC is reluctant to take complex court cases, and instead prefers easier targets;
- ASIC does not have the resources to take on well-resourced firms or individuals; and/or
- where ASIC does pursue enforcement action against large businesses, the result achieved generally relies on less severe remedies such as an enforceable undertaking, rather than court action.

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21 Ms Anne Lampe, *Submission 106*, pp. [4]–[5].

17.14 According to the Rule of Law Institute of Australia, the perception that ASIC does not investigate big business is most evident in insider trading and misleading information associated with takeovers. It argued that the pursuit of 'small fish' but not big businesses 'undermines the rule of law' and that 'the public's confidence in the system must be restored'.[22]

17.15 CPA Australia told the committee:

> Last month saw the release of the enforcement outcomes July to December 2013. They appear to indicate that there were three times the number of enforcement outcomes against small business in the last year than there were against the big end of town, reinforcing a perception, at least, that the regulator is targeting this sector in the context of a number of unresolved corporate behaviours.[23]

17.16 Professor Bob Baxt remarked that 'ASIC just seems to be very, very reluctant to run…tough cases', and that ASIC 'has been too soft'. However, Professor Baxt observed that it 'was not always the case', as ASIC had taken 'a number of criminal cases earlier on in its life'.[24] He concluded that the problem is partly attributable to recent approaches to regulation that encourage regulators to avoid courts due to the expense and time involved. They instead resolve matters by using other enforcement remedies such infringement notices, an enforcement tool he described as 'abominable'.[25] Professor Baxt added that, in his view, there was too much criticism of regulators such as ASIC when they lose a big, complex, case:

> …that suggests that the regulator really stuffed it up—excuse the expression—and that somehow or other we need new regulators or new people in charge in order to deal with these matters. Having been a chairman of a small regulator in comparison to what the ACCC is now—I was chairman of the Trade Practices Commission—I can assure you that it is a very, very difficult task to balance the way in which these matters need to proceed.[26]

17.17 ASIC rejected suggestions that it does not take on big businesses. While ASIC noted that this perception exists, ASIC countered it by claiming that there was a conflicting perception that ASIC only takes on the big end of town. In a written statement, Mr Medcraft commented that '[o]f course neither of these assertions are

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22 Rule of Law Institute of Australia, *Submission 211*, p. 4.

23 Mr Alex Malley, Chief Executive Officer, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 43.

24 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 10.

25 Professor Baxt criticised the infringement notice powers available to regulators such as ASIC and the ACCC. Although infringement notices do not involve an admission of liability, in his view they create a perception of guilt that can only be disproven when prosecuted by the regulator. Professor Baxt outlined his objection to infringement notices in detail: see *Submission 189*, pp. 1–3 and *Proof Committee Hansard*, 21 February 2014, pp. 10–11.

26 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 9.

true', and that ASIC acts 'without fear or favour irrespective of the size of the organisation'. ASIC provided the results of a breakdown of its enforcement action by entity size undertaken in 2010 to defend its record (Table 17.4).

Table 17.4: Percentage of investigations commenced per market sector, 2009–10 financial year

Market segment	*Investigations commenced*
Micro (0–5 employees and/or turnover of less than $500,000)	33 (16%)
Small (not a micro entity, has 6–15 employees and/or turnover of $500,000–$25m)	77 (37%)
Medium (not a micro or small entity, has 16–250 employees and/or turnover of $25m–$250m)	41 (20%)
Large (not a micro, small or medium entity, has over 250 employees and/or turnover of over $250m)	56 (27%)
Total	207

Source: ASIC, Opening statement to 10 April 2014 hearing, *Additional information 4*, p. 6.

17.18 Of course, such data provide limited insight into ASIC's enforcement record. For example, they do not indicate the severity of sanctions pursued.

Enforceable undertakings

17.19 ASIC's use of enforceable undertakings as a remedy for misconduct was an area that submissions and witnesses at the public hearings traversed in detail. A former enforcement adviser at ASIC expressed concern that ASIC had become too reliant on enforceable undertakings, particularly as a remedy for misconduct by large entities. In his view, often there was no correlation between the remedy and the nature of the misconduct:

> Enforceable undertakings have been used in de facto criminal proceedings and enforceable undertakings were really only introduced for compliance purposes. For example, recently enforceable undertakings were given to BNP and UBS banks where they influenced the swap index rate in Australia for three years. ASIC only fined them a very small amount of money, $1 million, which represents a very small amount compared to the crime. It flies in the face of their own guidelines where you are not supposed to give enforceable undertakings where there has been serious misconduct in relation to the market. Again, there are many other examples where there are inconsistencies.[27]

17.20 Former ASIC media adviser Ms Anne Lampe told the committee that when she worked at ASIC '[n]egotiating enforceable undertakings rather than taking people

27 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, p. 2.

or companies to court was a preferred course of action when complaints reached a crescendo'. Ms Lampe provided the following observations about the process for securing an enforceable undertaking and what generally occurred once one was entered into:

> These undertakings were discussed and fought over, over months, by armies of lawyers in secret behind closed doors and few details ever emerged about how the damage to investors was done, how many investors were affected, or even whether the undertaking was adhered to. In some cases the companies involved undertook to write letters to affected clients asking them to come in and discuss their concerns. Whether these letters were sent, how they were worded, whether they were replied to or what compensation was offered stayed secret. Everything seemed to go silent after a brief but meticulously crafted press announcement was released by ASIC.[28]

17.21 Aspects of ASIC's attitude to negotiating enforceable undertakings surprised the committee. The process leading to the CFPL enforceable undertaking indicates that ASIC may give excessive regard to the burden the undertaking could impose on a company that, after all, is the source of ASIC's serious concerns. In doing so, ASIC may be negotiating from a weakened position. The following exchange between the committee and ASIC, already outlined in Chapter 11, is repeated here as it is relevant to this issue and particularly revealing:

> CHAIR: …We had evidence from the lawyers from Maurice Blackburn, who handled 30 or 40 clients, to the satisfaction of all of their clients, that their costs per file were something like an average of $35,000. What I am putting to you, Mr Kirk, is that the process of review, remediation, reconstruction of files, was in and of itself inadequate and necessarily led to poor outcomes. That is what I am asking you to address. Why were you satisfied with that process?
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> Mr Kirk: I think in the circumstances, where there was this problem with record keeping and inadequate files, the process put in place, in terms of a large, mass-scale thing, where 7,000 clients were looked at, had appropriate steps to try and address that problem. I am not saying that that is going to be perfect in every file. When documents do not exist, the situation is very difficult, no matter what process you adopt.
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> CHAIR: Yes, but, if the problem derives from the fact that the officers of Commonwealth Financial Planning at first instance, with any or all of the 7,000 clients, did not do their job properly, did not maintain records, falsified records, falsified signatures, so that nothing could be reconstructed properly, in terms of outcomes, bad luck for the Commonwealth Bank. It should have been instructed to do the job properly, as was done by this law firm in Melbourne, Maurice Blackburn. If that cost $35,000 or $40,000 per client, well, that is the penalty for not operating properly in the marketplace at first instance.

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28 Ms Anne Lampe, *Submission 106*, p. [2].

> Mr Kirk: But doing that for 7,000 clients, at $35,000 or $40,000, would be a few hundred million dollars.
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> CHAIR: It would. That is not your concern. It is the concern of the shareholders of Commonwealth Bank, the concern of the directors of Commonwealth Bank. Let the directors go to the meeting and explain that the dividend has been reduced by 10c this year because of the incompetence that was allowed by the senior managers. It is not your concern. That is the point I am trying to make. Who cares?[29]

17.22 While enforceable undertakings as an enforcement tool were described as a 'critical mechanism in the regulatory arsenal', after analysing undertakings accepted by ASIC between 1998 and 2013 Professor Justin O'Brien and Dr George Gilligan expressed a 'suspicion…that ASIC has been soft on the big end of town'. They also questioned whether the enforceable undertakings accepted by ASIC 'place sufficiently stringent conditions on organisations whose business strategies may be damaging to their clients' best interests'.[30] One example given to support this argument was an enforceable undertaking accepted from the Commonwealth Bank of Australia (CBA) in 2012. The enforceable undertaking was given in response to concern from ASIC about messages sent to CBA customers seeking their consent to receive credit card limit increase invitations. ASIC's media release announcing the undertaking explains the basis for ASIC's concern:

> New laws commencing on 1 July 2012 prohibit card issuers from sending unsolicited credit limit increase invitations to their customers unless the customer has consented.
>
> On 12 and 13 December 2011, CBA sent messages via its internet banking platform to customers notifying them of the changes to the law regarding credit limit increase invitations. CBA requested that customers provide their consent to continue to receive credit limit increase invitations. Approximately 96,000 customers provided their consent.
>
> ASIC formed the view that the messages were misleading as they:
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> - suggested that if CBA's customers did not complete the electronic consent in response to the message they would lose the chance to receive credit limit increase offers
> - suggested that if they did not consent, customers would miss out on opportunities to access extra funds should they need them, and
> - created the impression that customers needed to act urgently, which may have led customers to respond without properly considering their options.
>
> In fact, under the changes to the law, customers can provide or withdraw their consent at any time. Further, regardless of whether they have

29 *Proof Committee Hansard*, 10 April 2014, pp. 78–79.

30 Professor Justin O'Brien and Dr George Gilligan, *Submission 121*, p. [3] (emphasis omitted).

> consented to being sent credit limit increase invitations, customers can request a credit limit increase from their financial institution at any time.[31]

17.23 Professor O'Brien and Dr Gilligan argued that the enforceable undertaking only precluded the CBA from taking advantage of the consents it obtained.[32] The only other obligations contained in the undertaking were for the CBA to contact affected customers to correct any misleading impression and inform them of their rights, and for the CBA to cooperate with requests from ASIC to provide documents to allow ASIC to assess compliance with the undertaking. Another example was provided by Professor Dimity Kingsford Smith, who considered that the terms of the enforceable undertaking accepted from Leighton Holdings in 2012 were inadequate.[33]

17.24 Submissions also argued that enforceable undertakings accepted by ASIC:

- do not always require an independent expert to be appointed to supervise the implementation of the undertaking's terms (it is argued that this makes it difficult to prove non-compliance with the undertaking);[34]
- may call for the development of remedial action, but do not specify what form the remedial action should take;[35] and
- where the appointment of an external expert is required, the obligations of that expert, what constitutes expertise and how potential conflicts of interest should be resolved are not specified.[36]

17.25 The issues of expertise and potential conflicts of interest were raised in the context of the CFPL enforceable undertaking as PricewaterhouseCoopers, the auditors of the CBA, were appointed as the independent reviewer required under the undertaking. One of the CFPL whistleblowers, Mr Jeff Morris suggested that the enforceable undertaking process was flawed as neither ASIC nor the independent expert understood the industry:

> In their submission, ASIC say that the independent expert had relevant financial planning qualifications. That is not the same as being a financial planner. Working as a compliance person is not necessarily the same as

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31 ASIC, 'ASIC accepts enforceable undertaking from Commonwealth Bank', *Media release*, no. 12-40, 7 March 2012.

32 Professor Justin O'Brien and Dr George Gilligan, *Submission 121*, p. [6].

33 Professor Kingsford Smith noted that the Leighton Holdings enforceable undertaking followed 'a $40 million kickback, and breaches of continuous disclosure obligations (in conjunction with three infringement notices amounting to total fines $300,000; 0.00075% of the bribe amount)'. Professor Kingsford Smith added that 'no compensatory obligations were imposed for the $907 million reduction in market share value, though this may be because there is a class action in progress'. Professor Dimity Kingsford Smith, *Submission 153*, p. 17.

34 Professor Dimity Kingsford Smith, *Submission 153*, p. 17.

35 Professor Justin O'Brien and Dr George Gilligan, *Submission 121*, pp. [6]–[7].

36 Professor Justin O'Brien and Dr George Gilligan, *Submission 121*, pp. [6]–[7].

> being a financial planner. If you actually look at the minimum requirement to be a financial planner, PS146, it is a ludicrously low standard.[37]

17.26 In response to questions on the conflict of interest issue, ASIC explained that a tender process identified three firms and required that the firms had to address how conflicts would be managed. Under the terms of the undertaking, ASIC had the ability to veto the CBA's choice of independent expert but ASIC did not do as it was satisfied with the process. However, ASIC acknowledged the importance of independence and managing conflicts of interest, and suggested that it may act differently if faced with a similar situation again:

> Senator WHISH-WILSON: I would have thought it was black and white that, if your independent expert was also the auditor for the entire organisation—and who knows how many millions that would be worth to them per year—you would have a very definite conflict of interest. We saw this during the GFC with ratings agencies, research houses and bonds and products. These were things that were really obvious but skipped the net.
>
> Mr Medcraft: I would rather not go there at the moment. But you make a good point. I will last Mr Kirk to comment on that.
>
> Mr Kirk: There is a difficulty with organisations as big as the Commonwealth Bank finding a major reputable professional services firms that does not otherwise do work for them. Given the size of the market and the size of those institutions, that is a real issue.
>
> Mr Medcraft: But I think you make a good point, Senator; if somebody is the auditor and they want them to be the independent expert, essentially you should have a sceptical presumption about how they are going to manage the independence issue, the potential conflicts of interest. There should always be a presumption and questioning on this particular issue. I think that is an important point.
>
> Mr Kell: And I suspect that we would take a different approach today compared to the approach we took back then.[38]

17.27 Decisions made by ASIC about the remedy it will seek following an investigation are significant not only for the individual or organisation facing enforcement action, but also because of the signal they send to other regulated entities. Trends in ASIC's selections can, over time, either reinforce or weaken the overall regulatory model. A joint submission from academics at the University of Adelaide Law School argued that the effectiveness of the enforcement pyramid model can be undermined by the regulator excessively relying on certain regulatory options with other options not being exercised.[39] On enforceable undertakings, the submission

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37 Mr Jeffrey Morris, *Proof Committee Hansard*, 10 April 2014, pp. 48–49.

38 *Proof Committee Hansard*, 10 April 2014, p. 88.

39 Dr Suzanne Le Mire, Associate Professor David Brown, Associate Professor Christopher Symes and Ms Karen Gross, *Submission 152*, p. 2. The enforcement pyramid was outlined in Chapter 4.

suggested that 'it is doubtful if the individual or the wider public is impacted by an undertaking as much as it would be by publicity following litigation'. It was also asserted that the consequences of breaching an enforceable undertaking are 'limited':

> First, if the terms are not complied with, ASIC has further discretion whether to pursue this through the courts. It is clear…that they do not automatically pursue every default in compliance. Even if they do pursue it through the court, the court has a very limited range of sanctions. Failure to comply with an undertaking given to ASIC is not contempt of court in itself, and the court can order the promiser to comply, or to compensate someone who has 'suffered loss or damage as a result of the breach'. The aim of the court order is to put the parties in the pre-breach position (ie give effect to the promise). It is not the aim of the court order to set aside or annul the undertaking so that the original wrongdoing can be sanctioned as if it had been originally pursued through litigation.
>
> What this means is that even someone who has breached an undertaking will be better off than if they had been pursued through the courts originally for the wrongdoing, because the court can make a much wider range of orders for contravention of the Corporations Act (and other legislation) than it can make for breach of an undertaking.[40]

17.28 Mr Lee White of the Institute of Chartered Accountants Australia (ICAA) suggested that enforceable undertakings accepted by ASIC have a poor track record of effectiveness because they have lacked transparency and an admission that something wrong occurred. Mr White indicated that after ASIC announced an enforceable undertaking:

> …everyone in the business community was left with the view, 'What's all that about?' because it did not say anything.[41]

17.29 However, Mr White added that ASIC appears to have recognised that the language used in the undertaking needs to be improved. The written submission provided by Mr White's organisation developed this further: it suggested that ASIC has taken steps to require a clearer admission of fault in enforceable undertakings. The ICAA concluded that 'greater transparency around ASIC's enforcement actions will have the effect of boosting confidence and stability in the marketplace'.[42]

17.30 Asked if the process for accepting and monitoring enforceable undertakings was transparent, and in particular whether the reports to ASIC from the independent experts appointed as a condition of the undertaking should be made publicly available, ASIC told the committee that:

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40 Dr Suzanne Le Mire et al, *Submission 152*, p. 4.

41 Mr Lee White, Chief Executive Officer, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 19 February 2014, p. 48.

42 Institute of Chartered Accountants Australia, *Submission 203*, p. 2.

> …we have been having similar thoughts ourselves about trying to make that process more transparent—the reporting back on the implementation of the EU by the independent expert. Really the EU is a replacement for a court enforcement process, and a court enforcement process would be transparent and public. I think that, if we are expecting the general public to accept this alternative—which we think in many cases can get a lot more change and be more effective if it is done well—and have confidence in that, we need to consider how to make that more transparent and how we can not only have it working well but have it seen to be working well and have the public understand that.[43]

17.31 Mr Medcraft agreed that there is value in considering a more transparent enforceable undertaking process through the publication of independent expert reports. Various ASIC commissioners and officials noted some potential complications, such as the need for the entity offering the undertaking to agree and the possibility that the publication of expert reports would discourage entities from entering into enforceable undertakings.[44] However, Mr Kell summed up ASIC's position as follows:

> …I should note that our enforceable undertakings themselves are currently public. What we are talking about here, and what I fully agree with, is having the milestones about how those firms are complying with and implementing the requirements that come with that to be public as well, and the reports that come with that. I think that is what we are aiming for. That would be a good outcome.[45]

Factors that may discourage ASIC from taking court action

17.32 As this chapter has already noted, the committee received evidence from insiders, key stakeholders and interested observers about ASIC's perceived lack of vigour in pursing large companies and an inclination that ASIC may possibly have for resolving matters involving large companies by enforceable undertakings rather than through court proceedings. The committee was keen to test these views and, if they have merit, to consider the most plausible explanations.

Cost of court proceedings

17.33 An obvious challenge of enforcement action against large companies is the disparity in resources that a regulator could devote to the case compared to the targeted firm. It is clear that regulators can incur significant expenditures when undertaking complex legal action; for example, the Storm Financial case cost ASIC $50 million.[46] However, ASIC was quick to dismiss concern that it did not have the

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43 Mr Greg Kirk, Senior Executive Leader, Deposit Takers, Credit and Insurance Providers, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 70.

44 *Proof Committee Hansard*, 10 April 2014, p. 70.

45 Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 71.

46 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 28.

funds to pursue large companies. In particular, ASIC's chairman highlighted the enforcement special account that is available to ASIC.[47] In February 2014, the special account had a balance of over $30 million and receives $30 million a year. ASIC is aiming to increase the balance to $50 million.[48] Mr Medcraft explained how he uses the enforcement special account to promote ASIC's enforcement credentials:

> I have made it very clear that the government provides us with the enforcement special account, and I made it very clear to big corporations that I have got money in there and that I will take on anyone. I am telling you I will—if I find it, it will not make me reluctant at all. It has to be the right case, but that special enforcement account is really important so that money is not the issue…I want the public to be confident that, if there is a big case and no matter who you are, we will take you on. I am passionate about that. All the bullying by the big end of town, if it does occur, does not affect us. We have the money. As I always say to them: we can do this the hard way or we can do it the easy way. At the end of the day it is about being feared.[49]

17.34 The submission from Levitt Robinson Solicitors, which criticised various aspects of ASIC, noted that ASIC was second only to the Australian Taxation Office in expenditure on legal fees, with $300 million spent by ASIC between 2008 and 2012.[50]

Standard of proof required by the court

17.35 The joint submission from Adelaide Law School academics expressed concern about the effectiveness of the civil penalty regime for directors and officers. As noted in Chapter 4, the introduction of a civil penalty regime for directors and officers was influenced by the theory of responsive regulation's enforcement pyramid model of sanctions of escalating severity. However, the submission argued 'that the

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47 A special account is an appropriation mechanism that notionally sets aside an amount of consolidated revenue to be expended for specified purposes. The enforcement special account was established to 'give ASIC the flexibility to conduct major investigations into, and bring legal and/or administrative proceedings against individuals and corporations in relation to, possible corporate or financial services misconduct when required, without the need to seek additional Budget funding'. It was intended that the investigations and proceedings 'would typically relate to matters for which ASIC could not absorb the costs without significantly prejudicing its existing general enforcement role, and/or those matters which are critical to continued public confidence in the corporate regulatory framework'. Mr Medcraft explained that once operational expenditure on a case goes above a certain level, ASIC can apply to government to move funding out of the enforcement special account. Explanatory Statement, *Financial Management and Accountability Act 1997*: Determination 2006/31 to establish a Special Account, pp. 1–2; Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 28.

48 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 28.

49 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 28.

50 Levitt Robinson Solicitors, *Submission 276*, p. 11. The figures are based on the Attorney-General's Department's *Legal Services Expenditure Report 2011–2012*.

current legislative framework and actions of the courts in relation to the civil penalty scheme have inhibited robust regulatory action'.[51] To support this claim, the submission outlined the following points:

- the courts have demanded a standard of proof higher than the balance of probabilities (by requiring cases to be proved to the 'Briginshaw' standard[52]);
- defendants are not obliged to specify their defences until ASIC's case has closed;
- ASIC has been criticised by a court for not acting in accordance with a duty of fairness as a model litigant—although this criticism was overturned by the High Court, the submission considers the obligation remains of 'uncertain dimensions';
- the legislation does not include a 'procedural roadmap' for civil penalty proceedings;
- when ASIC is successful in a civil penalty action, the penalties achieved have not been sufficient.[53]

17.36 The joint submission from the Adelaide Law School academics argued that as a result of these factors, ASIC now was more reliant on enforceable undertakings. Although the submission accepted that enforceable undertakings were a legitimate enforcement tool, it expressed concern about ASIC's 'unfettered discretion' to accept an undertaking, explained only in broad terms in guidance published by ASIC, rather than to pursue the matter through the courts:

> There are serious consequences of ASIC choosing an undertaking rather than litigation, and whilst it is understandable that resources have to be prioritised so that enforceable undertakings are the low-cost and quicker option, the danger is that cost factors, or cooperation with the regulator, may influence that decision to the detriment of consumers and investors, and to the public confidence in the market.[54]

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51 Dr Suzanne Le Mire et al, *Submission 152*, p. 2.

52 The Briginshaw standard refers to principles related to the civil standard of proof (on the balance of probabilities) expressed in the decision of the High Court in *Briginshaw v Briginshaw*. The Briginshaw standard is a general rule that as the gravity of the allegations increase, greater proof is required for the plaintiff to meet the civil standard of proof based on the balance of probabilities. In *Briginshaw*, Dixon J stated: 'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences'. *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J).

53 Dr Suzanne Le Mire et al, *Submission 152*, pp. 2–3.

54 Dr Suzanne Le Mire et al, *Submission 152*, p. 4.

17.37 Other witnesses alluded to the difficulties with the civil penalty regime and the incentive for ASIC to pursue a less severe enforcement remedy to secure an outcome:

> Part of the problem ASIC faces is they go to counsel, and counsel say: 'Gee, I don't know; we mightn't be able to get a conviction here even though we're only going for a civil penalty. It's still going to be difficult, so maybe—'and they take the soft option. There are times when you have to take the soft option, and there are times when you have to go and get a ruling under the law. In my view, they do not do that enough. They have done it a little more in the last few years, but the history has not been littered with great successes here.[55]

Time taken to get to court

17.38 Another issue the committee is aware of relates to the significant delays that often occur between when complaints are made to ASIC and enforcement action commences. One area where delays are particularly evident is the prosecution of criminal offences. In this regard, it is important to examine the relationship between ASIC and the CDPP, as it is the CDPP that decides whether to initiate prosecutions and conducts any such proceedings after receiving and assessing a brief from ASIC.

17.39 ASIC advised that, on average, between 2010–11 and 2012–13 it took the CDPP 42.6 weeks to assess matters referred by ASIC that ultimately led to a criminal prosecution being undertaken.[56] ASIC stated that delays can arise due to:

(a) difficulties in scheduling trials (the complexity of ASIC matters and the number of witnesses required may require longer periods to be set aside for trial);

(b) backlogs in the court lists generally due to existing caseloads;

(c) availability of witnesses;

(d) adjournments of trial and hearing dates, typically due to:

  (i) case management issues, such as for a plea hearing, to obtain further disclosure or further evidence or where a late application has been made to cross-examine a witness;

  (ii) the parties' readiness for trial;

  (iii) changes to the legal counsel for the accused or for the accused to obtain legal advice; and

  (iv) judicial processes such as preliminary hearings as to the admissibility of evidence or pre-trial examination of witnesses.[57]

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55 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, p. 13.

56 ASIC, *Submission 45.2*, p. 129.

57 ASIC, *Submission 45.2*, p. 129.

17.40 ASIC's chairman told the committee that, as a non-lawyer, he 'was a bit shocked by how long things take'. He acknowledged that this 'is why often…we move to something like an enforceable undertaking, because we can get a timely outcome and actually deal with an issue'.[58] Similarly, a former ASIC enforcement adviser described the time taken by the CDPP to finalise charges as 'unacceptable'. The former ASIC officer advised that in ASIC's Kleenmaid case it took the CDPP one and a half years to lay charges, which was the same length of time it took ASIC to investigate the matter.[59] On 1 April 2014, ASIC announced that former directors of Kleenmaid had been ordered to stand trial; this milestone is several years after alleged misconduct took place (between 2007 and 2008).[60]

17.41 Returning to perceived problems with the civil penalty regime for directors and officers, Dr George Gilligan directed the committee to a study by Melbourne Law School conducted five years after the regime was introduced. The interviews conducted as part of the study indicated that the relatively infrequent utilisation of the provisions at the time could largely be attributed to 'the reality that ASIC had to interact with the [CDPP] on the legitimate priorities that the DPP has in this area'. Dr Gilligan noted:

> A lot of the public anger that gets directed against ASIC is usually because there are perceptions in relation to criminal behaviour and there is an assumption amongst the public that it should be ASIC that is acting against these individuals. That is really the rightful prerogative of the Director of Public Prosecutions.[61]

17.42 The CDPP's response to questions about another referral revealed a further example of a prolonged assessment process:

> Senator WILLIAMS: ASIC gave a referral to the DPP on Dr Munro, who collected some $100 million in an investment scheme—I don't know if it was registered or not. That money went down to about US$65 million, I believe, during the Global Financial Crisis. I believe the DPP sought more information from ASIC and said there was no case to answer. Yet the Federal Court ruled in 2011 for Dr Munro to return the money to the appropriate investors. I find it amazing that here we are talking about $65 million. I actually phoned Dr Munro to ask what he is going to do about the court order and money and he hung up on me. Would you please have a close look at this very issue of Dr Munro for me.
>
> Mr Davidson: In May 2010 certain material was provided to the DPP in respect of Dr Munro. In October 2010 advice was provided to ASIC in relation to the material. In early December 2010 further material was

58 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 39.

59 Mr Niall Coburn, *Proof Committee Hansard*, 21 February 2014, pp. 2, 4.

60 ASIC, 'Former Kleenmaid directors ordered to stand trial', *Media Release*, no. 14-064, 1 April 2014.

61 Dr George Gilligan, *Proof Committee Hansard*, 19 February 2014, p. 55.

> provided by ASIC to the DPP, including some of the same material that had previously been provided together with further material. Further material after that was provided to us on 24 December 2010. The DPP provided advice to ASIC on 6 April 2011 and further advice was requested by ASIC in August 2011 and further advice provided by the DPP, which ended our involvement in particular matter in August 2011. We do not have any open file in relation to Dr Munro at this stage.[62]

17.43 The CDPP was asked about its resources. The deputy director, Mr Graeme Davidson, advised that the CDPP is 'very busy' but 'that is not to say that we are not dealing with the cases that are referred to us'. Mr Davidson added that it prioritises cases and develops timetables to address matters within acceptable time frames. While the CDPP stated that prosecution decisions are not based on these considerations, it referred to evidence given at Senate estimates that the CDPP expects to run a deficit in 2012–13.[63]

17.44 The CDPP also responded to the statistics given by ASIC about the average length of time it takes the CDPP to assess a matter that ultimately proceeds to trial. The CDPP explained that, as it is not an investigative body and is required to bring an independent mind and judgement to a brief of evidence, the CDPP often has to ask ASIC for further investigative work to be undertaken. Mr Davidson remarked that there 'can be quite robust discussions between ASIC and the DPP about that'.[64]

17.45 Although ASIC may have some concerns about the CDPP's processes and responsiveness, it should be noted that the integrity of ASIC's criminal prosecution decision-making process and, related to this, its relationship with the CDPP, has previously been reviewed by the Australian National Audit Office (ANAO) and found to have some deficiencies. Under the *Prosecution Policy of the Commonwealth* certain agencies can conduct their own summary prosecutions for 'high volume matters of minimal complexity'. ASIC is one of these agencies. In 2007, the ANAO issued the following finding about ASIC's handling of these minor cases:

> In 1992, the CDPP and ASIC agreed a set of Guidelines under which ASIC was permitted to conduct prosecution of minor regulatory offences. In 2003 the two organisations reached agreement that ASIC could prosecute offences under a number of explicitly nominated sections of the Corporations Act. In its enforcement procedures, ASIC did not pay due regard to the clear terms of the agreement. As a result, on 26 occasions between 2002 and 2006 ASIC had, without consulting the CDPP,

62 Mr Graeme Davidson, Deputy Director, Commonwealth Director of Public Prosecutions, *Proof Committee Hansard*, 2 April 2014, p. 12.

63 Mr Graeme Davidson, *Proof Committee Hansard*, 2 April 2014, p. 12. See also Mr Robert Bromwich SC, Director of Public Prosecutions, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, Estimates, 24 February 2014, p. 94.

64 Mr Graeme Davidson, *Proof Committee Hansard*, 2 April 2014, pp. 15–16.

prosecuted offences for which it had no specific agreement to do so from the CDPP.[65]

17.46 Once a matter is before the court, it is evident that it can take a significant time before a judgment is handed down. ASIC advised that for civil cases the average number of months between filing proceedings and a decision date has been steadily increasing, from 16.6 months in 2010–11, to 19.6 in 2011–12 and 24.8 in 2012–13. For criminal cases, the deputy director of the CDPP similarly observed that lengthy timeframes can occur as a result of the court process, although he added that the courts are 'very concerned about reducing those time frames'.[66]

Committee view

17.47 The committee acknowledges the difficult decisions that ASIC can be required to take when selecting a particular sanction or remedy to pursue. The committee also recognises the diverse challenges ASIC faces in taking court action with the high rate of success expected of a government agency. Nevertheless, the committee is of the view that the public interest would be better served if ASIC was more willing to litigate complex matters involving large entities. There appears to be either a disinclination to initiate court proceedings, or a penchant within ASIC for negotiating settlements and enforceable undertakings. The end result is that there is little evidence to suggest that large entities fear the threat of litigation brought by ASIC. Other remedies such as enforceable undertakings may correct behaviour within a particular organisation, but they do not yield the wider and more significant regulatory benefits that are associated with successful court action.[67] Further, the public perception that 'the big end of town' is treated differently and less transparently to other regulated entities is inherently dangerous to ASIC's legitimacy as a regulator.

17.48 To ensure that threats of litigation are credible, ASIC's enforcement special account needs to be bolstered. At present, ASIC's enforcement special account appears inadequate for allowing ASIC to fund large and complex cases. To provide a greater deterrence effect and to ensure that ASIC is not limited in any way from taking major litigation, the committee believes the size of ASIC's enforcement special account needs to be significantly increased. The committee stresses that the government will need to exercise restraint to ensure this is effective; the government should not access the funds or reduce the funding given to ASIC because its enforcement special account has a healthy balance.

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65 The Auditor-General, *ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001*, Audit Report No. 18 2006–07, p. 19.

66 On this issue, Mr Davidson advised that the CDPP seeks to assist the courts as far as it can. Mr Graeme Davidson, *Proof Committee Hansard*, 2 April 2014, p. 16.

67 For example, ASIC's chairman noted in late 2012 that ASIC 'has observed board engagement with disclosure has improved' as a result of the widespread publicity associated the James Hardie case.

Recommendation 22

17.49 The committee recommends that the balance of ASIC's enforcement special account be increased significantly.

17.50 The committee also recognises that there are issues outside ASIC's control that need to be examined. The enforcement pyramid model of sanctions of escalating severity is a sound foundation for enabling a regulator to address corporate misconduct. The application of this model to Australia's corporate laws has generally proven effective. However, the committee is concerned about the evidence received regarding the limitations of the civil penalty regime for directors' duties. This issue relates in part to the penalties available, which the committee will consider in Chapter 23. Nevertheless, the committee considers that the utility of these provisions should be examined further.

Recommendation 23

17.51 The committee recommends that the Attorney-General refer to the Australian Law Reform Commission an inquiry into the operation and efficacy of the civil penalty provisions of the *Corporations Act 2001* that relate to breaches of directors' duties.

17.52 The committee is also very concerned about the length of time it takes the CDPP to consider matters referred to it by ASIC. It is appropriate that the CDPP takes adequate time to carefully assess the evidence so that the highest standards are applied to the prosecutorial process. Delays in particular cases may also indicate that the CDPP has received a brief that is inadequate or that further investigative work by ASIC needs to be undertaken. However, ASIC advised that in recent years it has taken the CDPP 42.6 weeks *on average* to assess matters that ultimately led to a prosecution. This indicates a more widespread problem. The committee notes the evidence about the resource constraints the CDPP is facing. Although perceptions about ASIC's performance may be affected as a result of the CDPP, matters related to the resources, priorities and structure of the CDPP are otherwise beyond the scope of this inquiry. Accordingly, the committee has not developed recommendations on this issue but instead draws this matter to the government's attention. The committee urges the government to ensure that the CDPP has the resources necessary to ensure that financial and corporate crime is prosecuted efficiently and fairly.

17.53 Notwithstanding the earlier comments about court action, enforceable undertakings are a legitimate enforcement tool and an important remedy that ASIC should utilise. They are cost-effective for the regulator, can change behaviour within the entity and enable outcomes and remedies that are timely and that may not be achievable through the courts. As a remedy for misconduct, however, the acceptability of an enforceable undertaking to the general public and the ability of the undertaking to deter misconduct within or by other regulated entities can be damaged by various perceived deficiencies in the undertaking. These include a lack of transparency about the misconduct and remedial action required; concern about the independence of the expert appointed to oversee implementation of the undertaking's obligation; and

a belief that compliance with the undertaking will not be monitored effectively and the terms not enforced. The committee urges ASIC to do what it can to make the processes surrounding the acceptance and monitoring of enforceable undertakings more transparent.

Recommendation 24

17.54 As enforceable undertakings can be used as an alternative to court proceedings, the committee recommends that when considering whether to accept an enforceable undertaking, ASIC:

- **require stronger terms, particularly regarding the remedial action that should be taken to ensure that compliance with these terms can be enforced in court;**
- **require a clearer acknowledgement in the undertaking of what the misconduct was;**
- **as its default position, require that an independent expert be appointed to supervise the implementation of the terms of the undertaking; and**
- **consider ways to make the monitoring of ongoing compliance with the undertaking more transparent, such as requiring that reports on the progress of achieving the undertaking's objectives are, to the extent possible, made public.**

Recommendation 25

17.55 The committee recommends that ASIC should more vigilantly monitor compliance with enforceable undertakings with a view to enforcing compliance with the undertaking in court if necessary.

Recommendation 26

17.56 The committee requests that the Auditor-General consider conducting a performance audit of ASIC's use of enforceable undertakings, including:

- **the consistency of ASIC's approach to enforceable undertakings across its various stakeholder and enforcement teams; and**
- **the arrangements in place for monitoring compliance with enforceable undertakings that ASIC has accepted.**

Recommendation 27

17.57 The committee recommends that ASIC include in its annual report additional commentary on:

- **ASIC's activities related to monitoring compliance with enforceable undertakings; and**
- **how the undertakings have led to improved compliance with the law and encouraged a culture of compliance.**

Recommendation 28

17.58 The committee recommends that ASIC develop a code of conduct for independent experts appointed as a requirement of an enforceable undertaking. In particular, the code of conduct should address the management of conflicts of interest.