



ASIC
Australian Securities &
Investments Commission



ASIC Enforcement Update

July to December 2018

Report 615

Contents

Foreword	2
About this update	3
Summary of enforcement outcomes	4
Corporate governance	5
Financial services	8
Market integrity	10
Small business	14

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the *Corporations Act 2001* and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Foreword

Welcome to ASIC's Enforcement Update for the six months to December 2018.

In the past, this update has focused on immediate enforcement statistics, themes and case studies, and this report continues that approach. However, ASIC's success as a regulator cannot and should not be measured solely on the outcomes of criminal and civil actions. What we want to achieve is a substantial improvement in culture and conduct – the willingness to act efficiently, honestly and fairly.

No discussion of ASIC's enforcement endeavours can happen without first recognising the major changes affecting our work.

In February 2019, Commissioner Kenneth Hayne released the [final report](#) of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission). The report had 76 recommendations and we are now implementing a program of change that responds to those recommendations.

ASIC has adopted a 'why not litigate?' enforcement stance and began the process of establishing an Office of Enforcement. More information on this can be found in our [update](#) of February 2019.

The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 was enacted in March 2019. This new law improves ASIC's enforcement toolkit and allows us to pursue harsher civil penalties and criminal sanctions against banks, their executives and others who have broken the law. The new law increases penalties – individuals now face up to 15 years jail and companies can receive maximum fines of up to \$525 million.

In March 2019, Federal Treasurer the Hon. Josh Frydenberg announced [\\$404 million in additional funding over four years](#) to strengthen and expand ASIC's remit, including our ability to address misconduct in the financial services sector.

This funding will be crucial for ASIC as we put the Royal Commission recommendations into effect, particularly to support our 'why not litigate?' approach.

It will also enable ASIC's deployment of enhanced regulatory approaches, including our supervisory initiatives.

In line with public expectation and in the best interests of consumers and investors, civil or criminal matters brought by ASIC should not be treated by financial services firms as 'ordinary' litigation. ASIC and the Australian community expect financial services firms to demonstrate high levels of candour and cooperation in their dealings with us.

Looking forward, our message to corporate Australia is that ASIC is focused on enforcement. As the Royal Commission found, this is what Australians expect of their regulator and this is what ASIC will deliver.



Daniel Crennan QC
Deputy Chair

About this update

This update is ASIC's biannual overview of enforcement outcomes, priorities and cases during the period 1 July 2018 to 31 December 2018. [Previous ASIC enforcement outcomes reports](#) are available on our website.

About ASIC

ASIC is Australia's corporate, financial markets, financial services and consumer credit regulator. Our vision is for a fair, strong and efficient financial system for all Australians.

To realise our vision we will use all our regulatory tools to:

- › change behaviours to improve outcomes for consumers and investors
- › act against misconduct to maintain trust and integrity in the financial system
- › promote strong and innovative development of the financial system
- › help Australians to be in control of their financial lives.

Strategic priorities for enforcement

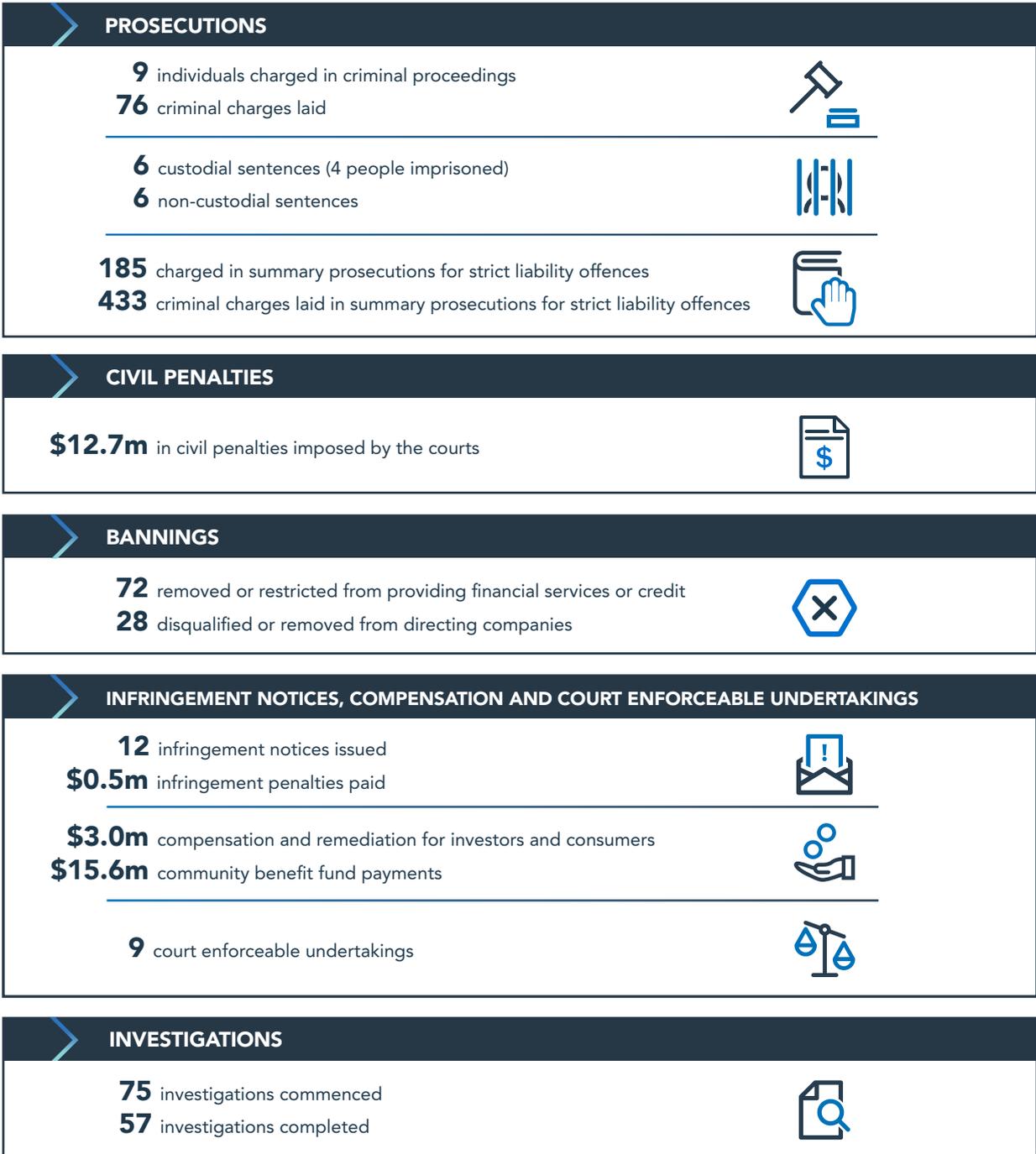
ASIC's enforcement teams are committed to meeting the strategic priorities outlined in [ASIC's Corporate Plan 2018–22: Focus 2018–19](#). We are focusing on:

- › potential harms from technology driven by the growing digital environment and structural changes in financial services and markets
- › poor culture and professionalism in financial services and credit, particularly in the provision of consumer credit and financial advice
- › culture, governance and incentives that can harm markets
- › practices that target financially vulnerable consumers
- › misalignment of retail product design and distribution with consumer needs.

Summary of enforcement outcomes

These outcomes were reported in ASIC media releases and include court determinations (criminal and civil), administrative remedies, negotiated outcomes and acceptance of court enforceable undertakings.

Figure 1: Summary of enforcement outcomes (July to December 2018)



Corporate governance

ASIC is responsible for regulating behaviour that influences company performance. To do this, ASIC uses the full suite of its regulatory tools to modify behaviour and improve corporate conduct.

This includes ensuring public companies understand their obligations to:

- › treat investors and consumers fairly
- › be accountable to investors through accurate, timely and clear disclosure
- › adopt sound corporate governance practices.

Corporate governance outcomes

In the six months between 1 July 2018 and 31 December 2018, ASIC resolved 30 corporate governance-related outcomes (see Table 1).

ASIC has 14 criminal and 17 civil corporate governance-related matters underway that had not achieved a final result as at 1 January 2019 (see Table 2). They were not included in Table 1 because either:

- › the court/tribunal has determined liability but not decided the penalty/final order
- › a plea was entered but the court/tribunal has not yet made a decision on conviction/sentence
- › the court has not yet decided if a breach of law/offence was committed.

Table 1: Corporate governance enforcement outcomes by misconduct and remedy type (1 July 2018 to 31 December 2018)

Misconduct type	Criminal	Civil	Administrative	Court enforceable undertaking	Negotiated outcome	Total (misconduct)
Action against auditors	0	0	6	0	0	6
Action against liquidators	0	1	0	1	0	2
Action against directors	2	0	3	0	0	5
Other corporate governance misconduct	0	17	0	0	0	17
Total (remedy)	2	18	9	1	0	30

Table 2: Corporate governance enforcement matters still ongoing as at 1 January 2019

Misconduct type	Criminal	Civil
Action against liquidators	1	4
Action against directors	10	11
Misconduct related to insolvency	1	0
Other corporate governance misconduct	2	2
Total	14	17



Case study: Leighton Holdings' Peter Gregg found guilty of criminal charges

Peter Gregg, a former director and chief financial officer of Leighton Holdings Ltd (LHL), was found guilty of criminal charges brought by ASIC relating to falsification of LHL's books. The jury gave its verdict in December 2018 after a five-week trial in the District Court of New South Wales.

Mr Gregg was charged with two counts of contravening s1307(1) of the *Corporations Act 2001* in January 2017, following an ASIC investigation that found he engaged in conduct that resulted in the falsification of LHL's books. Russell Waugh, the former managing director of Leighton Welspun Contractors Pty Ltd, was found not guilty of one count of aiding and abetting the offence committed by Mr Gregg.

This matter was prosecuted by the Commonwealth Director of Public Prosecutions (CDPP). For more information, see [ASIC media release MR18-374](#).



Case study: OneCash Ltd directors disqualified

On 30 November 2018, ASIC disqualified three Queensland directors from managing corporations, following liquidator reports that creditors were owed more than \$60 million. Damian Dodds and Stephen Anderson were disqualified for two years and six months, and Marie Dodds was disqualified for 18 months. Each of them has been charged by the Queensland Police Service with criminal offences.

The disqualifications followed the appointment of liquidators to OneCash Ltd (OneCash), RPMZone Pty Ltd (RPMZone), DSM Connect Pty Ltd (DSM) and All Breads Australia Pty Ltd (All Breads). For more information, see [ASIC media release MR18-378a](#).



Case study: Four-and-a-half years jail for dishonest conduct

In 2012, ASIC commenced investigations into the conduct of John Falconer, Farouk Fagredin and Andrew Sigalla of TZ Ltd, a Sydney-based company listed on the Australian Securities Exchange (ASX).

In September 2017, John Falconer, TZ Ltd's former director and chief financial officer, was extradited from Thailand to face charges. Mr Falconer pleaded guilty to:

- › five counts of dishonest conduct as a director, relating to illegitimate payments totalling \$6.25 million from the company's accounts between December 2006 and September 2008
- › one count of authorising or permitting the lodgement of false or misleading information to ASX in financial reports, which failed to disclose the true nature of certain payments within the report.

In November 2018, the Supreme Court of New South Wales sentenced Mr Falconer to four-and-a-half years imprisonment, with a minimum of three years to serve (see Figure 2).

During ASIC's investigation, we issued over 200 notices to produce documents, obtained statements from 52 different witnesses, undertook detailed forensic accounting analysis to determine the flow of funds, and liaised with the Hong Kong Securities and Futures Commission and the International Criminal Police Organization.

The matter was prosecuted by the CDPP.

Mr Falconer has appealed the severity of the sentence.

For more information, see [ASIC media release MR18-348](#).

Figure 2: Sentencing outcomes relating to TZ Ltd



Enforcement focus: next six months

In 2019 ASIC will continue its focus on gatekeeper conduct to ensure people are meeting the standards required by law.

'Gatekeepers' can include company directors and officers, auditors, insolvency practitioners and business advisers.

We are concentrating on:

- › companies with poor corporate governance
- › undisclosed associations and substantial holdings in shares in public companies (including beneficial ownership tracing and corporate fraud)
- › related-party transactions involving public companies
- › poor financial reporting by listed companies and other public interest entities
- › the quality of audits of listed companies and other public interest entities
- › insolvency practitioners and others who facilitate illegal phoenix activity and improper transactions in the face of insolvency
- › debenture issuers and other companies exposed to risk because of a declining property market
- › company directors and officers who fail to stop their companies making illegal payments to officials of overseas governments.

Financial services

ASIC regulates the conduct of financial services organisations and credit providers. To do this, ASIC acts against misconduct and enforces compliance with the financial services regime.

This work applies to a wide range of financial products including securities, derivatives, general and life insurance, superannuation, margin lending, carbon credit units, deposit accounts and means-of-payment facilities.

Financial services outcomes

In the six months between 1 July 2018 and 31 December 2018, ASIC resolved 56 financial services-related outcomes (see Table 3).

As at 1 January 2019, ASIC has 15 criminal and 66 civil financial services-related matters underway that had not achieved a final result (see Table 4). They were not included in Table 3 because either:

- › the court/tribunal has determined liability but not decided the penalty/final order
- › a plea was entered but the court/tribunal has not yet made a decision on conviction/sentence
- › the court has not yet decided if a breach of law/offence was committed.

Table 3: Financial services outcomes by misconduct and remedy type (1 July 2018 to 31 December 2018)

Misconduct type	Criminal	Civil	Administrative	Court enforceable undertaking	Negotiated outcome	Total (misconduct)
Misconduct related to provision of credit	3	0	11	2	1	17
Dishonest conduct, misleading statements	2	3	7	1	0	13
Misappropriation, theft, fraud	1	2	1	0	0	4
Unlicensed conduct	0	0	1	0	0	1
Other financial services misconduct	0	4	12	3	2	21
Total (remedy)	6	9	32	6	3	56

Note: One criminal remedy and one administrative remedy in the 'dishonest conduct, misleading statements' category are under appeal.

Table 4: Financial services matters still ongoing as at 1 January 2019

Misconduct type	Criminal	Civil
Misconduct related to provision of credit	2	4
Dishonest conduct, misleading statements	5	22
Misappropriation, theft and fraud	7	10
Other financial services misconduct	1	30
Total	15	66



Case study: ASIC's High Court win reinforces directors' duties obligations

In 2010 APCHL (an entity of Prime Trust) collapsed, owing investors approximately \$550 million.

On 22 August 2012, ASIC commenced civil proceedings against APCHL and its former directors in the Federal Court for breach of directors' duties under the *Corporations Act 2001*. The directors had passed an amendment to Prime Trust's constitution, which enabled them to pay \$33 million out of the trust's assets without members' approval.

On 12 December 2013, Justice Murphy found the directors had breached their duties and on 2 December 2014 handed down disqualifications and penalties.

The APCHL directors appealed the decision and the full bench of the Federal Court allowed the appeal in its judgments on 14 July 2016 and 1 November 2017.

ASIC appealed to the High Court of Australia (except in relation to director Peter Clarke). On 13 December 2018, the High Court found in favour of ASIC, setting aside orders made by the Federal Court. For more information, see [ASIC media release MR18-377](#).

Enforcement focus: next six months

In 2019 ASIC is looking closely at misconduct involving AFS licensees – an area of particular interest to the Royal Commission. Where appropriate, ASIC will refer briefs of evidence of criminal breaches to the CDPP, or commence civil penalties or other civil action in the courts.

We are also focusing on responsible lending breaches, as well as the sale of inappropriate products to consumers, which can potentially cause them harm.

Market integrity

ASIC investigates market misconduct and acts to ensure Australia's financial markets are fair and efficient. This includes:

- › Financial benchmarks. Used as the reference price for a wide range of financial products, manipulation of benchmarks can undermine their reliability and damage trust and confidence in Australia's financial markets.
- › Protecting investors in retail over-the-counter (OTC) markets. Investor trust and confidence in Australia's financial markets is vital to driving economic growth. To promote fair and efficient markets we address misconduct that threatens to create market uncertainty and erode investor confidence.
- › Insider trading. If prevalent, insider trading represents a failure of the market and damages trust in market fairness and transparency.

Market integrity outcomes

In the six months between 1 July 2018 and 31 December 2018, ASIC resolved 10 market integrity-related outcomes (see Table 5).

ASIC has nine criminal and 18 civil market integrity-related matters underway that had not achieved a final result as at 1 January 2019 (see Table 6). They were not included in Table 5 because either:

- › the court/tribunal has determined liability but not decided the penalty/final order
- › a plea was entered but the court/tribunal has not yet made a decision on conviction/sentence
- › the court has not yet decided if a breach of law/offence was committed.

Table 5: Market integrity outcomes by misconduct and remedy type (1 July 2018 to 31 December 2018)

Misconduct type	Criminal	Civil	Administrative	Court enforceable undertaking	Negotiated outcome	Total (misconduct)
Continuous disclosure	0	0	1	0	0	1
Insider trading	1	0	0	0	0	1
Market integrity rules	0	1	1	0	0	2
Market manipulation	0	1	0	0	0	1
Other market misconduct	0	0	3	2	0	5
Total (remedy)	1	2	5	2	0	10

Table 6: Market integrity criminal and civil matters still ongoing as at 1 January 2019

Misconduct type	Criminal	Civil
Continuous disclosure	0	7
Insider trading	4	0
Market manipulation	3	2
Other market misconduct	2	9
Total	9	18



Case study: ASIC wins Bank Bill Swap Rate case against Westpac

On 9 November 2018, the Federal Court ordered Westpac pay \$3.3 million for contravening the *Australian Securities and Investments Commission Act 2001* by its involvement in the setting of the ASX's Bank Bill Swap Rate (BBSW) in 2010. This was the maximum penalty available.

The Federal Court also ordered that an independent expert review Westpac's current systems, policies and procedures and report its findings to ASIC within nine months.

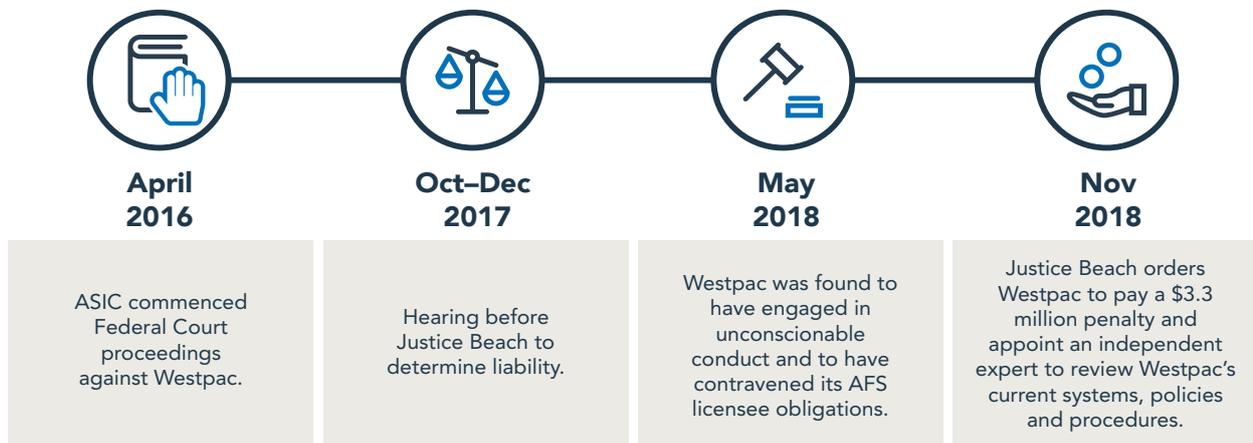
The court orders follow a judgment on 24 May 2018, which found that Westpac had, on four occasions between 6 April 2010 and 6 December 2010, traded with the dominant

purpose of influencing yields of traded prime bank bills and the setting of the BBSW in a way that was favourable to its rate set exposure.

The court found that Westpac had acted unconscionably, and that Westpac had contravened its obligation as an AFS licensee under s912A of the *Corporations Act 2001* and had inadequate procedures and training in place.

Westpac was also ordered to pay ASIC's costs of (and incidental to) the penalty hearing. For more information, see [ASIC media release MR18-341](#).

Figure 3: Timeline of Federal Court proceedings against Westpac for its BBSW conduct





Case study: Eight-year ban for unconscionable conduct in retail OTC market

On 13 November 2018, ASIC banned Yossef Ashkenazi from providing financial services for a period of eight years.

Mr Ashkenazi was a former director of AGM Markets Pty Ltd (AGM Markets). ASIC found that:

- › as a responsible manager, he had a key role regarding AGM Market's financial services business and had been involved in AGM Market's unconscionable conduct in connection with financial services
- › is likely to contravene a financial services law
- › is not adequately trained, or is not competent, to provide financial services.

On 5 November 2018, ASIC cancelled the AFS licence of AGM Markets. Our investigation into the retail OTC derivative issuer found that its financial services business disregarded key conduct requirements and had unmanaged conflicts of interest.

ASIC found that AGM Markets provided financial product advice about securities and superannuation interests when it did not hold a licence to do so and made representations to clients that were misleading or deceptive.

In addition, ASIC was concerned that AGM Markets failed to carry out adequate supervisory arrangements in relation to its corporate authorised representatives and ensure that the financial services covered by its licence were provided efficiently, fairly and honestly. For more information, see [ASIC media release MR18-347](#).



Case study: Six-year ban and AFS licence cancellation for OTC market contravention

On 22 November 2018, ASIC banned Stavro D'Amore, former director of Berndale Capital Securities Pty Ltd (Berndale), from providing financial services for six years. The order was made after ASIC found that Mr D'Amore:

- › was involved in contraventions of financial services laws by Berndale
- › is likely to contravene a financial services law
- › is not adequately trained, or is not competent, to provide financial services.

ASIC cancelled the AFS licence of Berndale on the same day.

Berndale is also a retail OTC derivatives provider and our investigations found systemic failures in complying with reporting requirements. ASIC also found that Berndale failed to have adequate financial and human resources and that it did not provide financial services efficiently, honestly and fairly.

Berndale is appealing the licence cancellation.

On 5 December 2018, ASIC obtained freezing orders from the Federal Court against Berndale, its associated entities and Mr D'Amore, thereby preventing them from selling or otherwise dealing with their property (including cash held with Australian banks) without ASIC's consent. The orders are still in place.

ASIC's investigation is ongoing. For more information, see [ASIC media release MR18-363](#).



Case study: Eighteen-month jail sentence for insider trading

On 17 August 2018, Darren Lind was found guilty of insider trading in shares of Minotaur Exploration Ltd (Minotaur), an ASX-listed mining exploration company.

Following a two-week trial in the District Court of South Australia, a jury found Mr Lind guilty of procuring another to purchase financial products while in the possession of inside information.

Mr Lind was sentenced to 18 months imprisonment with a minimum custodial term of nine months.

Mr Lind was a former managing director of Golden Fields Resources Pty Ltd, which had a joint venture partnership with Minotaur to explore for copper-gold in Cloncurry, Queensland.

ASIC's investigation revealed that on 25 July 2014, during a meeting with Minotaur personnel, Mr Lind came into possession of inside information regarding the discovery of copper-gold.

On 28 July 2014, while in possession of the inside information, Mr Lind made two share purchases of Minotaur shares through the company Longer View Pty Ltd. Following an ASX announcement on 31 July 2014 declaring the copper-gold discovery, Minotaur's share price almost doubled in value.

This matter was prosecuted by the CDPP. For more information, see [ASIC media release MR19-024](#).

Enforcement focus: next six months

Conduct risk and the integrity of financial benchmarks remain a high priority in 2019. We are paying particular attention to:

- › poor conduct in fixed income, commodities and currency (FICC) markets, including retail OTC markets
- › misconduct in relation to initial coin offerings and cryptocurrency markets
- › serious and organised market misconduct with a focus on cross-border transactions
- › technology-enabled offending, including cyber-related market misconduct.

Small business

ASIC focuses on helping small businesses understand and comply with their legal obligations under the *Corporations Act 2001*, and conducts surveillance, enforcement and policy work. Where necessary, this can mean administrative, civil or criminal action against companies, directors and other officeholders who fail in their duties. By doing so, ASIC helps to ensure all market participants can benefit from a level playing field.

Small business outcomes

These outcomes are from ASIC's Small Business Compliance and Deterrence area. Due to the high volume they are generally not announced in ASIC media releases.

In the six months between 1 July 2018 and 31 December 2018, ASIC resolved 228 small business-related outcomes (see Table 7).

As at 1 January 2019, ASIC has 151 small business-related criminal matters underway that had not achieved a final result (see Table 8). They were not included in Table 7 because either:

- › the court/tribunal has determined liability but not decided the penalty/final order
- › a plea was entered but the court/tribunal has not yet made a decision on conviction/sentence
- › the court has not yet decided if a breach of law/offence was committed.

Table 7: Small business enforcement outcomes by misconduct and remedy type (1 July 2018 to 31 December 2018)

Misconduct type	Criminal	Administrative	Total (misconduct)
Action against persons or companies	168	43	211
Efficient registration and licensing	17	0	17
Total (remedy)	185	43	228

Table 8: Small business criminal cases underway as at 1 January 2019

Misconduct type	Criminal
Action against persons or companies	143
Misconduct related to registration and licensing	8
Total	151



Case study: Allan Saunders jailed for 12 months for illegal phoenix activity

On 16 November 2018, Allan Saunders was sentenced to 12 months imprisonment by the Pine Rivers Magistrates Court in Queensland after pleading guilty to charges related to illegal phoenix activity.

Mr Saunders, the former director of Metropolitan Design Pty Ltd (Metropolitan), was convicted of 13 counts of directors' duties breaches under the *Corporations Act 2001*. He was released on a \$3,000, two-year good-behaviour bond.

ASIC commenced its investigation into Mr Saunders in 2015 after receiving a liquidator's report. On 30 September 2015, Metropolitan was placed into liquidation, owing the Australian Taxation Office (ATO) \$235,626.

Our investigations revealed that between 13 April and 22 September 2015, Mr Saunders instructed debtors to redirect payments owed to Metropolitan into his personal sole-trader bank account. By doing so, Mr Saunders used his position dishonestly with the intention of gaining an advantage for himself.

Mr Saunders' actions intentionally set out to deny the ATO money owed to it – conduct constituting illegal phoenix activity.

The matter was prosecuted by the CDPP. For more information, see [ASIC media release MR18-351](#).

Enforcement focus: next six months

In 2019, ASIC's small business focus will be on:

- › unfair terms in small-business contracts
- › credit lenders who do not lodge annual compliance certificates in accordance with the *National Consumer Credit Protection Act 2009*
- › illegal phoenix activity – addressing this activity and minimising its effects on companies suffering financial distress.

We are also supporting compliance programs that inform credit providers of their obligations to lodge documents.

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