

## Chapter 2

### Bodies established under Parts 9–11 of the ASIC Act

2.1 This chapter considers the 2015–16 annual reports of the:

- Companies Auditors and Liquidators Disciplinary Board (CALDB); and
- The Takeovers Panel (the Panel).

2.2 This chapter also provides an update on the status of the Corporations and Markets Advisory Committee (CAMAC).

#### Companies Auditors and Liquidators Disciplinary Board

2.3 CALDB was first established as an independent statutory body in 1989 and is currently established by Part 11 of the ASIC Act. Its primary purpose, in the administration of Australia's financial services system, is to hear applications and consider cancellation or suspension of a liquidator's or auditor's registration. The Board's casework is not self-generated as it holds no powers to instigate applications. Rather, applications are brought by either ASIC or the Australian Prudential Regulation Authority (APRA) for the Board's adjudication.<sup>1</sup> Accordingly, the Board operates as an expert disciplinary body for auditors and liquidators in Australia.

2.4 CALDB's 2015–16 annual report states:

CALDB's powers under the Corporations Act to cancel or suspend the registration of an auditor or liquidator...has a public protection element insofar as it both encourages the maintenance of high professional standards amongst auditors and liquidators and provides the means for a transparent disciplinary outcome with respect to those practitioners who do not meet appropriate standards.<sup>2</sup>

#### *Annual report of CALDB*

2.5 Since the committee last reported on CALDB, the passage and partial commencement of the *Insolvency Law Reform Act 2015* has removed responsibility for the discipline of liquidators from CALDB:

The new Act will transfer CALDB's disciplinary powers in respect of liquidators to:

- ASIC in the circumstances specified by [the *Insolvency Law Reform Act 2015*]; and
- Disciplinary committees convened by ASIC and comprising ASIC, a registered liquidator chosen by a prescribed body such as [the Australian

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1 *Corporations Act 2001*, Part 9.2, Division 3.

2 CALDB, *Annual Report: 2015–16*, p. 4.

Restructuring Insolvency & Turnaround Association] and a Ministerial appointee.<sup>3</sup>

2.6 The ASIC Act directs that the annual report is to 'describe the operations' of CALDB for the relevant financial year.<sup>4</sup>

2.7 New applications received by CALDB are categorised as either 'administrative' or 'conduct'. There was one new application to CALDB from ASIC in 2015–16 which related to a conduct matter to do with a liquidator. No new administrative applications were received.

2.8 During 2015–16, three matters were dealt with leading to orders being issued for the cancellation of registration, the suspension of registration, and an order for undertakings to be given respectively.<sup>5</sup>

2.9 An analysis of data provided in previous annual reports indicates that the number of cases referred has continued to decline since 2005–06 (see Table 2.1). CALDB's annual report indicates that during 2015–16 an increased hearing workload in relation to liquidators from 26 to 30 person days contributed to an increase in membership fees, from \$349 166 to \$365 390 during the year.<sup>6</sup> The committee notes that for this reporting period the Board continues to operate without its full complement of 14 members.<sup>7</sup>

**Table 2.1: Number of cases referred: 2005–06 to 2015–16<sup>8</sup>**

Financial Year	Auditors	Liquidators
2015–16	0	1
2014–15	1	1
2013–14	2	2
2012–13	0	4
2011–12	0	0

3 CALDB, *Annual Report: 2015–16*, p. 4.

4 *ASIC Act 2001*, s. 214.

5 CALDB, *Annual Report: 2015–16*, p. 8.

6 CALDB, *Annual Report: 2015–16*, pp. 7, 10.

7 CALDB, *Annual Report: 2015–16*, p. 2.

8 CALDB, *Annual report: 2015–16*, p.7; CALDB, *Annual report: 2014–15*, p. 7; CALDB, *Annual report: 2013–14*, p. 6; CALDB, *Annual report: 2012–13*, pp. 7–8; CALDB, *Annual report: 2011–12*, p. 12; CALDB, *Annual report: 2010–11*, p.13; CALDB, *Annual report: 2009–10*, pp. 14–15; CALDB, *Annual report:2008–09*, pp. 13–14; CALDB, *Annual report: 2007–08*, pp. 13–14; CALDB, *Annual report: 2006–07*, pp. 13–14; CALDB, *Annual report: 2005–06*, p. 11.

2010–11	2	1
2009–10	0	0
2008–09	11	1
2007–08	5	0
2006–07	7	0
2005–06	9	3

2.10 A decision of CALDB may be appealed to the Administrative Appeals Tribunal (AAT) or to the Federal Court of Australia. During the 2015–16 financial year, one application for decisions made by CALDB was referred to the AAT.<sup>9</sup> The Board notes that two matters appealed to the AAT in previous reporting years were finalised in 2015–16. The AAT upheld CALDB's decision in the first matter and dismissed the appeal in the second matter.<sup>10</sup>

#### *Committee view*

2.11 The committee considers that CALDB has fulfilled its regulatory and reporting responsibilities during the 2015–16 financial year.

2.12 The committee will continue to monitor the effect of the passage of the *Insolvency Law Reform Act 2015* on CALDB's responsibilities and functions.

#### **The Takeovers Panel**

2.13 The Panel was established by Part 10 of the ASIC Act as a peer review body largely composed of takeover experts, whose main purpose is the resolution of takeover disputes. During a takeover bid, the Panel is able to declare unacceptable circumstances with respect to the public interest in relation to the affairs of a company, in addition to establishing orders to remedy those circumstances.<sup>11</sup>

2.14 The Panel is also able to review decisions made by ASIC<sup>12</sup> and maintains its operations with a rule making power.<sup>13</sup> The Panel's annual report states that:

The Panel improves the certainty, efficiency and fairness of Australia's takeovers market by:

- resolving disputes in a fair, timely, consistent, informal and sound manner; and

9 CALDB, *Annual Report: 2015–16*, p. 1.

10 CALDB, *Annual Report: 2015–16*, p. 1.

11 *Corporations Act 2001*, s. 657A.

12 *Corporations Act 2001*, s. Part 6.10, Division 2.

13 *Corporations Act 2001*, s. 658C.

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- publishing clear, well-developed guidance.<sup>14</sup>

2.15 As at 30 June 2016, the Panel had 39 members, up from 38 at 30 June 2015.<sup>15</sup> Members are nominated by the Minister and appointed by the Governor-General.<sup>16</sup> Members are chosen so that there is a mix of expertise, geographical representation and gender.<sup>17</sup>

### ***Annual Report of the Takeovers Panel***

2.16 During the 2015–16 financial year, the Panel received 20 applications. This was below the yearly average of 28.7 applications since July 2000 and is the same number as those received in the 2014–15 financial year.<sup>18</sup>

2.17 As noted in the committee's previous report, the proportion of applications for which the Panel declined to conduct proceedings grew steadily from 6 per cent in 2001 to 60 per cent in 2014–15.<sup>19</sup>

2.18 The Panel indicated that this financial year saw a reversal of this trend, with the proportion of applications where the Panel declined to conduct proceedings dropping to 30 per cent in the 2015–16 financial year.<sup>20</sup>

2.19 The committee will continue to monitor the proportion of applications for which the Panel declines to conduct proceedings.

2.20 Nine declarations and/or orders were issued in 2015–16 and undertakings were accepted for two matters. The Panel conducted proceedings with nine cases in which unacceptable circumstances were deemed to be present and proceedings were withdrawn in one case.<sup>21</sup> The issues raised in applications included association/breach of section 606, disclosure, rights issues and trust schemes.<sup>22</sup>

2.21 The annual report indicates faster action between a Panel decision and its publication of reasons, with the average number of calendar days between a decision and the publication of reasons being 17.1 days for 2015–16. This is below the average of 35.9 calendar days since March 2000. The time between receipt of an application and a decision increased, with an average of 19.2 days, up from an average of 16.1 days since March 2000.<sup>23</sup>

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14 Takeovers Panel, *Annual Report 2015–16*, p. 7.

15 Takeovers Panel, *Annual Report 2015–16*, p. 4.

16 *ASIC Act 2001*, s. 172.

17 Takeovers Panel, *Annual Report 2015–16*, p. 12.

18 Takeovers Panel, *Annual Report 2015–16*, p. 5.

19 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the 2014–2015 annual reports of bodies established under the ASIC Act*, May 2016, p. 6.

20 Takeovers Panel, *Annual Report 2015–16*, pp. 5, 18.

21 Takeovers Panel, *Annual Report 2015–16*, pp. 5, 18.

22 Takeovers Panel, *Annual Report 2015–16*, p. 19.

23 Takeovers Panel, *Annual Report 2015–16*, p. 5.

2.22 The Panel was subject to one judicial review regarding Queensland North Australia Pty Limited. Following the Full Federal Court's decision to allow an appeal on 22 May 2015, the court on 4 September 2015 set aside the Panel's decision and remitted the matter to the Panel for decision. The Panel then sought and was granted additional time to consider the application and make a declaration. The Federal Court dismissed a judicial review by Palmer Leisure Coolum Pty Ltd for the Panel's decision to extend time.<sup>24</sup> The Panel did not use its rule making power, nor were any matters referred from the court during the financial year.<sup>25</sup>

2.23 The committee notes that the Panel executive has issued an index of past decisions for future guidance. The Australian Government Takeovers Panel Index of Reasons 2000–2016 is ordered by topic and by legislation. It was published on the Panel's website on 23 September 2016.<sup>26</sup>

2.24 The Panel maintains contact with the Australian Securities Exchange (ASX), the Foreign Investment Review Board (FIRB) and with ASIC, with which the Panel has a Memorandum of Understanding. The annual report notes the Panel may refer matters to ASIC because aspects of the application might give rise to concerns under the Corporations Act or the Panel wants ASIC to consider whether to make an application. There were three referrals to ASIC during 2015–16<sup>27</sup> The report also indicated that the Panel was not subject to any reports by the Australian National Audit Office (ANAO) in 2015–16.<sup>28</sup>

### *Committee view*

2.25 The committee considers that the Panel has fulfilled its regulatory and reporting responsibilities during the 2015–16 financial year.

## **Corporations and Markets Advisory Committee**

2.26 CAMAC was first established in 1989 and was subsequently established by Part 9 of the ASIC Act. CAMAC's role in the administration of Australia's financial services system is to provide informed and expert advice to the Minister about the content, operation and administration of the corporations legislation, corporations, financial products and markets. On its own initiative or at the Minister's request, CAMAC may provide advice or recommendations about any matter connected with:

- a proposal to make corporations legislation, or to make amendments of the corporations legislation;
- the operation or administration of the corporations legislation;

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24 Takeovers Panel, *Annual Report 2015–16*, p. 21.

25 Takeovers Panel, *Annual Report 2015–16*, p. 8.

26 Australian Government Takeovers Panel, *Index of Reasons*, [http://www.takeovers.gov.au/content/index\\_of\\_reasons/default.aspx](http://www.takeovers.gov.au/content/index_of_reasons/default.aspx), (accessed 22 March 2017).

27 Takeovers Panel, *Annual Report 2015–16*, p. 23.

28 Takeovers Panel, *Annual Report 2015–16*, p. 31.

- law reform in relation to the corporations legislation;
- companies or a segment of the financial products and financial services industry; or
- a proposal to improve the efficiency of the financial markets.

***Proposal to abolish CAMAC***

2.27 In March 2014, the National Commission of Audit considered that CAMAC's functions could be consolidated into the Department of the Treasury (the Treasury). In May 2014 the Commonwealth Government, as part of the budget, announced its decision to abolish CAMAC and its Legal Committee during the 2014–15 financial year. On 24 September 2014, the government released an exposure draft of legislation to abolish CAMAC. The Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 (the CAMAC Bill) was introduced into the House of Representatives on 4 December 2014. The CAMAC Bill was passed by the House of Representatives on 2 March 2015 and introduced into the Senate on 3 March 2015. The Bill lapsed when Parliament was prorogued on 17 April 2016.

2.28 On 12 February 2015, the Senate referred the provisions of the CAMAC Bill to the Senate Economics Legislation Committee for inquiry and report by 16 March 2015. While the Economics committee recognised that CAMAC had contributed extensively to the development of reforms to corporations law in Australia, it supported the passage of the bill.

2.29 At the time of reporting, the CAMAC Bill has not been reintroduced in the 45<sup>th</sup> Parliament.

2.30 The committee will continue to monitor developments in relation both to CAMAC and the ongoing effectiveness of the development of reforms to corporations law in Australia.