

## **Chapter 2**

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

2.1 This chapter considers the 2016–17 annual reports of the:

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

#### **Companies Auditors Disciplinary Board**

2.2 CADB was previously known as the Companies Auditors and Liquidators Disciplinary Board until the *Insolvency Law Reform Act 2016* (ILR Act) commenced on 1 March 2017. Under the ILR Act, the powers to discipline liquidators were transferred to ASIC.

2.3 CADB is currently established by Part 11 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). CADB's primary purpose in the administration of Australia's financial services system is to hear applications from ASIC or the Australian Prudential Regulation Authority (APRA) in relation to an auditor that is suspected of failing to carry out their duties and functions adequately and to consider the cancellation or suspension of an auditor's registration.<sup>1</sup> CADB is required to provide a 'Respondent' with the opportunity to appear at a hearing held by a panel of three or five CADB members including the Chairperson and to make submissions to and present evidence before CADB in relation to the application. The provisions for applications are established under Section 1292 of the *Corporations Act 2001*.

2.3 CADB categorises matters brought before it as either 'administrative' or 'conduct'. Administrative matters include failing to lodge annual statements, ceasing to be a resident of Australia, becoming disqualified from managing corporations or becoming incapable because of mental infirmity of managing affairs.<sup>2</sup> Conduct matters include playing a significant role in an audit without being eligible to do so, failing to comply with a condition of registration, not performing any significant audit work for five years, failing to carry out the duties of an auditor, not being a fit and proper person to remain registered as an auditor.<sup>3</sup>

2.4 The Board's casework is not self-generated as it holds no powers to instigate applications. Applications are brought only by either ASIC or APRA for the Board's adjudication in either administrative or conduct matters. Accordingly, the Board operates as an expert disciplinary body for auditors in Australia.<sup>4</sup>

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1 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 16.

2 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 15.

3 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 16.

4 *Corporations Act 2001*, s. 1292.

### *Annual Report of CADB*

2.5 The ASIC Act directs the annual report to 'describe the operations' of CADB for the relevant financial year.<sup>5</sup>

2.6 There was one new application to CADB from ASIC in 2016–17 which related to conduct of an auditor. No new administrative applications were received.<sup>6</sup>

2.7 Matters before CADB in 2016–17 resulted in the suspension of one registration and one undertaking.<sup>7</sup>

2.8 As noted in previous reports by this committee the number of cases referred to CADB has continued to decline since 2005–06. No matters were referred to the CADB in financial years 2009–10 and 2011–12 and only one matter was referred in each year of 2015–16 and 2016–17. This is a substantial decrease from the 12 matters referred in 2005–06.<sup>8</sup> This decrease is unrelated to changes to CADB's powers in relation to liquidators as a result of the ILR Act.

2.9 CADB continued to operate under transitional provisions relating to the ILR Act 2016 until the commencement date of 1 March 2017. This included CADB having general powers of investigation in relation to liquidators who failed to comply with duties before the commencement day.<sup>9</sup>

2.10 As at 30 June 2017, CADB noted that no new liquidator matters under its transitional provisions had been referred to it. However one matter is currently on appeal with the Administrative Appeals Tribunal (AAT) and may be referred to CADB pending the AAT's decision. The matter would fall within the scope of the transitional provisions.<sup>10</sup>

2.11 The committee notes the increase in CADB's overall administrative expenses from \$267 281 to \$353 630 was due to a one-off redundancy staff cost incurred as a result of the Board's restructure of administrative support arrangements. Travel and accommodation expenses also increased as a result of a hearing that took place over two separate periods which required three members empanelled to travel interstate. Conversely, there was a decrease in overall members' fees as a result of a decreased number of hearing days compared to the prior reporting period.<sup>11</sup> The daily rates for members of CADB were reset by the Commonwealth Remuneration Tribunal to commence from 1 January 2016. The rates are unchanged and consist of the

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5 Australian Securities and Investments Commission Act 2001, s. 214.

6 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 6.

7 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 7.

8 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 1; Parliamentary Joint Committee on Corporations and Financial Services, *Report on 2015–16 annual reports of bodies established under the ASIC Act*, pp. 4–5.

9 *Insolvency Law Reform Act 2016*, Part 23, s. 303.

10 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 4.

11 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, pp. 9–10.

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Chairperson being allocated \$1 411, the Deputy Chairperson allocated \$1 270 and members allocated \$1 129.<sup>12</sup> Costs incurred includes travel time to hearing venues, consideration of written determinations and frequently a final hearing and decision on sanction and appropriate orders.<sup>13</sup>

2.12 The committee notes that for this reporting period the Board continues to operate without its full complement of 14 members.<sup>14</sup> The Board currently consists of a Chairperson, Deputy Chairperson, three accounting members and three business members. The Chairperson and Deputy Chairperson must each be enrolled as a barrister, as a solicitor, or as a barrister and solicitor or as a legal practitioner of the High Court, any Federal Court or the Supreme Court of a state or territory and must have been enrolled for a period of at least five years.<sup>15</sup> Accounting members must be a member of a professional accounting body or any other body prescribed by regulation. Business members are selected for their qualifications, knowledge or experience in business or the financial and legal sectors.<sup>16</sup>

### **Committee view**

2.13 The committee considers that CADB has fulfilled its regulatory and reporting responsibilities for the 2016–17 financial year. The committee will continue to monitor the effect of the passage of the *Insolvency Law Reform Act 2016* on CADB's responsibilities and functions.

2.14 The committee remains concerned about the efficiency and effectiveness of CADB being such a small body, with such a small and irregular workload. The committee notes that the explanatory memorandum for the ILR Act indicates that one of the arguments for removing the liquidator functions from CALDB was the perceived inefficiency and cost of the CALDB process.<sup>17</sup> The committee also notes that the reforms associated with the ILR Act were focussed on insolvency and may not have adequately considered the adequacy of CADB continuing in its current form. ASIC has also continued to raise concerns about audit quality in its audit inspection program.<sup>18</sup> The committee therefore recommends that the Government review the adequacy of current arrangements for auditor disciplinary functions.

### **Recommendation 1**

**2.15 The committee recommends that the Government review the adequacy of auditor disciplinary functions.**

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12 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 10.

13 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 7.

14 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 5.

15 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 5.

16 Companies Auditors Disciplinary Board, *Annual Report 2016–17*, p. 5.

17 Insolvency law Reform Bill 2015, *Explanatory Memorandum*, p. 268.

18 See Australian Securities and Investments Commission, Report 534 *Audit inspection program report for 2015–16*, June 2017, p. 4.

## The Takeovers Panel

2.16 The Takeovers Panel (Panel) was established by Part 10 of the ASIC Act as a peer review body largely comprised 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. The Panel examines the way in which control of a company is acquired. The Panel can also establish orders to remedy those circumstances.<sup>19</sup>

2.17 The Panel is also able to review decisions made by ASIC<sup>20</sup> and maintains its operations with a rule making power.<sup>21</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
- publishing clear, well-developed guidance.<sup>22</sup>

2.18 As at 30 June 2017, the Panel had 45 members, up from 39 in 2016.<sup>23</sup> Members are nominated by the Minister and appointed by the Governor-General.<sup>24</sup>

## Annual Report of the Takeovers Panel

2.19 During 2016–17, the Panel received 23 applications to have matters considered. This was below the yearly average of 28.4 applications since July 2000, but consistent with the yearly average of 22.3 applications since July 2009.<sup>25</sup>

2.20 The proportion of applications for which the Panel declined to conduct proceedings increased to 55 per cent in 2016–17, up from 30 per cent in 2015–16. The Panel indicated that this financial year witnessed a return to the rising decline rate to conduct proceedings which peaked at 60 per cent in 2014–15.<sup>26</sup>

2.21 Of the 23 applications received in 2016–17, three were withdrawn. The Panel conducted proceedings in nine matters, accepted undertakings in two of those matters, made declarations and orders in seven, and declined to conduct proceedings in eleven matters.<sup>27</sup>

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

20 *Corporations Act 2001*, s. 656A.

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

22 Takeovers Panel, *Annual Report 2016–17*, p. 7.

23 Takeovers Panel, *Annual Report 2016–17*, p. 13.

24 *Australian Securities and Investments Commission Act 2001*, s. 172.

25 Takeovers Panel, *Annual Report 2016–17*, p. 5.

26 Takeovers Panel, *Annual Report 2016–17*, p. 5.

27 Takeovers Panel, *Annual Report 2016–17*, pp. 5, 20.

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2.22 In terms of its decisions not to conduct proceedings, the Panel makes an assessment of whether the circumstances being complained of would, if established, give rise to a declaration of unacceptable circumstances taking into account the strength of the evidence and the remedies that might be available.<sup>28</sup>

2.23 Timeliness is a key performance indicator for the Panel. The average calendar days between application and a Panel decision in 2016–17 was 16.3, broadly consistent with the 16.1 days since 13 March 2000 and slightly less than the 16.6 days since 1 July 2009.<sup>29</sup>

2.24 The average number of calendar days between decision and publication of reasons in 2016–17 was 22.2 compared to 35.2 since 13 March 2000 and 11.7 since 1 July 2009.<sup>30</sup>

2.25 Consistency of decision-making is another key facet of the Panel's work. In order to facilitate discussion of past proceedings, policy issues and market developments, the Panel holds meetings of all its members at least twice a year. Furthermore, the Panel has issued an index of Panel decisions from 2000–16.<sup>31</sup>

2.26 During 2016–17 the Panel conducted consultations in relation to two guidance notes: GN 12 Frustrating Action and GN 4 Remedies General. The Panel received a total of six submissions for GN 12 and 1 submission for GN 4. The Panel issued amendments to both guidance notes.<sup>32</sup>

2.27 The Panel's decisions were not subject to any judicial reviews during 2016–17. However, the committee notes that, subsequent to the annual reporting period, on 14 September 2017 the Panel was served with a Federal Court application for judicial review of the Panel's decision in the matter of Molopo Energy Limited.<sup>33</sup>

2.28 The Panel may refer matters to ASIC where the Panel wants ASIC to consider making an application. Matters are also referred to ASIC where a sitting panel is of the view that ASIC should examine aspects of the application that might give rise to concerns under the *Corporations Act 2001*. The Panel referred one matter to ASIC for review during reporting the period.<sup>34</sup>

### **Committee view**

2.29 The committee considers that the Panel has fulfilled its regulatory and reporting responsibilities during the 2016–17 financial year.

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28 Takeovers Panel, *Annual Report 2016–17*, p. 20.

29 Takeovers Panel, *Annual Report 2016–17*, p. 5.

30 Takeovers Panel, *Annual Report 2016–17*, p. 5.

31 Takeovers Panel, *Annual Report 2016–17*, p. 21.

32 Takeovers Panel, *Annual Report 2016–17*, p. 22.

33 Takeovers Panel, *Annual Report 2016–17*, p. 23.

34 Takeovers Panel, *Annual Report 2016–17*, p. 25.

