Chapter 23

Options for encouraging better enforcement outcomes

23.1 Several chapters throughout Parts II and III of this report have focused on ASIC's approach to enforcement. Recommendations were made about steps ASIC could take to improve the enforcement outcomes it achieves. This chapter examines the evidence received by the committee that argued there were more fundamental problems with enforcement beyond ASIC's control, either because of the legislation that ASIC administers or due to the law enforcement framework of which ASIC is a part.

Civil and criminal penalties

23.2 The penalties available to ASIC was an issue discussed in several submissions and at the committee's public hearings. Overall, most considered that the current penalties were generally insufficient. For example, former ASIC enforcement adviser Mr Niall Coburn stated:

> If thinking of lawbreakers is a tussle between fear versus greed, then we need penalties to amplify the fear and smother the greed. We need penalties that create a fear that overcomes any desire to take risks and break the law.[1]

23.3 As discussed in Chapter 17, some academics and observers argued that ASIC faces a number of difficulties in pursuing remedies available through the civil penalty regime for directors' duties. Although several reasons were put forward as possible contributors to these difficulties, the current penalty amounts was often cited. A group of academics from Adelaide Law School argued that despite a recommendation by Finkelstein J in *ASIC v Vizard* that the $200,000 upper limit on pecuniary penalties be reviewed,[2] this has not been addressed. The academics added:

> More worryingly, recent cases show that the courts are paying considerable regard to reputational damage as a substitute for significant pecuniary penalties. So in *ASIC v Healey* the non-executive directors were not subjected to any pecuniary penalty at all despite being found to have contravened ss 180(1), 344(1) and 601FD(3) of the *Corporations Act 2001* (Cth) and the court 'taking into account the seriousness of the offences'. In the James Hardie litigation the Court of Appeal reduced the pecuniary

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1 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 3.

2 On the maximum penalty of $200,000 available for civil proceedings, Finkelstein J wrote: 'This is despite the fact that a contravention holds great potential for profit and may cause much harm. In a criminal prosecution (and after 13 March 2000 there could be both a civil and criminal prosecution for the same conduct: see s 1317P of the Corporations Law), the maximum penalty was more severe, namely imprisonment for a period not exceeding five years plus a fine not exceeding $200,000'. *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57 at 63–64 [27].

> penalties imposed by the trial judge from $30 000 to $25 000 for the Australian directors and to $20 000 for the US directors. The influence of the parity principle (that similar breaches should attract similar penalties) and the doctrine of precedent means that it is unlikely that the courts will feel free to depart from the approaches in these cases without legislative intervention to raise the upper limit of the pecuniary penalty for an individual above the current level of $200 000.[3]

23.4 CPA Australia also advised it believed the upper limit of $200,000 was insufficient. When asked what the limit should be, Mr Malley explained that, depending on the nature of the offence 'it has to be of such an ilk that it really does make people think twice':

> You need to understand that, if you are dealing in markets where potentially people earn large amounts of money and the penalty in material terms is not material, perhaps that is not necessarily a deterrent. I think society deserves to be protected.
>
> I would also add that there are many directors working in Australia under some very tough legislation. It is our view—and I should say this in balance—that there are elements of the Corporations Law that pertain to directors that are far more difficult here than they are in other countries and in some ways impractical. I think there needs to be a review of that. But, on the basis that there is a review, there should also be higher penalties if there is a fairer scenario for directors in the marketplace.[4]

23.5 ASIC argued that a holistic review of penalties across the corporations legislation is required. It advised that the current penalties have been in place for extended periods, with criminal penalties reviewed in a piecemeal way since they were enacted and civil penalties unchanged since 1992.[5] ASIC concluded that the current civil penalties under the corporations legislation:

- have not kept pace with inflation (they are not linked to penalty units);
- regardless of the above, the penalties 'are proportionately low given the seriousness and impact of civil penalty matters', and when compared with the penalties available in other jurisdictions such as the UK and US; and
- are inconsistent with the penalties in other legislation ASIC administers, such as the *National Consumer Credit Protection Act 2009*.[6]

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3 Dr Suzanne Le Mire, Associate Professor David Brown, Associate Professor Christopher Symes and Ms Karen Gross, *Submission 152*, pp. 2–3 (footnotes omitted).

4 Mr Alex Malley, Chief Executive Officer, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 48.

5 ASIC noted that the civil penalties were extended in 2004 to include bodies corporate, with a maximum penalty for a body corporate of $1 million. ASIC, *Submission 45.2*, p. 169.

6 ASIC, *Submission 45.2*, pp. 169–70.

23.6 To illustrate its concern about the size of penalties available in Australia, ASIC pointed to the fines totalling over $6 billion that JP Morgan received as part of the 'London Whale' trading scandal. These fines consisted of £138 million by the UK FCA; US$200 million by the US SEC; US$200 million by the US Federal Reserve; US$309 million by the US CFPB; and US$300 million by the US Office of the Comptroller of the Currency. However, ASIC advised that under the Corporations Act, the maximum penalty applicable for an offence is $1 million. Further, due to the 'totality principle':

> multiple offences arising out of the same course of conduct will not usually give rise to a substantially greater penalty than a single offence. Accordingly, multiple offences cannot attract remotely comparable civil penalties in Australia, even assuming that the maximum penalty is applied.[7]

23.7 On 20 March 2014, ASIC released a comparison of penalties available to ASIC and those available to its foreign counterparts, other Australian regulators and across the legislation ASIC administers. It concluded that:

- while ASIC's maximum criminal penalties are broadly consistent with those available in other countries, there are significantly higher prison terms in the US, and higher fines in some overseas countries for breaches of continuous disclosure obligations and unlicensed conduct—for example, the fine for individuals for unlicensed conduct in Australia is $34,000, whereas in Hong Kong it is $720,000; in Canada it is $5.25 million; in the United States it is $5.6 million; and in the United Kingdom there is no limit on the maximum fine;[8]
- there is a broader range of civil and administrative penalties in other countries, and the penalties are higher (see Table 23.1);
- the maximum civil penalties available to ASIC are lower than those available to other Australian regulators and are fixed amounts, not multiples of the financial benefits obtained from wrongdoing; and
- across ASIC's regime there are differences between the types and size of penalties for similar wrongdoing (for example, ASIC noted that providing credit without a licence can attract a civil penalty up to ten times greater than the criminal fine for providing financial services without a licence).[9]

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7 ASIC, *Submission 45.2*, p. 170.

8 ASIC, *Penalties for corporate wrongdoing*, Report 387, March 2014, p. 17. The currency conversion to Australian dollars is based on the daily exchange rate published by the RBA as at 31 December 2013.

9 ASIC, 'ASIC reports on penalties for corporate wrongdoing', *Media Release*, no. 14-055, 20 March 2014; ASIC, *Report 387*, pp. 16–17.

Table 23.1: Comparison of civil and administrative penalties for individuals ($AUD)

Country	*Insider trading*	*Market manipulation*	*Disclosure*	*False statements*	*Unlicensed conduct*	*Inappropriate advice*
Australia	Civil: $200,000	Civil: $200,000	Civil: $200,000	–	–	Civil: $200,000
Canada	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million
Hong Kong	Administrative: unlimited	–	Civil: $1.12 million	–	–	Administrative: greater of $1.4 million, or 3 times the benefit gained
United Kingdom	Civil and administrative: unlimited	Civil and administrative: unlimited	Administrative: unlimited	Civil and administrative: unlimited	–	Administrative: unlimited
United States	Civil: 3 times the benefit gained*	Civil: greater of $111,000, or the benefit gained	Civil: greater of $111,000, or the benefit gained	Civil: greater of $111,000, or the benefit gained	Civil: greater of $111,000, or the benefit gained	Administrative: $83,850

Notes:

* For control persons, the maximum non-criminal penalty is the greater of $AUD1.1 million or three times the benefit obtained.

The currency conversion to Australian dollars is based on the daily exchange rate published by the RBA as at 31 December 2013.

Source: ASIC, *Penalties for corporate wrongdoing*, Report 387, March 2014, p. 19.

23.8 In addition to its suggestion that civil penalties be set significantly higher to better reflect the seriousness of breaches, ASIC argued that the penalties should adopt the disgorgement feature of the civil penalties imposed in the UK and the US, where the benefit attributable to the commission of the breach is removed.[10]

23.9 ASIC concluded that a 'stronger' penalty regime would improve the cost-effectiveness of enforcement action by maximising the impact and deterrent effect of such action.[11] However, some witnesses suggested that reputational issues carry more weight than the size of the penalty. For example, the chairman of the Business Law Section of the Law Council of Australia made the following observation:

> It is true that a person weighing up the risks of compliance and non-compliance would be thought to have regard for the size of the penalty. I find with the people I deal with that is not the way they think. The people we tend to be involved with, and there may well be some segmentation, are

10 ASIC, *Submission 45.2*, p. 171. For criminal matters, action can be taken under the *Proceeds of Crime Act 2002*.

11 ASIC, *Submission 45.2*, p. 169.

> more concerned about reputational issues than the size of a penalty. By and large, the vast majority of Australians involved in financial markets and business are trying to do the right thing. I use the example of continuous disclosure by listed companies, which is a very, very difficult area. There are judgements that have to be made, and it is very difficult sometimes to be certain what the right thing to do is because you have to juggle a number of interests—the interests of the investors in having the information but also making sure that the information is clear and understandable.[12]

23.10 The reputational aspect of deterrence was also noted by other witnesses who questioned whether larger financial penalties imposed on corporations would impact the reputation of the entity involved. Professor Justin O'Brien used the JP Morgan case to support his view that only imprisonment provides a deterrent based on reputational consequences:

> …JP Morgan agrees to a settlement with the US regulatory authorities for $13.5 billion; Jamie Dimon gets an 89 per cent pay increase. To what extent did that impact on his reputation? Well, arguably, you can make the point that he deserved that increase in his compensation because he reduced the actual litigation that he might have faced. So even in the United States where you have huge penalties it does not really have a reputational effect; what ends up happening is that it becomes part of the price of settlement, and it privileges what Judge Jed Rakoff, who we brought out to Australia last year, calls 'the facade of enforcement'. So what really will act as a reputational restraining force? The threat of jail.[13]

23.11 Others were not convinced that higher penalties were necessary. Although Professor Baxt acknowledged that there may be specific areas where an increase in penalties could be warranted, he rejected ASIC's call for greater penalties. In his view, ASIC 'is not even trying to get the penalties that it can get under the current law in a sufficiently aggressive and satisfactory way in many of the problem areas that exist'.[14]

Committee view

23.12 It is important that the penalties contained in legislation provide both an effective deterrent to misconduct as well as an adequate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties undermine the regulator's ability to do its job: inadequately low penalties do not encourage compliance and they do not make regulated entities take threats of enforcement action seriously. The committee considers that a compelling case has been made for the penalties currently available for contraventions of the legislation ASIC administers to be reviewed to ensure they are set at appropriate levels. In addition, consideration

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12 Mr John Keeves, Chairman, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 20 February 2014, p. 9.

13 Professor Justin O'Brien, *Proof Committee Hansard*, 19 February 2014, p. 61.

14 Professor Bob Baxt AO, *Proof Committee Hansard*, 21 February 2014, pp. 11, 17.

should be given to designing more responsive monetary penalties, such as multiple of gain penalties or penalties combined with disgorgement.

Recommendation 41

23.13 The committee recommends that the government commission an inquiry into the current criminal and civil penalties available across the legislation ASIC administers. The inquiry should consider:

- **the consistency of criminal penalties, and whether some comparable offences currently attract inconsistent penalties;**
- **the range of civil penalty provisions available in the legislation ASIC administers and whether they are consistent with other civil penalties for corporations; and**
- **the level of civil penalty amounts, and whether the legislation should provide for the removal of any financial benefit.**

Addressing overlaps in jurisdiction and improving the working relationship with other enforcement agencies

23.14 The inquiry's terms of reference directed the committee to consider ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies. To ensure the law enforcement framework works as it should, the working relationships between agencies need to be well-functioning and any overlaps in jurisdiction managed effectively. As the Institute of Chartered Accountants Australia noted, this is an issue that has received some attention:

> In recent years there have been a number of cases where regulatory agencies are seen to lay responsibility for poor regulatory outcomes at the feet of other agencies, rather than being seen to operate as one cohesive group of law enforcement agencies. Effective regulation in today's modern cross-border business environment will require a much greater degree of engagement and collaboration between regulators than has perhaps been the case in the past.

23.15 The ASIC Act[15] and the memorandums of understanding ASIC has entered into with numerous domestic[16] and international[17] agencies provides a legal and

15 Section 127 of the ASIC Act also allows for the sharing of confidential information with the minister and specified government officers or bodies, and allows for the ASIC chairman to authorise information sharing with other Commonwealth agencies or the government or agencies of a state, territory or foreign country.

practical framework for ASIC's working relationship with other regulators and law enforcement agencies. From the evidence the committee has received, it appears that the Australian Federal Police (AFP) is the agency ASIC is most likely to encounter overlaps in jurisdiction with. Mr Chris Savundra of ASIC explained:

> We investigate serious financial crime where it pertains to our jurisdiction, so we are not limited to taking action under the Corporations Act; we can take action under state and federal criminal laws, and we do. Equally, the AFP takes corporations law action, such as insider trading. So, the AFP has previously taken action under the Corporations Act, for both insider trading and breaches of director's duties, and the reason is the difference in the use of powers and that issue we raised on the last occasion around the sharing of information.[18]

23.16 Foreign bribery is one area where ASIC has been subject to scrutiny and criticism regarding both its enforcement of relevant provisions in the Corporations Act and how effectively it works with the AFP. The AFP is responsible for investigating foreign bribery offences,[19] although directors' duties under the Corporations Act can also be relevant. In particular, two of the principles expressed in the Federal Court's Centro decision[20] are pertinent to allegations of foreign bribery. These principles are scepticism (directors must question the information put to them) and accountability

16 ASIC has entered into an MOU with: the Australian Charities and Not-for-profit Commission (June 2013); ACCC (December 2004); AFP (October 2013); APRA (May 2010); ASX (October 2011); ATO (May 2007); Chi-X Australia Pty Limited (October 2011); Clean Energy Regulator (1 June 2012); CDPP (September 1992); Financial Reporting Council (June 2004); Private Health Insurance Administration Council (October 2011); Members of the Council of Financial Regulators (joint MOU agreed to September 2008); and the RBA (March 2002). ASIC is also a party to the MOU on Standard Business Reporting (an MOU between various Commonwealth, state and territory departments and agencies). ASIC, www.asic.gov.au (accessed 19 September 2013).

17 ASIC has entered into a multilateral memorandum of understanding with IOSCO and bilateral agreements with the European Securities and Markets Authority and the securities regulatory agencies, companies registrar and/or auditing oversight bodies of 51 countries and dependent territories. See www.asic.gov.au/asic/ASIC.NSF/byHeadline/OIR%20-%20Memorandum%20of%20Understandings.

18 Mr Chris Savundra, Senior Executive Leader, Markets Enforcement, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 11.

19 The bribery of foreign public officials is made an offence by division 70 of the Commonwealth Criminal Code. As with other offences in the Criminal Code, extensions of criminal responsibility such as attempts to commit an office apply (division 11), as does corporate criminal responsibility (division 12).

20 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291.

and control (an obligation to ensure that systems, protocols and control exist to ensure sound corporate governance).[21]

23.17 Allegations that two subsidiaries of the RBA, Note Printing Australia Limited and Securency International Pty Ltd, engaged in foreign bribery during the 1990s in attempts to secure polymer banknotes contracts have resulted in criminal charges being brought by the AFP against the companies and several employees. In March 2012, ASIC announced that it had decided not to proceed with an investigation into the Note Printing Australia/Securency allegations. It released the following statement:

> The Australian Federal Police (AFP) has provided ASIC with material relating to bribery allegations concerning Securency International Pty Ltd and Note Printing Australia Limited.
>
> ASIC considers a range of factors when deciding to investigate and possibly take enforcement action.
>
> In line with its normal practice, ASIC has reviewed this material from the AFP for possible directors' duty breaches of the Corporations Act and has decided not to proceed to a formal investigation.
>
> ASIC intends to make no further comment on this matter.[22]

23.18 An episode of the ABC's *Four Corners* program broadcast on 30 September 2013, however, suggested that ASIC did not investigate the directors of these companies for corporate misconduct. In its response to *Four Corners*, ASIC stated that its decision not to investigate followed 'a thorough assessment of the information', with 'more than 10,000 pages of documents including several detailed witness statements' reviewed.[23] ASIC subsequently issued a clarification advising that its assessment only related to alleged conduct in Indonesia, Malaysia, Vietnam and Nepal, and that it would consider the Iraq allegations raised in the program. However, ASIC added that 'it must be stressed that a six-year statute of limitations applies to civil penalty cases'.[24] In an October 2013 interview, the ASIC chairman added that the two RBA subsidiaries were propriety companies and that ASIC does not 'normally' pursue contraventions of the Corporations Act that relate to propriety companies:

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21 Greg Medcraft, 'Setting the record straight: ASIC, bribery and enforcement action', Address to the AmCham Business Leaders Lunch, 11 October 2013, www.asic.gov.au (accessed 14 October 2013), p. 4. The third principle expressed in the Centro decision relates to accounting knowledge.

22 ASIC, 'Statement on Securency International and Note Printing Australia', *Media Release*, no. 12-47, 12 March 2012.

23 ASIC, 'ASIC's response to ABC TV's Four Corners' questions', 30 September 2013, http://abc.net.au/4corners/documents/RBA2013/ASIC_response.pdf (accessed 1 October 2013), p. 1.

24 ASIC, 'ASIC clarification – 1 October 2013' www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+clarification+–1+October+2013?openDocument (accessed 2 October 2013).

> Our focus is on listed public companies where in fact, you know, if we see lots of people losing lots of money into retail investors and there is a significant market impact, that is where we give priority, where in fact there is a significant impact on the market or on significantly on retail investors losing a lot of money.[25]

23.19 Another alleged instance of foreign bribery has also recently been a matter of public interest. In February 2012, Leighton Holdings Limited announced that it was aware of possible contraventions of Australian laws relating to payments that may have been made in connection to work on facilities for Iraq's crude oil exports, and that it had alerted the AFP.[26] A series of media articles published in October 2013 alleged that internal documents of Leighton Holdings revealed a corporate culture that resulted in bribery, corruption and cover-up being 'rife' and known to certain directors and senior management.[27] In response, Leighton issued a statement advising that it continues to cooperate with the AFP and that it was 'not aware of any new allegations or instances of breach of our ethics'.[28] The Leighton allegations have resulted in commentators questioning the approach taken by ASIC and how effectively it works with the AFP, particularly given the concerns about this relationship in the context of the Securency/Note Printing Australia matter.[29]

23.20 The Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery conducts a cycle of reviews to monitor and assess the structures established by parties to the OECD Anti-Bribery Convention, such as Australia. The most recent report on Australia was released in October 2012. The Working Group concluded that it had 'serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low' in Australia. It provided the following reasoning:

> Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are on-going. Out of 28 foreign bribery referrals that have been received by the Australian Federal Police (AFP), 21 have been concluded without charges.[30]

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25 Greg Medcraft, *ABC Lateline*, 11 October 2013, www.abc.net.au/lateline/content/2013/s3867665.htm (accessed 14 October 2013).

26 Leighton Holdings, 'Leighton cooperating fully with AFP on possible breach of Code of Ethics', *Media Release*, 13 February 2012.

27 Nick McKenzie and Richard Baker, 'Wal King "approved Iraq bribe"', *Australian Financial Review*, 3 October 2013, p. 1.

28 Leighton Holdings, 'Response to allegations in newspaper articles in Fairfax media', *Media Release*, 3 October 2013, p. 1.

29 See, for example, Malcolm Maiden, 'ASIC must act fast on graft claims', *Sydney Morning Herald*, 4 October 2013, p. 28.

30 OECD, *Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia*, October 2012, www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 4 October 2013), p. 5.

23.21 The OECD Working Group also expressed concern about communication between the AFP and ASIC, suggesting that miscommunication 'may have left important aspects of foreign bribery cases uninvestigated'.[31] It recommended that the AFP and ASIC should develop a clearer written framework that outlines each agencies responsibilities and how the agencies would work together on foreign bribery cases:

> The AFP has MOUs with other agencies (e.g. the CDPP) but not with ASIC that would apply to the referral of foreign bribery cases. At various points in [the] on-site visit, the AFP stated that the Securency/NPA was referred to ASIC because these matters were "better managed by ASIC", that they were "better fit" for ASIC, or that ASIC could obtain "a better outcome". Why referral was "better" was not explained in concrete terms. In any event, these statements by the AFP and ASIC at the on-site visit about case referral and acceptance are not clearly reflected in written policies or agreements between the two bodies.[32]

23.22 The OECD Working Group made recommendations regarding ASIC, noting that ASIC is 'in a prime position to interact with companies that may commit foreign bribery' and that 'its experience and expertise in investigating corporate economic crimes' should be utilised to assist the AFP to prevent, detect and investigate cases of foreign bribery.[33] In a submission to this inquiry, Associate Professor Kath Hall of the Australian National University's Faculty of Law argued that ASIC should take a more active role in corporate corruption, noting that ASIC has stronger powers in relation to directors' duties than the US or UK regulators.[34]

23.23 Since the OECD report, ASIC has signed an MOU with the AFP that addresses investigations of alleged foreign bribery.[35] Also, in a speech given in October 2013, the ASIC chairman responded to concern about ASIC's role in investigating allegations of foreign bribery. The chairman described much of the media reports as being 'ill-informed in describing ASIC's role'[36] and emphasized that ASIC would not act in a way that would jeopardise an AFP criminal investigation. In his speech, the ASIC chairman:

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31 OECD, *Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia*, p. 26. However, ASIC observed that the report did not provide evidence of miscommunication. See Mr Greg Medcraft, ASIC, *Senate Economics Legislation Committee Hansard*, Estimates, 20 November 2013, p. 25.

32 OECD, *Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia*, p. 26.

33 OECD, *Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia*, pp. 5, 20.

34 Dr Kath Hall, *Submission 123*, p. 1.

35 Greg Medcraft, 'Setting the record straight: ASIC, bribery and enforcement action', Address to the AmCham Business Leaders Lunch, 11 October 2013, www.asic.gov.au (accessed 14 October 2013), p. 4.

36 Greg Medcraft, 'Setting the record straight', p. 3.

- stated that directors' duties investigations would ordinarily occur after any criminal investigation given that defendants in prosecutions have a 'right to silence' which is protected by courts delaying any civil proceedings until the criminal case is completed;
- argued that the prison term and fine available under the Criminal Code (along with the automatic ban from being a director that comes with conviction) is a greater deterrent than proceedings initiated under the Corporations Act; and
- noted that parallel investigations are difficult to manage.[37]

23.24 However, Mr Medcraft did outline the circumstances in which ASIC would run a parallel bribery investigation examining alleged breaches of directors' duties. In addition to the factors ordinarily considered when deciding whether to take enforcement action—namely the extent of the harm or loss, the cost versus the regulatory benefit and the available evidence—specific factors ASIC would consider when assessing whether to proceed with a bribery investigation are:

- if there is a risk the six year time limitation for civil proceedings will prevent ASIC bringing proceedings;
- the impact of the conduct on the market and retail investors, including whether the conduct is ongoing or the relevant directors are still on the board;
- if the bribery materially damages the company;
- if the bribery involves a publicly listed company;
- if ASIC's investigation will not adversely impact AFP's criminal investigation; and
- whether ASIC considers that AFP action alone is an appropriate response.[38]

23.25 Mr Medcraft told the committee that in his view, the problem with pursuing foreign bribery cases is not the particular agency that pursues the matter, but obtaining the evidence in the foreign jurisdiction.[39]

37 Greg Medcraft, 'Setting the record straight', p. 5.

38 Greg Medcraft, 'Setting the record straight', p. 6.

39 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 13.

Proposal for a Serious Fraud Office

23.26 One proposal that provoked discussion at the committee's public hearings was the suggestion that a Serious Fraud Office be established in Australia.[40] Serious Fraud Offices exist in the United Kingdom and New Zealand, and it was pointed out that a similar model could be adopted here. Potentially, a Serious Fraud Office could address the overlap in responsibilities between ASIC and the AFP and, given the AFP's priorities in other areas of law enforcement, could ensure that white collar crime cases receive sufficient attention from specialist staff.

23.27 When questioned about the proposal, Mr Greg Tanzer of ASIC identified that an advantage of the Serious Fraud Office model is that resources are quarantined to target a particular activity, instead of an agency with diverse responsibilities being required to prioritise its resources. However, Mr Tanzer suggested that the framework could lead to 'hand offs', where cases are referred between various law enforcement agencies.[41] Mr Medcraft added that establishing another agency creates the risk of fragmentation and that, assuming additional funding is not available, the funding for the new organisation would have to come from the existing agencies such as ASIC.[42] ASIC's preferred model is a whole-of-government response using existing agencies, such as Project Wickenby.[43]

23.28 The potential adverse consequences associated with fragmentation were also addressed by other witnesses. During her appearance before the committee, Professor Dimity Kingsford Smith concentrated on how ASIC's enforcement role can inform its other regulatory tasks:

> Very often a regulator can lead with new policies, new supervision, new focuses, and risk-weighting of which kind of financial organisation needs more scrutiny. That can come from the data they collect from complaints and their experience of enforcement. If there was to be restructuring of ASIC's enforcement activity it would have to be, very carefully, on the basis that the learning that ASIC can obtain from the undertaking of investigations and the execution of enforcement is not lost to them.[44]

23.29 Other academics also mulled over Australia's framework of law enforcement agencies for financial crime. Professor Justin O'Brien acknowledged that there are

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40 Although the proposal was generally not specifically raised in written submissions, in its submission the Governance Institute of Australia presented the committee with a list of several options that could be considered further to increase the efficacy of white collar crime investigations and prosecutions. One of these options was the formation of a separate prosecutorial body dedicated to pursuing white collar crime. Governance Institute of Australia, *Submission 137*, p. 5.

41 Mr Greg Tanzer, Commissioner, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 12.

42 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 13.

43 Mr Chris Savundra, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 39.

44 Professor Dimity Kingsford Smith, *Proof Committee Hansard*, 19 February 2014, p. 57.

examples of protocols that have not been effective, however, in his view there is not necessarily a problem with different agencies having overlapping responsibilities if effective protocols can be developed.[45] He also noted that following the Libor scandal in the UK it has been recognised that the Serious Fraud Office did not have the 'expertise or the competence' in financial markets matters. As a result a process of secondments between the Financial Conduct Authority and the Serious Fraud Office has commenced.[46]

23.30 As this inquiry progressed, the creation of a Serious Fraud Office was also discussed in other forums. In a paper presented in October 2013, Justice Mark Weinburg of the Supreme Court of Victoria's Court of Appeal, and a former Commonwealth Director of Public Prosecutions, expressed his view that the creation of a Serious Fraud Office would be 'an entirely retrograde step':

> The [Serious Fraud Office] both investigates, and prosecutes, cases involving serious or complex fraud, bribery and corruption. Its record in that regard is somewhat mixed. It has always seemed to me to be highly desirable that the investigative and prosecutorial functions be kept entirely separate from each other…My experience as a former Commonwealth Director was that even the most able of investigators could find themselves caught up in the fervour of a case, with which they may have had close involvement for months and perhaps years, and therefore unable to consider objectively the prospects of a successful prosecution. I should add that, in my opinion, prosecutors seldom make good investigators.[47]

Committee view

23.31 The committee is pleased that the AFP and ASIC have entered into a new memorandum of understanding. While these agreements may simply reflect existing arrangements, they promote public confidence by demonstrating that a formal framework designed to foster a sound and cooperative relationship between these agencies now exists, and that both agencies, through the process of developing the memorandum of understanding, have considered how they can work together more effectively.

23.32 Proposals for changing the current institutional framework for investigating and prosecuting certain offences were contemplated by the committee. Such proposals need to be studied carefully: fragmented and unclear arrangements can create further overlaps in jurisdiction and undermine established acceptable principles associated with prosecutions. The creation of a Serious Fraud Office could have some benefits,

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45 Professor Justin O'Brien, *Proof Committee Hansard*, 19 February 2014, p. 56.

46 Professor Justin O'Brien, *Proof Committee Hansard*, 19 February 2014, p. 56.

47 Justice Mark Weinberg, 'Some Recent Developments in Corporate Regulation – ASIC from a Judicial Perspective', Paper presented to the Monash University Law School Commercial CPD Seminar, Melbourne, 16 October 2013, http://assets.justice.vic.gov.au/scv/resources/8ba39daa-0868-4e5f-b9ef-8bd2469ae95a/recentdecorpregcpdseminar.pdf (accessed 15 April 2014), p. 2.

particularly if doing so resulted in a more effective law enforcement response to serious or complex fraud, bribery and corruption. It is evident, however, that even with a Serious Fraud Office appropriate protocols and frameworks for sharing expertise and staff still need to be in place. It appears to the committee that the problems identified with the current framework that relate to the resources and priorities of the existing agencies are not issues that the creation of an additional agency would solve.

23.33 As the committee has been tasked with the examining the performance of one agency, ASIC, the committee is not recommending the establishment of a Serious Fraud Office. This proposal would require the entire law enforcement institutional framework to be considered. Nevertheless, the committee is of the view that there needs to be a shake-up of how complex fraud, bribery and corruption is addressed in Australia. There has been considerable public discussion about the perceived failure of ASIC and the AFP to address such cases effectively. Instead of having a deterrent effect, the committee is concerned that the current arrangements send the wrong message about the likelihood of these cases being pursued. It is essential that the law enforcement framework promotes confidence in Australia's corporate and financial institutions. Australia's growing pool of superannuation savings provides an attractive target for fraud and the amounts involved can be significant: the Trio Capital fraud alone resulted in losses of around $176 million.[48] The current size and likely growth of Australia's financial sector, the importance of this sector to all Australians and the complexity and time-consuming nature of serious fraud and corruption investigations compared to other criminal cases means that it is imperative that the government clearly demonstrates that it has zero tolerance for financial crime.

23.34 The committee urges the government to consider these issues further and, in the interim, to ensure that relevant enforcement agencies, the CDPP and the courts are adequately resourced to meet the community's expectations of law enforcement and to facilitate the swift delivery of justice. The establishment of a Project Wickenby-type multi-agency taskforce might be an ideal start.

48 Treasury, *Review of the Trio Capital Fraud and Assessment of the Regulatory Framework*, 2013, p. 9.