COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## ECONOMICS REFERENCES COMMITTEE

**Australian Securities and Investments Commission investigation and enforcement**

Public

WEDNESDAY, 1 NOVEMBER 2023

CANBERRA

BY AUTHORITY OF THE SENATE

**ECONOMICS REFERENCES COMMITTEE**

**Wednesday, 1 November 2023**

**Members in attendance:** Senators Bragg and Walsh

## Terms of Reference for the Inquiry:

That the following matter be referred to the Economics References Committee for inquiry and report by the last sitting day in June 2024.

The capacity and capability of the Australian Securities and Investments Commission to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct, with particular reference to:

a. the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action;

b. the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;

c. whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement;

d. the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes;

e. the offences from which penalties can be considered and the nature of liability in these offences;

f. the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner;

g. opportunities to reduce duplicative regulation; and

h. any other related matters.

## WITNESSES

**BAIRD, Mr Timothy Joseph, Assistant Secretary, Financial System Division, Department of the Treasury [by video link]**

**LUU, Ms Nghi, Acting First Assistant Secretary, Financial System Division, Department of the Treasury [by video link]**

**PHILP, Mr Brenton, Deputy Secretary, Markets Group, Department of the Treasury [by video link]**

**Committee met at 09:31**

**CHAIR (Senator Bragg):** I declare open this hearing of the Senate Economics References Committee inquiry into ASIC investigation and enforcement. I begin by acknowledging the traditional owners. This committee will be conducting its hearing via videoconference and teleconference. These hearings are public proceedings being streamed live via the internet and with a *Hansard* transcript. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence. Witnesses have the right to be heard in camera.

The Senate has resolved that an officer of a department of the Commonwealth or a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. If a witness objects to answering a question, they should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Commonwealth officers appearing today are reminded of the Senate order specifying the process by which a claim of public interest immunity should be raised. The order will be incorporated into the Hansard.

*The extract read as follows—*

**Public interest immunity claims**

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

*(13 May 2009 J.1941)*

(Extract, Senate Standing Orders)

**CHAIR:** I now welcome representatives of the Treasury. I understand that information on privilege and witness protection has been given to you. I assume you haven't got an opening statement?

**Mr Philp:** No.

**CHAIR:** We'll go straight into questions this morning. I'll ask you about a few matters. Have you been following this inquiry?

**Mr Philp:** We have, yes.

**CHAIR:** So you would know broadly themes this has been focusing on. I want to ask you about a few things today. Do you think that we have a problem with white-collar crime in Australia?

**Mr Philp:** I pause only because I'm trying to think of how to an answer that without expressing an opinion. I think the fact that we had the AFP, most recently, announce a number of arrests when it came to money laundering and the fact that we need an agency like ASIC and the ACCC suggests there are those who are going to take advantage of systems in a white-collar sense, and that there is a need for regulators in this space, yes.

**CHAIR:** Over the last five years do you think there has been more corporate crime in Australia, or less?

**Mr Philp:** I haven't monitored that to suggest whether there's more or less. I'll just ask my colleagues if there's any information we have that we can share on that.

**Ms Luu:** There's nothing additional. I think that issue properly sits with our Market Conduct Division. It's something we may need to look into and get back to on, that question.

**Mr Philp:** We can take on notice whether there are some statistics we can provide that might assist the committee.

**CHAIR:** Sorry. Have we got the right people from Treasury here today?

**Mr Philp:** We weren't provided with any information to suggest what your lines of inquiry might have been.

**CHAIR:** We're doing an inquiry into ASIC—

**Mr Philp:** Yes. We considered the terms of reference yesterday. We were made aware of the committee on Friday. The terms of reference go to ASIC. This group has policy responsibility for ASIC, so we're best placed to answer these questions. The reason Ms Luu mentions the Market Conduct Division is that, when we consider white-collar crime that's not just ASIC, that includes all forms we consider in the Treasury. But we also involve responsibility from the Attorney-General's Department from a criminal sense.

**CHAIR:** I understand the reference is also to conduct in the financial services sense. I understand that. I'm asking you, broadly, about trends that you are seeing as the Treasury department in relation to corporate crime. My second question is: how effective do you think our corporate and financial regulators have been in combating particularly corporate crime in Australia?

**Mr Philp:** So, as to some examples and information to hand—the FRAA, when it considered ASIC, felt they were doing a generally effective and capable role. ASIC has a broad remit and that's with regard to those issues the FRAA was considering at the time. I had the benefit of looking at some of the submissions to this inquiry overnight. I saw, for example, the one from the joint consumer reps suggested that ASIC was doing a reasonable job, but there were some places where they'd suggest around disadvantaged and vulnerable consumers and the like where extra work could be done. I also note, though, that there were some significant arrests by the AFP guided by AUSTRAC, and I believe involving the ATO and ASIC last week when it came to money laundering syndicates.

The reason I hesitate is that, whilst we're not a crime agency of the Treasury, clearly there are significant needs for criminal law enforcement against white-collar or financial crime issues. I don't want to say there is no issue to

be seen here. I don't have in front of me the statistics of it, but I would say, though, that some of the information to hand in front of us says that the regulators we have got are dealing with that with the resources they've got.

**CHAIR:** So, your view is that ASIC is doing a reasonable job when it comes to enforcing the corporate law? The reason I'm asking you is that the Treasury is the department responsible for corporate law. So, the enforcement of the corporate law must be of interest to you?

**Mr Philp:** Yes, it is.

**CHAIR:** The DPP has said that ASIC, in the last financial year, 2022-23, has made half as many referrals as it did just five years ago. So, do you think there's less corporate crime in Australia today?

**Mr Philp:** Like I said, I don't monitor corporate crime statistics. I don't know if I can say there was less of that, and nor can I talk for the CDPP. One thing that could lead to those referrals though is that, as they work up investigations, an investigation at any point in time is somewhere along the spectrum from initial investigation through to referral to the CDPP. Whether that is just a movement of those investigations in the CDPP space or there is something else going on there would be a question for ASIC.

**CHAIR:** We look forward to your answers on notice about whether you think the enforcement mechanisms are effective and whether you think we're heading in the right direction on law enforcement here. As far as I can see, over the last five years, every year ASIC is making fewer and fewer referrals to the Commonwealth DPP. So, the trend appears to be fewer referrals, but my sense of it is that there is no great reduction in corporate crime. In this year alone we've seen a major scandal like PwC emerge. My sense is that there is still a lot of white-collar crime.

**Mr Philp:** As to one thing I would suggest maybe we can look at what we can get on notice to assist the committee—referrals to the CDPP for prosecution of serious criminal conduct are part of the equation. I think the other parts are the extent to which the DDOs, infringement notices and the suite of regulatory tools that ASIC has available to it all go to this general and specific deterrence of conduct in the market that become important about setting those thresholds for what's happening in the marketplace. As I said, we can take that on notice. ASIC is probably best placed to provide a lot of that information, but we can by all means do that and refer that through as well.

**CHAIR:** The reason I'm asking you is you're not conflicted. Your job is to advise the government on corporate law. If I ask ASIC it's like asking them to mark their own homework.

**Mr Philp:** I understand.

**CHAIR:** What about on insider trading? One of the major cases this committee has looked at has been in relation to Nuix, where there were massive allegations and a lot of detail given about some individuals who formerly worked at Nuix and their involvement in a potential insider trading case that was not taken to the DPP by ASIC. Do you think that insider trading laws in the Corporations Act are enforced appropriately in Australia?

**Mr Philp:** I think the laws we have there are appropriate for the problem we're trying to solve with those at the moment. How they're enforced is how ASIC takes those matters forward. We're aware of the Nuix matter. We're monitoring to see how that progresses and what ASIC does next. Again, we're mindful that there are ASIC's independent responsibilities. If there's a concern with that, we're very keen to see particularly the outcome of this inquiry as to whether there are any changes that need to be made that suggest a broader concern that from a policy perspective we need to consider in this sense.

**CHAIR:** That's interesting. So you think there is potential for some improvement here?

**Mr Philp:** No, what I'd say is we're interested to see the report of this committee, and the government will respond to that in due course as to what the problem might look like and the extent of that problem and if there are any policy changes that need to take place. What we have is a policy framework that we administer and then of course there is the how and the enforcement of that, which is the responsibility of ASIC as to how they take that forward.

**CHAIR:** I want to come to a couple of other issues before I hand over the call. What sort of work are you doing on industry levies at the moment in Treasury?

**Mr Baird:** I'm happy to talk to that question. We covered this briefly at Senate estimates. I know that you're aware there was an ASIC funding model review released earlier this year. The implementation of those recommendations is in progress. The recommendations directed to ASIC have been implemented. There are a number of recommendations that require legislation and consultation and they're being currently worked through between ASIC, Treasury and government.

**CHAIR:** Do you think it's reasonable that individual financial planners should see their levy go from $1,200 to almost $3,500 in one year?

**Mr Baird:** As you're aware, the previous government had in place a temporary levy relief during the financial years 2020-21 and 2021-22. That relief was always intended to be temporary. The costs imposed in that period were significantly less than what they would have otherwise been in that period. For example—

**CHAIR:** I understand that, but what's the answer? Do you think it's reasonable or not?

**Mr Baird:** The principle of the IFM is that the sectors that caused the need for regulation should cover the cost of that regulation, and that's the principle that's been applied here. During that period of levy relief there was a $46 million shortfall in funding due to that relief below what the costs of enforcing and regulating that sector were.

**CHAIR:** So Treasury recommended to stop the relief for this financial year?

**Mr Baird:** That was considered by the IFM review and that was the recommendation.

**CHAIR:** That was the advice. Finally, we talked about these FRAA issues last week at estimates. How much is the government going to save from cutting the reviews from two to five years?

**Mr Baird:** I don't have the figures in front of me. I'll have to take that on notice in terms of the dollar savings.

**CHAIR:** What are the current resourcing arrangements for the FRAA?

**Mr Baird:** The panel ended their terms at the end of June after the delivery of the APRA review. There is a small amount of funding—and I don't have the dollar figure in front of me—allocated to Treasury to monitor the implementation of the two reviews, and some money for the capability within Treasury ahead of the future reviews recommencing and a new panel being appointed.

**CHAIR:** What's it doing now, anything?

**Mr Baird:** We have regular engagement with the regulators, ASIC and APRA, the two that have been subject to prior reviews. There will be work done to monitor the progress of the implementation.

**CHAIR:** My last question to you is: what's the FRAA doing now? Is it doing anything or nothing?

**Mr Baird:** The FRAA itself is not currently constituted, but there are people in Treasury who will monitor the progress of the implementation of the recommendations.

**Mr Philp:** There's a small secretariat that's maintained within Treasury, as Mr Baird is saying, to monitor the implementation of the FRAA report. We'll reconstitute the FRAA as a body for the next set of reviews.

**CHAIR:** Senator Walsh.

**Senator WALSH:** Is the arrangement between the FRAA and the Treasury essentially that the Treasury just provides sort of an appropriate amount of secretariat services to the FRAA dependent on where they are at in their review cycle?

**Mr Philp:** Yes.

**Senator WALSH:** You mentioned that Treasury is maintaining a small number of people to monitor implementation of the reviews. There was the review in 2022, last year, into ASIC, the effectiveness and capability review. That found that FRAA considers ASIC is generally effective and capable in the areas reviewed, although there are important opportunities to enhance its performance, and it outlined a few areas for improvement including data and tech, stakeholder engagement and communication. Are you in a position to tell us whether you're monitoring ASIC's response to that report and what you're seeing in terms of monitoring ASIC's response to that report?

**Mr Baird:** Yes, we are monitoring those recommendations and the implementation, and it's fair to say there is some progress being made on those recommendations. In terms of specifics, we can take that on notice in terms of how much detail we can provide to the committee, but there is work underway to implement those recommendations.

**Senator WALSH:** Is there anything formal that is as a matter of course provided by the Treasury in its secretariat role or FRAA itself in terms of monitoring ongoing that we could expect to see publicly?

**Mr Baird:** There's nothing in the public domain at the moment, but we can take on notice what we can provide to the committee.

**Senator WALSH:** I just meant in terms of the process of how the FRAA works with secretariat support with Treasury and how the reporting cycle works. A report is given and then there's not necessarily an implementation review that is made public.

**Mr Baird:** Yes. What we would expect as part of the future FRAA reviews is they would include a component of looking back at the prior review and implementation as part of that next ASIC review. We would expect there would be a component in the report covering that, but in the intervening period the Treasury secretariat is engaging with ASIC on the implementation of those recommendations. One thing to note would be on the organisational side. The organisational restructure has recently occurred, and there is work underway on the digital recommendation as well.

**Senator WALSH:** Yes. For the purposes of understanding what information we can get for this inquiry—for example, is the July restructure something that Treasury would be looking at or able to provide us with any information or perspective on as to how it's progressing, or is that really only a role for ASIC to talk to us about?

**Mr Philp:** I think that's really a matter for ASIC. The government and Treasury are quite concerned to ensure that ASIC can achieve its goals in the marketplace. How it goes about those is really a matter for ASIC, including its structure and the employment of its resources to those areas of greatest priority, greatest harm and most significant market disruption. If that's not occurring, we'd expect we would be having a conversation with ASIC about that and briefing accordingly.

**Senator WALSH:** In terms of the change to the cycle of regulator reviews, do we know what that means for when we could expect the next review of ASIC?

**Mr Baird:** Yes, we expect the next ASIC review would occur in the 2026-27 financial year.

**CHAIR:** We look forward to your answers to questions on notice.

**BISHOP, Mr Mark, Head of Strategy and Public Affairs, Transparency Task Force [by video link]**

[09:54]

**CHAIR:** We will now move on to our next witness, Mr Mark Bishop. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Do you have an opening statement?

**Mr Bishop:** I do. I'm a consumer advocate in financial services of some 11 years standing, a British citizen living in the United Kingdom. I work on a voluntary basis for a certified social enterprise called Transparency Task Force based in the UK but with members in many countries, including Australia. My role focuses on strategy, public affairs and campaigning. I've given written and verbal evidence to UK parliamentary committee inquiries and worked closely with British parliamentarians, including by serving on the secretariat of the All-Party Parliamentary Group on Personal Banking and Fairer Financial Services. This APPG is currently producing a report on its recent call for evidence about the FCA, a project in which I've been heavily involved. I'm able to provide evidence and opinion about the arrangements for financial services conduct regulation in the UK, which is delivered principally by the Financial Conduct Authority, the FCA. This includes insights into recent changes introduced in the Financial Services and Markets Act 2023, measures lobbied for but not taken forward, and my and other consumer advocates' perceptions of the strengths and weaknesses of the UK regime.

My view, broadly speaking, is that while the FCA employs some capable individuals and some who are strongly motivated to do their best for consumers who use financial services, overall the organisation is not an exemplar of best practice that I would suggest Australia should emulate. In the past three years alone it's been the subject of four highly critical external reviews. I believe that, several times, a number of cases crystallised during this period that were at least as deserving of such scrutiny but haven't yet had it.

The FCA announced a big transformation program in response to the first two of the external reviews involving significant investment in data and IT, improved staff training in its contact centre and enhancing attention to whistleblowers. At this stage, evidence about its success or otherwise is mixed.

Unfortunately I don't have any significant expertise about ASIC itself or other aspects of the current financial services regulatory landscape in Australia. However, I'm pleased to help in any way I can with insights on any non-ASIC-specific aspects of the questions in the inquiry's terms of reference, the comparative review of regulation and, more widely, what financial conduct legislation and regulation my work leads me to believe is effective and what is not from a consumer perspective.

Finally, I believe that good regulation is not a zero sum game. Improving consumer protections also benefits the honest majority of financial service firms by raising levels of trust and confidence in the industry. The only people who have anything to fear from it are the industry's bad actors and, sadly, they're the ones who can often afford the expensive lawyers and lobbyists.

**CHAIR:** I might get you to talk to us about the UK regulatory restructure. How does it work in the UK? My understanding is there's a companies and securities regulator and a separate conduct regulator; is that right?

**Mr Bishop:** Not really. The Financial Conduct Authority is two things. It's a conduct regulator for all of the firms it oversees, but it also is a prudential regulator for about 97 per cent of the firms that it's responsible for. There's a myth widely circulating that the UK has moved to twin peaks regulation. This is true of banks, and also systemically important insurers, but it's not true of the majority of authorised firms. Of the 50,000 authorised firms, only 1,500 of them are dual regulated, which means that the Prudential Regulation Authority looks after their prudential regulation. So there is a bit of a misconception about that. There are also some things that are done I think by ASIC in Australia that are not the responsibility of the FCA. So, the FCA in the UK is really only responsible for what authorised financial services businesses do and, therefore, it's not responsible for other matters of corporate governance. For example, things to do with Companies House, which is a register of companies—I think this actually belongs to our business department. Matters to do with tax, for example—I've read about the PwC scandal. That would probably be something for HMRC, His Majesty's Revenue and Customs, in the UK.

**CHAIR:** How do you think that has worked in the UK? Has the FCA been an effective regulator in terms of companies or in terms of the financial service businesses?

**Mr Bishop:** In terms of financial services businesses, I mentioned in my introduction there have been four external reviews of the regulator in the last three years, and all of them were very critical. I think that probably a dozen more cases could have gone to review and the outcomes would have been pretty similar or worse. I think it struggles for a number of reasons. Really one of the messages I wanted to deliver to you today, based on having read the terms of reference of this exercise, is that one of the things that I think can happen in financial regulation

is that organisations are asked to do things that are complicated—not just complicated because they're difficult, but because there are many things they're being asked to do at once, and within those things there are challenges about prioritisation of time and resource, and also conflicts of interest. To give a really small example, is it necessarily the right thing—we certainly have this in the UK and you may have it in Australia—that a conduct regulator also provides prudential regulation for many of the firms? If the conduct of a firm is bad, and the consequence is that it has to, for example, pay redress to its customers, it might have some of its permissions removed or it might be fined, and suddenly it will become insolvent or at least financially be in some jeopardy. That's a problem for a prudential regulator. If those people are working in the same building, there is an automatic and intrinsic tension between the two.

That's one of the reasons in 2012 the UK legislated to separate out those functions for the big banks and insurers, but it didn't do it for the rest of the market. I wonder whether it might need to do so in the future. Our regulator as well, the FCA, has a competition mandate. It's supposed to make sure that there are no trusts or so on forming; that there is genuine price equality, innovation and competition going on. But it shares that responsibility with the Competition and Markets Authority, another regulator. This can lead to underlaps and overlaps. I think one of the messages I wanted to give you is that it's a good thing for regulators to have a single and clear focus. Giving them multiple things to do creates opportunities for things to slip.

**CHAIR:** We're looking at what will be the best structure going forward. Is it your view that the FCA in the UK is the right remit or is that doing too many things?

**Mr Bishop:** I think it's doing too many things.

**CHAIR:** What things do you think it's doing that it shouldn't be?

**Mr Bishop:** I don't think it should be both a conduct regulator and a prudential one, for example. I think competition regulation should go wholly to the Competition and Markets Authority and shouldn't be shared.

**CHAIR:** Anything else?

**Mr Bishop:** Those are probably the main things. Therefore, effectively, what I would be suggesting is it would become a standalone conduct regulator and do nothing else but conduct regulation. The great beauty of that is that, if conduct is bad, then it's the fault of the conduct regulator ultimately. Of course, initially it's the fault of the firm. But if the misconduct isn't remedied quickly it becomes the fault of the regulator.

**CHAIR:** Your view is that if it has a singular focus on conduct [inaudible] law enforcement, that is the appropriate approach? Do you measure its effectiveness in terms of its capacity to achieve prosecutions?

**Mr Bishop:** I suppose there are two ways of doing this. You can measure the number of prosecutions or you could measure the amount of consumer detriment caused by misconduct. Personally I'd prefer to do the latter, because otherwise there's a risk of a perverse incentive, which is the regulator might allow large amounts of misconduct to get started and then stop them very quickly by prosecuting. I'd much rather that the fire didn't start than that the fire brigade was good at putting it out. I should say as well that there is another complexity. When you asked me about conflicts of interest and multiple remits for a regulator, the Financial Conduct Authority has recently been given a new additional secondary responsibility, which is to effectively promote the industry's international growth and competitiveness. This also is probably something that shouldn't sit with the regulator. If you want to promote your industry you probably don't want to talk too loudly about things that go wrong in it. That might be a conflict of interest for a conduct regulator. I'd also suggest that's another area where perhaps that should belong to the business department.

**CHAIR:** Are there any particularly good models you've seen around the world where they have a finely calibrated regulator?

**Mr Bishop:** No regulation is perfect, but I think there's a lot to be said for the United States. The Consumer Financial Protection Bureau is a good thing. I'd like to see something like that in the United Kingdom. In fact, we've proposed a transparency Task Force that there should be something created that sits somewhere between the CFPB and your FRAA. So it would be a body that would represent consumer interests and keep the regulators honest, and it would also make some of the appointments in the governance structure. Something like that would be a useful thing to see because the industry speaks quite loudly in the ears of regulators and Treasury officials. It's a nice counterweight. I also think the SEC has a lot going for it. Its treatment of whistleblowers and their evidence, in my view, is streets ahead of anything we have in the UK. Protecting whistleblowers, perhaps also rewarding them, is important. I also think there is something to be welcomed about the way that the SEC's approach to regulation is quite muscular in respect of individuals. Basically they go on a perp walk. If they're guilty they go to prison for a very long time.

I've often thought that's better than the approach we have in the UK, which broadly speaking is to fine the firm. Fining the firm, of course, creates a number of problems. The first one is that it makes a firm less solvent, which creates a prudential risk. The second is it sends out a signal to shareholders and if it's a large firm, particularly a listed firm, the shareholders are not the perpetrators. They're not guilty. They didn't know it was going on. They weren't in a position to stop it. But, if you fined them, they may become disinclined to want to be shareholders in the future.

If the firm, for example, requires recapitalisation because of the costs of the misconduct, those shareholders may be reluctant to put their hands in their pockets. So, that's a perverse incentive. Also, it signals to the perpetrators, 'We've got your backs. We're not going to put you in jail or fine you. We're actually just going to go after the shareholders.' It's displacement activity. So, yes, I think there's a lot to be said for the US approach. It's not perfect, but it's a step in the right direction.

**CHAIR:** There's no doubt in Australia that whistleblowers are treated terribly and we'll be looking very closely in that area. Is there anything you could provide us on notice about a good way to legislate protection and support for whistleblowers?

**Mr Bishop:** Yes. In the UK there is an organisation called Whistleblowers UK, and it has made repeated attempts to get legislation through parliament to create what it calls an office of the whistleblower. The idea of this office is that it would be a statutory body that could be notified by whistleblowers and would basically then make sure they were treated well by the employer or by regulators. At the moment that often isn't the case. Certainly one of the things that was a common thread in two of the four external reviews, as I mentioned, of the FCA is appalling treatment of whistleblowers and their evidence—really appalling. One of them, for example, was publicly outed by a statement by the regulator, and that was the end of his career. Ignoring whistleblower evidence, and having fights effectively with whistleblowers sometimes even in court to try to shut them up—it's really quite abysmal.

I think we have a cultural problem here. The work of Geert Hofstede talks about cultural difference around the world. We in our Anglo-Saxon culture are not quite sure what our view is about whistleblowers. Some people will say, 'Actually we really like the plucky individual who stands up against the big corporation, but we also like the idea of taking one for the team and sticking by your mates.' Therefore, I think in these Anglo-Saxon societies we are quite divided in our treatment of whistleblowers. Personally I'd like to see cultural leadership from regulators and from lawmakers to improve it.

**CHAIR:** In Australia the parliament would be very supportive of whistleblowers. Because whistleblowers are calling out the right thing and taking a risk to do the right thing. I think the sense is that the regulator in particular has not protected and looked after them or even taken them seriously. So, we'll be looking at that. We would be grateful if you could provide us with as much information on notice about a model whistleblower code or law that we could take into our consideration as we draft our report.

**Mr Bishop:** Of course. I'd be pleased to do so.

**CHAIR:** We thank you for your time and evidence today. We now invite you to disconnect from the videoconference.

**D'ALOISIO, Mr Anthony Michael (Tony), Private capacity [by video link]**

[10:15]

**CHAIR:** I now welcome Mr Anthony D'Aloisio. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you.

**Mr D'Aloisio:** I'm Anthony D'Aloisio. I'm appearing at the request of the chair in terms of my experience as a former ASIC chairman, if I can assist the committee. In terms of background, I was chair for four years from May 2007 to May 2012—12 years ago. My experience would need to be looked at in that light. At the time I served, the commission had six members, including myself, Peter Boxall, the late Michael Dwyer, Belinda Gibson, Greg Medcraft and Shane Tregillis.

**CHAIR:** Do you have an opening statement or any opening comments?

**Mr D'Aloisio:** No, I don't. As I said, I'm here at your request to talk about twin peaks and other financial regulation, which I'm happy to take questions on and discuss in the context of how I can help the committee, bearing in mind that it is some time ago.

**CHAIR:** I guess the main questions that I have relate to the purview ASIC has had during your time as chair. My main opening question for you is: was the mandate of ASIC expanded when you were the chair?

**Mr D'Aloisio:** Yes.

**CHAIR:** What were the additional things you were asked to take care of?

**Mr D'Aloisio:** By way of background, I was chair during the GFC. So probably in a sense we were able to see how a regulatory system and approach was tested by those events. As the role developed, I think the twin peaks model we operated under with APRA on prudential and ASIC on the regulatory and conduct side, with the Reserve Bank and with liaison groups for coordinating those three bodies and Treasury, all really worked well. That period really did see the regulatory system tested. As to things that came out of the GFC—from memory, there were additional things. For example, the listed markets worked very well, even during the GFC, notwithstanding that money was lost. The unlisted markets didn't work as well, and there was mortgage debentures and a number of other products that didn't work for retail investors, which were through disclosure and other things probably not allowed anymore. I'd have to go back to check the specifics, but the remit did increase. But it increased in the context of the basic philosophy. With the twin peaks model the basic philosophy was that you let the markets operate and you rely on disclosure and symmetry of information more than you do on preventing or prohibiting and products. So, allow the market to operate. ASIC's role was really one of being the policeman, and that carried with it strong enforcement actions, recovering money—a number of things which we can go into. Basically in answer to your question, the basic system that we had, the twin peaks model, worked well during that period. When it was compared with what was happening in the UK, as an example, which had what was called a light-touch regulation, you saw those countries moving towards adopting the Australian model. The Australian model had come out of the HIH and other losses in the early 1990s, and was quite a robust model that was seen to be that by Canada, by then the UK and also I think South Africa and other countries that adopted it.

**CHAIR:** In terms of the remit and mandate of ASIC, do you have any views on the size of the mandate? Do you think it's about right or do you think it's doing too many things?

**Mr D'Aloisio:** At the time I was there, two issues always created tension. One was when legislation was passed and ASIC was given the remit the legislation wasn't as clear or directional. The legislation was passed, ASIC was given a mandate and it did take time for ASIC to really assess what the policy was and what was being done. That could cause frustrations. The other more important limitation, which is inherent in the philosophy, is that particularly with retail investors and particularly with consumer, losing money is not something they want to do. But implicit in the system is risk, significant risk, that investors and others need to take.

A number of times you did get the feeling that ASIC was seen as a guarantor of last resort that had to actually stop losses occurring, which is not the way the regulatory system is designed. The example I use is it's designed as a system of highways with ASIC as the policeman. As to ASIC's role—if there's an accident, it goes in, cleans it up, takes action, et cetera. It also keeps surveillance of the roads and the exits and entries. Sometimes it can prohibit products. But generally it's operating in the context of a market that is based on disclosure, openness and competition. You see it work at its best, that market, in the listed markets, with the reputation Australia has in the listed markets. It doesn't work as well in the unlisted markets, and that's a function of both policy and consumer understanding of risk when it comes to investing. An example in my time was Storm Financial. Storm Financial involved margin loans at a time when the markets were increasing in value, and the marginal lending looked very

good. There was big coverage in terms of the equity of the investors. But what happened is the market, with the GFC, dropped 30 per cent to 40 per cent, and a lot of that equity was wiped out. Now, that was an example where the markets operated in a way that was really difficult for anyone to really foresee that type of drop. That having happened, ASIC's function turned to enforcement but it also turned to recovering money where it felt that in the promotion of those products the rules hadn't been adhered to, and through a series of actions I think there was a recovery of $200 million or $300 million for those investors. That's an example of how the markets operate not always in a predictable way, and when that happens losses can occur. Unless the government wants ASIC, from a policy point of view, as a guarantor of last resort, then you're going to have these risks in the system and you're going to have pressure as there was on me as Chairman and on ASIC, 'Why isn't it doing enough? Why hasn't it done this? Why hasn't it done that?' That pressure is there, built into the system, I think. I'm not suggesting that I got everything right as Chairman, but I did feel there's a mismatch between taking risk and the consequence of losing money and making money.

**CHAIR:** What about in relation to law enforcement? How do you think ASIC has gone in enforcing the law?

**Mr D'Aloisio:** When you go back to the twin peaks model that I talked about and the regulatory philosophy that sits in it, what I found were the three or four main things that I felt, my commission felt, we needed to focus on. The first of those was strong enforcement action as a deterrence. Here in my time as Chair the major actions that we took were James Hardie, Centro, Fortescue, Chartwell, Opes Prime, and we took a number of insider trading and market manipulation actions. Those actions weren't always successful, but the point was that even though litigation is at best 50-50 in terms of when you look at success rates, if anything goes wrong it was that we'd maximised the ability of investors to recover their money, as I talked about earlier.

That also put obligations on us to intervene and protect the public market. A good example of that was the short selling ban that we put on at that time. So, your role as the regulator is strong enforcement, as we approach it, really looking at misconduct and recovering, and intervening where you felt that an intervention was required in the market, as I said, with rumourtrage and short selling.

**CHAIR:** I don't think I have any additional questions other than just confirming: you don't think there's any issue with the size of the mandate? You think the mandate is reasonable?

**Mr D'Aloisio:** I think as to the mandate that we had—and I know it's probably been expanded further—there is a debate I assume going on as there was in my time about whether it was too big and whether sections of it should be separated. There were suggestions of separating out enforcement or separating out the consumer finance part and linking that with ACCC's consumer function. I think they're policy matters to be explored. Provided we had the resources, I didn't see that as a problem in my time that needed to be separated. A good example of resources I should mention is in the enforcement space. In the enforcement space, because major litigation is unpredictable in terms of size, there's a special fund that we were able to draw on so that we weren't deterred from taking on big cases. So, resourcing ASIC properly is really a key part of the mandate that it has. If ASIC had greater clarity on what the government/parliament wanted it to do when it enacted legislation and had access to funds in addition to its usual budget where it had to investigate and do things, I think that would go a long way to helping with the size of the remit it has. But it's very difficult. At one time I had thought about talking to government about separating out the financial and consumer area, but I didn't press that.

**CHAIR:** Senator Walsh.

**Senator WALSH:** I want to pick up on what you're saying there about the role of strategic enforcement action for deterrence. I'd ask you to reflect on what it is possible for ASIC to realistically achieve. I think there are community expectations that every time someone breaks corporate law and every time there's a victim of that ASIC should have done something to prevent it or should be able to fix it. What do you think are reasonable community expectations and where does the role of deterrence sit in that?

**Mr D'Aloisio:** It's quite clear that from a resourcing point of view there have to be priorities, because you just don't have the resources to pursue every single action. It's up to the commission chair of the time to really work it out. Because we were coming through the GFC and because of what had been going on in the market, the enforcement actions involving, in the case of Centro, directors and accounts, in the case of Fortescue, potential insider trading and, in the case of James Hardie, directors duties and so on were, in our view at the time, important actions that reinforced the need for improved market behaviour. There were also a substantial number of lesser actions going on that also acted as deterrents in small and small-medium businesses, and there are hundreds of those that ASIC would have in any given year. In terms of priorities and pursuing them, I think we were mindful, but in the community—particularly when money is lost—the initial reaction is, 'Why wasn't ASIC there?' Then that becomes a very significant media event as well, because it's quite easy to write stories about what someone should have done as opposed to what was going on.

As ASIC chair, I recognised all of that. We had to do our job and answer those queries when we received them. We got it and dealt with the community as it existed. But sometimes it's just not a fair criticism of ASIC, and it has to be dealt with case by case by the chairman at the time.

**Senator WALSH:** As the chairman, you have to set those strategic priorities to try to get the best deterrent impact on what you do. Is it a realistic expectation for every regulated entity to be following every aspect of corporate law every moment of the day? Obviously, that's what we should all expect.

**Mr D'Aloisio:** Yes, that's right.

**Senator WALSH:** I'm going to that point you were making about whether the regulator can have a realistic goal of that being the case or whether it needs to, as you've said, prioritise.

**Mr D'Aloisio:** I think there's no option but to prioritise, because the money and the resources aren't going to be there to do that. I looked at the SEC. I looked at the FSA. I had connections with Canadian authorities and so on. I looked at those as examples and I think that in some respects we were doing far more in the enforcement area than was being done in the UK, for example. That gave me a feeling that we probably had our priorities right and that we were concentrating on the things that mattered. If government were to give ASIC unlimited resources—or double its budget or whatever—it could pursue a lot of other actions, if they're there, but I'm not sure that would be wise from a public benefit point of view. What really matters is, overall, when you look at the Australian markets and the Australian regulatory system and the work that APRA, the Reserve Bank and ASIC does—going back to my time there—there is no question that we have markets of very high international reputation and people want to come here to invest. We're not a basket case in any sense. We've got a regulatory system that's highly respected and supported through investment, which is the key. I totally accept that there will be situations where retail investors, mums and dads and even wholesale investors won't be happy when something happens and they will expect that ASIC to take action, and in some cases they'll say that ASIC should have acted earlier. They're case-by-case things. There's no general rule about that. As for ASIC itself, the men and women in ASIC were really dedicated. They were dedicated people wanting to serve the public interest.

**Senator WALSH:** One question that's come up in the inquiry is the relationship between ASIC and some of the professional associations representing regulated entities like liquidators and financial advisers and so on. What they've told us is that they think that when they see a problem in their own profession they should have some sort of dedicated pathway to raise that problem from the supervision side into the enforcement side of ASIC, and that those bridges should be more effective. Do you have any reflections on that that might help us?

**Mr D'Aloisio:** I'm terribly sorry, but you broke up quite significantly. Is it possible to repeat that question?

**Senator WALSH:** We had evidence from some of the professional associations that when they see problems in their own professions there should be a streamlined way they can raise those from the supervision side of ASIC into the enforcement side. Do you have any reflections that might help us there on the best way to work with those industry associations?

**Mr D'Aloisio:** In my time as chair, I worked with the industry associations, in the sense that I would outline what ASIC was doing and they would outline what they were doing. But I'd be concerned about a connection between a professional association and the chairman or the commissioners of ASIC in any formal sense. The key with ASIC is it has to be fully and totally independent. It should have the discretion to consult with whomever it might want, either in consultation or by order, to require information. I'm sorry if I've misunderstood the question, but I don't see a role for professional bodies to have any greater right than any other individual has to raise issues with ASIC and for ASIC to investigate. In my time I would not have pursued that level of connection between a professional association or industry group and ASIC. I would remain always at arm's length.

**Senator WALSH:** That is very useful evidence, actually, because we've had consistent advice from people like the Insolvency and Turnaround Association and, I think, the Financial Advice Association that they see misconduct that is happening that they think ASIC should look at. I think what you're saying is that there is a potential conflict between ASIC's role in enforcement and their role in supervision of those professionals?

**Mr D'Aloisio:** I think those roles need to be quite separate. It's totally open for anyone to provide any information to ASIC either confidentially or however, and ASIC then assesses that and acts on it. There's no issue there. As to a formal relationship between an industry body and ASIC—going back to my time; it's a matter for the current chairman—I wouldn't readily go with that myself. For me, independence is the absolutely critical point. No fear or favour, and the chairman represents that as chair of that body.

**Senator WALSH:** That's really useful. Finally, given the way in which it's set up today and with the volume of complaints and referrals that ASIC gets—there are thousands and thousands a year of them—people have described to us getting a bit lost in the portal. They make their complaints and then they're unsure what's being

followed up on and what's not being followed up. Again, the industry associations have said they think that when they make their referrals or complaints or alerts there should be some sort of special place in the portal, if you like. Again, your advice for us to consider is that there should be no special streams for these sorts of alerts or reports to go to.

**Mr D'Aloisio:** Obviously, I might be out of touch in a sense. It's been a while. As chair I totally would want people to come forward and give information, and I would look at it. That would be as far as I would go. Certainly, there's information that would be given to you confidentially. There's information that's given to you openly. There's information that's given to you that could actually lead to self-incrimination. There are a lot of ways a body gets information. It has to be really careful on how it assesses that. It has to act without fear or favour and it has to be independent. If it meets those tests, I'd be happy to look at it; otherwise I'm not sure that I'd elevate any particular body in any particular way.

**Senator WALSH:** That's really useful advice and I think we also appreciate that you've been very clear that you're talking about your time at ASIC and not seeking to give advice to the current chair. We appreciate that very much.

**CHAIR:** Thank you for your time today.

**BERNARDE, Mr Gabriel, Private capacity**

**LUCARELLI, Mr Domenic, Private capacity**

[10:44]

**CHAIR:** We will now move on to our next witness, Mr Gabriel Bernarde, and his legal representative. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Do you have a short opening statement?

**Mr Bernarde:** Yes, I have an opening statement. By way of background, I co-founded investor research agency Viceroy Research anonymously in 2017 when I was 22 years old. At Viceroy we worked extremely hard to uncover fraud, fads and failures in public markets. Our reputation and track record for uncovering fraud is exceptional. Market values of frauds identified by Viceroy exceed US$100 billion. After we've done the hard yards of meticulously researching a subject company, Viceroy sometimes takes a financial position against that business. Sometimes this research and the resulting positions we take have a handsome reward. Other times they do not, despite our successes in identifying frauds.

Our work has resulted in Russian government spies being placed on Interpol's most wanted list, and you can see their faces on posters at airports. We've helped thwart money-laundering channels, dangerous medical trials, illegal drug operations, loan sharks, Ponzi schemes and put those responsible behind bars. On stats alone I believe our team of three has vastly outperformed ASIC in cleaning up public frauds in public financial markets over the last six years.

Because of our work, I, my team and our families have been doxed, sued, stalked, harassed and physically threatened by those companies, their shareholders, private investigators and members of organised crime. Viceroy has been consistent in providing regulators access to our investigation findings prior to publishing them freely for all through our website.

We enjoy a cordial, cooperative and transparent relationship with most global financial regulators, and for reasons beyond my comprehension ASIC is a rare and unexpected exemption. This is despite best efforts from Viceroy's end. Some notable investigations by our team include Wirecard, Grenke and Tyro. Wirecard is the largest and most well-documented financial fraud in German history. My colleagues and I were put under constant surveillance, including in our own homes, by former Libyan intelligence hired by Wirecard to spy on us for our whistleblowing efforts. Grenke was a German financing company who financed dozens of fraudulent Ponzi-like schemes in Australia which were never investigated by Australian regulators. As a direct result of our findings the entire board was fired, the auditors quit and the company has been placed under effective curatorship by BaFin, the German regulator. Finally, I reported to ASIC and to the Australian markets that Tyro had bricked a large web of their payment terminals and had neglected to inform the market for several days, which led to several weeks. My stories of dealing with ASIC are extremely alarming.

On the morning of 5 August 2021, six armed Federal Police officers wearing ballistic vests stormed my apartment. Had my fiancee not been leaving the apartment to go for a morning walk and by chance opened the door and encountered the officers, I have no doubt they would have used the battering ram they carried to knock my door clean off its hinges.

I was frisked, despite still being in bed, and presented with a warrant which outlined I was being investigated for insider trading stocks of these companies. These companies were the very same companies Viceroy had whistleblown on to regulators, including Wirecard, Grenke and Tyro. In Tyro's case, Viceroy had directly whistleblown to ASIC.

During the execution of the search warrants, ASIC explicitly searched for and purposely took copies of Viceroy's entire cloud drive and my personal computer, and my phones were also physically seized. With all of my and Viceroy's information in their possession, ASIC chose to compel me to attend a compulsory section 19 interview, where I was forced to answer all questions put to me.

Prior to the interview I was also informed that this section 19 interview carried a gag order of 12 months. Mere weeks after receiving my data, and a forced section 19 interview, ASIC sent a 'no further action' letter to my lawyer. That was almost two years ago. My lawyer has for the last two years engaged in correspondence with ASIC to determine whether or not ASIC has destroyed all my data it took forcefully from my home in 2021. This is despite my never being charged with any crime, nor being under any active investigation by ASIC.

To conduct an armed raid on the homes of innocent financial analysts, market pundits or whistleblowers who raise questions of financial market fraud is harassment. To place those innocent individuals under gag orders for long periods while playing ducks and drakes about whether ASIC retains private data which they seized during

armed raids is an egregious abuse of power, and clear evidence, I feel, of gross misjudgement or corruption at ASIC as Australia's market regulator.

My experience of global financial regulators is that rarely if ever do financial regulators act in a timely manner which protects the interests of all innocent stakeholders of fraudulent businesses. However, most regulators will accept that the market will regulate itself and allow the regulator to deliver justice to bad actors.

ASIC takes a borderline Orwellian approach to protecting public markets, which is to say that it silences critics with threats, allows frauds to fester and creates a perception of safety in our markets. I can say this confidently because I know I'm not the only private citizen, fund manager or research house that has been harassed by ASIC under the guise of regulatory investigation. There are many others, and some likely do not feel they have the courage to speak out about these ills for fear of further reprisal from ASIC at an unknown time in the future.

I put it to you that there's a very real possibility that ASIC is incapable of identifying and prosecuting or unwilling to identify and prosecute—or a dangerous mix of both—corporate financial crime in Australia to any satisfactory degree. It further appears they're either intentionally or ignorantly treating whistleblowers as criminals. At best, ASIC is an incompetent regulator of public financial markets. At worst, I believe ASIC is a captured regulator. Thank you for your time.

**CHAIR:** My main question is: were you involved in insider trading in any of these companies about which ASIC was making allegations?

**Mr Bernarde:** No, I was not. The companies about which ASIC made allegations of insider trading—three were very public campaigns where we identified fraud at these companies, and that's publicly available on our website. The remaining companies appear to be randomly picked trades from a CFD account, most of which were trades I received from a public stock tip website run by a former *FT* editor called Ben Harrington.

**CHAIR:** Did ASIC serve you with any charges in relation to insider trading?

**Mr Bernarde:** Never.

**CHAIR:** How do you know which companies they allege you may have been insider trading in?

**Mr Bernarde:** In the warrant that I was served they outlined specific investigations which ASIC was undertaking, and it outlined the specific trades that I was alleged to have been insider trading.

**CHAIR:** Had you previously been involved in providing information to ASIC?

**Mr Bernarde:** Yes.

**CHAIR:** Was it in connection to some of these firms that were included in the warrant?

**Mr Bernarde:** Yes, specifically Tyro. I loosely recall also providing regulators in Australia evidence against Grenke. But I don't recall if it was ASIC or the police.

**CHAIR:** Why do you think they thought you were engaged in insider trading in Tyro?

**Mr Bernarde:** I have no idea. My documents and the reasons I was short Tyro were in public access. I have an enormous following on social media. I have large readership on my reports and on my website. The reasons I was short Tyro were very public and they were made available to ASIC, as I corresponded directly with their whistleblowing team.

**CHAIR:** When did ASIC give you notice that they had closed the insider trading investigation?

**Mr Bernarde:** I'm just checking with my lawyer. It was 16 December 2021.

**CHAIR:** Were you given any reasons?

**Mr Bernarde:** No.

**CHAIR:** Have you been engaged in providing whistleblower-like tip-offs to other regulators?

**Mr Bernarde:** Yes, consistently; we provided every report Viceroy published. We've published dozens. I believe I sent documents to the committee prior to my speech. For every single one of these reports we've written we provided full documentation and data rooms to financial regulators globally. We're registered whistleblowers with the SEC's whistleblower program. We act in a consulting capacity for BaFin on certain cases and we've been pretty much instrumental in active ongoing investigations to put criminals behind bars.

**CHAIR:** This is a parliamentary committee which is looking at the quality of ASIC's law enforcement. We are looking for whether there are good examples of where whistleblowers are treated appropriately and protected in other jurisdictions. Is there a model jurisdiction or regulator that you would recommend we examine?

**Mr Bernarde:** Yes, the SEC. The SEC has a very sophisticated whistleblowing program. It has sophisticated channels with which you are able to whistleblow through an attorney. It is incentivised with financial rewards. If

the government does make a recovery or institute a fine on these companies or bad actors, the whistleblower is entitled to a reward, and those rewards usually are significant enough to allow pro bono legal counsel for those willing to make a whistleblower submission.

**CHAIR:** How many tip-offs have you given ASIC that they have acted on, do you think?

**Mr Bernarde:** That I've given ASIC or that they've acted on?

**CHAIR:** How many have you given ASIC, do you think, overall?

**Mr Bernarde:** Perhaps on Wirecard and on Tyro we have given ASIC tip-offs on those, and we've provided them reports to other public forums. But we've never received a response from ASIC on any publications we've sent them.

**CHAIR:** When you engage with ASIC to give them tip-offs as a whistleblower, is it one way?

**Mr Bernarde:** Yes.

**CHAIR:** You don't receive an acknowledgement?

**Mr Bernarde:** We receive an acknowledgement sometimes.

**CHAIR:** Do you think ASIC has used information that's been given to you to take regulatory action?

**Mr Bernarde:** I don't believe they have, no.

**CHAIR:** You don't believe they have?

**Mr Bernarde:** No.

**CHAIR:** Could they have taken regulatory action, in your opinion?

**Mr Bernarde:** I believe some of the reports written were silver platter prosecutions.

**CHAIR:** Could you give me an example or two?

**Mr Bernarde:** I believe that our report on Quintus, which was probably in 2016 or 2017, showed a very clear managed investment scheme fraud perpetrated by its directors in Perth, and I don't believe they were criminally charged.

**CHAIR:** Are there any other suggestions you have in relation to the protection of whistleblowers other than the SEC model? Are there any European or other jurisdictions where we could take some lessons?

**Mr Bernarde:** I think the biggest lesson to take from ASIC's end is the lesson of BaFin, which is the German financial regulator, which staunchly defended Wirecard and other public market frauds in Germany up until its collapse in 2021. After its collapse there was an inquiry like this one into the actions of BaFin, and BaFin was found to have been a wholly incompetent regulator, to the extent they were even trading Wirecard securities as they were investigating them and prosecuting critics. The entire executive board of BaFin was wiped and they started fresh, and now we enjoy a very cooperative relationship with BaFin. We have continued to assist them on many other cases subsequent to Wirecard.

**CHAIR:** You might not be able to answer this, but do you think there's a view about the role of short selling inside ASIC? Do you think ASIC has a view about—

**Mr Bernarde:** I think there's a very obvious agenda ASIC has against short sellers, which has been widely propagated in its short-selling guidelines. These guidelines are obscure and vague. Since they have been published I haven't involved myself in any short-selling activity in Australia and will recuse myself from doing so until there is some clarity on what I can and cannot do as a short seller in Australia. During my section 19 interview with ASIC they were openly hostile to the fact that I was a short seller.

**CHAIR:** Do you think this is due to a lack of sophistication? What do you put it down to?

**Mr Bernarde:** I'm not sure if it's a lack of sophistication or if ASIC is seeking to actively protect Australian companies from short sellers, regardless of whether we may be right or wrong.

**CHAIR:** Thank you very much for providing your time and evidence to the committee today.

**BRAND, Associate Professor Vivienne, Private capacity [by video link]**

**TUTTON, Mr Jordan, Private capacity [by video link]**

[10:59]

**CHAIR:** I now welcome Associate Professor Vivienne Brand and Mr Jordan Tutton. I understand that information on privilege and the protection of witnesses giving evidence to the Senate has been provided to you. Do you have an opening statement?

**Prof. Brand:** We do, just a brief one. We understand, because you have the submission, the committee will be familiar with that. This is just to outline that our research interests relate to whistleblowing. I'm an academic, and Mr Tutton is an academic but also has experience in the government sector in regulation around matters involving confidential and sensitive disclosures. Our work considers the extent to which enhanced whistleblowing regulatory structures can assist the corporate regulatory puzzle in Australia. We think effective corporate whistleblowing approaches are relevant to a number of the specific references of this inquiry but in particular the reference on the range and use of the various regulatory tools and their effectiveness to support good outcomes in corporate regulatory ambitions in Australia.

We draw attention particularly to prior reviews of whistleblowing and to the 2017 Senate inquiry and the reforms that were proposed then, and the fact that they're due for review. The resultant legislation is due for review next year. It's really timely to give some attention to that issue.

In particular, we'd like to draw attention to the fact that since that 2017 review we've had further evidence from some really interesting comparative whistleblowing enforcement systems in both the US and Canada, and that data makes clear how incentive programs, for instance, can influence effective regulatory outcomes. We can speak further to that in the course of our evidence, if the committee is interested.

**Mr Tutton:** Briefly by way of opening statements—certainly having read the submissions which the committee has received and some of the questions that have been asked of witnesses, I note the committee has received quite a bit regarding the proportionately small number of disclosures from the public whether by way of whistleblowing disclosure or more generally a tipoff, and the action that is taken by ASIC. Insofar as it assists the committee, I'll just make two points regarding what's seen as a proportionately small number of tipoffs that are actioned. The committee has received ASIC's February submission wherein it describes aspects of how it handles those disclosures. Several committee members have sought further information from ASIC about the information it receives from the public. My impression is that the questions the committee members have asked and the information from ASIC has provided some real insight into why certain matters aren't taken further. Certainly ASIC has provided some useful information about how they have to target their resources in line with their strategic priorities.

Leaving that to one side, the second point I'd make is dealing with the fact that the proportion of tip-offs seems to be quite small versus what's actioned. It's like comparing apples and oranges, but, if you look at similar Australian agencies and how they handle information received from the public, some things can be observed.

For example, in 2017 the Centre for Health Policy at the University of Melbourne examined selected Australian entities and what they do with public complaints and tip-offs. The authors – I'm quoting from their report - examined the proportion of complaints or reports to those entities which resulted in substantive outcomes, indicating that the complaint has been accepted as legitimate and reaching the threshold for action.

Among the bodies the authors looked at, those that had regulatory functions were found to have taken action between 11 per cent and 30 per cent of disclosures, which led to a substantive outcome, and the average there was about 18 per cent. If you compare that to the figures provided with respect to ASIC, I think the number hovers around less than 10 per cent of information leads to enforcement outcomes or further action.

The figure is roughly consistent with what other Australian regulators are doing. If you look overseas—again, this is comparing apples and oranges—and you look at the United Kingdom and what the Financial Conduct Authority does with the information they receive, they indicated that in 2019 and 2020 about two-thirds of whistleblower notifications led to some action. However, only six per cent led to significant action, such as enforcement investigation. Again, it's apples and oranges, but these numbers provide some sort of perspective on how information received from the public would quite often, from different regulators, not lead to 100 per cent of matters being investigated. In fact, it seems closer to being a third or less that are actually seen as legitimate and within the regulator's purview.

**CHAIR:** I'm reading your submission, and it's helpful you've come in after that last witness because you would have noticed that he referenced the US SEC approach, which you put in your submission. Effectively, the

PJC does report on whistleblowing, and the government progresses part of it. It doesn't progress this issue on effectively paying people to be a whistleblower. Is there anything else in particular that you think could have been included as part of that 2019 law reform?

**Prof. Brand:** I think what I would say in general is that whistleblowing has been on a very significant journey as a regulatory tool over the last two decades. When I first started working in this area, it was pretty much the general attitude that whistleblowing was dobbing. It wasn't seen as a positive thing necessarily. It wasn't seen as a regulatory tool. It wasn't seen as something we wanted to necessarily encourage in corporate Australia. We've moved a very long way from there, and the 2017 report and the resultant 2019 reforms were part of that journey. I think most commentators would agree they were a reasonable step along the way. They were never going to be the final answer. We were always going to iterate, and the five-year review that was set as a statutory requirement was part of that thinking; there is more that can be done. One of the most controversial aspects of the proposed reforms was always going to be what you might call incentives and what are sometimes called bounties. It's what you could also call compensation. No-one seems to argue with the proposition that whistleblowing—

**CHAIR:** I don't want to interrupt you. But can I ask you: your submission is very good and clear. Why do you think the government didn't progress that?

**Prof. Brand:** It's a controversial thing to do, and culturally it's a really big step. In this journey that we're on, the idea that we would pay people to, as once would have been thought, dob was a pretty big cultural step. There were interim steps. I think there was probably a good reason for caution, even though I advocated myself for incentives or payments at the time. Usefully Canada did something a bit more moderate than the US and had more capped payments. We've now had enough time with the Canadian system to look at it. The most recent reports from the Ontario regulator are really clear about them seeing the benefits of the system. They're actually talking about proposing to increase the incentive payment. They're a nice comparison.

**CHAIR:** It says here that after five years of their whistleblower program it had resulted in enforcement actions resulting in the imposition of nearly $44 million—I assume that's Canadian dollars—of monetary sanctions and voluntary payments and the award of nearly Can$9 million to whistleblowers. Do you think that's a model we could look at?

**Prof. Brand:** We could look at both the US, which was looked at very seriously last time, but also Canada. There's been a lot of commentary on that from a lot of people. It's a really good model to look at because it's less extreme and we've now got some history.

**CHAIR:** That's good. My other question is really about the balance of the 2019 reforms and whether you think they have delivered a significant improvement.

**Prof. Brand:** They were better. There's no question there's improvement, but they're only a step along the way. There has been disappointment about the extent to which they've been effective. We've had as yet limited opportunity to see whether the protections offer the support that whistleblowers need. There's only been a very small level of litigation so far. Things can take a while to flow through the system. Within corporate Australia there's far greater awareness of whistleblowing. It's now generically referred to by the industry bodies that lead director thinking, for instance, as an important part of corporate regulatory management and corporate governance. That's a massive cultural change compared with 10 or 15 years ago. It's a good path.

**CHAIR:** We have engaged with a number of whistleblowers throughout this committee process. I would say to you that given the experience that these people have been through you'd have to be crazy to be a whistleblower in Australia, because you end up being sacked, poorly treated by the regulator or both. To make it a trifecta, often the prosecution is bungled anyway or not progressed properly. As the DPP statistics show, they're progressing fewer and fewer prosecutions. It's not a very good system. If you were going to be a whistleblower in Australia, my sense would be you'd have to have your head read.

**Prof. Brand:** It's a really difficult and challenging thing to do. It's always been a really difficult and challenging thing to do. The system provided varying support to no support. It now provides more than it did. Can it provide more still? Yes. Also, there are the silent counterfactuals here. There are within corporations around Australia on a daily basis whistleblowing reports being treated internally and responded to appropriately and helping to fix issues. Although we see the hard cases, and they're very hard and very disturbing, there are also positive impacts which we don't necessarily hear about but which are changing internal corporate regulatory structures for the better. Can more be done? Absolutely. Should it be? Yes.

**CHAIR:** Thank you very much for doing this work. I'm sure Senator Walsh has some questions.

**Senator WALSH:** I do. Thank you for being there for us. Did you hear the evidence of the prior ASIC chair, two witnesses ago?

**Prof. Brand:** We have considered the *Hansard* -- from this morning, do you mean? Sorry. No, we didn't.

**Senator WALSH:** We heard from a previous ASIC chair, Mr D'Aloisio, and I've put to him some of the evidence we've received from the industry associations which ASIC effectively regulates—liquidators and financial advisors, et cetera—who have been asking us I think, not to paraphrase them in a way they would not be happy, to consider designated pathways for their complaints or alerts on misconduct to go. The previous Chair, in the spirit of assisting the committee, raised concerns around that sort of approach, taking a view instead that ASIC shouldn't have any fear or favour in terms of how it invites or collaborates around those sorts of reports. I'm wondering whether you have any reflections on that and whether such reflections would be within what you consider to be your appropriate purview. It does seem to go to the question of lower value versus higher value information and how that is appropriately dealt with by a regulator.

**Prof. Brand:** That's a great question and it's a fundamental question. There's a division here between the policy aspects and the administrative aspects and executive aspects. Parliament can decide to do whatever it likes based on its best thinking about the division between directing regulatory enforcement in certain areas or not directing it—so setting up parallel systems and prioritising certain kinds of enforcement action. An office of the whistleblower, for instance, is something that's been discussed many times as a parallel system. On the other hand, ASIC are the corporate regulatory experts. They do this stuff day in, day out, and this committee, for instance, might choose to ask ASIC right now how it would like to respond to that kind of question and how it feels the best corporate regulatory picture could be arrived at. I'm not sure if that answers your question, but I think what you're asking is: do we need to have other ways of prioritising what gets looked at by the regulator other than leaving it to the regulator itself? If that is the question, I think the answer is certainly that parliament could intervene or it could take the view that ASIC is the appropriate body to make that call based on its broad remit underneath the Corporations Act and its other referring powers.

**Senator WALSH:** My question might be a little bit broader than that, which is: do you have any reflections on whether there can be conflicts of interest in a regulator prioritising certain kinds of referrals? It's not something I had thought too much about until some of the evidence we've received today.

**Mr Tutton:** I have thought about this, because I saw it in *Hansard*. I think in an earlier session you had asked one of the witnesses about triaging and what happens when a tip-off comes in from a professional-type person. It's certainly very difficult. In my experience working at a state level in an integrity agency there is a certain tension where statistically it's more likely that a tip-off disclosure from someone in a professional position or someone within the industry is more likely to be seen as legitimate versus one from the broader public. But at the same time, impartiality and independence is so critical to the regulator and confidence in the regulator. You would want to be quite careful before compromising that in any way, and certainly in preparing for today there was some really useful research I can provide to the committee, from a Dr Eugene Schofield-Georgeson published in 2020. Dr Schofield-Georgeson spoke to a number of former ASIC investigators as part of an interview study and explored some of themes relating to their enforcement powers, whether they were adequate, and some of the difficulties those former investigators had in performing their work. The idea of regulatory capture or at least the perception of regulatory capture was one of the issues identified there. It's this idea that ASIC might be treating certain people more preferentially than the general public. I don't really have any answers for you. What the former chair said this morning is something that really needs to be taken quite seriously. As soon as public confidence in the impartiality and independence of the regulator starts to diminish, a lot of other things will follow on from that.

**Senator WALSH:** Is that as simple as ASIC supervising and regulating a sector like liquidators and also getting information from them about enforcement opportunities; therefore, there could be a perception that they're taking a lighter touch back in the supervision side?

**Mr Tutton:** Precisely. That's a much better way of putting it.

**Senator WALSH:** That is really useful, fleshing out that issue. I wonder if I could press you a bit -- and tell me if it's outside the academic purview that you have. ASIC seems to also have a challenge with certain strong voices raising concerns about their performance, which could be professional associations. It could be the media, for example. Part of what they have to do is assure the public and the corporate community that there should be confidence. So there appears to be a need to respond to those things for the purpose of confidence. But those matters also direct ASIC in certain ways. If they were just taking a purely strategic prioritisation view, they might do things entirely differently. How legitimate is it, if you like, for ASIC to have to turn around and potentially chase those higher profile complaints?

**Prof. Brand:** You frame that as, I think, competing strategic tensions. I would conceptualise it as that's part of the same strategic picture. There are a lot of pressures on ASIC, and it is constantly making judgements about

what it will prioritise and why. They include things like maintaining public confidence in what it does, engaging with stakeholders, giving priority to particular issues at particular times based on what's happening in the economy. It's a really very sophisticated strategic picture they're trying to piece together. I think you've heard from many people already, and it's uncontentious, that ASIC is a massive organisation with a far bigger remit than like institutions in other jurisdictions. If the outcome of that is that the strategic balancing act is particularly challenging, I think that is predictable based on what's in front of them.

**CHAIR:** As to the concept that you've given us in your submission and in your comments around the lower value and higher value information—are there ways that you can point to without paid or similar incentivisation that are known to assist with attracting higher value and prioritising higher value information?

**Prof. Brand:** Taking the incentives or compensation model out of the picture makes that harder. One of the beauties of the incentives model is that you end up with -- as has happened in the SEC's example and also now increasingly in Ontario -- the development of a private bar that specialises in this kind of work. The quality of the tips that reach the regulator has already been triaged, worked up, analysed and formed into a much more comprehensive and clear piece of evidence around wrongdoing. That's one of the major benefits of the incentive system. Taking that off the table, how would you ensure better quality tips get through? We're improving the system the whole time, albeit, as Senator Bragg has pointed out, there are still massive shortcomings. That actually means you get more tips. That means you get more dross as well as more gold. So technology is being used increasingly. AI has a part to play. It's being used. It's being used in a negative sense as well. One UK regulator relies upon probability analysis about particular industries and the number of tips they expect to be getting. If they're not getting tips from a particular entity within that industry at that rate, they then go looking because it suggests to them, for instance, that there is not sufficient whistleblowing occurring in that location. You can use technology in quite creative ways. But, in the end, there is going to have to be a degree of human judgement, and the more experienced and expert that judgement that's brought to bear the better the quality of the response for whistleblowing. It's really how you resource that judgement piece that's perhaps going to make the biggest difference.

**Mr Tutton:** Another really important part of this that's unfortunately difficult to measure is the cultural shift that will occur over time. Associate Professor Brand was speaking earlier about the differences in the landscape 10 to 15 years ago as distinct from today. Certainly some of the softer regulatory pressure or instruments that you've seen in the last few years, some of which arose out of the 2019 reforms changing that conversation of the culture around whistleblowing, is one of the ways that kind of information is more likely to come to the regulator. It's less being seen as a dobber, more of making first an internal disclosure and then an external disclosure if it hasn't been acted on appropriately. Looking at the numbers of information that's coming to ASIC would suggest that slowly the culture is shifting, but unfortunately the whole cultural point is difficult to pin down and measure in a really useful way.

**Senator WALSH:** One of the issues that whistleblowers have or probably a lot of people who wouldn't necessarily consider themselves whistleblowers that are providing some information through the portal is that they have an expectation there will be a level of communication with them about their report being received and potentially their report being acted on. Of course, during this inquiry, and as you would both know, when ASIC does investigate something and use its significant coercive powers from time to time, it's probably not really going to be able to pick up the phone and say, 'We're just about to raid the guy that you told us about.' How do you see that issue? There's a need for some form of communication, but there's also a need for investigation and enforcement?

**Prof. Brand:** There are very significant competing tensions which you've pointed to very clearly. Obviously confidentiality and the need to ensure that any report back to the whistleblower doesn't then for instance trigger some loss of effective capacity to investigate because that removes the secrecy around an investigation ASIC is undertaking. There are all those reasons to preserve the confidentiality of the process. But also there's lots and lots of evidence in the research that's been done on whistleblowing for decades, that not keeping the whistleblower in the picture to some extent is really negative. So many whistleblowers are quite articulate about not really caring about whether the outcome goes one way or the other, but just wanting to know why and how and what happened. They've put themselves out there. They've put themselves at risk. They've tried to help. If they don't hear back, it's quite disruptive of their sense of value and purpose around engaging in whistleblowing. I'd tie that back to the cultural journey that I think we're on around whistleblowing and increasing awareness. I'm sure ASIC is increasingly aware of this. I think all regulators are. The need to stay in touch with informants and keep them updated to the extent you can without, as you say, blowing the cover on a raid that's about to happen.

**Senator WALSH:** Finally, Mr Tutton, you outlined a bit of research or exploration that you've done. You might say it was a bit of a back-of-the-envelope type of—

**Mr Tutton:** I threw numbers at you.

**Senator WALSH:** Yes. Is that something you would have a capacity to submit to us on notice, about those relevant numbers you put together, how you put them together and what you think they show? I think that would be very helpful to the committee.

**Mr Tutton:** I'm certainly very happy to do that. The takeaway point is that 100 per cent of the people are coming with what they see as a legitimate concern or problem, but the percentage that is legitimate, in the sense that the regulator is intended to look at them, or the factual evidence I think tends to be much smaller. I'll provide that.

**Senator WALSH:** That would be great. Thank you both very much. I've really appreciated your evidence.

**CHAIR:** Thank you for that. I agree. It was very good evidence.

**O'CHEE, Mr William (Bill), Partner, Himalaya Consulting [by video link]**

[11:31]

**CHAIR:** I now welcome Mr William O'Chee. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Do you have an opening statement, Mr O'Chee?

**Mr O'Chee:** Yes. With the indulgence of the committee, I'd like to make a few observations, as I have not had the opportunity to prepare a submission due to the short time. I'd like to begin by expressing my gratitude for and appreciation of the privilege and honour that the committee has given to me in asking me to provide evidence to them. I'd like to begin by saying—or exhorting the committee not to make the same mistake that the Senate Legal and Constitutional Affairs Committee made 30 years ago in examining the investigative powers of then Australian Securities Commission. What do I mean by that? The inquiry, which ran for almost three years in the nineties, was initiated by concerns about the failings of the investigative functions of the ASC. Initially, it arose out of something called Aust-Home Investments. The mistake we made was that, as legislators, we became captives of the legislation. Instead of looking at the big picture, we became too focused on what changes needed to be made to this section or that section in the belief that would solve the problem. Thirty years have gone by and the investigative and enforcement practices of ASIC are no better and arguably worse than the investigative and enforcement practices of its predecessor 30 years ago.

That's the basis on which I would urge senators not to become captive of the legislation but instead to look at the big picture and say, 'What are we trying to achieve?' I would start by saying there is a difference between insolvency and investigation. A lot of the comments I'm going to make are about insolvency, but they apply also to investigation. The difference between pre-emptive investigation and insolvency investigation is merely a point in time. Certain things have happened which have made the company insolvent, and an external administrator is appointed, but you're often dealing with potentially the same offences. I use the word 'offences' in a loose sense. I would actually prefer to call them 'financial crimes', and I'll get onto that later.

The role of insolvency law is twofold. It is, first of all, to ensure economic efficiency, and, secondly, it's to ensure justice. When I use the word 'justice', I think in terms of what the Emperor Justinian said in the seventh century—that justice is the constant and perpetual desire to render to each person that which is their due. For reasons that will become obvious as I go through this, it is very clear that ASIC is not rendering justice to the victims of financial crime. Now, this is also a problem because insolvency law is necessary to ensure that what are essentially moribund assets are repurposed and that moneys which are owing by corporations are repaid to creditors so that they can then be put into the efficient operation of the economy. So I think it's appropriate that we look at insolvency. Remember, insolvency cases are just part of the broad gamut of financial crime in Australia for which ASIC notionally has responsibility.

I think it's really useful to look at ASIC's own statistics. I note the opening statement made by the chair of ASIC to this committee earlier on this year in which it was said, 'ASIC is both proactive and retrospective.' Let's look at how effectively ASIC deals with the retrospective aspect. When a company has gone into administration, there is an external administrator appointed. So you've already got an independent investigator digging into the company and making a report. The statistics I'm going to use come from report 645 by ASIC, which is insolvency statistics from external administrators' reports for the year 2018-19. I do apologise to the committee: in the short period of time I haven't had a chance to produce this material for you, but I'm happy to give an undertaking to actually pull this stuff out and put it into a single document that will be available.

What is the extent of the losses involved in companies which become insolvent? If you go to table 34 of report 645, it lists all the broad gamut of deficiencies of assets to liabilities in companies. I've applied a normal distribution analysis of this, and I've arrived at the very conservative estimate that, in 2018-19, the deficiency of assets to liabilities in companies—and that is the amount to which creditors are being ripped off because they are owed money and they will never be repaid at this money—and the extent of those debts was over $8 billion in 2018-19.

Let's put that into perspective. People get very worked up over cybercrime. Cybercrime in the 2021-22 year, I think, was estimated at $3.1 billion. For a whole heap of reasons, which I'll outline when I write something, my estimate is extremely conservative. The most important reason is that, in many cases, the company has not maintained adequate books and records, so the administrator cannot get the full extent of the debts that the company is racked up. In table 28, I believe—sorry, there's another table. I don't have the number. I do apologise. One billion dollars of those debts were owed in the form of taxes and unpaid Commonwealth charges. So the Commonwealth is losing $1 billion a year in deficiencies of assets to liabilities. The other thing is that this

overhangs the economy because, if moneys are owed to banks, because of the way banks have much higher loan books than the actual Basel III or Basel IV assets, if you have a dollar in losses, it tends to wipe out about $6 of actual bank capital. So it's pretty important that we get this right.

Now, let's look at the statistics around offences. Again, I'm going to use report 645 and I'm going to refer to tables 13 and 14. Table 13 said that administrators reported to ASIC 16,874 breaches of civil obligations in that year. They reported 772 alleged criminal offences that occurred prior to appointment. They alleged 2,154 criminal offences occurred after appointment. So most of those will be failure to provide books and records to an administrator or a liquidator. They alleged 185 other offences. What happens to those reports which are made by an administrator? They go into what's called the liquidator online portal. I think the committee would be aware that ASIC uses a computer algorithm to determine which reports should result in a request for supplementary information—a supplementary report. It's a long time since I've been in parliament, so I'm not partisan. I will say that I think robodebt was wrong. It was wrong because it subordinated important decisions about people's lives to computers. That is ethically wrong. The role of government is to be just. If robodebt was wrong in the way in which it operated then ASIC's use of a computer algorithm to determine which cases are subject to further investigation is equally wrong, because it fails to do justice to the victims of financial crime. I don't need to say any more about that. Now, in 77.9 per cent of cases, the administrator indicated in the report to ASIC that he or she had documentary evidence to support the allegations of offences. In 77.9 per cent of cases the administrator has already identified and holds documentary evidence to show the offences occurred. In 34.8 per cent of cases, the administrator recommended further investigation by ASIC. So that is 2,613 cases.

The problem is that ASIC doesn't follow up. If you go to table—and just to get an understanding of the extent of these matters, in table 15, there were 561 reports of alleged offences in companies where the deficiency of assets to liabilities was between $1 million and $5 million. There were 77 cases where the deficiency of assets to liabilities was $5 million to $10 million. There were 69 cases where the deficiency of assets liabilities was over $10 million. But what has ASIC done with this? If you go to the 2018-19 ASIC annual report, they acknowledge that there were 8,106 reports from insolvency practitioners that year. There were 7,227 alleged breaches. There were 515 supplementary reports received alleging breaches. So you've got the initial reports and the supplementary reports. In 87 per cent of those supplementary reports, ASIC took no action. In 14 per cent of cases where there was a supplementary report—13 per cent of cases—action was taken. But that results in only 1.8 per cent of cases where there is an alleged criminal offence actually being investigated by ASIC. That is simply not good enough. No matter how ASIC spins it, it is not good enough, because it is not doing justice to the victims of financial crime. When you look at the numbers, you've got 515 supplementary reports and you've got 13 per cent of that. It would barely be enough to touch the cases over $10 million.

So what is the solution? The solution is to treat these offences as financial crimes and have them investigated—or ones over a certain threshold investigated by a financial crimes unit inside the Australian Federal Police. The AFP already do investigate financial crime, particularly cybercrime and other types of crime. ASIC will say, and have said in the past, that they have particular skill sets and expertise that make them the appropriate people to investigate matters to do with the Corporations Act. I will say that's just not true. On the basis of this evidence, they lack neither the expertise nor the willpower or capacity to do the investigations. Their excuse will be that they use a risk analysis framework to determine the cases. Well, they don't. They're not really measuring risk. They're certainly not measuring risk to consumers. It's actually a convenience test. The reality will be that, in most cases, you will not be prosecuted by ASIC unless you confess to having committed an offence.

Why should the Australian Federal Police do it? Because the Australian Federal Police have powers that ASIC don't have. It's a lot easier for the AFP to get a warrant to search premises than it is for an administrator or for ASIC. In ASIC's 2018-19 annual report, they indicate that they obtained only 66 search warrants, and they related to only 13 cases. That's because, under the Corporations Act, you actually have to make an application in court to the Federal Court to obtain a search warrant. You also have to obtain leave to make an ex parte application if you don't want the respondent to know you're about to exercise a search warrant. ASIC's normal course of conduct is to issue a notice to the director to produce books and records. But the effect of that, of course, is that, if you give them seven or 14 days to produce the books and records, the books and records have disappeared. The Federal Police, however, can get a warrant by going on oath to a magistrate and they don't have to seek leave for it to happen ex parte. They are very good at executing search warrants.

I spoke with a former colleague of mine. She has been an insolvency practitioner for 25 years. She said that insolvency practitioners almost never execute search warrants. She said she's only ever executed one search warrant in 25 years, and that was the search warrant she executed with me. But she's never done it since. Most of the insolvency practitioners she's spoken to have never done it because of the cost and difficulty of obtaining a

search warrant. The Federal Police are the right people. But they're also the right people because, increasingly, financial crime is international. The AFP has links into Interpol that ASIC simply don't have. They also have the power to arrest directors. If you look at the FTX trial, which is happening in the US, that involved a company which collapsed in December last year. The directors of that are either being prosecuted or have already pled guilty to charges against them. If that happened in Australia, because there is no power to arrest, the directors would all be overseas and outside the jurisdiction.

So I think the case for taking it outside ASIC is very clear. I have absolute confidence that you'll get better outcomes. If we started to arrest miscreant directors, it would send a massive signal to people who are involved in financial crimes using companies that it's no longer good enough. I'm going to end with one very simple explanation, and then I'm looking forward to taking questions. The whole reason for companies existing in the first place, if we go back to the 17th century, was to enable the aggregation of capital for investment. That's still the role that many companies play today, especially when investors are involved. As soon as you aggregate capital, you create a bigger target for corporate criminals. If I were a criminal, I know I could get away with a lot more using a company than I could by defrauding under my own name, because you create a buffer between yourself and your offences. It makes it very easy to lose the records. But, more importantly, you can get more victims quicker and in much greater amounts. So we now have to say, 'All right, we have massive financial crimes involving corporations. It is now time to stop treating these criminals as gentlemen who should be given special treatment under the Corporations Act and instead treat them as the financial criminals they are and have them investigated by the AFP'. On that note, I'll cease what was a long introduction. I'm happy to answer questions.

**CHAIR:** Thank you very much, Mr O'Chee, and thank you for making your time available today. I want to start by going back to the initial inquiry that you established back in May 1993. The basis of this inquiry was more than just complaints handling though, wasn't it? There had been some significant malfeasance at the time. Could you give a sense of how the ASC engaged with the Senate committee during that inquiry?

**Mr O'Chee:** I think the ASC engaged with the Senate committee in the same way that ASIC is engaging with the Senate committee now. In other words, they're saying, 'Look, we do a wonderful job'. I note in one of the recent speeches that ASIC said they couldn't actually tell people how they did their job because that would breach the security that they need to do their job. But, look, the conduct is the same.

**CHAIR:** There were some matters that were read into Hansard by you around this time—about a Mr and Mrs Bunt—that you may recall. I know it was some time ago, so I don't want to stretch your memory too much. But these sound very similar to some of the matters we've canvassed in this inquiry in that it's been very difficult to obtain information from ASIC which actually shows how they go about their business of running an investigation. I believe in this case Mrs Bunt underwent a section 19 transcript, which I don't think she was able to get in the end. Is there anything you could tell us about this secrecy?

**Mr O'Chee:** Yes. In the Aust-Home Investments case—and I remember it very well—what happened was that some criminals set up a series of investment trusts and they persuaded some of the investors that they should notionally be directors of trustee companies, but they had no involvement in it at all. The criminals then moved money from one trust to another. So it's a typical Ponzi scheme. In Aust-Home, the trust deeds of at least one of the trusts were varied with the permission of the corporate affairs commissioner in Victoria to enable funds to be commingled, which was a massive breach by the CAC of its duty to oversee the administration of the trust deeds. Then ASIC went after the investors, thinking they were the promoters of the scheme because they were notionally directors, and they were subjected to section 19 examinations. Can I say—and I'm getting emotional here—the case of Mrs Bunt has haunted me for 30 years. Successive governments have failed, despite pleadings by me and others, to even apologise to Mrs Bunt and her husband, who lost their life savings, their home and their mental health. The treatment from the ASC was appalling, and I think it is long overdue that a public apology is offered to Mrs Bunt by somebody in Parliament House.

**CHAIR:** In the case of Mrs Bunt, was she able to get a handle—was she able to obtain her section 19 transcript in the end?

**Mr O'Chee:** I can't recall. I know she had great difficulty. I cannot recall. I do apologise.

**CHAIR:** Okay. This idea that the investigative methods are secret has troubled our committee throughout the course of our investigation. We haven't been able to understand exactly what law enforcement methods are so secret that they can't be told to the committee, even in private. Can you help us with this at all?

**Mr O'Chee:** Yes, I can, because I've had many dealings over the years when I was winding up companies with ASIC. Section 19 was used to compel people to give evidence. They mismanaged it. What they do is they get directors in and they require them to give evidence. But there's no real investigation because the investigation

has largely already been conducted by the insolvency practitioner. The insolvency practitioner is the one who has gathered up all the documents. There might be, I could imagine, theoretically, some circumstances where ASIC might be able to get some records that the insolvency practitioner couldn't. But the insolvency practitioner, because they are an officer of the company, has a power to issue notices to third parties who hold information to produce that information. So I'd be at a stretch to find any means of obtaining documentary evidence that is in favour of ASIC that does not exist in favour of the insolvency practitioner. On the whole, ASIC run off the information that's provided to them by the administrator or liquidator. So I think that the idea that there is some sort of secret law enforcement method involved here is absolute bunkum.

**CHAIR:** You don't think it's a Colonel Sanders style secret sauce?

**Mr O'Chee:** Well, that's being polite. I prefer bunk sorry.

**CHAIR:** Turning to the report that the Senate tabled back in, I think, 1995, recommendation 2 went to the issue of complaints handling and the setting up of a—it looks like some sort of a structure inside the ASC. Was that a core recommendation because there was a sense that people would go to ASIC from different parts of the community—or ASC, as it was then—and the complaints would not be acted upon?

**Mr O'Chee:** Yes.

**CHAIR:** Okay. I'm reading the government's response here from the mid-nineties. It says here that the government did adopt that recommendation, but I can't see that function existing today in any material form.

**Mr O'Chee:** Well, in only 1.8 per cent of alleged offences is any action taken by ASIC. That's clear from their own report.

**CHAIR:** But there must have been for a time a mechanism inside the commission to deal with complaints handling because of the political pressure that was placed on them at the time.

**Mr O'Chee:** I think certain things were done. But, remember, the ASC continued on for a period of time after the 1996 election and it became ASIC. If that mechanism existed and was functioning, it probably ceased to exist and/or function after the creation of ASIC.

**CHAIR:** It disappeared. It looks like it disappeared after the twin peaks.

**Mr O'Chee:** Yes.

**CHAIR:** Do you have a sense of the success of the twin peaks now? The general view has been that it has been better than many other structures, but ASIC itself seems to be granted more and more powers and more and more—a bigger and bigger remit by parliament as the years go on.

**Mr O'Chee:** Granting more powers to ASIC doesn't work if they are only going to investigate less than two per cent of cases. Also—and this is going to offend some people—it assumes that the people inside ASIC are the right people. In discussions I've had over the last week with insolvency practitioners, they tell me that the people inside ASIC in the investigatory teams are thoroughly demoralised. I heard of a former colleague of mine who spent 12 months in ASIC and left in frustration because there was no desire to investigate anything. I don't think that giving more powers or having more funding is the answer. You need to change the way in which we look at it. If you keep it in ASIC, you are still trapped within the framework of treating these financial criminals better than any other criminals. With an insolvency, you've got three reasons for insolvency: you've got outright crime, you've got incompetence and you've just got—some industries get cruelled when the economy turns against them. But, if you say, 'Well 50 per cent of this is criminal', it's not even a get-out-of-jail-free card; it's get out of jail with a bounty card to people who are committing over $4 billion of criminal offences.

**CHAIR:** Your solution here is that the AFP would be brought in to do the bulk of the investigation and then take it through to the Commonwealth DPP. Is that right?

**Mr O'Chee:** Yes. They need to be given a power to—explicit authority to investigate offences under the Corporations Act. My recommendation would be that, if you look at the numbers, where you've got a deficiency of assets to liabilities in excess of, say, a million dollars—you're looking at around 700 cases—that's where the threshold is.

**CHAIR:** The Legal and Constitutional Affairs Committee, I think it was, ran the parallel inquiry from the mid-nineties. At that time corporate law was vested in the AG's department, wasn't it?

**Mr O'Chee:** Yes, it was.

**CHAIR:** What did you think about the AG's department's capability to look at this area of corporate law and law enforcement?

**Mr O'Chee:** I will say that my colleagues and I were possibly a little bit naive in accepting some of the assurances. I hate to say it, but let's be honest—I think we were too willing to accept assurances. With the benefit of hindsight I wouldn't have gone that way.

**CHAIR:** Okay. So, in summary, your testimony and advice is that, reflecting upon the parallel inquiry from 30 years ago, it didn't look at the matters in a structural sense; it was too focused on shifting existing laws?

**Mr O'Chee:** That's correct. We were too focused on the operation of particular provisions of the act and we never really got to grips with corporate financial crime as corporate financial crime. That's where I think we got it wrong. I hate to say it, but I think we let down the Australian public. At the time we thought we had done a great job. Everybody said what a great report it was, but I think we got it wrong.

**CHAIR:** Okay. Thank you very much for taking the time to be with us today at the hearing.

**Mr O'Chee:** Thank you very much. I really do want to express my thanks.

**CHAIR:** Thank you. We're now going to have a lunch break. Thank you very much.

**Proceedings suspended from 12:06 to 12:46**

**FELS, Professor Allan, Private capacity [by video link]**

**CHAIR:** I now welcome Professor Allan Fels AO. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Do you have any opening comments?

**Prof. Fels:** Yes, I have brief opening comments. Thank you for inviting me to appear. I'm happy to respond, as I have some brief points to make. I have broadly followed the course of ASIC since at least 1990 and it's always had a very poor enforcement culture. I'm also quite concerned at recent developments, where they appear to have abandoned Hayne's 'why not litigate' approach. On the use of undertakings, undertakings were legislated in the early nineties. The original purpose was to assist mergers. When a merger could go through subject to conditions, there were not very good legal arrangements to back up conditions. So we brought in undertakings so they could be enforced in court. Then this idea of using them spread at the ACCC, and I was a bit involved, and elsewhere to deal with breaches of the law. I always had considerable concerns about that, because if parliament passes a law and it's got sanctions then the starting point should be to apply the law and get the sanctions. The undertaking shouldn't be an excuse for not doing what is clearly intended in legislation. Also, that term 'court enforceable undertaking' sounds as if there's some kind of court action behind it. But, of course, there's not. It's just an agreement between the parties and the regulator: 'Nothing will happen, but, if you don't do certain things, we can go to court and get it enforced.' That's very different from a court verdict of guilty or not guilty and sanctions. So there really needs to be a lot of caution about their use.

I have another brief point about ASIC. There are many reasons, I'm sure, why it's not a very strong, appropriate law enforcement culture. I'll just mention one, and that is that the chair is invariably from the world of big corporate law -- not always, but even some of those who weren't from that field were very close to it. That culture of operating law in regard to big business is not close to the culture that's required for law enforcement. I just want to mention also a brief point about the chairs of these organisations. Back in the eighties, the conventional wisdom was that the Trade Practices Commission or ACCC chair should be a corporate law person. But everyone gave up that idea, whether Labor or the coalition or anyone else. My predecessor, Bob Baxt, was an academic from about 1986 to 1989. I didn't have a corporate law background. Graeme Samuel—I wouldn't characterise him—he's got a very broad background in lots of things. Rod Sims -- no. Even the current chair—well, she does have a background in that field, but there are many signs she's not following the corporate law approach, whereas ASIC tends to always have people with that corporate law approach and philosophy. So they are a few brief comments, but I'm happy to try to answer any questions.

**CHAIR:** Okay. Thank you very much, Professor Fels. One of the main issues we have found in this inquiry is that ASIC is loath to use criminal sanctions or to try and achieve criminal prosecutions. Is your view that they are too happy or it's too easy for them to go down the civil route?

**Prof. Fels:** Yes, it's very tempting. The civil route is a lot easier. I'm working off ACCC, but I'm sure this applies to ASIC. If it is civil, first of all, you don't have to go through the Director of Public Prosecutions. You do the prosecution yourself, and the burden of proof is quite low. It's basically balance of probabilities, not proof beyond reasonable doubt. Also, corporations don't fight that hard over civil penalties—they're just the cost of doing business—whereas, if there is a criminal case, very often massive resources will go into the defence and they'll fight at every stage of the process. But the fact is that parliament has made a lot of offences criminal, and the law enforcers should follow that through in cases. If they happen to lose, we can go back to parliament and ask for some help. Something like that, by the way, is happening at the moment with the ACCC. Rightly or wrongly, they've lost a few merger cases, and they've said to parliament, 'Well, actually we need a little bit of help with the law.' Now, I just use that as an illustration of the fact that, if you run a criminal case and lose, you can go back to parliament and say, 'We've got problems and can you help us?' It's a better approach to try and to lose than not to try at all.

**CHAIR:** The position that they take is not to try, which is a major problem. Going back in time, we had former senator Mr O'Chee give evidence today. He was around doing inquiries into these matters 30 years ago. The reason that ASIC was given jurisdiction here in relation to financial services, rather than the ACCC, is not really clear to me. Is there a particular reason that this was carved out from the ACCC's mandate back then?

**Prof. Fels:** Yes -- lobbying by the financial services industry. That explains it all. It got it through the Treasury. The Treasury is pretty good at standing up to interest groups, with the exception of the financial services industry, which it's always been a bit soft on. That's essentially what happened. I've got a couple of other points to make on that. The Wallis inquiry of 1998 were very concerned and unimpressed with ASIC, and they came and spoke to us at the ACCC. They said, 'We're sounding you out on the whole idea of handing it all over to you—financial services regulation'. There are two bits to that. The first is just to apply law enforcement. We were

happy to do that. But we were not terribly keen to get stuck with having to do licensing, disclosure and a whole lot of administrative things. We preferred to stick to law enforcement. So we said to the Wallis inquiry, 'Well, okay, with the law enforcement bit—we don't want to be buried in administrative work.' So they produced a report. If you read the fine text on that, the report basically says, 'Hand over financial services, certainly law enforcement, to the ACCC and make the jurisdiction concurrent so that one or other will take the action and they work out an MoU.'

Now, this change—this view of this could have been slightly more clearly expressed. It was in the report. I actually called Wallis, who I knew. I said, 'Could you make it clear?' So the following Sunday, actually, on *Business Sunday*, he made it really clear: hand it over to the ACCC. We did talk with Treasury and actually, I have to report, those officials later became involved at high levels of banks. They said, 'You shouldn't have two people enforcing the same law'. There are hundreds of precedents for that, particularly in areas where there are overlaps and so on. But, anyway, they dug in on that point and then they fought off the idea of the ACCC having the full enforcement power, and that has weakened financial services regulation.

**CHAIR:** One of the ideas that's been put forward is that the AFP could take on the role of investigation and you treat this white collar crime like any other crime.

**Prof. Fels:** That might well be good. I just hesitate to jump in and fully endorse it without having some idea of the AFP having the expertise and all that sort of thing. But it might well make some sense to give them white-collar crime. There's also another little complication, and that is the overlap of civil and criminal. It is complicated, but it's probably better to have it in one organisation.

**CHAIR:** That's a good point. Now, in relation to investigative methods that I expect that the ACCC and ASIC would do when they're looking at corporate crime, ASIC have said to this committee that they don't want to provide documents which show how they go about their investigations because they have a fear that it would expose some sort of secret internally about how they go about their business. I'm just trying to understand whether you have any insight as to what might be so secret.

**Prof. Fels:** I'm completely sceptical of that point of view. Quite a few ex-ASIC people actually work on the other side at the moment. Also, the fact that you investigate in a particular way—it becomes obvious at the end, particularly if it goes to court, what's been done. There's only a tiny fraction of methodology that you may want to keep secret—like the identification of maybe some people who gave you information. But, in general, the methodology should be exposed. It'd be quite good if we could look at it and point out strengths and weaknesses, particularly weaknesses, in their enforcement methodology.

**CHAIR:** Okay. I want to ask you about whistleblowers. I think this is going to be a big focus of our report, because we've encountered whistleblowers throughout our inquiry. I think people have risked a lot and have really been treated poorly. Do you have any thoughts about how we could better protect whistleblowers and how that could help with law enforcement?

**Prof. Fels:** You've certainly identified an important problem. The flavour of your critique I accept. Personally, I've always been an advocate for rewards for whistleblowers. That is practised quite a lot in America. Certainly, in the field that I know about, which is antitrust, it's pretty common to do it. Whistleblowers tend to come out very poorly. Probably more could be done to protect them. I can't be very specific, but my sense is that more could be done to protect them. In the end, the incentives for whistleblowing, in economic terms, are very poor. You don't come out ahead by being a whistleblower; you get some satisfaction in that you help to uncover illegality.

**CHAIR:** Deputy Chair, do you have any questions for Professor Fels?

**Senator WALSH:** I do. Thank you very much, Professor Fels, for being with us. One of my questions, as we go through this inquiry, is how much enforcement is enough and how the committee should think about that. I'll give you a couple of stats from the last financial year reporting that just came through at Senate estimates. In the last 12 months, enforcement work resulted in 35 criminal convictions and almost $190 million in civil penalties and fines. There was an increase over the previous financial year in financial services and credit bannings, as well as a greater number of summary prosecutions. These are the sorts of numbers that ASIC provides us with and that are on the public record in their annual reports. How should we judge how much enforcement is enough and how much use there should be of the criminal sanctions that you and the chair, Senator Bragg, were just talking about? It's very subjective, isn't it, in terms of the public commentary? Any time something happens under the radar, they're going to get slammed for that, potentially. What guidance do you have for us on how much enforcement is enough? Is it about public perception; is it about specific numbers; is it about outcomes, in terms of the strength of our system? I think people around the world would generally say that it is robust and that we're a good place to invest.

**Prof. Fels:** Thanks for the question. I've got some observations on it. They may not quite meet your question, but I'll do what I can. First of all, I think it's quite useful to compare ASIC and ACCC numbers. There's a vast difference there, particularly in levels of fines and penalties and so on. Secondly, on your general question, my way of approaching the issue you've raised, about how much is enough, is that I don't quite have that question in mind. Rather, I have the idea that parliament has passed a law and it says that if you break the law you should suffer sanctions, such as fines and other things. When a matter comes to the attention of ASIC or the ACCC, it shouldn't look up an economic calculus of cost-benefit blah, blah. It should say, 'Someone has broken the law and our job is to get a court remedy,' by and large. It may be that it can't manage it all, so it cuts back on some of the lesser cases and things like that. But, on the whole, as these things arrive on your desk, you just say, 'We've got to enforce the law. We'll do our best. It may stretch our resources, but we'll do our best.'

I contrast that with a kind of resource allocation approach, which says, 'Oh, well, there's a law and we've got limited time and resources, so we're not going to enforce it all; we'll just get what we think is the best bang for the buck.' By the way, that calculus also has its own problems because often it's easy to win small cases and, if that's part of your mathematics, it tends to stop you going in on the tough things. I say that if there's any serious breach of the law, the regulator has to go in and take court action about it, rather than starting to worry about efficient resource allocation within the agency.

It's also a fact that—and this certainly was the ACCC experience—we generally applied the law without fear or favour, without exceptions. We knew that it could be a bit of a stretch, but the government is usually prepared to back you if you can show that you haven't got the resources to fully follow through. If you win some cases or even litigate them, it is much easier to go back to the government and get additional resources and support. My approach is not the sort of economics thing but more 'This is against the law and our job is to stop it as best we can.'

**Senator WALSH:** That is a really helpful set of contributions. In your opening remarks you talked about enforcement culture. I think you're contrasting a strong enforcement culture with a set of rules about how you prioritise, triage and deal with the resources that you have. Regulators seem to have a lot of strategic tensions. That is emerging in this inquiry. We, in this inquiry, are literally asking how ASIC assigns its resources, triages matters and goes about strategic prioritisation, which puts a focus on those things. But I think what you're encouraging us to consider is how a regulator does those necessary things behind the scenes, whilst projecting and having a pretty ruthless kind of culture in how it approaches wrongdoing. It is a tension, isn't it?

**Prof. Fels:** Yes, you've got it. I think you fully understand what I was getting at. My starting point always is that the regulator is there to uphold the law, without fear or favour. With anything that comes across their desk that looks illegal, they just take the action that parliament wants. The resources question comes much later, and they often solve it themselves.

I just want to mention something that I learnt in the early 1990s, when we, then Trade Practices Commission, took a big business to court over an allegedly unlawful merger. There was a bit of an early question about whether we should get an early injunction to stop it. The judges and all the barristers then were used to big legal fights in the commercial world, so the discussion in court predominantly was about the so-called balance of convenience. I fully understand the commercial thing: on the one hand, it's a bit of a cost to the firm doing it and, on the other hand, it's a benefit to the litigant, so you weigh them up.

We challenged that. We said, 'That's not the way to look at it when it comes to public law enforcement. The starting point is that parliament has prohibited something. We don't want that to come about.' In the battle over the early injunctions and things like that, the dominant thing is to stop harm to the public through reduced competition. It's not about weighing up the interests of the big business against those of the regulator, so much as it is about putting the public interest first. Occasionally, that will mean that the regulator doesn't get its injunction, but that's the right way to look at it.

**Senator WALSH:** I can review the *Hansard,* but I don't think I quite got all of your comments about people being from a corporate law background.

**Prof. Fels:** Yes.

**Senator WALSH:** Obviously, we don't want to impugn anyone's capability and commitment, but are you saying that it's less useful to come from that sort of background—

**Prof. Fels:** Yes.

**Senator WALSH:** and more useful to come from more of a public interest kind of background?

**Prof. Fels:** Yes, that's broadly the flavour of what I was getting at. It's true that we could have a big debate about that. We don't want people with no knowledge of the law to take these positions, and the corporate law

people typically have a good understanding of the law. But the philosophy behind it is wrong for law enforcement. They're used to sorting out commercial disputes and juggling the interests and so on of both sides. It is a skill, but that's not the way to approach law enforcement. It needs a more uncompromising approach to give effect to the wishes of parliament, as expressed in the law.

**Senator WALSH:** I understand that point clearly now; thank you. Just finally from me—you'll tell me whether or not this is something that you have a view on—we've had evidence, and we've talked about it today, from some of the industry associations that represent groups that ASIC regulates, like the liquidators and the financial advisers. Those groups have told us that they often have enforcement information and that they'd like the information that they have about noncompliance to be elevated in some way in ASIC's thinking about enforcement. Today, we've had some evidence to counter that view. People have suggested that there may be a conflict between privileging that sort of information from entities that you regulate because it may appear that you take a softer touch in your supervision approach to them if you're getting good enforcement information. Has that sort of consideration come across your desk before?

**Prof. Fels:** On the whole, I'm on the hawkish side in that debate. The key job is law enforcement. If you do it properly, it gives strong incentives for proper compliance. On the other hand, maybe the other school of thought that you mentioned is more 'Let's do a deal. We're doing great things through reporting this and that,' but I'm very sceptical.

**Senator WALSH:** That is because you think it sounds a bit like stakeholder engagement, rather than cold, hard enforcement.

**Prof. Fels:** Correct. Yes, 'stakeholder' is something that I view with some suspicion in this context.

**Senator WALSH:** That's very interesting. Thank you very much, Professor Fels.

**Prof. Fels:** Thank you.

**CHAIR:** Professor Fels, we thank you for your evidence.

**JONES, Dr Evan, Private capacity [by audio link]**

[13:14]

**CHAIR:** Welcome. I understand that information on parliamentary privilege and the protection of witnesses has been provided to you. Do you have any comments to make on the capacity in which you appear?

**Dr Jones:** I am a retired academic. Since 2000 I have been the recipient of information from complainants, borrowers from banks, who feel that they have been unjustly treated.

**CHAIR:** Thank you. Do you have an opening statement?

**Dr Jones:** Yes. Unconscionable conduct has been my main concern from all the information I have received from complainant borrowers. These borrowers have no means of redress via the official regulatory and ombudsman agencies. They have been let down comprehensively, which is why they end up writing to me, a rather irrelevant person. How the law treats unconscionable conduct has long been difficult. It was originally in equity, but there is a high degree of subjectivity involved in it. Crucially for ASIC, and as Professor Fels has just told you, unconscionable conduct in the commercial sphere—a bank lender to a small business borrower—finally appeared in the Trade Practices Act, section 51AC. This was following the *Finding a balance: the report of the committee of inquiry into bank conduct 1997*. However, the powers that be moved unconscionable conduct in financial services to ASIC in 2021-02. That was 20 years ago, and not a single case has been taken by ASIC. Instead, they have consistently told borrowers: 'Go away; we don't have authority.' They lie. They have lied to complainant borrowers, often inconsistently, saying, 'We don't deal with individual cases' or 'We might deal with individual cases, but yours doesn't reach the threshold of public significance,' and so on.

I am gobsmacked by the indifference with which a succession of ASIC staffers have treated these people. You would think that, after 20 years like this, they would have gained a great deal of information to deal with the scope of the problem. There is a bit of honesty there -- in particular, from ASIC key staff such as Michael Saadat, who has now left, and Warren Day, who acknowledged in a parliamentary inquiry into the impairment of customer loans, 'We do have legislated authority, but we face high hurdles in the courts in winning unconscionable conduct cases.' That highlights that they have admitted to lying to customers. But they are right; there is a high hurdle in the courts. ASIC finally took a case against a lender to Aboriginal communities for buying used cars, which was ASIC v Kobelt, several years ago. The High Court turned back ASIC, which highlights that it is a problem not merely with ASIC but with judicial culture.

**CHAIR:** Thank you, Dr Jones. So your contention is that the unconscionable conduct provisions have not been applied by ASIC; they have not been enforced?

**Dr Jones:** Correct, yes.

**CHAIR:** Why do you think that is?

**Dr Jones:** I have no idea. You can't assume that the ASIC staff are being paid off under the table—but the indifference here is just extraordinary. ASIC used sections 12B and 12C of the ASIC Act to win a case against the NAB several months ago involving undeserved fees being withdrawn from people moving sums from one thing to the other. So ASIC has won a case with those provisions, but, compared to small business, the win against NAB is trivial. Banks take security over the family residences of small business and the family farmer and, when they have defaulted, small business and family farmers lose the lot. It is a nightmare for those small businesses and family farmers. In effect, it is like they are fish in a barrel. I can't mince words here. I have had these traumatised, foreclosed borrowers contacting me over 20 years. It is a racket that banks pursue on the side because they can. A crucial issue here is the asymmetry in the credit relationship between lender and borrower. The courts have never really confronted that, and it is reflected in the difficulty in winning cases on unconscionable conduct.

**CHAIR:** Your view is that the carving out of the financial services from the Australian Competition and Consumer Commission was a mistake. Civil and criminal enforcement—or nonenforcement—is now run by ASIC. What is the best way forward for us if we were to make some structural recommendations?

**Dr Jones:** In the first instance, unconscionable conduct in financial services has to go back to the ACCC, as Allan Fels has been recommending for some time. The ACCC haven't been as aggressive as one would like, but at least they know what unconscionable conduct is and they are dealing with it regularly. ASIC is comprehensively negligent. This is regulatory complicity of the highest order, and Warren Day is at the centre of it. So move it back to the ACCC in the first instance. But, beyond that, one has to confront the systemic problem, which is not readily resolved in terms of dealing with unequal bargaining power in commercial dealings. This is something that the courts have trouble with. They are badly educated, deifying the law of contract. They do not confront the

nature of the credit relationship, which is immensely asymmetric, open ended and capable of abuse. Since financial deregulation in the early 1980s, banks have systematically abused their power with impunity.

The other problem is that, once you deal with ASIC's weakness and the judicial culture, the complainants go to the Financial Ombudsman, now AFCA, and they are equally complicit. Beyond that, if you will allow me to enhance the depth of the problem, Treasury consistently in its review of AFCA gives AFCA a clean bill of health. The recent Treasury review, which I have examined closely, is appallingly complicit in AFCA's indifference and acceptance of the banks' stance. So small business and farmers are doing badly there as well. Treasury, the ultimate regulator, is ultimately complicit. Behind that, there is poor education of the people who staff Treasury, who predominantly are economists. I have seen the tertiary economic syllabus at close hand, and the one thing that is consistent about it is that it displaces any understanding of economic power regarding the use and abuse of market power. So you have a legal education and an economics education that cannot comprehend the fundamental nature of the brutality of the marketplace. That is a deeply entrenched problem that you cannot deal with overnight. But let us start by moving unconscionable conduct back to ACCC and we will go from there.

**CHAIR:** If you had responsible lending enforced by ASIC and you have prudential lending standards under the supervision of APRA, how would it go having a third regulator?

**Dr Jones:** I missed that, but APRA, having been carved out of the Reserve Bank, is only concerned with the stability of the banking system. They don't care about victims; what they care about is bank profits and, if anything, that is conducive to the continuation of bank predation. Complainants, without understanding, write to APRA for help, and APRA tells them to go away. One does need an institution that attempts to maintain stability, but I don't think there is anything to be gained from changing APRA at this stage.

**CHAIR:** Dr Jones, thank you for your time and your evidence today.

**SCHMULOW, Associate Professor Andrew David, School of Law, University of Wollongong**

[13:28]

**CHAIR:** Welcome. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you.

**Prof. Schmulow:** Those strictures have been relayed to me.

**CHAIR:** Do you have an opening statement?

**Prof. Schmulow:** I do.

**CHAIR:** Go ahead.

**Prof. Schmulow:** First off, thanks for the opportunity to support an inquiry conducted by the Senate; it's a privilege for me to do so. My employer, the University of Wollongong, appreciates opportunities for it to demonstrate the usefulness and practical application of the research that is conducted under its banner. In my remarks, I will confine myself to my area of specialisation, which is the regulation of the financial industry and particularly ASIC's regulation of the financial industry. Your colleagues might be asking themselves: why am I confining myself to such a narrow point of discussion when, in point of fact, ASIC's remit is far broader than that? The first answer is that it's my area of specialisation. I can't talk about Nuix because I don't know enough about it. The second is that the regulation of the financial industry is by far and away the biggest, most voluminous, most intractable, most important and most difficult part of ASIC's job.

My specialisation, my research expertise, such as it may be, has been such that I've been called upon to provide similar advice to the House of Commons and the House of Lords, the South African National Treasury, the South African Financial Sector Conduct Authority, the New Zealand Financial Markets Authority, the National Assembly of the Republic of Korea, CGAP, which is a division of the World Bank, and the Finance Ministry of Brazil.

I would like to touch on a number of issues, all of which are under one overarching rubric. There is only one question that interests me: why does ASIC not enforce the law? That is the only thing that matters to me, and that is the only focus that I will take today: why does ASIC not enforce the law?

There are four topics that I'd like to cover, if I have your permission. The first is that ASIC's remit is too wide; the second is instances of high-profile cases where ASIC decline to prosecute, and we're told that they have received legal advice to that effect; the third is the role of the CDPP; and the fourth is the role, or the potential role, that should have been played by the Financial Regulator Assessment Authority. That concludes my opening statement.

**CHAIR:** Thanks very much, Professor Schmulow. We are now looking at what would be the best mechanism to take the issue forward, which, as you identify, is about law enforcement. I will start with structure. When you look around the world at different approaches to corporate law enforcement, are there any particularly clean models that we could be looking at?

**Prof. Schmulow:** Yes, I think the South African model, to date, is the stand-out. It's the most recent adopter of the twin peaks model, although it is about to be supplanted in that respect by Jamaica, which has announced that it will be adopting the twin peaks model. The South African model is working exceptionally well because their regulator is very eager to enforce the law. They have a prudential authority which, with reference to the remarks made by Dr Jones a moment ago, takes a much broader view of prudential matters and has insisted on a purview that involves corporate culture, which I think is the right way to go.

Senator Bragg, if nothing else, let me leave you with this thought. We all understand that conduct regulation is about conduct, but I would suggest to you that prudential regulation is about conduct, too; and a prudential regulator that is conduct focused is a prudential regulator which I think is better suited to the task. The South African authorities, it must be said, do not suffer some of the constitutional impediments that ASIC suffers, so the regulator in South Africa can impose very substantial fines and all sorts of other punishment measures, and can only be opposed on very narrow administrative law grounds. ASIC, for constitutional reasons, doesn't have that freedom; nonetheless, neither does the ACCC, and the ACCC is very widely acknowledged as being far better at law enforcement than ASIC. It comes down to it being not just a question of constitutional impediments but also a question of leadership and of corporate culture.

**CHAIR:** If you take the last recommendation of Dr Jones, that there be an unconscionable conduct provision for the ACCC to enforce across the economy, effectively, including in financial services, how viable do you think that would be in the current context of already having APRA and ASIC with overlapping responsibilities?

**Prof. Schmulow:** I'm going to share a hunch, and it's nothing more than a hunch—I don't have any evidence to back this up—but I get the impression that there have been times in the past when the ACCC have found a reason to impose themselves within ASIC's remit because they see ASIC doing nothing. For example, they ran an inquiry into the pricing of bank services some time ago. I get the impression that there is some frustration at the ACCC in seeing instances in the broader economy that they would certainly take steps about and ASIC are doing nothing. Instead of giving the ACCC a confusing unconscionable conduct remit, which would be a broad catch-all for it to go after firms in the financial industry, let's just accept that ASIC is so dysfunctional. Senator Bragg, this is not just my view. There was a 2014 Senate inquiry into ASIC which determined that they were weak, feckless and suborned. There were criticisms of ASIC in the Murray inquiry. There were criticisms of ASIC in the Treasury capability review. There was an excoriation of ASIC in the Hayne royal commission.

Let's accept that ASIC is so fundamentally broken that it cannot do the job. Let's take a regulator that is exceptionally good at what it does, the ACCC, and give it the power to enforce market conduct and consumer protection in the financial industry. Let ASIC do all of the other stuff that it enjoys doing, which is not controversial and doesn't require it to take steps against anybody, and do company registrations, reporting requirements and all of that admin stuff that it seems to be very adept at.

**CHAIR:** We don't really have twin peaks anymore in Australia, though, do we?

**Prof. Schmulow:** We've never had twin peaks.

**CHAIR:** We started with twin peaks after Wallis and now we have one peak—I guess that's APRA—and now we have ASIC, which seems to be bigger and bigger with every year that passes.

**Prof. Schmulow:** We've never had twin peaks, Senator Bragg. Twin peaks recognise that the financial industry suffers from unique vagaries and systemic instability. It is only in the financial industry that, if ANZ goes bankrupt, it will take down all of the other banks with it. But, if Woolworths goes bankrupt, it won't take down Coles. If Virgin goes bankrupt, it won't take down Jetstar. If Foxtel were to go bankrupt, nobody would notice. But if ANZ, Commonwealth, NAB or even a second-tier bank, like Bendigo, were to go bankrupt, it would precipitate a financial crisis. For that reason, the twin peaks model identifies that there are two primary functions that need to be conducted in the financial industry—prudential, and market conduct and consumer protection. It further recognises that those two functions are at times antithetical to each other. For example, a prudential regulator will favour fewer banks that are bigger and better capitalised. A conduct regulator will favour consumer protection, which means more consumer choice, which means having more banks, which will unavoidably include banks that are smaller and less well-capitalised. You see this Dr Dolittle push-me, pull-me animal that is pulling in two separate directions.

The twin peaks model specifically says, 'Let's identify these as core functions; let's separate them and let's make them equal.' You have a dedicated prudential regulator and a dedicated conduct regulator. In Australia, we have a dedicated prudential regulator and a dedicated regulator for conduct in the financial industry and absolutely everything else to do with business—the economy, money, corporations registrations, insolvency reporting and everything else under the sun, except partnerships—regulator, and the remit is too wide. This was the finding of the House of Lords and House of Commons review into the collapse of Northern Rock and Halifax Bank of Scotland.

**CHAIR:** When was—

**Prof. Schmulow:** During the global financial crisis. When the United Kingdom abandoned the mega regulator, the Financial Services Authority, and adopted twin peaks, it was on the back of findings by the House of Commons and the House of Lords that the remit was too wide. When Wallis proposed the twin peaks model, he proposed a dedicated prudential regulator and then a regulator that would facilitate business. It would be a one-stop shop for business—registrations, reporting and all of that—basically, virtually, a glorified Officeworks. After the global financial crisis, people started to say, 'Hang on a minute; why isn't this securities regulator protecting me when I lose money; why isn't it protecting consumers?' It was only at that stage that there was an attempt to draft onto ASIC a culture that was concerned about conduct and consumer protection. By that stage the culture that was inclined towards facilitating business was so deeply entrenched that, at the 2019 Hayne royal commission, Commissioner Hayne said, 'Stop treating regulated entities like customers.' They've treated them like customers from the word go because that's what they were born to do. What we need to do is to adopt, for the first time, a twin peaks model.

Roughly at about page 423 of the final report—the page numbers vary depending on whether you're using the Word document or the PDF—Commissioner Hayne examines this question of ASIC's remit and says, 'With adequate resources and the right leadership, I see no reason why ASIC can't discharge its remit.' With the very

deepest respect to Commissioner Hayne and the very greatest respect for the extraordinary work done by the royal commission, I wish very respectfully to disagree.

In my view, Commissioner Hayne got it wrong, and he got it wrong because he misses the point. The point is not whether, with adequate resources and the right leadership, ASIC can discharge its remit. With adequate resources and the right leadership, anything is possible in the best of all possible worlds. But the fact is: which regulator, in which jurisdiction and in which industry, has ever been adequately resourced? As for the right leadership, that's just potluck. The fact is that the broader the remit, the more difficult the task, and the more difficult the task, the less likely it is to be achieved.

The history of financial regulation all over the world is a history of failure. Every single major jurisdiction that you care to think of or name has suffered some form of financial crisis. Paul Krugman, who won the Nobel Prise in 2008, says that there's a financial crisis somewhere in the world every 18 months. Senator Bragg, for those members of your committee who are old enough to understand this reference, if financial regulation was a motorcar, it would be a British Leyland Marina; it would just be a breakdown looking for a place to happen. If you don't have the right regulatory architecture, you are guaranteed to fail; whereas, if you do have the right architecture, instead of being guaranteed to fail, it will merely be highly probable that you'll fail. That's the best-case scenario: it's highly probably that you'll fail. You have to mitigate every single conceivable risk that you take as a learning from where things have gone wrong in other jurisdictions, and the first and most obvious is that ASIC's remit is too broad.

**CHAIR:** Could you take on notice coming back with some evidence around the break-up of the UK's mega regulator and some information about what you think ASIC is doing that it wouldn't necessarily need to do if, in your opinion, we got the architecture right? I also want to ask you about the issue here of the referrals to the Commonwealth DPP. In 2018-19, there were 86 referrals; in 2019-20, there were 82; in 2020-21, there were 80; and then there were 70. In the last financial year, there were just 41 referrals from ASIC to the Commonwealth Director of Public Prosecutions. Do you know what's going on here?

**Prof. Schmulow:** I think that's an exceptionally important point, Senator Bragg, and thank you for that question. The very eminent Professor Ian Ramsay, the doyen of corporate law in Australia, and George Gilligan, analysed CDPP prosecutions over a 10-year period. They found that, over 10 years, they relied on 86 sections out of a possible 900, so one must ask what happened to the other 814 sections. Of the 86 sections that they relied on, they relied really only on 19—that is, 19 out of a possible 900. The number of times that the CDPP used the ASIC Act for a prosecution constituted 2.1 per cent. They claim a 97 per cent success rate. Members of the public might be impressed by that, but, for me, as a lawyer, if a lawyer says, 'I never lose a case,' my response is: 'Well, you don't take on many difficult cases, do you?' If they had used the full gamut of sections available, they may have been able to extract far higher penalties in that 97 per cent of cases that they won. The cases that they do take on, according to Professor Ramsay, are against individuals in small firms, not corporations, and they tend to be about administrative failures, not misconduct. Professor Ramsay states:

As discussed earlier, given the pervasiveness and extent of misconduct scandals in Australia, including the misconduct in the financial services industry revealed by the Hayne Inquiry, these represent low levels of prosecutions over a 10-year period.

He goes on to say:

Given the scale of business misconduct in Australia in recent years, the fact that there have been only 715 prosecutions by the CDPP under two very significant corporate law statutes over a 10-year period is arguably low and reflects a limited level of criminal enforcement. Also, a relatively small number of sections comprise the bulk of prosecution activity over the 10-year period. For example, prosecutions under the five most extensively used sections in the Corporations Act constitute 36.9% of all cases … and 46.4% of all counts (or prosecutions under … the Corporations Act). There were only 118 prosecutions of corporations over the 10 years of the study period. The data on penalties reveals that actual custodial sentences served are a low number, only 104 … and the median sentence … is 16.5 months.

I've canvassed this widely and I've tried my very best to understand how this works. What happens is that ASIC submits a brief to the CDPP.

**CHAIR:** Yes.

**Prof. Schmulow:** In that brief, ASIC will mention—will name, will list—which sections it thinks have been breached. The CDPP can accept that or ignore that and choose other sections; it is entirely at the discretion of the CDPP. However, doubtless the sections that are named by ASIC will be of use to the CDPP. So I think we can conclude that the CDPP is under-resourced when it comes to expertise in the Corporations Act and the ASIC Act, but so is ASIC. Mr Justice Perram, in ASIC v Westpac, said that ASIC doesn't understand or know the law. So, between ASIC and the CDPP, you've got two organisations that are across 86 out of 900 sections, with those 86

being the easiest sections to prove because they're administrivia. The other 814 they don't want to touch because it's too difficult, they're too conservative and they don't want to lose.

**CHAIR:** I come back to the question, though: why do you think the number of referrals has halved in the past five years?

**Prof. Schmulow:** I think ASIC is too distracted; its remit is too broad. I get the impression from reports in the media about conduct exhibited by the leadership of ASIC that the organisation is in a state of chaos. They've lost sight of what they're supposed to do, which is why they run around federal parliament planting dorothy dixers. That is an effort to suborn accountability to the democratically elected representatives of we, the people. That is scandalous, in my view, Senator Bragg. It is outrageous that a Commonwealth authority is seeking to manipulate the questions that it gets asked as a form of accountability. It's unheard of. I think that, because they can't enforce the law, they're running around doing everything else but enforcing the law: lobbying members of parliament and then refusing to say which members of parliament they have lobbied because, apparently, that's confidential. It's not confidential. Confidential information is information that relates to a current or imminent case that you're about to run. It does not relate to what you are doing on the taxpayer's dime by lobbying the duly elected representatives of we, the people. It's an organisation that is out of control.

**CHAIR:** There has been some discussion today about further reforms that we might recommend for whistleblower protections. Do you have any insight on this matter for us?

**Prof. Schmulow:** I do. Whistleblower protection in this country is like a bait-and-switch trick. You're told that there's whistleblower protection, and then anybody who tries to bring themselves under whistleblower protection is publicly crucified upside down so that all the other whistleblowers get the message: there will be no protection. You must remember that, when a whistleblower blows the whistle, it is potentially the end of his or her career. What they've done in the United States is provide whistleblowers with substantial protection, including a payout on the rest of what they could have expected to earn in a career that they have now torched. I think they are the kinds of protections that we need. I think it's a very sad state of affairs, Senator Bragg. If I were the CEO of a company, that company wouldn't require whistleblower protection because my attitude would be that somebody who has the courage to blow the whistle is somebody who's just saved my job. I'm not going to be persecuting that person; I'm going to be promoting them. If the Commonwealth Bank, instead of persecuting Jeff Morris for blowing the whistle on Commonwealth Bank financial planning, had said, 'Oh, he's got courage; let's get him to sort the problem out,' they might have avoided a royal commission and they might still own a financial planning division.

**CHAIR:** Finally, do you think ASIC appreciates the role that short sellers play in capital markets?

**Prof. Schmulow:** I'd decline to answer that question, as I don't know enough about it. I would like to offer a comment, if I may, on the testimony provided by Mr D'Aloisio.

**CHAIR:** Sure.

**Prof. Schmulow:** I found his testimony to be muddled and confused. ASIC is not a traffic controller. ASIC's job is not to stand on a highway, directing traffic and saying, 'Let this stream come through and we'll hold this one so that we can have optimal traffic flow.' ASIC's job is to enforce the law, not to be a traffic controller. He says that consumers must accept risk. They do accept risk. What they don't accept is fraud and theft. When you charge dead people for financial advice or charge people who you know to be dead life insurance premiums, that's not risk; that's fraud and theft. When he says that what ASIC needs is greater clarity about what the government wants when enacting legislation, my response is: if ASIC wants to know what the government's intention is when enacting legislation, read the legislation. The things that you are supposed to prohibit are in the act. You don't need the government to hold your hand, mop your brow and say, 'There, there, sweetheart; this is what you need to do.' It's in the legislation. It's this litany of excuses that reinforces this culture at ASIC that it's all too hard. Thank you.

**CHAIR:** Thank you very much for your evidence today, Associate Professor Schmulow. We look forward to your answers to questions on notice.

**Proceedings suspended from 13:54 to 14:09**

**LOCKE, Mr David, Chief Ombudsman and Chief Executive Officer, Australian Financial Complaints Authority [by video link]**

**SMITH, Dr June, Deputy Chief Ombudsman, Australian Financial Complaints Authority [by video link]**

**CHAIR:** I welcome representatives from AFCA. I understand that information on parliamentary privilege and the protection of witnesses has been provided to you. Do you have an opening statement?

**Mr Locke:** I have provided an opening statement to the committee, which I propose to table.

**CHAIR:** Okay. How does it work in terms of you referring matters to ASIC?

**Dr Smith:** The Australian Financial Complaints Authority and the Australian Securities and Investments Commission have different but complementary roles within the consumer protection framework. We are not the regulator; ASIC is. ASIC, as a result, is responsible for the system, including obligations which financial firms have for internal dispute resolution and external dispute resolution. We are the authorised operator of the external dispute resolution system. Under Regulatory Guide 267 and Section 1052E of the Corporations Act, AFCA has obligations to report to a number of regulators, including ASIC, on any definite systemic issues it might identify from its handling of complaints, and any possible serious contraventions of the law it might identify through its dispute-handling work. We have a reporting cadence and a meeting cadence with ASIC. We have monthly reports to the regulator on emerging trends and issues in our complaint-handling operations. We provide quarterly reports on a range of matters, including complaint numbers, and we have a quarterly systemic issues report that we provide to the regulator, including to APRA and also others. In addition, we do ad hoc reporting. We are required to report within 15 days to ASIC any possible serious contraventions that we might find, and also within 15 days any definite systemic issue we have identified. It is then for the regulator to look at and consider that in light of its regulatory priorities and take action as it sees fit.

**CHAIR:** How many referrals have you made in the last year?

**Dr Smith:** We can provide a copy of our latest systemic issues insights report, from both quarters 3 and 4 of last year. We also refer you to our annual review. In the last year there were 121 reports to ASIC, APRA, the Office of the Australian Information Commissioner and the ATO; and 87 reports to ASIC.

**CHAIR:** How many of those were taken through to prosecution?

**Dr Smith:** That is a question best referred to ASIC. We have meeting cadence with its enforcement teams. Through our information sharing we are aware of surveillance and other enforcement activities that the regulator has on foot, but it is best to ask that question of the regulator.

**CHAIR:** So you don't know?

**Dr Smith:** We understand the number of enforcement activities that the regulator has on at the moment. The regulator and AFCA have undertaken some analysis of our 2021-22 figures to understand the percentage that went forward. We must remember that AFCA is only one area and one entity which provides intelligence and other information to ASIC in its broader remit and role. In that context, we were very pleased last year to see the regulator take, for the first time, enforcement action against a number of financial firms in relation to their failure to cooperate with AFCA under a new provision in the Corporations Act, 912, and also the consumer credit act.

**CHAIR:** You made 87 in the past year?

**Mr Locke:** That's correct.

**CHAIR:** What about over the last five years? Do you have that data?

**Dr Smith:** In terms of our five years of operation, let me find that figure for you.

**CHAIR:** Can you give me the data for the last five years? I will write it down. One of the important data points that you can give us is how many referrals you're making, which gives us some indication of some of the issues that are happening in the marketplace.

**Dr Smith:** I can certainly advise that, since 1 November 2018, when AFCA opened its doors, we have remediated, within our systemic issues function, to 4.8 million consumers, and $340 million returned. We will take on notice your request for statistics about the number of reports that we have made over that five-year period to all of the regulators, and particularly ASIC.

**CHAIR:** I am not trying to be difficult. I understand that you don't have all of the data in front of you. Just to confirm, you don't have the data in front of you, other than for the last financial year, about how many referrals there were to ASIC?

**Mr Locke:** That's correct. We don't have that in our packs. We can very easily provide that information. It's data that, obviously, we do have on hand.

**CHAIR:** What I would like you to do in your answer is to provide it to us in the way that the Commonwealth Director of Public Prosecutions has provided it to the committee. They have done 2018-19, 2019-20 and so on. They have done the number of referrals that they have received. In your case, I am trying to find out how many referrals you have made in each of the last five years to ASIC. I wouldn't have thought that it's a very complicated task.

**Mr Locke:** I agree. We will break that down as to whether they were definite systemic issues, whether they were serious contraventions of the law or whether they were other breaches of the regulations. We can easily provide that to the committee, and we are happy to do so.

**CHAIR:** That's helpful. If you are AFCA and you are making a referral to ASIC about a particular entity, is that how it works? Is it about a particular entity?

**Dr Smith:** Certainly, it's about an AFCA member, who is usually an Australian financial services licensee or a holder of a credit licence.

**CHAIR:** You say, 'Financial services licensee XYZ has, in our opinion, done this.' What sort of a brief do you provide to ASIC?

**Dr Smith:** Before we get to that point, we have obviously worked with the financial services firm, once we've identified that there might be a possible systemic issue. We investigate that and look to either fix the error or misconduct that's been identified and then remediate any particular consumers, other than the complainants we've seen that may have been affected. You'd understand that has been our objective—to reduce the number of complaints that come through to AFCA in the first place. The answer is that, if we report a definite systemic issue and it has been resolved, the notification will provide information about the outcome. It will provide information about why we have decided that it is a definite systemic issue, and the action that the financial firm has taken. The matter is then referred to the regulator. It is for the regulator—whether it is ASIC, APRA, the OAIC or the ATO—to consider that and any enforcement of the law, or breaches of regulation or law, that they might deem in the circumstances.

We must make that report in 15 days. If the matter is a possible serious contravention, we must form a reasonable opinion that there is a possible serious contravention of the law and we must report that to the regulators within 15 days of forming that view. Again, it's a matter for the regulators as to the action they take from there. Those reports would provide the name of the firm, the issue, the reasons why we formed the view we have, and then the report would be sent.

**CHAIR:** Do you get a response—an update on progress?

**Dr Smith:** We have a proactive and cooperative relationship with the regulator. We have meetings where matters that have been—

**CHAIR:** Sorry; I don't want to cut you off unnecessarily. Do you get a response from ASIC which provides you with an update on progress?

**Dr Smith:** Yes, we do, in relation to the serious contravention reports that we make, and in many of the systemic issues matters. I was explaining that information reported back to us may take many forms and come through many of the mechanisms and protocols that we've set up to ensure real-time information flow between the entities.

**CHAIR:** They do tell you if they are going to prosecute?

**Mr Locke:** They do. When AFCA was established by the Turnbull government, one of the changes that was made that was different from the predecessor schemes was that there was a legal gateway provided that enables ASIC to share information with us. As you know, very often the challenge with regulators is that you have reporting through to the regulator and then they can't tell the reporting body whether or not they are going to take any action. The legislation that parliament passed does provide for a two-way exchange of information. We do get full cooperation and exchange of information from ASIC. We know if they are going to be taking enforcement action with regard to particular matters. As June said, that will come through a variety of mechanisms. Some of these, of course, may be issues that lead to prosecution. Some of them may not be prosecuting priorities for ASIC.

Of course, some of the issues that we will identify will relate to conduct, but some of the issues that we identify may be systems failures that can be remediated in other ways. It wouldn't be appropriate, probably, for every matter that we refer to ultimately lead through to a prosecution. That may not be the appropriate regulatory

response. But we do get cooperation and an exchange of information from ASIC, so we are aware of that. Clearly, where we have very serious concerns, we would expect the regulator to take action.

**CHAIR:** When you make referrals to ASIC, out of the 87, are they all criminal or are they a mix?

**Mr Locke:** They are a mix. We will send through to the secretariat now the latest systemic issues report that we released on 19 October. That covers the period from 1 January 2023 through to 30 June 2023. Some of the examples in there are issues with the provision of credit, inadequate policies, procedures and training to assist vulnerable consumers, in particular those impacted by domestic and family violence, credit reporting issues, inappropriate debt collection, issues with claims handling under motor vehicle insurance policies, and issues with the calculation of premiums on life insurance policies. It can be quite a range of things that we're seeing. As you'll see, some of those may be issues, as I said, around conduct or misconduct that may lead to litigation; others may be addressed through other means—other regulatory tools.

**Dr Smith:** You'd know, Senator, that in the last financial year we have reported issues around claims and complaints handling of both the general insurance and the superannuation industries as well.

**CHAIR:** How many of the 87 were criminal?

**Mr Locke:** That wouldn't be a matter that we could assess because we are not, obviously, a prosecuting authority. We can provide on notice a breakdown of the issues that we thought were related to conduct, as opposed to systems or policy failures. We're happy to do that.

**CHAIR:** Finally, I want to ask you about the Dixon scandal.

**Mr Locke:** Yes.

**CHAIR:** ASIC appeared at the Senate estimates hearings last week. They said they haven't bothered to pursue any of the criminal issues. That was too hard. They've agreed to a civil penalty, which is never going to be paid, they reckon. AFCA has been working with ASIC, potentially, and others, to try and set up some sort of an arrangement through the compensation scheme of last resort. Can you explain to the parliament what exactly you've done here?

**Mr Locke:** Certainly. As you're aware, the parliament passed the legislation to establish the compensation scheme of last resort. That is intended to start in April 2024. AFCA was tasked with establishing the CSLR. That will be an independent body. Significant work is underway in order to do that. AFCA had a number of cases that were paused due to insolvency. The policy that we took was that, where the financial firm had gone insolvent, we paused action on the cases. There was uncertainty as to whether or not a compensation scheme of last resort would be set up. We felt that it wasn't appropriate to close these cases if that remained the government's intention. As you are aware, it was the intention of the Morrison government and then of the Albanese government to do so.

There are approximately 5,000 cases across 50 financial firms which are impacted by insolvency, and they were paused. Once the CSLR legislation passed, AFCA has been working through those cases, firstly to identify which of those matters may be covered by the compensation scheme of last resort. As you know, Senator Bragg, it only covers specific areas of financial services. It doesn't, for example, cover prudentially regulated bodies; it doesn't cover a whole range of areas.

We anticipate, from our analysis, that there will be just over 2,000 cases—2,027 cases, we think—that will fall within the potential scope of the compensation scheme of last resort. We are working through those. As you know, the biggest chunk of those relate to the Dixon Advisory, and the collapse of Dixon Advisory. We have 1,851 Dixon matters on our books that we are starting to work through.

The team that we have at AFCA is looking at those cases, in the same way as we would look at any matter, to look into the facts of the circumstances, and to look into what a fair resolution would look like in the context of this. Obviously, we are looking at the nature of the advice and the conduct of Dixon Advisory with regard to that, as well as the conduct of the individual consumer in that space.

We haven't issued any determinations yet in respect of this cohort, but we are working our way through them. It's quite a lot of cases to process. This is a team that would normally deal with about 500 such matters. We do think that it will take a while to get through the 1,851 Dixon matters and the couple of hundred other matters which we think are in scope.

With the whole process to work through those, at the moment we are anticipating it will take about 18 months to get through all of those cases. Until we have made decisions on those, we don't know yet whether there is any liability and, if so, whether they will be covered by the compensation scheme of last resort.

**Dr Smith:** Having worked out whether or not they are within the scope of CSLR, we need to turn our mind to whether they are within AFCA's jurisdiction. There are questions upfront that we will look at and explore,

including whether they are within monetary caps, whether they are against the financial advisory firm or whether they are related to a managed investment scheme, for example. There are a range of, if you like, jurisdictional boundaries that will need to be crossed as well. We need a robust and thorough process to undertake that work, as you would expect us to do.

**CHAIR:** My main question was: were you involved with the public announcements in the budget in 2023-24 before the budget papers were inked?

**Mr Locke:** In what sense 'involved'?

**CHAIR:** Were you consulted by Treasury, before the budget was announced, about the measures to do with the CSLR and Dixon Advisory?

**Mr Locke:** There have been conversations. We have regular meetings with Treasury. There have been conversations, as the government has developed its policy with regard to the compensation scheme of last resort, but not in terms of setting the policy or advising government on the policy settings or appropriateness of any of this. That is entirely a matter for government. We are not even a government agency, although we were established by statute. We certainly don't advise the government with regard to the policy parameters or with regard to the wisdom or not of proceeding with such a measure. It would be entirely up to Treasury to advise government. There have been conversations, as there were conversations under the previous government, with Treasury officers.

**CHAIR:** Do you still think it is unquantifiable or do you have a sense of the losses here for the Dixon clients?

**Mr Locke:** If we look at all of the consumer claims that we've got before us, if they were all found to be in favour of the consumer and all the losses were justified—and that's a big if—then that could total, we think, about $357 million.

**Dr Smith:** Then there is the cap.

**Mr Locke:** But there is of course a cap of $150,000 on each claim, so it is going to be significantly less than that. If we're just looking at what's been claimed as the losses on those 1,851 cases, that would be $357 million. That is a very broad figure. Most of the time, what you find in cases is that they don't always go in favour of the consumer; the full amount isn't always awarded. In this situation, as my colleague just said, there is a cap of $150,000 per claim, and we have monetary caps as well. Until we work through it, we don't know. As you are aware, there is the top 10 levy that has been levied on the largest financial firms, which will account for $250 million. It is intended that will cover complaints that were lodged with AFCA on or before 8 September 2022, which is when the legislation to establish the CSLR was introduced into parliament.

**CHAIR:** Thank you.

**Senator WALSH:** I think you just clarified one of the questions I was going to ask, which was about the funding model for AFCA. In relation to the chair's questions about the federal budget, the funding model is as you described. Are there a couple more elements to your funding model?

**Mr Locke:** How AFCA is funded for our core work—we're not talking about work with regard to the Compensation Scheme of Last Resort—is very much a user-pays model. There are three components to it. Every financial firm that has an Australian financial services licence is required to be a member of AFCA, with very limited exceptions to that. They all pay an annual registration fee, which is currently $375. Licensed authorised credit representatives also pay a fee, which is about $85. One component is basically an annual registration fee, which is just a flat fee. There are two other component parts, one of which is fees on the number of cases, per case that you have. Every financial firm has five free cases per year. You only start paying any fees on cases that AFCA is dealing with if you have six or more complaints. That's to ensure that small financial firms are not unfairly penalised, because anybody might have some complaints throughout the year.

Then there is a third component, which is a user charge, which means the very heavy users of the service, which tend to be the large financial firms. There may be mid-tier firms that have poor practice; then they pay a user charge as well. The service is fully funded by industry, through a range of measures which are designed to ensure that it's really the heavy users of the system, the firms that are generating very high volumes of complaints, that bear most of the cost of the service.

**Dr Smith:** In fact, we think that 87 per cent of our financial firms have not had a complaint within the year. Indeed, in the financial advice sector, only nine per cent of our financial advisory members received one or more complaints, so 91 per cent of financial advisory members only paid the $325.

**Senator WALSH:** One of the themes that have come up in this broader inquiry is about relationships with industry stakeholders. I was just wondering if you could talk to us about how you view, for AFCA, the best way

to work with your professional association stakeholders, if that's the appropriate term. For example, how do you view the best way to work with the Financial Advice Association Australia?

**Mr Locke:** We think it's really important that we have regular, open, constructive engagement with all of our members. Obviously, we work very closely with the different industry peak bodies as well, as you say—for example, in financial advice or in superannuation or with the ABA and the Customer Owned Banking Association and the Insurance Council. We have regular meetings throughout the year, including meetings between the AFCA board and some of these organisations. We attend conferences. We speak at conferences. We hold roundtables. We run online member forums two or three times a year. We have a fourth one coming up on 16 November. We have thousands of members who participate in those regularly. We also send out a monthly newsletter, updating members on all sorts of things that are going on that might impact their business—for example, approaches that we may be consulting on or changes that are coming in the regulatory space. We have about 42,000 subscribers to those monthly newsletters. But there's no substitute for face-to-face engagement. We are out and about doing that, both with the industry but also with consumer organisations and consumer groups and those who are working particularly with vulnerable consumers to ensure that we've got an accessible service.

We are a membership organisation. Even though our role is to determine what's fair for all the parties, that isn't in any way geared towards members; we have to be entirely impartial. We think it's critical that we have open and constructive relationships. We want to use the data and intelligence that we're seeing, through complaints and through systemic issues, to help the financial firms to improve their business and their practice. If we can do that then we can minimise complaints arising in the first place. We don't want to be at the bottom of the mountain providing compensation for somebody whose house has been destroyed by the boulder. We'd rather be at the top of the hill, working to ensure that the boulder doesn't fall down in the first place and destroy the house. That's very much how we work.

**Dr Smith:** This week we have consulted with a number of the industry associations in the credit space around our draft approaches to responsible lending and appropriate lending for small business. This year we have also consulted with many of the industry and professional associations in other areas around issues such as the proposed changes to our rules, following the independent review response, and also the approach that may be taken by AFCA in relation to a whole range of other matters in our decision-making area. They form a critical part of our stakeholder map and our stakeholder engagement, and many times they are the conduit through to their memberships as well.

**Senator WALSH:** Is there an example that you might be able to give of how that sort of stakeholder work with your professional association members assists with education on matters that you are starting to see come through, and assists with prevention?

**Mr Locke:** If you look at when we started—it's actually our fifth birthday today; we started on 1 November 2018—we had a number of issues, including with the major banks, around the level of response that we were getting in the early stages of the resolution process. With some of the major banks, we were having a situation where 25 to 30 per cent of the time they would be resolving matters when we were referring back to them and giving them a final opportunity to do so. Overall, I think the performance was often closer to 40 per cent across the majors. We are now in a situation where that is 57 per cent resolution. In the case of one of the very largest banks, often even 70 per cent of matters are being resolved at the point that we're referring back to the banks. That's been achieved in a variety of ways. It's partially through us providing information, providing approaches, explaining how we will deal with these matters and what our expectations are. With the major banks, we meet on an annual basis with the bank boards and we give full and frank feedback on areas where we think they are doing well and areas where we think they could improve their practice with regard to consumers.

We have worked directly with banks on, for example, their approaches to hardship, their approaches to dealing with customers who may be subject to domestic and family violence, and also scams. We're doing a lot of work in that space at the moment, really talking about good practice that we're seeing with some of the players and what we think would make a difference for other players in the market and how they could protect their consumers better and minimise the terrible impact and losses that are coming through scams.

They are a few examples of the ways in which we work. We see that very much as a partnership model, not a 'gotcha' model. We think that by using the intelligence we have—and we do have a unique perspective across the whole financial services sector—we can help.

Another thing we've done for all members is to launch, towards the end of last year, live dashboards. They can see the complaint types they are getting, where they are resolving and what the outcomes are on those. All members using this can also compare their performance with their peer group. We think that's really important. As a senior manager, as a CEO and as a board member, you can see that you are the outlier in terms of

performance. We know that competition amongst financial firms can generate improved practice in this area. Nobody really wants to be delivering the worst customer service to people in hardship. We use all those transparency tools, we use collaboration and we use the high-level engagement with CEOs and boards to try to drive improved practice.

**Senator WALSH:** Thanks. That evidence is useful in giving us the full picture of where people can go to get the help they need, and where some of this stakeholder work is happening in the way some people are calling for. Finally, going back to the chair's questions around referrals of systemic issues and contraventions, on page 6 of your submission you provide more information for the committee about that. The chair has asked for some data on notice. You also provide information about the types of regulatory actions and outcomes which I guess you have pieced back either from what ASIC has told you or from what has been published that has come from your referrals. You referred to some suspensions and cancellations, other enforcement action, remediation programs and a couple of Federal Court examples. From your perspective, you can see some level of action being taken on the referrals you make to ASIC once those referrals have been made.

**Mr Locke:** We do with some of the more serious matters. In recent months, other judicial outcomes have been achieved, including significant fines for major, large financial firms as a result of systemic issues that we have reported.

**Dr Smith:** The matters you refer to are from the 2021-22 dataset. We have the question on notice. We will provide additional information to the committee.

**Senator WALSH:** Thank you.

**CHAIR:** Thank you to our witnesses from AFCA. Thank you to all the people who have helped bring this production together today. We look forward to receiving answers to our questions on notice, forwarded to the secretariat according to the prescribed timetable.

**Mr Locke:** Thank you.

**Committee adjourned at 14:47**