



Australian Government
Financial Reporting Council

AUDITOR DISCIPLINARY PROCESSES: REVIEW

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The Hon Stuart Robert MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Dear Assistant Treasurer

In response to your letter of 7 November 2018 requesting that the Financial Reporting Council (FRC) conduct an assessment of the adequacy of auditor disciplinary functions in Australia, I enclose the *Auditor Disciplinary Processes: Review* (the Review).

The Review was conducted over a period of four months, using evidence provided by the Australian Securities and Investments Commission (ASIC), the Companies Auditors Disciplinary Board (CADB), Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia, and the Institute of Public Accountants (IPA). In the time available, this information has not been independently verified.

Despite these limitations, I trust that the Review and its recommendations will serve as useful advice to you in your consideration of auditor disciplinary processes in Australia.

Yours sincerely

A handwritten signature in blue ink that reads 'W. Edge'.

Bill Edge
Chair, Financial Reporting Council

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Executive Summary

Auditors play a critical role in fostering confidence in the integrity of our markets. They provide independent assurance of the quality of financial information in the market and assess compliance with reporting obligations.

There has been concern in recent years about audit quality standards in Australia, in part as a result of the findings of the Australian Securities and Investment Commission's (ASIC's) Audit Inspection Program. This has led to an increased level of interest in the consequences for auditors when they do not discharge their statutory or professional duties. The Parliamentary Joint Committee on Corporations and Financial Services expressed concern that the Companies Auditors Disciplinary Board (CADB) has heard few cases in recent years, and recommended that the Government review auditor disciplinary processes.

This Review was conducted in response to that recommendation. The Review assessed the processes available to discipline Registered Company Auditors (RCAs) that do not meet the standards required of them. The aim of this Review is to identify how disciplinary processes can be improved to ensure they effectively address cases of alleged misconduct.

The Review

RCAs can be disciplined in response to enforcement action commenced by ASIC, or through a decision of their professional accounting body. ASIC investigation of RCA misconduct can lead to a referral to CADB, proceedings being commenced in court, or ASIC taking administrative action or reaching a negotiated outcome with the particular RCA. This Review examined each of these disciplinary processes, and also considered the ASIC Audit Inspection Program which is currently used to identify firm-wide issues that are rectified through firms' own Audit Action Plans.

In conducting its review, the FRC secretariat sought statistical and qualitative information from ASIC, CADB, and the professional accounting bodies about their disciplinary processes. The FRC secretariat also conducted targeted interviews with these and other key stakeholders. It was not within the time available to the Review to independently verify the information available, or to conduct statistical surveys about audit quality and the effects of disciplinary processes. Accordingly, the Review focused on disciplinary processes from the point at which potential misconduct was reported, until an outcome was reached.

Findings

ASIC has only referred six matters to CADB in the last eight years and only commenced one matter in court. The Review identified two primary reasons for this low referral level: RCAs voluntarily cancelling their registration prior to a CADB referral or decision (with no publicity associated with that voluntary cancellation), and ASIC's preference for negotiated outcomes — which was partly a reflection of an organisation-wide enforcement approach, and partly based on the perception that CADB's processes are protracted and relatively formal.

The Review also identified that while ASIC's Audit Inspection Program is an important part of ASIC's surveillance work in relation to RCAs, the outcomes of this program are generally focused on educative efforts with the firms, rather than being enforcement-oriented or imposing disciplinary consequences on firms.

The professional accounting bodies' disciplinary processes were observed to be limited in their application in part because bodies lack the power to fully investigate RCA misconduct. However, the Review found the bodies consider a substantial number of matters, impose a range of disciplinary consequences on members, and that they therefore are a useful disciplinary process and basis for education within the profession.

The Review has developed a range of recommendations in light of these findings, which aim to improve the individual processes for RCA discipline, and their relationship to each other. Implementation of the recommendations should reinforce the spectrum of disciplinary processes with graduated levels of formality and consequence to enable regulators to reach appropriate disciplinary outcomes.

Recommendations

ASIC's detection, investigation, and enforcement processes

- ASIC should adopt a more structured and consistent approach to preliminary investigations of RCA misconduct matters.
- ASIC should improve its record keeping and data management systems to ensure key decision points in relation to RCA matters are easily tracked across the organisation.
- ASIC should evaluate whether the criteria used for resourcing a RCA misconduct matter for enforcement action appropriately recognises the market-wide benefits of improving audit quality.
- ASIC should outline how their 'why not litigate' enforcement strategy will apply to misconduct by RCAs.
- Barriers to ASIC making a factual public announcement when a RCA voluntarily cancels his or her registration while under investigation should be identified and addressed.

Companies Auditors Disciplinary Board (CADB)

- CADB and ASIC should work to adopt a less formal and a more timely approach to the carriage of CADB matters. This should include a review of CADB's practice and procedures manuals.
- The Government should consider revising provisions so that CADB may publish the commencement of proceedings including naming the RCA subject to the proceedings and his or her firm.
- The Government should consider providing CADB with additional disciplinary powers, including powers to suspend registration during a CADB proceeding and impose fines against individual RCAs or the firms that employ them, if adverse findings are made.
- If a greater number of applications are made to CADB as a result of current and upcoming reforms, the Government should consider whether CADB will require additional administrative support to ensure matters are dealt with.

ASIC's Audit Inspection Program

- Potential breaches of the law and failures of RCAs to meet their obligations identified in ASIC's Audit Inspection Program should be reviewed for possible enforcement action.
- ASIC should publish the results of audit inspections in greater detail, including naming firms.
- ASIC be given the power to compel remediation of defective audits, alongside the power to publish notices when this occurs.
- ASIC should consider the division of resources between audit inspection and financial reporting surveillance work to ensure that ASIC's resources are being used effectively to ensure good RCA audit quality.
- ASIC and the FRC will work together to implement the Parliamentary Joint Committee on Corporations and Financial Services report *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 45th Parliament* recommendation to devise a study that would track audit quality over time.

Recommendations (continued)

Professional accounting bodies

- Professional bodies should refer to ASIC all matters relating to RCAs where there appears there may be a breach of the law.
- Professional bodies should accurately record all disciplinary processes, including those that lead to no substantive action, and the reasons for the decision. They should also distinguish between lack of evidence that conduct was inappropriate and lack of evidence because information was not provided.
- Professional bodies should formalise processes for advising each other and the FRC of their disciplinary proceedings, particularly regarding RCAs.
- Professional bodies should publicly report statistics on the number of complaints they receive, and the number of complaints that do not proceed.

Abbreviations

Abbreviation	Definition
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
AUASB	Auditing and Assurance Standards Board
CA ANZ	Chartered Accountants Australia and New Zealand
CADB	Companies Auditors Disciplinary Board
CALDB	Companies Auditors and Liquidators Disciplinary Board
CCG	ASIC's Corporations and Corporate Governance enforcement team
CEU	Court Enforceable Undertaking
CCM	Close and Continuous Monitoring
Committee	Parliamentary Joint Committee on Corporations and Financial Services
Committee's report	Parliamentary Joint Committee on Corporations and Financial Services report on 2016-2017 annual reports of bodies established under the ASIC Act
Corporations Act	<i>Corporations Act 2001</i>
FRC	Financial Reporting Council
FR&A	ASIC's Financial Reporting and Audit team
IPA	Institute of Public Accountants
RCA	Registered Company Auditor
SMSF	Self-Managed Superannuation Fund
SOFAC	Statement of Facts and Contentions

1. Introduction

Background

On 26 July 2018, the Parliamentary Joint Committee on Corporations and Financial Services provided to Parliament its *Report on 2016-2017 Annual Reports of Bodies Established Under the ASIC Act*¹ (the Committee's report). Under section 243 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the Committee has a duty to examine annual reports for bodies established under the ASIC Act and report on matters for the Parliament's attention.

The Committee's report raised concerns about the Companies Auditors Disciplinary Board's (CADB's) irregular workload, noting that the Board had heard only one matter in both 2015-16 and 2016-17, and no new matters were referred in 2017-2018.

The Committee recommended the Government review the adequacy of auditor disciplinary functions. The Government agreed to this recommendation and in its response noted that the Review 'will provide insights into these auditor disciplinary processes and may identify potential areas for improvement'.²

On 7 November 2018, the Assistant Treasurer, the Hon Stuart Robert MP, wrote to the Financial Reporting Council (FRC) requesting the FRC conduct an assessment of the adequacy of auditor disciplinary functions in Australia in response to the recommendation in the Committee's report.

Auditors in Australia

The Review focuses on RCAs, who are subject to the disciplinary proceedings of ASIC and CADB. The Corporations Act requires that audits of Australian companies must be undertaken by a person who is registered. As of 30 June 2018, there were 4,226 RCAs registered with ASIC.

RCAs must comply with the auditing standards set by the Auditing and Assurance Standards Board, and certain requirements of the Corporations Act.³ The Australian Auditing Standards set out the responsibilities of a RCA when engaged to undertake an audit of a financial report, and prescribe the form and content of the RCA's report.

There is also a range of criminal penalty provisions in the *Corporations Act 2001*, with penalties ranging from \$2,100 to \$10,500 and, in rare cases, imprisonment. The higher penalties are for breaches of requirements for RCAs to: retain records for seven years;⁴ provide audit reports to members with details of non-compliance, defects and irregularities, and other requirements under the auditing standards;⁵ report interference with an audit to ASIC;⁶ and be independent.⁷

1 Report available online at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Annual_Reports/201617.

2 Government response available at https://www.aph.gov.au/~/_media/Committees/corporations_ctte/annual_report/2016-17/Government_Response.pdf?la=en

3 *Corporations Act 2001*, section 307A.

4 *Corporations Act 2001*, section 307B.

5 *Corporations Act 2001*, sections 308 and 309.

Scope of review

The Review considers the disciplinary processes that a RCA in Australia undertaking financial report audits may be subject to. It provides a qualitative assessment of RCA disciplinary processes from the time when an issue is raised with a regulator or professional body, until the time that this matter reaches its conclusion.

The Review identified three stages of RCA disciplinary processes in Australia, and consequently structured this report and recommendations around these stages:

- Enforcement activities undertaken by ASIC;
- CADB; and
- The disciplinary processes of Australia's professional accounting bodies.

The Review also examined ASIC's Audit Inspection Program. While this is not primarily a disciplinary process, it forms a key part of ASIC's regulatory oversight duties to improve audit quality by working cooperatively with firms when deficiencies in audits are identified. Given the Audit Inspection Program has continued to identify deficiencies in audit quality, the FRC considered it appropriate to assess whether the Audit Inspection Program continues to be fit for purpose, and whether there should be a greater link to enforcement action.

As the Review focused on RCAs who are subject to the disciplinary proceedings of ASIC and CADB, auditors of Self-Managed Superannuation Funds (SMSFs) are out of the scope of the Review. While RCAs provide audits to support the integrity of Australia's capital markets, independent SMSF audits work under a different regulatory regime, that of the Australian Tax Office (Australia's SMSF audit regulator) to ensure that SMSFs are complying with obligations under the *Superannuation Industry (Supervision) Act 1993*, and Australian tax law.

The Review did not consider private court action in Australia and disciplinary processes in jurisdictions outside of Australia. While private court action may provide general deterrence for RCA misconduct, it is not a disciplinary process. The Review also excluded firms' internal disciplinary processes.

Review methodology

In assessing the adequacy of current disciplinary processes, the FRC reviewed relevant legislation and publicly available documents about audit disciplinary processes in Australia, and engaged key stakeholders including ASIC, CADB, and the professional accounting bodies.

Stakeholders provided qualitative information about the structure of disciplinary processes, as well as statistical information about the number of matters processed.

Following analysis of this information, the Review conducted targeted interviews with ASIC staff and CADB members, while also seeking further information and clarification by correspondence.

6 *Corporations Act 2001*, section 311

7 See *Corporations Act 2001*, section 307C (RCA must declare independence); sections 324CA, 324CB and 324CC (RCAs must not have conflicts of interest); sections 324CE, 324CF, 324CG, 324CI, 324CJ and 324CK (auditors cannot be, or have recently been, in a relevant relationship with company). RCAs are also required to rotate to avoid working on one audit for prolonged periods (ss 324DB, 324DC and 324DD).

An exhaustive assessment of the adequacy of RCA disciplinary processes would require accurate knowledge of the total level of audit misconduct over time, as well as accurate data about the level of deterrence provided by disciplinary measures. This data is not currently available, and was not able to be produced with the resources and time available to the Review.

In addition to limitations on the data available, the Review was unable to independently verify the qualitative information provided to it by stakeholders within the resource and time constraints. While every effort was made to gather data about the number of matters that were addressed by the disciplinary processes, a full audit and verification of data provided was not within the scope and resources of the Review. Accordingly, the Review represents the views of the FRC members based on the FRC Secretariat's consultation with key stakeholders during the time available.⁸

In broad terms, the Review sought to assess the adequacy of RCA disciplinary processes by establishing whether reports of RCA misconduct resulted in appropriate disciplinary outcomes, and whether processes used were fair, consistent over time for individual RCA and between organisations conducting the processes, transparent, timely, and cohesive.

ASIC enforcement: new approach

ASIC has recently announced changes to its enforcement practices, including the adoption of a 'why not litigate?' approach, and the establishment of the Office of Enforcement. The FRC notes that this is likely to result in significant changes to RCA disciplinary processes, the choice of disciplinary action ASIC pursues in relation to RCAs and therefore the likely outcomes for audit enforcement actions.

ASIC is still working through the governance arrangements, strategic settings, guiding principles and operational guidelines that will be observed by the Office of Enforcement and how the 'why not litigate?' enforcement posture will work in practice.

In addition to the adoption of new enforcement practices, the FRC notes the potential impact of ASIC's new regulatory and supervisory approaches, such as the Close and Continuous Monitoring (CCM) of large financial services entities and the adoption of next generational regulatory tools, including through developing capacity in behavioural economics, data analytics and regulatory technology.

⁸ Stakeholders consulted were given the opportunity to confirm the accuracy of information about them included in the Review.

2. ASIC enforcement

Background

ASIC's enforcement actions against RCAs are taken in the context of ASIC's wider regulatory oversight of the financial reporting and auditing requirements for entities subject to the Corporations Act. ASIC's audit oversight activities aim to maintain and raise the standard of conduct in the auditing profession, and these activities are discussed further in chapter 4.

ASIC may take enforcement action against an individual RCA where significant non-compliance with the Corporations Act, Australian Auditing Standards or professional and ethical standards is identified, including in relation to RCA independence or non-compliance with the duties of a RCA.

ASIC audit enforcement: overview

The current process ASIC adopts for dealing with alleged RCA misconduct can be summarised into three stages (see also Figure 1 below):

1. **Case Identification** –ASIC's Financial Reporting and Audit team (FR&A)⁹ undertakes financial reporting surveillance¹⁰ and inspects audit firms to identify possible cases of non-compliance with the law or with auditing standards. Complaints about RCAs from the public are also channeled to FR&A from ASIC's central Misconduct and Breach Reporting team.¹¹ The FR&A team also considers other sources of intelligence, such as media reports or corporate collapses.
2. **Investigation process** — Possible cases of RCA misconduct are reviewed and investigated by the FR&A team. If a matter meets particular criteria (see Appendix A for a complete list), it is referred to the Corporations and Corporate Governance (CCG)¹² enforcement team. If the CCG team accepts the matter they will work with FR&A to progress the matter to a disciplinary outcome. CCG also receive referrals from other areas in ASIC on other corporate governance matters that may also include an RCA issue.
3. **Disciplinary process** — Possible disciplinary avenues include ASIC referring the matter to CADB, ASIC commencing court proceedings, ASIC accepting a Court Enforceable Undertaking (CEU) from a RCA, or ASIC imposing conditions on a RCA's registration.

9 According to the 2017-18 Annual report there were 28 full time employees in this team. The FR&A team is in ASIC's Markets Group and is responsible for the Audit Inspection Report and ASIC's Financial Reporting Surveillance program.

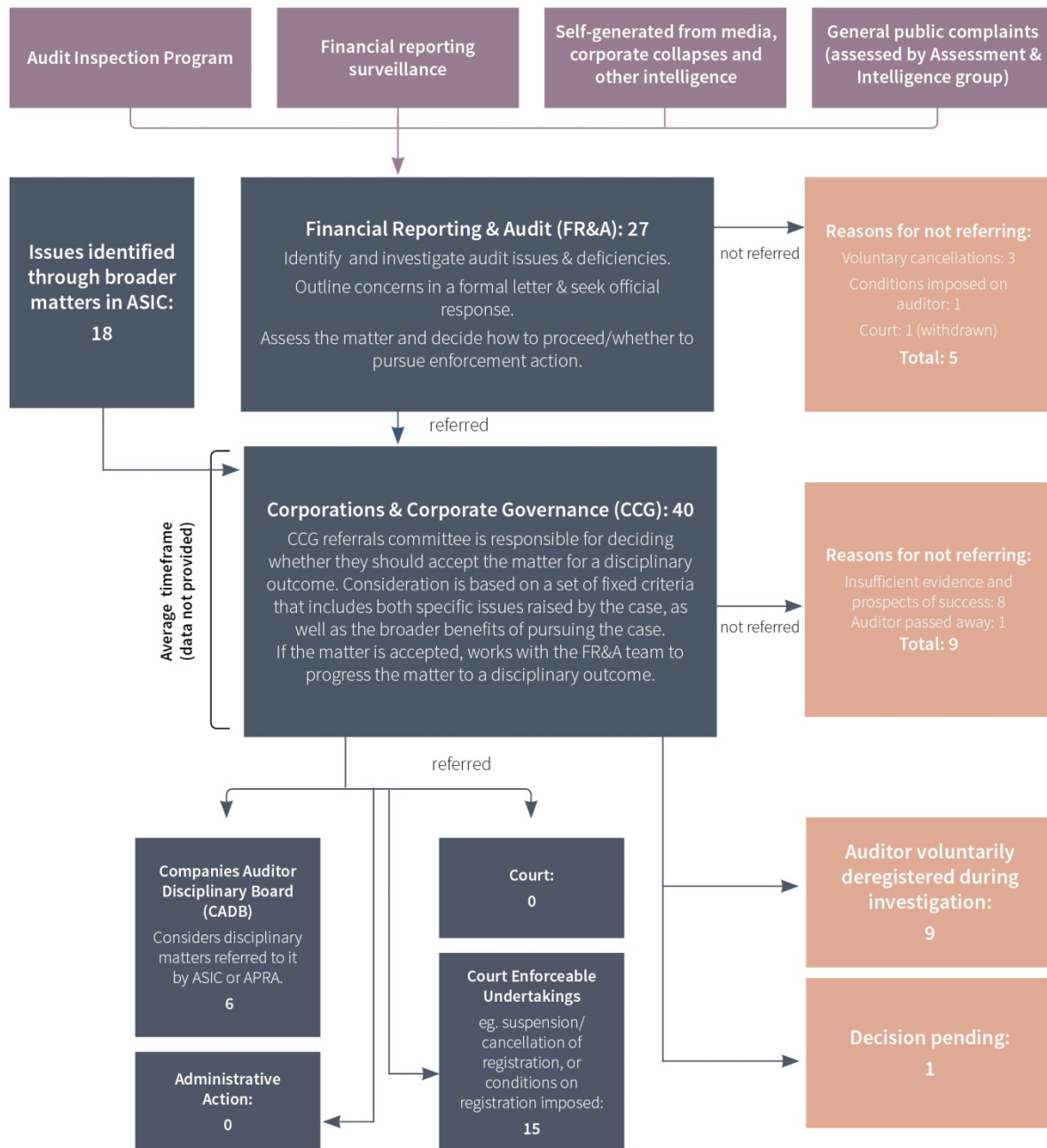
10 FR&A review the annual and interim financial reports of a selection of listed companies and other significant entities, to monitor compliance with the Corporations Act and Australian Accounting Standards.

11 ASIC record every report of misconduct received. ASIC make preliminary inquiries and conduct an initial assessment of misconduct received to see if a law relating to corporations or financial services has been broken.

12 According to the 2017-18 Annual report there were 34 full time employees in this team. The CCG is in ASIC's Markets Group and is responsible for enforcement for corporation and corporate governance matters.

The processes described in this chapter relate to practices up to March 2019, and may well change as ASIC’s enforcement practices are reformed and the Office of Enforcement is established. It should also be noted that additional funding to accelerate enforcement outcomes and substantial new penalties as a result of recent law reform are also likely to lead to more court actions or referrals to CADB.

Figure 1 — ASIC Auditor disciplinary process and outcomes: 2010–2018



Data provided by ASIC, may not be a complete reflection of all auditor matters.

Case identification

Many matters for investigation are uncovered by ASIC's own surveillance of financial reporting in Australia.¹³ Some matters are raised in complaints from the public, which arrive to the FR&A team from ASIC's central Misconduct and Breach Reporting team. Some matters are also identified through ASIC's regular audit inspection work and other intelligence gathering.

When a matter is identified, FR&A will investigate the issue and outline ASIC's concerns in a formal letter to the RCA or their associated audit firm, asking for an official response. Once FR&A have gathered enough information, the team assesses the matter to determine whether it should be referred to the CCG enforcement team for potential enforcement action. This decision is made by the Senior Executive Leader of the FR&A team. Key questions considered at this stage include the application of the auditing standards, materiality of the misstatement, the impact on creditors or investors, regulatory impact, and precedent value (see Appendix A for a complete list of criteria).¹⁴

If it is determined that a matter should be pursued, FR&A prepare a referral memorandum to CCG for consideration and assessment.

If a matter is not considered suitable for referral to CCG, the issue may be monitored closely by the FR&A teams to ensure that the issue is resolved, or a later referral to CCG may be made if the issue remains unresolved.

Prior to July 2018, ASIC used ad-hoc procedures to monitor such issues, but since that time has established a new workflow system which better captures information across ASIC. ASIC's records about surveillance, investigation, and enforcement activities are managed in a number of different systems, and the Review encountered difficulties in gathering and reconciling relevant data.¹⁵

Investigation process

Once a matter is referred to CCG, the CCG referrals committee is responsible for deciding whether they should accept the matter for a disciplinary outcome. The CCG referrals committee has a set membership, and generally meets fortnightly. Consideration of whether to accept the referral is based on a set of fixed criteria that address both the specific issues raised by the case, as well as the broader benefits of pursuing the case (such as general deterrence, or the need to test a case in a judicial proceeding) (see Appendix A for a complete list of criteria).¹⁶ The CCG team is responsible for enforcement of corporate governance matters more broadly, and decisions on whether to accept a given audit matter will depend on the relative strengths and merits of cases concerning different issues, as well as available resources.

If the CCG referrals committee accepts the matter, FR&A will provide supporting documentation to the CCG team and the two teams will work together towards a disciplinary or administrative outcome. Each quarter, the CCG referrals committee reviews the matters that have been declined due to resourcing constraints, and may allocate resources to the matter if they have become available.

13 The surveillance program is focused on concerns with specific audits arising from complaints and other intelligence, including corporate collapses where there are questions over the adequacy of information on the financial conditions and results provided in the financial report and questions over the audit.

14 Information provided by ASIC on request.

15 Ibid.

16 Ibid.

Disciplinary avenues and sanctions

Should disciplinary action be warranted, the options available to ASIC are:

- Negotiating a CEU;¹⁷
- Taking administrative action;¹⁸
- Commencing court action; and/or
- Applying to CADB (see chapter 3).

The disciplinary action pursued is determined by the nature of the misconduct, the appropriateness of the disciplinary outcome, and available resources. CCG and FR&A make this decision based on an assessment of the matter against the key criteria. These criteria include consideration of the severity of the misconduct, the duration of the misconduct (and whether it is ongoing), the person of interest's auditing history, the amount of admissible evidence available, and the cost and time effectiveness of enforcement action (see Appendix A for a complete list of criteria).

At any time during the investigation of an audit matter by ASIC, a RCA under investigation can lodge a form with ASIC to voluntarily cancel their registration. ASIC has advised that in these situations CADB would no longer have jurisdiction in relation to the deregistered RCA. At this stage, ASIC may decide not to take further action against the former RCA. ASIC may elect to take action against a deregistered RCA if there is a legal basis for doing so, but ASIC advised this had never occurred as historically ASIC considered deregistration a suitable outcome, having regard to the low penalties previously in place.¹⁹ These penalties have recently been increased by legislation passed by Parliament (see discussion below in relation to court action).

ASIC submitted that it does not notify the public when a RCA voluntarily cancels their registration following ASIC commencing an investigation as there are 'unacceptable legal risks' associated with doing so (including the risk that the notice is defamatory). ASIC will only publish a notice where a RCA consents. ASIC submitted that this has only occurred once.²⁰

Outcomes of disciplinary action since 2010

ASIC advised that since 2010, 45 RCA matters were considered for disciplinary action. The results of these matters were:

- Six matters in relation to RCAs progressed to CADB or its predecessor, the Companies Auditors and Liquidators Disciplinary Board (CALDB);
- Fifteen matters were resolved through the ASIC accepting a CEU;
- One matter had ASIC-imposed conditions;
- In 12 matters, the RCA voluntarily cancelled their registration;

17 ASIC Act, sections 93A and 93AA; ASIC Regulatory Guide 100.

18 *Corporations Act 2001*, section 1289 A.

19 Information provided by ASIC on request.

20 ASIC, 2019, *17-406MR Registration of Vocation auditor cancelled*, 27 November 2017, viewed on 18 February 2019, <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-406mr-registration-of-vocation-auditor-cancelled/>>

- One matter proceeded to court, but was withdrawn by the prosecution as there were technical issues with proving the alleged breaches;
- In nine matters, no disciplinary action was imposed. This included eight matters with insufficient evidence and prospects of success and one matter where the auditor passed away; and
- One matter is not yet resolved.²¹

The CADB process is discussed in detail in chapter 3. The other possible outcomes are discussed below.

Court Enforceable Undertaking

A CEU is an administrative settlement that ASIC accepts as an alternative to civil court action or other administrative actions. In the past, ASIC has pursued an enforceable undertaking when it considers that it would result in an effective regulatory outcome at a lower cost than what could be achieved through other enforcement remedies. For auditing matters, a CEU will usually result in ASIC cancelling a RCA's registration, suspending a RCA, and/or imposing certain conditions on the RCA. Conditions may include completing additional professional education, or requiring the RCA's work to be reviewed for a set period of time.

A CEU generally arises from discussions between ASIC and the RCA under investigation. If ASIC considers that a CEU would provide an effective regulatory outcome, they may enter into negotiations with, and accept a CEU from, the RCA. Once it is signed by both parties it will be made public on ASIC's enforceable undertaking register.²²

ASIC monitors compliance with the undertaking by the RCA, often with input from an independent RCA engaged to review the work of the RCA that is subject to the CEU. If the RCA does not comply with the CEU, ASIC may enforce the undertaking, generally in the Federal Court of Australia or a State Supreme Court.

For the 15 matters finalised with a CEU, the sanctions imposed included cancelling the RCA's registration, suspending the RCA's registration and imposing conditions on the RCA's registration.

Administrative action

ASIC can impose certain conditions on a RCA's registration through administrative action. The only conditions that ASIC can impose are requirements to undertake further education, be subject to peer review, take out a certain level of professional indemnity insurance, and to maintain a system for complaints handling.²³ The imposition of administrative conditions is not publicised, unless the RCA agrees to the publishing of this information.

To impose administrative conditions, the matter needs to be referred to an ASIC delegate for a hearing. Hearings are conducted informally and as promptly as possible. The RCA under investigation

21 Data provided by ASIC on request.

22 Enforceable undertakings register can be found here:
<<https://asic.gov.au/online-services/search-asics-registers/additional-searches/enforceable-undertakings-register/>>

23 Regulation R9.2.08 of the Corporations Regulations 2001.

can choose whether they want legal representation at the hearing, and they may provide any documents they consider relevant.

The delegate will make their decision based on the material or submissions and any other relevant material. Decisions are reviewable by the Administrative Appeals Tribunal.

One matter since 2010 has resulted in ASIC taking administrative action. In this case, ASIC imposed conditions (at the RCA's request) on their registration.

Court action

ASIC advised that since 2010 only one court proceeding has been commenced against a RCA for contraventions of the Corporations Act. However, this matter was withdrawn by the prosecution as there were technical issues with proving the alleged breaches.²⁴

ASIC advised court proceedings have only been used in exceptional cases where breaches are deliberate or reckless in accordance with the criminal standard of fault. In the past, penalties available for breaches of the Corporations Act ranged from \$2,100 to \$10,500. Some of these offences also carry a maximum penalty of three months to 12 months imprisonment. ASIC noted that even in exceptional cases, where court action could be considered, the low level of penalties available and the high cost of court proceedings would mean other outcomes (such as cancellation of registration) were often preferable to taking court action. Constraints on available resources were also relevant considerations for ASIC.

Further, a court conviction for a strict liability offence will not result in an automatic cancellation of the RCA's registration so further action would be required to deregister an auditor even after a strict liability conviction. Conviction for a fault-based criminal offence will result in disqualification from managing a corporation, which would trigger automatic cancellation of the RCA's registration.

The *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*, recently passed by Parliament, increases some of the maximum penalties for audit misconduct and creates a new fault-based criminal offence to sit alongside an existing strict liability offence. For example, the new fault-based criminal offence for a RCA who fails to conduct audits in accordance with auditing standards (section 307A) incurs a maximum penalty of \$50,400 or two years imprisonment, or both. The strict liability offence incurs a maximum penalty of \$10,500.

ASIC anticipates that these reforms to penalties, as well as their new approach to enforcement will mean court action will be considered appropriate in more cases.

ASIC audit enforcement: discussion

Identifying possible misconduct

ASIC uses a range of methods to identify RCA misconduct, including receiving reports of misconduct from the public, the press, detection in relation to corporate collapse, or identifying misconduct through its own surveillance activities. Because ASIC is not resourced to undertake random sampling of audit quality or more extensive risk-based sampling, it is not possible to identify what proportion of the total amount of audit misconduct ASIC becomes aware of. This issue is discussed further in Chapter 4.

24 The matter related to two potential breaches of section 324CA of the Corporations Act (auditor independence). The RCA was charged but the matter was withdrawn on advice from the Commonwealth Department of Public Prosecutions on the basis that there were technical issues with proving the alleged breaches.

Process for assessing alleged misconduct

Once ASIC is made aware of an allegation of misconduct by an auditor, its current process is to have this allegation assessed by its FR&A stakeholder team, and if sufficient criteria are met, referred to the CCG enforcement team.

The CCG referrals committee process applies set criteria, which results in decisions about whether a particular matter should proceed to an investigation being made in a consistent and detailed manner. All referred matters are tracked from this point, and records are kept about outcomes.

However, prior to referrals to CCG, matters appear to be subject to a less structured process that is more difficult to track. The Review became aware of five separate record-keeping mechanisms for matters under investigation or subject to enforcement action, and encountered difficulty reconciling them in order to form a coherent picture of the manner in which matters were progressed, and ascertaining the total number of matters considered.

ASIC submitted that the CCG team needs to prioritise resources across audit issues, governance issues, fraud, insolvency practitioner misconduct, and insolvency issues. The FRC observes that this may mean that audit issues are not prioritised in comparison with higher profile corporate misconduct cases. ASIC further submitted that resources are fully utilised with existing corporate governance investigations and enforcement proceedings, and that it is unable to pursue certain matters due to a lack of resources. Accordingly, the FRC acknowledges that any step-up in activity on audit-related matters will be at the expense of other corporations or corporate governance enforcement matters.

The establishment of ASIC's the Office of Enforcement in 2019 is likely to change the current work-flow system for identifying, investigating and prosecuting audit issues. While ASIC are still working through the implementation of the Office of Enforcement, early statements from ASIC indicate that it will be separate, as much as possible, from non-enforcement activities conducted by ASIC.

ASIC's enforcement approach in relation to RCAs

Since 2010, ASIC has pursued negotiated outcomes in relation to RCA misconduct more often than court or CADB-based action (15 CEUs compared to six referrals to CADB and one matter to court that was withdrawn). In addition, ASIC advised that 12 of the matters they were investigating resulted in an auditor voluntarily cancelling their registration before a disciplinary action could be completed.

The FRC recognises that both court action and a referral to CADB can be costly and time-consuming, and a CEU can result in cancelling a RCA's registration in a more efficient, timely, and predictable manner.

However, this enforcement approach has limitations in its reduced transparency and lack of public denunciation. While the cancellation of an auditor's registration voluntarily or through a CEU responds to that particular individual's alleged misconduct (and removes the need for CADB to act to remove their registration), there is little or no general deterrence achieved as a result of this action.²⁵ ASIC has advised that it does not notify the public when a RCA voluntarily cancels their registration while being investigated by ASIC for misconduct issues, due to legal risks associated with doing so.

25 In some cases, specific deterrence may not be achieved either. Partnership and other firm structures can allow a deregistered partner to continue to work with another partner that remains registered.

ASIC submitted to the review that naming RCAs who cancel their registration while under investigation would improve general deterrence. The FRC agrees that this would strengthen the disciplinary process, but notes that any disclosure regarding voluntary cancellation of registration must remain limited to facts about the contact between ASIC and the RCA regarding the misconduct matter, and the subsequent cancellation of the registration.

The historical limitations of the penalties available under the Corporations Act have also been relevant to ASIC's decision to pursue a CEU instead of proceeding to a court. For example, prior to recent law reforms, a breach of section 307A was only a strict liability offence, a court conviction would have resulted in a maximum penalty of \$10,050 and would have required a further decision by CADB in order to cancel the RCA's registration.

ASIC's new enforcement strategy

The FRC notes that recent statements by ASIC's leadership in relation to enforcement, particularly the adoption of a 'why not litigate' strategy, may result in fewer negotiated outcomes and a greater number of court actions or referrals to CADB (see Appendix B for more information). Increased penalties in recently passed legislation may also change ASIC's decisions on whether to pursue court actions.

ASIC's detection, investigation and enforcement processes: Recommendations

The FRC recommends that:

- ASIC should adopt a more structured and consistent approach to preliminary investigations of RCA misconduct matters.
- ASIC should improve its record keeping and data management systems to ensure key decision points in relation to RCA matters are easily tracked across the organisation.
- ASIC should evaluate whether the criteria used for resourcing a RCA misconduct matter for enforcement action appropriately recognises the market wide benefits of improving audit quality.
- ASIC should outline how their 'why not litigate' enforcement strategy will apply to misconduct by RCAs.
- Barriers to ASIC making a factual public announcement when a RCA voluntarily cancels his or her registration while they are under investigation should be identified and addressed.

3. Companies Auditors Disciplinary Board

Companies Auditors Disciplinary Board: overview

The Companies Auditors Disciplinary Board (CADB) is an independent statutory body established under Part 11 of the ASIC Act. It is responsible for determining whether a RCA's registration should be cancelled or suspended. This includes determining whether a RCA has:

- breached certain requirements under the Corporations Act,
- failed to comply with a condition of their registration,
- failed to adequately and properly perform the duties of a RCA, or
- is otherwise not a fit and proper person.²⁶

CADB jurisdiction is limited to matters referred to it by ASIC and APRA,²⁷ and to matters involving RCAs. Its functions and powers are conferred to it by particular sections of the ASIC and Corporations Acts.

Members of CADB are appointed by the Treasurer and the ASIC Act requires members to have a breadth of law, accounting, and business expertise. CADB currently has seven board members including a chairperson and a deputy chairperson both of whom must hold legal qualifications. Legislation permits the appointment of up to 12 members. CADB does not have any permanent administrative staff, with resources allocated from ASIC when a panel is convened.

A three or five member panel is convened from the members of CADB on an ad hoc basis when the chairperson receives an application. The composition of the panel for a matter will depend on the requirements of that particular matter and member availability, but must include at least one business member and one accounting member and be chaired by the CADB chairperson or deputy chairperson.

From 1 March 2017, the power to discipline registered liquidators shifted from the CALDB to committees constituted under Division 40 of the Insolvency Practice Schedule (Corporations) to the

26 For a complete list of the grounds on which CADB can exercise its powers, see subsection 1292(1) of the Corporations Act.

27 APRA's engagement with auditors is in the context of its prudential oversight of entities. Accordingly, its supervisors of financial institutions have regard for the independence, skills, and experience of those auditing the financial statements of the relevant APRA-regulated financial institution.

Where APRA identifies concerns in this area, they are raised with the APRA-regulated financial institution, who will then take appropriate action to ensure that the audit services it is commissioning are up to standard.

If the concerns are not addressed to APRA's satisfaction, APRA has other tools available to them. For instance, a lack of adequate audit assurance may be a contributing factor in the prudential risk assessment for a particular firm, which APRA can use as justification to increase the amount of regulatory capital that a firm must hold.

Once all of these tools are exhausted, APRA may take action to remove or disqualify an appointed auditor from auditing APRA-regulated entities. But APRA has not disqualified an auditor since 21 June 2004, and an enforceable undertaking was negotiated with an auditor in 2006. APRA has never made a referral to CALDB/CADB, as it can achieve its objectives using other tools.

Corporations Act.²⁸ The CALDB was renamed the CADB, and retained disciplinary powers with respect to RCAs. As a result, the volume of matters being heard by CADB is less than when it was in the form of CALDB. As part of these reforms, the discipline of registered liquidators shifted to a different disciplinary process.

CADB has received six applications from ASIC on RCA-related matters since 2010. Prior to the responsibility for disciplining liquidators being removed, it received substantially more applications on liquidator-related matters.

To facilitate compliance with CADB's key statutory requirements, CADB has designed its practices and procedures:

- to ensure that the proceedings at a hearing are conducted with as little formality and technicality, and with as much expedition, as the requirements of the Corporations legislation and a proper consideration of the matters before CADB permit; and
- to ensure that the rules of natural justice are observed at and in connection with a hearing.²⁹

CADB's practice and procedures manuals also set out its usual practice and procedures when dealing with RCA matters.³⁰ These manuals are comprehensive and provide, among other things, details around service of documents, acceptance of expert evidence, witnesses, and how hearings are conducted. The practice and procedures manuals were last updated in 2014. CADB advised that the manuals are in the process of being reviewed.

The process for considering applications can be summarised into three stages, which will be addressed in greater detail below:

1. **Pre-hearing process** — CADB chair oversees case preparation and constitutes a panel. Procedural matters are resolved prior to a substantive hearing.
2. **Formal hearing** — After documents and evidence have been filed and served by both parties, an in-person hearing is convened before the panel. Witnesses may be called and cross-examined.³¹
3. **Sanctions, costs and publicity** — After a determination has been made on the allegations, evidence and submissions may be prepared in relation to costs and sanctions. The panel will decide on these issues and determine whether the decision and reasons should be publicised.

CADB decisions can be appealed to the Administrative Appeals Tribunal.

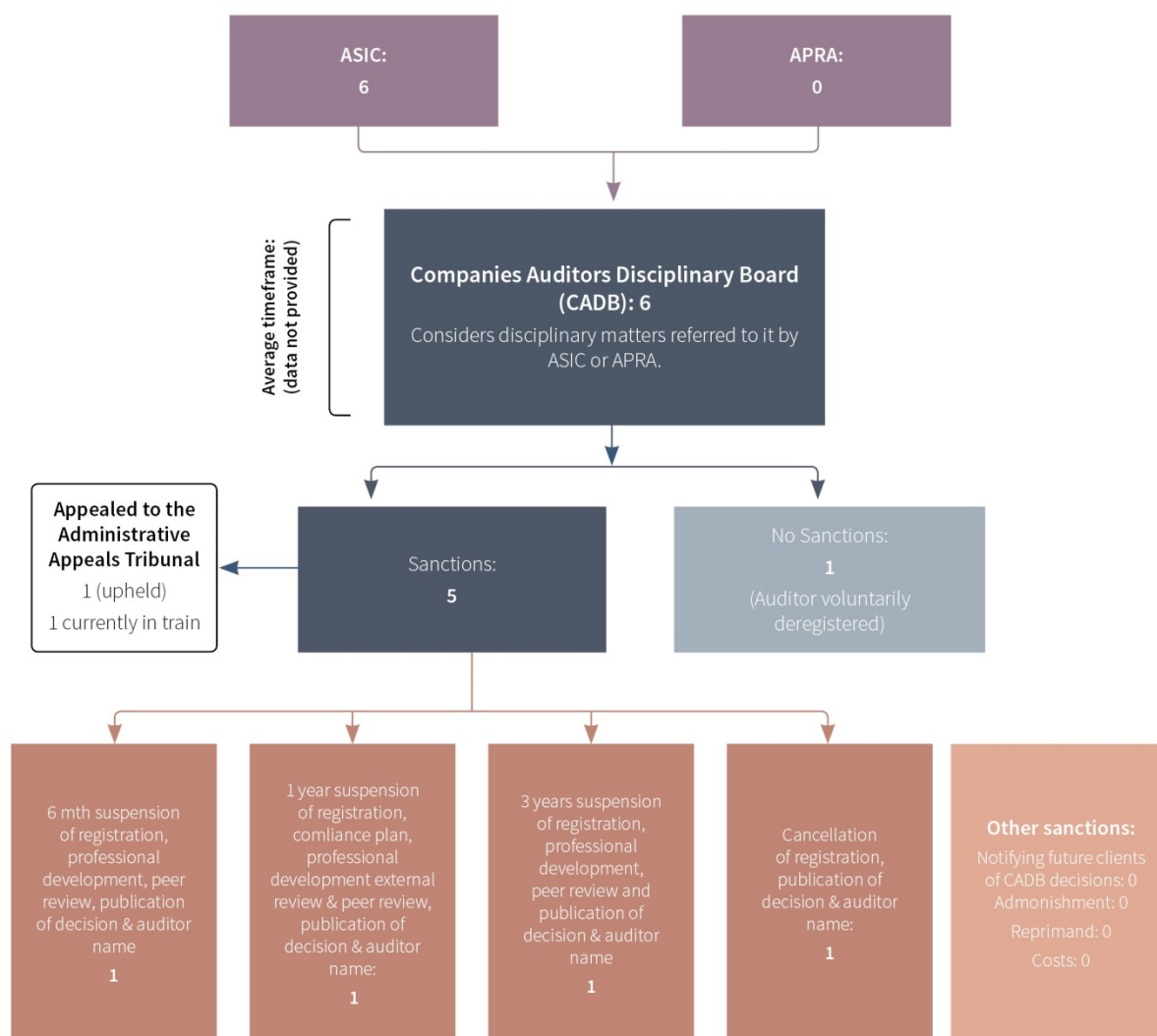
28 Known as the Insolvency Practitioner Disciplinary Committees.

29 See section 1.1. of CADB's Manual of Practice and Procedure for conduct matters, available at <https://www.cadb.gov.au/procedures/cadb-practice-and-procedures>.

30 CADB's Manual of Practice and Procedure for conduct matters is available at <https://www.cadb.gov.au/procedures/cadb-practice-and-procedures>.

31 CADB may hear a matter on the basis of the application filed if the auditor does not appear or file evidence or does not wish a hearing to be held.

Figure 2 — CADB Disciplinary Process: 2010–2018



Pre-hearing process

Applications to CADB are in the form of a Statement of Facts and Contentions (SOFAC) that is prepared by ASIC. A SOFAC states the allegations made against the relevant RCA and refer to the supporting evidence. A SOFAC can be quite a lengthy and technical document that requires extensive work for ASIC to prepare. CADB advised that a SOFAC can be a particularly cumbersome process where ASIC chooses to plead numerous allegations rather than narrowing the SOFAC to the most serious or pertinent allegations.

Applications to CADB are treated as either administrative matters or conduct matters based on the level of complexity involved. The less complex administrative matters include matters such as failing to lodge an annual statement or ceasing to be an Australian resident.³² For the purposes of its review, the FRC has focused on CADB’s disciplinary processes in relation to conduct matters.

32 Other administrative matters include disqualification from managing corporations and incapacity due to mental infirmity.

After CADB receives an application, a copy of the application, and a date nominated for the pre-hearing conference, is served on the relevant RCA. The conduct manual requires the RCA to file a Notice of Appearance³³ and the RCA is notified of the date nominated for a pre-hearing conference. The relevant RCA is invited to prepare and file a response to the SOFAC before the pre-hearing conference. This part of the CADB process can be prolonged, particularly if the SOFAC is lengthy and the relevant RCA wishes to contest the details of the facts and contentions in the statement.

At the pre-hearing conference case management matters including setting directions for a timetable for the exchange of statements of evidence and documents between ASIC and the relevant RCA are dealt with. Other procedural matters are also considered at the conference. A date for the formal hearing is usually fixed at the first pre-hearing conference.

Formal hearing

Following the filing of all relevant documents and evidence by ASIC and the relevant RCA, a hearing ordinarily takes place in private. The relevant RCA may request a public hearing but ASIC cannot.

Both parties may be represented at the hearing. Support persons and witnesses may also attend with notice given to the panel. The other party must be given the opportunity to cross-examine witnesses. The panel has the power to compel a person to appear at the hearing to give evidence and produce documents.³⁴ Detailed information on how proceedings are conducted is published online on CADB's website.³⁵

The RCA may not wish to appear at a hearing and may make written submissions for the panel to consider. If the RCA fails to appear, the hearing will proceed in their absence. In the RCA's absence, ASIC will need to prove that all documents on which it seeks to rely at the hearing have been served on the RCA.

Based on the documents filed and the proceedings of the hearing, the panel must determine whether or not it is satisfied that any of the allegations have been established against the relevant RCA. Satisfaction is a matter of determination for the panel and, while technically not subject to civil or criminal standards of proof, the fact that natural justice must be observed means that the civil standard of proof is generally applied. If none of the allegations have been established to the satisfaction of the panel, the matter does not proceed and only the question of costs remains.

The panel may reserve its decision at the conclusion of the hearing, but it must be provided in writing with reasons at a later date. The panel may give an oral determination with reasons. CADB advised that this approach is not taken in practice due to the lengthy nature of allegations made in most conduct matters.

Sanctions, costs and publicity

Where the panel has made a determination that is adverse to the RCA, a further hearing may be required to determine sanctions and costs and whether the panel's decision and reasons should be published. CADB aims to fix this hearing date no later than three weeks after delivery of the determination, with a view to finalising the matter as soon as possible, while ensuring the parties have had sufficient time to consider the panel's reasons for its determination and to prepare submissions on sanctions.

33 The Notice of Appearance is completed by the auditor and includes contact details and details of the auditor's legal representation, if applicable.

34 ASIC Act, section 217.

35 In particular, see section 5.10 of CADB's Manual of Practice and Procedure: Conduct Matters. Available online at: <https://download.asic.gov.au/media/1273161/caldb-practice-and-procedures-manual-conduct-matters.pdf>

CADB's sanctions power is discretionary and includes powers to:

- Suspend a RCA's registration;
- Cancel a RCA's registration;
- Admonish or reprimand the RCA; and/or
- Require undertakings from the RCA to: peer review their future audits, undertake professional development, establish a compliance plan, impose firm-wide training and process reviews and require notification of future clients of CADB's determination.³⁶

Following a sanctions hearing the panel issues its final written decision, which incorporates both its reasons for determination and its reasons for the sanction imposed. CADB can decide to publicise the decision and the reasons for the decision, including online publication.³⁷ CADB issues a separate written decision on costs and publicity to the parties, that decision is not publicised.

A panel has the power to order that all or part of the costs relating to the hearing are paid by the unsuccessful party to the successful party. CADB may also order the unsuccessful party to pay CADB's costs in relation to the hearing.³⁸ Orders made by CADB with respect to costs are not subject to review by the Administrative Appeals Tribunal.

As outlined in the ASIC disciplinary process (see Figure 1), since 2010 ASIC made six applications to CADB in relation to RCAs. CADB has published four decisions with the following sanctions (noting more than one sanction applies to each decision) (see Table 1).

Table 1: CADB Sanctions from 2010

Suspension of registration ³⁹		3
Cancellation of registration		1
Ordered undertakings	Peer review of future audits	3
	Professional development	3
	Compliance plan	1
	Firm-wide training and process review	1
	Notifying future clients of CADB decisions	0
Admonishment		0
Reprimand		0
Costs		0
Publication of decision and name of RCA		4

Of the remaining two matters, one is currently on appeal to the Administrative Appeals Tribunal and in the other matter the RCA voluntarily deregistered after ASIC made its application to CADB.

³⁶ Corporations Act, subsections 1292(1) and (9).

³⁷ Previous decisions have been published on the CADB website at: <https://www.cadb.gov.au/decisions/cadb-decisions/>

³⁸ CADB has the power to make fixed quantum costs orders that are enforceable in a court as a debt to the Commonwealth.

³⁹ Suspension for different durations, specifically for three years, 12 months, and six months.

CADB notes that professional bodies have previously taken additional action against a RCA based on the CADB decision. Such action includes cancelling their membership to the professional body which may further curtail the RCA's ability to practise as a RCA and can impact on their reputational status in the profession.

Companies Auditors Disciplinary Board: discussion

Making CADB more effective

CADB is well-placed to consider and decide applications in relation to RCA misconduct and is available to play an important role as an independent panel of experts. CADB serves as a less formal and timelier alternative to court action, particularly where suspension or cancellation of a RCA's registration is the intended disciplinary outcome as opposed to more serious consequences such as criminal conviction. Nonetheless, it currently receives very few such applications.

CADB may also be useful for ASIC in its negotiation of alternative enforcement outcomes (because a RCA knows ASIC may commence CADB proceedings if negotiations are not successful), but identifying reasons why so few matters are referred is important. As noted in chapter 2, referral numbers are reduced because RCAs have the opportunity to withdraw their registration without any publicity at any time prior to a referral to CADB. Additionally, ASIC made few applications to CADB because it has favoured negotiated outcomes through CEUs.

Based on the material reviewed, the FRC believes that CADB would receive more applications if its processes and procedures were less formal, and more focussed on providing efficient and timely administrative action. Shifting to a less formal model would better leverage CADB's position as a more expeditious alternative to court action while preserving the right of appeal to the Administrative Appeals Tribunal, which allows for a more formal process.

For example, based on interviews with ASIC staff responsible for referring matters to CADB, the CADB process is perceived to be lengthy and highly technical. While it is important for allegations to be tested and defendants should have adequate time to respond, CADB could consider modifying its process to allow ASIC and RCAs to present their competing arguments and evidence in a more efficient and expedient manner. As noted above, CADB has also suggested that ASIC could improve the process by focusing only on key issues in preparing a SOFAC.

The FRC notes that the disciplinary process for registered liquidators could provide a more streamlined disciplinary model.⁴⁰ The liquidator disciplinary process puts greater onus on the defendant to demonstrate why they should continue to be registered, through a show-cause notice issued by ASIC before the matter proceeds to a disciplinary committee. Further, this disciplinary committee has greater flexibility to consider matters on the papers rather than conducting face-to-face hearings. The FRC notes that this regime is relatively new for registered liquidators and so the contention that the regime is more efficient and effective has not yet been sufficiently tested. There may be merit in considering whether any elements of the registered liquidators' regime could be adopted for use in auditor disciplinary processes.

40 Where ASIC has reason to believe a registered liquidator no longer meets certain requirements under the law, it can issue a written 'show-cause notice' asking the liquidator to explain why they should continue to be registered as a liquidator. A response must be provided within 20 business days. If no response, or an unsatisfactory response, is provided, ASIC may convene a committee to decide whether that liquidator should continue to be registered. The committee will interview the registered liquidator and make a determination, usually on the papers. The committee's decision is reviewable by the Administrative Appeals Tribunal.

A shift in the CADB's approach toward less formal and less technical administrative action would close the gap between enforceable undertakings and the more formal proceedings of the Administrative Appeals Tribunal. It would ensure that ASIC has access to a more continuous spectrum of graduated approaches to enforcement action.

Increasing the deterrent effect of CADB

Auditors can voluntarily cease to practise as a RCA at any time prior to CADB reaching and publicising its decision (including before ASIC makes an application to CADB).⁴¹ This issue has been raised in connection with ASIC enforcement processes, and the FRC's recommendation that barriers to ASIC making a factual public announcements when a RCA voluntarily cancels his or her registration, should also apply to instances when CADB proceedings have been commenced.

In some matters, CADB has asked RCAs to provide an undertaking that they will refrain from performing audits that must be performed by a registered company until the conclusion of the CADB proceedings. This is aimed at mitigating the risks associated with allowing a RCA to continue to perform audits that must be performed by a RCA while allegations with respect to that RCA are being evaluated by CADB. The FRC considers there may be merit in formalising this process and providing a framework for requiring temporary suspension even without the consent of the auditor.

CADB: other matters

CADB advised that the primary purpose of their deregistration power is to protect the public and to deter misconduct by RCA. However, if CADB's purpose is broadened, for example to include punishment of RCAs or with a greater focus on general rather than specific deterrence, it would follow that other enforcement tools, such as fines for individual RCAs and/or the firms that employ them, may be desirable.

As discussed previously, the FRC notes that ASIC's new approach to enforcement is expected to result in fewer negotiated outcomes. As a result, ASIC advised it anticipates that more work will flow to CADB as a result. Should CADB's volume of work significantly increase, it may be necessary for CADB to be provided with additional administrative support.

41 Of the 40 matters referred to ASIC's CCG enforcement team, nine were not referred to CADB because the auditor voluntarily notified ASIC that they were ceasing to practice (Form 905). See ASIC flowchart for the remaining matters.

Companies Auditors Disciplinary Board: Recommendations

The FRC recommends that:

- CADB and ASIC should work to adopt a less formal and a more timely approach to the carriage of CADB matters. This should include a review of CADB's practice and procedures manuals.
- The Government should consider revising provisions so that CADB may publish the commencement of proceedings including naming the RCA subject to the proceedings and his or her firm.
- The Government should consider providing CADB with additional disciplinary powers, including powers to suspend registration during a CADB proceeding and impose fines against individual RCAs or the firms that employ them, if adverse findings are made.
- If a greater number of applications are made to CADB as a result of current and upcoming reforms, the Government should consider whether CADB will require additional administrative support to ensure matters are dealt with.

4. ASIC audit inspection

ASIC audit inspection: overview

In addition to investigating possible cases of RCA misconduct, ASIC conducts an Audit Inspection Program with a more general goal. The objective of the ASIC Audit Inspection Program is to promote high quality external audits of financial reports and raise the standard of conduct in the auditing profession. The focus of the Audit Inspection Program is on audit firms, rather than individual RCAs. A strong audit profession helps maintain and promote confidence and integrity in Australia's capital markets.

The purpose of the inspection program is not primarily to discipline RCAs, but rather to improve audit quality by working cooperatively with firms.

The audit inspection is carried out by ASIC's FR&A team. The process for the audit inspection work has three main steps:

1. **Planning process** — FR&A selects firms and files for inspection.
2. **Inspection process** — FR&A reviews audit files against auditing standards and other relevant criteria, reviews select areas of firm quality controls, and works with the firms to address any deficiencies.
3. **Reporting and outcomes** — Aggregated results are published in a report every 18 months with the most recent Audit Inspection Report released on 24 January 2019. Firms update their internal Audit Action Plans, governance practices, and educational materials in response.

Planning process

Audits with a higher risk of poor audit quality are targeted for inspections, with an emphasis on audits of publicly listed or public interest entities. Each year around 65 audit files are reviewed, across 17 audit firms. As the files are selected through a targeted, risk-based approach, they may not reflect standards in the industry more broadly. Audits from both large and small firms are inspected.

Inspection process

FR&A selects a number of audits based on an assessment of the risk of non-compliance, and reviews the audit work papers while onsite. ASIC also conducts interviews with RCAs in order to clarify and confirm their assessment, and gather information about relevant policies and practices in place at the firm.

During this process, ASIC highlights areas of concern to the firm. Typically, these will be where the RCA did not:

- obtain sufficient assurance that the financial report was free of material misstatement of concern;
- exercise appropriate judgement; or
- comply with auditing standards in key audit areas.

Records are kept of all correspondence and interactions between ASIC and the firm, and the firm is provided with the opportunity to respond to all matters raised by ASIC.

Reporting and outcomes

ASIC also prepares confidential reports for the firm inspected. The firm's responses to ASIC's observations and findings and the firm's proposed remedial actions are also recorded.

ASIC will occasionally demand that a firm remediate a defective audit, although the firm is not legally obliged to do so in response. In all cases, firms are expected to incorporate ASIC's findings into their Audit Action Plans, and implement changes to their internal processes accordingly.

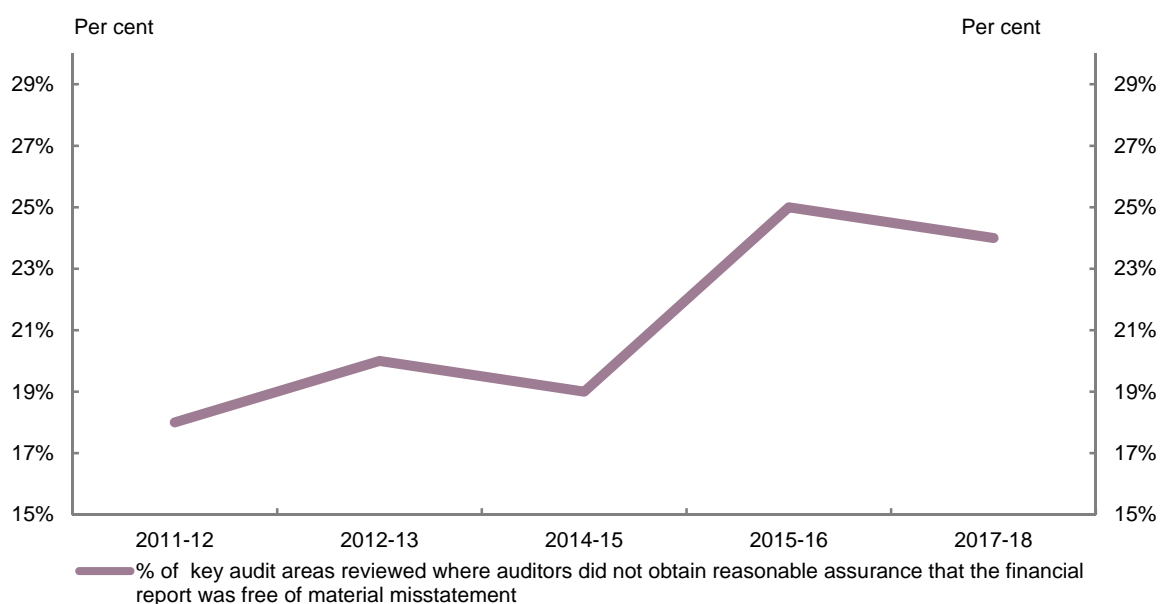
ASIC has limited resources to follow up on issues identified during the inspection process that are not referred for enforcement action, but for the six largest firms, ASIC monitors the firm's progress against Audit Action Plans over time, and for other companies, ASIC monitors whether similar issues arise over time.

Aggregated results are published in a report every 18 months with the last Audit Inspection Report released on 24 January 2019.

Audit inspection report findings

The latest Audit Inspection report, covering ASIC's inspections undertaken in the 18 months to 30 June 2018, found that in 24 per cent of the key audit areas reviewed, ASIC considered that RCAs had not obtained reasonable assurance the financial report was free of material misstatement. This represents a slight reduction on the previous 18-month period, however since comparable statistics were published by ASIC the trend is towards a higher incidence of non-compliant key audit areas (see Chart 1 below).

Chart 1 — Incidence of poor audit quality observed in ASIC's Audit Inspection Program



Note: reports prior to 2011-12 did not contain comparable data on the incidence of poor audit quality

ASIC audit inspection: discussion

Linking audit inspection and enforcement action

ASIC's Audit Inspection Program is designed to promote high quality external audits of financial reports and raise the standard of conduct in the auditing profession. Audit inspections provide feedback and education to firms which may lead to a firm imposing remuneration adjustments, changing processes or other outcomes. While these general goals are laudable, the FRC suggests that the outcomes from the Audit Inspection Program be more directly linked to ASIC's enforcement goals of deterring and punishing misconduct, as this may help to improve audit quality. While there have been instances where an audit inspection outcome has been referred by ASIC staff for possible enforcement action, it is worth considering whether all possible breaches of the law, and failures of RCAs to meet their obligations, that are identified through the Audit Inspection Program be considered for possible enforcement action.

The FRC believes that ASIC's goals of improving audit quality could be advanced through greater transparency in the Audit Inspection Program. For example, ASIC could include more detail in the Audit Inspection Report, including considering publishing firms' names (the FRC notes that ASIC is already considering this recommendation). This would improve transparency for the public and provide a market-based incentive for RCAs and firms to improve the quality of their audits. ASIC will need to consider what impact this might have on their ability to work co-operatively with firms, and whether their audit inspection practices may need to be modified as a result.

It may also be beneficial for ASIC to order the remediation of defective audits, and to publish notices that publicly outline these orders. ASIC has submitted that they do not currently possess this power, but would welcome it should the Government wish to grant it.

Allocating resources to various audit programs

The FR&A team are responsible for allocating resources between inspections and surveillance to meet priorities, ensuring that resources are being used effectively to promote audit quality. Given the different objectives of these programs, the FRC queries whether the current allocation of ASIC resources is achieving the right balance between education and working with firms and deterrence through disciplinary processes, or whether a closer link could be achieved.

ASIC has submitted that any reduction in resources to the Audit Inspection Program may make the program unviable, and that any re-allocation of resources to pursue audit matters will result in an opportunity cost to the pursuit of other corporate governance matters.

The FRC notes that ASIC has already committed to reform of its enforcement activities, and that this may have an impact on the Audit Inspection Program and the pathways that leads to more formal enforcement proceedings.

Measuring audit quality

ASIC's Audit Inspection Program is a targeted inspection program designed to examine challenging RCA audits; it is not designed to be a representative sample of the audits conducted by RCAs or the audit industry as a whole. It is therefore not possible to draw definitive conclusions from the program's reports whether the overall quality of RCA audits and audits more generally in Australia is improving or not.

The FRC agrees with the Parliamentary Joint Committee on Corporations and Financial Services report, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1. of the 45th Parliament* that ASIC should devise, alongside or within its current Audit Inspection Program, a study which will generate results which are comparable over time to reflect changes in audit quality.⁴²

ASIC Audit Inspection Program: Recommendations

The FRC recommends that:

- Potential breaches of the law and failures of RCAs to meet their obligations identified in ASIC's Audit Inspection Program should be reviewed for possible enforcement action.
- ASIC should publish the results of audit inspections in greater detail, including naming firms.
- ASIC should consider the division of resources between audit inspection and financial reporting surveillance work to ensure that ASIC's resources are being used effectively to ensure good RCA audit quality.
- ASIC and the FRC will work together to implement the Parliamentary Joint Committee on Corporations and Financial Services report *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1. of the 45th Parliament* recommendation to devise a study that would track audit quality over time.

42 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/No1of45thParliament/Report.

5. Disciplinary processes by professional bodies

Overview

Three professional accounting bodies have auditors in their pool of members:

1. Chartered Accountants Australian and New Zealand (CA ANZ);
2. CPA Australia; and
3. Institute of Public Accountants (IPA).

The disciplinary processes of professional accounting bodies are included in the Review due to their impact on the subset of auditors that are RCAs. CA ANZ has 82,250 members, 3,234 of which are RCAs.⁴³ CPA Australia has 163,750 members, 1,945 of which are RCAs.⁴⁴ In 2017-18, the IPA had 17,665 practicing members.⁴⁵ The IPA does not have a significant number of auditors relative to their overall membership base; at 15 January 2019, the membership was comprised of 29 RCAs.⁴⁶ RCAs may be members of more than one professional body.

The FRC notes that this chapter is based on publicly available information and information provided by the professional bodies in response to FRC's request. This included up to four years' data on their disciplinary processes.

The FRC notes that this chapter refers to a disciplinary process that applies to all members of the professional body, not just RCAs.

Process

Members of all three bodies are expected to comply with their respective body's code of ethics, by-laws, constitution and other professional standards. The complaints process for each body is governed by the relevant body's constitution or by-laws, and can be summarised into three stages:

1. **Initiation of proceedings** — preliminary review of complaint by a designated officer or team.
2. **Investigation process** — allegations are investigated by a specialised committee or team. Disciplinary outcomes can be applied at this stage, for some of the professional bodies.
3. **Disciplinary process** — the relevant body's disciplinary tribunal decides whether to apply sanctions.

All three bodies have also established an appeals tribunal to review their disciplinary tribunal's decisions.

43 As at 31 December 2018, data provided on request by CA ANZ.

44 For the 2016-17 financial year, data provided on request by CPA Australia.

45 This does not include student members, retired members and various other minor categories of members. Data provided on request by IPA.

46 Data provided on request by IPA.

The bodies have also developed oversight mechanisms to ensure the integrity, timeliness and effectiveness of their disciplinary processes are maintained. CA ANZ and CPA Australia have both established specific oversight committees which report to their respective boards twice and once per year respectively. The IPA Board conducts its oversight function directly.⁴⁷

Full details of professional bodies' disciplinary processes are in Appendix C.

Professional accounting bodies: discussion

Inherent limitations

Due to their scope, powers and protections, professional bodies have only a limited ability to monitor compliance and take appropriate disciplinary action across the profession.

No matter how effective the professional bodies might be in carrying out auditor disciplinary functions, they are limited in their remit and powers. Not all auditors are members of professional bodies, meaning that their jurisdiction over the industry is incomplete. While professional bodies may expel members, place conditions on their membership, or issue fines (contingent on the individual auditor wishing to remain a member of the professional body), they are unable to exercise any authority over non-members or members who resign their membership during an investigation (although CPA Australia's Constitution does not allow members to resign their membership whilst there is an ongoing investigation against them). Furthermore, professional bodies are unable to influence an auditor's status as a RCA.

Nonetheless, each body has developed a disciplinary process to deal with complaints against members. The three professional bodies appear to follow the requirements in their respective by-laws, provide opportunities for appealing their decisions, publish previous disciplinary decisions and provide public information about their disciplinary processes.

Improvements to processes

The Review has identified a number of steps that professional bodies could take to improve their disciplinary processes.

The FRC notes that while the professional bodies take note of the outcomes of each other's disciplinary proceedings, they may wish to consider a more formal coordination process for notifying each other of complaints against members who are RCAs and are members of multiple bodies. This will provide bodies with more complete information about any previous complaints against members, help these bodies detect trends, and assess whether referral to ASIC is appropriate.

Recording of the outcomes of complaints and the reason supporting that outcome is inconsistent across the three professional bodies. This reduces transparency of the disciplinary investigation and decision-making process. For example, there were some cases where complaints were closed without a comprehensive reason for this decision. Ensuring that all matters are recorded accurately will help ensure decisions regarding disciplinary action are made consistently.

47 IPA reported that regular reports are made to the Board of Directors on investigations including the number and type of current investigations, finalised investigations, members referred to the IPA Disciplinary Tribunal, and investigation findings. Feedback from the Board is incorporated into procedural changes and may be used to develop programs to alleviate areas of concern.

Furthermore, the professional bodies generally only publicly release information relating to complaints that result in a particular disciplinary sanction. Providing additional information and aggregate data on the total number of complaints received and how they are dealing with them would provide greater transparency for members.

Referrals to ASIC

The FRC recommends that all possible breaches of the law detected by professional bodies in relation to RCAs be referred to ASIC, and that sound processes be put in place to ensure this occurs. While the professional bodies' processes do include an assessment of whether a complaint would be better referred to ASIC or another regulatory body for investigation, it was not clear what underpinned this decision. Establishing a transparent process for deciding whether a complaint should be referred to ASIC (or not referred) would help in this regard.

These limitations highlight the importance of establishing processes for professional bodies to refer complaints about serious misconduct, or cases where they cannot obtain sufficient evidence to assess the complaint, to ASIC for further investigation. If ASIC considers that the matter is better dealt with by the professional body, ASIC has the option of referring the matter back to the professional body.

Professional Accounting Bodies: Recommendations

The FRC recommends that:

- Professional bodies should refer to ASIC all matters relating to RCAs where it appears there may be a breach of the law.
- Professional bodies should accurately record all disciplinary processes, including those that lead to no substantive action, and the reasons for the decision. They should also distinguish between lack of evidence that conduct was inappropriate and lack of evidence because information was not provided.
- Professional bodies should formalise processes for advising each other and the FRC of their disciplinary proceedings, particularly regarding RCAs.

Professional bodies publicly report statistics on the number of complaints they receive, and the number of complaints that do not proceed.

6. Conclusion

Throughout the Review, the FRC has observed that the various auditor disciplinary processes at work in Australia were designed as discrete processes, targeted at specific goals or outcomes. The FRC does not believe that an entirely new process is necessary to provide adequate RCA discipline in Australia, but that the adjustment of existing mechanisms would result in more cohesive, consistent and improved RCA disciplinary processes.

The recommendations of this review would increase transparency in RCA performance, and provide for a more graduated disciplinary pathway that starts with education of firms and continues to administrative action where required, with the possibility of appeal to the Administrative Appeals Tribunal and the court system. The recommendations address each of the disciplinary processes identified by the Review.

The ASIC Audit Inspection Program is not a disciplinary process, but is in a position to provide a disciplinary effect. Making the results of the Audit Inspection Program public would bring market discipline to bear on audit firms in Australia and create a strong incentive to improve audit quality — which is the ultimate goal of the Audit Inspection Program.

Reviewing the findings of the Audit Inspection Program for possible enforcement actions would provide a deterrence against continued adverse findings. Similarly, facilitating announcements by ASIC about the voluntary deregistration of RCAs under investigation (where appropriate) would provide a means of public exposure of RCAs who have failed to meet their obligations, and contribute to general deterrence against other RCAs doing the same.

ASIC's proposed changes to its enforcement practice, including the 'why not litigate?' approach to enforcement, is likely to result in a greater number of disciplinary outcomes imposed against RCAs. In addition, if CADB's efforts were to be refocused towards expedient administrative action in line with its statutory objectives, a greater number of outcomes may be achieved more rapidly and efficiently while still maintaining RCAs' rights of appeal to more formal deliberative bodies.

Finally, while noting the limitations of professional bodies' disciplinary powers, their role in disciplining members could be productively expanded through referral to the more formal enforcement mechanisms available to ASIC.

The FRC believes that if implemented, the suggested reforms would combine to improve the existing RCA disciplinary process in reaching appropriate outcomes in a timely, fair, consistent and transparent manner.

Appendix A: ASIC key criteria for assessing complaints

Case Identification criteria — Financial Reporting & Assessment team

FR&A will assess a RCA matter against the following criteria to determine whether it should be referred to the CCG team for enforcement action:

- Whether the level of assurance is reasonable assurance or negative assurance;
- Materiality of the audited subject;
- The strength, clarity and interpretation of auditing standards;
- The nature and extent of work performed;
- The regulatory impact/precedent value;
- Whether there was a material misstatement and the impact on investors, creditors, etc;
- The number of issues involving the RCA; and
- The prioritisation against other matters for use of limited resources.

Investigation process criteria — Corporations and Corporate Governance Enforcement

If a matter is referred to CCG, CCG will assess the matter against the following criteria to decide whether they should accept the matter for disciplinary action:

1. Strategic significance
 - Would enforcement action support ASIC's strategic framework?;
 - Does it align with an enforcement business unit priority or fall within the key risks / key projects in ASIC's corporate plan?
 - Is the matter of such high public profile or have such far-reaching impact on the market that ASIC ought to investigate it?
2. General Significance
 - Benefits of pursuing the misconduct;
 - Is it a new or untested legal issue that requires clarification?
 - Is the misconduct systemic in the market?
 - Is the misconduct symptomatic of a growing trend/emerging risk?
 - Will enforcement action send an effective deterrent message to the market?
 - Issues specific to the case: —
 - Is the alleged misconduct severe? (e.g. dishonest or deliberate or led to widespread public harm);
 - Is the alleged misconduct ongoing?;
 - Does the person of interest have a non-compliant history?;
 - Is sufficient admissible evidence likely to be available?
 - Is enforcement action likely to be cost effective?; and
 - Is enforcement action likely to be time effective?
 - Alternatives to formal investigation: —
 - Would enforcement action be a more effective response than action by another agency?; and
 - Would enforcement action be a more effective response than another ASIC regulatory tool?

Appendix B: ASIC's new enforcement strategy



ASIC
Australian Securities &
Investments Commission

ASIC update on implementation of Royal Commission recommendations

February 2019

Further to its statement of 4 February, the Australian Securities and Investments Commission (ASIC) is today providing an update on its planned actions in relation to the recommendations of the Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission).

The Royal Commission's recommendations reinforce, and will inform the implementation of steps ASIC has been taking as part of a strategic program of change that commenced in 2018 to strengthen our governance and culture and to realign our enforcement and regulatory priorities. This update also provides a report of progress on those changes.

Royal Commission recommendations directed at ASIC

There are 12 recommendations that are directed at ASIC, or where the Government's response requires action now by ASIC, without the need for legislative change. ASIC is committed to fully implementing each of these. The attached table provides an outline of ASIC's planned actions.

ASIC extended remit and strengthened powers and penalties

Importantly, the Royal Commission in recommending the retention of the 'twin peaks' model of financial regulation, made many recommendations to strengthen and contemporise it. To this end, a further 34 recommendations that require legislative change will expand ASIC's remit, strengthen our powers and require more of the entities we regulate. Of those 34 recommendations, 11 will extend ASIC's remit and powers, whilst 23 recommendations will impose new requirements or restrictions on the entities we regulate. ASIC will supervise industry's implementation of those new requirements and take action where there is non-compliance.

Across the range of its jurisdiction, as a result of the recommendations and current reforms, there will be over 60 additional penalty provisions that ASIC will be able to action. These penalty provisions will be of greater deterrence value with the recent passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018*. That Bill increases maximum prison penalties for the most serious offences to 15 years. It significantly increases civil penalties for companies, now to be capped at \$525 million, with maximum civil penalties for individuals increasing to \$1.05 million. Significantly, the Bill also introduces, for the first time, a civil penalty (capped at \$525 million) for breach of the primary obligation banks and other financial services and credit licensees owe to all of their customers, that is 'to do all things necessary to ensure the financial services covered by the licence are provided efficiently, honestly and fairly'.

Royal Commission referrals

In its final report the Royal Commission also made 11 specific referrals to ASIC in relation to eight entities. This was in addition to two referrals made during the course

of the Commission's hearings. We have prioritised work on those matters. While ASIC does not comment on actual or potential investigations, it will provide an update (when appropriate to do so publicly) on the handling of those matters — if proceedings are commenced, for example.

Royal Commission related enforcement work

In addition to the specific referrals, ASIC's enforcement teams are undertaking investigations into 12 matters that were case studies before the Royal Commission and have commenced proceedings in relation to two other case studies (Nulis and MLC, 18-259MR refers; and Dover Financial Advisers and Terry McMaster, 18-269MR refers). ASIC is assessing another 16 case studies to determine whether investigations should be commenced. Aside from the Royal Commission case studies, ASIC's enforcement teams are undertaking a large volume of work on a range of misconduct relating to major financial institutions and their representatives. ASIC expects these investigations to result in a number of referrals to the Commonwealth Director of Public Prosecutions for assessment for criminal prosecution. ASIC will continue to work closely with all relevant agencies, including the Australian Prudential Regulations Authority (APRA) and the Commonwealth Director of Public Prosecutions during the course of these investigations.

"Why not litigate?" posture and establishment of an Office of Enforcement

The Royal Commission identified ASIC's enforcement culture as the focus of the change needed at ASIC. The Royal Commission also identified that ASIC had acknowledged the need for that change and had already initiated action to do so. ASIC sought, and on 7 August 2018 obtained, additional funding from Government to accelerate its enforcement outcomes.

In October 2018, ASIC adopted a 'why not litigate?' enforcement stance and publicly committed to that posture going forward. ASIC initiated an Internal Enforcement Review (IER), led by Deputy Chair, Daniel Crennan QC, and assisted by Michael D Wyles QC, Professor Ian Ramsay of The University of Melbourne and Deputy Commissioner Leanne Close of the Australian Federal Police. ASIC put in place a series of interim measures to ensure a strong focus on court-based outcomes while that review took place.

The IER, completed in December 2018, includes a number of significant recommendations, foremost being the establishment of an Office of Enforcement within ASIC. The IER's report was provided to the Royal Commission in December 2018. The Royal Commission emphasised, as did the IER, the need to, as much as possible, separate enforcement staff from the ASIC's non-enforcement contact with regulated entities.

Following the release of the Royal Commission's Final Report and Government response, and informed by these and the IER, ASIC has determined to establish a separate Office of Enforcement within ASIC. A document summarising the framework and principles the Commission has determined for its implementation is

attached (page 12). ASIC is establishing a taskforce to put the Office of Enforcement in place. This will be completed in 2019.

While these changes will be implemented, due to the long pipeline involved in fully investigating and successfully prosecuting misconduct, the impact of these changes will only become fully visible over time. However, as an early indication of change, since 1 February 2018 there has been a 15% increase in the number of ASIC enforcement investigations on foot and a 50% increase in the number of ASIC enforcement investigations of misconduct by large financial institutions (or their employees or subsidiary companies).

ASIC's broader strategic change program

ASIC's changed enforcement approach is part of a broader change program initiated in 2018. This includes additional Commission members and a new leadership structure, a new Vision and Mission, and changes to ASIC's governance, structure and decision-making. In addition to adopting a strategy of greater court-based enforcement, it includes the adoption of new regulatory and supervisory approaches, such as Close and Continuous Monitoring (CCM) and the adoption of next generation regulatory tools, including through leading developments in behavioural economics, data analytics and RegTech.

The Royal Commission acknowledged ASIC's use of CCM in its final report. Our use of new regulatory and supervisory approaches is aimed at driving meaningful change in industry directly, and at supporting our strong enforcement stance. In the first two months of operation commencing at the end of October 2018, our CCM onsite reviews have seen ASIC staff on site at major financial institutions for 40 out of 45 working days and involved in more than 100 onsite interviews of banking staff at all levels. These reviews enable early identification of specific issues in institutions to minimise future harmful impact, including through the frank disclosure of our findings to the CEOs, business leaders, and boards of the institutions.

The strengthened "twin peaks" model will also require closer coordination and cooperation with APRA. ASIC and APRA already have joint work underway to enhance our cooperation arrangements in order to improve outcomes across the financial system, increase efficiency of regulation and promote a whole-of-system oversight.

ASIC welcomes the call for greater regulator accountability with the planned establishment of a new oversight body. We will be proactive in working with the new oversight body to develop regulatory performance measurement frameworks that provide a public mechanism for monitoring our effectiveness, with particular focus on the level of impact ASIC's work has on the overall fairness, strength and efficiency of the Australian financial system.

Beyond the formal recommendations, the Royal Commission's final report contained a number of findings and observations about ASIC and its work. Those findings and observations will inform our actions going forward — how we implement the Royal Commission recommendations and our change agenda.

Reforms advocated by ASIC

Many of the recommendations made by the Royal Commission involve reforms ASIC advocated for in its earlier submissions to the Royal Commission and, in some cases, in earlier reviews and inquiries. These include:

- an expanded role for ASIC to become the primary conduct regulator in superannuation;
- the extension of Banking Executive Accountability Regime (BEAR)- like accountability obligations to firms regulated by ASIC, with their focus being on conduct;
- the end of grandfathering of Future of Financial Advice (FOFA) commissions;
- the extension of the proposed product intervention powers and design and distribution obligations to a broader range of financial products and services;
- the extension of ASIC's role to cover insurance claims handling and the application of unfair contract terms laws to insurance;
- reforms to breach reporting; and
- ASIC being provided with a directions power.

These changes will build on the existing reform agenda and, in particular, on the important changes introduced by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018*, which implements changes that were also sought by ASIC.

Conclusion

ASIC acknowledges the statement made by the Government in its response to the Royal Commission that the findings, recommendations and referrals of the Royal Commission 'will require the regulators to take on new responsibilities and, in many cases, simply do more'. ASIC will work with the Government as it seeks to ensure that regulators remain appropriately resourced and as it considers what additional funding is required in the 2019–20 budget context.

The proposed new powers, penalties, legislative reform and funding are crucial to ASIC meeting the expectations of the community, Parliament and the Government. Taken collectively they significantly strengthen ASIC's regulatory and enforcement powers and the deterrence value of those powers to stem future misconduct.

ASIC stands ready to work with the Parliament, the Government, and APRA to implement the reform agenda. Beyond that, ASIC looks forward to working with enhanced powers and resourcing, its strengthened enforcement culture and the full range of other regulatory tools available to it, to strive for a fair, strong and efficient financial system for all Australians.

FSRC recommendation	Government response	ASIC update
<p>Recommendation 1.13 — Charging default interest</p> <p>The ABA should amend the Banking Code to provide that, while a declaration remains in force, banks will not charge default interest on loans secured by agricultural land in an area declared to be affected by drought or other natural disaster.</p>	<p>The Government supports the ABA acting on this recommendation.</p>	
<p>Recommendation 1.16 — 2019 Banking Code</p> <p>In respect of the Banking Code that ASIC approved in 2018, the ABA and ASIC should take all necessary steps to have the provisions that govern the terms of the contract made or to be made between the bank and the customer or guarantor designated as ‘enforceable code provisions’.</p> <p>Recommendation 4.9 — Enforceable code provisions</p> <p>As referred to in Recommendation 1.15, the law should be amended to provide for enforceable provisions of industry codes and for the establishment and imposition of mandatory industry codes.</p> <p>In respect of the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice, the Financial Services Council, the Insurance Council of Australia and ASIC should take all necessary steps, by 30 June 2021, to have the provisions of those codes that govern the terms of the contract made or to be made between the insurer and the policyholder designated as ‘enforceable code provisions’.</p>	<p>The Government supports ASIC and the ABA acting on this recommendation following the implementation of Recommendation 1.15.</p> <p>The Government supports the Financial Services Council, the Insurance Council of Australia and ASIC acting on this recommendation, following the implementation of the Government response to Recommendation 1.15 about ASIC’s powers to approve codes with enforceable provisions.</p> <p>This responds to the Productivity Commission’s report <i>Superannuation: Assessing Efficiency and Competitiveness</i> which recommended a binding and enforceable superannuation insurance code of conduct, which would thereafter become a condition of holding an RSE licence.</p>	<p>ASIC will work with industry in anticipation of the Parliament legislating reforms in relation to codes and ASIC’s powers to provide for ‘enforceable code provisions’. This work will include a focus on which code provisions need to be made ‘enforceable code provisions’ on the basis they govern the terms of the contract made or to be made between the financial services provider and the consumer. ASIC will also continue to work within the existing law to improve the quality of codes and code compliance.</p>
<p>Recommendation 2.4 — Grandfathered</p>	<p>The Government agrees to end grandfathering of conflicted remuneration</p>	<p>Consistent with the Government’s response to this recommendation, ASIC will monitor and</p>

FSRC recommendation	Government response	ASIC update
<p>commissions</p> <p>Grandfathering provisions for conflicted remuneration should be repealed as soon as is reasonably practicable.</p>	<p>effective from 1 January 2021.</p> <p>Grandfathered conflicted remuneration can entrench clients in older products even when newer, better and more affordable products are available on the market. Grandfathering has now been in place for over five years, providing industry with sufficient time to transition to the new arrangements. It is therefore now appropriate for grandfathering to end.</p> <p>The Government is also committed to ensuring that the benefits of removing grandfathering flow to clients. From 1 January 2021, payments of any previously grandfathered conflicted remuneration still in contracts will instead be required to be rebated to applicable clients where the applicable client can reasonably be identified.</p> <p>Where it is not practicable to rebate the benefit to an individual client because, for example, the grandfathered conflicted remuneration is volume-based so it is not able to be attributed to any individual client, the Government expects industry to pass these benefits through to clients indirectly (for example, by lowering product fees).</p> <p>To ensure that the benefits of industry renegotiating current arrangements to remove grandfathered conflicted remuneration ahead of 1 January 2021 flow through to clients, the Government will commission ASIC to monitor and report on the extent to which product issuers are acting to end the grandfathering of conflicted remuneration for the period 1 July 2019 to 1 January 2021 and are passing the benefits to clients, whether through</p>	<p>report on the extent to which product issuers are acting to end the grandfathering of conflicted remuneration for the period 1 July 2019 to 1 January 2021. This will include consideration of the passing through of benefits to clients, whether through direct rebates or otherwise.</p>

FSRC recommendation	Government response	ASIC update
	<p>direct rebates or otherwise.</p> <p>This also responds to the Productivity Commission's report <i>Superannuation: Assessing Efficiency and Competitiveness</i> which also recommended ending grandfathered trailing commissions.</p>	
<p>Recommendation 2.5 — Life risk insurance commissions</p> <p>When ASIC conducts its review of conflicted remuneration relating to life risk insurance products and the operation of the ASIC Corporations (Life Insurance Commissions) Instrument 2017/510, ASIC should consider further reducing the cap on commissions in respect of life risk insurance products. Unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero.</p>	<p>In 2017, the Government enacted reforms to life insurance remuneration that capped the commissions a financial adviser would receive for providing advice in relation to the purchase of a life insurance product. As part of these reforms, the Government announced that ASIC would conduct a review in 2021 to consider whether the reforms have better aligned the interests of advisers and consumers. If the review does not identify significant improvement in the quality of advice, the Government stated it would move to mandate level commissions, as was recommended by the Financial System Inquiry.</p> <p>The Government supports ASIC conducting this review and considering the factors identified by the Royal Commission when undertaking this review.</p>	<p>ASIC will implement this recommendation. ASIC will consider this recommendation and factors identified by the Royal Commission in undertaking its post implementation review of the impact of the ASIC Corporations Life Insurance Commissions Instrument 2017/510, which set commission caps and clawback amounts, and which commenced on 1 January 2018 (ASIC media release 17-168 MR refers). As noted by the Royal Commission, and consistent with the Government's timetable, ASIC's review will take place in 2021.</p>
<p>Recommendation 4.4 — Cap on commissions</p> <p>ASIC should impose a cap on the amount of commission that may be paid to vehicle dealers in relation to the sale of add-on insurance products.</p>	<p>The Government agrees to provide ASIC with the ability to cap commissions that may be paid to vehicle dealers in relation to the sale of add-on insurance products.</p> <p>The value of the commissions paid in relation to add-on insurance products sold through vehicle dealers has significantly exceeded the amounts paid out to consumers through claims. High levels of commissions have contributed to poor</p>	<p>Pending the Parliament legislating to provide ASIC with the ability to place a cap on such commissions, ASIC will continue to work to address problems in relation to the sale of add-on insurance products in the context of motor vehicle sales.</p>

FSRC recommendation	Government response	ASIC update
	<p>consumer outcomes.</p> <p>Providing ASIC with the ability to cap commissions will ensure an appropriate cap is set and varied if required in response to any future concerns.</p>	
<p>Recommendation 6.2 — ASIC’s approach to enforcement</p> <p>ASIC should adopt an approach to enforcement that:</p> <ul style="list-style-type: none"> • takes, as its starting point, the question of whether a court should determine the consequences of a contravention; • recognises that infringement notices should principally be used in respect of administrative failings by entities, will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation; • recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking and the utility in obtaining admissions in enforceable undertakings; and • separates, as much as possible, enforcement staff from non-enforcement related contact with regulated entities. 	<p>The Government supports ASIC acting on this recommendation.</p> <p>The adoption of the Royal Commission’s recommendation will build on changes already underway within ASIC, both with its recent shift to a ‘why not litigate’ stance, and recommended changes to its policies, processes and procedures put forward by its recent internal review of enforcement.</p>	<p>ASIC’s actions are underway. ASIC will continue to implement this commitment, which is consistent with the strategic direction it has adopted for its approach to enforcement. In particular, ASIC has adopted a ‘<i>Why not litigate?</i>’ enforcement stance and initiated an internal enforcement review (IER). ASIC’s Commission has determined to create a separate Office of Enforcement within ASIC and this will be implemented in 2019. ASIC will take the IER report and the Royal Commission’s comments on it into account, as it makes its final changes to its enforcement policies, procedures and decision-making structures to deliver on its ‘<i>Why not litigate?</i>’ enforcement stance.</p>
<p>Recommendation 6.10 — Co-operation memorandum</p> <p>ASIC and APRA should prepare and maintain a joint memorandum setting out how they intend to comply</p>	<p>The Government supports ASIC and APRA continuing to work together to update their existing memorandum of understanding to ensure that it clearly sets out how they will comply with their statutory obligation to</p>	<p>ASIC will, working with APRA, implement this recommendation, including in relation to any statutory obligation to cooperate, share information and notify APRA of breaches or suspected breaches, that the Government puts in</p>

FSRC recommendation	Government response	ASIC update
<p>with their statutory obligation to co-operate. The memorandum should be reviewed biennially and each of ASIC and APRA should report each year on the operation of and steps taken under it in its annual report.</p>	<p>co-operate.</p>	<p>place as part of its response to Recommendation 6.9</p> <p>ASIC and APRA are currently working together to enhance cooperation arrangements including by revising the existing Memorandum of Understanding. The aim is to improve outcomes across the financial sector, increase efficiency of regulation and promote a whole of system view. This work will be completed in 2019.</p>

FSRC recommendation	Government response	ASIC update
<p>Recommendation 6.12 — Application of the BEAR to regulators</p> <p>In a manner agreed with the external oversight body (the establishment of which is the subject of Recommendation 6.14 below) each of APRA and ASIC should internally formulate and apply to its own management accountability principles of the kind established by the BEAR.</p>	<p>The Government agrees that APRA and ASIC should be subject to accountability principles consistent with the BEAR.</p> <p>The Government notes that the Financial Conduct Authority in the UK has adopted a similar regime to enhance its own internal accountability.</p>	<p>ASIC agrees to implement this recommendation. In anticipation of the Government’s establishment of the external oversight body, ASIC will commence work on developing accountability maps consistent with the BEAR. ASIC will consider the approach of the Financial Conduct Authority in implementing this recommendation.</p> <p>ASIC will develop and publish accountability statements before the end of 2019.</p>

Appendix — Establishing ASIC’s Office of Enforcement.

ASIC is committed to increasing consumer trust and confidence in the financial system and combating misconduct. ASIC will take action against misconduct and the resulting harms to consumers and markets. ASIC’s enforcement culture requires investigations to be conducted with a clear view of the regulatory outcomes to be achieved and with a focus on the question, “why not litigate?”.

Following the Final Report of the Royal Commission, the Government’s Response and ASIC’s Internal Enforcement Review, the Commission has resolved to establish an Office of Enforcement within ASIC. The Office of Enforcement will be responsible to the Commission for investigation and enforcement of contraventions of the laws that ASIC administers. The decision to establish a separate Office of Enforcement is founded on the principles that:

- It is preferable to centralise decision-making processes to ensure determination of whether or not it is in the public interest to commence enforcement action and (if so) utilising the most appropriate and effective responses available to ASIC;
- Such decision-making should be informed by cogent and well-reasoned recommendations from experienced enforcement senior executives and managers with defined and dedicated accountabilities for delivery of ASIC’s enforcement strategies and objectives;
- Teams operating within the Office of Enforcement will be separate, as much as possible, from non-enforcement related contact with regulated entities.

The Commission will continue to determine the governance arrangements, strategic settings, guiding principles and operational guidelines that will be observed by the Office of Enforcement and ASIC generally. In particular, the Commission will retain decision-making responsibility for significant enforcement matters.

Commission decisions:

1. The Commission approves and will implement an Office of Enforcement within ASIC to be responsible and accountable to the Commission for investigation and enforcement of contraventions of the legislation administered by ASIC.
2. The Royal Commission’s Final Report, insofar as it relates to ASIC’s enforcement activities, will be integral to Commission’s consideration of guiding principles and operational guidelines for the Office of Enforcement and ASIC generally.

3. The guiding principles and operational guidelines approved by the Commission for the Office of Enforcement and ASIC generally will have as their predicate a focus on deterrence, public denunciation and punishment of wrongdoing by way of litigation.
4. The Office of Enforcement will adopt and monitor the observation of clear and transparent overarching principles set by the Commission to give effect to the objects set out in ss1(2)(a), (b), (d) and (g) and ss12A(2) and (3) of the ASIC Act.
5. The following principles will guide ASIC's work including the approach of the Office of Enforcement:

Principle One: Where a possible breach of the law is known to ASIC, ASIC will undertake an assessment and, if appropriate, conduct an investigation by reference to the facts and law. Once ASIC is satisfied that breaches of law are more likely than not, it will ask itself: why not litigate?

Principle Two: Any public interest in pursuing a (non-court) negotiated outcome is weighed against the clear benefits of a judgment and imposition of a prison sentence, civil penalty or other court-based outcome with a negotiated outcome pursued only where objective assessment weighs in favour of the negotiated outcome (reflecting paragraph 3 above).

Principle Three: There is a focus on both corporate accountability and individual accountability particularly at executive and board level for breaches of the legislation administered by ASIC.

Principle Four: Emerging technologies are employed to enhance ASIC's enforcement capabilities and these technologies are monitored so ASIC keeps pace with advances in these technologies.

Principle Five: There is careful monitoring of, and an endeavour to pre-empt, budgeting and resourcing requirements.

6. The Office of Enforcement will have an overarching and effective communication strategy to ensure the deterrent impact of ASIC's enforcement actions are maximised.

7. ASIC will provide ASIC staff, including the staff of the Office of Enforcement, with regular education and training including in the skills of investigation and enforcement.
8. The Commission will formulate and adopt Key Performance Indicators for the Office of Enforcement which should report against those KPIs annually.
9. The Office of Enforcement will prepare and provide the Commission with comprehensive data and analysis on (at least) an annual basis which evaluates the performance of the Office of Enforcement both quantitatively and qualitatively.

Appendix C: Additional information on professional bodies

Chartered Accountants Australia and New Zealand (CA ANZ)

In 2014 CA ANZ commissioned an independent review of its professional conduct function in Australia. As a result of this review, in July 2016 CA ANZ changed their disciplinary process substantially. The process outlined below refers to the new process, but also cross references the old process, where appropriate.

Initiation of proceedings

CA ANZ can receive complaints about members from the public and from other regulatory or professional bodies. The Professional Conduct Committee may also initiate a complaint following an investigation, through quality reviews undertaken by CA ANZ members, adverse findings made by courts or the regulator, and self-reporting by the member.⁴⁸

Complaints are initially reviewed by CA ANZ's Investigation and Discipline Division to determine whether there is jurisdiction to investigate. The division also considers whether further information is required from the complainant before determining whether a complaint should be referred to the Professional Conduct Committee. Complaints will only be referred where the correct complaint form is used and the matter is within the scope of the CA ANZ's authority as outlined in the By-Laws.⁴⁹

If a complaint is being investigated to the Professional Conduct Committee, the relevant member must be notified.⁵⁰

The investigation process

Professional Conduct Committee (PCC)

Upon receipt of a complaint the PCC registers the complaint in the CA ANZ system, conducts an initial review, investigates and then reaches a decision.⁵¹

There are three key phases in PCC's investigations: initial review, investigation and consideration.

The initial review involves assessment of whether the complaint is within the jurisdiction of the PCC. The PCC must investigate the complaint unless the complaint is trivial, frivolous, vexatious, in bad faith, insufficient, a potential abuse of process, related to historical issues that are not practical for investigation, related to conduct that occurred during a member's suspension or within the jurisdiction of another forum. The PCC does not investigate anonymous complaints.⁵²

After jurisdiction is established and if the complaint is being investigated, the relevant member is ordinarily provided with a copy of the complaint for response, this response is ordinarily provided to the complainant for comment and this continues until there is sufficient information for PCC to make

48 CA ANZ, 2018, *By Laws 40 — Chartered Accountants Australia and New Zealand*, para. 4.

49 Ibid.

50 Ibid.

51 Chartered Accountants Australia and New Zealand 2017, *Annexure I: The Complaints Process for Complainants, Annual Report 2017*, p. 219.

52 CA ANZ, 2018, *By Laws 40 — Chartered Accountants Australia and New Zealand*, para. 4.

a decision. The member has a final right of reply. In complex matters, an expert investigator may be appointed.⁵³

After investigation the PCC can decide to:

- Take 'no further action';
- Convene a case conference;
- Caution the member;
- Require the member or the member's practice entity to submit to a quality review(s);
- Require the member to pay the costs;
- Seek the member's consent to enter into a consent agreement, which can include:
 - reprimands, fines, costs,
 - requiring professional development, and/or
 - publicising the decision;
- Refer the complaint to the Disciplinary Tribunal for hearing.⁵⁴

PCC decisions are publicised online and through the CA ANZ members magazine, subject to the agreement of the relevant member and if the PCC considers appropriate (based on it being in the public interest to do so). Decisions may be reviewed by the Reviewer of Complaints.⁵⁵ The Reviewer will consider the procedures and decision of the PCC and can request the PCC reconsider its decision or make recommendations.⁵⁶

If another regulator or agency is investigating a member's conduct at the same time as the PCC or if there are court proceedings, in relation to matters which are substantially similar to the subject matter of the complaint, the PCC investigation will be adjourned until the other investigation or court proceedings have been completed. If any adverse finding is made by a Court, Tribunal or other regulator, the matter is to be provided to the PCC, as the adverse finding may be a breach of the By-Laws and will be considered by the PCC.⁵⁷

PCC may also apply to the Disciplinary Tribunal for an interim suspension of a member pending further investigation by the PCC. The Disciplinary Tribunal will consider whether an interim suspension is necessary or desirable due to the urgency of the matter, the interests of the public, the reputation of CA ANZ or the integrity of the accounting profession.⁵⁸

For matters that require more detailed investigation, the PCC can convene a face-to-face case conference with the relevant member to discuss the complaint and evidence provided. The complainant may also attend at the PCC's request. The PCC may give the member an option of entering into a consent agreement to resolve the matter. If an agreement cannot be reached, the matter will be referred to the Disciplinary Tribunal.⁵⁹ Case conferences are held privately and

53 CA ANZ, 2018, *By Laws 40 — Chartered Accountants Australia and New Zealand*, para. 5.

54 *Ibid*, para. 6.

55 The Reviewers are lawyers who are independent of the disciplinary bodies and CA ANZ.

56 CA ANZ, 2018, *By Laws 40 — Chartered Accountants Australia and New Zealand*, para. 8.

57 CA ANZ, 2019, *Making a complaint against a member*, CA ANZ viewed 26 January 2019, <<https://www.charteredaccountantsanz.com/about-us/complaints/complaints-about-a-member>>.

58 CA ANZ, 2018, *By Laws 40 — Chartered Accountants Australia and New Zealand*, para. 9.

59 CA ANZ, 2019, *Making a complaint against a member*, CA ANZ viewed 21 January 2019, <<https://www.charteredaccountantsanz.com/about-us/complaints/complaints-about-a-member>>.

witnesses do not attend. Consent agreements are not publicised unless the PCC considers that it is in the public interest to do so and member provides their consent. Any sanctions are entered on the member's membership record (subject to their agreement) and the complaint closed.

The disciplinary process

Disciplinary Tribunal

Where the PCC refers a matter to the Disciplinary Tribunal, CA ANZ provides the member with a Notice of Disciplinary Action which set out the basis on which CA ANZ alleges that the member breached the By-Laws. CA ANZ will also provide all material on which it was relying in support of its allegations. The member is provided an opportunity to respond to the allegations against them either in writing or at the Tribunal hearing.

At the Disciplinary Tribunal, the PCC is responsible for presenting the case against the member on behalf of CA ANZ. The PCC has the onus of proving the case against the member on the balance of probabilities. The member also has an opportunity to make submissions and present evidence in support of their defence. Members appearing before the Tribunal may have representation from a solicitor, barrister or other representative.

The Tribunal will then make a decision on whether or not the member breached the By-Laws and if so, order sanctions, if appropriate. Disciplinary Tribunal hearings are held in public and name suppression of the member is granted only in exceptional circumstances.

The outcomes and decisions of the Tribunal hearings are published on the CA ANZ website and the CA ANZ's member magazine titled, *Acuity*.⁶⁰ This publication is circulated to members and includes details on the outcomes of the Tribunal hearings including the type of issues that give rise to complaints and the consequences of non-compliance and unethical behaviour.

Any member subject to a determination or sanction from the Disciplinary Tribunal may appeal to the Appeals Tribunal.⁶¹ The Appeals Tribunal can vary or reverse any decisions by the Disciplinary Tribunal, including decisions related to liability, sanction, costs and publicity.⁶² In 2015-2016 two matters were heard by the Appeals Tribunal.⁶³

Sanctions

In July 2016, CA ANZ introduced *Regulation CR8* which outlines the guidelines for consideration of CA ANZ disciplinary bodies to consider in deciding what sanctions to impose.⁶⁴ As outlined in CA ANZ policy, sanctions are meant to be reflective of the impact of the member's actions on CA ANZ's reputation and other members.⁶⁵ In ordering sanctions, previous decisions will be given consideration but are not determinative.

60 CA ANZ, 2019, *Decisions Register*, CA ANZ viewed 21 January 2019, <<https://www.charteredaccountantsanz.com/about-us/complaints/decisions-register?q=audit>>.

61 CA ANZ, 2018, *By Laws 40 — Chartered Accountants Australia and New Zealand*, para. 11.1.

62 CA ANZ, 2019, *Making a complaint against a member*, CA ANZ viewed 21 January 2019, <<https://www.charteredaccountantsanz.com/about-us/complaints/complaints-about-a-member>>.

63 CA ANZ data provided on request.

64 *Ibid.*

65 *Ibid.*

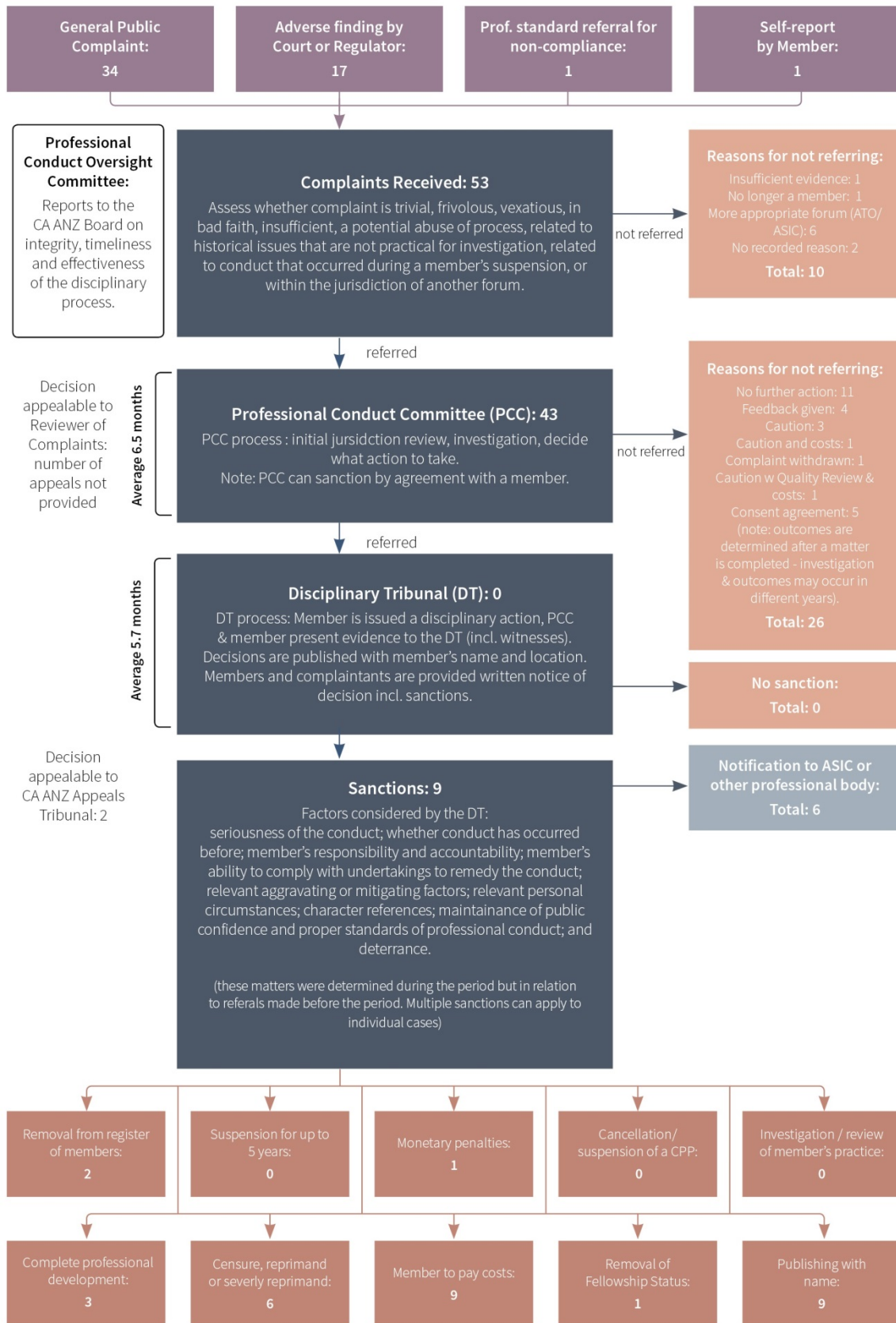
Sanctions the Disciplinary Tribunal may order include:

- Removing the member from the register of members.
- Suspending the member for up to five years.
- Imposing monetary penalties.
- Cancelling or suspending a Certificate of Public Practice.
- Requiring a review of the member's practice.
- Requiring the member to complete professional development or engage an adviser or consultant.
- Reprimanding or severely reprimanding the member.
- Requiring the member to pay costs.

The disciplinary bodies do not have the powers of a Court and therefore cannot order damages, compensation or make criminal findings. They also cannot intervene or overturn a court order or decision by another regulator.⁶⁶

66 CA ANZ, 2019, *Making a complaint against a member*, CA ANZ viewed 21 January 2019, <<https://www.charteredaccountantsanz.com/about-us/complaints/complaints-about-a-member>>.

Figure 3 – CA ANZ Complaints Process and Auditor Sanctions: July 2015–June 2018



CPA Australia

Initiation of proceedings

CPA Australia can receive complaints about members from internal sources (the General Manager of Professional Conduct or the Quality Review Unit) and from members of the public.

The General Manager of Professional Conduct (GMPC) may raise a complaint based on public information provided anonymously or published information including media reports or bankruptcy listings.⁶⁷ The Quality Review Unit may refer matters arising out of a member's Quality Review.⁶⁸ CPA Australia does not investigate complaints made anonymously, aside from anonymous complaints based on public information.

All complaints received are logged in CPA Australia's complaints database and assessed by the GMPC to determine whether the complaint is suitable for referral for investigation or should be dismissed.⁶⁹

A complaint is considered unviable when the conduct occurred more than five years prior to lodgement, it concerns a person who is not a current CPA Australia member, it does not have any supporting evidence or it is primarily concerned with a dispute related to fees.

Quality assurance reviews

Any breaches of the Code of Ethics or AUASB standards that are uncovered may be referred for investigation or may be remedied by the member. Breaches of auditing standards in the initial Quality Review do not necessarily result in disciplinary action, however are subject to a follow up review. Failure to meet the requirements at the follow up review may cause referral directly to the Professional Conduct Unit for investigation.⁷⁰

The investigation process

Complaints assessed by the GMPC as viable are referred to an officer in the Professional Conduct Unit for investigation. The Professional Conduct Unit conducts its own monitoring of adverse outcomes against members including monitoring ASIC media releases and the websites of regulatory bodies.⁷¹ This monitoring can lead directly to an investigation by the Professional Conduct Unit.

At commencement of the investigation process, CPA Australia sends a copy of the complaint and any supporting evidence to the relevant member for a response. The complainant is also given the opportunity to provide further evidence.⁷²

After the investigation, the Professional Conduct Officer provides a report to the GMPC to determine, on the balance of probabilities, whether the member has a case to answer within the terms of the Constitution and By-Laws.⁷³

67 Information provided by CPA Australia on request.

68 All members that provide public accounting services must hold a Public Practice Certificate and must complete periodic Quality Reviews.

69 Information provided by CPA Australia on request.

70 CPA Australia, 2018, *Professional Conduct Report for FRC*, paper provided to the FRC November 2018, p.2 -4.

71 Ibid, p 2.

72 Information provided by CPA Australia on request.

73 CPA Australia, 2019, *What happens when I make a complaint?*, CPA accessed on 21 January 2019, <<https://www.cpaaustralia.com.au/about-us/member-conduct-and-discipline/making-a-complaint/what-happens-when-i-make-a-complaint>>.

Where the GMPC determines there is a case to answer, the GMPC may refer the matter to a Disciplinary Tribunal.

Where there is sufficient evidence to show a breach has occurred but the breach can be remedied, an internal reprimand can be issued. Internal reprimands will not be considered for serious breaches of the Constitution. The reprimand is not published but is recorded as a 'prior' in the event of future complaints or disciplinary action. If the member does not consent to the internal reprimand then the matter is referred to a Disciplinary Tribunal for hearing.⁷⁴

Where there is a lack of evidence to show a breach has occurred, the complaint will be closed and 'no further action' taken.

The disciplinary process

Disciplinary Tribunal

Matters referred to the Disciplinary Tribunal are heard by an independent Disciplinary Panel, consisting of a Chairperson and four panel members including members of both CPA Australia and the general community.⁷⁵

The Disciplinary Tribunal considers the allegations and provides the member with an opportunity to present their case. The matter is presented to the Disciplinary Tribunal by CPA Australia's Investigating Case Officer. The member is asked to admit or deny the complaint during the hearing. Members appearing before the Tribunal may have representation from a solicitor, barrister or other representative.⁷⁶

If the member does not admit to the complaint, the Disciplinary Tribunal will adjourn to determine whether the principal facts are made out and the complaint is to be upheld.

If the allegations (or part thereof) are established, the Disciplinary Tribunal will make a decision including determining guilt, penalty and costs.

If the complaint is upheld, the member (as well as the Investigating Case Officer) will be able to make submissions on mitigation for consideration by the Disciplinary Tribunal when deciding the penalty. Factors the Disciplinary Tribunal consider in determining a sanction include the severity of the breach, whether any individuals were impacted, mitigating circumstances, evidence of remorse, and the impact of the sanction on the member or related parties.⁷⁷

The member has a right of appeal to a separately constituted Appeals Tribunal, comprising of five Disciplinary Panel members. The Appeals Tribunal can decide to uphold, vary or set aside the Disciplinary Tribunal's decision. The complainant receives written notification of the Tribunal's finding and decision following the outcome of the appeal hearing.⁷⁸

If the member does not appeal, the complainant receives written notification of the Tribunal's finding and decision after the appeal period has expired. The outcome of the Disciplinary Tribunal's

74 Information provided by CPA Australia on request.

75 Ibid.

76 Ibid.

77 Ibid.

78 Ibid.

Determination is also published on CPA Australia's website.⁷⁹ Wider publication of the decision may occur if recommended by the Disciplinary Tribunal.⁸⁰

Sanctions

The Tribunal may impose sanctions including:

- a fine of up to \$100,000;
- continuing professional development;
- seeking advice on the conduct of the person's practice (usually through conducting a quality review);
- forfeiture of membership;
- suspension for up to five years;
- cancellation of a member's certificate of public practice; and/or
- severe reprimand.⁸¹
- The Tribunal cannot order a member to make any restitution or compensate a client for any losses suffered and CPA Australia does not have any fidelity fund for compensation.⁸²

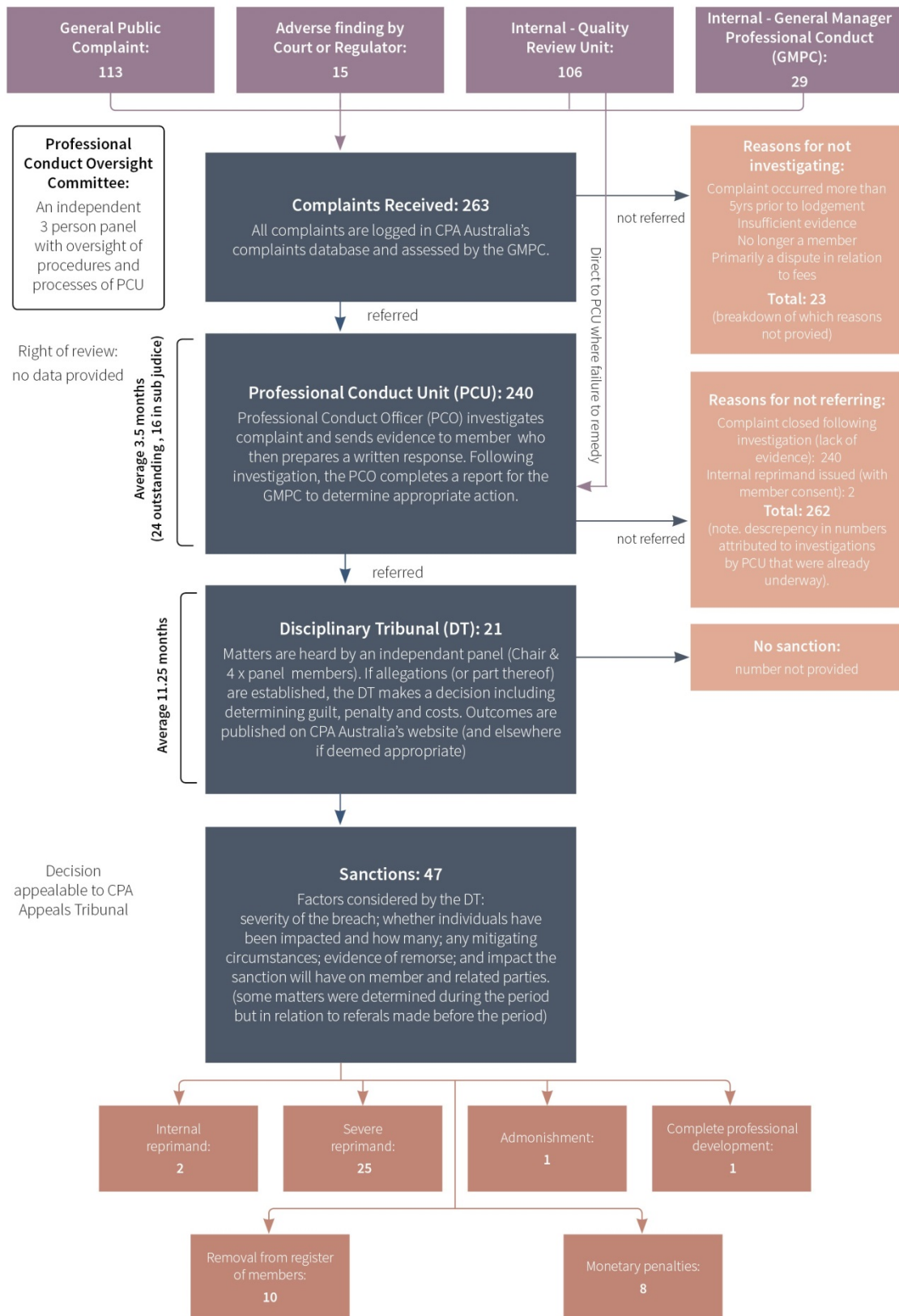
79 CPA Australia, 2019, *Outcomes of Disciplinary Hearings*, CPA, accessed on 21 January 2019, <<https://www.cpaaustralia.com.au/about-us/member-conduct-and-discipline/outcome-of-disciplinary-hearings>>

80 CPA Australia, 2018, *Professional Conduct Report for FRC*, paper provided to the FRC November 2018, p.7.

81 CPA Australia, 2018, *Professional Conduct Report for FRC*, paper provided to the FRC November 2018, p.6.

82 Information provided by CPA Australia on request.

Figure 4 – CPA Australia Complaints Process and Auditor Sanctions: 2015–2018



Institute of Public Accountants (IPA)

Initiation of proceedings

Complaints received by the IPA may originate from clients or the public, through internal quality assurance reviews, or referrals from a regulatory body.

A complaint will only be received if it is in writing with the IPA complaint form completed. The complaint requires the following details to be completed: details of the complaint including background and chronological timeline of events; supporting documentation; an outline of any action taken to attempt to resolve the matter (including any complaints made to other professional or regulatory bodies and their responses); details of legal proceedings commenced; complainant's contact details; and an authorisation to act on the complaint.⁸³

Investigation process

Upon receipt of a complaint, IPA will review the complaint to determine whether the IPA can investigate the matter. IPA does not investigate all complaints, including in circumstances where the complaint is more appropriately dealt with by another body such as a regulator or the police.⁸⁴ When the complaint cannot be investigated it will be referred for 'no further action'.⁸⁵

The IPA investigation process is based on full transparency for both the complainant and the member. This requires that a copy of the formal complaint be provided to the member and replies from both the member and the complainant are copied to each other. Natural justice dictates that any person facing investigation is aware of all the facts being considered.

An investigation can lead to one of the following possible outcomes:

- 'no further action' taken;
- referral to arbitration or mediation;
- recommendation for administrative action (in circumstances where the member has made an admission of wrongdoing and/or there is sufficient evidence and/or there are issues requiring resolution) this includes requiring the member to undertake Continuing Professional Development, undertakings to the IPA, written warnings or any other remedial action deemed appropriate;
- voluntary resolution; or
- referral to the IPA Disciplinary Tribunal. A referral to the Disciplinary Tribunal is made in circumstances where administrative action or voluntary resolution is not appropriate.⁸⁶

The timeframe for completion of an investigation is within six to nine months as indicated on materials published by IPA.⁸⁷ It was noted in a report that it seeks to reduce the time for the completion of investigations by retaining external resources to assist with investigation reports.⁸⁸

83 Information provided by IPA on request.

84 Other circumstances where IPA will not investigate include complaints: on breaches of the law or matters outside their jurisdiction and where there are no relevant professional or ethical issues; on commercial disputes on fees that do not relate to professional or ethical issues; that do not warrant investigation; that relate to historical conduct that occurred more than seven years prior to the complaint; it does not relate to a current IPA member; and the complaint is anonymous.

85 Information provided by IPA on request.

86 Ibid.

Disciplinary tribunal

The IPA Disciplinary Tribunal is held on a quarterly basis.⁸⁹

The findings and orders of the IPA Disciplinary Tribunal are published by IPA, this includes publication of the member's name, breaches and finding for sanctions including order of censure, suspension or forfeiture of membership. For other sanctions such as orders of admonishment, fines or other orders, IPA will determine whether any details are published.⁹⁰

The IPA also publishes a list of breaches commonly subject to investigation on its website to raise awareness among members.⁹¹

Factors the Disciplinary Tribunal consider in determining a sanction include:

- the severity of the misconduct and breach;
- potential loss suffered by the complainant;
- circumstances that led to the misconduct;
- whether the misconduct was due to misconduct by another party (or the member's misconduct was as a result of a genuine misunderstanding, ignorance or deliberate or reckless action);
- whether the conduct was systemic (and whether previous disciplinary action has been taken against the member);
- whether action has been taken against the member by a regulatory or other body; and
- the member's conduct during the process (including whether the member disclosed the matter, cooperated during the investigation and any action has been taken to remedy the breach).⁹²

Sanctions

The Board of Directors or the IPA Disciplinary Tribunal may impose sanctions including:

- forfeiture of membership;
- suspension from membership;
- fine (not exceeding \$10,000);
- censure (formal severe reprimand, name and details published);
- admonishment (formal reprimand, details published);
- payment of all costs incurred by IPA (failure to pay costs will lead to forfeiture of membership for a period); or

87 Institute of Public Accountants, 2017, *Complaints and Investigation Procedure*, Institute of Public Accountants, viewed 21 January 2019, <<https://www.publicaccountants.org.au/media/1391449/Complaint-and-Investigation-Procedure-Information-20170311.pdf>>.

88 Institute of Public Accountants, 2017, *Annual Professional Standards Improvement Program Report*, p. 62.

89 Ibid, p. 62.

90 Information provided by IPA on request.

91 Institute of Public Accountants, 2017, *Annual Professional Standards Improvement Program Report*, p. 62.

92 Information provided by IPA on request.

- non-compliance order (which may lead to automatic forfeiture of membership administered by the CEO).⁹³

The IPA does not have legal power to order payment of compensation or restitution to a complainant, require a member to produce documents or provide any particular services to a client.

93 Information provided by IPA on request.

Figure 5 — IPA Complaints Process and Auditor Sanctions: July 2015–June 2018

