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Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators

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This article discusses a trend towards increased empiricism in enforcement reporting by financial regulators that emphasises greater use of numerical indicators. The article examines how the Australian Securities and Investments Commission (ASIC), the UK Financial Conduct Authority (FCA) and the US Securities and Exchange Commission (SEC) report on the outcomes of their enforcement practices, with a particular focus on ASIC. The article begins with a brief introduction to the functions and structure of ASIC, the FCA and the SEC. It then describes how these regulators report on their enforcement outcomes and considers how recent national developments emphasising increased empiricism are likely to influence such reporting practices. Finally, the article provides a detailed case study on ASIC's enforcement functions and quantitative approach to reporting of enforcement outcomes. The article closes by discussing what trends can be discerned regarding reporting of enforcement outcomes and what this could mean for regulators' reporting practices in the future.

KEYWORDS: regulation; enforcement; reporting; accountability; transparency

A. INTRODUCTION

As the impacts of globalisation increase and intensify, regulation has become an increasingly important mechanism to mediate the tensions between societies, their economies and the environment. As the Organisation for Economic Cooperation and Development (OECD) emphasises, regulatory infrastructures and mechanisms are crucial in managing how the domains of politics and the market interact.² The Global Financial Crisis (GFC) heightened tensions in many countries regarding how laissez-faire or

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² Organisation for Economic Co-operation and Development, *Best Practice Principles for Regulatory Policy: The Governance of Regulators* (OECD Publishing, 2014), 13, <http://www.oecd.org/gov/regulatory-policy/governance-regulators.htm> accessed on 27 August 2015.

interventionist governments should be in relation to markets, especially financial markets, on issues such as aligning community protection and reducing the regulatory burden on market participants. Even in highly regulated economies, financial regulators had to confront the sobering reality that the crisis hit despite significant reforms to their structures, processes, powers and rules in the period leading up to the crisis.³ Regulation had not been able to anticipate or prevent the crisis.⁴ Many hypotheses have been advanced to explain the crisis but one common thread attributes part of that responsibility to the poor understanding and implementation of regulation by financial regulators.⁵ The effect has been to turn the focus onto the competence and accountability of regulators as the managers of the tools of financial regulation. The crisis has now passed but questions still remain as to how regulators should account for their regulatory actions and whether they do in fact account effectively for what they do.

Regulatory accountability, or the regulation of regulators, is an emerging discipline, the scope of which is not yet settled.⁶ Colin Scott argues that the discipline encompasses two broad, interconnected concerns.⁷ First, the fidelity of regulators to their mandate, given that they are exercising powers delegated to them by governments. Secondly, an assessment of the outcomes or substance of a regulator's actions in making rules, then monitoring and enforcing them. In relation to the first concern, accountability is fundamentally about democratic legitimacy or reassurance that regulators exercise only the authorised powers delegated to them in the form required by their regulatory remit.⁸ The second concern invites more technical questions about how effective a regulator is and how that regulator can demonstrate the quality and effectiveness of what it does.⁹ While democratic legitimacy and technical credibility are both significant issues, this article is exclusively concerned with technical credibility. Specifically, it is concerned with one aspect of technical credibility: the emerging trends in the way financial regulators account for the outcomes of one of the most significant parts of their regulatory remit, their enforcement practices.¹⁰ Financial regulators utilise a range of core regulatory strategies including education, enforcement, stakeholder engagement and

³ C Scott, "Evaluating the Performance and Accountability of Regulators" (2014) 37 *Seattle University Law Review* 353, 355.

⁴ J Black, "Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis" (2012) 25 *Governance* 35, 40.

⁵ Scott, *supra* n 3.

⁶ As to the fields of activity that it contemplates, see: C Scott, "Accountability in the Regulatory State" (2000) 27 *Journal of Law & Society* 38; M Lodge, "Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments", in J Jordana and D Levi-Faur (eds), *The Politics of Regulation*, CRC Series on Competition, Regulation and Development (Cheltenham, Edward Elgar Publishing, 2004), 124; D Levi-Faur, "The Global Diffusion of Regulatory Capitalism" (2005) 598 *The Annals of the American Academy of Political and Social Science* 12; J Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes" (2008) 2 *Regulation & Governance* 137; F Gilardi, "Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe" (2009) 87 *Public Administration* 425; L Stirton and M Lodge, "Accountability in the Regulatory State", in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010), 349; C Coglianese, "Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy", OECD Expert Paper No 1, 2012, http://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf accessed on 25 August 2015; C Radaelli and O Fritsch, "Measuring Regulatory Performance: Evaluating Regulatory Management Tools and Programmes", OECD Expert Paper No 2, 2012, http://www.oecd.org/gov/regulatory-policy/2_Radaelli%20web.pdf accessed on 25 August 2015; X Fernández-i-Marín, J Jordana and A Bianculli, "Varieties of Accountability Mechanisms in Regulatory Agencies", in A Bianculli, X Fernández-i-Marín and J Jordana (eds), *Accountability and Regulatory Governance: Audiences, Controls and Responsibilities in the Politics of Regulation* (London, Palgrave Macmillan, 2014) 23.

⁷ Scott, *supra* n 3, 360–61.

⁸ M Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *European Law Journal* 447.

⁹ Scott, *supra* n 3, 361.

¹⁰ For a discussion of regulatory budgets and enforcement practices, see section B of this article.

policy input, but enforcement is the most high profile of these and the one that tends to receive the most focus from governments, the media and the broader community.

The article discusses how three financial regulators, the Australian Securities and Investments Commission (ASIC), the UK Financial Conduct Authority (FCA) and the US Securities and Exchange Commission (SEC), report on their enforcement practices in periodic reports, media releases and other digital materials. ASIC is the primary focus of discussion with the FCA and SEC experience providing comparative support for the article's central observation; namely, that there is a trend towards increased empiricism in enforcement reporting by financial regulators. By "empiricism" what is meant is that there is an increasing trend on the part of financial regulators to report objective, measurable, quantitative data on enforcement outcomes in a systematic manner. This empirical approach is distinct from the approach that traditionally has been adopted by financial regulators, which is to report qualitative data consisting of individual case studies in an ad hoc fashion. Until recently financial regulators typically have not attempted to conduct systematic quantitative analyses of the individual case data, instead letting the case studies speak for themselves. This article suggests that a change is occurring in that financial regulators are breaking away from the traditional approach and adopting increasingly empirical approaches to enforcement reporting. The jurisdictions of Australia, the UK and the US have been selected because they are at the forefront of this trend.

The trend towards empiricism is seemingly no accident but rather is a deliberate strategy adopted by financial regulators in response to the pressures they face in the post-financial crisis era of economic uncertainty, including pressures from their state and government hierarchies (courts, legislature and ministers of government), the regulatory community (other agencies, audit institutions, information regulators and networks such as the OECD¹¹) and the market (actors, stakeholders, the media and consumers).¹² In an era of budgetary pressures and deteriorating national balance sheets governments increasingly demand that regulators do more with less. A rising focus and premium are placed on achieving *better value for money regulation*; that is, more efficient regulation that can still achieve the core social, political, environmental and economic goals set by the government.¹³ The regulatory community demands transparent governance by regulators with a results-oriented approach to its regulatory practices to make possible information sharing, performance assessment and measurement of enforcement risks.¹⁴ Market participants depend on having reasonable levels of confidence in the regulatory oversight of financial markets, demonstrated in part by the production of data on the

¹¹ See Organisation for Economic Co-operation and Development, *supra* n 2.

¹² Scott, *supra* n 3, 360–61; J L Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance", in M W Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge, New York, Cambridge University Press, 2006), 115.

¹³ See, eg The Australian Government's online deregulation resource (2015), <https://cuttingredtape.gov.au/> accessed on 28 August 2015.

¹⁴ See, eg Australian National Audit Office, *Administering Regulation: Achieving the Right Balance, Better Practice Guide* (2014), <http://www.anao.gov.au/Publications/Better-Practice-Guides/2013-2014/Administering-Regulation> accessed on 28 August 2015.

regulator's activities including enforcement actions taken.¹⁵ Each of these concerns has helped to propel regulators to produce technical reports detailing supposedly reliable, measurable, evidence-based outcomes as a means of justifying what they do and assessing their regulatory performance. In the case of enforcement practices, these reporting practices are a means of demonstrating their enforcement activity and helping to justify both the legitimacy of their regulatory activity and the value of their regulatory budget. However, despite these pressures and the resulting upward trend in empiricism in enforcement reporting, it will become apparent in the course of this article that it is a very challenging task to accurately measure, let alone evaluate, the enforcement activity of financial regulators.

This article begins with a brief overview of the structure and functions of ASIC, the FCA and the SEC and the financial size of the markets they regulate. The article then examines how those regulators report on the outcomes of their enforcement practices and highlights their increasing emphasis on empiricism. Next, it discusses some recent national and international developments that indicate a continued trend towards empiricism in enforcement reporting practices.¹⁶ Finally, it presents a detailed case study of ASIC's enforcement functions and reporting practices, highlighting areas in which ASIC's data collection, classification and analysis could be improved. The article concludes by considering the implications of the trend towards empirical enforcement reporting practices for regulatory accountability in the future.

B. A BRIEF INTRODUCTION TO THE STRUCTURE AND FUNDING OF ASIC, THE FCA AND THE SEC

The increasing performance pressures on financial regulators and the heightened prominence of their enforcement activity reflect the reality that the financial sector is a crucial and indeed increasingly important component of both the global economy and specific national economies. Based on data from the International Monetary Fund (IMF) and the McKinsey Global Institute, it has been estimated that the size of the global financial services sector was US\$13.1 trillion in 2014, approximately 16.9% of the US \$77.6 trillion global economy as measured in GDP.¹⁷ Data published by the Australian Trade Commission reveals the scale and contribution of the finance and insurance sector to Australia's national economy, indicating that it:

- contributes 9% of Australia's real gross value added by industry;
- employs 3.6% of Australia's total workforce;
- had an annual average growth rate of 6% between 1991 and 2014;

¹⁵ See, eg HM Treasury, *A New Approach to Financial Regulation: Building a Stronger System* (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81411/consult_newfinancial_regulation170211.pdf accessed on 28 August 2015.

¹⁶ This article has sought to take account of developments up until August 2015. It covers key developments that exemplify the trend towards increasing empiricism in enforcement reporting in Australia, the UK and the US.

¹⁷ Investopedia, "What Percentage of the Global Economy is Comprised of the Financial Services Sector?" (2014), <http://www.investopedia.com/ask/answers/030515/what-percentage-global-economy-comprised-financial-services-sector.asp> accessed on 28 August 2015.

- holds assets of AUD \$6,386 billion (more than four times Australia's nominal GDP);
- has US \$2.4 trillion pools of funds under management (the largest in Asia and third largest in the world);
- has stock market capitalisation of US \$1,123 billion (the eighth largest in the world); and
- has financial markets turnover annually of AUD \$125 trillion (79 times the size of Australia's nominal GDP).¹⁸

It is a similar situation in the UK. Data from the UK Parliament in 2014 reveals that the UK's financial and insurance services sector:

- contributed £126.9 billion in gross value added (GVA) to the UK economy, 8% of the UK's total GVA (up from 5.6% in 2001);
- provided 1,100,000 jobs (3.4% of the UK's total jobs); and
- delivered a trade surplus on insurance and pensions of £20.9 billion and £38.3 billion on financial services (these two sectors therefore account for a large proportion of the UK's overall services trade balance of £78.9 billion).¹⁹

Data published by SelectUSA in 2014 shows the importance of the financial and insurance sector to the US, as the sector:

- represented 7.2% (or \$1.26 trillion) of US gross domestic product;
- exported \$92.5 billion and had a \$23 billion surplus;
- employed 5.99 million people; and
- held, in managed assets, more than \$39.6 trillion of long-term conventional assets under management or 45% of the global total for these funds.²⁰

Consequently for governments and regulators in Australia, the UK and the US, protecting the integrity of their financial and insurance sectors is of crucial importance to the well-being of their national economies and populations. There are several factors that shape how regulatory agencies operate to meet these obligations to protect market and sector integrity. One key variable is how the regulators are governed and funded, which will have important implications for all facets of their activities including enforcement. Using data drawn from the 2015 OECD Corporate Governance Factbook,²¹ Table 1 offers some insights into the structural dynamics that shape ASIC, the FCA and the SEC.

¹⁸ Australian Trade Commission, *Why Australia: Benchmark Report* (2015), <https://www.austrade.gov.au/International/Invest/Resources/Benchmark-Report> accessed on 28 August 2015.

¹⁹ House of Commons Library, "Financial Services: Contribution to the UK Economy" (2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06193> accessed on 28 August 2015.

²⁰ SelectUSA, "The Financial Services Industry in the United States" (2014), <http://selectusa.commerce.gov/industry-snapshots/financial-services-industry-united-states> accessed on 28 August 2015.

²¹ Organisation for Economic Co-operation and Development, *OECD Corporate Governance Factbook* (2015), 23–26, <http://www.oecd.org/daf/ca/corporate-governance-factbook.htm> accessed on 28 August 2015.

Table 1. Governance and funding of ASIC, the FCA and the SEC

Jurisdiction	Regulator	Form of Funding	Main Funding Resource	Ruling Body	Members (current)	Term of Members	Members appointed by
Australia	ASIC	Public	National budget	Commission	3-8 (5)	3-5 years	Governor General
UK	FCA	Self	Fees from regulated entities	Board	12	3 years	Treasurer
US	SEC	Public/Self	National budget & fees from regulated entities	Commission	5	5 years	President

Table 1 shows that the FCA is self-funded with its main funding source being fees from regulated entities, ASIC is publicly funded from the national budget, and the SEC receives fees from the regulated entities, but the US Congress determines the SEC's funding and the amount of funding received is offset by fees collected. In an era of increasing fiscal pressure on public budgets, there is a heightened focus on the subject of funding models for regulatory agencies. Whether ASIC should move more towards a user-pays approach is an especially live issue in Australia given ASIC's lobbying for such an approach. For example, ASIC Chair Greg Medcraft stated in his opening address to the ASIC Annual Forum in March 2015:

“Those who participate in our markets should have a price signal for the cost of ASIC's oversight to incentivise them to meet the outcomes the Australian Government expects ... To provide this, ASIC should have a user-pays funding model, as recommended by the Financial System Inquiry. Under a user-pays system, those industries needing the most attention would pay the most.”²²

The capability review of ASIC announced on 25 July 2015 by the Australian Government is almost certain to consider this funding question as part of its overall deliberations.²³ Funding, of course, has a direct relationship with regulatory capability. Most recently, the Australian Government on 28 August 2015 released a consultation paper seeking stakeholder views on the potential introduction of an industry funding model for ASIC's regulatory activities.²⁴ Assistant Treasurer The Hon Josh Frydenberg MP stated, when releasing the consultation paper, that the Government's decision on how ASIC should be funded will be informed by both the consultation process and the capability review.²⁵ ASIC's funding arrangements may well change in the future but Table 2 provides a

²² G Medcraft, “Opening Address: Creating Confidence to Grow”, speech at the ASIC Annual Forum 2015, Sydney, 23 March 2015, 6, <http://asic.gov.au/about-asic/media-centre/speeches/asic-annual-forum-2015-creating-confidence-to-grow/> accessed on 28 August 2015.

²³ The Hon Josh Frydenberg MP, “Capability Review of the Australian Securities and Investments Commission”, Media Release, 25 July 2015, <http://jaf.ministers.treasury.gov.au/media-release/036-2015/> accessed on 28 August 2015.

²⁴ Australian Government, The Treasury, *Proposed Industry Funding Model for the Australian Securities and Investments Commission* (28 August 2015), <http://treasury.gov.au/ConsultationsandReviews/Consultations/2015/Proposed-industry-funding-model-for-ASIC> accessed on 28 August 2015.

²⁵ The Hon Josh Frydenberg MP, “Public Consultation Commences on an Industry Funding Model for the Australian Securities and Investments Commission”, Media Release, 28 August 2015, <http://jaf.ministers.treasury.gov.au/media-release/041-2015/> accessed on 28 August 2015.

snapshot of the regulatory and enforcement resources currently available to ASIC, the FCA and the SEC, sourced from the regulators' annual reports and business plans.²⁶

Table 2. Regulatory and enforcement resources available to ASIC, the FCA and the SEC

Regulator	Total Budget	Total personnel	Enforcement (% operational budget)	Surveillance (% operational budget)
ASIC	AUD \$405 million	1,785	35**	20**
FCA	£445.7 million	2,488	17	24
SEC	US \$1,463.6 million	4,544	31	26

*** These figures are sourced from page 7 of ASIC's Annual Report 2013–2014 and appear to be inconsistent with the figure cited at page 3 of the Annual Report, which states that ASIC uses around 70% of its regulatory resources on surveillance and enforcement. The 70% figure may include ASIC's registry and licensing services, which account for 25% of ASIC's budget according to page 7 of the Annual Report.*

While Table 2 provides a general indication of the resources available to each of the regulators and shows that there are significant differences in resources available to each of them, it is very difficult to compare funding and budget allocations with any precision based on the publicly available information. ASIC allocates proportions of its budget across seven categories (2014 percentage allocations in parentheses): education (4%); enforcement (35%); engagement (9%); guidance (3%); policy advice (4%); registry (25%); and surveillance (20%).²⁷ The FCA and SEC classify their budget allocations differently, making meaningful comparisons between the jurisdictions problematic.

It is inevitable that different jurisdictions will have different perceptions in regard to economic and social priorities, legitimate interests and appropriate regulatory strategies. In turn these differences will result in variances not only in the scale of national regulatory budgets but also in the allocations of regulatory finance and other resources. These broader political, economic and structural factors are continually shaping the regulatory environment in general and have ongoing significant implications for the reporting and evaluation of enforcement. How the enforcement activity of financial regulators is perceived by government, industry and the broader community is crucial in the assessment of their overall regulatory performance. However, perceptions regarding enforcement activity are not simply a one-way process because how financial regulators actually report on their enforcement activity is pivotal in shaping the perceptions of their stakeholders regarding that regulatory performance. The reflexive and dynamic character of these interactions is a major explanatory factor in recent trends towards increased

²⁶ Australian Securities and Investments Commission, *Annual Report 2013-2014* (2014), <http://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/#ar14> accessed on 28 August 2015; UK Financial Conduct Authority, *Business Plan 2013-2014*, <https://www.fca.org.uk/static/documents/business-plan/bp-2013-14.pdf> accessed on 28 August 2015; US Securities and Exchange Commission, *FY 2015 Congressional Budget Justification* (2015), <https://www.sec.gov/about/reports/secfy15congbudgetjust.pdf> accessed on 28 August 2015.

²⁷ Australian Securities and Investments Commission, *Annual Report 2013-2014* (2014), 7, <http://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/> accessed on 28 August 2015.

empiricism in enforcement reporting as can be seen below in the discussion of the enforcement reporting practices of ASIC, the FCA and the SEC.

C. HOW ASIC, THE FCA AND THE SEC REPORT THE OUTCOMES OF ENFORCEMENT PRACTICES

1. Australian Securities and Investments Commission

ASIC reports on enforcement outcomes via four main avenues: Media Releases;²⁸ “ASIC enforcement outcomes” reports (“Enforcement Reports”);²⁹ Annual Reports;³⁰ and “ASIC supervision of markets and participants reports” (“Market Supervision Reports”).³¹ The latter three documents reveal a recent trend towards empirical reporting of enforcement outcomes, which began around 2011. Enforcement Reports and Market Supervision Reports were first published in 2011. The 2011–2012 Annual Report also sees the beginning of a greater emphasis on being “outcomes-focused”, particularly in relation to enforcement. Section E.2 of this article provides a detailed examination of ASIC’s Enforcement Reports. This section focuses on the other of ASIC’s main enforcement reporting avenues: Media Releases, Annual Reports, and Market Supervision Reports.

ASIC’s Media Releases are published on its website from 2001 onward. From 2001 to 2014, ASIC published an average of about 400 Media Releases per year, the majority of which concerned enforcement activities. For example, in 2014 ASIC published 350 Media Releases, of which approximately 240 (69%) relate to specific enforcement actions against individuals or corporate entities. Several more concerned systemic matters relevant to enforcement, such as ASIC reporting on its enforcement practices or raising community awareness about corporate law rights and obligations. The rate of media release coverage was even higher for more significant enforcement activities. In a sample of 48 superior court penalty judgments in directors’ duties matters from 2005 to 2014, Media Releases accompanied 41 of the judgments (85%). The conclusion to be drawn is that the primary purpose of ASIC’s Media Releases is to report on enforcement activity.

ASIC’s Media Releases tend to present data in a qualitative, not quantitative, form by way of individual case reports. These releases are published with great frequency but are inconsistent in the amount of detail they include. Lack of consistency across data categories makes meaningful quantitative analysis of the data contained in the Media Releases difficult, if not impossible. In terms of ASIC’s four main enforcement reporting avenues, the Media Releases are therefore the exception to the rule in that there is no readily apparent trend towards a more empirical approach to enforcement reporting. If

²⁸ Australian Securities and Investments Commission, “Find a Media Release” (2015), <http://asic.gov.au/about-asic/media-centre/find-a-media-release/> accessed on 28 August 2015.

²⁹ Australian Securities and Investments Commission, “ASIC Enforcement Outcomes” (2015), <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/> accessed on 28 August 2015.

³⁰ Australian Securities and Investments Commission, “ASIC Annual Reports” (2015), <http://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/> accessed on 28 August 2015.

³¹ Australian Securities and Investments Commission, “Market Supervision Reports” (2015), <http://asic.gov.au/regulatory-resources/markets/supervision/#market-supervision-report> accessed on 28 August 2015.

the trend towards such an approach continues, it will be interesting to observe whether it also begins to influence the content of ASIC's Media Releases, resulting in a more systematic and uniform approach.

Transparency and "outcomes-focused" reporting, especially of ASIC's enforcement practices, has been a key theme of ASIC's Annual Reports since 2010. The "Chairman's Report" in the 2011–2012 Annual Report explained:

"ASIC is outcomes-focused. We have a number of tools available to achieve the desired outcomes. These are:

- ◆ engagement with industry and stakeholders
- ◆ surveillance
- ◆ guidance
- ◆ education
- ◆ enforcement
- ◆ policy advice.

We have improved the transparency and accountability of our enforcement work, by publishing information sheets that describe how, when and why we take enforcement action and the circumstances in which we may make public comment on it, by publishing bi-annual reports on enforcement action outcomes, and by reporting on the use of our compulsory information-gathering powers in the Annual Report...³²

The heightened focus on outcome reporting is also reflected in the structure of the 2010–2011 Annual Report,³³ which recast the section on "ASIC's Priorities and Key Achievements" as "Major Outcomes" and extended the discussion of those outcomes by about ten pages. In terms of increased transparency, the 2010–2011 Annual Report introduced a quantitative breakdown of ASIC's regulated populations and key responsibilities, which specifies the number of responsible staff and regulated entities within each regulatory area. Similarly, it added a quantitative breakdown on ASIC's surveillance coverage of regulated populations, which provides estimates of the number of entities subjected to surveillance and the frequency of surveillance within each regulatory area. A new statistical summary of "major deterrence outcomes" was also included in the appendices.

The trend towards a more empirical approach to enforcement reporting continued in subsequent annual reports. The 2011–2012 Annual Report³⁴ further emphasised the language of "Outcomes", retitling the discussion of outcomes as "Outcomes in detail" and making it a separate sub-heading. The 2012–2013 Annual Report³⁵ introduced a new

³² Australian Securities and Investments Commission, *supra* n 30, *Annual Report 2011–2012*, 2.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

section on “Key Outcomes” which provides a quantitative assessment of major outcomes against each of ASIC’s key priorities. This section also included a new statistical breakdown of ASIC’s resource allocations, again reflecting a heightened focus on transparency and more efficient regulation. The 2012–2013 Annual Report also relocated the statistical summary of “major enforcement outcomes” from the appendices to the first section of the Report “About ASIC”, giving it greater prominence. The 2013–2014 Annual Report³⁶ moves this section even further forward into the “Key Outcomes” section. Overall, the annual reports show a clear trend towards a greater focus on enforcement outcomes and, in particular, in presenting those outcomes in an empirical fashion.

First published in January 2011, the stated purpose of ASIC’s Market Supervision Reports is to summarise key outcomes of ASIC’s market and participant supervisory and surveillance functions and highlight markets-related enforcement outcomes.³⁷ Similar to ASIC’s Enforcement Reports, the Market Supervision Reports contain a mix of qualitative and quantitative data on ASIC’s enforcement outcomes. Several pages of the Market Supervision Reports are devoted to various statistical analyses of ASIC’s activity within the market integrity regulatory area.³⁸ The Market Supervision Reports have become significantly more detailed over time, with almost every report longer than the previous one.

Publication of ASIC’s Market Supervision Reports and Enforcement Reports coincides with the trend towards a greater focus on quantitative reporting of enforcement outcomes in ASIC’s Annual Reports. Taken together, they evidence a deliberate push towards increasing empiricism in enforcement reporting by ASIC. This push is also apparent in ASIC’s strategic documentation. For example, in the section of ASIC’s 2014–2015 Strategic Outlook dealing with community expectations, ASIC states that it will “[c]ontinue to promote [its] strategic framework, key risks and regulatory responses, and be transparent about [its] approach and achievements – for example, communicate [its] enforcement outcomes through six-monthly enforcement reports”.³⁹ ASIC’s Stakeholder Survey 2013 also takes up the issues of community perceptions of its enforcement activity, stating that ASIC is “...committed to improving transparency and increasing the public’s understanding of how we operate”.⁴⁰ The following passages from ASIC’s July 2014 Statement of Intent provide further evidence of ASIC’s commitment to an empirical approach to reporting of enforcement outcomes:

“Outcomes-focused, principles-based regulation

³⁶ *Ibid.*

³⁷ Australian Securities and Investments Commission, *supra* n 31.

³⁸ *Ibid.*

³⁹ Australian Securities and Investments Commission, *ASIC’s Strategic Outlook 2014-2015* (2015), 13, <http://asic.gov.au/about-asic/what-we-do/our-role/asics-strategic-outlook-2014-15/> accessed on 28 August 2015.

⁴⁰ Australian Securities and Investments Commission, *ASIC Stakeholder Survey 2013* (2013), 3, <http://download.asic.gov.au/media/1311529/ASIC-stakeholder-survey-2013-1.pdf> accessed on 28 August 2015.

ASIC supports the Government's preference for outcomes-focused regulation. We welcome broad strategic direction from Government on regulatory outcomes. We will seek to achieve these outcomes in the most effective way, using the resources available to us.

Performance indicators

ASIC looks forward to the development of specific performance indicators to provide objective measures of success in achieving our statutory role. This would also provide greater transparency for end-users, industry and Government.”⁴¹

ASIC's development of Key Performance Indicators in response to the Australian Government's Regulator Performance Framework⁴² is discussed in section D.1 of this article, along with other recent developments indicating an increasing empiricism in relation to enforcement reporting by financial regulators. The article now turns to consider briefly what measures are taken in the UK and the US to report on the enforcement outcomes of the FCA and the SEC respectively. These jurisdictions serve to highlight that the trend towards empiricism in enforcement reporting observed in Australia is part of a broader, international movement in this direction.

2. UK Financial Conduct Authority

The FCA reports on enforcement outcomes via a number of avenues, including: Press Releases;⁴³ Final Notices;⁴⁴ Supervisory Notices;⁴⁵ Fines;⁴⁶ Market Abuse Outcomes;⁴⁷ Data Bulletins;⁴⁸ Enforcement Annual Performance Accounts;⁴⁹ and Annual Reports.⁵⁰ This section briefly describes each of these reporting avenues. Of these documents, the Market Abuse Outcomes and the Data Bulletins are the only new documents published by the FCA that were not also published by its predecessor, the Financial Services Authority (FSA). The other documents have been published mostly from 2002 onwards, initially by the FSA, and later, by the FCA. Further, the Market Abuse Outcomes and Data Bulletins

⁴¹ Australian Securities and Investments Commission, “Statement of Intent: July 2014” (2014), <http://asic.gov.au/about-asic/what-we-do/our-role/statements-of-expectations-and-intent/statement-of-intent-july-2014/> accessed on 28 August 2015.

⁴² See Australian Government, *supra* n 13.

⁴³ UK Financial Conduct Authority, “News” (2015) <http://www.fca.org.uk/news/list?types=Press+Release&> accessed on 28 August 2015.

⁴⁴ UK Financial Conduct Authority, “Outcomes and Notices” (2015) <http://www.fca.org.uk/firms/being-regulated/enforcement/outcomes-notices> accessed on 28 August 2015.

⁴⁵ *Ibid.*

⁴⁶ UK Financial Conduct Authority, “2015 Fines” (2015) <http://www.fca.org.uk/firms/being-regulated/enforcement/fines> accessed on 28 August 2015.

⁴⁷ UK Financial Conduct Authority, “Market Abuse” (2015) <http://www.fca.org.uk/firms/markets/market-abuse> accessed on 28 August 2015.

⁴⁸ UK Financial Conduct Authority, “Data Bulletin” (2015) <http://www.fca.org.uk/your-fca/documents/data-bulletin> accessed on 28 August 2015.

⁴⁹ UK Financial Conduct Authority, *Enforcement Annual Performance Account 2013/2014* (2015) <https://www.fca.org.uk/your-fca/documents/corporate/enforcement-annual-performance-account-13-14> accessed on 28 August 2015.

⁵⁰ UK Financial Conduct Authority, *Annual Report 2014-2015* (2015) <https://www.fca.org.uk/news/annual-report-14-15> accessed on 28 August 2015.

do not provide any new information; instead, they reformulate data contained in the other documents. This presents an important point of difference between the FCA and ASIC, as the latter has commenced two significant new enforcement reporting practices as recently as 2011: the Enforcement Reports and Market Supervision Reports. This might initially suggest that there is not the same trend in the UK as seen in Australia, towards greater enforcement reporting and quantitative analysis. However, as discussed below in section D.2, there are several recent developments indicating that this trend is also occurring in the UK, even if it is not yet reflected in the FCA's periodic reporting practices to the same degree as it is in ASIC's reporting practices.

The FCA's Press Releases⁵¹ serve a slightly different function from ASIC's Media Releases. The FCA produces fewer releases and they do not tend to focus on individual enforcement actions to the same extent as ASIC's Media Releases. In the five years from 2010 to 2014, the FCA/FSA produced an average of 142 releases per year, which falls far short of the average of 400 produced by ASIC per year. However, this difference is probably explained by the fact that the FCA has a number of different reporting avenues that serve a similar function to ASIC's Media Releases, including its Final Notices and Supervisory Notices.

The FCA website indicates that the FCA/FSA has produced 1,836 Final Notices⁵² since 2002. Final Notices report on enforcement actions taken by the FCA/FSA, such as cancellations, refusals, prohibitions and fines. It is unclear whether the Final Notices are comprehensive in their coverage of the FCA/FSA's enforcement actions, but the coverage certainly appears to be wider in scope and more systematic than the Press Releases. The FCA also produces Supervisory Notices,⁵³ which operate similarly to the Final Notices but relate to supervisory functions such as varying permissions and imposing additional requirements on regulated entities.

The FCA's Fines database⁵⁴ provides access to a list of fines imposed on regulated entities and links to the relevant Press Release reporting each fine. It therefore serves to reorganise the Press Releases relating to fines into a more systematic and easily accessible form. This is similar to the Market Abuse Outcomes database,⁵⁵ which provides a list of links to Final Notices and Press Releases that relate to market abuse and related conduct. Again, the Market Abuse Outcomes database does not provide independent data; it merely serves to reorganise the Press Release and Final Notices data.

The FCA began publishing its Data Bulletin⁵⁶ in October 2014 in response to the consultation process on transparency it conducted in 2013. The FCA has published three Data Bulletins to date, which present key statistics in relation to the demographics of regulated entities, complaints received about such entities, numbers of final notices in relation to individuals and companies, and suspicious transaction reports, among other

⁵¹ UK Financial Conduct Authority, *supra* n 43.

⁵² UK Financial Conduct Authority, *supra* n 44.

⁵³ *Ibid.*

⁵⁴ UK Financial Conduct Authority, *supra* n 46.

⁵⁵ UK Financial Conduct Authority, *supra* n 47.

⁵⁶ UK Financial Conduct Authority, *supra* n 48.

things. The statistics are typically presented in graphical form and the Data Bulletins are indicative of a trend towards this type of quantitative analysis in enforcement reporting in the UK, discussed in further detail in section D.2.

The FCA's Enforcement Annual Performance Accounts (EAPAs)⁵⁷ are published at the same time as its Annual Reports. The EAPAs examine the fairness and effectiveness of the FCA's enforcement functions. The EAPAs are predominantly comprised of qualitative data in the form of case studies of enforcement actions. However, they do provide quantitative data in relation to the length and cost of civil and criminal actions, to "...support the FCA's commitment to being a transparent regulator".⁵⁸ The quantitative data in the EAPAs appears to be either partly or entirely replicated from the FCA's Annual Reports.⁵⁹ The latter contain relatively basic quantitative data on market cleanliness, suspicious transactions, whistleblowing reports, authorisations, supervision of regulated entities, enforcement actions commenced, financial penalties imposed, decisions of the Regulatory Decisions Committee, the length and cost of civil and criminal actions, and a breakdown of final enforcement outcomes.

This section shows that the FCA goes to some length to report on its enforcement activities via the various avenues discussed. The FCA's systematic publication of Final Notices and Supervisory Notices provides a level of uniform coverage and detail that is arguably lacking from ASIC's Media Releases. At the same time, the FCA's quantitative enforcement reporting techniques are arguably not as comprehensive and detailed as those used in ASIC's Enforcement Reports and Market Supervision Reports. However, since 2011 NERA Economic Consulting, an independent consulting firm, has produced quantitative analyses that to some degree compensate for the lack of detail in the FCA's own periodic reporting. These and other developments in the UK showing a trend towards increased empiricism in enforcement reporting are discussed below in section D.2.

3. US Securities and Exchange Commission

The SEC reports on enforcement outcomes via a number of avenues, including: Press Releases;⁶⁰ Administrative Proceedings Notices and Orders;⁶¹ Litigation Releases;⁶² Appellate Court Briefs;⁶³ Annual Performance Reports;⁶⁴ Financial Reports;⁶⁵ and

⁵⁷ UK Financial Conduct Authority, *supra* n 49.

⁵⁸ *Ibid.*

⁵⁹ UK Financial Conduct Authority, *supra* n 50.

⁶⁰ US Securities and Exchange Commission, "Press Releases" (2015), <http://www.sec.gov/news/pressreleases> accessed on 28 August 2015.

⁶¹ US Securities and Exchange Commission, "Administrative Proceedings" (2015), <https://www.sec.gov/litigation/admin.shtml> accessed on 28 August 2015.

⁶² US Securities and Exchange Commission, "Litigation Releases" (2015), <https://www.sec.gov/litigation/litreleases.shtml> accessed on 28 August 2015.

⁶³ US Securities and Exchange Commission, "Commission Appellate Court Briefs" (2015), <https://www.sec.gov/litigation/appellatebriefs.shtml> accessed on 28 August 2015.

⁶⁴ US Securities and Exchange Commission, "Reports" (2015), <https://www.sec.gov/about/secreports.shtml> accessed on 28 August 2015.

⁶⁵ *Ibid.*

Summaries of Performance and Financial Information.⁶⁶ Each of these reporting avenues is outlined briefly below.

Press Releases⁶⁷ provide substantial qualitative data on the SEC's enforcement activities. The SEC utilises Press Releases in a manner similar to ASIC's use of Media Releases. The vast majority of the Press Releases relate to enforcement action against individuals and there is a high volume of releases per year. In the five year period from 2010 to 2014, the SEC issued an average of 285 Press Releases per year. The Press Releases date back to 1997, although the rate of reporting has increased significantly since then. In the five years from 1997 to 2001, the average number of Press Releases per year was about 163. The content of the Press Releases tends to be variable in detail and information, similar to ASIC's Media Releases. However, in the case of the SEC, the Press Releases are supplemented by more specific releases in relation to administrative proceedings,⁶⁸ litigation releases concerning civil lawsuits,⁶⁹ and releases regarding appellate court briefs.⁷⁰ Taken together, these various releases mean that the SEC is relatively comprehensive in its qualitative coverage of its enforcement activities.

The SEC's Annual Performance Reports (APRs)⁷¹ contain a detailed performance indicator framework, including: broad "strategic goals" of the SEC and the resources allocated to each goal; the narrower "strategic objectives" involved in achieving each strategic goal; and then the even narrower "performance goals" and "performance indicators" involved in achieving each strategic objective. One of the "strategic goals" is to "Foster and Enforce Compliance with the Federal Securities Laws". This section of the APRs is aimed at evaluating the SEC's enforcement practices. The performance goals and indicators are measurable targets and empirical data is used to record the performance of the SEC against those targets. The empirical database generally spans back four years but in some cases only one or two years of data is available, indicating the recent nature of the trend towards empirical enforcement reporting. The APRs also contain a section on verification and validation of performance data, which is critical if an empirical enforcement reporting system is to yield meaningful results that impact on enforcement policy and practice. Due to resource constraints this article does not critically examine the SEC's data and how comprehensive and accurate its data is. However, the case study on ASIC's Enforcement Reports data in section E of this article does draw attention to some of the potential pitfalls if data collection, classification and analysis processes are not sufficiently transparent and rigorous. Claims by financial regulators regarding the accuracy and completeness of their enforcement data should not be taken automatically at face value.⁷² Rather the numbers ought to be carefully scrutinised to determine how they

⁶⁶ US Securities and Exchange Commission, *Summary of Performance and Financial Information: Fiscal Year 2014* (2014), <https://www.sec.gov/reportspubs/annual-reports/sec-fy-2014-summary-of-performance-information.pdf> accessed on 28 August 2015.

⁶⁷ US Securities and Exchange Commission, *supra* n 60.

⁶⁸ US Securities and Exchange Commission, *supra* n 61.

⁶⁹ US Securities and Exchange Commission, *supra* n 62.

⁷⁰ US Securities and Exchange Commission, *supra* n 63.

⁷¹ US Securities and Exchange Commission, *supra* n 64.

⁷² See U Velikonja, "Reporting Agency Performance: Behind the SEC's Enforcement Statistics" 101 Cornell Law Review (forthcoming 2016)

have been calculated and whether they present an accurate account of the regulators' enforcement activities.

The SEC's Financial Reports⁷³ replicate some of the key data from the APRs and also contain a substantial section of qualitative data on "Major Enforcement Cases" in Appendix B. The Summaries of Financial Performance and Financial Information⁷⁴ draw on the APRs and Annual Reports to provide an accessible snapshot of key performance and financial information, fulfilling a similar function to the Data Bulletins produced by the FCA. These Summaries appear to have been introduced in 2012, arguably pointing to increased pressure on financial regulators to present readily accessible information on their regulatory and financial performance.

Similar to ASIC, and to a lesser extent the FCA, the trajectory of the SEC's enforcement reporting practices shows an increasing focus on enforcement outcomes and empirical methods of reporting. Up until 2003 the SEC's "Annual Reports"⁷⁵ did not have any formal system for measuring performance outcomes. The primary focus of the Annual Reports was financial accountability. The current structure for the SEC's performance measurement system was introduced in its 2004 "Performance and Accountability Report",⁷⁶ however, more detail was progressively added to the "performance section" of this report from 2004 to 2011. In 2012 the report was divided into two separate reports, the APRs and the Financial Reports,⁷⁷ the former dealing with performance evaluation and the latter dealing with financial accountability. The separate APRs are not significantly more detailed than the "performance section" of the previous "Performance and Accountability Reports", although a notable addition is that a "Performance Plan"⁷⁸ now accompanies the APRs and sets out the SEC's performance targets and strategies for the future. It can be observed that there is a trend towards an increasing focus on quantitative performance evaluation, including enforcement, first by devoting a section to performance in 2004 and subsequent years, and then by devoting a whole report to it in 2012. While the SEC appears to be somewhat ahead of ASIC and the FCA in relation to this trend, having introduced a performance indicator framework in 2004, the gaps in the data in the most recent APR suggest that the empirical approach to enforcement reporting is also still evolving in the US.

D. RECENT DEVELOPMENTS EMPHASISING INCREASED EMPIRICISM IN ENFORCEMENT REPORTING

1. Australia

⁷³ US Securities and Exchange Commission, *supra* n 64.

⁷⁴ US Securities and Exchange Commission, *supra* n 66.

⁷⁵ US Securities and Exchange Commission, *supra* n 64.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

The issue of increased accountability of regulatory actors is very much a live issue in Australia. In October 2014, the Commonwealth Government of Australia published its Regulator Performance Framework (RPF) as part of its ongoing drive to “cut red tape” and reduce the regulatory burden on industry. From 1 July 2015, the RPF acts as a regulatory audit tool by requiring all Commonwealth regulators to report objectively on their regulatory outcomes against these six Key Performance Indicators (KPIs):

- KPI 1: Regulators do not unnecessarily impede the efficient operation of regulated entities
- KPI 2: Communication with regulated entities is clear, targeted and effective
- KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed
- KPI 4: Compliance and monitoring approaches are streamlined and coordinated
- KPI 5: Regulators are open and transparent in their dealings with regulated entities
- KPI 6: Regulators actively contribute to continuous improvement of regulatory frameworks.⁷⁹

These KPIs apply across the whole spectrum of regulatory oversight and so inevitably are broad in nature. In July 2015 ASIC published the evidence metrics that it would use to report its outcomes against the six mandated KPIs of the RPF.⁸⁰ These are summarised in Table 3.

Table 3. ASIC’s evidence metrics response to the Regulator Performance Framework

ASIC evidence metric	Relevant KPIs
Stakeholder panels/engagement	1,2,3,6
Feedback	1
Stakeholder surveys	1,2,4,5
Corporate plan	1,3,5
Attend relevant international gatherings	1
Publish peer review results	1
Relief appropriately granted and details published	1,5
Compliant with Office of Best Practice Regulation requirements	1,3
Available guidance and information	2,5
Appropriate complaints guidelines and processes	2
Enforcement reports	3,5
Published reports	3,5
Consultation papers	3,5
Targeted information requests	4
Risk based surveillance	3,4
Self-assessment published and validated annually	5

⁷⁹ Australian Government, *supra* n 13, 4.

⁸⁰ Australian Securities and Investments Commission, “Regulator Performance Framework: ASIC Evidence Metrics” (2015), <http://download.asic.gov.au/media/3293662/regulator-performance-framework-evidence-metrics-published-10-july-2015.pdf> accessed on 28 August 2015.

Utilise media	6
Annual Forum	6
ASIC provides policy input	5

ASIC's Enforcement Reports are classified to apply to KPIs 3 and 5 with other outputs and processes deemed to meet the remaining KPIs. As this new national system of regulatory performance reporting evolves it will be interesting to see whether the Commonwealth Government introduces further benchmarks either across the whole of government or targeted at specific regulatory agencies that demand increased empirical measures of reporting activity and effect. Such moves would place a higher emphasis on the auditing of regulatory activity for impact. It is reasonable to assume that this may well happen and ASIC seems to expect a trend towards increased rigour in the measurement of performance indicators as flagged last year by its July 2014 Statement of Intent:

“ASIC looks forward to the development of specific performance indicators to provide objective measures of success in achieving our statutory role. This would also provide greater transparency for end-users, industry and Government.”⁸¹

The concept of “objective measures of success” that ASIC anticipates implies greater levels of empiricism than currently are displayed by the RPF KPIs or the evidence metrics that have been produced by ASIC in response. The Australian National Audit Office (ANAO) is pushing hard for increased empirical measures in regulatory performance reporting, recommending in June 2014 that regulators: “Define relevant effectiveness and efficiency indicators to support reporting for internal management and external accountability purposes”.⁸² The ANAO admits that developing such indicators “is particularly challenging for many regulators”, but nevertheless the ANAO flags that this is indeed exactly what should occur.⁸³

The issue of developing more substantive indicators of regulatory performance is also a challenge for bodies with responsibility for the oversight of ASIC or the investigation of ASIC's performance. For example, the Final Report of the Australian Senate Economics References Committee into the performance of ASIC did not make any recommendations on the issue of direct measurement of regulatory performance, but expressed the following view in Recommendation 52:

“...the Parliamentary Joint Committee on Corporations and Financial Services could be well-placed to monitor ASIC's performance against the government's statement of expectations and ASIC's statement of intent. The committee recommends that the

⁸¹ Australian Securities and Investments Commission, *supra* n 41.

⁸² Australian National Audit Office, *supra* n 14, 27.

⁸³ *Ibid.*

Parliamentary Joint Committee consider this as part of its statutory ASIC oversight function.”⁸⁴

It remains to be seen what specific steps the Parliamentary Joint Committee may in the future recommend on the issue of ASIC’s regulatory performance, especially in the area of enforcement reporting.

The recent Financial System Inquiry (FSI) chaired by Mr David Murray AM, was the first major review of Australia’s financial system in almost two decades. The FSI’s final report was published in December 2014.⁸⁵ The FSI noted the issue of patchy parliamentary oversight of ASIC: “parliamentary scrutiny tends to be episodic and focus on particular issues or decisions”.⁸⁶ The FSI stressed that “[g]overnment lacks a regular mechanism to assess the overall performance of its financial regulators”.⁸⁷ The FSI acknowledged that financial regulators currently receive little guidance about how they should balance their regulatory objectives and so more explicit oversight and performance direction from government should be introduced. Consequently the FSI proposed Recommendation 27:

“Create a new Financial Regulator Assessment Board to advise Government annually on how financial regulators have implemented their mandates. Provide clearer guidance to regulators in Statements of Expectation and increase the use of performance indicators for regulatory performance.”⁸⁸

Although the Commonwealth Government did not accept this recommendation in its response to the FSI Final Report, the capability review of ASIC is wide-ranging and includes as part of its terms of reference a focus on accountability and a direction to have regard to how comparable international regulators operate.⁸⁹ Consequently the structures and reporting processes of comparable regulators such as the FCA and SEC are likely to be examined by the review, including the specifics of how they report upon their enforcement activity.

2. United Kingdom

Recent developments in the UK provide comparative support for the observation that there is a trend towards increasing empiricism in enforcement reporting by financial regulators. One interesting and pertinent recent development is the quantitative analysis of the FCA’s enforcement activity produced by NERA Economic Consulting, *Trends in*

⁸⁴ Senate Economics References Committee, *The Performance of the Australian Securities and Investments Commission* (2014), 426, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index accessed on 28 August 2015.

⁸⁵ Financial System Inquiry, *Final Report* (2014), <http://fsi.gov.au/publications/final-report/> accessed on 28 August 2015.

⁸⁶ *Ibid* 241.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* 239.

⁸⁹ The Hon Josh Frydenberg MP, *supra* n 23.

Regulatory Enforcement in UK Financial Markets.⁹⁰ The first of these reports was published in July 2011 and further editions were published in June 2012 and October 2014. The reports provide detailed quantitative analysis of the FCA's enforcement activity based on a database compiled from the publicly available FCA and FSA Final Notices. NERA's analysis bears certain similarities to the quantitative analysis of ASIC's enforcement activity in section E of this article, which is based on a database drawn from ASIC's Enforcement Reports. However, the analysis in the NERA reports is more detailed and covers a wider range of aspects of the enforcement process. The NERA reports represent a sophisticated empirically informed quantitative analysis of enforcement activity and may be indicative of an international trend in this direction. It is unclear from the reports whether they were commissioned by the FCA or whether NERA conducted the analyses of its own accord. In either case, these reports will almost certainly be looked to as a source of inspiration and information by those advocating an empirical approach to enforcement reporting.

Turning to developments within the public sphere, one recent relevant initiative was the UK Treasury's *Review of Enforcement-Decision-making at the Financial Services Regulators*,⁹¹ the final report of which was published in December 2014. This review was conducted "[to] ensure the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) continue to make fair, transparent, timely, and efficient enforcement decisions..."⁹² While this review was mostly directed towards how the FCA and PRA make strategic enforcement decisions, rather than how they report on their enforcement practices, it made the following recommendations in relation to transparency of enforcement activity:

"6. The government recommends that the FCA continue to publish information about its enforcement activities to enhance transparency, and that both regulators explore how better information might be provided. That information should relate not only to formal enforcement outcomes, but to 'early interventions', where enforcement staff work with supervisors to persuade firms to take action to address risks.

7. In its annual report, the FCA should clearly state the enforcement action that it has taken – whether opening investigations or formal outcomes – in priority areas.

8. The FCA should also publish information following thematic reviews, to explain – generally, and without identifying firms – why certain cases were referred for investigation but others were not."⁹³

⁹⁰ NERA Economic Consulting, *Trends in Regulatory Enforcement in UK Financial Markets 2014/15 Mid-Year Report* (2014), <http://www.nera.com/publications/archive/2014/trends-in-regulatory-enforcement-in-uk-financial-markets-2014-15.html> accessed on 28 August 2015.

⁹¹ HM Treasury, *Review of Enforcement Decision-Making at the Financial Services Regulators: Final Report* (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389063/enforcement_review_response_final.pdf accessed on 28 August 2015.

⁹² *Ibid* 3.

⁹³ *Ibid* 14–15.

It is implicit in these recommendations that the Treasury is recommending that the FCA adopt a clearer and more detailed quantitative approach to enforcement reporting.

The UK National Audit Office (NAO), which became the statutory auditor of the FCA pursuant to the Financial Services Act 2012, has expressly urged the FCA to adopt a more empirical approach to enforcement reporting in its March 2014 report, *Regulating Financial Services*.⁹⁴ This report “...examines the progress made by the FCA and the PRA in developing and implementing their regulatory approaches to date”.⁹⁵ In the section entitled “Performance Measurement”, the NAO makes the following observation:

“Both regulators have translated their statutory objectives into more specific objectives, and have frameworks for measuring performance against their objectives and are continuing to develop these further. The FCA has identified four desired outcomes for each of its three operational objectives (for example, under the consumer protection objective: fair products and services; improved consumer experience; building trust and engagement; effective remedies). Each desired outcome has one or two indicators. To measure its own performance, the FCA also currently reports divisional activities under seven interim success measures, and has published eight success measures which it is considering using to measure its own performance for the longer term.”⁹⁶

However, the report concludes that the FCA has more work to do in relation to its development of a performance measurement framework:

“There is scope for the performance metrics of each regulator to bring together more clearly whether their desired outcomes are met, how much influence they have over those outcomes, and how they are performing where they can exert influence. The FCA has indicators of desired outcomes but (because these do not yet link strongly to its proposed success criteria) a less clear picture of how the FCA’s actions have affected these. The PRA’s performance indicators are linked more closely to what they can influence, but they could link more clearly to the (more outcome-based) success criteria that they are still developing.”⁹⁷

This statement appears to be broadly consistent with the FCA’s own assessment of the status of its performance measurement framework in its 2015–2016 Business Plan: “The framework as a whole, the outcomes, indicators and certainly the performance measures are likely to evolve over time as we continue to develop our performance framework and identify better measures”.⁹⁸

Transparency in relation to enforcement activities has clearly been on the radar of the FCA for some time, as demonstrated by the transparency consultation process it

⁹⁴ UK National Audit Office, *Regulating Financial Services* (2014) <http://www.nao.org.uk/report/regulating-financial-services-2/> accessed on 28 August 2015.

⁹⁵ *Ibid* 6.

⁹⁶ *Ibid* 37.

⁹⁷ *Ibid*.

⁹⁸ UK Financial Conduct Authority, *Business Plan 2015/2016* (2015), 72, <http://www.fca.org.uk/static/channel-page/business-plan/business-plan-2015-16-index.html> accessed on 28 August 2015.

conducted in 2013. In March 2013 the FCA published Discussion Paper DP13/1 Transparency, in which it stated that it was considering making its enforcement processes more transparent by:

- “• saying more about what we are seeking to achieve through our enforcement activities;
bringing together themes and explaining why we have focused on particular topics in our work;
- highlighting the achievements and any lessons learned;
- enhancing the brief summaries of the feedback meetings we have with firms at the end of cases, by providing more information about the issues covered; and
- including more information about our work such as the average length and cost of investigations, our allocation of resource by sector, and some of the challenges we face in carrying it out.”⁹⁹

In August 2013 the FCA published the Transparency Feedback on DP13/1, which found that respondents agreed that the FCA’s enforcement processes should be more transparent.¹⁰⁰ The respondents suggested that the FCA publish the following additional information:

- “• the number of referrals to enforcement;
- allocation of resource by sector and by type of activity;
- outcomes of each case; and
- fine calculations and how fines compare to revenues of firms.”¹⁰¹

It is interesting to note the particular data categories suggested by the respondents in the consultation process, as they show a clear community interest in more quantitative enforcement reporting techniques.

This section has shown that recent developments in the UK point towards the FCA developing an empirical and quantitative performance measurement system, with a particular focus on enforcement reporting. This observation is supported by examples from the private sector (eg, NERA Economic Consulting), the UK government, the statutory auditor, the FCA itself and the stakeholder community. In April 2014 the FCA established an empirically informed key performance indicator system for its activities relating to its authorisation, permission and payment services.¹⁰² Given the recent developments discussed in this section of the article, it seems likely that in the future the

⁹⁹ UK Financial Conduct Authority, “Discussion Paper DP13/1 Transparency” (2013), <http://www.fca.org.uk/news/discussion-papers/fsa-dp13-01-fca-transparency> accessed on 28 August 2015.

¹⁰⁰ UK Financial Conduct Authority, “Transparency – Feedback on DP13/1” (2013), 12, <https://www.fca.org.uk/about/governance/transparency/how-the-fca-can-be-more-transparent> accessed on 28 August 2015.

¹⁰¹ *Ibid* 13.

¹⁰² UK Financial Conduct Authority, “Quarterly KPIs: 2013/2014” (2014), <http://www.fca.org.uk/static/documents/corporate/key-performance-indicators-april-2014.pdf> accessed on 28 August 2015.

FCA will adopt such a system for its enforcement activities as well, as the SEC has done in its Annual Performance Reports.

3. United States

In regard to the United States, it is more a matter of identifying the developments that have *already* occurred, rather than the developments that *are* occurring, which show a trend towards increased empiricism in enforcement reporting practices. As noted in section C.3, the United States appears to be somewhat ahead of ASIC and the FCA in developing a performance indicator framework. As discussed, the SEC began to develop a quantitative approach to enforcement reporting based on key performance indicators in 2004. The SEC's progress in developing an empirical reporting system is noted in the June 2015 report by the International Organization of Securities Commissions (IOSCO): *Credible Deterrence in the Enforcement of Securities Regulation*.¹⁰³ IOSCO cites the SEC as an example of a regulator that uses data and metrics to better assess and determine priorities and enforcement strategies:

“The US SEC tracks performance indicators to understand how it is using its resources to meet its objectives. One of these indicators assesses the quality of the cases filed by the US SEC's Division of Enforcement that involve factors reflecting enhanced risk to investors and markets. Such cases may involve: (i) those identified through risk analytics and cross-disciplinary initiatives to reveal difficult-to-detect or early stage misconduct, minimising investor loss and preventing the spread of unlawful conduct and practices; (ii) particularly egregious or widespread misconduct and investor harm; (iii) vulnerable victims; (iv) a high degree of scienter; (v) involvement of individuals occupying substantial positions of authority, or having fiduciary obligations or other special responsibilities to investors; (vi) involvement of recidivists; (vii) high amount of investor loss prevented; (viii) misconduct that is difficult to detect due to the complexity of products, transactions, and practices; (ix) use of innovative investigative or analytical techniques; (x) effective coordination with other law enforcement partners; and/or (xi) whether the matter involves markets, transactions or practices identified as an enforcement priority, or that advances the programmatic priorities of other US SEC Divisions or Offices.”¹⁰⁴

IOSCO's endorsement of the SEC's system of empirical enforcement reporting is indicative of the international nature of the trend towards such reporting, given IOSCO's role as the global standard setter for the securities sector. This international aspect is further evidenced by the OECD's May 2014 report, *Best Practice Principles for*

¹⁰³ International Organization of Securities Commissions, *Credible Deterrence in the Enforcement of Securities Regulation* (2015), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf> accessed on 28 August 2015.

¹⁰⁴ *Ibid* 48.

Regulatory Policy: Regulatory Enforcement and Inspections.¹⁰⁵ The OECD spells out the growing expectation that regulatory enforcement will be empirically evaluated:

“A principle of evidence-based enforcement and inspections would require that regulatory enforcement agencies’ actions and their effectiveness should be regularly evaluated, against a set of well-defined indicators, and based on reliable and trusted data. Collecting data on activities and outputs (e.g. how frequently an agency conducts inspections, how many entities are subject to inspections, how much time, private or public is taken up with inspections – and what are the administrative sanctions or criminal prosecutions that may follow) is important to assess resource use and burden on businesses. However, these should not be taken as a reflection of the effectiveness (or lack thereof) of an agency.”¹⁰⁶

The OECD is encouraging a note of caution about conflating reporting of quantitative indicators as proxies for regulatory effectiveness or ineffectiveness. While the developments in Australia, the UK and the US indicate a trend towards increasing empiricism in enforcement reporting, it is important to keep in mind what is driving this trend and whether it will deliver what it promises. Ultimately, the purpose of greater empiricism in enforcement reporting must be to improve assessment of regulatory effectiveness, but, as the OECD observes, the former does not automatically entail the latter. Section E of this article shows that, although ASIC has adopted an increasingly empirical approach to enforcement reporting, imprecision in how the data is classified hinders accurate interpretation of the data and assessment of regulatory effectiveness. This highlights the importance of transparency in respect of financial regulators’ collection, classification and presentation of enforcement data. It is critical to scrutinise the numbers to determine how they have been calculated and whether they present an accurate account of the regulators’ enforcement activities. Nevertheless, provided that the indicators are “well-defined” and the data is “reliable and trusted”, as the OECD stipulates, empirical enforcement reporting promises a more meaningful assessment of regulatory effectiveness than traditional qualitative reporting based on case studies. As the OECD goes on to note, “it remains crucial to monitor [enforcement] outcomes in order to judge whether enforcement is having any positive contribution”.¹⁰⁷ It is becoming increasingly accepted that accurate empirical enforcement reporting systems are necessary, but not sufficient on their own, to assess regulatory effectiveness and develop better enforcement practices.

E. CASE STUDY: ASIC’S ENFORCEMENT FUNCTIONS AND QUANTITATIVE APPROACH TO REPORTING ENFORCEMENT OUTCOMES

¹⁰⁵ Organisation for Economic Co-operation and Development, *OECD Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections* (2014) <http://www.oecd.org/gov/regulatory-policy/enforcement-inspections.htm> accessed on 28 August 2015.

¹⁰⁶ *Ibid* 18.

¹⁰⁷ *Ibid*.

This part of the article presents a case study on ASIC and the quantitative approach it adopts to enforcement reporting in its six monthly Enforcement Reports.¹⁰⁸ It begins with an introductory discussion of ASIC's enforcement functions, powers and strategies and then turns to a detailed examination of the data presented in the Enforcement Reports. While the primary purpose of the case study is to describe rather than critically evaluate ASIC's enforcement reporting, it also draws attention to some aspects of the data that would benefit from further elaboration or clarification. The examination of the data serves to illustrate some of the advantages, but also some of the pitfalls, of the trend towards increased empiricism in enforcement reporting by financial regulators.

1. ASIC's enforcement functions, powers and strategies

ASIC is a corporate law enforcement agency with three strategic priorities:

- “(a) promoting investor and financial consumer trust and confidence;
- (b) ensuring fair, orderly and transparent markets; and
- (c) providing efficient and accessible registration.”¹⁰⁹

Based on information in ASIC's 2013–2014 Annual Report, the regulated populations corresponding to the above three strategic priorities include:¹¹⁰

(a) Investors and financial consumers

- Deposit-takers, credit and insurers: 168 authorised deposit-takers; 5,837 Australian credit licensees; 29,798 credit representatives; 97 licensed general insurance companies; 28 life insurers; 12 friendly societies; 636 non-cash payment facility providers; 12 trustee companies.
- Financial advisers: Australian Financial Services (AFS) licensees licensed to provide personal advice (3,391 licensees) or general advice (1,454 licensees); 2 ASIC-approved external dispute resolution schemes.
- Investment banks: 25 investment banks; 250 hedge fund managers/ responsible entities; 61 retail OTC derivative providers; 7 credit rating agencies; 29 wholesale electricity derivatives dealers.
- Investment managers and superannuation: more than \$1 trillion funds under management; 165 superannuation fund trustees; 485 active responsible entities; 3,673 registered managed investment schemes; 614 foreign financial service providers; 718 custodial service providers.

¹⁰⁸ Australian Securities and Investments Commission, *supra* n 29.

¹⁰⁹ Australian Securities and Investments Commission, *ASIC Enforcement Outcomes: January to June 2015* (2015), 4, <http://download.asic.gov.au/media/3315413/rep444-published-5-august-2015.pdf> accessed on 28 August 2015.

¹¹⁰ Australian Securities and Investments Commission, *supra* n 27.

(b) Markets

- Corporations (including emerging mining and resources companies): 2.12 million registered companies, of which 21,767 are public companies, and 2,252 are listed entities (including registered schemes and foreign companies).
- Financial market infrastructure: 40 authorised financial markets; 6 licensed clearing and settlement facilities.
- Insolvency practitioners: 696 registered liquidators; 9,822 companies entering external administration.
- Financial reporting and audit: 4,729 registered company auditors; 28,000 companies required to produce financial reports; 7,073 self-managed superannuation fund (SMSF) auditors.
- Market and participant supervision: 133 market participants; 800 securities dealers; 7 markets.

(c) Registry and licensing services for 2.12 million companies, 1.99 million business names, 5,101 AFS licensees, 5,837 credit licensees, 4,729 registered company auditors, 7,073 registered SMSF auditors, 696 registered liquidators, 3,673 registered managed investment schemes.

Table 4 shows how many ASIC employees are responsible for each group of regulated populations and how frequently ASIC conducts routine surveillance of selected populations within those groups. In some instances, ASIC supplements this routine surveillance with reactive surveillance to target particular risks or concerns. For ease of expression, populations that are not subject to routine surveillance but are instead reviewed on a solely reactive or primarily reactive basis have been excluded from the right-hand column of Table 4.¹¹¹

Table 4. ASIC's surveillance of regulated populations

Regulated populations	No. of employees	Frequency of surveillance
Investors and financial consumers		
Deposit-takers, credit and insurers	68	Largest 4 Authorised Deposit-taking Institutions (ADI): 1 year Remaining 164 ADIs: 13 years 125 insurers: 7 years 12 trustee companies: 7 years 5,706 non-ADI credit licensees: 37 years
Financial advisers	28	Top 20 AFS licensees authorised to provide personal advice: 0.7 years Next 30 AFS licensees authorised to provide personal advice: 0.8 years
Investment banks	25	25 investment banks: 0.5 years 61 retail OTC derivative providers: 1 year 7 credit rating agencies: 1 year

¹¹¹ *Ibid* 22-23.

Investment managers and superannuation	39	Top 25 active responsible entities: 2 years 9 highest risk active responsible entities: 1 year 5 highest risk superannuation fund trustees: 1 year 20 major custodians: 2.9 years
Small business compliance and deterrence	**	6,223 companies in the 5 highest risk industries for the potential to conduct illegal phoenix activity: 29 years
Markets		
Corporations	48	21,767 public companies, including 2,252 listed entities: • all control transactions for listed entities • a significant proportion of prospectuses • a small sample of entities in areas of emerging risk: 1 year
Financial market infrastructure	22	18 licensed financial markets: 1 year 6 licensed clearing and settlement facilities: 1 year
Insolvency practitioners	23	696 registered liquidators: 3.7 years
Financial reporting and audit	30	Financial reports of: • top 500 listed entities: 3 years • remaining 1,500 listed entities: 9 years • 2,100 unlisted public interest entities: 25 years • 100 large proprietary companies: 54 years Audit firms that audit listed entities: • largest 4: 1.5 years • next 18: 2.5 years • remaining 64: 10.3 years
Market and participant supervision	62	133 market participants: 3.3 years 100 larger securities dealers: 4 years

** It is unclear from ASIC's Annual Report 2013-2014 how many employees are responsible for the "small business compliance and deterrence" population within the area of "investor and financial consumers".

ASIC's regulatory remit is extensive and its enforcement functions and powers are summarised in these terms:

"We regulate corporations, managed investment schemes, participants in the financial services industry and people engaged in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act).

The ASIC Act directs ASIC to 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.'

We use our enforcement powers to detect and deal with unlawful conduct, to recover money in appropriate circumstances and sometimes to prevent unlawful conduct before it happens. By doing this we deter future misconduct."¹¹²

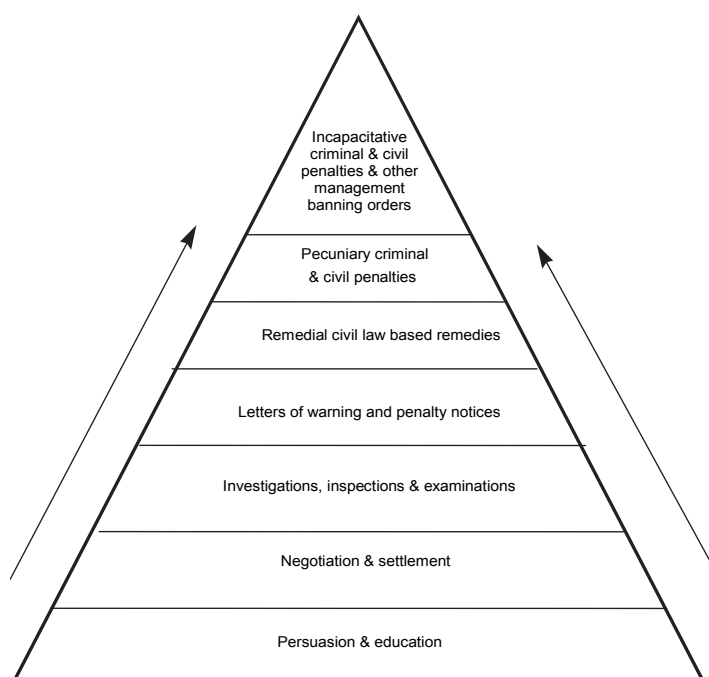
The central strategic considerations that inform ASIC's enforcement practices are: strategic significance (eg, extent of the harm or loss); benefits of pursuing misconduct

¹¹² Australian Securities and Investments Commission, "Information Sheet 151: ASIC's Approach to Enforcement" (2013), 3, <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/> accessed on 28 August 2015.

(eg, cost-effectiveness); features of the matter (eg, available evidence); and non-investigative alternatives.¹¹³ ASIC may adopt enforcement strategies that are: punitive; compensatory; corrective; preservative (eg, ensuring assets remain within jurisdictional authority); protective (eg, disqualification orders); or aiming for a negotiated resolution (eg, enforceable undertakings).¹¹⁴ The punitive outcomes that ASIC may seek include civil financial penalties, criminal financial penalties, prison terms and community service orders.¹¹⁵ There are several factors that ASIC may consider in deciding which remedy to pursue, including: the nature and seriousness of the suspected misconduct; the conduct of the person or entity after the alleged contravention; the relative strength of the case; the expected levels of public benefit; mitigating factors; the likelihood that the person's or entity's behaviour will change in response to a particular action; and the likelihood that the business community is generally deterred from similar conduct through greater awareness of its consequences.¹¹⁶

The regulatory pyramids first promoted by Ayres and Braithwaite provide a helpful illustration of how regulators might seek to design their enforcement strategies.¹¹⁷ These pyramids, which form part of responsive regulation theories, have been widely espoused by regulators and those analysing regulation in practice. For example, Gilligan, Bird and Ramsay in Figure 1 show how directors' duties could be enforced in a pyramid fashion in corporate law in Australia.¹¹⁸

Figure 1. Enforcement of directors' duties in Australian corporate law



¹¹³ *Ibid* 3–4.

¹¹⁴ *Ibid* 6–7.

¹¹⁵ *Ibid* 4–6.

¹¹⁶ *Ibid* 8–9.

¹¹⁷ I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

¹¹⁸ G Gilligan, H Bird and I Ramsay, "Civil Penalties and the Enforcement of Directors' Duties" (1999) 22 *UNSW Law Journal* 417.

It is beneficial for regulators, the regulated, and other key stakeholders, such as the state and consumers, if the vast proportion of regulatory interaction, including enforcement, takes place at the lower levels of the pyramid, especially its base. Assuming that good compliance outcomes are achievable via persuasion, education and negotiation, these strategies constitute a much more cost-effective approach. Difficulties of course arise with actors who do not understand or pay attention to their obligations. In respect of such actors, a stronger enforcement strategy from higher up the pyramid may be appropriate. The core rationale is that, depending on the circumstances of the actor and the contravention, different levels of enforcement response, ranging from a warning letter to imprisonment, may be applied. ASIC's enforcement activity would ideally reflect this rationale. However, the empirical data examined in the following section suggests that there is little correlation between ASIC's enforcement outcomes and the pyramid model.

2. ASIC's quantitative approach to reporting enforcement outcomes

This section of the article examines in detail the quantitative data presented in ASIC's Enforcement Reports. This serves to illustrate some of the advantages, but also some of the pitfalls, of the trend towards increased empiricism in enforcement reporting by financial regulators. One advantage worth noting at the outset is that empirical approaches may reveal that there is a disjoint between theory and practice. As noted above, even though the pyramid approach to enforcement is widely espoused by regulators and theorists, the data in ASIC's Enforcement Reports reveals a different picture, which is that there is little correlation, and potentially even a rough inverse correlation, between ASIC's enforcement outcomes and the pyramid model.

ASIC's first Enforcement Report was issued in March 2012 covering the period July to December 2011 and the most recent was issued in August 2015 covering the period January to June 2015. As discussed earlier in section C.1, the Enforcement Reports contain both qualitative and quantitative data. The quantitative data is divided into four broad regulatory areas: market integrity; corporate governance; financial services; and small business compliance and deterrence. Enforcement activity in these four areas is classified across five enforcement methods: criminal; civil; administrative remedies; enforceable undertakings/negotiated outcomes; and public warning notices.

The tables and figures in this section present a set of data extracted from the Enforcement Reports from 2011 to 2014.¹¹⁹ For the purposes of the data analysis presented in this article, ASIC's classification and definitions of regulatory areas and enforcement activities have been adopted. This presents certain challenges in terms of being able to interpret accurately the data. For example, the authors' research suggests that ASIC's definition of an "enforcement outcome" includes interim stages of the enforcement process. In a criminal proceeding, a guilty plea is treated as an enforcement outcome, even where the defendant has yet to be sentenced. The subsequent sentencing and imposition of a criminal penalty

¹¹⁹ Australian Securities and Investments Commission, *supra* n 29.

are treated as separate, additional enforcement outcomes. Defining enforcement outcomes in this way inflates the number of outcomes and makes it more difficult to obtain a true picture of ASIC's enforcement activity.

This raises an important issue, which is that, in adopting quantitative approaches to reporting of enforcement outcomes, there is a risk of imprecision in the ways that regulators present and classify the data.¹²⁰ For example, it is noteworthy that, despite ASIC presenting relatively detailed empirical data on its enforcement outcomes, it has omitted explanatory notes that would clarify the data and arguably make ASIC more accountable for whatever the data might reveal. It is beyond the scope of this article to conduct a detailed evaluation of ASIC's classification of the data in the Enforcement Reports, but caution is certainly warranted where regulators may have an interest in boosting numbers, whether to meet key performance indicators or political or community expectations. This point has been noted by the OECD in its May 2014 report on *Best Practice Principles for Regulatory Policy: Regulatory Enforcement and Inspections*:

“...any data that is recorded or produced by the agency should be treated with caution in terms of evaluation, because of the potential for conflict of interest and there may be incentives for the inspectorate to alter the data so as to improve its apparent performance.”¹²¹

Table 5 presents the aggregate “enforcement outcomes”, as defined by ASIC, in the period 1 July 2011 to 31 December 2014. This data was prepared by aggregating the data from the seven individual Enforcement Reports published from 2011 to 2014. From 2013 onward, ASIC has prepared tables which aggregate the previous two years' of data. However, some inconsistencies between the individual tables and the aggregate ones were identified. To ensure that the data is accurate, only the individual tables have been relied upon in preparing Table 5 and Figures 2 through to 11.

Table 5. ASIC Enforcement Outcomes from 1 July 2011 to 31 December 2014

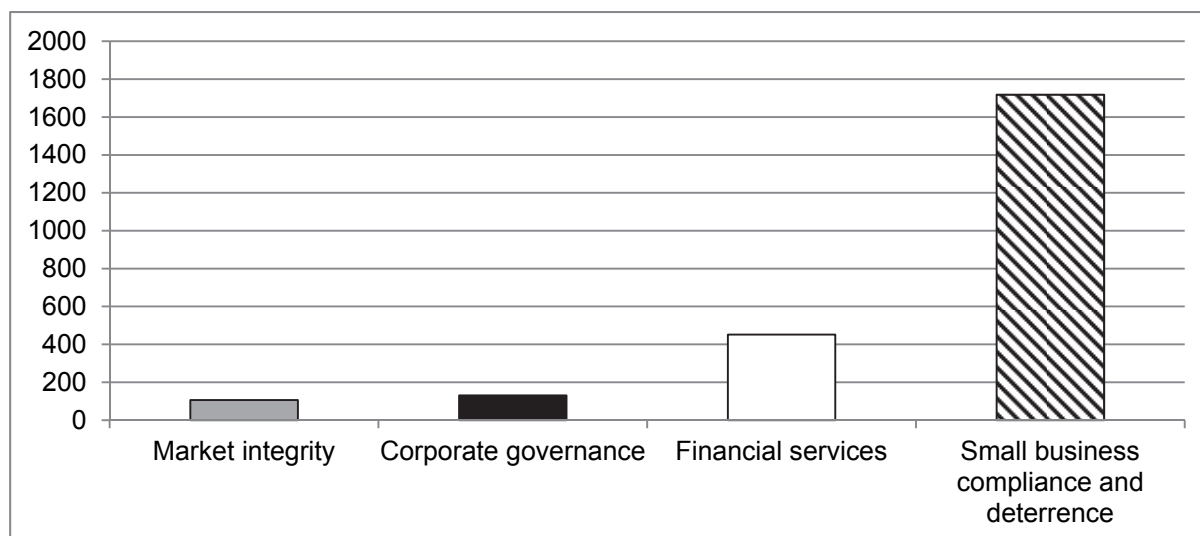
ENFORCEMENT METHOD → REGULATORY AREA & WRONGDOING TYPE ↓	Criminal	Civil	Administrative remedies	Enforceable undertakings /negotiated outcome	Public warning notice	Total
Market integrity	43	6	48	9	0	106
Insider trading	33	1	0	0	0	34
Market manipulation	6	0	1	1	0	8
Continuous disclosure	0	2	14	2	0	18
Market integrity rules	0	0	33	2	0	35

¹²⁰ See Scott, *supra* n 3, 367.

¹²¹ Organisation for Economic Co-operation and Development, *supra* n 105, 18.

Other market misconduct	4	3	0	4	0	11
Corporate governance	51	24	35	20	1	131
Action against directors	48	19	2	2	1	72
Insolvency	1	1	2	0	0	4
Action against liquidators	1	4	10	5	0	20
Action against auditors	0	0	2	12	0	14
Other corporate governance misconduct	1	0	19	1	0	21
Financial services	63	66	208	109	6	452
Unlicensed conduct	4	7	0	0	0	11
Dishonest conduct, misleading statements, unconscionable conduct	31	36	45	24	1	137
Misappropriation, theft, fraud	16	2	22	5	0	45
Credit	9	5	73	31	3	121
Other financial services misconduct	3	16	68	49	2	138
Subtotal	157	96	291	138	7	689
Small business compliance and deterrence	1497	2	218	0	1	1718
Action against directors	1454	0	215	0	1	1670
Efficient registration and licensing	43	2	3	0	0	48
Total	1654	98	509	138	8	2407

Figure 2 displays the aggregate enforcement outcomes in each regulatory area from 1 July 2011 to 31 December 2014. This Figure shows that “small business compliance and deterrence” accounts for the vast majority of ASIC’s enforcement outcomes. In turn, Table 5 indicates that “action against directors” accounts for most of the enforcement outcomes within “small business compliance and deterrence”. The small business “action against directors” category (1,454) accounts for well over half of all of ASIC’s enforcement outcomes (2,407).

Figure 2. ASIC Enforcement Outcomes by Regulatory Area from 1 July 2011 to 31 December 2014

The sheer scale of the small business “action against directors” category raises the question as to what *specific* enforcement outcomes it includes. There is no guidance on this issue in the Enforcement Reports. ASIC’s 2013–2014 Annual Report indicates that misconduct, compliance with licensing and registration requirements and illegal phoenix activity are some of the matters addressed within the area of “small business compliance and deterrence” generally.¹²² ASIC’s work in this area also includes the Liquidator Assistance Program,¹²³ which is one of the measures it utilises to combat illegal phoenix activity.¹²⁴ However, considerable ambiguity remains as to the specific breakdown of this category.

The ambiguity surrounding this category points to broader issues in regard to the ASIC data, which is that a number of the categories are too broad and the categories are not logically consistent. For example, categories such as “action against directors” and “action against auditors” could encompass various causes of action. Further, the sub-categories in the left-hand column of Table 5, which have been dubbed “wrongdoing types” for ease of expression, include not only causes of action, but also categories defined by reference to the type of actor, such as “action against directors” or “action against auditors”, and categories defined by reference to a more specific regulatory area, such as “insolvency” or “credit”. If the trend towards increasing empiricism in enforcement reporting identified in this article continues, it is likely that regulators such as ASIC will come under pressure to produce data that is more specific and logically consistent than the quantitative data in the Enforcement Reports, as it is difficult to see how such data could meet anything but the most general of key performance indicators.

¹²² Australian Securities and Investments Commission, *supra* n 27, 20–21, 42.

¹²³ See Australian Securities and Investments Commission, “Liquidator Assistance Program” (2015), <http://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/liquidator-assistance-program-report-as-to-affairs-books-and-records/> accessed on 28 August 2015.

¹²⁴ See Australian Securities and Investments Commission, “Small Business Illegal Phoenix Activity” (2015), <http://asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/small-business-illegal-phoenix-activity/> accessed on 28 August 2015.

Figure 3 shows the aggregate enforcement outcomes for each specific “wrongdoing type” from 1 July 2011 to 31 December 2014. As noted above, the “wrongdoing types” are not necessarily causes of action; some of the categories are defined by reference to actors or more specific regulatory areas. The shading scheme in Figure 2 has been maintained in Figures 3 and 4 to represent the different regulatory areas.

Figure 3. ASIC Enforcement Outcomes by Wrongdoing Type from 1 July 2011 to 31 December 2014

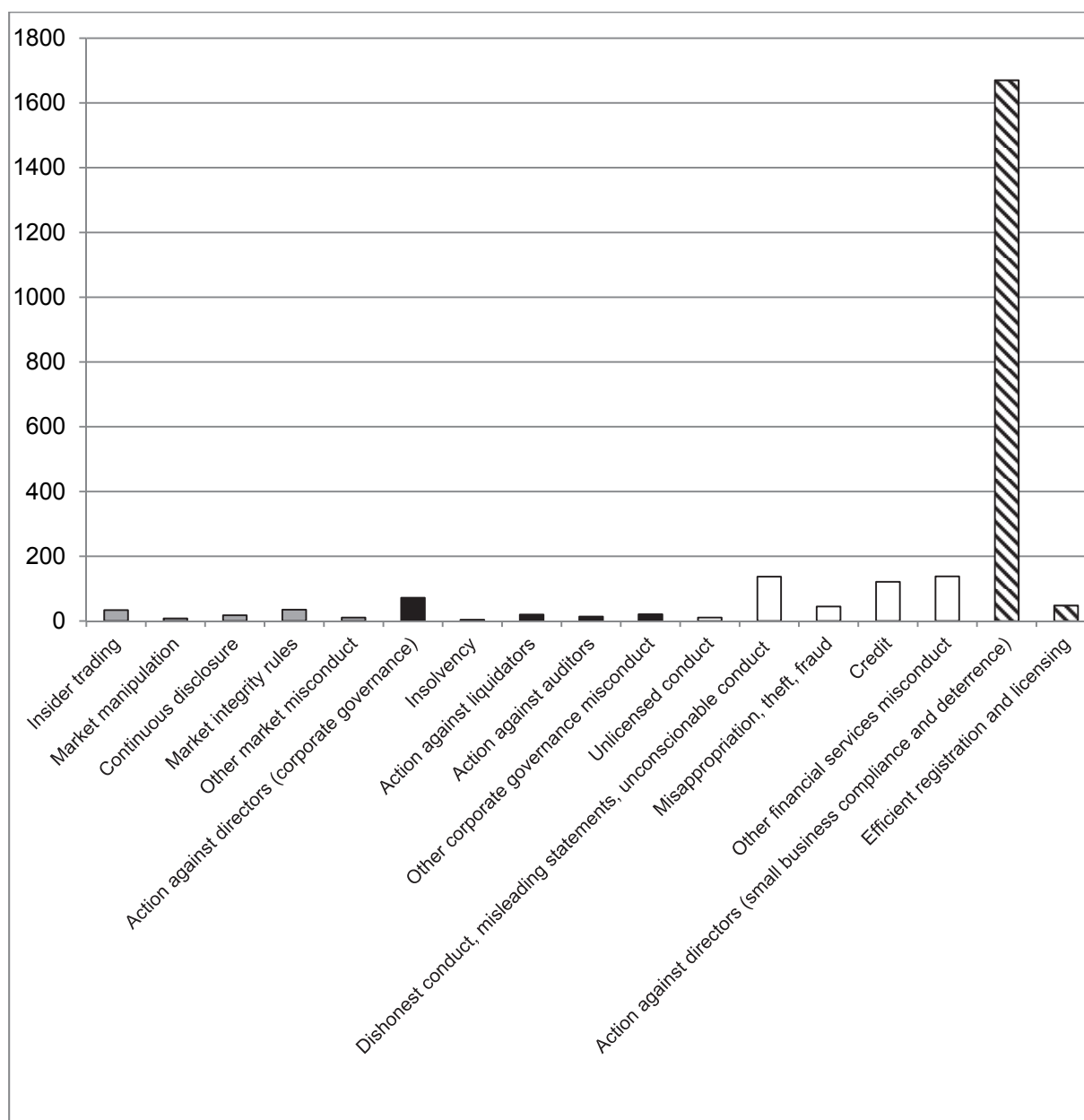
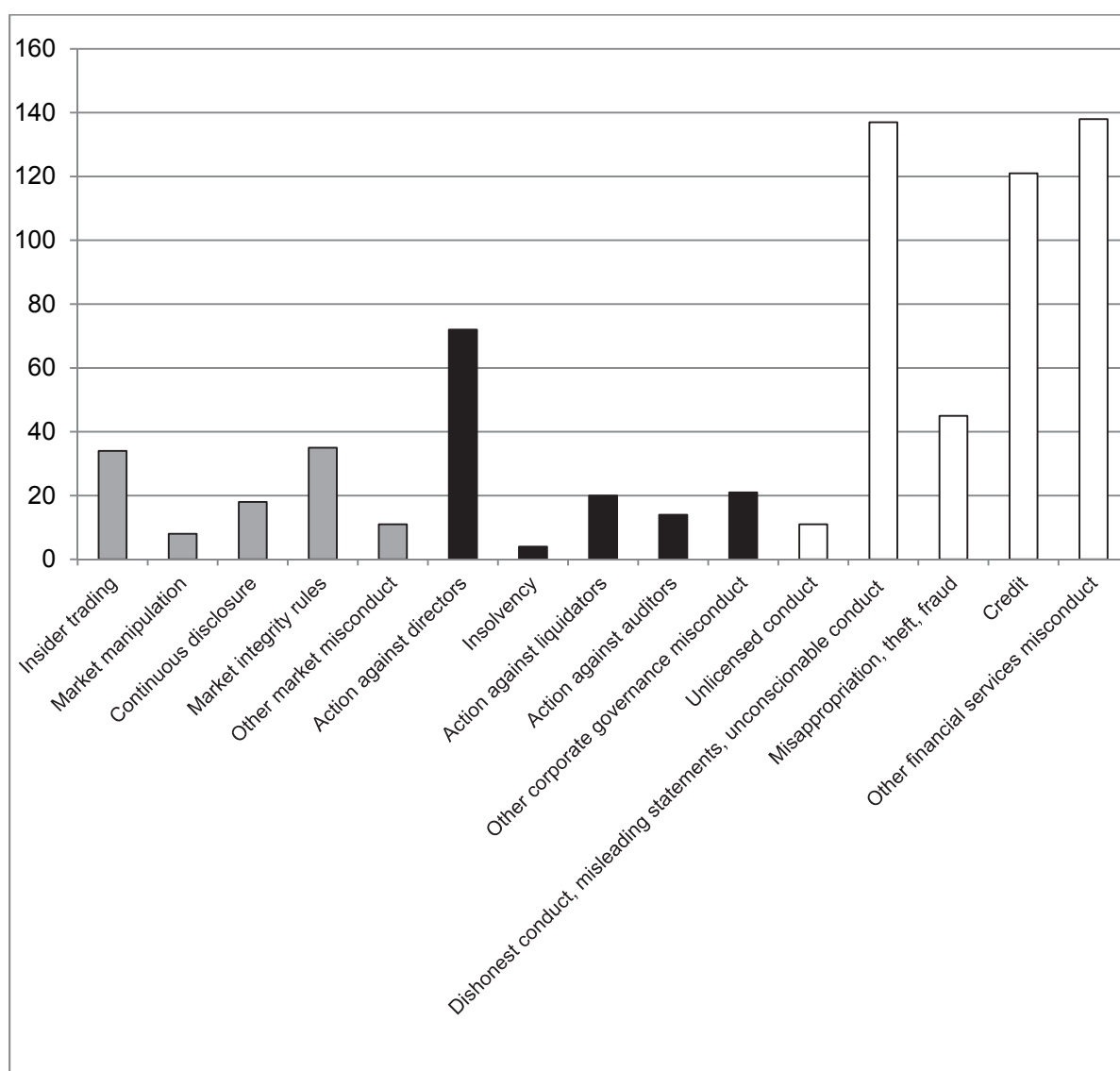


Figure 3 further emphasises the degree to which the “action against directors” category within “small business compliance and deterrence” dominates ASIC’s enforcement activity (at least in terms of the sheer number of enforcement outcomes). The next most commonly

enforced wrongdoing types are within the “financial services” regulatory area, including wrongdoing in relation to “dishonest conduct, misleading statements, unconscionable conduct”, “credit” and “other financial services misconduct”. Once again, it is unclear what causes of action might be included within the “credit” or “other financial services misconduct” categories, pointing to the need for more specificity if this data were called upon to respond to particularised key performance indicators.

Figure 4 is a variant on Figure 3, which excludes the data for “small business compliance and deterrence”. By excluding the small business data, it is possible to differentiate clearly between the wrongdoing types in the other regulatory areas. Figure 4 shows that, apart from enforcement activity in relation to small businesses, most of ASIC’s enforcement activity is occurring within financial services. This is perhaps not surprising given the heightened scrutiny on the financial services sector following the GFC.

Figure 4. ASIC Enforcement Outcomes by Wrongdoing Type from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data



After the three leading “financial services” categories, the next most significant category in Figure 4 is the “action against directors” category within “corporate governance”. This is yet another broad category defined by reference to an actor, not a cause of action, and therefore it is not possible to identify what specific enforcement outcomes this category includes.

Turning now to focus on enforcement methods, Figure 5 displays the aggregate enforcement outcomes reached via each enforcement method. This Figure shows that criminal enforcement methods are by far the most common, although this is due to the large number of criminal enforcement outcomes in the “action against directors” category within “small business compliance and deterrence”. It can be seen from Figure 6 that, once the small business data is excluded, administrative enforcement methods are the most common and enforceable undertakings are almost as numerous as criminal methods.

Figure 5. ASIC Enforcement Outcomes by Enforcement Method from 1 July 2011 to 31 December 2014

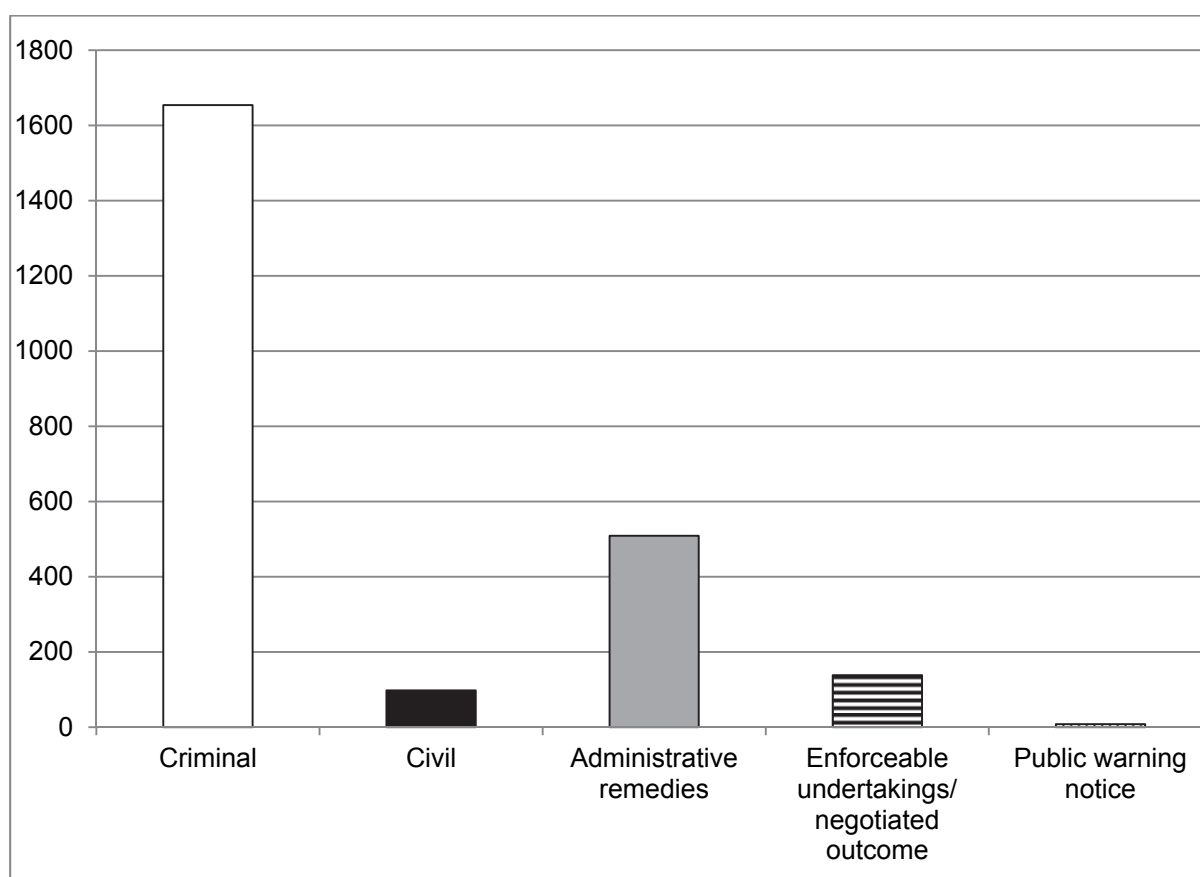
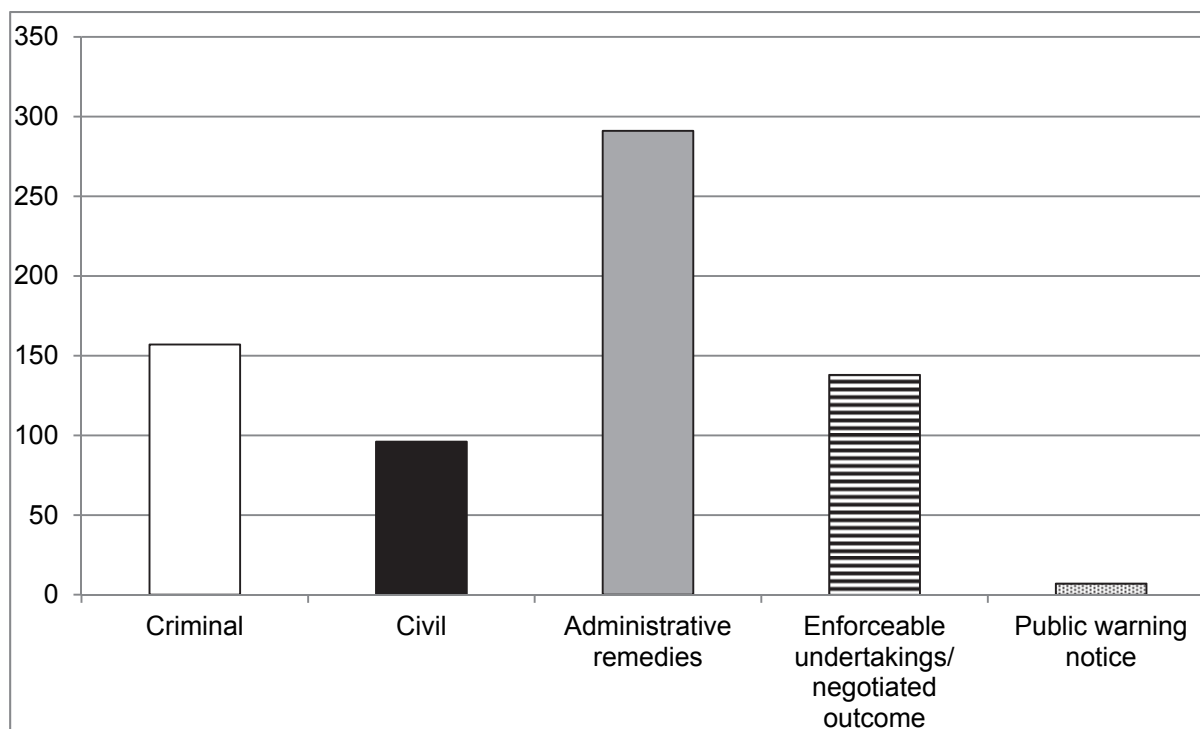


Figure 6. ASIC Enforcement Outcomes by Enforcement Method from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data



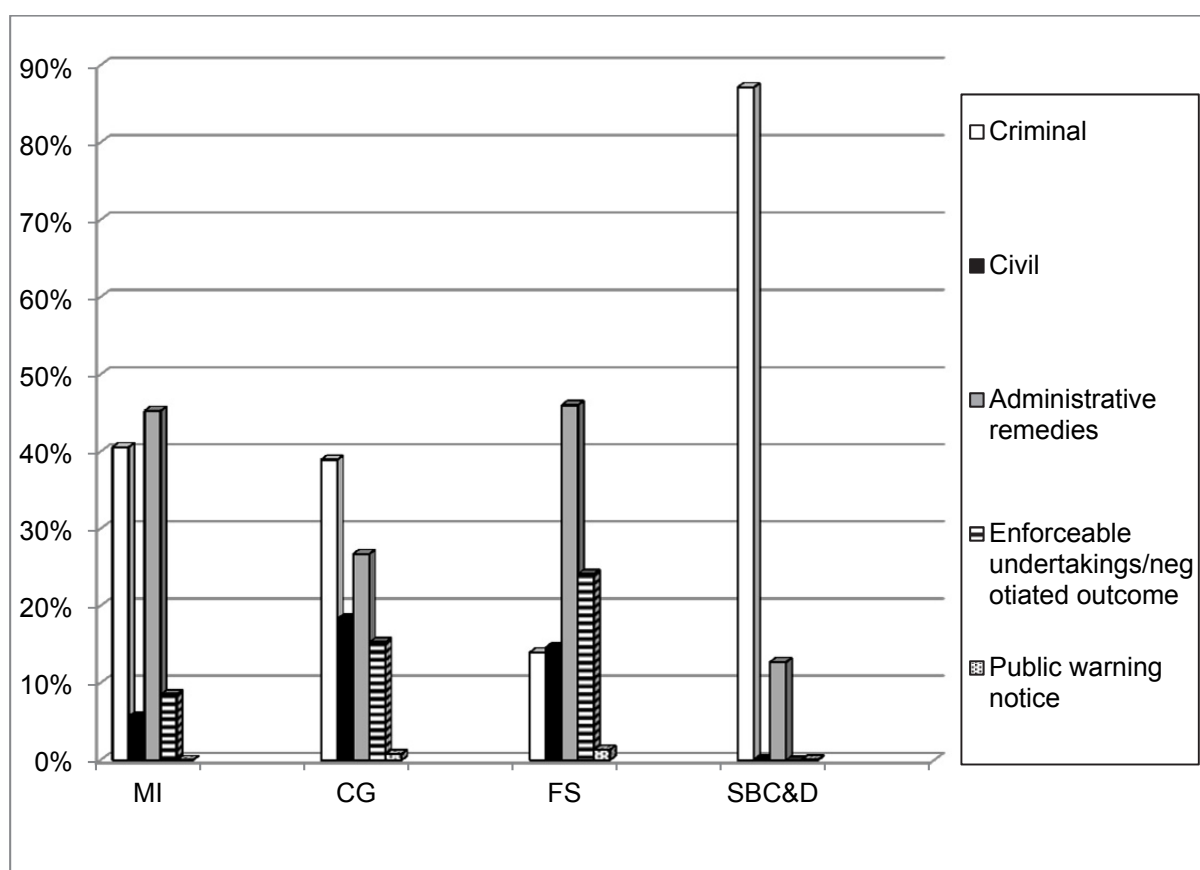
Figures 5 and 6 show that ASIC's choice of enforcement methods does not appear to correlate to the pyramid model of enforcement discussed earlier in this article. Negotiated settlements are located in the second lowest segment of the pyramid, therefore one would expect such methods to predominate, yet enforceable undertakings/negotiated outcomes are outnumbered by both criminal and administrative methods, which are most likely to occupy the two uppermost segments. Meanwhile, criminal methods significantly outnumber civil methods and public warnings are barely used at all. The data from ASIC's Enforcement Reports indicate that there is little correlation between the enforcement methods apparently used by ASIC and the enforcement pyramid, and one might even suggest that there may be inverse correlation; that is, there is a trend towards the methods at the top of the pyramid being used the most and those at the bottom of the pyramid being used the least.

The problem of the excessively broad nature of the data categories also applies to the "enforcement method" categories. In particular, it is not possible to determine from these categories which outcomes are financial and which are incapacitative. The "criminal" category includes both fines and imprisonment. The "civil" category includes both pecuniary penalties and disqualification orders. The "administrative" category may refer to serious disqualification orders or negligible variations of licences. This highlights a critical flaw in the data, which is that it is simply not possible to determine whether more severe or less severe enforcement outcomes are being imposed. An "administrative" outcome might entail a serious disqualification order, while a "criminal" outcome might entail a negligible fine. This suggests that, rather than there being no correlation or an inverse correlation with

the enforcement pyramid, it is simply *not possible* to determine the level of correlation, as the pyramid is structured according to the severity of sanctions, which is precisely what cannot be determined from the ASIC Enforcement Reports data.

Figure 7 adds further detail to the picture of which “enforcement methods” ASIC is choosing to adopt. This Figure shows the number of enforcement outcomes reached via particular enforcement methods as a percentage of the total enforcement outcomes within each regulatory area. For example, it can be seen that about 45% of enforcement outcomes within “market integrity” are reached via administrative enforcement methods, while only about 6% are reached via civil enforcement methods. Administrative enforcement methods are particularly dominant in relation to “financial services” (46%) and criminal enforcement is overwhelmingly used in “small business compliance and deterrence” (87%) and also the most common enforcement method in the “corporate governance” area (39%).

Figure 7. ASIC Enforcement Methods as Percentages of Regulatory Areas from 1 July 2011 to 31 December 2014 (see corresponding table in Appendix)



While the ASIC data has certain limitations in relation to the breadth of the “enforcement method” categories, as discussed above, Figure 7 is striking in the sense that it shows that ASIC’s enforcement strategy varies significantly depending on the regulatory area within which it is operating. This might indicate that ASIC is tailoring its approach to the particular regulatory area or that there is an element of randomness involved. This is precisely the

kind of question that a more rigorous empirical approach to enforcement reporting might seek to answer, by requiring regulators to provide not only sufficiently particularised quantitative data but also detailed explanatory notes that contextualise the variation in the data.

Looking at trends in ASIC’s enforcement activity over time, Figure 8 displays the number of enforcement outcomes within each regulatory area over the 2011 to 2014 period. Overall, there has been a moderate downward trend in “small business” activity and a slight upward trend in the other areas since July 2012. Figure 9 is a variant on Figure 8, which excludes the “small business compliance and deterrence” data to get a better picture of trends in the other regulatory areas.

Figure 8. Trends in ASIC Regulatory Areas from 1 July 2011 to 31 December 2014 (see corresponding table in Appendix)

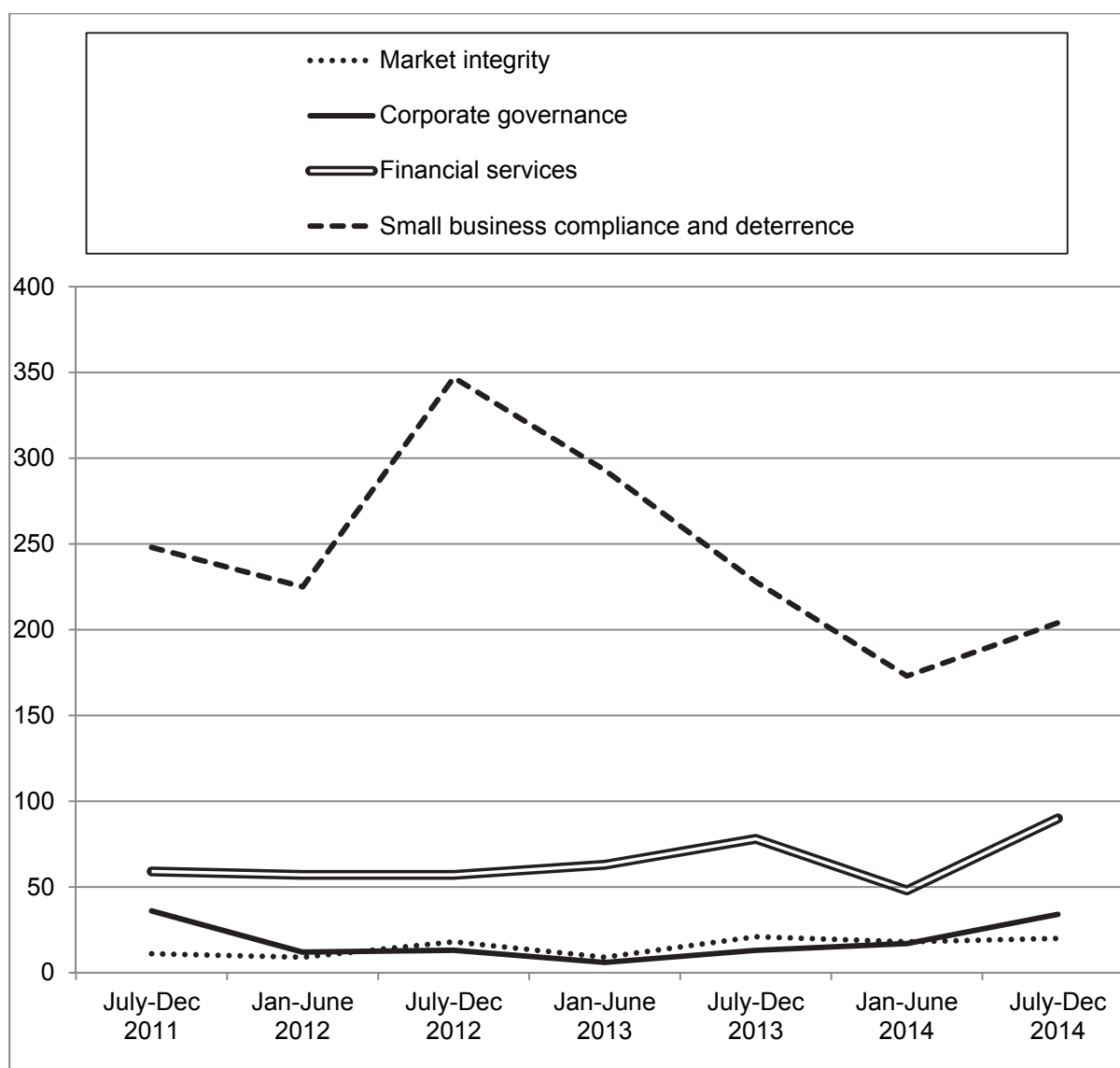


Figure 9. Trends in ASIC Regulatory Areas from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data (see corresponding table in Appendix)

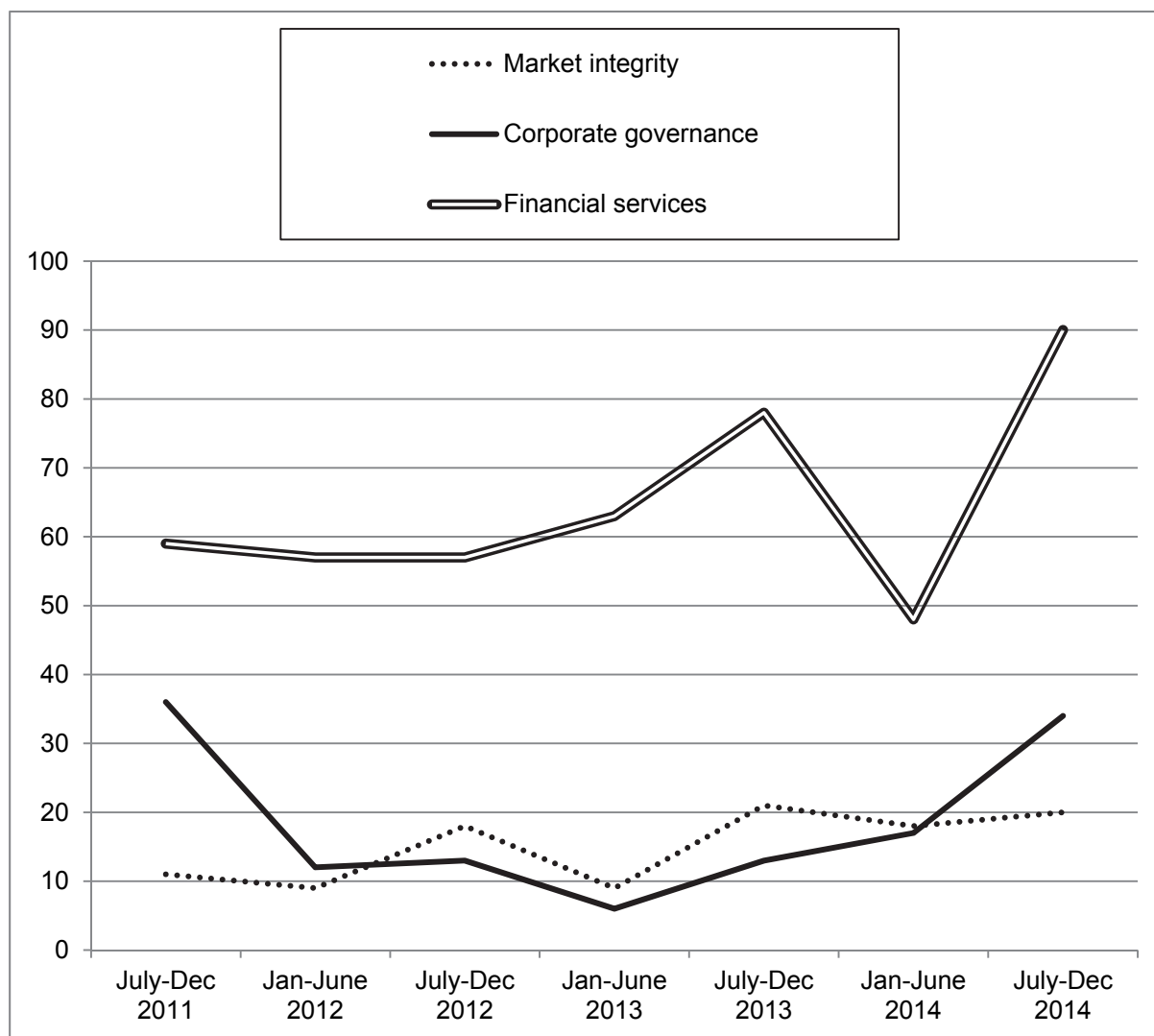


Figure 10 shows the number of enforcement outcomes reached via each “enforcement method” over the 2011 to 2014 period. Figure 11 is a variant on Figure 10 that excludes the “small business compliance and deterrence” data. Figure 10 shows a moderate downward trend in criminal methods of enforcement since July 2012, which corresponds to the aforementioned downward trend in enforcement outcomes within “small business compliance and deterrence” due to the large number of criminal small business matters. Figure 11 shows a moderate upward trend in the use of administrative methods of enforcement across the 2011 to 2014 period, which accelerates notably in the final six months.

Figure 10. Trends in ASIC Enforcement Methods from 1 July 2011 to 31 December 2014 (see corresponding table in Appendix)

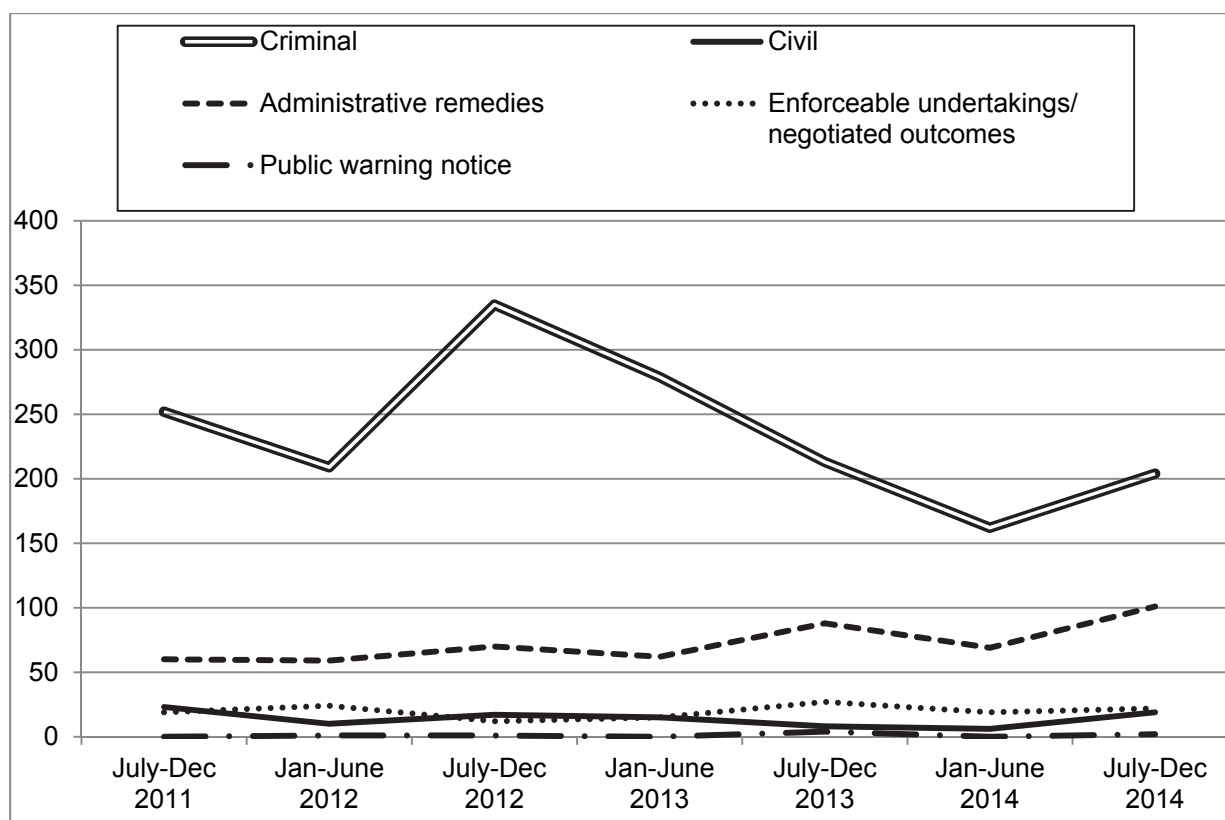
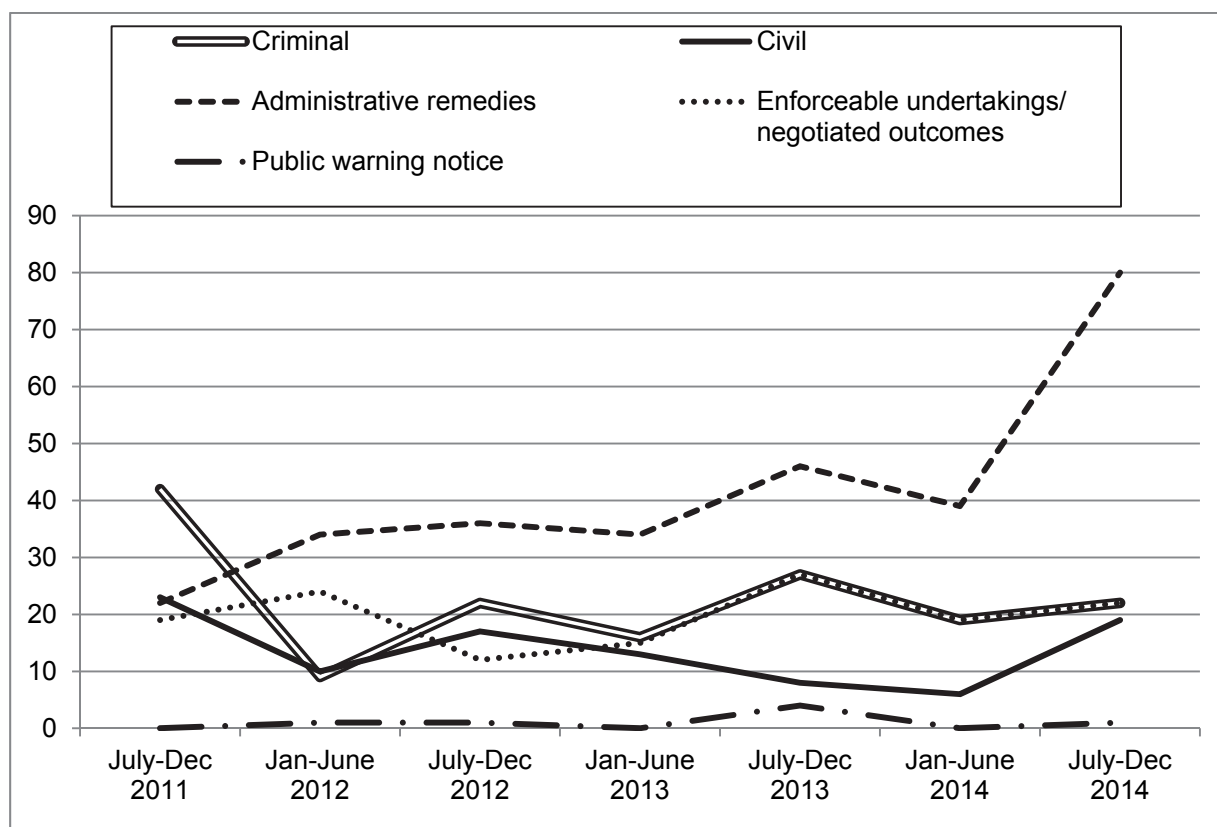


Figure 11. Trends in ASIC Enforcement Methods from 1 July 2011 to 31 December 2014, excluding small business compliance and deterrence data (see corresponding table in Appendix)



Overall, it is not possible to discern any significant trends over time in the data extracted from the ASIC Enforcement Reports, primarily because of the limited 2011 to 2014 duration of the data sample. Should the trend of increased empiricism in enforcement reporting continue, this would no doubt reveal some informative patterns over time in the degree to which regulators focus on particular regulatory areas, methods or enforcement or types of wrongdoing. However, the usefulness of such data would also be dependent on the regulators devising an appropriately particularised and logically consistent classification system with accompanying explanatory notes. It is one thing to identify whether categories increase or decrease over time, but this is of little use if it is not possible to identify the content of the categories with sufficient precision. It is apparent that there is substantial scope for improvements in the rigour of ASIC's data collection, classification and analysis. Although this article has not critically examined the enforcement data produced by the FCA and the SEC, similar issues may arise in those jurisdictions with respect to data classification and interpretation.¹²⁵ While empirical enforcement reporting systems ultimately promise to produce more meaningful information on regulatory effectiveness, such systems need to be transparently and rigorously designed in order to deliver on that promise.

F. CONCLUSION

This article has identified a trend of increased empiricism in the enforcement reporting practices of three significant national financial regulatory agencies, the FCA in the UK, the SEC in the US and ASIC in Australia, the latter in some detail. The FCA, SEC and ASIC are influential regulatory actors who have led international best practice in the regulation of contemporary financial markets. Consequently it is not unreasonable to expect that many of their regulatory peers are likely to integrate increased empiricism in enforcement reporting into the processes that they practise and promote. This trend is part of a broad-based response from governments, industry and other stakeholders since the GFC involving increasing national and international scrutiny of financial regulators. This scrutiny is not only a fiscally motivated push to generate further value from the regulatory dollar spend in an era of growing pressures on national budgets, but also is part of a deeper drive to impose greater accountability on regulators and improve regulatory outcomes according to delineated key performance indicators.

The ASIC case study shows how ASIC utilises its Enforcement Reports to self-report its enforcement activity and provide an overview of its organisational response to wrongdoing. The increased detail regarding enforcement activity is welcome in terms of a greater commitment to transparency and accountability, but, as noted in section E, the lack of accompanying explanatory information regarding classification processes and ambiguity in elements of the data dilute the transparency and accountability benefits. This attests to the OECD's warning¹²⁶ that calculative practices have the potential to divert attention towards

¹²⁵ See Velikonja, *supra* n 72.

¹²⁶ See Organisation for Economic Co-operation and Development, *supra* n 105, 18.

targeted measurable numbers and away from other important normative aspects of regulation that are less amenable to quantification. There is a risk that regulatory actors may game the numbers, prioritising the numerical representation of a regulatory outcome over the actual delivery of that regulatory outcome.¹²⁷

The reality of performance evaluation, as noted by Coglianese is that it is hard to measure.¹²⁸ It is inevitable that forms of data deficiencies will persist or evolve in terms of regulation in general and the reporting of financial regulation enforcement in particular. Nevertheless, the momentum towards increased empiricism in financial regulation enforcement reporting directly related to external key performance indicators seems inexorable, as evidenced both by national developments, such as the RPF in Australia and the UK NAO's assessment of the FCA's enforcement reporting practices in its *Regulating Financial Services* report,¹²⁹ and by lobbying by international organisations, such as the OECD¹³⁰ and IOSCO.¹³¹ That momentum is likely to see similar evolution in enforcement reporting in order to mitigate various kinds of data deficiency. The challenge for the future is to produce data on financial regulation enforcement that not only is more precise and capable of responding meaningfully to the emerging key performance indicators, but also has both legitimacy and the capacity to generate traction and commitment in financial markets that have significant global influences.

¹²⁷ See Scott, *supra* n 3, 367.

¹²⁸ C Coglianese, *supra* n 6.

¹²⁹ See UK National Audit Office, *supra* n 94.

¹³⁰ See Organisation for Economic Co-operation and Development, *supra* n 105, 9.

¹³¹ See International Organization of Securities Commission, *supra* n 103.

APPENDIX: TABLES CORRESPONDING TO FIGURES 7 TO 11

Table corresponding to Figure 7

	Criminal	Civil	Administrative remedies	Enforceable undertakings/negotiated outcome	Public warning notice
Market integrity	41%	6%	45%	8%	0%
Corporate governance	39%	18%	27%	15%	1%
Financial services	14%	15%	46%	24%	1%
Small business compliance and deterrence	87%	0%	13%	0%	0%

Table corresponding to Figures 8 and 9

	July-Dec 2011	Jan-June 2012	July-Dec 2012	Jan-June 2013	July-Dec 2013	Jan-June 2014	July-Dec 2014	Total
Market integrity	11	9	18	9	21	18	20	106
Corporate governance	36	12	13	6	13	17	34	131
Financial services	59	57	57	63	78	48	90	452
Small business compliance and deterrence	248	225	347	293	228	173	204	1718
Total	354	303	435	371	340	256	348	2407

Table corresponding to Figure 10

	July-Dec 2011	Jan-June 2012	July-Dec 2012	Jan-June 2013	July-Dec 2013	Jan-June 2014	July-Dec 2014	Total
Criminal	252	209	335	279	213	162	204	1654
Civil	23	10	17	15	8	6	19	98

Administrative remedies	60	59	70	62	88	69	101	509
Enforceable undertakings/ negotiated outcomes	19	24	12	15	27	19	22	138
Public warning notice	0	1	1	0	4	0	2	8
Total	354	303	435	371	340	256	348	2407

Table corresponding to Figure 11

	July-Dec 2011	Jan-June 2012	July-Dec 2012	Jan-June 2013	July-Dec 2013	Jan-June 2014	July-Dec 2014	Total
Criminal	42	9	22	16	27	19	22	157
Civil	23	10	17	13	8	6	19	96
Administrative remedies	22	34	36	34	46	39	80	291
Enforceable undertakings/ negotiated outcomes	19	24	12	15	27	19	22	138
Public warning notice	0	1	1	0	4	0	1	7
Total	106	78	88	78	112	83	144	689