

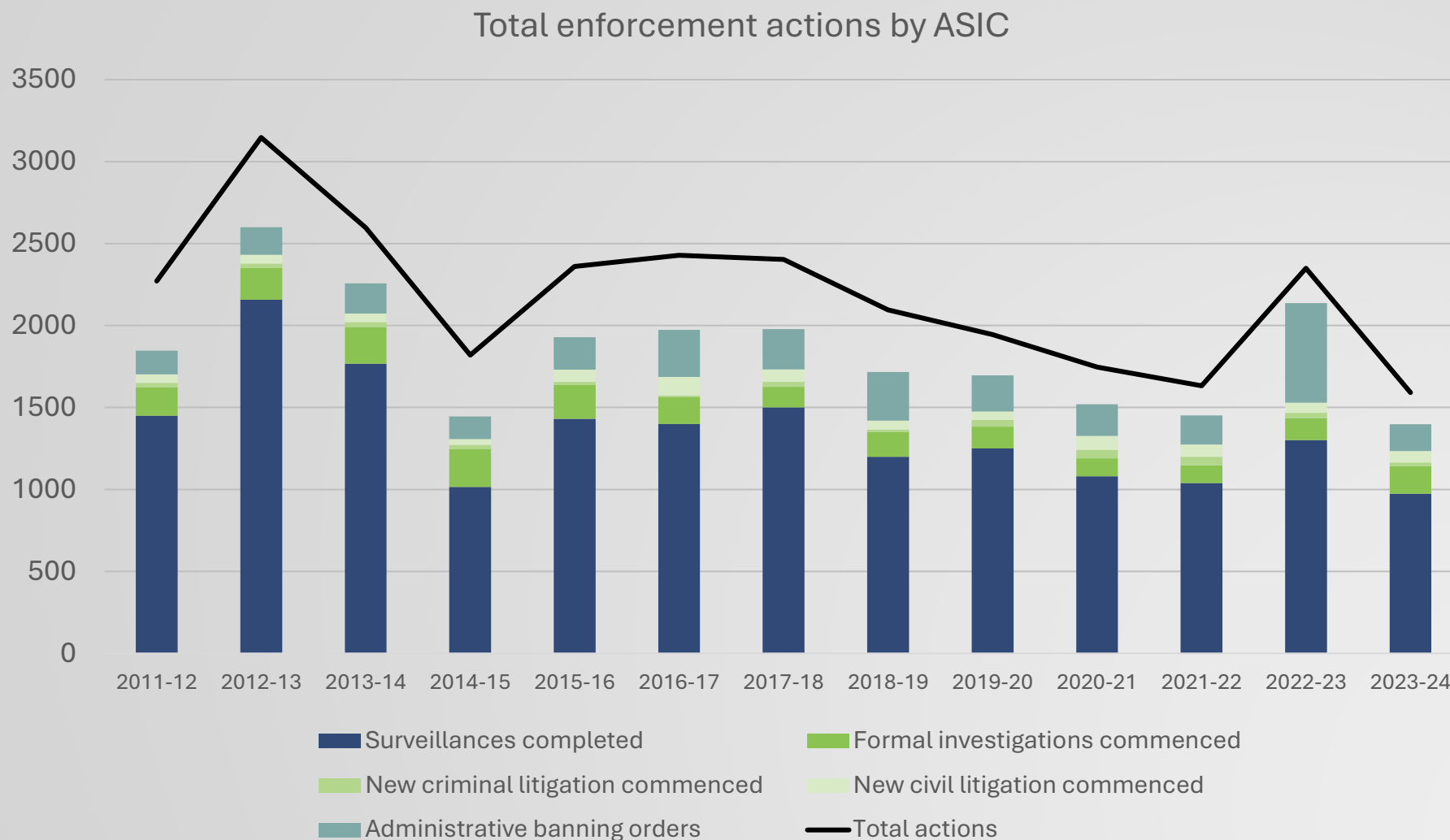
Hazards for directors in 2025

ASIC investigations, directors' duties, disqualification and financial penalties

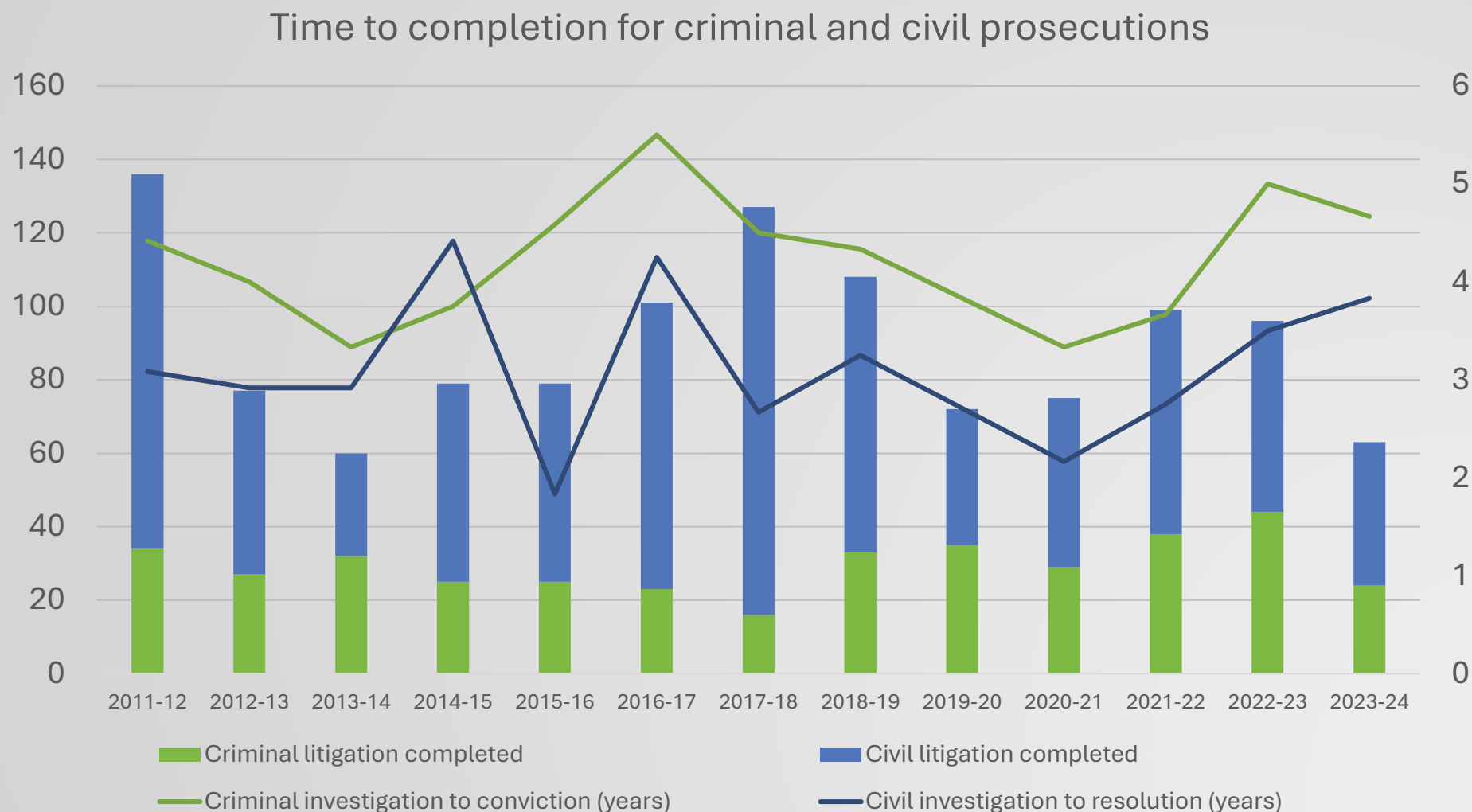
Presented by:

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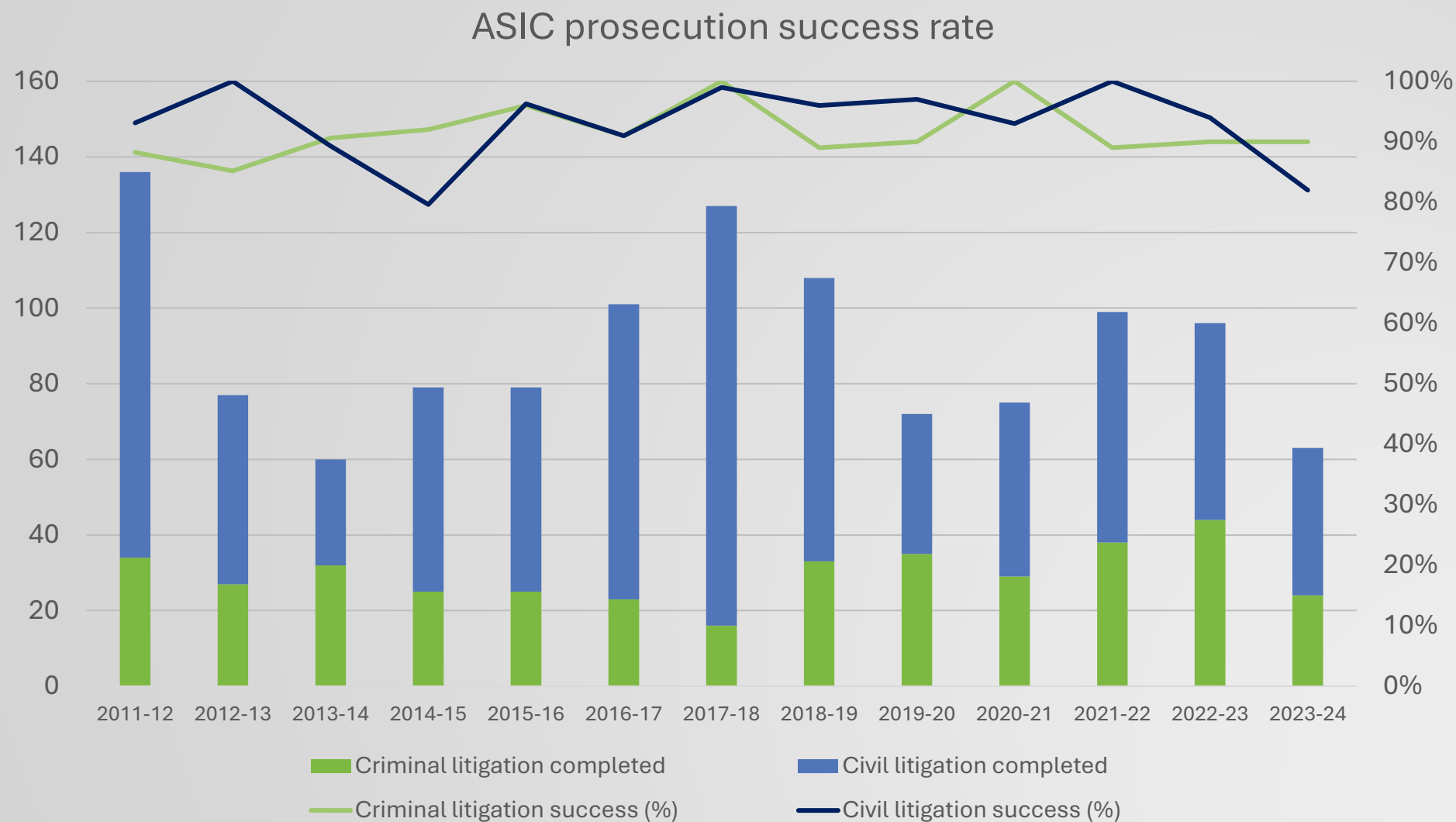
Trends in ASIC investigations



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Section 180 – Care and diligence

- Obligation of reasonable care and diligence (s 180(1))
- Business judgment rule (s 180(2)): A business judgment that falls within s 180(2) is taken to meet the obligation in s 180(1) if:
 - the judgment is made in good faith for a proper purpose; and
 - they do not have a material personal interest in the subject matter of the judgment; and
 - they inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - they rationally believe that the judgment is in the best interests of the corporation.

Directors' Duties

Section 181 - obligation to act in good faith in the best interests of the company and for a proper purpose

Section 182 – obligation not to improperly use position to gain an advantage or cause detriment to the corporation

Section 183 - obligation not to improperly use information to gain an advantage or cause detriment to the corporation

Section 184 – criminal offences - good faith, use of position and use of information

Section 588G – duty to prevent insolvent trading

Section 588GAA – duty to prevent creditor-defeating dispositions



Section 1317S: Relief from liability for contravention of a civil penalty provision

(2) If:

(a) eligible proceedings are brought against a person; and

(b) in the proceedings it appears to the court that the **person has, or may have, contravened a civil penalty provision** but that:

(i) **the person has acted honestly**; and

(ii) **having regard to all the circumstances of the case** (including, where applicable, those connected with the person's appointment as an officer, or employment as an employee, of a corporation or of a Part 5.7 body), **the person ought fairly to be excused** for the contravention;

the court may relieve the person **either wholly or partly from a liability** to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

Section 1317S: Relief from liability for contravention of a civil penalty provision

(3) In determining under subsection (2) whether a person ought fairly to be excused for a contravention of section 588G, the matters to which regard is to be had include, but are not limited to:

- (a) any action the person took with a view to appointing an administrator of the company or Part 5.7 body or a restructuring practitioner for the company; and
- (b) when that action was taken; and
- (c) the results of that action.

Section 1318: The power to grant relief

(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach **but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused** for the negligence, default or breach, the court may relieve the person **either wholly or partly** from liability on such terms as the court thinks fit.

**Federal Court sanctions Getswift
with record continuous disclosure
penalty**

**ASIC quick to
utilise Federal
Court's expanded
jurisdiction to hear
criminal matters**

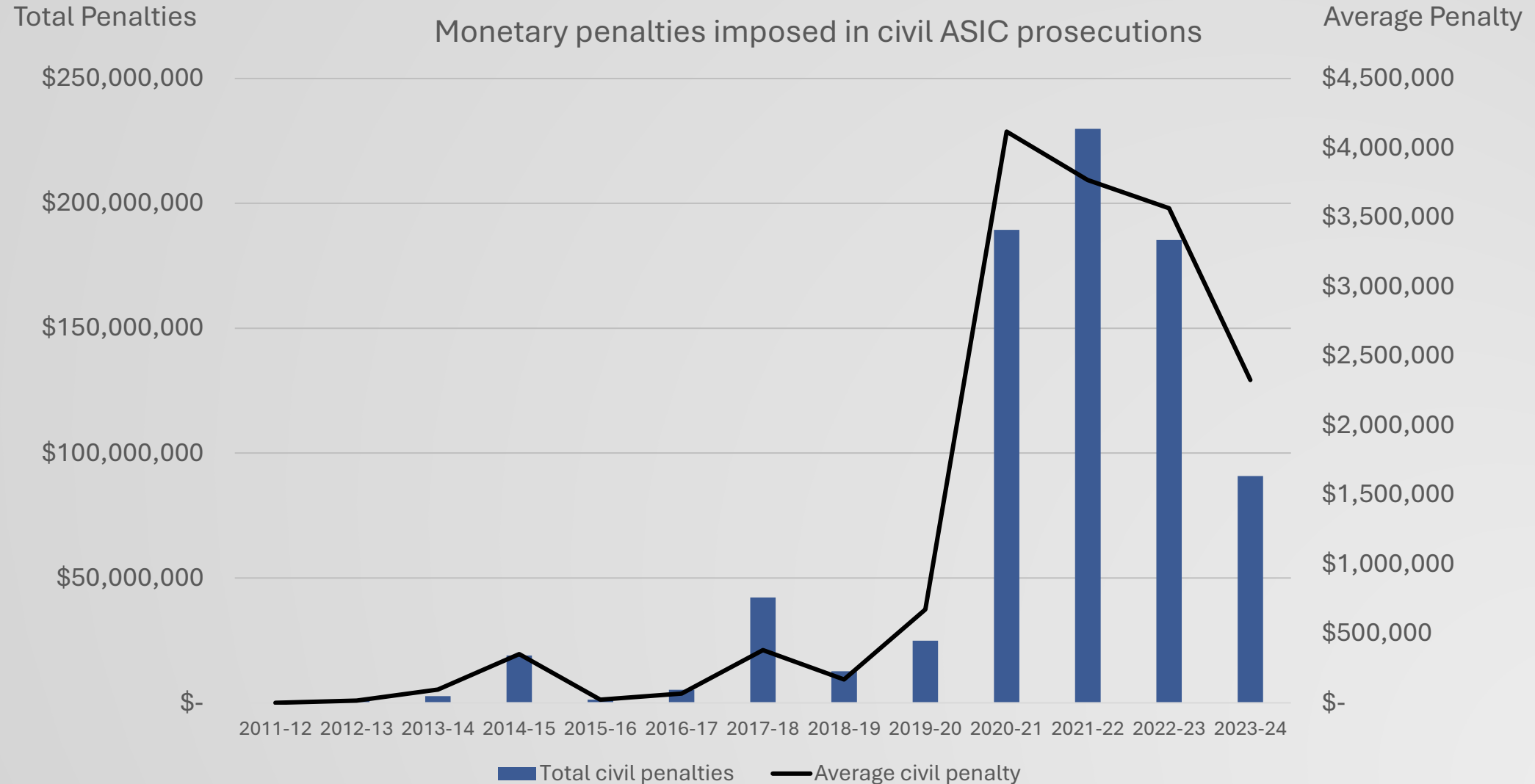
**ASIC's Vanguard greenwashing
action results in record \$12.9 million
penalty**

**ASIC set to take action against predatory lending, backed by
new laws and threats of jail time**

**Star provides \$150 million for fines
and penalties after ASIC raises
concerns**

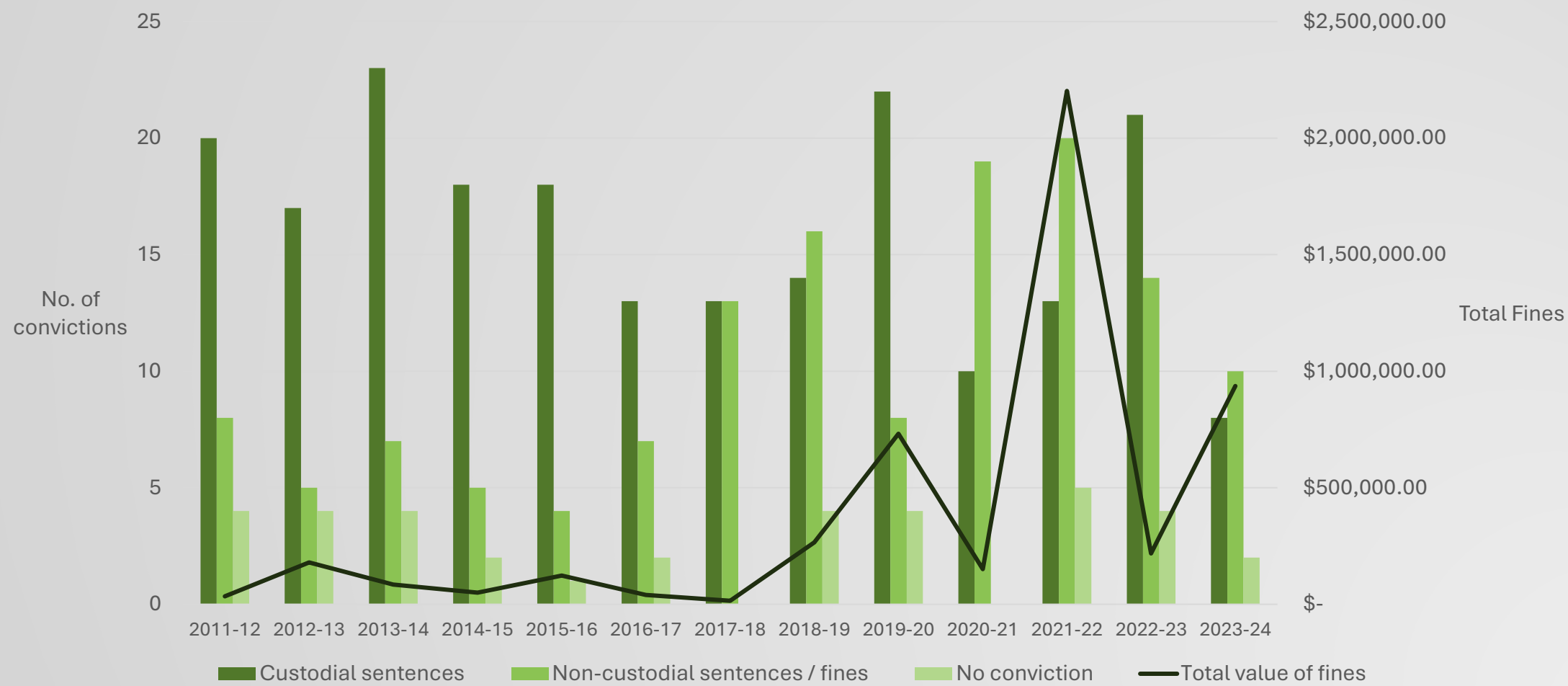
**Fines that'll hurt. ASIC's powerful, if
ill-fitting, teeth**

Trends in ASIC investigations



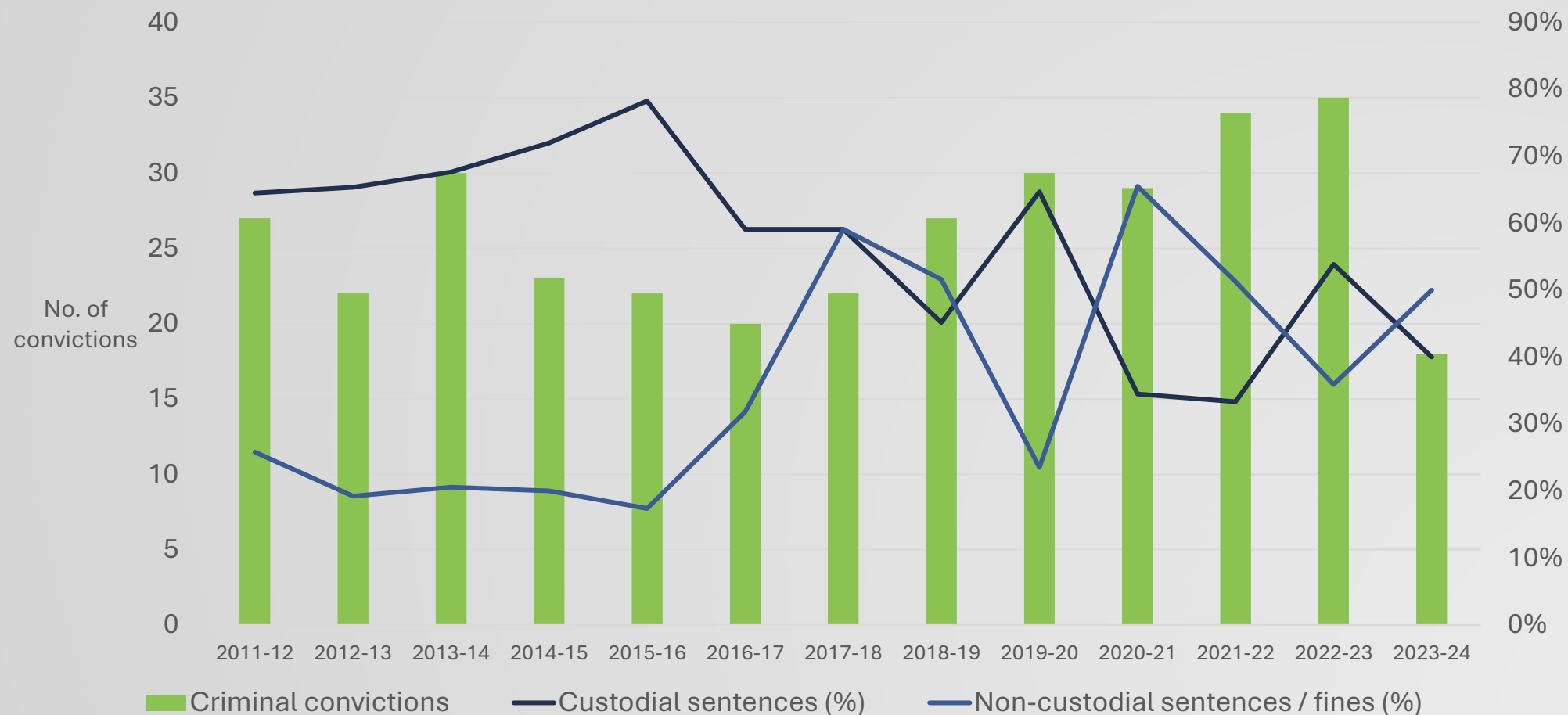
Trends in ASIC investigations

Outcomes in ASIC criminal prosecutions



Trends in ASIC investigations

Outcomes in ASIC prosecutions







Calculation of penalties

Case study: *ASIC v Noumi Limited* [2024] FCA 862 (Jackman J)

	Penalty units	Penalty unit value	Penalty unit total	10% of turnover	No. of contraventions	Total maximum penalty
Pre-March 2019	N/A	N/A	N/A	N/A	1	\$1 million (\$200,000 for individuals)
Post-March 2019	50,000	\$210	\$10.5 million	\$46 million	244	\$11.2 billion (\$256.2 million for individuals)

Now \$330!

Final Result:

Noumi Limited

\$5 million penalty

Campbell Nicholas (CFO)

4 year disqualification
\$100,000 penalty

5 Key Takeaways

1. Take ASIC investigations seriously
2. Consider instructing counsel at the earliest opportunity, and particularly once your client knows that they will have to attend a s. 19 examination
3. Be conscious that the scope of an ASIC investigation might change
4. Do not assume that your client will avoid disqualification or a large penalty just because they acted honestly
5. Remember: ASIC may have a reputation of being a toothless tiger, but the legislation has armed it with a set of sizeable fangs