

Additional Comments (Dissenting Report) by Deputy Chair, Senator David Bushby

1.1 I recognise that the complaints, misconduct and policy issues raised in the course of the inquiry are serious matters of public importance and warrant detailed analysis and response.

1.2 The confidence in Australia's corporate, markets and financial services regulator—ASIC—is vital to the economic wellbeing of the nation. ASIC's key role is to make certain Australian financial markets are fair and transparent, and that Australian investors and consumers are kept well informed so as to support investor decision making and to maintain confidence in those markets.

1.3 The balance for government and parliament is to ensure regulation is sufficient to protect consumers and maintain confidence in the market but not so onerous as to deter informed risk-taking investment and thereby harm economic activity.

1.4 On balance, I do not agree that the majority report has got this balance right and the conclusion drawn cannot be supported in full.

1.5 Whilst some of the recommendations are sensible—indeed corresponding improvements have already been undertaken independently by ASIC or are under contemplation—some of the recommendations cannot be supported or require significant further consideration.

1.6 These additional comments (dissenting comments) do not seek to address every recommendation in the main report. It will address three central areas where I consider that the recommendations of the majority cannot be supported in part, or in full, in their current form.

General recommendations surrounding the operation of ASIC

1.7 The report makes a number of recommendations regarding the operation of ASIC. I believe that these recommendations should be informed by the wider inquiry that has been announced by government into the financial market system—the Financial System Inquiry (FSI). The FSI will have the resources of government, will be able to consider the impact of regulation in a holistic fashion, will be able to look at the interaction of regulators and any weaknesses revealed since the last significant inquiry in 1997.

1.8 The FSI terms of reference are comprehensive:

The Inquiry is charged with examining how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth.

Recommendations will be made that foster an efficient, competitive and flexible financial system, consistent with financial stability, prudence, public confidence and capacity to meet the needs of users.¹

1.9 In particular the terms of reference deal directly with the question of regulation:

2. The Inquiry will refresh the philosophy, principles and objectives underpinning the development of a well-functioning financial system, including:

1. balancing competition, innovation, efficiency, stability and consumer protection;
2. how financial risk is allocated and systemic risk is managed;
3. assessing the effectiveness and need for financial regulation, including its impact on costs, flexibility, innovation, industry and among users;
4. the role of Government; and
5. the role, objectives, funding and performance of financial regulators including an international comparison.²

1.10 In addition it was clear from the evidence given by ASIC that some of the changes recommended by the committee majority have already been commenced or are being considered.

1.11 In these circumstances, I believe it is prudent to examine the further changes already underway within ASIC in the context of the wider FSI, and for parliament to consider changes presented by the government following the FSI.

Cost recovery charging by ASIC

1.12 Considerable thought needs to be given to any changes to the manner in which ASIC is funded, noting that changes potentially have broader consequences and could vary significantly from current practices. Despite this, there are clear advantages in considering change as canvassed in the majority report, from two key perspectives.

1.13 First, enabling ASIC to levy its fees to reflect the effort involved by ASIC in performing its regulatory functions is good practice, more equitable and fosters appropriate rational responses from regulated entities consistent with regulatory aims.

1.14 Secondly, if changes to ASIC's funding extended to enabling it to set its fees to cover its costs, without the need for it to rely on the government's annual budgetary process, it would introduce a degree of independence from government that could also deliver various desirable outcomes, helping ensure that the executive of the day could

1 Financial System Inquiry, <http://fsi.gov.au/terms-of-reference/> (accessed 23 June 2014).

2 Financial System Inquiry, <http://fsi.gov.au/terms-of-reference/> (accessed 23 June 2014).

not utilise funding ties to influence corporate regulatory outcomes for political reasons.

1.15 However, for these advantages to be realised, careful consideration is required to address a number of challenges.

1.16 The government—through the parliament—is currently responsible for setting the budget for agencies funded through taxes or levies.

1.17 If the government were simply to adopt a cost recovery model for ASIC, its appropriation would continue to be determined by the government and be subject to government budget policies and processes, including NPPs, efficiency dividends, and gross spending limits.

1.18 Cost recovery would merely facilitate the way in which revenues are determined to match the appropriation.

1.19 If an agency were possibly able to self-determine its own funding envelope through another funding mechanism, it could act on self-interest to expand its own regulatory reach and would be less accountable for its level of intrusion into community life and the economy. For that reason, any such approach would of necessity require appropriate third party assessment and approval of ASIC budgets.

1.20 Such an approach would also conflict with the long-accepted right of the government, acting under the scrutiny of parliament, to determine the scale and scope of an agency and its activities, in this case the costs incurred by business as a result of interactions with that agency.

1.21 As such, I consider any movement to a full cost-recovery model should be considered as part of the FSI.

1.22 The funding model of ASIC is in scope for review in the Financial System Inquiry.

Whistleblower protections

1.23 It is clear that the current protections afforded to private sector whistleblowers can be improved.

1.24 ASIC has stated that it could have responded better to whistleblowers who came forward in relation to the Commonwealth Financial Planning Limited matter, and has since taken action to update its procedures to improve the way it identifies and communicates with potential whistleblowers.

1.25 The Corporations Act protects employees, officers and contractors where they report suspected breaches of the corporations legislation to either ASIC, the company's auditor, or internally within the company.

1.26 ASIC has undertaken an internal review and updated its existing approach to dealing with whistleblowers in order to improve the way it identifies and communicates with potential whistleblowers:

...in particular I would like to mention our plans for dealing with whistleblowers. We have been working on dealing with our whistleblowers. Changes we are implementing include: establishing whistleblower liaison officers within all ASIC teams; staff will soon be receiving training in misconduct and breach recording and on awareness, whistleblower protections and handling whistleblower complaints; providing better, clearer and more regular communication to whistleblowers during investigations; and conducting a stocktake of matters involving whistleblowers to ensure they are getting appropriate priority.³

* * *

Yes, we certainly do recognise that whistleblowers may be vulnerable in certain situations and that there are some protections for them under the law. Our submission advocates an expansion of who qualifies for protection as a corporate whistleblower and also when we must produce documents in court revealing whistleblowers' identities. We are advocating additional protections there, in part because we do recognise the particular difficulties that whistleblowers face. We have also just announced some changes to our internal processes that are clearly aimed at improving the sort of interaction, communication and support that we can provide whistleblowers.⁴

1.27 ASIC's enhanced approach to whistleblowers encompasses its dealings with 'insiders' who seek to provide information to ASIC but who are not corporate whistleblowers (e.g. because they are no longer an employee of the company involved at the time they make the disclosure, or because they do so anonymously).

1.28 Given that the approach of ASIC has changed, but that specific protections may be required, I specifically endorse recommendation 14 of the report, whilst noting that recommendations 12, 13, 15, 16 should be considered as part of a government initiated review of whistleblower protections.

Further Inquiry, Judicial Inquiry or Royal Commission

1.29 There is no doubt that there was a failure of governance when it came to operations of certain advisors related to the Commonwealth Bank of Australia (CBA).

1.30 In fact CBA in its evidence clearly made such an admission:

Commonwealth Financial Planning Limited acknowledges that in the past a small number of its Advisers, none of whom remain with CFP, provided inappropriate advice to some customers.

3 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 2.

4 Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 25.

CFP deeply regrets that some of its customers were impacted in the past by poor advice they received from those Advisers.

CFP has no tolerance for behaviour that prejudices the financial wellbeing of its customers.

CFP acknowledges that a number of customers suffered financial losses as a result of inappropriate advice they received from certain Advisers.

These regrettable events are firmly in the past and CFP has taken decisive action to:

1. Investigate the quality of advice provided to customers;
2. Compensate customers who were adversely affected commencing in 2010;
3. Work closely with the Australian Securities and Investment Commission (ASIC) to remediate customers;
4. Have the remediation verified by an independent accounting firm;
5. Assist in funding independent legal or qualified financial advice for affected customers with respect to compensation;
6. Co-operate with ASIC, which took action to ban seven Advisers;
7. Enter into an enforceable undertaking with ASIC; and
8. Fundamentally transform its financial advice business.⁵

1.31 In response to its acknowledged problems CBA has made significant restitution:

Compensation payments totalling \$51 million have been paid to 1,127 customers. The remaining customers reviewed either received appropriate advice or suffered no loss from the inappropriate advice they received.⁶

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1.33 The governance failures linked to CBA were exacerbated by the fact that ASIC did not apply two important aspects of the compensation arrangements relating to Commonwealth Financial Planning Limited (CFPL) and Financial Wisdom Limited (FWL) to **all** affected clients.

The specific aspects related to:

- not all clients being initially consulted regarding compensation; and
- not all clients being offered \$5,000 to obtain independent advice.

5 Commonwealth Bank of Australia Group, *Submission 261*, p. 4.

6 Commonwealth Bank of Australia Group, *Submission 261*, p. 9.

1.34 As a result, ASIC has announced that it will impose specific license conditions on CFPL and FWL to address concerns around these issues.

1.35 A Royal Commission is primarily intended to undertake a fact-finding mission, however, the issues proposed to be examined here have already been extensively reviewed—including by ASIC, the CBA, the police and the committee.

1.36 Although a Royal Commission might recommend improved practices, existing institutions have already been at work exploring and driving wide-scale reform in the financial sector. ASIC's investigation into CFPL also predates the substantial changes to the regulation of financial advice under the Future of Financial Advice (FOFA) reforms, which have imposed strong obligations on advisers to prioritise their clients' interests over their own and to act in their clients' best interests. In addition, ASIC's actions have greatly transformed the practices, culture, compliance and quality of advice provided through CFPL as well as delivering \$51 million in compensation to date, with the potential for additional compensation to over 4,000 people under the new license conditions.

1.37 Given these circumstances, and given that the law has changed and will possible change again following the FSI, a Royal Commission or any other inquiry will incur significant cost to taxpayers without delivering any greater level of understanding or financial restitution. A fresh review of files and individual cases could protract the emotional strains on victims of malpractice over a longer time period, without the advantage of offering additional remedies beyond those that are already being worked through.

1.38 In fact it could raise false hopes that further compensation may become available.

1.39 On this basis I do not support recommendation 7 of the report.

Senator David Bushby
Deputy Chair