

Inquiry into the performance of the Australian Securities and Investments Commission

Interim report

1.1 On 20 June 2013, the Senate referred the performance of the Australian Securities and Investments Commission (ASIC) to the Economics References Committee for inquiry and report by 31 March 2014. The committee was to give particular reference to:

- (a) ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations;
- (b) the accountability framework to which ASIC is subject, and whether this needs to be strengthened;
- (c) the workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies;
- (d) ASIC's complaints management policies and practices;
- (e) the protections afforded by ASIC to corporate and private whistleblowers; and
- (f) any related matters.¹

1.2 On 5 August 2013, the then Governor-General prorogued the 43rd Parliament and a general election was held on 7 September 2013. The 44th Parliament commenced on 12 November 2013. Two days later, the Senate agreed to the committee's recommendation that this inquiry into ASIC's performance be re-adopted with a reporting date of 30 May 2014. To date, the committee has received 468 submissions and 96 supplementary submissions, conducted five days of public hearings and has received substantial amounts of additional information, correspondence and answers to questions on notice.

1.3 This is an important inquiry. The size and growth of Australia's financial sector and the fact that millions of Australians are involved in it, not least because of compulsory superannuation, makes it essential that modern and adaptable regulations are in place and regulators such as ASIC are at the top of their game.

1.4 The inquiry's terms of reference are broad and the submissions received by the committee traversed a wide range of concerns about ASIC's performance. Many of the people who wrote to the committee recounted their experiences of receiving bad financial advice, of unknowingly being placed in high-risk investments, of having documents forged and signatures used improperly. They referred to serious

1 *Journals of the Senate*, 2010–13, no. 150 (20 June 2013), p. 4110.

financial losses and difficulties in having their complaints addressed. In their view, the regulatory framework and the regulator had failed to protect their interests.

1.5 The committee could not investigate every allegation of misconduct before it. It decided, therefore, that it would conduct two case studies to enable the committee to examine ASIC's performance in greater depth. It would then use these initial findings to determine or to test whether there were common complaints or patterns in ASIC's behaviour evident in the remaining evidence. This evidence covered a range of issues including corporate collapses and non-compliance, liquidations, and whistleblowers. As its first case study, the committee looked at lending practices between 2002 and 2010 drawing its findings largely from over 160 submitters whose stories of irresponsible even predatory lending practices were remarkably similar.

1.6 The second case study involved the conduct of financial planners in Commonwealth Financial Planning Limited (CFP), part of the Commonwealth Bank of Australia Group (CBA), and ASIC's response to allegations of wrongdoing. A number of former CFP clients provided evidence that indicated that they had suffered significant losses because of the conduct of some unscrupulous advisers. They spoke of being bullied by CFP/the CBA, and described the stress and uncertainty that they and their families suffered as a result of misconduct at CFP. The inquiry raised questions about CFP's sales-based culture, which was described as 'toxic' at a public hearing. Allegations of forgery and a cover-up within CFP have also been aired.

1.7 One of the committee's key concerns in the CFP matter related to the adequacy and integrity of the ASIC-approved compensation arrangements that CFP/the CBA put in place for affected CFP clients.

1.8 The committee was well advanced in preparing its report, when on 16 May 2014, ASIC and the CBA advised the committee that there were inconsistencies in the way in which the compensation arrangements for CFP clients had been applied. This revelation suggested that, for some time, the CBA had not kept either the committee or ASIC fully informed about the compensation process for clients affected by serious misconduct within CBA's businesses (see attachments).

1.9 The latest information that ASIC and the CBA provided to the committee in order to correct the record was sketchy and left many key questions unanswered. They included the number of affected clients who did not receive correspondence from CFP and those who missed out on the offer of \$5,000 to help them pay for an expert assessor to assist their claim.

1.10 Concerned that it may still not have a correct understanding of what has happened, the committee has sought additional information and clarification from both ASIC and the bank on this matter of central importance to the committee's inquiry and report.

1.11 In light of these surprise developments, the committee is of the view that it requires more time to assess the significance the new evidence coming to light and

the responses it expects to receive from ASIC and the CBA. The committee agreed to table this interim report and to request an extension to present a final report no later than 26 June 2014.

Senator Mark Bishop
Chair

Commonwealth Bank Group

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16 May 2014

Dr Kathleen Dermody
Committee Secretary
Senate Economics References Committee
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Parliament House
Canberra ACT 2600

BY EMAIL: economics.sen@aph.gov.au

Dear Dr Dermody,

RE: Information provided to ASIC Inquiry by Commonwealth Bank of Australia Group

The Commonwealth Bank of Australia Group (**Group**) refers to its written submission to the Inquiry into the performance of ASIC (**Inquiry**) dated 11 November 2013 (**Submission**), the transcript of its appearance before the Inquiry on 10 April 2014 (**Transcript**) and its Answers to Questions on Notice dated 24 April 2014 (**Answers**). The Group wishes to clarify the following four points in these materials.

1. Review of customer files

The Group stated¹ that over 7,000 manual file reviews were carried out. Similar statements appear in the Transcript and the Answers including discussions of customers. We would like to ensure clarity and consistency of terminology and include cases where no compensation was assessed as payable as part of a review. The number of customers reviewed was 7,960 which represents 6,659 cases across Commonwealth Financial Planning Limited (**CFP**) and Financial Wisdom Limited (**FWL**). We asked 3,886 customers to provide supplementary information, and 1,265 customers responded with supplementary information.

By way of explanation, some cases involve multiple customers (such as where a husband and wife seek advice together and have multiple investments housed in different legal entities).

2. Compensation payments to customers

Total compensation payments specified in the Submission² were in respect of customers of CFP and FWL. Similarly, where we discussed our remediation process in the Answers³, this applied to both CFP and FWL customers.

¹ See section 3.3(f) on page 9 of the Submission, pages 28, 29 and 37 of the Transcript and page 8 of the Answers.

² In respect of section 3.3(g) of the Submission.

³ See page 8 of the Answers

3. Remediation process

The remediation process described in the Submission⁴ was not applied consistently. The primary differences were:

- (a) not all CFP and FWL customers were offered \$5000 to pay for an independent review of their assessment by a qualified accountant, solicitor, or licensed financial adviser of the customer's choice;
- (b) not all CFP and FWL customers received all the written communications described; and
- (c) in respect of FWL customers only, an independent accountancy expert did not endorse and oversee the remediation process, as FWL was not subject to the CFP enforceable undertaking.

4. Maurice Blackburn submission

In the Group's response to the submission to the Inquiry by law firm Maurice Blackburn⁵, the statement that CFP remained committed to ensuring that customers were offered financial support to obtain independent advice related only to customers of Mr Nguyen, as Maurice Blackburn only represented customers of Mr Nguyen.

Additionally, in response to a question from Senator Williams regarding the reviews of files of eight banned planners⁶, I incorrectly stated that the file reviews related to seven planners. The reviews related to all planners who were subject to the remediation process. The number of customers of the eight banned planners was 3,802.

Yours sincerely,

David Cohen
Group General Counsel
Commonwealth Bank of Australia

⁴ Detailed in sections 2.1(e)(v), 3.2(h) and Appendix C of the Submission.

⁵ In sections 3.3(k) to (p) of the Submission.

⁶ See page 37 of the Transcript.



ASIC

Australian Securities & Investments Commission

Senate inquiry into the performance of the Australian Securities and Investments Commission

Third submission by ASIC on Commonwealth Financial Planning Limited

May 2014

Purpose and scope

- 1 The Senate Economics References Committee Inquiry into the performance of the Australian Securities and Investments Commission (ASIC) (Senate Inquiry) has terms of reference that cover a wide range of ASIC's functions, powers, activities and resources. A particular focus of the Senate Inquiry is the manner in which ASIC dealt with problems within Commonwealth Financial Planning Limited (CFPL) and the outcomes that ASIC achieved in this matter.
- 2 ASIC has already provided the Senate Inquiry with two submissions about CFPL (ASIC's submissions):
 - (a) an initial submission, which provided an overview of ASIC's actions in relation to CFPL, as well as some context about our work in the financial advice sector; and
 - (b) a supplementary submission, which:
 - (i) highlighted key aspects of CFPL's transformation as a result of entering into an enforceable undertaking with ASIC;
 - (ii) provided further information on the methodology used by CFPL to compensate those clients who received inappropriate advice and suffered financial loss; and
 - (iii) provided an update on CFPL's compensation scheme.
- 3 ASIC is taking this action after the Commonwealth Bank of Australia (CBA) informed ASIC that the original process developed to compensate clients of two former CFPL advisers¹ was not applied consistently across all affected clients.
- 4 Accordingly, the purpose of this submission is to:
 - (a) correct certain statements made in ASIC's submissions about the CFPL compensation scheme. These statements were repeated in some of ASIC's testimony to, and answers to questions on notice from, the Senate Inquiry, the June 2013 Parliamentary Joint Committee and the July 2013 Senate Economics References Committee; and
 - (b) inform the Senate Economics References Committee that CBA will undertake further work to address the deficiencies in the compensation scheme methodology. This program of work will be overseen by an independent expert.

¹ Don Nguyen and Anthony Awkar, in Project Hartnett: see paragraph 5(a).

ASIC's submissions: CFPL compensation scheme

- 5 By way of background, CFPL implemented its compensation scheme in two phases:
- (a) The first phase was referred to as 'Project Hartnett', which remediated clients of Don Nguyen and, later, Anthony Awkar.
 - (b) The second wider phase, developed under the enforceable undertaking, was known as the 'Past Business Review'. This phase remediated clients of advisers who were the subject of a breach report² (by CFPL to ASIC) or about whom CFPL had received a complaint or who were otherwise a concern to CFPL.
- 6 ASIC's submissions stated that under the CFPL compensation scheme:
- (a) more than 7,000 client reviews had been performed;
 - (b) approximately 1,100 clients had been paid a total of approximately \$51 million; and
 - (c) CFPL had been unable to contact and finalise compensation in respect of 19 clients of Anthony Awkar.
- 7 ASIC's submissions also noted that:
- (a) Clients were restored to the financial position they would have been in had the inappropriate elements of the advice not occurred and had they been provided with appropriate advice.
 - (b) The process of determining whether compensation was payable to a client and, if so, how much, occurred in three phases:
 - (i) In phase one, a letter was sent to clients, who had not already engaged with CFPL, informing them that CFPL had concerns with the advice provided by their adviser and would be seeking to review the advice each client had received (upfront communication).
 - (ii) In phase two, CFPL assessed the client's circumstances and, in appropriate cases, telephoned the client to verify whether CFPL held accurate records relating to the client's needs, objectives and circumstances, and the advice that was provided to the client. These conversations allowed CFPL to test the reliability of the information CFPL had on its file, make an assessment as to whether inappropriate advice had been given to the client and, further, whether compensation could be paid promptly to the client. If the client's situation varied from CFPL records or other special circumstances existed (e.g. the client had submitted a formal

² Under the *Corporations Act 2001*, a holder of an Australian financial services (AFS) licence must report material breaches of financial services laws to ASIC.

complaint about the adviser; the client had been affected by multiple complex issues that would require more investigation; the client raised new issues regarding the advice they were given which CFPL was not aware of; the client had suffered from a particular hardship or special disadvantage), phase three occurred.

- (iii) In phase three, CFPL employees, as required, met with clients to obtain detailed information regarding their personal financial circumstances, needs and objectives, and the advice provided by their advisers.
- (c) A large amount of analytical work was completed on each client file. CFPL considered a number of questions, including:
 - (i) Did the adviser conduct a comprehensive investigation into the client's circumstances?
 - (ii) Was the client's risk profile clearly established?
- (d) If CFPL determined that compensation was payable, a letter was sent to the client which, among other things:
 - (i) made an offer of compensation;
 - (ii) explained how the compensation offer had been calculated; and
 - (iii) advised that CFPL would pay the reasonable costs (up to \$5,000) of an accountant, lawyer and/or independent licensed financial adviser to assess the compensation offer.

Corrected statements: CFPL compensation scheme

- 8 All elements of the compensation scheme methodology (as set out in paragraph 7) were followed in respect of clients of Don Nguyen and Anthony Awkar (in Project Hartnett). In addition, the offer to obtain independent advice was extended to all clients whose files were reviewed (not only those clients who received an offer of compensation: see paragraph 7(d)).
- 9 However, the methodology applied in respect of clients of certain CFPL advisers (in the Past Business Review) and certain Financial Wisdom advisers differed in two ways from the compensation scheme methodology (as set out paragraph 7):
 - (a) first, CFPL and Financial Wisdom did not send a letter to clients of certain advisers³ informing them that there were concerns with the advice provided and that the business would be seeking to review the advice the client had received (upfront communication).

³ About whom CFPL and Financial Wisdom held concerns about the quality of their advice.

(b) second, CFPL and Financial Wisdom did not advise clients, either those in respect of whom a compensation offer was made, or the broader group whose files were reviewed, that CFPL would pay the reasonable costs (up to \$5,000) of an accountant, lawyer and/or independent licensed financial adviser to assess the compensation offer.

10 In addition, ASIC's submissions reported that the compensation paid to affected clients of CFPL (under Project Hartnett and the Past Business Review) totalled \$51 million. The total compensation is now \$52 million. Of that amount, \$10.5 million was paid to affected clients of advisers of Financial Wisdom, and \$41.5 million was paid to affected clients of advisers of CFPL.

11 In relation to uncontactable clients, our supplementary submission reported that CFPL had been unable to contact 19 clients of Anthony Awkar. The correct number is, in fact, 45 clients. This number includes clients of Anthony Awkar and other CFPL advisers the subject of the Past Business Review. In our testimony to the Senate Inquiry in April 2014, ASIC used the correct figure of 45 clients.

12 ASIC remains of the view that the original compensation methodology, as applied in Project Hartnett, was fair and robust. However, the failure of CFPL and Financial Wisdom to consistently apply two key measures from the original methodology compromised:

- (a) the ability of clients to receive independent advice to assess the appropriateness of the compensation offered by CFPL and Financial Wisdom; and
- (b) the client's right to be informed of concerns about their adviser.

13 To address the inconsistency in the application of the original methodology, ASIC has announced that we will impose (by agreement) licence conditions on CFPL and Financial Wisdom that require those businesses to:

- (a) apply *all* measures set out in paragraph 7 to clients who did not originally receive the benefit of those measures during the original compensation process. This includes offering—to all clients contacted in their process—up to \$5,000 to seek independent advice from an accountant, lawyer and/or licensed financial adviser; and
- (b) allow all affected clients to reopen the question of compensation.

These measures will be offered to over 4,000 clients.

14 These corrective measures will be subject to oversight by an ASIC-appointed independent expert. The independent expert will report to ASIC and the results made public.