



## **Australian Government**

### **Australian Government response to the Senate Economics References Committee Report:**

#### **Performance of the Australian Securities and Investments Commission**

October 2014

**Economics References Committee**  
**Performance of the Australian Securities and  
Investments Commission**

Government Response

**Recommendation 1**

- The committee recommends that ASIC develop a multi-pronged campaign to educate retail customers about the care they need to take when entering into a financial transaction and where they can find affordable and independent advice or assistance when they find themselves in difficulties because of that transaction.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission already undertakes a multi-pronged approach to the education of consumers of financial products through its MoneySmart, financial literacy and consumer outreach programs.

The Australian Securities and Investments Commission's MoneySmart website has wide-ranging online content and practical tips about the questions people should ask, and the issues they should consider, when entering into various types of financial transactions or buying various financial products or services. It also has information and publications about where they can seek advice or how they can complain if they find themselves in difficulties.

The Australian Securities and Investments Commission regularly reviews its key messages to investors to ensure they remain accurate, up to date and reflect the external environment.

**Recommendation 2**

- As part of the multi-pronged campaign (see Recommendation 1), the committee recommends that ASIC actively encourage consumers to report any suspected unscrupulous conduct related to consumer credit.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission already undertakes a multi-pronged approach to the education of consumers of financial products through its MoneySmart, financial literacy and consumer outreach programs.

As part of these programs, the Australian Securities and Investments Commission already encourages consumers to report any suspected unscrupulous conduct related to consumer credit.

The Australian Securities and Investments Commission also fosters close working relationships with consumer groups, community legal centres, financial counsellors and legal aid offices. These organisations see large numbers of consumers affected by unscrupulous

conduct in relation to credit. The Australian Securities and Investments Commission encourages these organisations to pass on complaints and concerns from consumers.

### **Recommendation 3**

- The committee recommends that as the national credit reforms introduced in 2010 bed down, ASIC should:
  - carefully monitor the implementation of the new laws giving particular attention to activities that may fall outside the legislation but which pose risks to consumer interests;
  - ensure that it acts quickly to alert consumers to likely dangers and the government to any problems that need to be addressed; and
  - build capacity to monitor and research lending practices and to be prepared to launch marketing and education strategies should poor practices begin to creep back into the industry.

The Australian Government agrees with this recommendation.

Since the introduction of national credit reforms in 2010, the Australian Securities and Investments Commission has been very active in monitoring and enforcing compliance of the law. It will continue monitoring lending practices to ensure compliance with the national credit reforms.

The national credit reforms included a comprehensive licensing regime for all providers of consumer credit, including brokers and intermediaries. The reforms also included responsible lending requirements: these requirements ensure that credit providers do not provide unsuitable credit products and services—that is, products or services that do not meet the consumers' requirements or that the consumer does not have capacity to repay.

### **Recommendation 4**

- The committee recommends that ASIC devote a section of its annual report to the work of the financial services and consumer credit external dispute resolution (EDR) schemes, accompanied by ASIC's assessment of the systemic and significant issues the EDR schemes have raised in their reports to ASIC. Further, the committee recommends that ASIC include in this commentary information on any action in response to the matters raised in these reports.

The Australian Government agrees with this recommendation.

The Australian Securities and Investments Commission will devote a section of its annual report from 2014-15 to the work of External Dispute Resolution schemes.



#### **Recommendation 5**

- The committee recommends that the Financial Ombudsman Service and the Credit Ombudsman Service set key performance indicators (KPIs) for meeting milestones in their management of a complaint, publish these milestones and KPIs on their website and report their performance against these KPIs in their annual reports.

The Australian Government notes this recommendation.

The Financial Ombudsman Service and the Credit Ombudsman have already started reporting against key performance indicators in their annual reports. As the Financial Ombudsman Service and the Credit Ombudsman are independent entities, any decision to introduce further reporting is a matter for them.

#### **Recommendation 6**

- The committee recommends that ASIC, in consultation with the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service (COSL):
  - consider amending the terms of reference for FOS and COSL so that the caps on the maximum value of a claim that the EDR schemes may consider and the maximum amount that can be awarded are increased and indexed to the consumer price index;
  - examine the processes for reporting to ASIC matters of significance and emerging systemic issues with a view to improving the reporting regime;
  - establish protocols for managing allegations of less serious fraud to ensure that such complaints do not get lost in the system and are recorded properly on ASIC's databases;
  - improve the guidance provided to complainants so they fully understand that FOS and COSL are dispute resolution bodies and that complainants must prepare their own cases; and
  - consider establishing special divisions in FOS and COSL to deal with small business complaints.

The Australian Government notes this recommendation.

The Financial Ombudsman Service and the Credit Ombudsman have been putting in place improved business processes to address this recommendation. The Financial Ombudsman Service has put in place processes to report matters of significance to the Australian Securities and Investments Commission, including fraud, and updated its guidance to complainants. The Financial Ombudsman Service has recently released a Consultation Paper on potential amendments to its Terms of Reference; the Paper included questions around the caps. The Credit Ombudsman has been improving its timeliness in accessing cases.

As independent entities, any further improvements will be a decision for the Financial Ombudsman Service and the Credit Ombudsman to make. Such changes are made in consultation with the Australian Securities and Investments Commission, which is ultimately responsible for overseeing the effective operation of EDR schemes, as well as with industry and consumer representatives

The Australian Securities and Investments Commission will consult with the EDR Schemes on both improved reporting of systemic issues and the monetary and compensation caps.

#### **Recommendation 7**

- The committee recommends that the government establish an independent inquiry, possibly in the form of a judicial inquiry or Royal Commission, to:
  - thoroughly examine the actions of the Commonwealth Bank of Australia (CBA) in relation to the misconduct of advisers and planners within the CBA's financial planning businesses and the allegations of a cover up;
  - identify any conduct that may amount to a breach of any law or professional standard;
  - review all files of clients affected or likely to be affected by the misconduct and assess the appropriateness of the compensation processes and amounts of compensation offered and provided by the CBA to these clients; and
  - make recommendations about ASIC and any regulatory or legislative reforms that may be required.

The Australian Government does not agree with this recommendation.

There have been several Senate Committee and other inquiries into these and related issues in recent years, including the very comprehensive inquiry by this Committee. Since the Committee has reported, the Senate has also initiated a further inquiry related to these same issues.

Instead of initiating another inquiry, in relation to CBA Financial Planning, the Government considers that the most important focus must be on resolving any legitimate outstanding grievances from affected customers.

In that context, the Government has welcomed the Commonwealth Bank's announcement of the Open Advice Review Program, including the establishment of an Independent Review Panel, headed by retired High Court Justice the Hon Ian Callinan AC, the appointment of Promontory Financial Group as the Independent Expert to the Review and the provision of a national advertising campaign to notify affected customers.

The Government considers that the Open Advice Review Program and the various related initiatives as undertaken by CBA should be given the opportunity to work and resolve any outstanding and unresolved legitimate issues for aggrieved Commonwealth Bank customers.



In the meantime, the Government will of course engage with and respond as appropriate to the further inquiry initiated by the Senate in recent weeks.

#### **Recommendation 8**

- The committee recommends that ASIC establish a pool of approved independent experts (retired experienced and hardened business people with extensive knowledge of compliance) from which to draw when concerns emerge about a poor compliance culture in a particular company. The special expert would review and report to the company and ASIC on suspected compliance failings with the process funded by the company in question.

The Australian Government agrees in part with this recommendation.

The Australian Securities and Investments Commission regularly commissions independent experts to prepare reports on the compliance culture of particular entities. Although this commonly occurs in the context of negotiated outcomes, such as enforceable undertakings, the Australian Securities and Investments Commission may have the power to impose such an arrangement in a limited range of matters.

The Australian Securities and Investments Commission has experience dealing with a range of independent experts for this purpose and will seek to add to that range to ensure that the right expert (with the right mix of skills, experience and culture) is chosen in each case.

#### **Recommendation 9**

- The committee recommends that the government consider increased penalties and alternatives to court action, such as infringement notices, for Australian financial services licensees that fail to lodge reports of significant breaches to ASIC within the required time.

The Australian Government notes this recommendation.

The Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

#### **Recommendation 10**

- The committee recommends that ASIC review its surveillance activity with a view to making it more effective in detecting deficiencies in internal compliance arrangements.

The Australian Government agrees to this recommendation.

The Australian Securities and Investments Commission recognises the importance of a targeted and risk-based surveillance program to identify misconduct. The Australian Securities and Investment Commission will give consideration to this recommendation when designing individual surveillances.

### **Recommendation 11**

- In light of the Commonwealth Financial Planning matter, the committee recommends that ASIC undertakes intensive surveillance of other financial advice businesses that have recently been a source of concern, such as Macquarie Private Wealth, to ensure that ASIC's previous concerns are being addressed and that there are no other compliance deficiencies. ASIC should make the findings of its surveillance public and, in due course, provide a report to this committee.

The Australian Government agrees in part with the recommendation.

The Australian Securities and Investments Commission conducted an extensive surveillance of Macquarie Private Wealth (Macquarie) in 2011 and identified recurring compliance deficiencies. The Australian Securities and Investments Commission accepted an enforceable undertaking by Macquarie in January 2013, under which Macquarie agreed to rectify these deficiencies.

As part of the enforceable undertaking, Macquarie was required to compensate those customers who had been adversely affected by an adviser's failure. On 15 August 2014, the Australian Securities and Investments Commission announced that Macquarie would begin writing to 160,000 current and former clients of Macquarie about possible remediation for flawed financial advice.

The enforceable undertaking is scheduled to run until 29 January 2015. The Australian Securities and Investments Commission will continue to work with Macquarie to ensure that they improve their compliance to meet the standards the community expects of the financial advice sector. The Government welcomes the Australian Securities and Investments Commission's recent statement to the effect that the enforceable undertaking has already led to changes in Macquarie's management team and internal standards.

The Australian Securities and Investments Commission routinely publishes summary findings of surveillances that are conducted across an industry, including the financial advice industry. However, confidentiality considerations restrict the level of public reporting on the details of individual surveillance matters.

The Government further notes that the Australian Securities and Investments Commission has ongoing investigations into a number of former Macquarie financial advisers.

The Australian Securities and Investments Commission will continue to have a strong risk-targeted focus on the area of financial advice, as it is a sector that the Australian Securities and Investments Commission considers to be high-risk.



#### **Recommendation 12**

- The committee recommends that, consistent with the recommendations made by ASIC, the government develop legislative amendments to:
  - expand the definition of a whistleblower in Part 9.4AAA of the *Corporations Act 2001* to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners;
  - expand the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate; and
  - provide that ASIC cannot be required to produce a document revealing a whistleblower's identity unless ordered by a court or tribunal, following certain criteria.

#### **Recommendation 13**

- The committee recommends that an 'Office of the Whistleblower' be established within ASIC.

#### **Recommendation 14**

- The committee recommends that the government initiate a review of the adequacy of Australia's current framework for protecting corporate whistleblowers, drawing as appropriate on Treasury's 2009 *Options Paper* on the issue and the subsequent consultation process.

#### **Recommendation 15**

- The committee recommends that, subject to the findings of the broader review called for in Recommendation 14, protections for corporate whistleblowers be updated so that they are generally consistent with and complement the protections afforded to public sector whistleblowers under the *Public Interest Disclosure Act 2013*. Specifically, the corporate whistleblower framework should be updated so that:
  - anonymous disclosures are protected;
  - the requirement that a whistleblower must be acting in 'good faith' in disclosing information is removed, and replaced with a requirement that a disclosure:
    - : is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or
    - : shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes;
  - remedies available to whistleblowers if they are disadvantaged as a result of making a disclosure are clearly set out in legislation, as are the processes through which a whistleblower might seek such remedy;



- it is a criminal offence to take or threaten to take a reprisal against a person (such as discriminatory treatment, termination of employment or injury) because they have made or propose to make a disclosure; and
- in limited circumstances, protections are extended to cover external disclosures to a third parties, such as the media.

#### **Recommendation 16**

- The committee recommends that, as part of the broader review called for in Recommendation 14, the government explore options for reward-based incentives for corporate whistleblowers, including qui tam arrangements.

The Australian Government notes these recommendations.

The Australian Securities and Investments Commission has agreed to establish an Office of the Whistleblower, which will monitor the handling of all whistleblower reports, manage staff development and training and handle the relationship with whistleblowers on more complex matters. The Office will build on improvements that the Australian Securities and Investments Commission has made to its whistleblower arrangements through the adoption of a centralised monitoring procedure.

#### **Recommendation 17**

- The committee recommends that ASIC, in collaboration with the Australian Restructuring Insolvency and Turnaround Association and accounting bodies, develop a self-rating system, or similar mechanism, for statutory reports lodged by insolvency practitioners and auditors under the *Corporations Act 2001* to assist ASIC identify reports that require the most urgent attention and investigation.

The Government notes this recommendation.

Auditors and liquidators provide statutory reports to the Australian Securities and Investments Commission. These reports provide information on, among other things, alleged offences committed by officers of the companies the subject of audits or external administration.

The Australian Securities and Investments Commission has worked, and continues to work, to ensure that it promptly identifies statutory reports that require the most urgent attention and investigation. The Australian Securities and Investments Commission has done this by:

- Implementing a sophisticated scoring system to assess statutory reports. This system is designed to ensure that those matters which warrant further investigation are identified and referred to the appropriate team within the Australian Securities and Investments Commission for further investigation.

- Improving the questions asked in the statutory reports around potential offences. The Australian Securities and Investments Commission has consulted with the Australian Restructuring Insolvency and Turnaround Association (ARITA) concerning the questions about potential insolvent trading. This has resulted in the drafting of better questions about insolvent trading (these changes are currently being incorporated into the statutory report template). The Australian Securities and Investments Commission will further engage with ARITA and the accounting bodies to continue to improve the questions asked in the statutory reports around other alleged offences, such as breaches of director duties. The Australian Securities and Investments Commission will also seek to better communicate the results of our assessments, how we might better inform registered liquidators of what matters to the Australian Securities and Investments Commission in terms of alleged misconduct and better inform registered liquidators about how we use their reports other than as a basis for enforcement action (for example, our public reporting on corporate failure statistics).

#### **Recommendation 18**

- The committee recommends that ASIC establish a dedicated channel for complaints from certain key professional bodies, industry bodies and consumer groups, as well as for accountants and financial advisers/planners.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission already maintains dedicated channels and structured processes to allow stakeholders to make complaints to the Australian Securities and Investments Commission. The Australian Securities and Investments Commission has agreed to monitor the effectiveness of the existing measures before considering making further changes to its processes.

#### **Recommendation 19**

- The committee recommends that ASIC examine carefully:
  - its triage system to ensure that the officers managing this process have the skills and experience required to identify complaints and reports of a serious nature requiring attention;
  - its misconduct reports management system to ensure that once identified, a serious misconduct report is elevated and more senior people are available to deal with the issue; and
  - its culture to ensure that those managing complaints and reports who wish to draw to the attention of senior officers what they perceive as a potentially serious matter are encouraged to do so; that is, for ASIC to foster an open and receptive culture within the organisation so that critical information is not siloed.

The Australian Government agrees in part to this recommendation.



The Australian Securities and Investments Commission has recently undertaken a comprehensive review of its complaints management process. As a result, the Australian Securities and Investments Commission has made significant improvements in its handling processes. This has included increased telephone contact with persons who report misconduct, new procedures to identify and respond to misconduct reports that can be resolved quickly, improved website information about how to report misconduct, and how reports will be responded to, and regular online and telephone based customer satisfaction surveys to monitor satisfaction with processes and identify areas for improvement.

The Australian Securities and Investments Commission will undertake a formal review of its complaints management processes in 2016 to ensure that the improvements it has made have led to a more effective handling of alleged misconduct reports.

#### **Recommendation 20**

- The committee recommends that ASIC look at the skills it needs to forensically and effectively interrogate its databases and other sources of information it collates and stores, with a view to ensuring that it is well-placed to identify and respond to early warning signs of corporate wrongdoing or troubling trends in Australia's corporate world.

The Australian Government notes this recommendation.

The Government supports the Australian Securities and Investments Commission's risk-based approach to surveillance. In determining how it will allocate its resources efficiently to achieve the greatest market impact, the Australian Securities and Investments Commission will continue to investigate ways to improve its ability to search across its 30 current and legacy registers.

The Government will take into account the Australian Securities and Investments Commission's ability to interrogate information received when considering the findings of the scoping study into the ownership options of the Australian Securities and Investments Commission registry function.

#### **Recommendation 21**

- The committee recommends that ASIC put in place a system whereby, after gross malfeasance is exposed, a review of ASIC's performance is undertaken to determine whether or how it could have minimised or prevented investor losses or consumer damage. Spearheaded by a small panel of independent, experienced and highly regarded people (with business/legal/ academic/public sector and/or consumer advocacy backgrounds), together with all ASIC commissioners, this investigation would identify lessons for ASIC to learn and how to incorporate them into ASIC's mode of operation. The committee recommends further that their findings be published including details of any measures ASIC should implement.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission currently conducts internal reviews of most enforcement matters, including independent, external reviews (where appropriate).

The Government recognises that the Australian Securities and Investments Commission's current internal review process provides a means for disseminating organisational learnings from significant enforcement matters across the Australian Securities and Investments Commission's enforcement teams. The Australian Securities and Investments Commission is currently investigating how these internal review processes can be expanded to significant non-enforcement regulatory matters. In addition, commencing in September 2014, the Australian Securities and Investments Commission will conduct an internal review of all enforcement matters, except those which are discontinued within five months of commencement.

It is noted that due to commercial and sensitive nature of the information collected by the Australian Securities and Investments Commission during an investigation, there are difficulties in providing external reviewers with access to all of the confidential information collected by the Australian Securities and Investments Commission. This would necessarily hamper the ability of an external party to conduct reviews of the sort contemplated by the Committee.

#### **Recommendation 22**

- The committee recommends that the balance of ASIC's enforcement special account be increased significantly.

The Australian Government does not agree to this recommendation.

The balance of the Enforcement Special Account will continue to be considered in the context of the Government's ordinary Budget processes.

The special account has not been fully utilised by the Australian Securities and Investments Commission in recent years.

In order to reduce the barrier to the utilisation of the special account, the threshold that the Australian Securities and Investments Commission is required to spend before accessing the account has been reduced from \$1.5 million to \$750,000 from 1 July 2014.

#### **Recommendation 23**

- The committee recommends that the Attorney-General refer to the Australian Law Reform Commission an inquiry into the operation and efficacy of the civil penalty provisions of the *Corporations Act 2001* that relate to breaches of directors' duties.

The Australian Government notes this recommendation.

The Government recognises that there are number of questions as to how effectively the civil penalty provisions of the Corporations Act 2001 have operated, including whether they are hampering the Australian Securities and Investments Commission's ability to enforce the



law. The lack of clarity as to their operation also impacts on director's understanding of their obligations under the law.

The Government is considering this recommendation, having regard to the capacity of the Australian Law Reform Commission to undertake this inquiry and other references that the Government may make to the Commission.

#### **Recommendation 24**

- As enforceable undertakings can be used as an alternative to court proceedings, the committee recommends that when considering whether to accept an enforceable undertaking, ASIC:
  - require stronger terms, particularly regarding the remedial action that should be taken to ensure that compliance with these terms can be enforced in court;
  - require a clearer acknowledgement in the undertaking of what the misconduct was;
  - as its default position, require that an independent expert be appointed to supervise the implementation of the terms of the undertaking; and
  - consider ways to make the monitoring of ongoing compliance with the undertaking more transparent, such as requiring that reports on the progress of achieving the undertaking's objectives are, to the extent possible, made public.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission has implemented some changes in relation to the drafting, implementation and monitoring of enforceable undertakings since the commencement of the Inquiry, and is continuing to consider further changes.

The Australian Securities and Investments Commission will continue to seek to negotiate stronger terms in enforceable undertakings. However, these terms will depend on the agreement of the other party as it cannot unilaterally impose terms on them.

The Australian Securities and Investments Commission regularly negotiates the independent monitoring in enforceable undertakings where the undertaking involves detailed implementation steps over time including compensation mechanisms or reviews and changes to the businesses compliance mechanisms. This will continue, with a strong focus on ensuring the effectiveness of the independent monitor.

The Australian Securities and Investments Commission has committed to greater transparency and public reporting on the outcomes of enforceable undertakings and these processes are currently being designed.

**Recommendation 25**

- The committee recommends that ASIC should more vigilantly monitor compliance with enforceable undertakings with a view to enforcing compliance with the undertaking in court if necessary.

The Australian Government notes this recommendation.

The Australian Government recognises that compliance with enforceable undertakings is necessary to maintain community confidence. The Australian Securities and Investments Commission will increase its monitoring of enforceable undertakings and public reporting on the outcomes of the enforceable undertakings.

**Recommendation 26**

- The committee requests that the Auditor-General consider conducting a performance audit of ASIC's use of enforceable undertakings, including:
  - the consistency of ASIC's approach to enforceable undertakings across its various stakeholder and enforcement teams; and
  - the arrangements in place for monitoring compliance with enforceable undertakings that ASIC has accepted.

The Australian Government notes this recommendation.

The Auditor-General has recently announced that it would undertake an audit of the Australian Securities and Investments Commission's administration of enforceable undertakings. The audit objective is to assess the effectiveness of the Australian Securities and Investments Commission's administration of enforceable undertakings. The Auditor-General is expected to table its report in winter 2015.

**Recommendation 27**

- The committee recommends that ASIC include in its annual report additional commentary on:
  - ASIC's activities related to monitoring compliance with enforceable undertakings; and
  - how the undertakings have led to improved compliance with the law and encouraged a culture of compliance.

The Australian Government agrees with this recommendation.



The Australian Securities and Investments Commission will include further information about enforceable undertakings in future Australian Securities and Investments Commission annual reports, commencing with the annual report for the current year 2014-15.

**Recommendation 28**

- The committee recommends that ASIC develop a code of conduct for independent experts appointed as a requirement of an enforceable undertaking. In particular, the code of conduct should address the management of conflicts of interest.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission will develop a set of guidelines for independent experts appointed under an enforceable undertaking, in particular to address conflicts of interest, as part of its current program of work to improve the drafting, implementation, monitoring and transparency of enforceable undertakings.

**Recommendation 29**

- The committee recommends that ASIC improve its procedures for updating past online media releases and statements to reflect recent court developments, such as the outcome of an appeal or when proceedings are discontinued.
- ASIC should ensure that these updates are made in a timely manner and published in a more prominent position than what currently occurs.

The Australian Government agrees with this recommendation.

The Australian Securities and Investments Commission has updated its procedures to ensure past public statements are updated, in a timely way, to reflect subsequent court or tribunal developments.

**Recommendation 30**

- The committee recommends that when ASIC has been unsuccessful in court proceedings both an internal review and an independent review of the initial investigation and case must be undertaken.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission currently conducts internal reviews in respect of most enforcement matters. Commencing in September 2014, the Australian Securities and Investments Commission will conduct an internal review of all enforcement matters, except those which are discontinued within 5 months of commencement.

In appropriate cases, the Australian Securities and Investments Commission conducts external reviews of enforcement matters, including independent external reviews.

**Recommendation 31**

- The committee recommends that the accounting bodies and ASIC work to repair their relationship and commit to a more constructive approach to discussing regulatory issues. The committee requests that ASIC provide a written report to the committee in six months' time informing the committee of progress achieved in strengthening this relationship.

The Australian Government agrees with this recommendation.

The Australian Securities and Investments Commission recognises the importance of maintaining strong relationships with key stakeholders, including professional bodies and it is committed to productive, professional relationships with all stakeholders.

The Australian Securities and Investments Commission will inform the Senate Economics Committee of its progress in strengthening its relationship with accounting bodies.

**Recommendation 32**

- The committee recommends that ASIC publish on its website information about its secondment programs and the policies and safeguards in place that relate to these programs.

The Australian Government agrees with this recommendation.

The Australian Securities and Investments Commission published its secondment policy on its website on 25 July 2014. This policy provides information about the Australian Securities and Investments Commission's secondment programs and the policies and safeguards in one place.

**Recommendation 33**

- The committee requests that the Commonwealth Ombudsman consider undertaking an own-motion investigation into the allegations related to the process that resulted in ASIC granting regulatory relief for generic online calculators in 2005. An investigation undertaken by the Ombudsman should, in particular, consider whether the process was undermined because ASIC did not adequately manage a conflict of interest identified by a person on secondment from a financial services firm.

The Australian Government notes this recommendation.

The Commonwealth Ombudsman is an independent statutory officer and any investigation is at the Ombudsman's discretion. The Australian Government notes that responding to the recommendation is a decision for the Commonwealth Ombudsman.



#### **Recommendation 34**

- The committee recommends that after exercising its discretionary powers to grant relief from provisions of the legislation it administers, ASIC should ensure that it puts in place a program for monitoring and assessing compliance with the conditions of the relief.

The Australian Government does not agree with this recommendation.

The Australian Securities and Investments Commission considers a large number of applications for individual and class order relief every year. For example, during 2012–13, the Australian Securities and Investments Commission issued 41 class orders and received 3,094 applications for relief (of these, 2,047 were approved, 358 were refused, 318 were withdrawn and 371 were under consideration at the end of that period).

The Government supports the Australian Securities and Investments Commission's risk-based approach to surveillance. The Australian Securities and Investments Commission should continue to allocate its resources efficiently to achieve the greatest market impact. Diverting surveillance resources to monitoring the many pieces of relief which involve technical or minor amendments to the law would significantly compromise the Australian Securities and Investments Commission's ability to undertake surveillance on issues of much more significant risk.

#### **Recommendation 35**

- The committee recommends that ASIC include on all registry search results and extracts a prominent statement explaining ASIC's role and advising that ASIC does not approve particular business models.

The Australian Government notes this recommendation.

It is important that consumers recognise the limits of the Australian Securities and Investment's role and that, in particular, of the Australian Securities and Investments Commission does not approve particular business models. However, such information may be more effectively and efficiently disseminated via the Australian Securities and Investments Commission's main website or the MoneySmart website. The Australian Securities and Investments Commission will take into account this recommendation in updating its website.

The Australian Government will take into account this recommendation when considering the findings of the scoping study into the ownership options of the Australian Securities and Investments Commission Registry function.

### **Recommendation 36**

- In bringing together the multi-pronged campaign to educate retail customers outlined in Recommendation 1, ASIC have regard to the fact that:
  - many retail investors and consumers have unrealistic expectations of ASIC's role in protecting their interests; and
  - financial literacy is more than financial knowledge but also incorporates the skills, attitudes and behaviours necessary to make sound financial decisions. The committee recommends that ASIC include on all registry search results and extracts a prominent statement explaining ASIC's role and advising that ASIC does not approve particular business models.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission already undertakes a multi-pronged approach to the education of consumers of financial products through its MoneySmart, financial literacy and consumer outreach programs.

As part of these programs, the Australian Securities and Investments Commission is very conscious of these two factors and does and will continue to have regard to them in its financial literacy work and its broader communication with investors and consumers including those who lodge reports of misconduct with the Australian Securities and Investments Commission or use its websites.

The Australian Securities and Investments Commission launched the National Financial Literacy Strategy 2014-17 on 1 August 2014 (the Strategy). The Strategy was developed in consultation with stakeholders across all sectors and expressly acknowledges that financial decision-making is complex and a range of variables, including an individual's level of financial literacy as well as various external factors, can have an impact on outcomes.

The Strategy therefore takes a tailored approach to influencing financial decision making, and its priorities recognise that financial literacy initiatives need to reach people at relevant life stages, when they have particular decisions to make, and that those initiatives need to take into account each person's circumstances, experience, knowledge, beliefs and attitudes.

### **Recommendation 37**

- Recognising the importance of giving priority to the needs of consumers when ASIC develops regulatory guidance and provides advice to government, the committee recommends that ASIC should consider whether its Consumer Advisory Panel could be enhanced by the introduction of some of the features of the United Kingdom's Financial Services Consumer Panel.

The Australian Government does not agree with this recommendation.

The Australian Securities and Investments Commission has a close working relationship with its Consumer Advisory Panel and this relationship is an important part of the Australian



Securities and Investments Commission's work to identify and prioritise the needs and problems of consumers.

The Australian Securities and Investments Commission is committed to enhancing the sound and open relationships that it has with its stakeholders, including with the Consumer Advisory Panel. The Australian Securities and Investments Commission is committed to ensuring the effectiveness of the Panel for those purposes. The Australian Government notes that the United Kingdom's Financial Services Consumer Panel is a statutory body with staff and budget. The Australian Government does not support the proliferation of new statutory bodies, where functions can be undertaken by existing agencies.

**Recommendation 38**

- The committee recommends that ASIC undertake an internal review of the way in which it manages complaints from retail investors and consumers with the aim of developing training and professional development courses designed to:
  - have ASIC officers more attuned to the needs of vulnerable and disadvantaged consumers and to enhance ASIC's consumer advisory role;
  - devise strategies and protocols for responding to retail investors and consumers registering a complaint, many of whom are at their wits end and in desperate need of help;
  - ensure that ASIC officers, when advising a consumer to transfer their complaint to the relevant external dispute resolution scheme, make that transfer as seamless and worry-free as possible while conveying the sense that ASIC is not discarding their complaint; and
  - acknowledge the advantages of making a return call to the complainant and provide guidance for ASIC officers on the times when making a return call would be appropriate.

The Australian Government agrees to this recommendation in part.

The Australian Securities and Investments Commission has commenced work to improve its procedures for dealing with complaints and reports of misconduct. As part of this work, the Australian Securities and Investments Commission is implementing guidelines for communicating with witnesses and victims at various stages in the life of a project and providing training for staff on those new guidelines.

These new procedures build on improvements made to the Australian Securities and Investments Commission's complaints management processes since 2011, which introduced a protocol for dealing with reports of misconduct, provided clear communication objectives at each stage of the process for handling reports of misconduct and a commitment to providing clear information about reporting misconduct on the Australian Securities and Investments Commission's website.

The Australian Securities and Investments Commission has a strong focus and a good track record in identifying and addressing the problems of vulnerable and disadvantaged consumers.

**Recommendation 39**

- The committee recommends that ASIC promote 'informed participation' in the market by making information more accessible and presented in an informative way.

The Australian Government notes this recommendation.

The Government will consider this recommendation as part of its broader response to the Financial Systems Inquiry.

The Australian Securities and Investments Commission has worked extensively over many years to improve the quality of disclosure to retail investors. The Australian Securities and Investments Commission highlighted issues in relation to the effectiveness of disclosure in its submission to the Financial System Inquiry.

The Government has commenced a scoping study into the future ownership options for the Australian Securities and Investments Commission's registry function. The accessibility of information that is currently lodged with the Australian Securities and Investments Commission will be considered as part of the scoping study.

**Recommendation 40**

- The committee recommends that ASIC consider the aims and purposes of its website and redesign its website so that these aims and purposes are achieved.
- Particular consideration should be given to:
  - explaining ASIC's role clearly on the website's homepage;
  - providing a 'for consumers' category of information; and
  - redesigning the homepage to give greater prominence to key information and services and less prominence to recent media releases.

The Australian Government agrees with this recommendation.

The Australian Securities and Investments Commission is currently redesigning its website to provide greater accessibility and usability. The newly designed website will address the issues outlined by the Committee to give greater prominence to information about the Australian Securities and Investments Commission's role and functions.



#### **Recommendation 41**

- The committee recommends that the government commission an inquiry into the current criminal and civil penalties available across the legislation ASIC administers. The inquiry should consider:
  - the consistency of criminal penalties, and whether some comparable offences currently attract inconsistent penalties;
  - the range of civil penalty provisions available in the legislation ASIC administers and whether they are consistent with other civil penalties for corporations; and
  - the level of civil penalty amounts, and whether the legislation should provide for the removal of any financial benefit.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

#### **Recommendation 42**

- The committee recommends that financial advisers and planners be required to:
  - successfully pass a national examination developed and conducted by relevant industry associations before being able to give personal advice on Tier 1 products;
  - hold minimum education standards of a relevant university degree, and three years' experience over a five year period; and meet minimum continuing professional development requirements.

The Australian Government notes this recommendation.

The Government's goal is to ensure a robust but efficient financial services regulatory system; one that is competitively neutral so that people saving for their retirement or managing financial risks throughout their life can access high quality advice that is also affordable.

The Government will keep working with all relevant stakeholders on measures to lift professional, ethical and educational standards across the financial advice industry as appropriate.

The Government has established an industry working group to work with all relevant stakeholders on efficient and effective ways to further lift those standards across the financial advice industry. This will include consideration of initiatives such as increasing the education requirements for advisers, introducing a national exam, or introducing a broad professional standards framework with a professional standards board.

#### **Recommendation 43**

- The committee recommends that a requirement for mandatory reference checking procedures in the financial advice/planning industry be introduced.

The Australian Government notes this recommendation.

The Government considers that establishing an enhanced register of financial advisers (see also Recommendation 44) will go some way to achieving the objectives of this recommendation.

Australian Financial Services licensees already have a legal obligation to ensure their representatives are adequately trained and competent to provide financial services.

The new financial adviser register will support licensees in undertaking thorough due diligence on prospective employees and advisers operating under their licence. For example, the register will enable licensees to view the credentials and status of a prospective adviser.

#### **Recommendation 44**

- The committee recommends that a register of employee representatives providing personal advice on Tier 1 products be established.

The Australian Government agrees with this recommendation.

An industry working group has been established to advise the Government on the implementation of an enhanced public register of financial advisers. This public register will increase transparency and help to build trust and confidence in the financial advice industry.

The working group will consider:

- the scope and content of the register (including a record of each adviser's credentials and status in the industry);
- whether reporting obligations are placed on licensees and/or advisers;
- who is responsible for providing information and input of data; and
- potential privacy issues.

The working group includes representatives from the accounting, financial services, funds management, insurance broking, banking, stockbroking and superannuation industries, as well as consumer and academic representatives, the Australian Securities and Investments Commission and the Treasury.

The industry working group has provided its report to the Government in late August and its recommendations are currently being considered by Government.



**Recommendation 45**

- The committee recommends that the *Corporations Act 2001* be amended to require:
  - that a person must not use the terms ‘financial adviser’, ‘financial planner’ or terms of like import, in relation to a financial services business or a financial service, unless the person is able under the licence regime to provide personal financial advice on designated financial products; and
  - financial advisers and financial planners to adhere to professional obligations by requiring financial advisers and financial planners to be members of a regulator-prescribed professional association.

The Australian Government notes this recommendation.

The Government has established an industry working group to consider this recommendation.

**Recommendation 46**

- The committee recommends that the government consider whether section 913 of the *Corporations Act 2001* and section 37 of the *National Consumer Credit Protection Act 2009* should be amended to ensure that ASIC can take all relevant factors into account in making a licensing decision.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 47**

- The committee recommends that the government consider the banning provisions in the licence regimes with a view to ensuring that a banned person cannot be a director, manager or hold a position of influence in a company providing a financial service or credit business.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 48**

- The committee recommends that the government consider legislative amendments that would give ASIC the power to immediately suspend a financial adviser or planner when ASIC suspects that the adviser or planner has engaged in egregious misconduct causing widespread harm to clients, subject to the principles of natural justice.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 49**

- The committee recommends that the scoping study examining future ownership options for ASIC's registry function take account of the evidence that has been presented to the committee.

The Australian Government agrees with this recommendation.

The Government has allocated funds in the Federal Budget to undertake a scoping study into the future ownership options of the Australian Securities and Investments Commission's registry function. The scoping study will examine the various options for delivering the Australian Securities and Investments Commission's registry function.

The Government's decision on the future of the Australian Securities and Investments Commission's registry function will also be informed by the Financial System Inquiry, which is examining the role and objectives of the regulator.

**Recommendation 50**

- The committee recommends that the current arrangements for funding ASIC be replaced by a 'user-pay' model. Under the new framework, different levies should be imposed on the various regulated populations ASIC oversees, with the size of each levy related to the amount of ASIC's resources allocated to regulating each population. The levies should be reviewed on a periodic basis through a public consultation process.
- The government should commence a consultation process on the design of the new funding model as soon as possible.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.



**Recommendation 51**

- Following the removal of ASIC's registry responsibilities and the introduction of a user-pays model for funding ASIC outlined in Recommendations 49 and 50, the committee recommends that the government reduce the fees prescribed for chargeable matters under the *Corporations (Fees) Act 2001* with a view to bringing the fees charged in Australia in line with the fees charged in other jurisdictions.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 52**

- The committee notes that 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 Parliamentary Joint Committee consider this as part of its statutory ASIC oversight function.

**Recommendation 53**

- The committee recommends that the Parliamentary Joint Committee on Corporations and Financial Services consider how it could undertake its statutory duties in a way that places a greater emphasis on emerging issues and how action could be taken to pre-empt widespread investor losses or major frauds. As a first step the Parliamentary Joint Committee could, on an annual basis, reserve a public hearing to emerging issues, taking evidence from both ASIC and relevant experts.

**Recommendation 54**

- The committee recommends that the Parliamentary Joint Committee on Corporations and Financial Services inquire into the various proposals which call for a lifting of professional, ethical and educational standards in the financial services industry.

The Australian Government notes these recommendations.

Under the Australian Securities and Investments Commission Act 2001, it is a requirement of the Parliamentary Joint Committee on Corporations and Financial Services to monitor the Australian Securities and Investments Commission's performance. The Government notes that responding to the recommendation is a decision for the Parliamentary Joint Committee on Corporations and Financial Services.

The Government notes that the Parliamentary Joint Committee on Corporations and Financial Services holds regular public hearings into the oversight of the Australian Securities and Investments Commission and reports its findings to Parliament.

The Government is committed to improving the performance of the Australian Securities and Investments Commission and regulators more broadly. As stated in the Government's statement of expectations to the Australian Securities and Investments Commission, we will

provide it with further detail about a whole-of-government risk management framework and expectations for the Australian Securities and Investments Commission's performance against specific performance indicators in the second half of 2014.

The Government appreciates the importance of identifying emerging issues and early warning signals before they develop into major scandals. We support the Australian Securities and Investments Commission's risk-based approach to surveillance, and consider that the Australian Securities and Investments Commission is best placed to allocate its resources efficiently to achieve the greatest market impact.

On 14 July 2014, the Parliamentary Joint Committee on Corporations and Financial Services commenced an Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry.

In addition, the Government has established an industry working group to work with all relevant stakeholders on efficient and effective ways to continue lifting professional, ethical and educational standards across the financial advice industry. This will include consideration of initiatives such as increasing the education requirements for advisers, introducing a national exam, or introducing a broad professional standards framework with a professional standards board

**Recommendation 55**

- The committee recommends that at the end of two years, the Government undertake a review of the *Australian Securities and Investments Commission Act 2001* that would consider ASIC's governance arrangements, including whether ASIC should be governed by a board comprised of executive and non-executive members.

The Australian Government notes this recommendation.

The Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 56**

- The committee recommends that ASIC publish a code of conduct for its statutory office-holders.

The Australian Government notes this recommendation.

The Australian Securities and Investments Commission Act, APS code of conduct, the Public Governance and Accountability Act 2014, a range of internal Australian Securities and Investments Commission policies (such as the Harassment Policy, and the Disclosure of Interests Policy), as well as other disclosure and contractual obligations regulate the conduct of Australian Securities and Investments Commission employees and statutory office holders.

In order to improve transparency, the Australian Securities and Investments Commission will publish a document on its website summarising the obligations imposed on its statutory office-holders.



**Recommendation 57**

- The committee recommends that the government give urgent consideration to expanding ASIC's regulatory toolkit so that it is equipped to prevent the marketing of unsafe products to retail investors.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 58**

- The committee recommends that the Financial System Inquiry (FSI) carefully consider the adequacy of Australia's conduct and disclosure approach to the regulation of financial product issuers as a means of protecting consumers. In particular, the FSI should:
  - consider the implementation of measures designed to protect unsophisticated investors from unsafe products, including matters such as:
    - : subjecting the product issuer to more positive obligations in regard to the suitability of their product;
    - : requiring the product issuer to state the particular classes of consumers for whom the product is suitable and the potential risks of investing in the product;
    - : standardised product labelling;
    - : restricting the range of investment choices to unsophisticated investors;
    - : allowing ASIC to intervene and prohibit the issue of certain products in retail markets; and
    - : assess the merits of the United Kingdom's Financial Conduct Authority model which allows the Authority to suspend or ban potentially harmful products.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 59**

- The committee recommends that the government clarify the definitions of retail and wholesale investors.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 60**

- The committee recommends that the government consider measures that would ensure investors are informed of their assessment as a retail or wholesale investor and the consumer protections that accompany the classification. This would require financial advisers to ensure that such information is displayed prominently, initialed by the client and retained on file.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.

**Recommendation 61**

- The committee recommends that the government commission a review of Australia's corporate insolvency laws to consider amendments intended to encourage and facilitate corporate turnarounds. The review should consider features of the Chapter 11 regime in place in the United States of America that could be adopted in Australia.

The Australian Government notes this recommendation.

The Australian Government will consider this recommendation as part of its broader response to the Financial System Inquiry.