

List of recommendations

Recommendation 1

5.80 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.

Recommendation 2

6.39 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.

Recommendation 3

6.40 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.

Recommendation 4

7.39 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 taken in response to the matters raised in these reports.

Recommendation 5

7.82 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.

Recommendation 6

7.83 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.

Recommendation 7

12.28 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.

Recommendation 8

13.33 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.

Recommendation 9

13.34 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.

Recommendation 10

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

Recommendation 11

13.36 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.

Recommendation 12

14.112 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

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

Recommendation 14

14.114 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

14.115 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

14.116 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.

Recommendation 17

15.66 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.

Recommendation 18

16.42 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.

Recommendation 19

16.43 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.

Recommendation 20

16.44 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.

Recommendation 21

16.45 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.

Recommendation 22

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

Recommendation 23

17.51 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.

Recommendation 24

17.54 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.

Recommendation 25

17.55 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.

Recommendation 26

17.56 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.

Recommendation 27

17.57 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.

Recommendation 28

17.58 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.

Recommendation 29

18.22 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.

Recommendation 30

18.46 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.

Recommendation 31

19.50 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.

Recommendation 32

19.53 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.

Recommendation 33

19.56 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.

Recommendation 34

19.59 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.

Recommendation 35

20.33 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.

Recommendation 36

20.34 The committee recommends that 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.

Recommendation 37

20.41 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.

Recommendation 38

21.33 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.

Recommendation 39

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

Recommendation 40

22.38 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.

Recommendation 41

23.13 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.

Recommendation 42

24.57 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.

Recommendation 43

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

Recommendation 44

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

Recommendation 45

24.60 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.

Recommendation 46

24.61 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.

Recommendation 47

24.62 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.

Recommendation 48

24.63 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.

Recommendation 49

25.57 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.

Recommendation 50

25.61 The committee recommends that the current arrangements for funding ASIC be replaced by a 'user-pays' 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.

25.62 The government should commence a consultation process on the design of the new funding model as soon as possible.

Recommendation 51

25.63 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.

Recommendation 52

26.24 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

26.25 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

26.26 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.

Recommendation 55

26.46 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.

Recommendation 56

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

Recommendation 57

27.30 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.

Recommendation 58

27.32 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.

Recommendation 59

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

Recommendation 60

27.37 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, initialled by the client and retained on file.

Recommendation 61

27.52 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.