

Chapter 28

Concluding comments

28.1 Given the important roles that ASIC undertakes, an inquiry into its performance is overdue. The committee is pleased that ASIC constructively engaged with this inquiry and recognised the value of it, as the following statement by its chairman demonstrates:

...we welcome the inquiry into ASIC's performance. This has been a rigorous inquiry and it has allowed many Australians to have their say. It is an inquiry that ASIC has taken very seriously, and it is one to which we have devoted substantial resources. We are grateful that so many people have provided submissions to the inquiry, and we have closely considered all of the submissions in an effort, most importantly, to learn as much as we can from them.¹

28.2 In performing its regulatory roles, ASIC seeks to promote confident and informed investors and financial consumers, fair and efficient financial markets, and efficient registration and licensing. These are challenging tasks, particularly given the complex and difficult environment ASIC operates in. The committee appreciates that a regulator like ASIC is always going to disappoint someone. It will never have the resources necessary to act on every allegation of misconduct. Nevertheless, it is vital that participants in the financial system consider that the same rules will apply to everybody. Appropriate regulations enforced by a tough and responsive regulator will help promote public and international confidence in investing in Australia.

28.3 As a final chapter, the committee considered it would be useful to provide some additional comments about the recommendations that specifically relate to how ASIC operates. The majority of the committee's recommendations are designed to help ASIC become a self-evaluating and self-correcting organisation: a harsh critic of its own performance with the drive to identify and implement improvements. The recommendations recognise the need for ASIC to become a far more proactive regulator, ready to act promptly but fairly. With this aim in mind, the recommendations are intended to strengthen ASIC in several key ways.

28.4 A main objective is to improve ASIC's understanding and appreciation of Australia's corporate environment and those it regulates, and to ensure that ASIC has access to independent, external expertise. ASIC needs to be alert to emerging business models or new financial products and to match the inventiveness and resourcefulness of those in the industry who seek to circumvent the law. In this regard, the committee considers that ASIC should more effectively tap into the experience, knowledge and insight of retired and highly respected business people, legal professionals, academics

1 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 67.

and former senior public servants to help it identify and minimise risks that have the potential to cause significant investor or consumer harm.

28.5 Recommendations are also aimed at encouraging more information to be provided to ASIC, and for this information to be utilised more effectively. Building the analytical skills within ASIC necessary to discern early warning signs of unhealthy trends or troubling behaviour is a key goal. Australia needs a corporate and financial services regulator that has the analytical and investigative skills required to identify and act on problems early. ASIC should establish an internal system and encourage a receptive internal culture that will ensure that misconduct reports or complaints indicative of a serious problem lodged with ASIC are elevated to the appropriate level and receive due attention. The committee also believes that the corporate whistleblowing regime needs to be strengthened to encourage whistleblowers to come forward. Informed individuals need to be confident that they can report alleged misconduct, potentially unsafe products or dubious practices in Australia's corporate world.

28.6 Given the resource constraints and knowledge gaps that a body like ASIC will always encounter, the committee has also designed recommendations intended to make the regulatory system more self-enforcing, allowing ASIC to concentrate on key priorities and trouble areas. To achieve this, first ASIC needs to work effectively with other industry and professional bodies that share ASIC's goals. In particular, ASIC needs to ensure it has strong, constructive and cooperative relationships with all of the financial system gatekeepers. ASIC could also work with companies to strengthen their internal compliance regimes and their systems for reporting non-compliance to ASIC. Finally, ASIC should be primarily funded through a user-pays system of industry levies designed to reflect the cost associated with regulation and incentivise sectors to minimise the attention the regulator needs to devote to them. Again, more effective self-regulation will allow ASIC to focus on and more effectively deal with egregious misconduct.

28.7 ASIC's communication with members of the community needs to improve. In particular, the evidence taken by this committee reveals that ASIC must be more responsive and sensitive to the concerns of retail investors and consumers. Expectations about what ASIC can do also need to be appropriately managed. In this regard, steps to improve the level of financial literacy in Australia will, in the long-term, help to limit the number of people that encounter difficulties and turn to ASIC. The committee acknowledges ASIC's existing work in this area and urges ASIC to intensify its efforts.

28.8 ASIC's enforcement role is one of its most important functions. ASIC needs to be respected and feared. It needs to send a clear and unmistakable message, backed-up and continually reinforced by actions, that ASIC has the necessary enforcement tools and resources and is ready to use them to uphold accepted standards of conduct and the integrity of the markets. However, the resolution of a particular matter through enforcement action is not the end of the process—ASIC needs to ensure that a culture of compliance results from the enforcement action. For example,

when ASIC accepts an enforceable undertaking, it needs to have a mechanism in place that will provide assurances to the public that the desired changes have indeed taken place and that the entity has introduced safeguards that would prevent similar misconduct from recurring. The transparency associated with enforceable undertakings should also be enhanced; in particular, the report of an independent expert appointed as a result of an undertaking should be made public. On the other hand, when ASIC is unsuccessful in enforcement action it needs to reflect and learn what it can from the case.

28.9 The cases of misconduct in the financial advice industry and ASIC's evidence regarding the regulatory gaps in that industry have convinced the committee that various changes need to occur. The recommendations seek to improve the overall standards in the sector and provide ASIC with greater information and powers regarding problem advisers. For example, ASIC should be able to ban someone from managing a financial services business if ASIC has already banned them from directly providing financial services.

28.10 The committee also considered ways for ASIC to become more accountable and transparent. Increased transparency of its operations and how its functions are performed would be appropriate and may avoid accusations of the regulator being captured by big business. Some of the changes are straightforward, such as ASIC publishing more of its internal policies. ASIC also should keep the business and academic worlds better informed about developments and trends in corporate Australia by providing and disseminating information it receives from a range of sources, as well as ASIC's analysis of this information.

28.11 Finally, the committee considered the range of tasks ASIC performs. It is overburdened and charged with tasks that do not assist its other regulatory roles. The committee is of the view that ASIC's registry function should be transferred elsewhere to allow ASIC to concentrate on its core functions.

28.12 The recommendations developed by the committee are intended to address gaps in the legislative and regulatory framework and to encourage ASIC to consider how its performance can be improved. The committee strongly believes that these recommendations will allow ASIC to fulfil its legislative responsibilities and obligations more effectively. However, many of the issues with ASIC's performance cannot be addressed by anyone other than ASIC. In the committee's opinion, ASIC has been in the spotlight far too frequently for the wrong reasons. It is acknowledged that not all of the criticisms levelled at ASIC are justified; ASIC is required to perform much of its work confidentially and to ensure natural justice. It is also constrained by the legislation it administers and the resources given to it for this purpose. Nevertheless, the credibility of the regulator is important for encouraging a culture of compliance. That ASIC is consistently described as being slow to act or as a watchdog with no teeth is troubling.

28.13 This inquiry has provided many with the opportunity to have their say on ASIC's performance. It has made possible many valuable discussions about corporate

and financial services regulation in this country. The recommendations developed by the committee will lead to a more effective regulator. In addition, the committee believes that this inquiry has been a wake-up call for ASIC. The committee looks forward to seeing how ASIC changes as a result.

Senator Mark Bishop
Chair