

Additional Comments by Labor Senators

1.1 At the outset of these additional comments, Labor Senators want to indicate that they are broadly supportive of this legislation.

1.2 This legislation however, is no substitute for a Royal Commission. This inquiry, in fact, has received evidence that strengthens the case for a holistic and considered review of the sector rather than the ad-hoc nature of reforms taken by this Government in order to pursue political outcomes.

1.3 Many stakeholders have also made it clear that this legislation is unlikely to change the culture in major financial institutions.

1.4 In fact, the inquiry received no conclusive evidence to suggest that this legislation would have either prevented the six scandals set out on page 49 of the explanatory memorandum had the BEAR legislation been in place beforehand or would have triggered the BEAR's penalties.

1.5 The inquiry also heard how there could be competition impacts in the insurance sector, where entities with a parent ADI would be covered by the BEAR and others without an ADI related entity would not be covered.

1.6 Labor Senators note that the United Kingdom (UK) conducted a lengthy, fulsome review of the regulation of its financial sector and note the benefits that such a review brings.

1.7 A Royal Commission can conduct a fulsome review in Australia and consider legislative and regulatory changes from a holistic perspective, resulting in a set of interconnected reforms that complement and enhance each other.

1.8 In contrast, this Government has adopted an ad-hoc approach with a short consultation process that failed to meet the best practice expectations of the Department of Prime Minister and Cabinet's Office of Best Practice Regulation. The committee views in the main body of this report, supported by Government Senators, are also a clear sign that the Treasurer has botched the policy process.

1.9 A number of other concerns have also been raised through the inquiry and have been noted below.

1.10 Labor Senators won't stand in the way of the bill and note Recommendation 1 set out by Government Senators to allow a proper time for implementation.

1.11 Labor Senators will seek an amendment that smooths the implementation burden on small and medium ADIs.

The Government in its piecemeal approach to reform has missed an opportunity to take real action

1.12 Labor Senators note the approach of the UK in reviewing their own regulatory arrangements after the Global Financial Crisis, resulting in the Senior Manager and Certification Regime (SMCR) and note the comments made by stakeholders such as Dr Wardrop and CHOICE on this issue:

If you look at the UK position, the Financial Conduct Authority and the prudential regulator there—the twin peaks—work together on this type of stuff. They have codes of conduct that apply to all staff, from the top down, and then they have the code of conduct that applies to the senior managers, which is part of that. It seems like the regulators are working together on this idea in the UK, whereas what's happened here is that this has been put just into APRA's bailiwick at the moment.¹

Our take generally is that the UK system has been really constructive—that it has involved both regulators working together to define the limits of powers for each one and make sure that there aren't gaps. Because this was developed in tandem it just means that you don't end up with those awkward gaps between regimes that can happen when you split regulatory powers between a prudential and a consumer regulator.²

1.13 The UK harmonised the regulatory framework, making sure that the prudential regulator and the conduct authority were able to competently handle both prudential matters and non-prudential matters. The UK reforms ensured that there were no regulatory gaps and that regulatory responsibility was clear.

1.14 The Finance Sector Union (FSU) also made it very clear that UK rules also applied to all banking employees, from executives at the top of an organisation all the way through to frontline staff.

It really goes to the situation that the introduction of BEAR will be seen as an opportunity lost if not done to the depth and level of perhaps—and I think the representative from the ABA touched on this—the rollout of the UK senior manager regime. It's undertaken a 12-month to two-year process to ensure that a regulated regime does cover the top executives of UK financial institutions all the way to a frontline worker. The UK system is integrated and ensures that the processes and accountabilities of executives, CEOs and directors is captured in the same system as the accountabilities of frontline workers—and that process is cleanly explained—that provides the security and the different thresholds and different accountability points are well understood. I think the introduction of BEAR is a small snippet of that piece of regime from the United Kingdom as well as other places. It's an opportunity lost, not to take the will of executive accountability and roll it out across the industry.³

1.15 In contrasting the UK's approach to this Government's approach, it is clear that the Treasurer has selected a small component of the UK scheme without the supporting elements. This risks the BEAR being less effective, particularly if there are regulatory gaps or overlaps that confuse enforcement of behaviour. The rushed development of this bill heightens such risks.

1 Dr Ann Wardrop, *Committee Hansard*, 14 November 2017, p. 29.

2 Ms Erin Turner, *Committee Hansard*, 17 November 2017, p. 3.

3 Ms Alicia Clancy, *Committee Hansard*, 14 November 2017, p. 23.

Criticism of the consultation process and the influence of the major banks

1.16 Some stakeholders criticised the short consultation process for the Treasury draft legislation.

1.17 Australian Bankers' Association chief executive Anna Bligh stated that:

The seven-day consultation period announced by the federal government on new banking executive accountability laws is grossly inadequate and playing fast and loose with a critical sector of the economy.⁴

1.18 Dr Wardrop and Dr Wishart also raised concerns:

Senator KETTER: I go back to the policy development process for this bill. I'm not sure if you have any comments to make about that. Other stakeholders have suggested it's been somewhat truncated.

Dr Wishart: I think we'd agree—

Dr Wardrop: We'd agree with that.

Dr Wishart: We worked very quickly.

Dr Wardrop: Yes. In fact, our views about it change, depending on the time that we've had to look at it. So, yes, we would say it's been a very quick consultation time.

Dr Wishart: Yes, and I think our comments about some of the words that are used imply, without stating directly, that they might be a result of the swift development process of the bill.⁵

1.19 Even the Office of Best Practice Regulation raised concerns that best practice was not followed, stating that:

The Office of Best Practice Regulation (OBPR) assessed the Regulation Impact Statement (RIS) prepared by the Department of the Treasury as compliant with the Government's RIS requirements, but the process undertaken was not consistent with best practice. The OBPR considered that to only provide one week for affected stakeholders to consider and comment on draft legislation was a significant departure from best practice.⁶

1.20 Labor Senators' concerns about consultation were exacerbated when learning about secret discussions between the Government and the major banks before the policy was announced in the budget.

The Government also met with regulators in the UK to discuss the experience to date of the Senior Managers Regime – with follow-up

4 <http://www.afr.com/business/banking-and-finance/financial-services/treasurer-unveils-bear-trap-for-bank-boss-pay-20170922-gyn2ur>

5 Dr Ann Wardrop & Dr David Wishart, *Committee Hansard*, 14 November 2017, p. 29.

6 Department of Prime Minister and Cabinet, *Banking Executive Accountability Regime*, 15 November 2017, accessed via <http://ris.pmc.gov.au/2017/11/15/banking-executive-accountability-regime>

discussions following the Budget announcement. Options to address accountability gaps were also canvassed in discussions with the Chairs of the major ADIs in February 2017.⁷

1.21 It is not clear whether these discussions had any bearing on the policy options considered in the lead up to the budget announcement, such as limiting the scope of BEAR to prudential matters or to not harmonise the BEAR legislation and the ASIC enforcement review.

1.22 Labor Senators are concerned that the Government is selling an image of being tough on the banks, when in fact it appears that the major banks are the only stakeholders who get early access to policy discussions on banking accountability.

1.23 The explanatory memorandum and the inquiry process indicates that small and medium ADIs were not afforded the same access, despite the Treasurer's comments about wanting to promote competition in the sector.

Senator KETTER: The explanatory memorandum includes a discussion about the fact that the government was in talks with the major banks from around February on the issue of heightened accountability, not necessarily specifically in relation to the BEAR proposal. What was the involvement of your organisation in any of those discussions prior to the budget?

Mr Lawler: None.⁸

1.24 Labor Senators also note reports that Mr. Gonski was instrumental in the introduction of appeal rights into the legislation, further raising concerns that the major banks have a significant influence over this Government.

The provision of an appeal mechanism in the BEAR comes after Treasurer Scott Morrison called ANZ Banking Group chairman David Gonski, a well-respected voice in Canberra who helped broker the deal on behalf of the banking sector.⁹

Concerns that the bill has flaws which reflect the rushed process

1.25 The ABA raised concerns that the policy intent set out in the explanatory memorandum was not the same as the text set out in the bill:

From the start—and the ABA has done three submissions—we have always asked for clarity on these terms and some level of materiality. The threshold question if you go to prudential reputation is: what exactly is meant by that term? The legislation doesn't give that answer yet, so it is now given to APRA to answer that question, and I'll get to the implementation time frame in a while. APRA, the first agency in Australia and the first agency in the world, now have to sit down and say: what do we mean by 'prudential standing' and 'prudential reputation'? And then also test the question of materiality. The legislation itself is very much silent on materiality. One

7 Paragraph 2.75 of *Explanatory Memorandum*.

8 Mr Luke Lawlor, *Committee Hansard*, 14 November 2017, p. 6.

9 <http://www.afr.com/news/scott-morrison-makes-bear-concession-after-david-gonski-intervention-20171010-gyxvgm>

bad tweet could impact the prudential reputation of a bank, and I don't think that is what the explanatory memorandum intended. The explanatory memorandum does talk about behaviour that is systemic and prudential in nature that does have a material impact on the ADI. That's reflected in the EM; it's not reflected in the legislation.¹⁰

1.26 Dr Wardrop raised similar concerns:

There is, at the moment, a dissonance in the explanatory memorandum, which seems to say that the conduct which is being directed by this legislation has to be prudential and systemic, implying that there's some difference between the two. Then, when you look throughout the legislation, you see that, for example, in the enforcement provisions, an ADI will only ever suffer a civil penalty if they have not complied with their obligations and it relates to a prudential matter.¹¹

1.27 Dr Wishart went further and indicated that uncertainty about key words included in this legislation were signs of a rushed process. This may lead to confusion and uncertainty about how the BEAR will operate when the scheme starts:

Senator KETTER: If I'm reading between the lines correctly, are you suggesting that there are some things that haven't been properly thought through in this bill?

Dr Wishart: You could think that, yes.¹²

1.28 The highest volumes of concerns raised were about how this bill would operate alongside the Corporations Act. The inquiry received submissions which made statements such as:

Moreover, how such obligations interface, both practically and theoretically, with similar duties under the Corporations Act 2001 (Cth) is not clear.¹³

27. Labor Senators believe that the rushed nature of the bill has heightened uncertainty and that it is incumbent in the Government to clearly explain to the industry how the new obligations will operate alongside existing legislation such as the Corporations Act and other regulatory standards.

Concerns about the short implementation timeframe

1.29 Many stakeholders remain concerned about the short implementation timeframe, given the proposed 1 July 2018 start date. A wide range of stakeholders raised this concern, from the banks themselves as well as stakeholder groups and the regulator APRA.

1.30 APRA noted that:

10 Mr Aiden O'Shaughnessy, *Committee Hansard*, 14 November 2017, p. 10.

11 Dr Ann Wardrop, *Committee Hansard*, 14 November 2017, p. 27.

12 Dr David Wishart, *Committee Hansard*, 14 November 2017, p. 29.

13 Ann Wardrop, David Wishart and Marilyn McMahon, *Submission 14*, p. 3.

Following passage of the legislation, both APRA and the banking industry will have a great deal of work to do to implement the accountability regime by the scheduled commencement date of 1 July 2018. APRA expects that this timeframe will be challenging; for this reason, the legislation provides some additional transition arrangements in some areas.¹⁴

1.31 The ABA noted that:

As noted in our August and September submissions, the additional powers and responsibilities granted to APRA as part of the BEAR are significant. Effective implementation of the BEAR regime will require material effort and reallocation of resources by ADIs and APRA to meet the proposed deadline.¹⁵

1.32 The Australian Shareholder's Association said that:

While we acknowledge the government's desire to implement the legislation as soon as possible, we are of the view that ADIs will need time to undertake changes to policies, contracts and systems.¹⁶

1.33 The AICD said that:

We reiterate our view that the BEAR's implementation date should be deferred, so that it commences on 1 January 2019. This will enable all ADIs to prepare their affairs to be in full compliance with the BEAR, and enable APRA to provide the industry with sufficient guidance.¹⁷

1.34 During the inquiry, concerns were raised by Customer Owned Banking Association (COBA) about the problems of the 1 July 2018 start date when the Senate is inquiring into these bills this month, given the substantial amount of work required by both APRA and ADIs between possible passage of the legislation and 1 July 2018.

In order to effectively and efficiently implement the BEAR there are a number of things that must happen prior to the implementation date. APRA must develop its initial expectations in the form of draft standards and guidance. APRA must then consult with the industry on those expectations. APRA then must communicate its finalised expectations. ADIs need to understand those expectations, the impact they'll have on their businesses, and ADIs will then have to implement compliance with the standards and guidance through changes to policies, procedures, training, IT systems and so on. In general, APRA consults for at least three months on proposals it considers will lead to material changes, including the period for public consultation. Similarly, APRA generally aims for a period of one year from finalisation for ADIs to implement any material prudential standards. Six months is clearly insufficient time to do this.¹⁸

14 APRA, *Submission 11*, p. 6.

15 ABA, *Submission 10*, p. 6.

16 ASA, *Submission 2*, p. 2.

17 AICD, *Submission 16*, p. 2.

18 Mr Luke Lawler, *Committee Hansard*, 14 November 2017, p. 2.

1.35 Labor Senators note these concerns and believe that they have merit. It is important that the implementation of this BEAR regime is carried out correctly. Labor Senators note these concerns are shared by Government Senators as set out in Recommendation 1 of the main body of this report.

This legislation is likely to do little to address consumer outcomes

1.36 The Consumer Action Law Centre (CALC) and CHOICE made it clear that the legislation would do little for consumer outcomes:

We've one clear ask of the committee, and that is to give this BEAR real teeth. Treasury has restricted the application of the proposed BEAR so that it will apply to poor conduct or behaviour that is of a systemic and prudential nature. This misses the crucial element of the United Kingdom model that ties accountability measures to poor consumer outcomes, not just prudential matters.¹⁹

We hope that the requirement for accountable persons to pay due regard to the interests of consumers and treat them fairly can be added to the BEAR. As it stands, what we've got is a bit of a teddy bear. We need something much more powerful. I will leave that with the one request we are making today of the committee: please consider extending the regime so that it goes beyond prudential matters and considers consumer outcomes.²⁰

1.37 When the basic question of whether this legislation would have made a material difference to the scandals set out on page 49 of the explanatory memorandum, both APRA and Treasury were unable to give a definitive answer:

We haven't back-tested any of those examples or any others you could mention, again, on the basis that without interrogating and investigating the situation through the lens of BEAR, we cannot definitely say what the outcome would be. What I can say of those ones listed and some others is that they were certainly matters of prudential concern that we were investigating and so would have been investigated through the lens of BEAR. But it would be inappropriate for me to say what the outcome was, without an investigation having taken place.²¹

I don't think Treasury's in a position to do an analysis and to look back as to whether a law would have applied in particular circumstances, I think for the same reason that Mr Brennan indicated when you were talking with APRA-you look at conduct matters in relation to the law you have available at the time and assessing whether it will apply and a different law that applied in the future is very challenging.²²

19 Ms Katherine Temple, *Committee Hansard*, 17 November 2017, p. 1.

20 Ms Erin Turner, *Committee Hansard*, 17 November 2017, p. 2.

21 Mr Pat Brennan, *Committee Hansard*, 17 November 2017, p. 20.

22 Ms Diane Brown, *Committee Hansard*, 17 November 2017, p. 30.

1.38 Paragraph 2.86 of the main report is a clear indication that even Government Senators wish for heightened accountability to be extended to consumer outcomes and note that the BEAR legislation is insufficient in this regard.

1.39 Labor Senators understand the difficulty in advising on the impacts of legislation had it been in place during the time that events occurred. However, when this issue is considered alongside concerns that the BEAR's remit will be limited to 'prudential' matters, it raises concerns that this legislation might not be targeted at policy outcomes.

The effect of this legislation on small and medium ADIs

1.40 COBA raised concerns that this legislation might introduce significant additional regulatory costs and make it more difficult to challenge the major banks:

The Treasurer's second reading speech says that in addition to enhanced accountability the government also wants a robustly competitive banking system. To meet the twin objectives of an unquestionably accountable banking system and a robustly competitive banking system, it's critically important to minimise the regulatory compliance burden on smaller ADIs. Generally speaking, the regulatory compliance burden is a critical factor in determining whether the competitive fringe of second-tier ADIs can challenge the major banks. This is because the regulatory compliance burden is effectively a competitive advantage to the major banks, because they have vastly greater resources and capacity than their smaller competitors to cope with new regulatory obligations. In the case of the BEAR, reducing the regulatory compliance burden can be achieved by giving small and medium ADIs sufficient time to plan and prepare for the BEAR and for APRA to give due consideration to relevant guidance and prudential standards to implement a proportionate BEAR.²³

1.41 COBA in its submission also noted other reforms that its members are trying to implement at the same time as the BEAR legislation, and the pressure it puts on some internal departments:

- new credit card rules
- new consumer credit insurance rules
- new breach reporting rules
- new product design and distribution obligations
- new product intervention power for ASIC
- new co-regulatory model for industry codes
- new external dispute resolution scheme
- new data breach notification requirements, and
- new reporting obligations about foreign tax residents.²⁴

23 Mr Luke Lawlor, *Committee Hansard*, 14 November 2017, p. 1.

24 COBA, *Submission 13*, p. 7.

1.42 Bendigo bank also raised concerns that:

In addition to the issues highlighted in the ABA's submission, the Bank believes that section 37G of the Bill sets out disproportionate penalty unit maximums for medium and small sized ADIs, in comparison to large ADIs.²⁵

1.43 Paragraph 2.84 of the main report confirms that Government Senators hold this same view.

1.44 Labor Senators are concerned about the impact of this legislation on small and medium ADIs and support COBA's request to smooth the implementation cost and burden by delaying the commencement date for small and medium ADIs. Labor Senators note that paragraph 2.87 of the main report indicates that Government Senators share these same concerns.

The cultural divide between frontline workers and executives when it comes to accountability

1.45 The FSU made it very clear that the current approach to accountability reform in the financial services sector was ad-hoc at best and not in line with the UK's approach:

But the process of banning senior managers is, again, another snapshot out of the UK regime that's trying to be bolted together without the systematic review processes that led to the senior manager regime in the UK. So we have BEAR that's come out through this process, through APRA, through ASIC, looking at filling that partial hold between executives and frontline workers, as part of the UK system, and then the other part of the UK system being plugged by the ABA through their conduct of the background check process.²⁶

As I said, the difference between our first submission to Treasury and now was particularly the ASIC enforcement review of the senior managers ban. That shed a light that saw a potential third element of accountability throughout the industry. It saw APRA with some accountability, ASIC with some accountability for different people, and then the industry having an accountability regime underneath it. And we were just concerned that the speed with which this was being undertaken was going to leave us in a position that meant that the true accountability that we're calling for across the industry was going to be lost in what were becoming very complex, very overlaid systems.²⁷

1.46 The FSU went further to say that these different schemes could worsen cultural divides in banking organisations:

It is possible that by only providing an administrative appeals process to executives through BEAR, a cultural and accountability divide is created

25 Bendigo Bank, *Submission 18*, p. 1.

26 Ms Alicia Clancy, *Committee Hansard*, 14 November 2017, p. 23.

27 Ms Alicia Clancy, *Committee Hansard*, 14 November 2017, p. 20.

between executives and frontline workers, who do not have such an appeal process and are therefore potentially exposed as scapegoats for poor outcomes.²⁸

1.47 Labor Senators support the intent of the FSU's recommendation to have a coherent accountability framework from top to bottom. At the very minimum Labor Senators believe that frontline staff included in the ABA's conduct background check be afforded a similar appeals process to the appeals mechanism that banking executives fought for, and received as a concession, during the consultation process on the BEAR legislation.

The regulatory responsibilities of ASIC and APRA are further confused in this legislation

1.48 This legislation further blurs the lines of responsibility between ASIC and APRA. Labor Senators believe that a Royal Commission should include in its scope whether the powers, regulatory approach and responsibility of each regulator is fit for purpose in addressing the misconduct and poor consumer outcomes that have occurred in the industry.

1.49 Dr Wardrop, Dr Wishart and Associate Professor McMahon note the differences in regulatory approach currently:

APRA prides itself on employing a regulatory approach which is forward-looking, primarily risk-based, consultative, consistent and consistent with international best practice. It actively supervises by maintaining continuing conversations with institutions as to the matters with which it is concerned. ASIC, on the other hand is a much more traditional regulator, albeit one still adhering to the regulatory compliance pyramid based on the Ayres and Braithwaite model.²⁹

1.50 This legislation will change the relationship between APRA and ADIs:

Senator GALLAGHER: I accept that, but doesn't the BEAR change that? This is not about behind-the-scenes quiet chitchats telling people they need to change what they're doing, that APRA has some level of concern; the BEAR is very different. They're moving into a much more of an enforcement arrangement, which would seem to me to align much more logically with ASIC.

Mr Kirk: That's true for at least some of the elements of the BEAR-that they would more likely involve public action and look more like enforcement action-but that sort of tool is already available to APRA under its existing legislation.³⁰

1.51 It is also unclear whether any case would not involve concurrent investigations by both APRA and ASIC:

28 FSU, *Submission 19*, p. 3.

29 Ann Wardrop, David Wishart and Marilyn McMahon, *Submission 14*, p. 6.

30 *Committee Hansard*, 17 November 2017, p. 27.

Senator GALLAGHER: For incidents that get covered under this regime as outlined in the legislation, can you think of any situation that wouldn't involve ASIC, where you wouldn't have dual investigations going on? If an incident triggered BEAR, wouldn't it also trigger some ASIC investigation?

Mr Saadat: Potentially, where there's a situation of misconduct that doesn't impact consumers or investors.

Senator GALLAGHER: Isn't that what it's about? I'm trying to think of a situation where you wouldn't have to be running a concurrent investigation under your responsibilities.

Mr Kirk: We were suggesting there may be instances of conduct which trigger the BEAR but do not translate into particular bits of misconduct impacting consumers. It may be about the broader management of their risk management systems and failures in management of a significant nature at that level. Those sorts of things are beyond ASIC's reach. For those sorts of risk management type systems arrangements, there is a clear exemption from some of the things that we look at. They're the purview of APRA. Whilst I would acknowledge there will be cases, as there are now, where we're both interested, there are potentially cases where it's only APRA.

Senator GALLAGHER: Perhaps once your senior management banning regime-I don't know what it's going to be called-is put in place, it would be even more likely that an accountable person penalised under BEAR would also trigger some response from ASIC.

Mr Kirk: The senior management regime is not yet designed or legislated, but I think that would have to be one of the things considered in that process.³¹

1.52 ASIC made it clear during the inquiry that they requested additional powers to heighten accountability well before the idea of BEAR was first announced:

Senator GALLAGHER: The first I heard of it was a couple of estimates ago. It's over a year.

Mr Kirk: It's in that sort of order, yes. But during that time there have been a large number of issues looked at.

Senator GALLAGHER: Yes, I'm aware of that. When did ASIC first become aware of the work underway on the BEAR regime? And did it fall into the work that was being done around assessment of ASIC's tools and capability?

Mr Kirk: Again I can't give you a date, but I think it was probably in the early months of this year. We had discussions with Treasury about a desire to increase accountability. They talked to us about what were the limitations in ASIC's existing regime in terms of holding managers to account, and a bit about what could be done within that regime, particularly things that might be able to be done by ASIC in terms of new licence conditions and the like, and we explained some of the limitations of that. Then there was a

31 *Committee Hansard*, 17 November 2017, p. 27.

decision by government to go with the sort of approach that they have taken, and we have had less to do with that since, because it has been focused on APRA and on prudential issues. At that point, we saw the vehicle for getting greater accountability around conduct issues to be the enforcement review and that's been our focus subsequently.³²

1.53 The decision to implement the BEAR regime and to put it in APRA's scope of responsibility was a decision of government:

Senator KETTER: Can you tell us who made the decision to give responsibility for BEAR to APRA?

Mr McDonald: That would be a government decision

Senator KETTER: And to focus on prudential aspects of banking behaviour rather than-

Mr McDonald: That's a government decision.³³

1.54 Labor Senators remain concerned that decisions for the BEAR regime to cover prudential matters only and to have APRA be responsible for its enforcement have not been clearly outlined by the Government. Given ASIC requested additional powers to hold managers to account, it seems strange that the BEAR would be developed with little consideration for ASIC's role in managing conduct as well.

The impacts on the insurance market

1.55 Evidence received by the inquiry confirmed that some entities in the insurance market will be covered by the BEAR regime, while others will not be covered:

Senator GALLAGHER: Are we going to be in a situation where-because Commonwealth Bank have off-loaded CommInsure-the new owner of CommInsure won't be covered by this legislation?

Mr Brennan: To the extent that they're not an ADI, they won't be covered. I'm not completely familiar with the terms of the agreement. It is possible that even when an ADI off-loads a subsidiary they have some involvement. It might be selling or supporting the products, even if they're not taking the insurance risk. It depends on the cases, but your first point is correct-some insurance companies will be covered; some won't be.

Senator GALLAGHER: It seems a bit inconsistent to me. I can't see how CommInsure will be covered, because it's been bought out entirely, in my understanding, by a global insurer, but Westpac's BT, for example, which is owned by Westpac, will be covered. Those businesses are in direct competition.³⁴

1.56 ASIC in evidence to the PJC on Corporations and Financial Services committee also confirmed their view that other parts of the financial sector should be covered, including the insurance:

32 *Committee Hansard*, p. 25.

33 *Committee Hansard*, p. 29.

34 *Committee Hansard*, p. 20.

A third aspect to this is that at the moment it is restricted to banks, while in the UK it extends to insurance companies. That might be an area to be thinking about as a next phase.³⁵

1.57 CHOICE also supported this view:

Senator KETTER: Okay. To both organisations, my question is in relation to APRA's submission, which sort of postulates that this regulation could be extended at a later date to other parts of the finance industry. Do you have any views about that—firstly Ms Turner and then Ms Temple?

Ms Turner: I don't disagree with them. If it's not extended at the moment, we'd certainly want it to be extended in future. We know in the United Kingdom it has been extended to insurers, and I think, given that a lot of concerns that consumers have about the finance sector have related to insurance scandals, that seems very appropriate.³⁶

1.58 Labor Senators note these comments, and that paragraph 2.86 of the main report states that Government Senators endorse this view. Labor Senators will monitor any policy developments in this area should the Government seek to extend the scheme to cover other parts of the industry.

Labor Senators position on this bill

1.59 The legislation is no substitute for a Banking Royal Commission.

1.60 Stakeholders made it clear that the UK conducted a lengthy, fulsome review of the regulation of its financial sector. A Royal Commission into this sector in Australia can conduct a fulsome review in Australia and consider legislative and regulatory changes from a holistic perspective, a set of interconnected reforms that complement and enhance each other.

1.61 Many stakeholders raised concerns about the ad-hoc approach taken by this Government. Concerns were raised about the differences in intent set out in the bill as opposed to the explanatory memorandum, that the ASIC enforcement review was not considered alongside this legislation and that the BEAR regime included an appeal mechanism when frontline staff covered by the ABA conduct background check process would not be given a similar mechanism. Labor Senators believe that these issues are caused in part by the rushed process to develop this legislation, legislation which seeks political outcomes more than policy outcomes.

1.62 Labor Senators remain concerned that the legislation will not have a major impact on culture in this industry. No clear answers were offered to say that the BEAR regime would have had any impact on recent banking scandals had the BEAR legislation been in place at the time those events occurred. On this basis, it is difficult to believe that this legislation will have a major impact on the culture within the banking and financial services sectors. More will have to be done.

35 Mr Greg Medcraft, *PJC Corporations and Financial Services Hansard*, 11 August 2017, p. 30.

36 *Committee Hansard*, 17 November 2017, p. 4.

1.63 Labor Senators are also concerned about this legislation further blurring the responsibilities of APRA and ASIC in regulating conduct within the banking sector.

1.64 The inquiry confirmed that some entities in the insurance market will be covered by the BEAR while others will not be covered. Labor Senators will monitor any policy developments in this area should the Government seek to extend the scheme to cover other parts of the industry.

1.65 Labor Senators are also concerned about the 1 July 2018 start date and the impact of this start date on small and medium ADIs.

1.66 Labor Senators also note that many of the same concerns raised in these additional comments are shared by Government Senators.

1.67 Labor Senators won't stand in the way of the bill, but will seek an amendment to reduce the implementation burden on small and medium ADIs.

Recommendation 1

1.68 To amend the bill in the Senate so as to have a commencement date for small and medium ADIs of 1 July 2019.

Senator Chris Ketter

Deputy Chair

Senator Jenny McAllister

Senator for New South Wales