

## Chapter 13

### Summary . . .

# Managing Change

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## Overview

- This chapter sets out the steps involved in managing the changes recommended by this Inquiry, identifies the recommendations made in the preceding chapters which would most benefit from early action, and suggests an order in which the changes might be implemented.

## Key Recommendations

- The Government should take a staged approach to implementing this Report.
- It should give priority to announcing its position on the commercially sensitive recommendations involving mergers and ownership of financial institutions.
- It should then announce its position on the remaining recommendations, implement those that do not require a change in legislation, and negotiate with the States/Territories over those issues that involve current State/Territory responsibility.
- The Government should then establish the new regulatory agencies proposed by this Report, and transfer the existing Commonwealth based responsibilities to those agencies.
- The final step should be investing those agencies with new or changed responsibilities and implementing the remaining recommendations.



## Managing Change

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### 13.1 Introduction

This Report makes a number of recommendations, ranging from changes in the responsibilities of regulatory agencies, through changes in regulatory approach, to specific changes in the regulations being administered.

The purpose of this chapter is to:

- set out the steps involved in managing the recommended changes;
- identify the recommendations made in the preceding chapters which would most benefit from early action; and
- suggest an order in which the changes might be implemented.

### 13.2 Key Issues

#### 13.2.1 General Approach

This Report recommends the establishment of two new regulatory agencies: the Australian Prudential Regulation Commission (APRC) and the Corporations and Financial Services Commission (CFSC). These agencies will:

- assume functions currently performed by other Commonwealth or State based bodies; and
- assume responsibility for new functions.

The Report also recommends that the surveillance of excluded superannuation funds to ensure compliance with the *Superannuation Industry (Supervision) Act 1993* be transferred to the Australian Taxation Office.

There are two options for implementing these changes:

- the ‘big bang’ approach under which the new regulatory institutions are created and all necessary changes to legislation are made in time for them to take effect from the date of commencement of the new bodies; or
- a more staged approach.

The Inquiry favours the staged approach, which need not involve a prolonged implementation period.

- Full implementation will require negotiation with State/Territory governments, but other changes can be implemented immediately.
- Considerable managerial effort would need to be devoted in the early stages to melding existing functions performed by different regulators and engendering a common regulatory culture within the new organisations.

***Recommendation 113: A staged approach to change is required.***

A staged approach should be adopted to implementing the recommendations of this Report, commencing with announcement of the Government’s position in principle on the main recommendations, and followed by establishing the new regulatory agencies and investing them with existing regulatory functions.

### **13.2.2 Commercially Sensitive Recommendations**

The recommendations in this Report on merger policy and ownership of financial institutions, in particular, may be considered to carry significant commercial implications. These should be implemented as a matter of priority to minimise uncertainty.

## Merger Policy

It is highly desirable that the Government announce its position on the mergers and acquisitions recommendations as soon as possible, in order to quell speculation and provide commercial certainty. The key recommendations are that the Government:

- abandon the 'six pillars' policy;
- adopt an interim policy position of accepting the Australian Competition and Consumer Commission (ACCC) or tribunal/court findings on the competition implications of mergers;
- consider the views of the Reserve Bank of Australia (RBA) and the Insurance and Superannuation Commission (ISC) on the prudential implications of mergers prior to the necessary legislative amendments; and
- remove the complete policy prohibition on the foreign takeover of any of the four largest banks and not object to some increase in foreign ownership of the Australian financial system.

These recommendations could be implemented immediately upon the Government forming a position. The fundamental changes require only a change to existing regulatory policy.

## Ownership of Financial Institutions

The current restrictions on ownership of financial institutions by non-financial entities and on holding company structures are not the subject of explicit legislation. The proposed changes to policy on ownership will enhance the competitiveness of the financial system and could be implemented by means of a policy statement issued by the Treasurer. Those recommendations are that:

- mutually-owned organisations should be permitted to hold a banking licence;
- a financial conglomerate should be permitted to adopt a non-operating holding company structure; and

- subject to prudential considerations being met, and provided the substantial part of the operations of a group relates to licensed financial activities, non-financial entities should be allowed within the group, particularly where their activities relate to the provision of services to the group or to other financial institutions.

These changes in policy could be implemented in advance of the establishment of the APRC.

### 13.2.3 Other Major Policy Changes

#### Payments System

The changes to open access to the payments system by participants who meet prudential standards (other than those requiring legislation) could be implemented as soon as appropriate standards can be developed. The existing access arrangements are not mandated or subject to specific legislation, outside the general competition provisions in the *Trade Practices Act 1974*. The Inquiry believes this is an important measure to generate greater competition within the financial system. (The Payments System Board should be established, and other legislative changes made, when the APRC is established.)

#### Prospectuses

There are two critical legislative changes that, in the Inquiry's view, need not await the establishment of the CFSC:

- Recommendation 4, concerning the overlap between s. 52 of the Trade Practices Act and other legislation requiring positive disclosure; and
- Recommendation 9, concerning profile statements.

In each case the existing provisions have been criticised as creating an uncertain and costly fundraising environment for business and warrant early attention.

## Consumer Protection Regulation

The Australian Securities Commission (ASC) and ISC are currently seeking to harmonise the regulation of investment advisers and life agents. The Inquiry believes this work can be extended to encompass the single licensing regime for investment advice and life agents envisaged in Chapter 7.

Following consultation with the States/Territories, action could also be taken at an administrative level for the ASC to assume the consumer protection oversight roles currently performed by the ISC and Australian Payments System Council (APSC).

The recommendations concerning the development of a single gateway for consumer complaints and a complaints resolution scheme covering finance companies do not require legislative backing and should also be implemented as soon as possible, in consultation with industry.

### 13.2.4 Areas of State Responsibility

The Report recommends in two cases that parts of the regulatory framework currently administered by the States/Territories be transferred to a single regulatory agency accountable to the Commonwealth Treasurer:

- responsibility for the prudential regulation of non-bank financial institutions should be transferred from the Australian Financial Institutions Commission (AFIC) and the State Supervisory Authorities (SSAs) to the APRC; and
- responsibility for the registration and corporate governance of non-bank financial institutions, which currently lies with AFIC and the SSAs, should be transferred to the CFSC.

The Report also notes the need to make various State regulations consistent, including State taxation measures. For example, Chapter 11 refers to the need to amend State/Territory evidence laws to allow for the admission of evidence in electronic form, to develop uniform trustee companies legislation, and to make State/Territory transaction taxes and duties as uniform as possible in their application and administration.

Substantial changes are also proposed to the current responsibilities of the ASC.

The challenge is to implement these recommendations while recognising the State/Territory governments' longstanding interest in:

- the possible impact on State/Territory finances in areas involving taxation or imposition of fees for registration or other services;
- concerns about regional levels of service;
- the extent to which there are local conditions or factors which require regional variations to the proposed national approach;
- details of financial arrangements; and
- where appropriate, transfers of State government staff involved in the function.

It is beyond the scope of this Inquiry to set out a detailed timetable and plan for the implementation of recommendations which touch on areas of State/Territory government involvement. However, some observations can be made.

### **Commitment at Senior Government Level to Structural Changes**

The Inquiry recommends that, as a first step, the Commonwealth should focus on seeking the agreement of the States/Territories for:

- renaming the ASC as the CFSC and the additional responsibilities being recommended for the new body; and
- transferring responsibility for the regulation of non-bank financial institutions to the Commonwealth.

### **Preferred Legislative Model**

It is assumed that the Commonwealth lacks constitutional power to pass legislation with complete coverage in the area of non-bank financial institutions.



Various models of national legislative systems are in place. At one level, the States/Territories might refer constitutional power to the Commonwealth to allow it to pass stand-alone legislation. Given the pace of change and the importance of the financial system to the national economy, this is the Inquiry's preferred method for transferring to the Commonwealth responsibility for regulating non-bank financial institutions.

An alternative approach is through the Corporations Law, which was established under an agreement between the States, Territories and the Commonwealth in June 1990. That agreement provides for the States/Territories to maintain a modified policy role in certain changes to the legislation. The existing agreement has achieved the goal of providing adequate State/Territory involvement at Ministerial level in policy issues, without unduly impeding the efficiency of the legislative scheme.

Because it is a cooperative scheme, the Corporations Law model suffers from some diffusion of parliamentary accountability. To provide clear lines of accountability and parliamentary responsibility, the Inquiry would prefer that, where it is necessary for current State/Territory functions to be performed by a Commonwealth agency, the agency operate under stand-alone Commonwealth legislation, if necessary following a referral of constitutional power by the States and Territories.

If this is not possible, a scheme could be devised in which institutions could opt to be subject to Commonwealth stand-alone legislation. Under this option, the majority of institutions (by assets) would be likely to opt in because of the advantages of a unified scheme. However, it could fragment the market, resulting in a structure that would be less robust than one based on clear constitutional power or a Commonwealth/State agreement, and reducing the protection for depositors in State based institutions. It is therefore not the preferred option.

## **Changes to the ASC**

This Report recommends that the companies and markets regulator, the ASC, also be given responsibility for consumer protection regulation in respect of banks, non-bank financial institutions, superannuation and insurance.

The Inquiry believes it is important to build on the current legislative underpinning of the Corporations Law in changing these responsibilities. The Corporations Law, under the Heads of Agreement on Corporate Regulation, should continue to be the legislative vehicle for corporations, financial products and financial markets regulation, and the CFSC should be responsible for administering it. The Corporations Law or a similar model should also be used as the legislative vehicle for conferring responsibility for State/Territory functions, in the absence of a referral of power.

Under the Heads of Agreement, a change to the name of the ASC and changes to the constitution of the ASC to provide for a governing board or independent chairperson of the CFSC will require the consent of some States/Territories as well as the Commonwealth. Similarly, it would be within the spirit, if not the letter, of the agreement for the Commonwealth at least to consult the States and Territories on the proposals for investing it with responsibility for consumer protection in banking, insurance and superannuation.

## General Process for Developing National Approaches

There are a number of mechanisms in place for improving the uniformity of State and Territory laws. These mechanisms are specific to each particular project, and proceed at varying speeds. For example, the Standing Committee of Attorneys-General (SCAG) has been monitoring progress with amendments to evidence laws. These amendments, among many other things, update the law to recognise electronic documents and transactions. Through SCAG, the Commonwealth and New South Wales governments agreed to develop joint amendments based on an Australian Law Reform Commission report completed in 1987.<sup>1</sup> The Commonwealth and New South Wales governments have now implemented these reforms.<sup>2</sup> Other jurisdictions are considering adopting the amendments.

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1 Australian Law Reform Commission 1987.

2 See the *Evidence Act 1995* (Commonwealth), which covers proceedings in federal courts and the courts of the Australian Capital Territory. NSW has enacted basically identical legislation, the *Evidence Act 1995* (NSW), which covers proceedings in NSW courts exercising State or federal jurisdiction.

The roots of modern consumer credit regulation preceded the deregulation of the financial system in the 1980s. The emergence of finance companies — which, unlike banks, did not face interest rate controls — led to the first round of consumer credit legislation between 1972 and the mid-1980s. There were various attempts during the 1980s by individual States to revise and update consumer credit legislation, under the auspices of the Standing Committee of Consumer Affairs Ministers. Those efforts culminated, following a long history of discussions through the Ministerial Council of Consumer Affairs, in the adoption by all States and Territories with effect from 1 November 1996 of the *Uniform Consumer Credit Code*.

State and Territory stamp duty legislation in New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory is currently the subject of review by the Commissioners of State Revenue. The Stamp Duty Rewrite project commenced in November 1994. It is expected that a proposal for uniform stamp duty legislation will be ready to introduce into the New South Wales Parliament by the middle of this year. The remaining jurisdictions have indicated that they may adopt the resulting legislation.

While these developments are encouraging, the existing mechanisms do not ensure a coordinated approach by all jurisdictions, and they are slow in achieving results. The Inquiry therefore considered whether a more systematic process should be put in place, given the pace of change in financial markets and the costs of regulations which impede that change.

The Law Institute of Victoria recommended the establishment of a Commission for the Enactment of Uniform Commercial Laws in Australia, partly funded by the private sector.<sup>3</sup> It would include a small, technically competent work force and dedicated drafting resources.

While the current mechanisms have produced results in some cases, the Inquiry is convinced that a more efficient process is needed. If this process is to succeed, however, it is also critical that it be endorsed at senior

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3 Law Institute of Victoria, Supplementary Submission No. 74. See also Law Society of New South Wales, Supplementary Submission No. 92, which made a similar submission supporting the establishment of a Financial Law Panel “to help ensure the effectiveness of the underlying legislative framework of financial regulation and assist in its revision, particularly to meet the changing circumstances associated with globalisation” (para. 2.1).

government level, and that agreement be reached on priorities and time frames for completing uniformity exercises.

***Recommendation 114: A panel for uniform commercial laws should be established.***

A Panel for Uniform Commercial Laws in Australia (PUCL) should be established, to pursue uniform Commonwealth, State and Territory commercial laws. Agreement should be reached at the Council of Australian Governments level on the establishment of the panel and its priorities and deadlines. The panel should complete its task by no later than the end of 1999.

### **13.2.5 Establishment of Financial Sector Advisory Council**

Chapter 12 discusses the role of the Financial Sector Advisory Council (FSAC). As an advisory council with no official monitoring role, it should not be a statutory body with its own appropriation. However, given the nature of its role, it should be established by administrative action as soon as practicable.

## **13.3 Summary**

In summary, the recommendations could be implemented in four distinct stages:

- **Stage 1** — announcement of Government response to commercially sensitive areas; formulation and announcement of Government response to other areas; implementation of those changes set out in Section 13.2.2 above.
- **Stage 2** — implementation of legislative and policy changes set out in Section 13.2.3; agreement in principle with States/Territories on transfer of the prudential regulatory responsibilities of AFIC to the

Commonwealth and changes in the responsibilities of the ASC; establishment of FSAC and PUCL.

- **Stage 3**— establishment of APRC and CFSC with responsibilities transferred from existing Commonwealth agencies.
- **Stage 4**— significant amendments to legislation to implement other major policy changes; conferring of State/Territory functions on APRC and CFSC; implementation of outcomes of other policy reviews.

***Recommendation 115: Proposed sequence for implementing the recommendations.***

Implementation of the recommendations of this Report, if accepted, should proceed in the following broad sequence:

- announcement of the Government’s decisions on mergers policy and ownership of financial institutions;
- development and announcement of the Government’s in-principle responses to the proposals for the regulatory framework;
- establishment of the FSAC;
- implementation of the changes to promote competition in the payments system and to improve disclosure and consumer protection regulation;
- negotiation and agreement with the States and Territories on the in-principle approach to be adopted to the proposed transfer of prudential and related responsibilities to the Commonwealth, the changes to the responsibilities of the ASC, and the establishment of the PUCL;
- establishment by legislation of the new regulatory agencies and their investment with existing regulatory functions, with parallel processes of internal consultation within existing regulatory agencies;
- development and enactment of legislative reforms, and the subsequent implementation of reform proposals by the regulatory agencies; and

- implementation of the outcome of proposed review processes, for example for the *Uniform Consumer Credit Code*.