

## TREASURY COMMITTEE'S MAXWELLISATION INQUIRY

### SUBMISSION ON BEHALF OF

### THE FINANCIAL SERVICES LAWYERS' ASSOCIATION

1. The Financial Services Lawyers' Association ("FSLA") is an association for financial services lawyers, regulators, academics, judges and policy experts to share ideas about financial services law and regulation. Its members include many lawyers whose work involves participation in inquiries and investigations in the financial services context. FSLA members represent those undertaking inquiries and investigations, as well as those who are the subject of inquiries and investigations.
2. This submission sets out the comments of a FSLA working group on the three topics raised in the Terms of Reference of the Maxwellisation Inquiry set up by the Treasury Committee. This submission does not necessarily reflect the views of all FSLA members.

#### **(1) What the law requires**

3. Part 5 of the Financial Services Act 2012 makes no express provision for a process of Maxwellisation within an inquiry arranged by the Treasury under s.68, an investigation carried out by the FCA under s.73, or an investigation carried out by the PRA under s.74. Statements of policy by the FCA and PRA on the conduct of such investigations includes: "Should it be necessary, those subject to potential criticism in the report will be given an opportunity to make representations in response before it is finalised."<sup>1</sup>
4. However, even in the absence of any formal requirement for Maxwellisation, a person carrying out an inquiry or investigation pursuant to that legislation will be under a public law duty to act fairly<sup>2</sup>. That duty is likely to require the provision of some opportunity to those who may be criticised in a public report to respond to the intended criticisms before publication. The timing and procedure for such opportunity is not prescribed.
5. This position contrasts with inquiries set up under the Inquiries Act 2005, to which the Inquiries Rules 2006 apply. Rules 13 to 15 make detailed provision for the sending of Warning Letters to

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<sup>1</sup> PRA Policy Statement, "Conducting statutory investigations", April 2013, paragraph 32; FCA "How the Financial Conduct Authority will investigate and report on regulatory failure", April 2013, paragraph 7.13.

<sup>2</sup> See, for instance, the comments by Lord Denning in Re Pergamon Press [1961] Ch 388.

those who may be criticised. Such rules offer a good model which, as proposed below, might be of assistance in inquiries or investigations under Part 5 of the Financial Services Act 2012.

6. In addition to responding to the technical question of “what the law requires”, FSLA suggests that the Inquiry should also consider why Maxwellisation has evolved and whether it is a good thing.
7. In the view of many FSLA members, Maxwellisation is very valuable and important. The primary benefits of an inquiry following such a process are that:
  - a. It helps ensure that the inquiry’s findings are accurate fair and soundly based; and
  - b. It provides an element of protection for individuals’ rights, whether they are an individual person or a legal entity.
8. As to the first point, Maxwellisation can improve the quality of a report by giving the authors the opportunity to correct factual inaccuracies and reconsider their interpretation of documents and witness evidence in light of comments made during the process. The responses received can help authors to ensure that a report is balanced and that it fairly records differing perspectives on the same set of events.
9. As to the second point, it fulfils a need for natural justice. Those facing criticism for their conduct outside the framework of the criminal justice system or civil litigation should be able to comment on those criticisms, even if the conclusions remain unchanged. Omitting or curtailing Maxwellisation from a public inquiry or investigation may impose a heavy toll on its perceived and actual impartiality, quality and fairness. Furthermore, if the criticism turns out to have been based on a misunderstanding of the evidence given or the significance of a document having been overlooked, an individual will have been subject to unnecessary and unjustified vilification which it will be too late to remedy.

## **(2) Typical problems that arise during Maxwellisation**

10. FSLA members recognise and have experience of various problems arising during Maxwellisation including the following:
  - a. From the perspective of the public and those who set up the inquiry, Maxwellisation can be perceived as:

- i. Causing delay between the inquiry reaching conclusions and publishing its report;
    - ii. Increasing costs of the conduct of the inquiry;
  - b. From the perspective of those conducting the inquiry, Maxwellisation can appear to be used by consultees as a vehicle (or additional opportunity) for advocacy;
  - c. From the perspective of those subject of the inquiry, mystery surrounding the process can cause consultees to feel obliged to provide responses which are in fact unhelpfully long and unfocussed;
  - d. From all perspectives, problems can arise where it is necessary to go back to an individual for a second time (“re-Maxwellisation”). In particular, there is the potential for conflicting evidence being received or a significant shift in the burden of criticism placed on an individual.
11. The amount of time spent on Maxwellisation (and the consequent additional cost) appears to be the main issue which has prompted the Treasury Committee to set up this Maxwellisation Inquiry. The Inquiry is invited to bear in mind the possibility that Maxwellisation may, in some cases, have been used as something of a scapegoat to explain delay by those conducting inquiries and investigations. If Maxwellisation in some form is necessary and desirable, then it follows that it is appropriate for any inquiry to spend some time and money on the process. Increasing the length of an inquiry by a proportionate and reasonable amount of time does not therefore constitute “delay” at all.
12. In the experience of FSLA members, Maxwellisation does not have to take an unreasonable amount of time, and so genuine “delay” is far from inevitable. “Delay”, properly so called, arises from the particular process which an inquiry decides to follow and the way in which it follows such process. For example:
- a. The HBOS inquiry involved re-Maxwellisation which, with hindsight, could perhaps have been avoided by more comprehensive evidence gathering and analysis before the first Maxwellisation process began. The total time devoted to Maxwellisation was 14 months (although the vast majority of this time appears to have been spent by the inquiry team reviewing the Maxwellisation responses).

- b. The Leveson inquiry concluded evidence gathering in July 2012, sent out a series of Warning Letters to newspaper titles in August 2012 and to individuals in and after September 2012 and published its report in November 2012. The total time devoted to Maxwellisation was a few months at most.
  - c. FSLA members have experiences, in the context of investigations into relatively discrete events, of Maxwellisation being carried out within one month and within one week.
13. The factors which influence the length of a Maxwellisation process appear to include the following:
- a. The number of parties the inquiry intends to criticise and the scope of such criticism. That in turn depends to a large extent upon the inquiry's terms of reference.
  - b. The extent to which the Maxwellisation process is well structured and well explained to consultees in advance.
  - c. The planning and management of the evidence taking process in the first place.
  - d. The amount of analysis done by the inquiry before starting Maxwellisation and the clarity of drafting of Warning Letters (or equivalent).
14. The first factor identified above is within the control of the body which set up the inquiry and drafted the terms of reference (i.e. the Treasury, in the case of inquiries and investigations under Part 5 of the Financial Services Act 2012). The following example illustrates the impact of this factor:
- a. Part 1 of the Leveson Inquiry examined the culture, practices and ethics of the press. Many sections of the report made findings of fact about press conduct at such a high level of generality that no specific newspaper was implicated. The findings of fact about the conduct of individuals were relatively mild in nature and modest in number, in spite of the extensive written and oral evidence taken by the inquiry.
  - b. Part 2 of the Leveson Inquiry (if it should ever take place) would examine allegedly wrongful conduct within News International titles and other specific titles. The findings

of fact would have to be more specific and Maxwellisation would no doubt be more lengthy and complex.

15. The second factor identified above is not only the responsibility of the person carrying out the inquiry. It also has the potential to be within the control of the body which set up the inquiry:

a. If an inquiry is set up under the Inquiries Act 2005, then the Inquiries Rules 2006 apply and the inquiry automatically has a set of principles to follow about Maxwellisation. It may be appropriate for more inquiries to be set up in this way, to take advantage of the ready prepared structure.

b. Part 5 of the Financial Services Act 2012 grants to the Treasury the power to give a direction to control the conduct of any inquiry or investigation. In the case of an inquiry arranged by the Treasury, the power is contained in s.69(2)(c). In the case of an investigation by the FCA or PRA, the power is contained in s.78(5)(c). The structuring of the Maxwellisation process is one aspect of the conduct of an inquiry or investigation; accordingly, it appears that it could be the subject of a direction by the Treasury. For example, the Treasury could direct that the inquiry follow Rules 13 to 15 of the Inquiries Rules 2006.

16. The third and fourth factors identified above are effectively within the control of the person carrying out the inquiry. How well the inquiry is planned and executed will depend not only on the abilities of that person, but also on the number and experience of staff engaged to assist them. The experience of FSLA members is that there have been significant differences in how inquiry teams have performed.

### **(3) Recommendations to ensure Maxwellisation is fair and proportionate**

17. FSLA members respectfully offer the following proposed recommendations for the fair and proportionate conduct of Maxwellisation processes in inquiries and investigations under Part 5 of the Financial Services Act 2012. These recommendations flow from the four factors identified above.

18. First, the Treasury, FCA or PRA setting up the inquiry or investigation should consider Maxwellisation when drafting the terms of reference. The length of the time period under

investigation and the number of organisations or departments whose conduct will be investigated will influence the scale of Maxwellisation.

19. Secondly, at the outset or at some later time, the Treasury could consider giving a direction under s.69(2)(c) or s.78(5)(c) of the Financial Services Act 2012 (as relevant) as to the structure of the Maxwellisation process which should be followed. Use of the Inquiries Rules 2006 as a model might work well in an appropriate case. FSLA members suggest that consultees may be assisted by knowing in advance:

- a. Who will get the draft report;
- b. How much of the draft report they will receive;
- c. How long they will have to respond to criticisms;
- d. Materiality and burden of proof (i.e. what will be regarded as a criticism).

20. The above may not always be possible or desirable at the outset of an investigation, or at the direction of the Treasury. As an alternative, FSLA members suggest that the Treasury could prescribe a point during the inquiry or investigation at which the Maxwellisation process should be considered, determined and communicated. Such consideration and determination would be done by those conducting the inquiry or investigation.

21. Thirdly, a person conducting an inquiry should be encouraged to plan and manage the taking of evidence with particular care, having regard to the following matters:

- a. As far as possible, put witness and documentary evidence that seems to conflict with a witness's views to that witness during a live witness session (rather than leaving for Maxwellisation);
- b. Plan to take sufficient witness evidence to inform the content of the report;
- c. Prepare well for witness sessions and send the interviewee an outline of questions and bundle of documents to review in advance of any witness session.

22. Fourthly, a person conducting an inquiry should be encouraged to plan the Maxwellisation process with particular care, having regard to the following matters:

- a. In drafting the report, give careful thought to the extent to which it is really necessary to identify individuals or categories of individual;
  - b. Give consultees the opportunity to comment on relevant sections of the report that contain information which expose them to criticism;
  - c. Give consultees a clear and realistic deadline to comment, with the sufficiency of time determined by the extent of the issues on which they are expected to comment;
  - d. Give consideration to the extent to which an individual needs to be shown a potential criticism at all. In the case of less significant criticisms, where the individual was given appropriate notice and an opportunity to deal with the criticism during a live witness session, a written consultation may not be necessary. In the case of more significant criticisms or where the individual did not have the opportunity to deal with the criticism on proper notice, it would not be appropriate to skip written consultation.
  - e. Avoid the need to preserve confidentiality from causing any delay. Uploading sections of the draft report to secure non-printable databases which can be accessed by consultees should avoid the need for restrictions on access to hard copies.
  - f. Consider whether the inquiry can publish its report in phases to avoid the need to wait for Maxwellisation to be completed on all sections of the report before publication.
23. There is a range of ways in which Maxwellisation can be carried out in accordance with the law. This may militate against producing detailed prescriptive rules. It is often better to permit those conducting an inquiry or investigation to judge how best to discharge their public law duty. For example, one FSLA member reported that in one report recently produced Maxwellisation was handled within seven days because most of the potential criticisms had been put to the subjects in interviews. This short timescale did not draw any complaints as to fairness from those subject to criticism. A set of rules for Maxwellisation written in stone at the time of appointment might have produced a more rigid, length and formal process.
24. In conclusion, FSLA is a strong supporter of the use of Maxwellisation to ensure the fairness and quality of public reports. Maxwellisation will always take some time and incur some cost; that must be recognised and accepted at the outset. Such time and cost can however be kept within

reasonable bounds by thoughtful drafting of terms of reference, good structuring of the Maxwellisation process, careful management of evidence taking and well planned execution of the Maxwellisation process.

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This submission has been prepared by a Working Group chaired by Charles Evans (Milbank, Tweed, Hadley & McCloy LLP) and made up of the following firms and chambers:

- Arnold & Porter
- Clifford Chance
- Freshfields Bruckhaus Deringer
- Herbert Smith Freehills
- Linklaters
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\* Particular acknowledgement is paid to Anna Boase for her significant contribution.