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ARTICLE

Australia's Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and its Impact on Corporate Rescue

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Synopsis

Australia's ongoing Royal Commission into the Banking, Superannuation and Financial Services Industry has attracted widespread interest and attention, and has exposed the industry to intense public scrutiny. The Royal Commission will result in significant regulatory reform and is likely to have a lasting impact on the Australian economy.

The Royal Commission will release a final report in February 2019. It is expected that the report will make recommendations to the Federal Government dealing with issues of malpractice, misconduct and cultural issues in the banking, superannuation and financial services industry.

In this article, we examine the major issues arising out of the Royal Commission to date and identify some of the key considerations and potential outcomes for restructuring professionals.

Introduction and background

Since the time that the global financial crisis reached Australia (December 2008), an increasingly intensive level of scrutiny has been directed toward Australian financial service providers, culminating in a staggering 73 Senate, Parliamentary and other inquiries.

The majority of these inquiries have been focussed on consumer protection, institutional misconduct and opportunities for structural reform across the financial services sector.

While these inquiries addressed, in part, the ongoing concerns expressed about misconduct in the financial institutions sector, they ultimately proved to be inadequate to quell the critics and stave off the political momentum for a deeper systemic review of the industry and its participants. Ultimately, after initially opposing an enquiry, it was the boards and CEO's of the four major Australian banks that petitioned the Federal Government to establish an enquiry to bring the issues to a head, once and for all.

On 14 December 2017, the Governor-General of the Commonwealth of Australia appointed former High Court of Australia Justice, the Honourable Kenneth Hayne AC QC, to inquire into and report on misconduct in the banking, superannuation and financial services industry.

The result is the officially-named Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Royal Commission'). The Royal Commission will deliver an interim report on 30 September 2018 and a final report on 1 February 2019.

Impact of the Royal Commission

This paper will discuss the significant long-term impacts that the Royal Commission will have on the financial services sector in Australia. Indeed, recent events indicate that the Royal Commission is already having a significant negative impact on the financial performance of leading institutions.

The share prices of all the major banks as well as other financial institutions have taken a significant hit since the announcement of the Royal Commission. AMP Limited has been impacted most severely losing almost 25% of its share price.

In addition, there have been a number of high profile changes to the composition of the boards and executive teams of these institutions as a result of the evidence given at the Royal Commission and the intense media and public scrutiny that has been generated.

As explained in further detail below, the Royal Commission is likely to have a significant impact on Australia's corporate restructuring environment, in particular in respect of the financial industry and other major listed companies.

Focus of the Royal Commission

The letters patent setting out the scope and terms of the Royal Commission confer on the Commissioner power of inquiry into the following subjects:

- whether conduct by financial services entities, their executives, directors, officers or employees has amounted to misconduct and whether this conduct has amounted to the need for a referral to the criminal or regulatory bodies of the necessary jurisdiction;
- whether conduct by these entities has fallen below community standards and expectations;
- whether this misconduct is attributable to the particular culture and governance practices of the entity concerned;
- the effectiveness of mechanisms and governance bodies in achieving redress for consumers where this misconduct has occurred;
- whether the current legal and regulatory frameworks and policies of the Commonwealth are adequate in relation to the relevant industries; and
- whether further changes into the legal and regulatory frameworks and policies of the Commonwealth are needed and what these changes may be.

As at 1 June 2018, 6,320 submissions have been received by the Royal Commission; and by industry, the top 3 categories of submission are banking (64%), financial advice (10%) and superannuation (pension products) (10%).

The Royal Commission is divided into rounds of hearings, each dealing with a separate theme of misconduct in the banking and financial services industry. The themes are divided into key topics, each of which are considered by way of case studies of misconduct in the industry.

The first round of hearings focused on the treatment of consumers by banking and financial service providers, with a particular focus on residential mortgages, car finance and credit cards.

The second round of hearings considered the conduct of financial services entities that provide financial advice to consumers, including the treatment of consumers, compliance with the law and community standards and expectations, and the sufficiency of the current legal and regulatory structure.

The third round of hearings considered the conduct of financial services entities in respect of their dealings with small and medium enterprises, in particular in providing credit to businesses. The hearings also explored the current legal and regulatory regimes, as well as self-regulation under the Code of Banking Practice.

The fourth round of hearings will focus on issues affecting Australians who live in remote and regional communities. Specifically, the hearings will deal with issues relating to farming finance, natural disaster insurance, and the interactions of Aboriginal and Torres Strait Islander Australians with financial services entities.

Issues arising

Legal Counsel assisting the Commission, Ms Rowena Orr QC, has recommended the Commissioner make a number of findings of misconduct against certain banking and financial service providers. These include breaches of the *National Consumer Credit Protection Act 2009* (Cth), *Corporations Act 2001* (Cth) ('Corporations Act') and *Australian Securities and Investment Commission Act 2001* (Cth) as well as a number of findings of conduct falling below community standards and expectations. Ms Orr also submitted that a cause of this misconduct appears to be attributable to culture and governance practices.

While the corporate regulator, the Australian Securities and Investments Commission ('ASIC'), has not yet specified the particular breaches currently under investigation (citing their policy on no public comment during such investigations) it has noted that these breaches can result in serious civil and/or criminal sanctions. The regulator cited 'fees for no service' and 'misleading government bodies' as their key areas of concern thus far.

Fee for no service ('FFNS')

In April 2015, the corporate regulator announced that it was investigating multiple instances of Australian financial institutions charging customers periodic fees for annual advice reviews that were not being provided.

In most instances, it was alleged that the fees had been charged as part of an ongoing fee arrangement under which the financial institution was obliged to conduct an annual advice review (among other things) under the terms of the contractual agreement with the customer.

The terms of each financial institution's ongoing service arrangements and the manner in which ongoing service fees are charged to the customer vary, but the fees were said to be generally either categorised as adviser fees (calculated as a percentage of invested assets) or initial and trail commissions (based on the amount of the customer's investment or insurance premium) that customers authorise to be automatically deducted from their financial products and paid directly to the financial institution or the adviser or both of them.

A number of financial institutions have been implicated in this practice and are in the process of seeking to compensate customers affected by this conduct.

Misleading the corporate regulator

There have been a number of examples of institutions misleading ASIC which may result in serious civil and criminal sanctions against executives and the relevant institutions.

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For example, an executive of one of the leading financial institutions admitted in testimony that the company had repeatedly and deliberately misled ASIC by covering up the practice of charging fees to customers, even though they were not receiving any service. The Commissioner described these actions as '[s]elling what you can't deliver, selling what you won't deliver and selling what you don't deliver'.

Obligation to act efficiently, honestly and fairly

Ms Orr noted that the banks may have 'contravened their statutory obligation under section 912A(1)(a) of the Corporations Act to do all things necessary to ensure the financial services covered by their licence are provided efficiently, honestly and fairly. Each of these entities may also have contravened their statutory obligation under section 912A(1)(d) of the Corporations Act to have available adequate resources, including technological resources to provide the financial services covered by the licence and to carry out supervisory arrangements'.

A common theme throughout the Royal Commission has been the length of time it has taken, in many instances, to remediate legitimate claims of poor advice or questionable banking conduct.

The banks have injected enormous amounts of time and money into remediation programs and compensation schemes. Notwithstanding their protestation that these programs take time, due to the size and nature of the bank itself, we would expect that the court of public opinion will find that it is simply unacceptable for customers to wait long periods to have their claim determined.

Shareholder class actions

In addition to facing serious civil and criminal sanctions, increased scrutiny from ASIC and the likely introduction of tougher legislation from the Federal Government to deal with misconduct in the industry, the major banks may also be subject to large scale shareholder class actions and increased shareholder activism.

A class action has already been filed in the Federal Court of Australia on the back of the Royal Commission alleging that AMP was aware that it had engaged in FFNS conduct (and that this was or was likely to be a breach of the Corporations Act) and that AMP misled the regulator but failed to disclose these matters to its shareholders in breach of its continuous disclosure obligations under the Corporations Act.

An additional suit has been filed in the New South Wales Supreme Court on the back of the same revelations from the Royal Commission. Craig Arnott, Managing Director of Burford Capital (who is funding the litigation), stated, 'the conduct admitted at the Royal Commission is starkly at odds with AMP's responsibilities and shareholders' legitimate expectations, requiring redress so that AMP's shareholders can recover the value that has been lost.'

Maurice Blackburn (a major class action law firm in Australia) has entered the fray promising low commissions for running class actions on the back of the Royal Commission.

The active class actions are limited to conduct engaged in by AMP at present, however, it is apparent from the Royal Commission that the impugned practices are widespread across the financial services industry.

In addition, it is probable that the events unwinding at the Royal Commission will trigger further shareholder activism in Australia. Activist investors have been very effective at utilising Australia's shareholder-friendly laws to pressure change within companies, specifically in relation to Board positions. Shareholder activists took aim at 26 Australian-listed companies in the first five months of 2017, a significant uptick from the same period five years earlier.[1]

The reasons boards are targeted by shareholders often relate to social, ethical and environmental concerns that shareholders have with the company or the individuals on the board. The issues arising out of the Royal Commission are prime examples of issues which may be expected to spark shareholder activism. Large scale shareholder class actions are therefore a real risk for each of the major banks in Australia and the financial services industry broadly.

The financial advice profession

Despite financial advice being a major element of the financial services industry (Australia's largest industry), the expertise and qualifications of its professionals have been called into question during the course of the Royal Commission. Ms Orr submitted to the Royal Commission that only 35% of financial advisers in Australia have completed a degree at bachelor level or above.

The Deputy Chair of ASIC, Mr Peter Kell, has publicly stated that he does not consider that the financial advice sector meets the standard required to be labelled a 'profession'.

Further, the Royal Commission heard many examples of nefarious behaviour including forged documents and other fraudulent conduct by financial advisors.

Notes

1 J. Freed and M. Keidan, 'No more quiet chats? Australia becomes new frontier for shareholder disruption' <www.smh.com.au/business/no-more-quiet-chats-australia-becomes-new-frontier-for-shareholder-disruption-20170621-gwvh5n.html> 22 June 2017.

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Accordingly, it is likely that the financial advice sector will be subject to greater scrutiny and regulation in the fall-out from the Royal Commission.

Potential legislative reform

In response to the initial Royal Commission hearings, the Federal Government has proposed a new penalty regime that would give ASIC a much greater arsenal in its efforts to stamp out misconduct in the financial services sector. New penalties for misconduct will include:

- companies paying a maximum penalty of AUD 9.45 million, three times the benefits gained or 10% of a company's annual turnover (whichever is the larger), capped at AUD 210 million;
- a new maximum criminal penalty of 10 years imprisonment for individuals and the greater of a AUD 945 000 fine or three times the benefits gained or loss avoided; and
- individuals who provide false or misleading information to ASIC would face a maximum five-year prison term, up from two years.

This new regime would be in conjunction with the previously planned Banking Executive Accountability Regime ('BEAR'), a scheme setting out expectations on banks and other institutions, as well as senior individuals, to deliver good prudential outcomes, and improve standards of behaviour and accountability. BEAR is modelled on the UK Senior Managers Regime. Authorised Deposit-Taking Institutions ('ADIs') and Accountable Persons will be required to act honestly, be constructive with the Australian Prudential and Regulatory Authority ('APRA'), and take reasonable steps to prevent matters from arising that would adversely affect the ADI's prudential standing or reputation.

Since the beginning of the Royal Commission hearings on 13 March 2018, previously opposing opinions on the condition of the financial services sector have given way to bipartisanship in the Federal Parliament. This bipartisanship, together with the high level of media and public scrutiny, will likely lead to the swift introduction by the government of new regulations in the near future.

Potential impact on corporate rescue

It is likely that the Royal Commission will impact upon Australia's corporate rescue space in a number of different respects.

Growth in distressed debt investment

Further macro-prudential regulation on the back of the Royal Commission may lead the major banks to be less willing, in some instances, to enforce debt recoveries due to increased compliance costs, greater public scrutiny and reputational issues.

Enforcement actions can appear aggressive and lead to protracted legal battles with customers which banks may now choose to avoid more often (at least in the immediate wake of the Royal Commission).

This could further energise the booming distressed debt investment market in Australia. In early 2018, Partner and Joint National Head of Capital & Debt Advisory at Ernst & Young, Sebastian Paphitis, noted that the corporate private debt market (which includes direct bilateral, club and syndicated loans as well as debt placements funded by institutional investors and credit funds) had reached approximately AUD 65 billion in total volume or about 7 percent of the Australian business lending and bond markets as of the end of 2017.[2]

The growth of this market has encouraged a hike in special situations investment. Norton Rose Fulbright has witnessed this first-hand. There has been a significant uptick in recent years in the purchase of senior debt from traditional banks with a view to engaging in a financial restructuring of distressed businesses.

The tightening of lending will contribute to the appeal of special situations investment in Australia. Partner and Co-chief Investment Officer of Varde Partners, Ilfryn Carstairs, told The Australian Financial Review recently that the creditor-centric Australian business environment and tighter lending regulations for the major banks is creating ample opportunities for special situations and distressed debt investment.[3]

Mr Carstairs described the allure of the Australian market by highlighting its 'very strong legal system, a good basis of doing business and good creditors rights.'[4]

In 2017, Varde Partners teamed up with The Carlyle Group's special situations team in a major debt-for-equity recapitalisation of Bis Industries. The deal saw pre-restructure gross debt of about AUD 1.2 billion reduced to approximately AUD 280 million.[5] BIS Industries Group Ltd had just over a billion Australian dollars

Notes

2 S. Paphitis, 'The Australian Private Corporate Debt Market Reaches A New All Time High' <www.linkedin.com/pulse/australian-private-corporate-debt-market-reaches-new-all-paphitis/> 18 January 2018.

3 J. Moullakis and S. Tan, 'US hedge fund Varde eyes Aussie commercial real estate' (4 September 2017) *Australian Financial Review*.

4 See n. 3 above.

5 B. Rogers, 'Bis Recapitalisation Completed' www.bisindustries.com/News-and-Media/Latest-News/2017/Bis-recapitalisation-completed.aspx accessed 1 June 2018.

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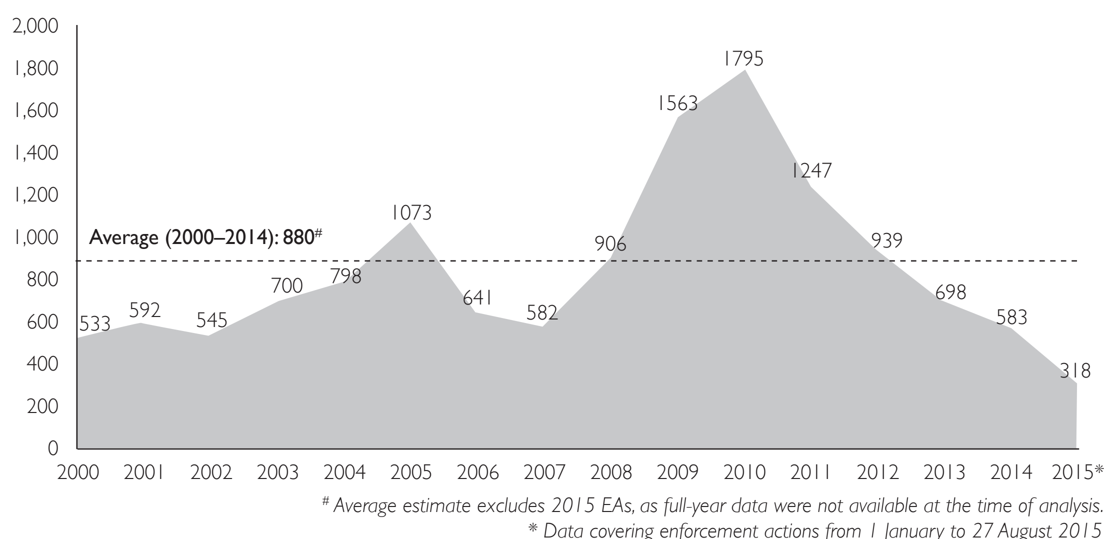
Figure 1. Total number of enforcement actions, 2000–2015



Source: SNL Financial; Deloitte Center for Financial Services analysis

net debt as at 30 June 2016 and had made a AUD 70 million loss in the 2016 financial year. High financing costs including interest on traditional bank loans was cited as a major reason for the company's distressed position.

As can be seen in Figure 1, enforcement actions are trending down since the global financial crisis and the Royal Commission will only bolster this trend.

Housing market

In Australia, mortgage lending accounts for approximately 60 percent of ADI lending.[6]

In the context of consumer mortgages, the responsible lending practices of the major banks have come under scrutiny and will very likely be subject to legislative reform following the Royal Commission.

ASIC advises that the key concept underlying the responsible lending regime is that 'credit licensees must not enter into a credit contract or consumer lease with a consumer, suggest a credit contract or consumer lease to a consumer or assist a consumer to apply for a credit contract or consumer lease if the credit contract or consumer lease is unsuitable for the consumer.'[7]

Notwithstanding these requirements, the Royal Commission appears to have unearthed a series of cases where, prima facie, the obligations imposed by the responsible lending regime appear to have been thwarted. This has raised questions as to the effectiveness of the consumer credit regime and whether regulators have issues with enforcement of the regime.

For example, during the Royal Commission, Ms Orr referred to the prevalence of 'liar loans' in which customers misrepresent their financial position to their financial services providers in order to qualify for a loan. It was admitted that often no inquiry is made even where a customer's living expenses (submitted to the bank through a mortgage broker) directly contradict the customer's living expenses on their bank statements.

This is to be contrasted with case studies before the Royal Commission that do not evidence misconduct on behalf of the financial institutions, but simply examples of poor decision-making by customers in relation to their ability to repay and/or service loans. In these instances, it is entirely appropriate and necessary that banks be allowed to seek recovery of these loan amounts and that there be consequences for financial failure.

APRA has been keeping a keen eye on consumer mortgage lending since the Global Financial Crisis. In its submission to the first round of the Royal Commission, APRA noted:

> 'In its role as prudential regulator, APRA has in recent years substantially increased the intensity of its supervision of residential mortgage lending. APRA has placed a strong focus on strengthening mortgage lending standards, given the scale and materiality of the portfolio from a prudential perspective.'

Notes

6 APRA, 'Written Submissions of the Australian Prudential Regulation Authority (APRA) Round 1: Consumer Lending' (2018).
7 ASIC, 'Regulatory Guide 209: Credit licensing: Responsible lending conduct' (November 2014).

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In March 2017, APRA wrote to all lenders advising them that interest-only loans had to be restricted to 30 percent of all new residential mortgage loans. At the time, interest-only loans accounted for nearly 40 percent of all residential mortgage loans.

As stated earlier, it is likely that the Royal Commission will result in further macro-prudential regulation, which may lead to more conservative lending practices and a tightening of available credit.

UBS economists George Tharenou and Carlos Cacho note that improved lending standards 'could lead to a longer period of sub-trend GDP growth.'

Tharenou and Cacho also noted that, '[w]hile a tightening of mortgage underwriting standards is prudent, especially as the banks move to fully complying with responsible lending, it has a material impact on the economy.'

For example, we have already started to witness the property market cooling off and a drop in foreign investment in this respect.

Corporate governance and director's duties

Since the global financial crisis, the concept of 'conduct risk' has become a serious consideration for the boards of Australian banks and indeed for directors of all corporations.

Conduct risk is defined by Thomson Reuters to mean 'risk to the delivery of fair customer outcomes, or to market integrity.'[8] The Royal Commission has precipitated a significant downswing in community trust as customers and the public at large have questioned the integrity and fairness of the financial services sector.

Similarly, APRA has recently noted (in a report published in relation to an inquiry into governance, culture and accountability at one of the banks) that:

> 'As was evident in the aftermath of the global financial crisis, a bank's risk culture can have a profound effect upon its long-term success or failure. In many global institutions, a multitude of poor risk practices had been allowed to flourish, despite well-established principles of prudent risk taking. Notwithstanding the range of regulatory reforms introduced in response to the crisis, a series of scandals has continued to shine a light on ethical shortcomings and weaknesses in banks' cultures.'

The criticism that has been levelled at executive teams and boards of directors as a result of the Royal Commission is likely to fuel a renewed focus on norms of corporate governance and institutional culture not only within the financial industry, but also among other large corporates within Australia.

Similarly, the responsibilities and accountabilities of boards of directors are likely to increase in the face of this intense scrutiny.

In the context of the directors' duty of good faith contained in the English *Companies Act 2006*, a director is required to 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.

The *Companies Act 2006* does not define 'success', but this generally means a long term increase in the value of the company. However, 'it will be a matter for the directors' good faith judgement to determine what will promote the success of the company, and what constitutes such success'.[9]

Howard and Hedger note that this particular duty under English law is to be:[10]

> '... carried out with regard to all relevant consideration, together with (so far as relevant) a series of 'statutory matters', including the likely long-term consequences of their decisions, the interests of employees, the impact of the company's operations on the community and the environment, the need to foster the company's business relationships with suppliers, customers and others, the desirability of maintaining a reputation for high standards of business conduct and the need to act fairly as between members of the company.'

Although, the equivalent duty under Australian law does not have as broad an ambit as the English duty, the fall-out from the Royal Commission so far appears to have raised the bar for directors and senior executives, who will no doubt be focusing more intently on carrying out their duties with ample deference to community expectations and other stakeholders.

Conclusion

The misconduct unearthed in the Royal Commission to date has been significant. The Australian Federal Treasurer, the Honourable Scott Morrison MP, called the alleged breaches 'deeply disturbing' and noted that many carry potential prison sentences for the officers, directors and employees concerned. While the full effect of the Royal Commission remains to be seen, there are early signs that the impact on the financial services industry and the economy more broadly will be far-reaching.

Notes

8 Thompson Reuters, 'Conduct Risk' <risk.thomsonreuters.com/en/risk-solutions/conduct-risk.html> accessed 5 June 2018.

9 Hon Lady Justice Arden DBE, 'Regulating the Conduct of Directors' (2010) 10 *Journal of Corporate Law Studies* 1.

10 C. Howard and B. Hedger, *Restructuring Law and Practice* (LexisNexis, 2nd edn, 2014), p. 646.

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Economists have predicted a tightening of credit availability in both consumer and business lending may lead to slower economic growth.

In light of the reputational damage the Royal Commission has caused to the major Australian banks, it is possible that enforcement by traditional lenders will continue to decline. This may provide opportunities for distressed debt and special situations investors.

Corporations, regulators and restructuring and insolvency practitioners will be watching closely as the Royal Commission continues to raise issues and concerns about the financial services industry.

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