

Submission to The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Date: 18 October 2018

From: Dr John Garrick (Law) and Dr Nazila Razil (Accounting), Charles Darwin University

We thank the Commissioner for the opportunity to comment on the Commission's Interim Report. We have followed proceedings closely and, in particular, the hearing and evidence tended in Darwin with respect to cases of unconscionable conduct in some of our remote Aboriginal communities. It is the Northern Territory hearings which has prompted our submission.

We note the Interim Report identifies two principal questions: (1) Why did it happen, and (2) what can be done to avoid it happening again? The "it" being the pursuit of short term profit at the expense of basic standards of honesty leading to misconduct that went either unpunished or where consequences failed to meet the seriousness of what had been done.

Our brief submission seeks to address whether new laws are required, existing laws administered or enforced differently and/or simplified. In particular our concern centres on why is it that Banks and Financial services such as Insurance companies continue to test the boundaries of unconscionable conduct when Legislation such as s.21 of the Australian Competition and Consumer Act (2010) and various case authorities make it clear that it is prohibited? Are the laws on 'unconscionable conduct' not clear enough? Is there confusion as what conduct goes against conscience in today's complex society? The Royal Commission has already established that the high standards the community rightly expects of banks and insurers are not being met.

We note that the stream of disturbing revelations about the conduct of Australia's financial institutions has led to an announcement by the Government of a tough new penalty regime that could see bank executives face up to 10 years in prison. A few of the examples of 'unacceptable behaviour' we have noted include:

1. NAB: Bribes were paid to a group of employees in western Sydney to wave through loans known to be based on fake documents in order to: "smash targets and score bonuses". A syndicate of 11 people, including six branch managers, allegedly made up fake pay slips, IDs and Medicare cards. In one case, a borrower was told they could borrow \$800,000 when the valuation was \$450,000.¹

¹ A whistle-blower first raised concerns in 2015 about the bank's "Introducer Program", which generated \$24 billion worth of home loans between 2013-16 and paid out between \$100-\$150 million in commissions for lending referrals to non-bank employees such as financial planners and accountants. The whistle-blower said: "the money exchanges hands in cash in white envelopes, usually over the counter... Money is then deposited at CBA so NAB can't detect the deposits. Happening on a daily or weekly basis and has been happening for a number of years." (Senior Counsel assisting the Commission, Rowena Orr QC). Five bankers were sacked in November 2015 over the scandal, but the Commission has now heard that 60 bankers were involved in varied levels of misconduct related to the program, including falsified loan documents, dishonestly putting customers' signatures on forms and the provision of unsuitable loans.

2. Commbank: A client, David Harris, told the Commission how, after continually maxing out his credit cards before consolidating them to a lower-rate card in 2016, CommBank offered to increase his credit limit despite telling them “I had a problem”. During a call to change his address, he was told he was eligible for an increase on his \$27,100 limit. “I explained that I’m a gambler, I have a gambling problem... I can’t understand why they kept offering me more money.” Less than two weeks later he received a letter offering to increase his limit to \$32,100; a month later another offer to increase it to \$35,100. He eventually accepted the higher limit. In the witness’s own words: “I maxed it out within a space of a month to two months, then borrowed \$35,000 off my boss to pay it off.” Accusing the bank of negligence, Mr Harris applied for financial hardship assistance. CommBank reduced his debt by \$10,000 and waived future fees and interest. But he still owed \$23,400.

3. CommBank also stated it would stop selling its ‘Credit Card Plus’ and ‘Personal Loan Protection’ and refund \$16 million to customers who had purchased worthless insurance products knowing they would not be able to claim on them. First identified as a problem by ASIC in 2011, CommBank continued to sell the products until 2015 when an internal audit identified 64,000 affected customers. Witness Irene Savidis told the Commission that in 2013, while she was unemployed and receiving Centrelink benefits, she applied for a credit card. After being approved for a \$4000 limit, she was convinced at the branch to take out credit card insurance. In her words: “They were telling me it’s good for me, it will help me in the long run if anything happened to me ... I explained how I wasn’t working, [but] she said if I stopped working ... it would help cover any sort of costs that I couldn’t afford. When I told her [again that] I wasn’t working, that I was unemployed and on Centrelink, she said I can still claim on it.” But this was not true. Unemployed clients were ineligible to claim on insurance specifically intended to cover for the ‘loss of a job’.

4. The Commission also identified that the CommBank continued to charge fees for more than a decade despite its adviser knowing the client had died in 2004. Internally, the problem was noted as a “possible warning to adviser”. Another planner was receiving about \$65 a month in fees from a client who had been dead for seven years before contacting the widow, but even then still took no action to fix the continuing charges.²

Many more examples are noted in the Interim Report including the sale of Insurance policies to people with disabilities (such as Down’s Syndrome) and other unconscionable conduct cases involving “cold-call” selling in remote Aboriginal communities. It appears there is no effective deterrence in s21 of the Consumer Law. Since **the** landmark High Court case

² In April 2015, Jacqueline McDowall and her husband lost their home and most of their superannuation after approaching Westpac for help in buying a \$1 million live-in bed and breakfast to run in their retirement. Ms McDowall told the Commission financial planner Krish Mahadevan tipped the couple into a self-managed super fund and advised them to sell their \$550,000 home and take out life insurance of up to \$1 million each. It was advice that cost her home.

Commercial Bank of Australia v Amadio (1983) it appears little real progress has been made to reduce unconscionable conduct in the banking and finance industries.

Some main issues we took from the Interim report as to 'why it happened':

- Financial institutions deal with monitoring regulatory compliance and application of law in piecemeal/disjointed ways rather than comprehensively and coherently
- The nature and extent of the effects of the misconduct is not yet sufficiently revealed
- Value/volume-based remuneration is a significant contributor to misconduct
- There is confusion about the roles and responsibilities of the various agencies charged with regulating Banks, Superannuation and Finance Services.
- Entities emphasise selling over the delivery of services and products
- Selling is too often a sole focus
- Entities prefer 'profit' over all other purposes
- Banks and Insurance companies treat regulatory compliance as a cost of doing business (rather than as a foundation underpinning and guiding how business must be conducted)
- Regulatory responses are focused on the remediation of specific instances rather than seeking to identify root-causes of conduct within institutions (and industry more broadly)
- The self-interest of Banks and Insurance companies prevails over consumers
- Findings of misconduct often result in immaterial penalties or goes unpunished
- There is a lack of adequate records to enable monitoring and analysis (including a lack of sharing of sufficient information between regulatory and industry bodies)
- The consequences of misconduct often fail to meet the seriousness of what has been done
- Greed permeates financial institutions.

Suggestions on what ought to be done?

We recommend further review of s.21 of the *Australian Consumer Law* to clarify what conduct is 'unconscionable' and what enforcement procedures follow breach. (Section 12 of the *ASIC Act* may also require review eg. ss.12D; CB94)(b)).

Further clarification of disclosure requirements, for example, s. 952C of the *Corporations Act* (2001) is required.

Industry practices such as "cold calling" – for example to sell insurance products – should be prohibited. This may include reforms to the *Disability Discrimination Act* (eg. ss. 5 and 24.)

Volume or value-based remuneration needs closer examination with a view to possible removal from industry practice.

Clearer definition of roles and responsibilities amongst key regulators is essential with stronger enforcement of laws around misconduct essential.