



23 October 2018

Re: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Interim Report

Dear Commissioner Hayne,

Thank you for the opportunity to comment on the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. I make this submission based on my professional and research expertise. I am a legal academic, holding the position of Professor of Criminal Jurisprudence at Monash University, having been based previously in the UK. I am expert in responses to corporate, white collar and organised crime, and have written numerous peer-reviewed academic publications on these matters in domestic and comparative contexts.

The Royal Commission's Interim Report has unearthed and confirmed systematic, extensive harmful behaviours by banks. While referred to as misconduct, many of these practices are crimes, though they were neither regarded nor not pursued as such. The Interim Report reminds us of how these acts were encouraged and enabled by certain problematic corporate cultures, and how they could endure without intervention, in part due to ASIC's risk-averse litigation strategy. This latter trend meant that only 'safer' prosecutions were pursued, and so the boundaries of the criminal law were not tested. Moreover, it gave the illusion of impunity.

The Interim Report notes that important deterrents to misconduct are missing from the banking industry. I argue that such deterrence could come from more robust application of criminal law to both individuals and corporate actors. Though mindful of the need to tread cautiously in respect of deploying the criminal law, and while I agree with the notion of escalating regulatory responses systematically and appropriately, I espouse the values of the criminal law in this context, due to its particular effects as well as its symbolic value. The criminal law response is distinctive when compared to regulatory and civil law responses. The criminal process, culminating in the form of a public trial, is unique and important. As the Royal Commission exemplifies, exposition of socially harmful behaviour is crucial to identify and reveal the issues. The criminal process of course has the added component of the potentially stigmatising label as well as criminal punishment, not least with the possibility of imprisonment for individuals in more egregious cases.

As to whether negotiation and settlement should be the main approach for a regulator, I would answer yes but suggest that these should be the initial approaches, always backed up by the realistic prospect of matters escalating to criminal action. Extant ASIC practice is such that criminal action is not a credible prospect, and so any moderating/deterrent effect the criminal law may have is stymied.

I also agree that there should be greater focus on general deterrence in regulatory strategy, though note some concerns about the concept and effectiveness of deterrence. Deterrence presupposes and is predicated on rational responses to likely outcomes, which is not always the case in reality. Individual and legal actors may be motivated more by emotional or instinctive reasons than manifesting rational/irrational behaviours. Nonetheless, any deterrent and broader educative function of regulation and criminal law should be bolstered through more robust practice, if negotiation and settlement prove fruitless. And all that aside, deterrence is also best when the outcome is swift, likely, and predictable. Such insights should steer individual and ongoing decision-making by regulators, who should react promptly and consistently.

Linked to the points made above, as an advocate for the expressive and symbolic component of state reaction, I agree that a component of enforceable undertakings should be the acknowledgment of specific wrongs.

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As to whether there should be more focus on criminal proceedings against licensees rather than individual advisers, I do not see this as a zero-sum game. It is crucial to address legal persons' wrongdoing or failure to engender an appropriate corporate culture, and this can be combined with the pursuit of individuals also.

Both the content of the Interim Report and my calls for more use of the criminal law put renewed focus and a certain complexion on deferred prosecution agreements (DPAs), which are provided for in the draft Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017. If enacted, the Commonwealth Director of Public Prosecutions will be able enter into a DPA with a person other than an individual for an offence mentioned in s17B (which, importantly for present purposes, includes market misconduct and other prohibited conduct relating to financial products and financial services under sections 1041A, 1041B, 1041C, 1041D, 1041E, 1041F, 1041G, 1043A and 1307 of the Corporations Act 2001, as well as various property offences under the Criminal Code). A DPA entails suspension of prosecution for a certain timeframe, as long as the corporate entity meets certain specified conditions, such as paying a financial penalty or compensation; co-operating with future prosecutions of individuals suspected of involvement in criminality etc. While there is a safeguard insofar as an approving officer (a former judicial officer of federal/State/Territory court) must review and approve the DPA if satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate, ultimately DPAs centre on negotiation and settlement with corporate actors. This is in the shadow of prosecution, given that prosecutions may be resumed if the DPA's terms are breached. Nonetheless, in contrast to the criminal trial, and indeed to Royal Commission hearings, DPA negotiations take place behind closed doors. Overall, there is a tension between more robust use of criminal law as I propose above, and the introduction of DPAs. Further piecemeal and reactive reforms are to be avoided, and any final proposals should seek to ensure coherent and holistic responses to corporate crime.

I would be pleased to provide further detail on any of the above remarks, should that be of help to the Commission.

Yours faithfully,

Professor Liz Campbell