Submission in response to FSRC Interim Report

(Dr) Evan Jones

evan.jones@sydney.edu.au

26 October 2018

See my submission #2371, 26 February 2018, its contents universally ignored by the Commission to date.

6 Regulation and the regulators

Q. Should any bank employee dealing with a customer be rewarded (whether by commission or as part of an incentive remuneration scheme) for selling the client a product of the employer? That is, should any 'customer facing employee' be paid variable remuneration?

A. All employee remuneration schemes for 'customer facing employees' linked to business turnover or revenue should be abolished and made illegal. They are an automatic invitation to malpractice. If processes that measure proper customer service and satisfaction over the extended relationship can be constructed, then by all means have remuneration schemes linked to them. Continuation of employment, pay and promotions should be tied to traditional components of professionalism – competence and integrity. Think the medical profession. Tying doctor remuneration to 'business' turnover is too ludicrous for words, with the outcomes for patient health potentially catastrophic. Ditto the financial sector.

Q. If the recommendations of the Enforcement Review are implemented, will ASIC have enough and appropriate regulatory tools?

A. No. Nothing essential will change, as it appears that the sections of the select Acts addressed for stronger penalties are in general not relevant to crimes against business customers. Also see below.

8 Restating the issues

8.1.1 Access

Q. Do all Australians have adequate and appropriate access to banking services?

A. No. Rural and regional areas remain impoverished due to the wholesale closure of bank branches during the 1990s. My childhood Melbourne suburb of West Footscray lost its 4 bank branches overnight, with the nearest bank branch miles away. If the Commonwealth Bank had remained in public hands, this anti-social event would not have happened. Services for the

elderly, disabled customers, financially unsophisticated, etc.? Small business cash needs and deposits? Another branch closure movement is underway at the moment, implicitly coordinated amongst the banks, as occurring along the South Coast of New South Wales. Post office outlets do not suffice. A public bank replacement is essential – consider the NZ Kiwi Bank precedent.

8.1.2 Intermediaries

Q. For whom do the different kinds of intermediary act?

A. Lacking the appropriate question, it is necessary to include an essential issue here. Law firms, valuers, receivers, select real estate agents, are key 'intermediaries' for banks – not least to facilitate default and foreclosure of borrowing customers. All such 'professions' are known to act corruptly as bank agents in such processes. The corruption amongst these groups is not occasional but is endemic and integrally linked to the corruption spawned within the banks themselves – all these 'professions' are on the bank teat. This crucial dimension of bank 'misconduct' (sic) has not been addressed by the Royal Commission to date. Another round of hearings is in order.

Q. Are external dispute resolution mechanisms satisfactory?

A. No. FOS has been missing in action, inept or/and deeply complicit in bank malpractice. Myriad victims' submissions to the FSRC and to previous Parliamentary Committee inquiries must have made this failure crystal clear. Yet the same structure and dependence on financing by the guilty parties has been reproduced in the AFCA, and personnel deeply complicit with bank corrupt practices re-hired. Farm Debt Mediation services, rather than offsetting the imbalance of power of the lender as was intended, have served to reinforce that power, with bank staff bullying of defaulted borrowers and the acquiescence of mediators and State Rural Assistance Authorities. FDM services, except on very rare occasions, now merely act to reinforce and entrench the foreclosure process by imbuing it with a seeming legitimacy.

Q. Should there be a mechanism for compensation of last resort?

A. Yes. The quantum of compensation deserved for victims spanning the entire period of financial deregulation is enormous. Any such mechanism is a beginning. But these are not victimless crimes, and taxpayers should not foot the bill (as they currently pay for the huge bill in running the court system for the benefit of banks addicted to litigation). The proceeds of all penalties/fines imposed on financial institutions should go into such a fund. Moreover, the existence of such a fund and pressure on taxpayer involvement will sharpen the minds of the political class and regulators to refine procedures and structures such that the guilty parties are ultimately responsible for the paying the bill, which may in turn improve financial institution behaviour for the better.

8.1.3 Responsible lending

Q. Should the NCCP Act apply to any business lending? In particular, should any of its provisions apply to: SMEs? agricultural businesses?

A. Yes and yes, As long as the law and the courts fail to acknowledge the profound disadvantage faced by SMEs and family farmers vis-à-vis bank lenders, such borrowers should be covered by comparable protective legislation recognising 'vulnerable' parties utilising financial services.

Q To what business lending should the Banking Code of Practice apply?

A. All business lending, without exception. Does one want to foster the law of the jungle or inhibit it?

Q. Should lenders adopt different practices or procedures with respect to agricultural lending?

A. Of course. It is indicative of how far removed from intelligence, how deeply entrenched is the neo-liberal ethos, and how ill-informed are current regulators of the last two hundred years of financial institutional developments globally, that this question should be asked at all. Farmers need specialist financial facilities that relate to their seasonal and unstable income streams – it's a no-brainer. The privatisation and/or destruction of specialist rural lending institutions has been a disaster for the bush. Note the corrupt maltreatment of borrowers involved in the CBA destruction of its in house CDB, the silent maltreatment of PIBA borrowers by the WA R&I then Rabobank, and the recent instances of the ANZ takeover of Landmark customers and the Bendigo takeover of Rural Bank customers. One fears for the customers of Rural Finance Victoria after the Bendigo takeover.

Q. Are there classes of persons from whom lenders should not take guarantees; or should not take guarantees unless the person is given particular information or meets certain conditions?

A. The demanding and/or taking of guarantees from anyone other than the direct borrower should be made illegal overnight. There is zero justification for it, other than a licence for theft. Naturally, any potential guarantor should be provided with comprehensive information and entailed obligations. My personal opinion is that the demanding of guarantees *per se*, including from the borrower themselves, should be made illegal. Given the prevailing cultures of bank lenders, against which no reform is in sight, the guarantee is a natural vehicle for strategic default and customer asset theft. Ditto, the taking of security over the residential home of potential SME borrowers. Are bankers bankers or are they money lenders? If banks want to be bankers and receive the immense privileges of a banking license, they should train personnel for the job to discern viable lending propositions, otherwise get out of the game.

Q. How should lenders manage exit from a loan … if the borrower is in default?

A. Processes should be mutually advantageous, as opposed to the transparent theft and customer destruction at the moment, which indicates criminal intent rather than banking professionalism. It is possible and it's a no-brainer. Current default and foreclosure practices highlight of course that customer property theft and customer destruction, financially and psychologically, is the object of the game.

8.1.4 Regulation and the regulators

Q. Has ASIC's response to misconduct been appropriate? If not, why not?

A. ASIC has been not merely negligent but criminally complicit in denying its assistance to SME/farmer victims of their bank lenders and associated complicit intermediaries (as above), in particular valuers and receivers. ASIC has ignored, evidently strategically, its legislated obligations under s12CB and s12CC of the ASIC Act. It has deceived victim complainants in its responses to them regarding its responsibilities and its capacities. I have expounded on this neglected issue in submissions to various cognate Parliamentary inquiries, and in a submission (19 October) to the current Treasury ASIC Enforcement Review.

Q. How can recurrence of inappropriate responses be prevented?

A. Clean out all of ASIC's relevant personnel involved in such complicity, not least Messrs Day and Saadat. The statements by Day and Saadat at the hearing of the Impairment of Customer Loans inquiry, 23 November 2015, detail clearly their involvement in the inaction and their excuses for such. The Commission should subpoena all correspondence between ASIC and SME/farmer bank victim complainants, call for complementary supply of such by all victim complainants, and subject all signatories to investigation with a view to locating personnel ultimately responsible for disbarment from public office and possible prosescution. In addition, see below.

8.2 Causes

Q. What were the causes of the conduct identified and criticised in this report?

A. All four causes listed under this heading are relevant. But the list is simplistic, substantially inadequate, scratching the surface (like the entire Royal Commission findings to date). See my submission #2371, especially parts 2.3C, 3.6, 3.7 & 3.9. Fundamental causes: the near comprehensive financial deregulation and privatisation of a sector henceforth run for private profit yet necessarily serving a public purpose; the deep asymmetric power relationship between lender and borrower or adviser and advisee; etc. Add the complementary corruption of bank satellite services (as above). Add the indifference or corrupt complicity of regulators and mediation services (as above). Add the ill-education of the legal profession and the complicity of the judiciary and court system itself which includes the odd corrupt judge – in particular, an ex-Supreme Court Chief Justice (still influential). Some court and judiciary procedural reforms could be readily implemented, not least the establishment of a public register of judiciary

pecuniary interests. Financial support for more equal access to justice of bank victims should be considered. When is this entire package going to be confronted, acknowledged, and dealt with? Otherwise, it's all merely going through the motions with the promise of more of the same soon down the track.

The deep asymmetric power relationship of lender/borrower (and adviser/advisee) is embodied in the terms of the contract itself, the intangible relationship between the parties (reflected for example in verbal exchanges and undertakings), and in the capacity of the bank lender to abuse and break the contract at will and with impunity. The much-vaunted 'law of contract' puts only the borrower under obligation, not the lender. This is the guts of the matter, which the Commission in its hearings has failed to discern, leave alone address.

No better example of this structure can be found than in the CBA takedown of hundreds of Bankwest commercial property customers after its cutdown price purchase of Bankwest in December 2008. Cursory examination of the experiences of even a handful of such borrowers would highlight the mechanisms by which this large-scale fraud was perpetrated. By declining to do so, indeed, by assertively supporting the CBA's claims, the Commission has merely reinforced the success of the fraud and legitimised the practice, widespread, for future employment by the entire banking sector. Do we need a Royal Commission into the Royal Commission?

8.3 Responses

Q. Are changes in law necessary?

A. The ultimate object of an effective penalty regime for the finance sector should be to send senior executives to gaol. And to work back as to how to achieve it. By contrast with potential gaol birds like insider traders, the economic and social impact of bank lender crimes is enormous. There is economic, social and psychological devastation out there in the hinterland, with dramatic adverse impact on overall business productivity and pressure on welfare services. Given that it appears impossible to offset the structural asymmetry of power between bank lender and borrower once a culture of professionalism has been dismantled post-financial deregulation, and given that monetary penalties hit the corporation (and are passed on) rather than the perpetrators, I have concluded that 'custodial sentences' are the only means to clear up rampant criminality in the banking sector. Bizarrely, the new penalty regime mooted in the current ASIC Enforcement Review, especially with respect to the Corporations Act, has a severe disconnect with the source and nature of the crimes perpetrated against business bank victims (as I have noted in my brief submission to the ASIC Enforcement Review). These amendments will thus have no impact on the current situation.

Q. Should the regulatory architecture change? Are some tasks better detached from ASIC?

A. Unconscionable conduct in financial services against business customers (currently ASIC Act s12CB & s12CC) should be returned to the ACCC. ASIC has not taken a single case against

bank lenders under these sections since it acquired responsibility from the ACCC in the amended ASIC Act August 2001. A scandal of the highest order. I have copies of correspondence from ASIC to victim complainants testifying to ASIC personnel indifference and complicity. Allan Fels has been pushing for this return for years. The ACCC is not ideal, but current Chair Rod Sims is atypically cognisant of the power imbalance facing small business in the marketplace.

Q. What is the proper place for industry codes of conduct? Should industry codes of practice like the 2019 Banking Code of Practice be given legislative recognition and application?

A. All industry codes should be mandatory and incorporated in the relevant sections of Consumer Law. Self regulation is a farce, as has been shown by over two decades of the existence of the bank-run Code of Banking Practice, its principles consistently ignored by its adherents. The 2015 Elliott J judgment in NAB v Rice/Rose against the NAB (which argued, both in the Trial hearing and on appeal, that the Code was discretionary!) should have changed the game. It hasn't happened. Endless refashioning of the Code is mere window dressing. Moreover, once the Code is in Consumer Law, it needs to be rigorously enforced – witness the failings of the mandatory franchise code as evidenced in the recent exposure of the most appalling abuses against franchisees.

Q. Is structural change in the industry necessary?

A. The concentration of the banking sector and dominance of the Big 4 is a malodorous consequence of multiple failures on the part of the competition regulator when faced with potential bank takeovers/mergers. Nothing can now be down to reverse that failure. The second tier merely copies the anti-social practices of the Big 4. Two desirable changes can, however, be envisaged. One, the forced divestment from banks of all operations offering superannuation services, financial advice and insurance. No more *allfinanz* institutions. Two, the re-establishment of a national publicly-owned bank with a public service remit. The reasons proffered for privatisation were spurious. One could start with the NZ Kiwi Bank model and work upwards.

For lack of a suitable question, I include the following recommendation under the heading of desired structural change for the industry. It is a matter of personnel employment involving recurrent 'revolving door' practices joining companies and sectors immersed in malpractice, of which the current NAB Board Chairman Ken Henry is an exemplary representative (ditto Mike Baird, NSW Treasurer/Premier to NAB; Tony D'Aloisio, ASIC Chair to PPB Insolvency). If there is a presumption that banking experience can enhance the skills of the political and regulatory classes, and vice versa, the system is not working to that effect. Rather, the revolving door acts to weaken political and regulatory commitment to effective financial regulation and to strengthen banking (and related institutions) resolve against self-regulation in the public interest. Revolving doorism at a senior level should be simply prohibited – those seeking high-flying careers should pursue one or the other.