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The Commissioner,
the Honourable Kenneth
Madison Hayne AC QC,
Via website

Re: Submission on the *Interim Report - Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (“Interim Report”)

Dear Commissioner,

Thank you for the opportunity to comment on the Interim Report and for your insight and that of the counsel assisting which I hold in the highest regard.

The Interim Report rightly focuses on laws specifically designed for the financial services, banking and superannuation industry, the relevant case studies and the detail of application and enforcement (or lack thereof by ASIC and APRA).

This submission is different. I am hoping to raise some general policy and law reform issues which are still within the Letters Patent terms of reference (see **Appendix A**), but in some cases apply beyond the financial services sector.

1. Stakeholder approach to director’s duties

The *Corporations Act 2001* requires that directors act in good faith in *the best interests* of the corporation (section 181). This has been interpreted to mean in the interests of the shareholders or members of the company as a whole.

This can be contrasted to the approach in some other countries where directors duties are owed to a wider range of stakeholders, such as customers, creditors, and the local community. A sensible balance between the profit essential (for example to pay shareholders saving for retirement) for the economy and other factors such as the rights of the workforce, customers, environment protection and community respect is needed. This is missing from the heart of our business law.



This is the 'elephant in the room' when considering misconduct in the financial services sector. We are to face another Royal Commission into aged care and then possibly into the electricity sector given the politics around power prices.

As an avid reader of the business pages and *Australian Financial Review*, I note reports such as that regarding the Coroner's inquest into the Dreamworld tragedy. Apparently, for the sake of \$2400 in budget, important safety features were **not** installed on the ride in question.

Although the 'stakeholder approach' has been previously considered and not taken up, it is submitted the time has come. This approach may avoid the taxpayer simply 'chasing their tail' with inquiry after inquiry into what is really the same issue - an inappropriate balance struck by the c-suite and Boards of some of our leading companies in regard to the priorities discussed above.

2. Applicability of crimes legislation, e.g., "secret commissions"

It is submitted that the consideration of relevant offences be expanded to cover the criminal law more broadly. Even where it is found not to apply, it is important for public confidence in the justice system, that accused are perceived to be treated the same, no matter whether they wear a white collar (such as those before the Commission), blue collar or a 'hoodie' (young offenders), to use an established phrase.

For example, the "secret commissions" prohibitions may call to mind situations of bribery of a public official or business agent for a principal (in the strict legal sense) but the actual legislative definitions suggest a wider application.

In Victoria, part of the definition is the term "agent" but this is defined to include "trustee". Could it apply to a superannuation trustee who holds funds on my behalf, as the customer, but accepts consideration from other entities in their corporate group, in exchange for keeping me in a poor performing investment option, or selling me 'junk' insurance with no relevant cover?

In *Jamieson* [1988] VR 879, Young CJ stated at 888:

Offences of this kind which may be said to be concerned with the 'business morality' of the community are hard to detect. When they do come before the Court they are often found to have been committed by persons who have been regarded as of good character and reputation. Often they are also well-to-do.



It is important for public trust in the enforcement system that these issues also be considered. The Royal Commission is performing an excellent and important role in fostering community trust and engagement in our legal system.

3. Customer right to apply to Tribunal

The current legal system for customers of financial services is clearly not adequate to address their concerns over misconduct.

In Victoria, the Victorian Civil and Administrative Tribunal provides a low cost and accessible solution for disputes. Legislative amendments should be considered so all customers considered in the case studies may take action in this type of venue in their jurisdiction.

It has been reported that to take one enforcement action against a bank, ASIC would require a budget of \$30 million. Given the high cost of court and representation and average wages in Australia, it is submitted that customers be given a more simple avenue and the unfairness which may result from the resources asymmetry (where just cases can't be pursued) be resolved in this way.

4. Market pressures on listed public company executives

It is suggested that consideration of the relevant policy issues be expanded to include the pressures on executives of public listed companies due to the investment environment.

It is important not to view the misconduct examples in a vacuum. Pressure from investors to continually increase profit and to meet 'guidance' may increase the risk of decisions which favour short term profit over customers legitimate rights.

Also, there appears to be 'market failure' to properly price in legal/catastrophe risk. By this I mean, for example shareholders in the major banks and Ardent Leisure (Dreamworld) were likely not prepared for the huge impact of these events.

In a financial world where executives of well performing companies which fail in even a minor way to meet 'guidance' are punished by the market, how long would business leaders last, who proposed additional spending (and thus lower returns) on safety or legal compliance (customer rights)?

Please feel free to contact me to discuss.

Further information or reports

As a former member of the Commonwealth public service, I understand there can be challenging budget constraints in the delivery of projects. As a hybrid- virtual firm (members of a co-working space with sites in Melbourne and Sydney) GOVLAW are able to deliver research, policy and legal work to clients' budgets, more effectively





than large firms with fixed overheads. If you would like me to expand on any of these points I would be happy to work to your budget requirements.

Yours sincerely,



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Appendix A

Extract from the Letters Patent	Relates to submission
(a) whether any conduct by financial services entities (including by directors, officers or employees of, or by anyone acting on behalf of, those entities) might have amounted to misconduct and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency;	2. "secret commissions"
(d)(i) are attributable to the particular culture and governance practices of a financial services entity or broader cultural or governance practices in the relevant industry or relevant subsector; or	1. Stakeholder approach to director's duties 4. Market pressures on listed public company executives
(e) the effectiveness of mechanisms for redress for consumers of financial services who suffer detriment as a result of misconduct by financial services entities;	3. Financial services customer right to apply to Tribunal
(g) the effectiveness and ability of regulators of financial services entities to identify and address misconduct by those entities;	3. Financial services customer right to apply to Tribunal
We further declare that you may inquire into any matter mentioned in paragraphs (a) to G) to the extent that the matter relates to or is connected with the peace, order and good government of the Commonwealth and any public purpose or any power of the Commonwealth.	1. Stakeholder approach to director's duties