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Our Reference Y0171

Financial Services Royal Commission review

Like so many Australians and the Financial Services Union, we too are "bitterly disappointed" in the Hayne Royal Commission. The community consensus is that "He's squibbed it". This is unacceptable. (See attached ABC News 26/2/19 article.)

Hayne goes nowhere near far enough and has completely failed to address the big issues lying at the centre of the banks' collective appalling conduct. The "sensational" fees for no service and deceased etc is, in fact, relatively small beer and just a smoke screen to deflect from the major core issues and problems.

Please find attached an analysis of Hayne's treatment, or at least mistreatment, of my case. I have dissected his report in so far as it relates to me and CBA's treatment of other Bankwest victims and compared his statements, analyses and findings with the facts. The comparison is shocking.

Hayne has got fundamental basic facts completely wrong. This has led to misinterpretation and seriously erroneous conclusions and findings. What is even more extraordinary is that when these factual errors were brought to his attention, he refused 'point blank' to re-examine or change his report. This is totally unacceptable and frankly an extraordinary position for a Royal Commissioner to take.

It seems the Commissioner has no real appreciation of the commercial dynamics of banking, property development and the interaction and implications of the relationship and mechanics associated therewith. Despite this obvious shortcoming, the Commission steadfastly refused our repeated requests to engage the services of suitably qualified, independent, banking and property experts to advise and assist the Commission in this regard. Again, this is quite extraordinary. Why not get expert advice on a complex commercial matter?

If the Commission has gotten so much wrong about the simple fundamentals of my compelling case and indeed the whole Bankwest issue, it is little wonder that this Commission barely rates a pass mark and is, in fact, considered a disappointment, failure and a travesty. I agree with the Financial Services Union....Hayne "squibbed it"! For a Royal Commissioner, who has not done a thorough, nor effective job, to dismiss us victims like recalcitrant children with "...enough is enough." is entirely inappropriate, at best, if not highly insulting to those who have suffered so badly at the hands of CBA.

Unlike Commissioner Hayne, please take the time to study the documents carefully and consider their very serious implications. It is clear to any balanced observer that a new Commission of Inquiry and/or a Royal Commission Mark 2 needs to be held urgently to specifically address the CBA/Bankwest issue and other matters which have been completely overlooked and/or ignored by Hayne.

Rory F O'Brien



**Review of the Royal Commission into Misconduct in the Banking,
Superannuation and Financial Services Industry (FSRC).**

- Hayne says of us Bankwest "agitators" that we do not understand the role of the Commissioner." The role and DUTY of the Commissioner is to inquire without fear nor favour ". We (Hayne) is/are here to "inquire" he says.
See RC Extracts 1 and 2.
- Hayne then asks for "evidence not mere assertions or conjecture". It seems to be with hard evidence there is no compelling need to "inquire" as the evidence surely speaks for itself. Conversely "assertions and conjecture" by their very nature demand "inquiry" to determine their veracity and weight. Is this not inconsistent with his role and duty to inquire"? A court can determine the implications of "evidence". A Royal Commission can "inquire" on a broader basis and consider "assertions and conjecture".
See RC Extract 3.
- Hayne claims to have read all submissions. He looked at them very carefully as did Counsel assisting. He further states that serious consideration was given as to what cases would be examined publicly. Hayne claims that "proceeding by case study is the best way he had of finding out what happened" yet only 27 out of 10,000 were ultimately examined. Assumedly he very carefully read and fully understood all the detail and implications of the other 9,973 submissions? (Yet in my case he got all the pivotal facts and fundamentals totally wrong see below.)
See RC Extract 4.
- In the Interim Report in relation to the Bankwest matter Hayne says that:
 1. CBA asserted it acted for sound commercial reasons.
See RC Extract 5.
 2. CBA identified Bankwest pre-acquisition loans of poor asset quality and high LVR etc.
See RC Extract 5.
 3. CBA says Bankwest loan book had poor quality loans.
See RC Extract 6.
 4. CBA acted in the prudent exercise of its contractual powers.
See RC Extract 7.

These are ALL the untested and uncontested (by Hayne) assertions of CBA. This is the very same CBA described by Hayne's own Commission as:

- The Gold Medal performer of bad conduct;
See RC Extract 8.
- Needing to face criminal charges;
- Needing to temper its sense of justice;
See RC Extract 9.
- Failing to keep proper Board Minutes on crucial decisions etc;
See RC Extract 10.
- Putting profits before the interests of customers.
See RC Extract 11.

- Despite **ALL** the above, and our constant rejected requests for the Commission to engage the services of independent, banking, experts to make an informed and fair assessment of CBA's conduct towards us, Hayne simply accepted CBA's position untested and failed completely to "inquire" into CBA's central claims as was his clearly stated "role and duty". Where is the diligence, balance and objectivity? This is totally unacceptable.
See RC Extract 12.
- Hayne rightly asks the question "Why would CBA engineer the default of performing loans", but again Hayne completely fails to "inquire" into this most central question. Why? He offers no explanation other than to promote and accept CBA's own response. Where are the independent banking experts? Where is the objectivity? Where is the rigorous questioning of CBA? Where is the comprehensive examination of us, the victims? Indeed, where is the "Inquiry"?
See RC Extract 13.
- Hayne claims "there is nothing in CBA's submission to the Commission that demonstrates any link between CBA's conduct in relation to Bankwest and CBA's management of its Tier 1 Capital Ratio. Is this at all surprising? Again, where is the forensic "inquiry"? Where is the independent expert advice? Given CBA's well established "form" in the dishonesty department, surely Hayne needs to do much, much more than merely accept CBA's version at face value?
See RC Extract 14.
- Hayne claims that unless CBA was irrational, there is no logical connection between the price CBA paid for Bankwest and how it managed its loans after acquisition. He "expects" CBA would have managed Bankwest loans post-acquisition to its commercial benefit. Where is the "inquiry" rather than "expectation" or assumption? What if the loans were mismanaged by CBA? What if CBA did, in fact, have some other obscure advantage elsewhere? Again, where is the independent, forensic, banking, expert investigation? Expectations or mere assumptions by a Royal Commissioner charged with the sole duty to "inquire" are simply not good enough and are in fact totally unacceptable.
See RC Extract 15.
- Hayne also claims in this context that "The price CBA paid for Bankwest was a sunk cost. Whether CBA had obtained a bargain or not did not affect future outcomes. "This is very tricky and deceptive wording indeed. It is in fact the exact opposite. In reality it is the actual unfolding of "future outcomes" that determine if a bargain was had at a fixed purchase price in time. CBA paid \$2.1 billion for Bankwest. If CBA could influence or affect "future outcomes" to its commercial advantage when measured against the fixed purchase price (which may well have included defaulting or getting rid of inherited Bankwest loans for a variety of undisclosed reasons) then the Bankwest purchase would be valued as an even bigger bargain than the (fixed) purchase price paid in December 2008. That is why it was so critical to have CBA's actions in this area forensically examined and analyzed by independent banking experts. This did not happen. Rather Hayne simply took CBA's explanation as Gospel and despite their shocking revelations about their conduct exposed elsewhere.
See RC Extract 16.

- Hayne claims that CBA paid less than book value for Bankwest and took it as it found it. He further claims the vendor (HBOS) got the best price it could for what both HBOS and CBA "evidently" regarded as a poor loan book. This is simply incorrect. Bankwest and HBOS did not consider their loan book was poor, in fact, to the contrary. Bankwest was sold reluctantly and cheaply because HBOS in London could not support the wholesale support funding requirements. Then CBA CEO, Ralph Norris, is on record saying the exact opposite i.e. what a high-quality asset etc.:

"The Commonwealth Bank regularly reviews acquisition opportunities but rarely have we seen a quality asset such as BankWest become available on such attractive terms to us. The strength of our current capital and funding position combined with the strategic value of this transaction makes this an attractive opportunity for the Group and its shareholders." [CBA media release Sydney 8 October 2008.]

See RC Extract 17.

Again, the Commissioner cannot, or at least should not, rely on an "evident" position but rather must "inquire" into the facts at a far more detailed and multi-dimensional forensic level supported by independent experts. Where is this rigour and professionalism? Again, this is well below the standard and indeed obligations of a Royal Commission.

- Hayne says, "an impaired asset is a loan where the bank does not expect to recover the full proceeds of the loan and expects to make a loss". In my case CBA claimed my loan was impaired to the tune of some \$47m i.e. in the sole opinion of CBA. By contrast my loan was considered as sound i.e. effectively unimpaired by:

See RC Extract 18.

- Me, an experienced, successful developer;
- Independent experts (Dransfield Hotels and Resorts);
- Bankwest;
- HBOS;
- KPMG;
- Ernst & Young.

In fact, CBA's claim was totally rejected by the independent arbiter under the Bankwest purchase contract, Ernst & Young. Again, why would Hayne not even question let alone properly "inquire" into CBA's attempt to make an obviously unjustifiable \$47m impairment claim against my loan and the real motives driving such a false claim particularly given CBA's established propensity for dishonest conduct elsewhere? This beggars belief.

See RC Extract 19.

In respect of my loan specifically Hayne says :

I claim the "Clawback" theory explains CBA's conduct towards me. This is not correct. I claim that it was in fact a multifaceted approach by CBA as follows:

See RC Extract 20.

1. The 6-month delay in CBA making a decision re my loan roll-over drove up creditors etc and "engineered" a position where an otherwise stable and sound loan was rendered less stable (it was certainly stable when CBA took over in December 2008 as independently determined by Ernst & Young and KPMG)
2. CBA were totally "conflicted" between December 2008 and April 2009 as they were simultaneously making a \$47m clawback claim against Bankwest owner/vendor HBOS at precisely the same time that the roll-over funds were needed urgently. The required and promised roll-over would have rendered CBA's \$47m claim totally untenable and indeed void and irrelevant had they rolled-over the residual debt in December 2008 as required. Had the loan been rolled no claim could have been made on any basis i.e. it was an absolute zero-sum game. If the bank rolled over the residual debt, they could not possibly claim that project was impaired or in trouble on any sensible basis.
See RC Extract 23.
3. By making a \$47m clawback claim as at the 19 December 2008 which was being considered/negotiated in early 2009 and by simultaneously freezing loan rollover funds for 6 months CBA had engineered a self-fulfilling prophecy giving retrospective credence to their claim. In any event, had the funds been rolled over back in December there was, nor could there be, any basis for a claim. In other words, CBA simply could not provide the rollover and claim against HBOS at the same time plus the delays and stresses upon me and the project helped the perceived veracity of their claim. CBA did not engineer a default to make a claim, but they did engineer an inordinate and uncommercial and "unconscionable" delay to assist their claim.
See RC Extract 23.
4. Had CBA rolled over the residual debt as required they would have had to provide some \$70m (down from \$175m i.e. **NOT** increased as claimed by Hayne) against a residual valuation of \$149m (\$255m less \$106m in settled sales) being a new LVR of 47%. This also generated annual cash flow of some \$10m from resort operations and is a highly stable and sound position by any established and accepted banking/lending measure and which is reflected in the KPMG and Ernst & Young determinations i.e. CBA's claim for a \$47m impairment was totally rejected i.e. not one dollar was awarded. In other words, CBA stood to get **ALL** its money back.
See RC Extract 23.
 - Hayne claims to identify the basic facts about my dealings with Bankwest and CBA as follows:
 - Hayne claims my loan expired at the end November 2008 and was due to be repaid then. Not true. The loan was extended by agreement with Bankwest to 28th February 2009
See RC Extract 21
 - Hayne claims as such the loan was in default in November 2008. Not true as the loan had been extended.
See RC Extract 21.

Hayne claims I asked for more money to complete the project. Not true. The Certificate of Practical completion had been issued on 28 November .The project was complete. I was seeking rollover of a vastly reduced residual debt (approx. \$175m down to \$70m).

See RC Extract 22.

- Hayne claims I made application for additional funding in December 2008 after my loan had expired. Not true. The loan rollover with Bankwest was made well before December but asked to be summarized in December. The existing loan was not expired but extended through to 28 February 2009. The reason further advances were made during December was precisely because the loan was still on foot. CBA did in fact "stall" the time-crucial decision and failed to provide a decision on roll-over of residual debt for 6 months between November 2008 and April 2009. This is uncommercial, untenable and unconscionable conduct by a bank. During this 6-month period we (and other third-party project participants) were constantly told, in writing, by Bankwest that the urgently needed roll-over funding would be released imminently . This was clearly false, misleading and deceptive conduct.

See RC Extract 23 and 24.

- Hayne claims in the context of the ASBFEO investigation "my loan was not performing at the time of acquisition" i.e. 19 December 2008. Not true as per above.

See RC Extract 25.

- Hayne claims that the decision by CBA not to lend "more" money was open to them especially when I was already in "default ". It was a matter for CBA to decide whether it "would grant a new and larger loan". As highlighted above ALL these statements by the Commissioner are totally false and paint a vastly perverted picture. I was seeking not a new and larger loan, but the exact opposite namely a **ROLLOVER** of an **EXISTING** and dramatically **SMALLER** loan (a reduced amount by circa \$100m). This skewing of the basic facts by a Royal Commissioner, who claims to have thoroughly read my submission, and all the evidence, is outrageous and totally unacceptable.

See RC Extracts 26 and 27.

- Hayne claims that the decision by CBA not to roll-over the reduced residual debt "was not directed IN ANY WAY to obtaining a clawback price reduction". For the multifaceted reasons detailed above, it is obvious to any astute observer that CBA's actions were clearly designed to assist the veracity and enhance the chances for the successful clawback claim of some \$47m. Certainly the inexplicable 6-month time delay was designed to do just that albeit that it created a massive conflict of interest in relation to the rollover.

See RC Extracts 26 and 27.

ALL these fundamental and crucial errors of fact were formally advised to Hayne in writing on a number of occasions, however Hayne formally responded that he would not review nor change, or correct, his Interim Report in this regard. This is extraordinary conduct by a Royal Commissioner.

See RC Extract 28.

It is critical to note that the key CBA senior executives who perpetrated the above conduct have NOT been called, nor appeared before the Commission. Indeed Messrs Norris, Narev and Craig are all very conspicuous in their total absence. Why have they not been called to account by the Commissioner?

I have had enough!
See RC Extract 29.

Hayne says that the substantial discount price achieved by CBA in purchasing Bankwest (a highly regarded and valuable targeted asset according to CEO Ralph Norris see point see reference to Extract 17 above) had no bearing on CBA's conduct towards Bankwest customers. According to Hayne "this point goes nowhere". This demonstrates that Hayne has no idea of the commercial motives, incentives and objectives of CBA. This is very troubling.

Given CBA acquired Bankwest (a highly desirable banking asset) at a significant discount to book value ie they did not actually "pay" for many loans or the overall loan book came at a heavy discount means that CBA had the maneuvering commercial flexibility and "headroom" to get rid of loans, if so desired for any reason, with impunity and no commercial impact on CBA. Why? Simply because they came for free. What value does one ascribe to an asset that wasn't paid for or which came a heavily discounted "cheap" price? In short, the discount price allowed CBA to deal with Bankwest loans in an abnormal manner. Conversely **IF** CBA had paid full price or even above full price, they would have crawled over broken glass to preserve, nurture and support performing or even marginal loans in order to protect their asset value that they had actually paid for.

See RC Extract 30.

Hayne incorrectly claims that my loan was expired in November 2008 and I was in default at that time. This is factually wrong (see reference to Extracts 21 above). Despite my loan being "expired" and "in default" Hayne acknowledges that CBA made additional advances of \$2.3m and \$750k ie \$3.05m during December 2008. Hayne also acknowledges that receivers were not appointed until April 2009 approximately six months AFTER the "default" and "expiry" events way back (according to Hayne) in November 2008. This clearly confirms three crucial points all missed by Hayne:

1. No bank would advance \$3m plus against a defaulted and expired loan
2. No bank would wait six months to appoint receivers against a loan that was already in default and expired particularly a large loan of circa \$175m
3. Clearly in CBA's opinion my loan was neither in default nor expired in November 2008 as claimed by Hayne. CBA's and Bankwest's actions, representations, statements and general approach towards me between November 2008 and April 2009 totally support this position.

If, as confirmed above, I was not in default in Nov/Dec 2008 and CBA was continuing to advance substantial funds and support the project going forward all the way to April 2009, then how could they possibly claim my loan was "impaired" back in December 2008?

We now know that CBA claimed a \$46m impairment against HBOS as at 19 December 2008. The claim was rejected by HBOS, KPMG and Ernst & Young with no impairment discount awarded. These findings were entirely consistent with CBA's own assessment at that time. This means that CBA's attempted impairment discount claim was made "retrospectively" ie a clawback. To give seeming veracity to that claim, CBA initiated an interminable and unconscionable time delay to make their retrospective decision look more plausible. Even then it totally failed on merit or lack thereof.

This is an appalling miss by Hayne.
See RC Extract 23 and 24.



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**Extracts from the Royal Commission into Misconduct in the Banking,
Superannuation and Financial Services Industry (FSRC) Hearing Transcripts, Interim
Report and Final Report.**

1. These misconceptions have emerged in a number of communications which have been addressed to the Commission since the last round of hearings **by persons seeking to agitate for the Commission to devote more attention to the investigation of the CBA takeover of Bankwest**, either generally or in relation to particular cases.
[Source: Transcript 25 June 2018 FSRC Hearing, Brisbane page 3065 para 1 line 5.]
2. That, of course, misunderstands the role and the duty of a Royal Commissioner, **which is to inquire, without fear or favour, into matters falling within the terms of reference**. Neither I, nor Counsel Assisting, or the solicitors assisting the Commission, carry any brief for those who assert a grievance arising from the takeover of Bankwest or, indeed, any other issue. **We are here to inquire**.
[Source: Transcript 25 June 2018 FSRC Hearing, Brisbane page 3066 para 4 line 30.]
3. However, we have made clear that we will derive most assistance if those who take up this invitation focus on identifying matters which have not already been raised with us **and identifying evidence, not mere assertions and conjecture**, that is said to be relevant to the consideration of these matters. Of course, I will bear well in mind that any additional material raised by this process may, in turn, trigger procedural fairness obligations in favour of other persons.
[Source: Transcript 25 June 2018 FSRC Hearing, Brisbane page 3067 para 1 line 5.]
4. **I read those submissions before deciding whether to grant leave. I looked at them very carefully, as did members of the Commission staff. Counsel and solicitors assisting the Commission looked at those and at all of the other submissions about issues of the kind that will be examined in this round of hearings before deciding what case studies would be examined publicly. I remain of the view that proceeding by case study is the best way I have of finding out what has happened, finding out what was done or not done in response to what happened, identifying what could have been done and what should have been done in response, and then thinking about what follows from those conclusions**. And proceeding in that way means, inevitably, that some who want their cases dealt with publicly do not have their cases chosen. As will be apparent, however, from what I have said: **serious consideration has been given to what case studies would be examined in the course of the public hearings**, and which people and entities would be given leave to appear. **[Source: Transcript 25 June 2018 FSRC Hearing, Brisbane page 3067 para 3 line 265.]**
5. CBA **has long asserted that it acted for sound commercial reasons**. In its profit announcement for the year ended 30 June 2010 CBA said that:
[CBA] identified many pre-acquisition loans [made by Bankwest] reflecting poor asset quality, high loan to value ratios and insufficient covenant coverage. This resulted in significant risk grade reassessments and security revaluations with loan impairment expenses increasing \$304 million. These loans are confined to the pre-acquisition business banking book.

[Source: FSRC Interim Report Page 193-194 Section 4 Analysis of the various theories.]

6. This observation captures the central elements of CBA's answer to allegations that what it did in connection with Bankwest's business loan book was improper. **CBA says that Bankwest's business loan book had loans of poor quality;** **[Source: FSRC Interim Report Page 194]**
7. At the third round of hearings, **CBA says that it acted in individual cases in the prudent exercise of its contractual powers,** albeit on occasion attended by conduct that it now concedes falls short of community standards and expectations. **[Source: FSRC Interim, page 194.]**
8. And you know that **Commonwealth Bank group entities have charged more fees for no service than any other financial services entity in the country;** do you know that?---I do know that.
- It would be **the gold medallist** if ASIC was handing out **medals for fees for no service, wouldn't it?**---Yes. **[Source Transcript of Day 13 Melbourne 18 April 2018 page 1258, line 16 Mr Costello's examination of Ms L M Elkins, GM Colonial First State.]**
9. And the last entry:
Temper your sense of justice.
You made after the meeting?---Yes.
What does that mean, "temper your sense of justice", Mr Comyn?---That is what Mr Narev said to me. **[Source Transcript Day 61 20 November 2018 page 6623 line 31.]**
10. And then we see the committee discussed and noted – I'm sorry, we will need to pan back – the final line is that:
The committee discussed and noted the group audit and assurance report.
?---That's correct.
- Now, **the minutes don't report the committee saying anything** about the anti-money laundering and counter-terrorism financing audit issues?---**No, they don't, but that wouldn't mean that there hadn't been a discussion.** **[Source: FSRC Transcript of examination of Ms Livingstone, CBA Chair.]**
- 11....*the context of priorities within the bank culture at that time is relevant.*
- I would have taken that as suggesting that **profitability was what was driving decision-making** at that time. Am I wrong to read it in that way?---No. I – I don't think you're wrong to make that conclusion at that point in time, and I think, as I also referenced the same point in my witness statement, there are specific examples **where we did not sufficiently prioritise customer interests over shareholder interests.** Yes, I agree. **[Source: Transcript of Day 61.Commissioner Hayne questioning Mr Comyn, CEO CBA, on 20 November 2018. Page 6633, line 25]**

12. I now will make only two points.

First, as I said in the *Interim Report*:

[I]t should not be surprising that the sense of individual grievance [of borrowers who suffered loss], joined with the grievances of others, should spark allegations that the lender did not act according to the lender's judgments about the risks of continuing the loan to a particular borrower, but acted according to some overall plan that was at least improper if not unlawful. [Source: FSRC Final Report Page 118 para 3.]

13. The importance of unpacking the expressions is emphasised by asking the question that has already been identified. Why would CBA 'engineer' default of otherwise 'performing' loans? If the loan was sound, adequately secured, and being serviced, why bring it to an end? Why do that if the probable, even inevitable, consequence of doing so was that CBA would itself suffer loss? [Source: FSRC Interim Report Vol 1 page 194-195.]

14. Fourth, there is nothing in any of the material that CBA produced to the Commission that shows any connection between CBA's conduct in relation to the Bankwest commercial loan book and CBA's capital management of its Tier 1 Capital Ratio. [Source: FSRC Interim Report Vol 1 page 198.]

15. First, unless it is assumed that CBA was irrational, there is no logical connection between the price CBA paid for Bankwest and how it managed loans after acquisition. I would expect that CBA managed loans after its acquisition of Bankwest for its commercial benefit. [Source: FSRC Interim Report Vol 1 page 199]

16. The price it had paid for Bankwest was a sunk cost. Whether it had obtained a bargain or not did not affect future outcomes. [Source: FSRC Interim Report Vol 1 page 199]

17. CBA paid less than book value for Bankwest and took Bankwest as it found it. The vendor got the best price it could for what both vendor and purchaser evidently regarded as a poor loan book. [Source: FSRC Interim Report Vol 1 page 200 para 1.]

18. An impaired asset is a loan where the bank does not expect to recover the full proceeds of the loan and expects to make a loss. [Source FSRC Interim Report Vol 1 page 200.]

19. (The case of Mr Rory O'Brien, to which I refer below, is a notable exception.) EY had completed its expert determination under the price adjustment mechanism by 7 July 2009. Nothing done after that date, could have, or did have, any effect on that determination. The price adjustment mechanism had done its work. Subsequent events were irrelevant to the price adjustment process. [Source: FSRC Interim Report Vol 1 page 196]

20. The person who provided the most extensive further submissions was Mr Rory O'Brien. Mr O'Brien considers himself to be a victim of CBA's conduct. He propounds the 'clawback theory' and says that it explains CBA's conduct towards him.

As I have said, I consider that the clawback theory is false.

Mr O'Brien's complaint arises from loans Bankwest made in respect of his Whisper Bay project. He says that the project had achieved completion at the end of November 2008 and that the conduct of CBA, particularly its appointment of receivers in April 2009, was directed to achievement of an adjustment to the purchase price CBA paid for Bankwest. [Source: FSRC Interim Report Vol 1 page 211 para 5.]

21. By the end of November 2008, Mr O'Brien's company, FOB-Airlie Beach Pty Ltd had borrowed approximately \$172 million from Bankwest. The term of the loan had expired. The loan was due to be repaid. FOB-Airlie did not, and could not, repay the loan on the due date. It was in default.
22. In December 2008, Mr O'Brien asked for more funding to complete the project. It appears from the documents that FOB-Airlie then owed Westpac money. CBA completed the acquisition of Bankwest on 19 December 2008.
23. Mr O'Brien complains that CBA 'stalled' on its consideration of the application for further funding that he had made in December 2008 after the term of the existing loan had expired. In fact, during December 2008, Bankwest made two additional temporary advances: one of \$2.3 million and the other of \$750,000 (a total of \$3.05 million).
24. Bankwest did not advance the additional \$16 million that FOB-Airlie sought. The application was considered by the bank and rejected. In April 2009, Bankwest appointed receivers [Source: FSRC Interim Report Vol 1 page 212 para 4.]
25. Mr O'Brien's case was considered by the ASBFEO. As noted above, the ASBFEO concluded that '[t]he significant and sudden change in support for the project, driven by the CBA representative, in March '09 appears consistent with CBA's intent to maximise the clawback against the purchase price of [Bankwest]'. But, later, when the ASBFEO made submissions to the Commission, she said that the hypothesis that 'losses on loans incurred post acquisition could be 'clawed back' by [Bankwest]/CBA... [Source: FSRC Interim Report Vol 1 page 214 para 2]
26. There was no capacity in the Share Sale Deed for a clawback of performing loans that were present at acquisition and which post-acquisition became impaired. [Source: FSRC Interim Report Vol 1 page 214 para 3]
27. Perhaps the decision that CBA made, not to lend more money to Mr O'Brien's company when it was already in default, was not the only decision open to CBA. But the decision not to lend more money was reasonably open, especially when CBA knew that Mr O'Brien had defaulted to it and owed Westpac more than \$17 million. It was a matter for CBA to decide whether it would grant a new and larger loan. It chose not to do so. The decision that CBA made was not directed in any way to obtaining some 'clawback' of purchase price. [Source: FSRC Interim Report page 214 para 5.]
28. I seek neither to add to, nor subtract from, what I said about those matters in the *Interim Report*. [Source: FSRC Final Report, Vol 1, page 117 para 5.]

29. Yet they say there should be yet another inquiry. I do not agree. Enough is enough. [Source: FSRC Final Report Vol 1, Page 118 para 5.]
30. The second point to make is that some submitters pointed out that CBA was expecting to pay, and did pay a price for acquisition of Bankwest that was a discount to the net assets of Bankwest (and St Andrews and HBOSGS). They are correct. As at October 2008, the purchase price of \$2.1 billion before adjustments was 0.8 multiplied by the 2007 book value of Bankwest, St Andrews and HBOSGS.⁷² But the point goes nowhere. Whether CBA engaged in misconduct in its dealings with Bankwest borrowers after acquisition depends upon how it dealt with those borrowers. Dealings that do not otherwise constitute misconduct or conduct falling below community standards and expectations are not transformed into misconduct because CBA paid a discount to book value. Similarly, had CBA paid a price for Bankwest based on a multiplier of greater than one on the book value, that would not have somehow lessened the legal obligations that applied to it in dealing with Bankwest borrowers.
[Source FSRC Interim Report Vol 1, page 223.]

ABC NEWS

ANALYSIS

Kenneth Hayne's final royal commission report held back 'heavy hits' from the banks

By Stephen Long

Updated Tue 26 Feb 2019, 11:18am

The body language said it all.

On the afternoon of Monday, February 4, representatives of the banking lobby and various other interest groups were locked in a windowless room at Parliament House, perusing the three-volume report of the Hayne royal commission before its public release by the Treasurer.

According to several people in the room, some 35 minutes into the lock-up, Anna Bligh, chief executive officer of the Australian Banking Association, sat back, relaxed and looked around the space.

Bligh's brow unfurrowed and the tension in her shoulders slipped away.

Although she and her minions kept reading, **the former Queensland Premier had seen enough to know that it was a good outcome for the banks.**

"Fifteen minutes in, people were looking perplexed," recalls someone who was in that room.

"Where were the heavy hits?"

About the same time as Ms Bligh relaxed, a representative of the industry funds turned to a colleague and said: **"He's squibbed it."**

That phrase soon echoed around the hall.

It became the headline on the Finance Sector Union's media release **expressing "bitter disappointment" at the outcome.**

Investors also seemed to take the view that **Kenneth Hayne had delivered a damp squib**; the following day a relief rally sent bank share prices soaring.

In the wash-up of the royal commission, **the disconnect between the evidence unearthed in the hearings and the commissioner's mild recommendations for change remains striking.**

With a tone of moral outrage, the report catalogues, in detail, transgressions by all the major banks and finance houses such as AMP and IOOF: fees for no service; gouging money from the dead for "financial advice" and even life insurance; traducing customers' best interests and profiting at the expense of the people these financial institutions are meant to serve.

Is self-restraint the solution to **a culture of greed?**

The analysis firmly ties this behaviour to an aggressive sales culture in the industry that **puts the pursuit of short-term profit ahead of basic standards of honesty and decency.**

"Rewarding misconduct is wrong. Yet incentive, bonus and commission schemes throughout the financial services industry have measured sales and profit, but not compliance with the law and proper standards," the commissioner lamented.

"Providing a service to customers was relegated to second place. Sales became all important."

How does the commissioner plan to dismantle that culture?

Although he has called for some tweaks to the law, self-regulation is one of the main remedies he's relying on.

Justice Hayne wants the banks to adopt the recommendations of the Sedgwick review, a study of bank remuneration by former APS commissioner Stephen Sedgwick commissioned by the big banks' lobby group, the Australian Banking Association.

The Sedgwick review stopped short of recommending an outright ban on incentive payments for product sales, but said pay incentives for retail bank staff should not be based directly or solely on sales performance, and that sales incentives should form a minor part of remuneration for bank employees.

All the banks have publicly committed to implementing the Sedgwick review's recommendations.

But bank insiders say privately there is a lot of wriggle room; and how long before commitments are eroded under pressure to deliver shareholder returns?

Just as instructive is what the Hayne commission didn't recommend.

The conflicts of interest, the duping of customers, the sales pitches masquerading as financial advice were all underpinned and amplified by regulators' decisions to let banks swallow up wealth management businesses and broking houses.

This turned banks into vertically-integrated behemoths with a vast sales force to flog financial products they manufactured and sell people investments that made the banks' money, often regardless of whether this was in the best interests of the customer.

Enforced structural separation of these businesses was one of the biggest fears of the finance sector and an obvious remedy.

But it was not considered in the Hayne report.

Super conflicts sidestepped

In a similar way, the royal commission sidestepped the blatant conflicts of interest that extend all the way to the boardroom.

Under law, the "sole purpose" of the trustee of a superannuation fund is to serve the interests of members.

Yet in the retail superannuation funds run for profit by banks and finance companies, the interests of members have been routinely undermined by arrangements that place bank executives and senior employees on the trustee boards.

What a surprise that trustees whose remuneration in their day job is tied to the profits of the bank have let underperforming super funds funnel huge revenues to the banks that own them and pay multiples of market rates for in-house bank services.

These conflicted governance arrangements were left untouched by the royal commission.

After posing the question of what led to the scandalous behaviour, Justice Hayne concluded: "Too often, the answer seems to be greed — the pursuit of short-term profit at the expense of basic standards of honesty."

Yet the laws governing much financial regulation were built on the assumption that "greed is good" — in the economist's sense that the pursuit of self-interest (profit) will lead to competition and innovation that benefits consumers.

In the superannuation sector — where not-for-profit industry and corporate funds have overall consistently outperformed bank funds run for profit — this is a highly questionable assumption.

A different commissioner, a different inquiry, might have contemplated whether the purpose of maximising retirement savings is served at all by having profit-driven funds in the compulsory superannuation sector.

He or she might have gone where the Cooper review of superannuation balked at going, and recommended that everyone's superannuation be transferred into a basic account with balanced investments and low fees unless they actively opted out and chose another fund.

But it was unrealistic to expect this from a small 'c' conservative and black letter lawyer such as Justice Hayne.

Can bankers really change their spots?

Someone I know recently observed that in most professions — medicine, law, even economics — there is a cohort of people whose primary motivation is not to make money but to serve the public good, but you don't find this much in finance and banking.

It's a view reflected in popular culture: from *Billions* to *Wall Street* and advertisements that harness the trope of the greedy

banker, the pursuit of profit and naked self-interest is portrayed as a hallmark of the industry.

Justice Hayne's view was that the problem lay less with the law than with a lack of enforcement; stung by his criticisms, the corporate watchdog ASIC is now promising that litigation — rather than doing deals with banks — will be its first option.

Yet, at the same time, its new chairman James Shipton has been complaining to all who will listen that ASIC doesn't have enough money.

If the regulators up the ante, and while the memories of the commission linger, there are sure to be less bankers behaving badly.

Whether it lasts is less certain.

Like the bread and circuses served up in the arenas of Rome, it may be the royal commission's main purpose was to distract and entertain.

The hearings were great theatre — daily revelations of egregious conduct absorbed the populous and the shaming of bank executives and directors helped sate the public's anger.

There's even a couple of heads on sticks now NAB's chiefs have resigned, and the politicians are promising action, though few people will examine the detail.

But will it slowly return to business as usual as we look away?

Topics: banking, royal-commissions, australia

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