

PRESS RELEASE

As the financial services business community braces itself for what may emerge from the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, the most recent issue of the *Company and Securities Law Journal* offers perspectives from leading academic researchers on the success of financial regulators in delivering qualities such as fairness and accountability to financial markets.

ASIC's burgeoning powers

In an article titled 'Fairness and Financial Services: Revisiting the Enforcement Framework' Professor Pamela Hanrahan, of UNSW Business School says,

"Giving extensive new powers to a regulator will not result in change if that agency is under-resourced or under-incentivised to use them or if it is subjected to other forces that impact on its willingness to act, such as regulatory capture, inertia or political interference."

Moreover, she notes,

"There is now a level of consensus that the severity of the sanctions for breaches of the regulatory requirements covering financial services in Australia does not reflect the seriousness with which the community views breaches of those requirements and may not be a credible deterrent for larger providers."

Therefore, she concludes,

"If changes to the enforcement framework are ... now... the only design game in town, then it is worth reflecting critically on what those changes might involve. Otherwise there is a risk that the process will default to a wholesale ratcheting up of sanctions or erosion of legal protections available to individuals and companies, the subject of enforcement actions. At the same time, it is important that the enforcement regime satisfies the community that bad behaviour by financial services providers can be dealt with appropriately at a firm level, rather than just by picking off individual 'bad applies'."

Dr Scott Donald takes a similar view in 'Whither Customer Protection in Financial Services?'. He says,

"it is important to recognise that many rules and processes that might be required to remediate past misdeeds and to discourage future transgression already exist... Adding ... (more) in the absence of the political will to use them simply adds costs and a temporary (and illusory) veneer of safety. Similarly, imposing new rules... which responds to political imperatives rather than technical necessity, simply invests the regulatory regime with unevenness and inconsistencies which undermine its integrity."

The rise of customer advocates

In an article entitled 'The Fairness Rationale for Customer Advocacy in the Financial Sector,' Professor Dimity Kingsford Smith, recently stepped-down customer advocate for NAB Wealth, and before that Chair of the Conduct Review Committee of the Financial Planning Association from 2007 to 2014, reflects on the trend towards the appointment of customer advocates with banks as a means of injecting a measure of customer-focus into the day to day operations as well as in their remediation programmes. She notes,

“The appointment of customer advocates by Australian banks is a recent initiative the transparent purpose of which is the increase of fairness and trust in banks.”

She asks,

“Why have financial sector customer advocates? The simple answer to this question is that fairness is not self-executing”

However, she notes,

“the key to seeing things from the customers’ standpoint is the independence of mind coming from the habits of curiosity, skepticism and questioning...” “Ideally, advocates should also be part-time. Without other income and time for exposure to other perspectives, they are unlikely to maintain the independence of mind and personal resolve necessary to challenge a bank... In the Australian experiment this ideal has mostly not been realised in practice: this is disappointing.”

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