

Who comes first as regulators enforce change?



Chair of JP Morgan Securities and the Financial Reporting Council UK **Sir Winfried Bischoff** says the global tide is now turning towards better culture in banking. *Image credit: supplied*

Banking royal commission

By Alexandra Vanags
Mon 2 September 2019

Shareholders first and pay packets second could be the new model as regulators focus on culture in the banking sector post-Hayne.

Chair of JP Morgan Securities and the UK Financial Reporting Council **Sir Winfried Bischoff** said the global tide was now turning towards culture.

"In the UK and US, regulators are focusing on culture. In banking in particular, culture is much more at the forefront and I think it is going to continue to be so," he told *Australian Banking Daily* in an interview at the **Governance Institute of Australia's** [National conference](#) in Sydney.

"There is a view that culture eats strategy for breakfast but I happen to disagree. I think you have to have both. Strategy is important as well — to be a very nice firm but not to have a viable, long-term strategy won't work either."

Change in culture, which takes in everything from shareholder primacy to remuneration, is often criticised as a wishy-washy concept, but experts speaking at the conference said it was in fact measurable and enforceable.

“The banking regulators have more power... they can look at culture. And culture is measurable. Data which we all collect through exit interviews, turnover, customers, whistleblowing. A lot of it is there, but we don't necessarily use it,” Bischoff told *Australian Banking Daily*.

“So it isn't as if we are imposing on companies a lot of new stuff. A lot is there but it isn't used properly. Whistleblowing is now being used, and we're now looking further into to bullying and harassment.”

Rhizome Advisory Group managing director and co-founder, and former senior **APRA** staffer **Fahmi Hossain**, said during a panel session that the calls for culture change went back years, to 2003 and the investigation into the collapse of HIH Insurance, then the global financial crisis.

“It's only now that regulators are doing more and going harder on changing culture,” Hossain explained.

“It's taken strong action to force it to a head.”

He said that in his experience, when corporates did a deep dive on culture and got a real sense of the culture of their organisation, they began to see something tangible, and that was when companies started to recognise the value of doing so.

Shareholders or stakeholders

Bischoff said shareholder primacy was one issue underpinning cultural change.

“Should you just be looking at shareholder returns or should you be more widely engaged in relation to the community, employees, customers etc?” he questioned.

This issue was in the spotlight recently when the **Business Roundtable**, a group of chief executive officers of nearly 200 major US corporations, [suggested removing the idea](#) that they function first and foremost to serve their shareholders and to maximise profits.

The **ASX** last year [proposed updates](#) to its [Corporate Governance Principles and Recommendations](#). The update suggested the creation of a purpose for businesses, which would include removing “shareholder primacy. It was widely rejected.

ANZ company secretary **Simon Pordage** told the conference the bank could not “get away from the changes that need to be made” and there was a “big shift” at ANZ following its APRA self-assessment [into culture, governance and accountability](#).

“We're of the firm belief that the current law within Australia certainly permits us to look at our responsibility to other stakeholders, and not just our shareholders. One of the things that has been happening at ANZ is a real drive to instil purpose,” Pordage said.

Governance Institute CEO **Megan Motto** told *Australian Banking Daily*. “we tend to make shareholder and stakeholder interest into a dichotomy, but I think we should take a more

Remuneration

At the heart of culture change and shareholder primacy was also remuneration — financial and non-financial.

“Of course remuneration and incentive schemes have a big impact on behaviour — APRA is currently consulting on its [new CPS 511 standard](#), that certainly looks at both financial and non-financial measures,” Pordage said.

“One of the things we put in place is a whole reimagining of rewards. So whereas in the past we have had a number of different business unit incentive plans, now there’s just an overall approach, which is aimed at reducing the overall variable pay all around.”

Ausbil equities analyst **Jan van der Shalk** said there was not enough board oversight to challenge and scrutinise executives on remuneration and that there would be “real change” going forward, with an increased role for company secretaries and general counsels.

Motto said it was a challenge to find the right balance.

“There are very polarised views,” she said.

“On one hand, we are in a competitive global market for talent. But on the other there are expectations around fairness. There is low wages growth in the general population and a lot of disgruntled people.”

“There’s also the issue of non-financial rewards — time with the CEO, training, time off, extra leave,” she added. “There is a huge scope there for us to go beyond money.”

Alexandra Vanags is an experienced Sydney-based business journalist. She has written on finance, M&A and pharmaceuticals/healthcare for large publishing companies including Euromoney and Acuris (Mergermarket) in the UK and Australia.



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Just a mistake? Inside CBA's guilty plea



Financial Rights Legal Centre director of casework **Alexandra Kelly** said ASIC's proposal to ban unsolicited telephone sales of insurance was a good first step. *Image credit: supplied*

CBA ASIC Insurance

By Alexandra Vanags
Tue 19 November 2019

Inside the Sydney court room where **CommInsure** was challenged by ASIC over hawking insurance, parties were a long way from agreeing on what it means when processes fail.

CommInsure, once a subsidiary of **CBA** but sold to Hong Kong-listed **AIA Group** in 2017, has pled guilty to 87 alleged contraventions of the anti-hawking provisions of the Corporations Act, involving telephone calls selling its Simple Life Insurance Products in 2014. The bank has since started a remediation process.

Magistrate **Jennifer Atkinson** heard the matter today at the Downing Centre Court in Sydney and will hand down a sentence on November 28.

ASIC [announced](#) the guilty plea this morning, a few weeks after the charges were [first made public](#) in early October.

The regulator argued that in all 87 of the calls CommInsure did not comply with the requirement to

becoming bound to acquire Simple Life and was not clearly informed of the importance of using information in the PDS when deciding to buy it.

The regulator also issued a separate statement saying CBA had conducted a remediation program, paying A\$12 million worth of refunds to customers who were sold a range of life insurance products via telemarketing calls by Aegon Insights.

CBA confirmed the guilty plea in a [statement](#) issued today, and reiterated that telephone sales of Simple Life Insurance Products stopped at the end of 2014.

ASIC deputy chair **Daniel Crennan QC** was crowing about the win, telling a Parliamentary Joint Committee on Corporations and Financial Services public [hearing](#) in Sydney that within six weeks of the regulator choosing to bring charges against CommInsure the bank had pled guilty.

"So that's a good outcome, expeditious ... a very significant outcome from our perspective," Crennan said.

"That is using the criminal responsibility of a corporation tools that hitherto we have not used often.

"It may be a signal to the regulated communities that there is a willingness to employ the criminal consequences that we can pursue, perhaps, more so than we have in the past, in appropriate circumstances."

Just a blip

Inside the court, the issue of why the hawking happened was debated at length.

Defence counsel **Hamet Dhanji** told the court that "there was a process in place ... the process failed".

He argued that CommInsure had pled guilty in the case, self-reported breaches and co-operated with ASIC. He also emphasised the practices had ended in 2014, long before the Hayne royal commission highlighted hawking as an issue for immediate reform ([recommendation 4.1](#)) in February this year.

But it wasn't enough for the prosecution or consumer groups.

"You shouldn't be able to come to court and say 'sorry, it was a mistake'. It passed through all these processes. How was there still a mistake?" countered **Tom Muir** for the prosecution.

He argued that the behaviour "didn't follow the spirit" of legislation, because even if customers did have a chance to review the PDS before the end of the cooling off period, not all had it before they made a decision to buy.

"This is a reversing of responsibility. It puts the onus on the customer when the legislation puts the onus on the person making the sale," Muir said.

"If it's a failure, it's a gross failure," he later added.

Speaking ahead of today's court case **Financial Rights Legal Centre** director of casework

"We want to see them take ownership of their conduct, not try to diminish their responsibility or dismiss their conduct as an error," she said.

Punishment as a deterrent

While remediation has been undertaken, many eyes will be on next Thursday's sentencing and whether the punishment handed down will be considered significant enough to act as a deterrent.

"If legislation is passed to protect consumers and a breach occurs, that should result in a punishment so people can't say it's just a part of doing business," Muir told the court.

Kelly also said the **Financial Rights Legal Centre** was "waiting to see whether this will be taken seriously and therefore act as a deterrent".

"We really want this to act as a disincentive, because these practices are very pervasive [across the industry]. And we find when people who ring us up to report these behaviours they're very difficult to prove," she said.

Consumer Action Law Centre CEO **Gerard Brody** told *Australian Banking Daily* the rules around hawking were too complex and with so many exemptions, it was inevitable there would be breaches among "profit-motivated corporations".

"This guilty plea from CBA shows we should have an outright ban on unsolicited sales of all products and services," Brody said.

Brody also noted the financial penalties were reasonably low. He said CBA undertaking remediation was positive, but there should be more transparency of remediation processes in general.

Focus on unsolicited selling of insurance products has intensified since stories [emerged](#) during the banking royal commission, including a young man with Down syndrome who was pressure sold insurance he didn't want or need, after which Hayne's final report recommended a ban on insurance hawking.

ASIC has since [proposed](#) banning unsolicited telephone sales of insurance, and [consulted](#) on this earlier in the year.

Kelly said the Financial Rights Legal Centre welcomed the move, but believed ASIC needed to go further to keep up with technology, such as social media or pop-ups in apps. As an example, she [pointed to TAL](#) recently getting into hot water over unsolicited emails sent from offshore locations.

Alexandra Vanags is an experienced Sydney-based business journalist. She has written on finance, M&A and pharmaceuticals/healthcare for large publishing companies including Euromoney and Acuris (Mergermarket) in the UK and Australia.



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VIEW EDIT DELETE MANAGE DISPLAY REVISIONS

Responsible lending debate continues to rage



Australian Small Business and Family Enterprise Ombudsman assistant director **Ben Holland** told the Legalwise Credit Law Conference in Sydney that small business lending had slowed over the past year. *Image credit supplied*

[Responsible lending](#) [ASIC](#) [AFCA](#) [Australian Banking Association](#) [ASBFEO](#)

By Alexandra Vanags
Fri 29 November 2019

ASIC has declared its [hearings](#) into responsible lending a success as debate continues around the finer aspects of the upcoming [RG 209](#) and whether it has caused a credit crunch.

"Public hearings worked well and we've received a lot of positive feedback," ASIC senior manager of credit, retail banking and payments, financial services group **Kevin Foo** told the Legalwise Credit Law Conference in Sydney today.

"They were an opportunity for lenders and consumer advocates to air their views."

The hearings took place earlier in the year and saw banks and others grilled over issues including the [household expenditure measure](#).

They were talked up by Foo as one of the regulator's "new approaches" and a power it had not exercised before.

Foo said the updated RG 209 guidance was expected within the next couple of weeks ([meaning it's on track to meet the previously stated goal of year-end](#)) and will take into account feedback from the hearings.

"We did also hear [at the public hearings] that more clarity and detailed guidance is required, and we are looking now at minimum standards with scalability on top of that," he said.

Foo also discussed the regulator's decision to [appeal to the Full Federal Court in its responsible lending case against Westpac](#), which he called a "test case" "used to clarify the law" around credit providers making an assessment of whether a loan was unsuitable for the borrower.

"Justice Perram's decision translates to saying 'well banks need to make inquiries', but really they can do what they want in their assessments," he said.

"A more careful reading on the judgement suggests that it's still unclear what additional inquiries a lender should make about declared expenses."

Clayton Utz partner **Steven Klimt** reflected: "I don't know how they can make a coherent statement on RG 209 with Westpac hanging over them."

"I agree ASIC is in a difficult position," said **Alexandra Kelly**, principal solicitor at the **Financial Rights Legal Centre**.

"But as someone whose job is to run a hotline for people experiencing financial hardship, I want to see them be bold and face it head on," she said.

The numbers don't lie. Or do they?

AFCA data showed that responsible lending was one of the most, if not the most, complained about area of credit.

Lead ombudsman **Evelyn Halls** presented the conference with data on complaints for AFCA's first 12 months of operation, to October 31, which showed credit complaints made up 44% of the 73,272 received. Within credit, credit reporting was the biggest area of complaints, with 5,225 complaints, and responsible lending second with 3,293.

However, Halls said the data was skewed because credit reporting was often a secondary complaint rather than the primary issue. This indicated responsible lending could even be the biggest complaint.

"Responsible lending is an ongoing issue, particularly we have concerns around traditional home loans, and also in the newer lenders in personal loans, credit cards," Halls said.

ABA jumps on debate

Meanwhile, the **Australian Banking Association** said it would continue to voice industry's views as "debate" continued on RG 209.

"We've been firm that regulatory guidance from ASIC should retain scalability," ABA policy director **Justin Mining** said.

"We do accept there are standards that need to be met ... but the level of due diligence on a customer should be based on the level of risk, the level of information that a lender has about the customer and even potentially the credit product risk.

"If a customer has a long history of paying debt and the bank has a very clear picture of their financial circumstances, it is our view that less steps should be required."

Mining also said discretionary expenses weren't necessarily a good indicator of a customer's future behaviour when banks assessed loans.

"When customers take on a certain level of debt, such as a mortgage, they will in most cases — and this is shown by data from here and overseas — adjust their lifestyle to meet their debt obligations. And so that is something we have made the central thrust of our submissions to ASIC," he said.

He added the banking lobby was keen to explore other aspects of assessing how a customer could meet its debt obligations, such as a debt-to-income ratio, which was commonly used overseas.

Mining also said the ABA "sees a very clear role for the use of benchmarks". He said APRA had worked with many banks over the past 18 months to develop more sophisticated benchmarks, and thought it would be too limiting to only test the plausibility of a customer based on their expenses.

Access to credit

Meanwhile, Foo said the responsible lending hearings "dispelled a myth" that responsible lending, or at least ASIC's interpretation, had caused a "credit crunch".

"What we found from hearing from lenders was it was due to a reduction in demand for credit rather than the law, or the rules around the law being interpreted in a particular way," he said.

But **Ben Holland**, assistant director of the **Australian Small Business and Family Enterprise Ombudsman**, painted a picture of a lending environment which was almost impossible for small business — an issue that had [also been widely discussed](#).

"Small business lending has slowed over the past year," he said, adding that a blanket approach to SMEs being super risky is impeding small business growth," Holland said.

"ASIC has recently come out and addressed the issue of this restricted small business lending. It appears ASIC believes the banks have misunderstood and inappropriately applied responsible lending rules."

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