

Greg Medcraft, chairman of the corporate regulator ASIC, is a [distinguished banker](#) who worked for 27 years in the obscure world of asset securitisation with the large French bank Societe Generale. He helped to set up the American Securitisation Forum (ASF) and is also chairman of the international securities industry body, IOSCO, which bills itself as “the global standard setter for securities markets regulation”.

Mr Medcraft then is probably as well placed as anyone in Australia to understand the complexities of the financial markets that gave rise to the interest rate benchmark manipulation scandals, which are grouped under the general term LIBOR but include other benchmarks such as EURIBOR, TIBOR and the local variant, BBSW (Bank Bill Swap Rate).

The fallout from these scandals rolls on but according to [reporting](#) by Adele Ferguson (a one-woman regulator) it will soon be the turn of BBSW to take the spotlight.

The reasons that manipulation of interest rate benchmarks took place are complicated, caused by an explosion of financial trading in the last 20 years, especially in so-called Interest Rate Swaps (IRS), and the failure of regulators to handle the flood of new types of securities.

[For an academic explanation of the phenomenon, see [here](#) and [here](#) and for a general overview see [here](#) .]

The initial reaction to the [revelations](#) that Australian banks just might be involved with manipulating BBSW was outrage, especially from AFMA, the investment bankers' industry body. This stance was however [undermined](#) when, in January 2014, ASIC accepted an “enforceable undertaking” from BNP Paribas (BNP) in relation to potential misconduct involving BBSW.

Since then, however, there has been little information about other possible instances of BBSW manipulation other than ASIC’s investigations were [ongoing](#) and ongoing and ongoing.

It is strongly [rumoured](#) that ANZ will be in the firing line when ASIC eventually decides to take regulatory action, long after other jurisdictions have done so. This is, in part to do with the [salacious revelations](#) emerging from a civil case brought by ANZ traders against the bank for wrongful dismissal related to possible manipulation of BBSW.

ASIC is in the spotlight and it really has to put up or shut up.

Many of the big birds have already flown. With the recent [departure](#) of Mike Smith from ANZ, all of the CEOs of the big Australian banks who were in charge when the BBSW investigation was started have gone. ASIC's inquiries have taken so long that the chances of getting any "[clawback](#)" of bonuses if serious misconduct is proven have disappeared.

Unfortunately, Mr Medcraft is an accountant rather than a lawyer and ASIC faces a real legal quandary - whether to prosecute the individuals involved, the banks they worked for, or both. All of these paths are fraught with possible dangers.

Going after individuals is difficult. Although the UK Serious Fraud Office had a win against Tom Hayes, the [Libor Mastermind](#), it had a [spectacular loss](#) against six brokers who had been accused of supporting Hayes. The failure to convict the brokers resulted in the ridiculous situation where Hayes was convicted but his alleged co-conspirators walked free.

A UK legal expert, Alison McHaffie noted that

"Apart from being acutely embarrassing to the SFO, these verdicts show how difficult it is to demonstrate criminal activity by individuals for this type of market misconduct

It is always easier to bring regulatory action rather than criminal prosecution."

Which brings us to the second option, going after the banks.

If the reports are correct, ASIC may be considering prosecuting ANZ, although it is difficult to see under which statute. In the past, Mr Medcraft has [pointed to](#) Section 12.2 of the Commonwealth Criminal Code, which he argued would allow

“companies to be charged with being an accessory to a crime if the company’s culture encouraged or tolerated breaches of law.”

But that was in the days when “culture” was [flavour of the moment](#) .

It would be a brave (and probably foolhardy) regulator who would take on a single bank alone, hoping to prove conclusively in court that the bank’s culture was responsible for fraud and misconduct. That is only a bonanza for lawyers for the next decade.

So what to do?

History has shown that a single regulator can do very little on their own, especially one whose mandate is so diffuse and its staff so overstretched.

Overseas experience has shown that when multiple regulators get together, share information, skills and most importantly purpose they can [succeed](#) in jointly fining multiple banks. Singly, regulators can get picked off - as a pack they can be successful.

In the Australian context, what this means is that, while ASIC might be the spearhead, the real firepower should be provided by the [Council of Financial Regulators](#) , comprising ASIC, APRA and the RBA. When ASIC finally decides to prosecute someone for manipulating the market, the other members of the CFR should not only come out in unequivocal support of ASIC but also announce how they will use their powers to support ASIC, such as, for example in the case

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Written by The Conversation

of APRA, additional operational risk capital charges for misconduct.

The curtain is about to go up on the second act of the BBSW tragedy (or is it farce), and we await the entry of the villain(s) with keen expectancy. But will the show close on its first night, with no prospect of a revival?

Read more <http://theconversation.com/market-manipulation-asic-better-get-it-right-first-time-54388>