

Embedding regulators in banks can help change cultures of wrongdoing, despite the risks

Written by Vicky Comino, Lecturer in Corporations Law and Regulation of Corporate Misconduct, The University of Queensland

The federal government's [adoption](#) of ASIC chair James Shipton's proposal to embed ASIC supervisors in the banks is an important initiative. The Global Financial Crisis and the procession of corporate and financial scandals since then have led to what Shipton calls a "[trust deficit](#)". The move to embed regulators in banks aims to drive to drive much-needed cultural change and rebuild [lost trust](#).

The scandals and further evidence of misconduct uncovered at the [Hayne Royal Commission](#) have turned the spotlight on the failures of senior executives, corporations and also regulators to combat white-collar crime. Increasingly, commentators [identify "defective" culture as a prominent cause of corporate and financial misconduct](#). Certainly, ASIC identifies corporate culture as being "[a key driver of conduct](#)".

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That is the reasoning behind embedding ASIC supervisors in banks. But such action is not without its risks and problems.

What are the risks?

One such risk is "[regulatory capture](#)". Shipton has said he is "[attuned](#)" to this, but it remains a very real issue.

[In the United States](#), for example, "monitors" have been embedded under deferred prosecution agreements to ensure compliance with such agreements. Under these agreements, regulators

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suspend prosecution conditional upon specified terms, typically requiring the corporation to pay fines, compensate victims and reform their corporate governance. Indications are that monitors have become “too close” to those corporations and organisations.

The result is that the formal governance structures (often documented in codes of conduct and mission statements) may have improved, so that there is box-ticking of regulatory requirements, but [substantive compliance remains wanting](#) . In other words, there is a disconnect between “stated” and “lived” values.

Many of the scandals that have engulfed Australian banks highlighted this problem even before the royal commission began. The Commonwealth Bank of Australia’s [response](#) earlier this year to the criminal case brought against it by AUSTRAC is but one example.

Another problem is the difficulty of creating a consistent culture throughout an organisation. Shipton has made it clear that ASIC supervisors will start with the banks’ chief executive officers. That reflects the thinking that “tone from the top” sets the culture.

This is a positive step. While top management may not themselves perpetrate the wrongdoing, they have often been complicit in encouraging, condoning or, in some cases, concealing it.

However, there is a danger that the banks might see the embedding of ASIC specialists as just another imposition of bureaucratic burdens from outside. That’s how the banks have responded to previous attempts to scrutinise their operations.

In the first place, they, and the federal government, resisted calls for a banking royal commission until the pressure for one was overwhelming. Second, despite clear evidence, and some “acknowledgement”, that systemic failings have been at the heart of many, if not all, of the scandals that dog them, the banks overall remain in denial that systemic cultural issues are at play.

For example, Westpac’s attitude to the outcome of the case against it for the alleged rigging of the Bank Bill Swap Rate (BBSW) is telling. In April 2018, when the Federal Court found that

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Westpac employees acted unconscionably (albeit a less serious finding than market manipulation), the bank [claimed it as a victory](#) .

A sign of more robust enforcement

Nevertheless, the significance of embedding ASIC staff in the banks cannot be overstated. It signals a changed regulatory landscape – a more intrusive style of regulation – based on the conclusion that the banks cannot be left to regulate themselves. The hope is that ASIC has resolved to pursue more robust enforcement, including civil penalties and criminal proceedings against suspected wrongdoers.

In recent years ASIC has relied almost exclusively on enforceable undertakings in relation to wrongdoing by the banks. The only exception seems to be the BBSW rate-rigging case, in which ASIC launched civil penalty proceedings against Westpac, ANZ, NAB and CBA. All but Westpac reached settlements with ASIC.

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It has been argued that enforceable undertakings avoid the uncertainty, time and expense associated with court action. They also arguably have the potential to work for prevention – by requiring corporations to change future behaviour, improve corporate governance and end wrongdoing cultures. But there is no reliable evidence to support such arguments.

In fact, the opposite seems to be the case. There is clear evidence of recidivism and other noncompliance by organisations that are subject to enforceable undertakings.

For example, in 2006 ASIC entered into an enforceable undertaking with AMP after it had been caught overcharging customers by switching them onto expensive and poorly performing products. This did not prevent AMP from engaging in further misconduct, notably the “fee for no

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service” scandal explored in the royal commission hearings.

ASIC, armed with [tougher jail terms and penalties](#) (both civil and criminal), should bring criminal proceedings in appropriate cases not just against corporations or organisations, but against their top executives as well. In this way, ASIC will show that it is not “[asleep at the wheel](#)” and is serious about tackling corporate crime.

The government, having [restored ASIC’s budget following previous cuts](#), needs to ensure the regulator is properly resourced to do so. Only then will the fight against corporate wrongdoing be meaningful, because the most potent deterrent for white-collar criminals is jail.

Read more: [Heavy penalties are on the table for banks caught lying and taking fees for no service](#)

Vicky Comino does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond their academic appointment.

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