

Uncomfortable comparisons. Why Rod Sims broke the ACCC record

Written by Caron Beaton-Wells, Professor, Melbourne Law School, University of Melbourne

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry released its [interim report](#) last month.

This month [Rod Sims was re-appointed](#) as chairman of the Australian Competition and Consumer Commission (ACCC).

The reappointment, the second by a Coalition government after the then Labor treasurer, Wayne Swan, appointed Sims in 2011, will give him an [unprecedented third term](#).

The two events might seem unrelated, but it pays to take a closer look.

Compare the pair

Royal Commissioner Kenneth Hayne's preliminary diagnosis was that fault lay, at least in part, with the financial system regulators; in particular the Australian Securities and Investments Commission (ASIC).

His chapter on "the regulators" is peppered with comparisons between ASIC and the ACCC. These do not favour ASIC.

ASIC plays too nice

The report charges ASIC with bending over backwards to negotiate agreed outcomes with offenders. Instead of litigating in pursuit of sanctions, too often ASIC has resorted to enforceable undertakings, the terms of which were heavily manipulated by the offending entity, or infringement notices that involved no admission of guilt. The report states:

... ASIC's starting point appears to have been: How can this be resolved by agreement?

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The starting point should be: Why would it not be in the public interest to bring proceedings to penalise the breach?

The agreements focused on remediation measures, which, as Hayne also notes, took far too long to reach. While it is important to compensate victims, it is not a substitute for penalties that punish wrongdoers and deter others.

As Hayne put it:

The regulator *must* do whatever can be done to ensure that breach of the law is not profitable.

Limited resources are no excuse. Allocation of ASIC's limited resources is a process of prioritisation. Bringing cases against wrongdoers appears to have been low on its list of priorities.

The ACCC plays tough

The ACCC has the same tools at its disposal as ASIC and makes good use of negotiated agreements. But it is also prepared to escalate its approach from negotiation to litigation.

By contrast, under ASIC oversight, financial institutions have been allowed to think, in Hayne's words, that they could "decide when and how the law will be obeyed or the consequences of breach remedied".

Read more: [Criminal charges against banking 'cartels' show Australia is getting tough on competition law](#)

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Comparisons between the volume of proceedings brought by each regulator are difficult given the differences in their responsibilities and the provisions governing them.

However, it is hard to imagine a charge of litigating too little being made against the ACCC.

Enforcement has been at the centre of the ACCC's mission under Sims, and under Allan Fels before him.

The ACCC takes on the big end of town

Hayne bemoans the fact that 70% of ASIC's enforcement actions have been against small business. A healthy proportion of the ACCC's have been against large businesses including the big supermarkets, the airlines, telecommunication companies and banks.

Over the past decade the ACCC has racked up A\$366 million in fines for breaches of just one of the many prohibitions that it is responsible for enforcing: the prohibition against cartel conduct.

Read more: [*Cartel case shows not all corporate misbehaviour goes unpunished*](#)

Aided in part by an upward adjustment in the statutory maximum size of the penalty it is able to obtain, its average over the past ten years has been [double that of the preceding ten years](#) .

In May this year, the ACCC persuaded the Federal Court to impose Australia's highest civil penalty for anti-competitive conduct to date – [A\\$46 million](#) . This topped the A\$36 million against cardboard giant Visy that had stood as the record for more than 10 years.

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The fresh record was an important step in the Sims-led campaign to lift the benchmark for corporate fines.

Read more: [*Cartels caught ripping off Australian consumers should be hit with bigger fines*](#)

Not content with higher civil penalties, Sims also oversaw the first criminal prosecutions for cartel behaviour. The first produced a penalty of [A\\$25 million against a Japanese shipping company](#), discounted by half for cooperation. Further prosecutions against a [regional healthcare company](#) and three major banks swiftly followed.

The value of such litigation goes beyond public denunciation, beyond punishment and beyond deterrence. It strengthens respect for and support for the law.

In an age in which distrust in institutions is verging on acute, it has been one of the ACCC's most important contributions.

ASIC avoids risks

The report further charges ASIC with failing to take necessary risks in its litigation strategy, by shying away from “strategically important” cases.

When it does go to court, ASIC's success rate has averaged above 90%.

That “seeming accomplishment”, according to Hayne, “has concerning implications”. It suggests the agency largely picks low-hanging fruit.

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Contrast this from Sims in his [first major speech](#) on his appointment:

The ACCC's success rate in first instance litigation stands at almost 100%. This is frankly too high. It may sound strange to say so, but benchmarking against our international counterparts we are sitting at a much higher level of success. Of course I'm happy with the implication that ACCC staff handle cases well, but the flip side is that we have been too risk-averse. We need to take on more cases where we see the wrong but court success is less assured.

The ACCC tests boundaries

For Sims, legal losses are neither a waste of resources nor a stain on the agency's reputation.

They are an important mechanism for providing the business community with greater certainty about its obligations and a constant reminder that the ACCC will proceed in a way that reflects the seriousness and culpability of the conduct, without fear or favour.

Showcasing its appetite for testing uncharted territory were the cases brought against Coles and Woolworths for [unconscionable conduct against their suppliers](#), a win and a loss respectively.

The ACCC also proceeded quickly to flex its muscles in [enforcing the unfair contracts provisions that took effect in 2016](#)

Hayne went to lengths to compare the ACCC's boldness to ASIC's timidity in seeking compliance with these reforms.

The ACCC is prepared to be unpopular

The ACCC has been on the end of its fair share of criticism.

For some, it has been too soft on mergers – banking acquisitions included (although it should

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be noted these were waved through pre-Sims under then chairman Graeme Samuel).

For others, it has overstepped the mark in its use of the media.

For my own part, the ACCC's approach to cooperating offenders could be sharpened. It could do more to secure compensation for cartel victims and review its merger decisions after the fact.

But law enforcement is not a popularity contest and, as the indomitable Fels was fond to remark, if there's criticism, then we must be doing something right.

While ASIC tries to accommodate

Hayne pointedly observed that the major banks could not “find a word of criticism for ASIC”.

The royal commission is still to produce recommendations to deal with the suite of issues exposed to date.

Read more: [**Banking Royal Commission's damning report: 'Things are so bad that new laws might not help'**](#)

But clearly Hayne favours [more effective enforcement of the laws we have](#) , rather than the creation of new ones.

What's next?

Hayne says there is a case for a new statutory body to ensure regulators are subject to regular critical review and held to greater account for their performance – a sort of body to watch over

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the regulators that are supposed to be watching over us.

An alternative would be to ask them to “watch Sims”.

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Read more <http://theconversation.com/uncomfortable-comparisons-why-rod-sims-broke-the-accc-record-105730>