Hong Kong September 2018 International Commercial Law Conference

‘After the Apocalypse: Re-regulation of the Banking and Financial Services Industries’

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INTRODUCTION

1. In the wake of the 2008 Global Financial Crisis (**GFC**), and more recently now that the trends that led to that catastrophic event have been scrutinised, serious questions are being raised about the Banking and Financial Services Industry. In particular, what the intersection between its corporate culture, internal and external regulatory mechanisms, and prudential oversight tells us about how we got there in the first place, and more importantly, how we are to avoid ever going back.

2. The 2018 public hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry have crystallised nagging doubts about these matters.

3. My main focus is on jurisprudence post the GFC and how pointers in judicial reasoning in a few Australian cases have the potential to form the foundation for future best practice in the Banking and Financial Sector. The 3 leading judgments I will discuss in the time permitted are:

   a) *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1; [2012] FCA 1028 (***Wingecarribee***);
   b) *Bathurst Regional Council v Local Government Financial Services Pty Ltd (in liq) (No 5)* [2012] FCA 1200 (***Bathurst***); and
   c) *Australian Securities and Investments Commission v National Australia Bank* (2017) 123 ACSR 341; [2017] FCA 1338 (***ASIC v NAB***).

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4. *Wingecarribee* and *Bathurst* are a damning indictment on the corporate ethics and the internal and external regulatory regimes underpinning the financial sector. Both address the power imbalance between the financial institutions on the one hand and the regulators and consumer on the other. The cases deploy, as potent tools to address this imbalance, orthodox legal principles founded in contract, tort and equity (breach of contract, breach of contractual and tortious duty of care, and breach of fiduciary obligations) as well as statutes sanctioning misconduct like misleading and deceptive conduct. Both judgments set landmark pointers on standards of corporate and ethical behaviour and internal and external regulatory practices which the financial sector ought to heed.

5. The cases illustrate that in spite of increasing sophistication in modern times of financial products and the modus operandi of financial institutions to innovate, customize, and market them, the ability of the courts to deliver sound results sanctioning bad behaviour, by the deployment of well-established legal principles, has not been blunted.

WINGECARRIBEE

6. The November 2012 judgment of Justice Rares of the Federal Court of Australia in *Wingecarribee*, involving a class action, has the potential to have far-reaching implications for the regulation of the financial sector in Australia and possibly more widely.

7. This is the first case that cuts to the heart of two key issues regarding financial regulation, namely, whether a legal duty is owed by a financial services provider to its clients, and can it be voided by contractual terms or legislative exceptions? Justice Rares provides the first definitive answer to the first question and answers the second question in the negative.[2]

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2 This is the first judgment of the Australian Federal Court since *Australian Securities and Investments Commission (ASIC) v Citigroup Global Markets Australia Pty Ptd (No 4)* (2007) FCR 963 (***Citigroup***) in 2007 in which Jacobson J held [at 278] that contractual terms can obviate the operation of fiduciary duties. By way of background, Citigroup was engaged by Toll as its financial adviser in a proposed takeover of Patrick. ASIC alleged that Citigroup had

8. The facts, in broad compass, are that three applicants, Wingecarribee Shire Council and two other councils, all non-profit and charitable entities, sought damages against the respondent, Lehman Bros Australia Ltd (In Liq) (**Lehman**), for actions of its wholly owned subsidiary Grange Securities Ltd (**Grange**).

9. The Councils claimed for losses arising out of their acquisition of synthetic collateralised debt obligations and other complex financial products (collectively **SCDOs**) on the advice of Grange, the financial advisor. SCDOs by their nature are highly complex products with many associated risks. Justice Rares described these products as a "sophisticated bet" that did not result in any investments in a corporation; it merely bestowed a bundle of rights that were subject to all or nothing "credit events".[3] Grange used the high ratings of the SCDOs as a selling point to its risk averse Council clients.

10. Justice Rares mused at the time of delivering judgment "How was it that relatively unsophisticated Council officers came to invest many millions of ratepayers' funds in these specialised financial instruments? That is the fundamental question at the heart of these proceedings". This is how it happened.

11. Grange portrayed itself to the Councils as a financial adviser that understood the investment requirements of local government, including the relevant legislative and policy settings. In 2000, the New South Wales Minister for Local Government had made an order under the *Local Government Act 1993* (NSW) that allowed councils to invest in any securities, that had been rated "A1" or above by the ratings agencies. Thus, subject to compliance with the prudent person requirement, a licensed investment adviser like Grange could use the Minister's order to sell Councils in New South Wales "any securities", including SCDOs, that had a Standard & Poor's (**S&P**) rating greater than A1 or a rating from Moody's greater than "Prime-1".

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breached fiduciary duties it owed to Toll by engaging in 'substantial' trading in Patrick shares and not informing Toll of this trading. It was held that Citicorp did not owe any fiduciary duties as such duties were excluded by a mandate letter which stated that Citicorp was retained 'solely as an adviser' and their engagement was 'as an independent contractor and not in any other capacity, *including as a fiduciary* [emphasis added]' (at [16]). *Citigroup* is not referred to in *Wingecarribee*.

[3] Examples of a "credit event" are a rating downgrade, debt default, or bankruptcy that may have an adverse impact on the value of a product or creditworthiness of a person/entity.

12. Grange advised the Councils that its SCDO products were a form of floating rate notes, and if held to maturity the Councils would get their money back and that the products' high credit ratings put them in the same "universe" as the AAA rated Australian Government and AA- rated four major Australian banks investments.

13. Grange represented to the Councils that the SCDOs were suitable for a conservative investment strategy and were capital protective investments, and that they complied with statutory and Council policy requirements. The SCDOs were portrayed as having the same liquidity as other well-known bank products, readily redeemable for cash and easily tradeable on an established secondary market, with maturity dates that suited the Councils' needs. Individual agreements to manage the Councils' portfolios were entered into between Grange and the Councils to facilitate these investments.

14. Once the symptoms of the GFC became evident, in around mid-2007, many of the Councils' SCDOs suffered adverse credit events. The money in 3 SCDO products was lost. In addition, 11 of the products issued by Lehman Bros Special Financing Inc and guaranteed by Lehman Bros Holdings Inc were directly caught up in a conflict between judicial decisions in the United Kingdom and the United States that arose from the Chapter 11 bankruptcy of the US Lehman Bros companies. This meant that the money due to be repaid to investors in the SCDO products was frozen and unlikely to be returned for some years while the Courts determined whether some of the money that was available should be paid to the Lehman Bros companies, even though they had suffered no relevant loss, or returned to the investors as the Supreme Court of the United Kingdom had decided. The Councils suffered loss as SCDOs were either valueless or had to be held for long periods, with uncertain prospects of payment in full in the future.

15. Grange was found to be liable to the Councils for their claims in contract, in negligence, for misleading and deceptive conduct, as well as for breach of fiduciary duty.

16. Specifically, Justice Rares found that Grange had acted in breach of its fiduciary duties as a financial adviser to the Councils in facilitating transactions for complex products to unsophisticated investors without properly explaining the risks and the structure of the investments including hidden advantages for Grange. Grange had a conflict between its duty to give independent financial advice to or make investment decisions on behalf of the

Councils and its own interest in earning fees or profits in its sales of SCDOs which it failed to disclose to the Councils. Additionally, unbeknownst to the Councils, Grange not only controlled the secondary market in which the SCDOs operated but sourced its borrowings at favourable rates from the Council/s investments, thus benefitting from the SCDO investments.

17. In addition, Grange was found to have breached implied terms in the individual agreements with the Councils, on the basis that the SCDOs were first, not suitable investments for risk averse Councils, and second, lacked the characteristics that Grange promised in the agreements namely that the SDCOs had a high level of security for the invested capital, and the ability to be easily tradeable or liquidated for cash on an independent established secondary market.

18. Justice Rares also found that Grange was negligent in recommending to and advising Councils to make the investments into SCDOs. His Honour found that the tortious duty of a financial adviser to exercise reasonable skill and care in making recommendations, giving advice to, or acting on behalf of clients in making investments, co-existed with the implied contractual term to this effect. This was on the basis of the established principle that concurrent duty of care can arise in contract and in tort where a professional provides a client with professional services.

19. For the same reasons as for the breach of contract finding, Grange was found to have engaged in misleading and deceptive conduct in breach of s 12DA of the *Australian Securities and Investments Commission Act 2011* (Cth) when it promoted and placed highly complex collateralised debt obligations in the investment portfolios of Councils as suitable investments. Justice Rares rejected the argument that Councils relying on representation failed to take reasonable care for the purposes of s 12GF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).

20. The Court rejected Grange's argument that it could rely on the disclaimers appearing in small print in the product presentations to escape liability. The Court found that such disclaimers did not relieve Grange from its duty of care, and did not provide a defence to the misrepresentation alleged. Justice Rares also found that there was no evidence that Grange ever suggested to any of the three Councils that it was not acting as the Council's

financial adviser or that they should seek "professional advice".

21. Importantly, Justice Rares called into question the differentiation in the Australian *Corporations Act 2001* (Cth) between sophisticated and unsophisticated investors as Grange argued that each Council was a sophisticated investor within the meaning of s 708(8) of the *Corporations Act* in order to deflect liability.[4] His Honour was of the view that this differentiation cannot be used by financial service providers to evade responsibility to act in the best interest of clients. Grange (and not the Councils as alleged by Grange) was found to be the "sophisticated investor" and as such it should have acted in accordance with the Councils' investment policy when making investment decisions.

22. Until this judgment, the alleged differentiation between sophisticated and unsophisticated investors formed a basis for claims of caveat emptor and was central to financial advisors contracting out of investor protection mechanisms. Sophisticated investors have traditionally been assumed to have the resources to make informed decisions.

23. The following frank assessments of Justice Rares about the Councils' investing capabilities, the financial advisor's methods, and the nature of the investments are worth repeating as they are easily transportable into the most modern investment scenarios. Just change the names of the investor, the financial advisor, and the product – the opaque modus operandi and the scant regard for ethics and the regulatory framework is a recurring theme in court judgments, public airings in the Royal Commission, and the

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[4] Sophisticated investors
(8) An offer of a body's securities does not need disclosure to investors under this Part if:
(a) the minimum amount payable for the securities on acceptance of the offer by the person to whom the offer is made is at least $500,000; or
(b) the amount payable for the securities on acceptance by the person to whom the offer is made and the amounts previously paid by the person for the body's securities of the same class that are held by the person add up to at least $500,000; or
(c) it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made that the person to whom the offer is made:
(i) has net assets of at least the amount specified in regulations made for the purposes of this subparagraph; or
(ii) has a gross income for each of the last 2 financial years of at least the amount specified in regulations made for the purposes of this subparagraph a year; or
(d) the offer is made to a company or trust controlled by a person who meets the requirements of subparagraph (c)(i) or (ii).

inquiries held into investments gone wrong and bad behaviour on the part of the financial institutions.

Nature of SCDOs as an investment

24. The SCDOs were not suitable or appropriate for a risk averse local government. Justice Rares observed that "generally, risk-averse people do not take bets with substantial assets held for public purposes". Justice Rares concluded that the fact that the risk-averse Councils did act in this way was explainable only by the fact that "they were victims of an elaborate deception".[5]

Grange methods

25. When required, Grange obtained finance by borrowing from its Council clients and it did so at a rate of interest or on terms of security unlikely to have been obtainable from a commercial financier in a properly informed arms-length transaction. This demonstrated knowledge on the part of Grange that the Council clients did not adequately appreciate the true risks of the product or the "financial wisdom" of Grange's recommendation.[6] The investments were "highly advantageous to Grange".[7]

26. The SCDOs were complex products with risks. Justice Rares acknowledged that most people, including himself even after substantial assistance from counsel and multiple experts, were unable to fully grasp the nuances of how these products and their associated risks work. Grange went ahead regardless and held itself out as an expert, knowing about and taking advantage of the Councils' lack of expertise in these products.[8]

27. Grange "tested the water" and eased the Council clients into a false sense of security, believing that they "had the best of both worlds: principal protection and increased

[5] At 895.
[6] At 264-265.
[7] At 266.
[8] At 410.

interest". It referred to this process of calming the fears of the "risk averse, financially unsophisticated council officers" as "as easy as shooting fish in a barrel".[9]

Councils' investing capabilities

28. Grange's Council clients could only have entered into such transactions so "highly advantageous" to Grange because the Council officials responsible for entering into them were "financially quite unsophisticated and completely out of [their] depth"[10], "uninformed"[11], and "careless"[12]. They had no "real appreciation of the true risks of SCDOs or the financial wisdom [or otherwise] of [Grange's] recommendation"[13].

29. Grange, on the other hand, had "the necessary financial acumen and expertise to be categorised as a 'sophisticated investor'"[14].

BATHURST REGIONAL COUNCIL V LOCAL GOVERNMENT FINANCIAL SERVICES PTY LTD

30. *Bathurst*, delivered 6 weeks after *Wingecarribee* is the landmark S&P rating agency case in which Justice Jagot of the Federal Court of Australia considered the liability of rating agencies for the rating, sale and purchase of a structured financial product called a "constant proportion debt obligation" (**CPDO**). The CPDO was a complex, highly leveraged credit derivative, operating over a term of 10 years, within which the CPDO would make or lose money through notional credit default swap contracts. A number of Australian local councils lost money through their investments in the CPDOs.

31. Justice Jagot determined that the rating given to these "grotesquely complicated" financial instruments was negligent, and that S&P had engaged in misleading and deceptive conduct in giving the CPDO a AAA rating. Further, the bank that had invented the CPDOs (ABN AMRO Bank NV (**ABN AMRO**)) and the agent through which the investors purchased the CPDOs (Local Government Financial Services (**LGFS**)) were also held

[9] At 662.
[10] At 483.
[11] At 491.
[12] At 462.
[13] At 265.
[14] At 913.

liable for the losses of the local councils.

32. This is the first case where a court found that a rating agency owed a duty of care to investors. Before this judgment, courts in Australia and indeed most courts in other jurisdictions around the world, including the United States, had been reluctant to find rating agencies liable for the losses suffered by an investor who claimed that they relied on the rating given to an investment product. *Bathurst* has triggered a deeper consideration of duties and responsibilities of a rating agency like S&P.

33. The rationale discussed in *Wingecarribee* was that the typical investor makes various investments based on recommendations and advice given by financial advisers. Even though those financial advisers may in turn rely on or use the ratings given to certain products, the rating agency does not have control over the way in which those ratings are used. Consistent with previous decisions, Justice Rares in *Wingecarribee* determined that a rating given by S&P was not misleading or deceptive because S&P had no responsibility for the use of its rating by financial advisers.[15]

34. In *Bathurst*, Justice Jagot questioned whether this position ought to be reconsidered and whether the case of misleading and deceptive conduct, or negligence, had been made out in the circumstances at hand.

35. The two main points that can be distilled from *Bathurst* are:

    a) a rating agency may have a duty of care to investors, notwithstanding that there is no contract between them. The duty is to ensure that there is a reasonable basis for issuing a rating. Where a rating agency issues a rating without a reasonable basis, or where there are significant flaws in the methodology and model used, this will constitute a breach of that duty; and
    b) a rating agency may also be liable to investors if its rating is considered to be misleading or deceptive or its rating constitutes a misrepresentation.

    Bathurst found the duty of care was owed as the S&P rating was used to market the CPDOs to a select class of investors. This helped her Honour to distinguish cases where

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[15] At [1099].

a company such as S&P offered ratings concerning public companies on the basis of publicly available information. The Court did not find, nor did it have to find, that the rating given was incorrect. The duty of care owed to potential investors was found to have been breached as there was no reasonable basis for making the rating.

36. Justice Jagot's rejection of the caveat emptor defence was emphatic. Her Honour stated:

> "I consider the proposition that a prudent person must not invest in any product they do not themselves understand problematic. It suggests that a prudent person could never take and rely on advice. It suggests that a prudent person who had been advised that a particular investment should be made must reject the advice if they themselves are capable of understanding the advice but incapable of understanding the way in which the investment operates. It is the equivalent of saying that only people who truly understand the principles of flight should be allowed to travel by plane. It seems to me that the rigidity of the proposition is a recipe for imprudence ... Prudent people seek to identify others who are best placed and have demonstrated they can be trusted to assess relevant facts, matters and things. They rely on the expertise of others to compensate for their own limitations."[16]

37. Justice Jagot rejected the S&P argument (which it had previously run successfully in overseas jurisdictions) that even if it owed a duty it had been negated by disclaimers. (The result may have been different if the disclaimers had been brought to the attention of the investors).

38. It is also significant that S&P purported to draw a distinction between advice and an opinion – the latter it said ought not attract liability. This was also rejected by the Court, Her Honour instead taking a pragmatic approach by focusing on the "representation" made by the rating agency. This was at odds with the United States approach at that time which classed ratings as opinions and emphasized the protection of free speech and right to express opinions in the First Amendment.

39. Her Honour was upheld by the Full Court of the Federal Court in *ABN Amro v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at 771 (Jacobson, Gilmore and Gordon JJ) and the Full Court was similarly scathing about S&P's conduct:

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[16] At 1472-1473.

> "A reasonable person would understand that the rating was an opinion as to creditworthiness held out to be carefully formed, and having a reasonable basis. That reasonable person would not understand the disclaimer to render the rating an exercise in futility, or an opinion with no reliable content. S&P's submission that a reasonable person would understand the disclaimer to 'effectively negate' the conduct which was misleading is rejected. As LGFS stated, if the conduct is negated, it would also 'effectively negate' the rating."

40. To put the above in context the facts in *Bathurst* briefly were as follows. The first and 2 subsequent incarnations of the CPDO were rated AAA by S&P. This rating was a result of highly unsatisfactory conduct on the part of S&P including the following:

    a) S&P's lazy reliance on faulty modelling compiled by ABN Amro for rating purposes;
    b) unjustifiable and unreasonable assumptions on the part of S&P including as to volatility (induced by ABN Amro's misrepresentation);
    c) S&P's failure to calculate the actual average volatility of the product and have regard to the potential detrimental impact on the CPDO of ratings migration; and
    d) stale ratings being issued by S&P (distant from the time of the issue of the product to which it related).

41. Justice Jagot found that S&P's modelling and assignment of the AAA rating was not what a reasonably competent ratings agency would have carried out and assigned in all of the circumstances. Her Honour also found that ABN Amro was aware of and benefited from the faulty modelling and that S&P authorised ABN Amro to disseminate its rating of AAA of the CPDO to potential investors.

42. Further compounding the culpability of S&P, the following additional facts were apparent:

    a) S&P had realised that other ratings agencies examining the CPDO were making allowance for certain market conditions which S&P had failed to do;
    b) a S&P employee was expressing the view that the "current rating (and high coupon) of the CPDO might be worth little, given the high ratings vol [volatility] with this product";
    c) S&P's New York office considered that market participants knew about the ABN Amro CPDO and were "in no hurry to stay in front of the truck";
    d) S&P was receiving daily calls on quantitative issues relating to CPDO criteria;
    e) S&P had still not managed to complete its own model for evaluating the rating of

CPDOs and was still using the model it had modified from ABN Amro's model;

f) S&P considered it was dealing with "a crisis in CPDO land";

g) there was debate within S&P about whether S&P's ratings were "under pressure" with the senior ratings analyst who was involved in the rating of the CPDO expressing the view that it was "analytical bs at its worst. I know how those ratings came about and they had nothing to do with the model!";

h) a senior New York based S&P analyst expressed the opinion that the S&P employees directly involved in the rating of the CPDO as AAA had been "sandbagged a little" at a time when S&P's model "was a work in progress" and ABN Amro "simply bulldozed it [the rating] through". This analyst recommended that as the AAA rating of CPDO had gained such huge attention in the markets S&P should either stick with all its assumptions "and emphasize that we stress other factors" or stick with its assumptions for existing deals only and then change its assumptions for future deals (S&P in fact adopted the latter option, at least insofar as it treated the Rembrandt 2006-3 CPDO as an existing deal, and thus stuck with its "existing assumptions" for that deal despite S&P having by then recognised the problems with its volatility); and

i) another senior S&P employee considered that this "CPDO issue is a real mess" (confirmed a week later by another senior S&P employee who recommended that S&P simply advise ABN Amro that it had "messed up" the rating when S&P used the suspect volatility rate).

43. Adverse findings about the conduct of all three, ABN Amro, S&P, and LGFS were made. Justice Jagot found that S&P's rating of AAA of two CPDO notes was misleading and deceptive and involved the publication of false statements and negligent misrepresentations to the class of potential investors including the councils and LGFS. The AAA rating conveyed false representations that in S&P's opinion the capacity of the notes to meet all financial obligations was "extremely strong" and that S&P had reached this opinion based on reasonable grounds and as the result of an exercise of reasonable care.

44. ABN Amro was found to be knowingly concerned in S&P's contraventions of the various statutory provisions proscribing such misleading and deceptive conduct, to have engaged in conduct that was misleading and deceptive and publishing false statements, and

making negligent misrepresentations including by deploying S&P's AAA rating which ABN Amro knew to be false.

45. ABN Amro was also found to have breached its contract with LGFS under which ABN Amro was to model and structure the transaction by which LGFS would purchase the CPDO notes having a rating assigned by S&P of AAA.

46. LGFS was found to have engaged in misleading and deceptive conduct, making false statements and negligent misrepresentations to the councils about the CPDO notes. It was also found to have breached its Australian financial services licence in advising and selling to the councils the notes because the notes were not a debenture and thus not a security but a derivative under the *Corporations Act*. LGFS was not licensed to deal with a derivative. LGFS was also found to have breached its fiduciary duties to each of the councils.

ASIC v NAB

47. In *ASIC v NAB*, NAB and ANZ admitted the following offences:

    a) that they each attempted to manipulate the Bank Bill Swap Reference Rate (**BBSW**) to their own advantage and to the disadvantage of counterparties and thereby attempted to engage in unconscionable conduct in connection with the supply of financial services; and
    b) that they each failed to do all things necessary to ensure that they provided financial services honestly and fairly, including by not providing employees engaged in providing those services with adequate training.

48. Justice Jagot made the following scathing remarks in her reasons when imposing penalties after a belated settlement of the ASIC claim in respect of the NAB and ANZ attempted manipulation of the Bank Bill Swap rate:

> "Each of NAB and ANZ has admitted to unethical and dishonest conduct. It is difficult to convey the seriousness of what the attempts involved. Knowing the function of the BBSW in the Australian financial system and that it was relied upon as an independently established benchmark throughout the system, employees of NAB and ANZ deliberately sought to manipulate that benchmark to advantage their employer (and their own performance) over

> counterparties who had no means of protecting themselves from the effects of such manipulation, and had a right to expect that NAB and ANZ would deal with them fairly, honestly, and in good faith ... .
>
> That any employee performing these kinds of functions within a bank, let alone two pillars of Australia's banking system, could have conceived of manipulating the BBSW, and in fact attempted to do so repeatedly over such periods of time bespeaks fundamental failings in the culture, training, governance and regulatory systems of both NAB and ANZ. The public should be shocked, dismayed and indeed disgusted that conduct of this kind could have occurred."[17]

49. Her Honour ordered each of the banks to enter into enforceable undertakings, pay a fine of $10 million, pay $20 million to a financial consumer protection fund nominated by ASIC, and pay $20 million for the costs of the regulator, ASIC. ASIC's case against Westpac continued and resulted in May of 2018 in the judgment of Justice Beach of the Federal Court of Australia in *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 357 ALR 240; [2018] FCA 751 in which Philip Cruthchfield QC featured for ASIC. Our esteemed colleague will shortly enlighten us on the wisdom gained from that case.

CONCLUSION

50. These cases demonstrate that downstream, negligent conduct and misrepresentations by the financial sector will not go unpunished by the Courts. Of course, the question remains as to how effectively upstream the regulators are putting a stop to this conduct occurring at all and what sanctions are being imposed on those that stray into misconduct independent of the Court system. Even though the judgments discussed have been reached, to date it has not yet transpired in the application of more rigorous standards to the financial sector.

51. By design, the financial sector has been expected to self-report breaches. Some opine

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[17] At 112-115.

and I agree that this model is deeply flawed. Further, breaches, when identified, have not been responded to with sufficient vigour by the regulator. The regulator's response has by and large been weak. Often penalties imposed are in the nature of a "slap on the wrist" or only a fraction of what it could have been. Moreover, where standards have been articulated by regulators, they have not been adhered to, or monitored effectively by the financial sector, or the regulators themselves.

52. Perhaps as a takeway we can ask whether public airings of misconduct in forums like the Hayne Royal Commission will in fact have the result of curbing such conduct or whether the risk of being found out and reprimanded will continue to be small enough so as to encourage, or indeed incentivise, such misconduct as the rewards reaped will continue to outweigh any penalty likely be imposed (if caught). We can also ask whether the current disclosure regimes for financial products for the global financial sector are adequate and also whether there should be a more focused personal targeting of high end highly paid executives who preside over such debacles in order to enforce personal responsibility for compliance with standards and penalties when things go wrong. We should all be vigilant as history teaches us that such misconduct left unchecked has the potential to disrupt the very foundations of a civilized society.