

## REGULATORY INTELLIGENCE

**OPINION: More powers? ASIC already has the tools to pursue BBSW manipulation allegations**

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Scott Morrison, the federal treasurer, has [announced](#) a raft of new measures to tackle bank bill swap rate (BBSW) manipulation, which is alleged to have been committed by three of Australia's big four banks.

The measures will include civil and criminal liability for bankers found guilty of manipulating these rates in future. Morrison's announcement has come six years after the scandal first broke. During the same period, regulators in the UK have brought offenders to trial and achieved a number of convictions. Tom Hayes, for example, was convicted and sent to jail for 14 years.

Regulators in the United States have arrested, among others, UK citizens such as Mark Johnson, HSBC's global head of foreign exchange, and Stuart Scott, then head of FX trading in Europe, for manipulating rates not in the United States, but in the UK, five years prior to their arrests. They were arrested in July 2016 while transferring through John F Kennedy International Airport.

By comparison, the Australian Securities and Investments Commission (ASIC) has dragged its feet spectacularly on prosecuting rate rigging. In respect of some of the alleged wrongdoing the clock has run out and ASIC is now no longer able to prosecute. Nor was it the regulator that uncovered the BBSW scandal in the first place; the information was volunteered by BNP Paribas.

Moreover, while ASIC's counterparts in the UK have brought down fines in the billions of dollars against UBS, RBS and Barclays, ASIC has yet to impose a financial penalty. In the event that it ever does so, those who were in charge at the time of the infringements, such as Mike Smith at ANZ, have now gone, and with them any prospect of clawing back bonuses.

That said, not everyone views the situation with such seriousness. Steven Munchenburg, chief executive of the Australian Bankers' Association (ABA), has repeatedly downplayed the significance of these allegations. Munchenburg has stated repeatedly that Australia does not need a Royal Commission into banks.

**ASIC: "timid and incompetent"?**

Amid the allegations of greed and fraud, ASIC comes across as a regulator that is feckless, timid, incompetent, and controlled by the entities it is meant to regulate. Despite all of this, and overseas regulators' considerable successes at combating this fraud, the public had been told not to worry because new laws are on the way.

The problem with this perspective is ASIC already has laws available which it has failed to use. For example, it could go after banks under s 12.2 of the Schedule to the Criminal Code Act 1995, which allows a court to hold a corporation criminally liable for the criminal misdeeds of its employees. This author is unaware of any cases where ASIC has sought to prosecute under this provision, however.

In addition, there is [s 11CA \(2\)\(e\) of the Banking Act 1959](#), which allows the Australian Prudential Regulation Authority (APRA) to remove members of the board of a bank, and appoint its own nominee, if that bank has demonstrated corporate governance failures.

Corporate governance failures would undoubtedly include rigging the rates in a market worth A\$20 trillion. Since 1998, when the provision was enacted, APRA has not used it once.

The message this sends to the market is clear: Australian regulators are scared to take on the big banks, perhaps fearing that a mis-step might precipitate panic in the market, resulting in a bank run or financial crisis.

**Storm clouds**

Nevertheless, while Australian banks may be laughing up their sleeves at this latest attempt to placate the public with assurances that the government is "doing something", their hubris may be short-lived. Storm clouds are gathering in places where even the ABA's influence does not reach.

Deutsche Bank is facing an A\$10 billion fine in the United States for malpractices it allowed to take place in Russia. Banks in the UK and Switzerland have been fined billions of dollars by U.S. authorities for rigging rates in countries other than the United States.

The U.S. authorities are not only accustomed to levying fines in the billions of dollars, but also seem unfazed if the size of those fines fells another country's national icon. All that is required is for the U.S. Department of Justice to detect a malpractice or a fraud that can be shown to have affected U.S. investors.



In the United States, a class action lawsuit has already been issued against Australian banks for alleged BBSW rigging. This may garner unwanted attention from U.S. authorities, and that could be serious. It may not simply mean that the banks are in for a "jawboning" from Greg Medcraft, ASIC's chairman, or a mild admonishment from Prime Minister Malcolm Turnbull, as happened at the Westpac birthday lunch. It may instead result in punishments which have the effect of deterring future misconduct.

Add to that the possibility that some Australian bankers may find themselves under arrest when they pass through JFK at any stage in the next five years, and one starts to put into perspective just how badly the country's regulators have done their jobs. It is not the Australian authorities that Australian banks fear in relation to allegations of dishonest rigging of an Australian market; ultimately, it is the U.S. authorities.

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