School of Law

THE UNIVERSITY OF QUEENSLAND
AUSTRALIA
CREATE CHANGE

Regulating For A Culture Of High Reliability

.

Introduction

The essential questions this paper will address are:

- What role, if any, should a regulator play in encouraging a culture of high reliability?
- Why?
- What will this entail in practice?
- What shouldn't regulators do?

While it is acknowledged that the primary drivers for change and high reliability rest with organisations themselves and their leaders,[1] this paper contends that **the role of regulators in this space should be to have a secondary yet vital supportive role, where crucially they must work with industry in the drive to enhance a culture of high reliability**.

As to why regulators should be part of the regulatory project and play such a role in encouraging a culture of high reliability in the resources sector, this paper draws on analogies regarding Australia's 'company law watchdog', the Australian Securities and Investments Commission (ASIC), highlighted most recently by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Hayne Royal Commission).[2] The Final Report of the Hayne Royal Commission tasked the banks and financial services entities themselves and those who managed and controlled them: their boards and senior management with "primary responsibility" for remedying their culture, governance and remuneration practices, after it found that they were "primarily" responsible for the misconduct it examined.[3] Significantly, however, the Final Report went on to recognise the important role that regulators can play in supervising these matters,[4] with ASIC also emphasising that the strength of supervisory approaches are that they seek to identify factors that create risks *before* they become breaches of the law, rather than reacting and sanctioning breaches after they occur.[5]

What this will entail in practice for regulators regulating for a culture of high reliability might include on the one hand, is regulators being seen as able to work with the industry so as to avoid the 'them and us' dynamic and yet able to walk a fine line so as not to be 'captured' by industry; consistent, clear and transparent in their dealings with the regulated community, especially in the exercise of their "discretion" and decision-making powers; and also to seek to ensure their own governance (including accountability and risk management systems) and culture are in order so as to be conducive to the achievement of a culture of high reliability organisations (HROs).

On the other hand, what regulators should not do is arguably to act in ways that might lead to them being viewed as 'outsiders', 'bureaucratic' and/or 'remote'; and exercise their discretion and powers in an inconsistent and opaque manner, undermining their credibility and leaving the regulated community confused or worse still, distrustful of regulators where the latter might also be perceived negatively as 'arbitrary' and 'oppressive' in their decision-making and actions.

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1 This is consistent with the scholarship on high reliability organisations (HROs): see, e.g., Mario Martinez-Corcoles, 'High Reliability Leadership: A Conceptual Framework' (2018) 26 *Contingencies and Crisis Management* 237.

2 This royal commission was announced on 30 November 2017 by then Australian PM, Malcolm Turnbull. The announcement was the result of overwhelming political pressure, preceded by allegations of widespread misconduct at Australia's largest banks and persistent calls for a royal commission into their operations from as early as 2014: see Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (Report, June 2014), xxiv (*Senate Inquiry into the Performance of ASIC*).

3 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019), vol 1, 4 (*Hayne Royal Commission Final Report*).

4 Ibid, 47.

5 See, e.g., James Shipton, 'The Fairness Imperative' (Speech, AFR Banking and Wealth Summit, 27 March 2019). Note ASIC's supervisory approach is similar to that of other conduct regulators, such as the UK's Financial Conduct Authority: see Financial Conduct Authority (FCA), *FCA Mission: Approach to Enforcement* (Paper, April 2019).

These answers are supported by the regulatory scholarship, which this paper will canvass in addition to drawing on examples mainly involving ASIC.

Focus of the regulatory scholarship

If regulators want to regulate in a particular way – here for a culture of high reliability – the regulatory scholarship focuses attention on two matters:

1. How does a regulator operate internally? and
2. How it presents itself externally?

This attention also requires a consideration of three critical issues:

(i) Why is it important to regulate 'corporate culture'/ 'organisational culture'?[6]

(ii) The difficulties of using 'corporate culture' as a regulatory tool; and

(iii) The role of regulation – how is regulation defined and the role that a regulator can or should play?

Why is it important to regulate 'corporate culture'?

Flawed 'corporate cultures' have been implicated as a root cause of wrongdoing in recent scandals in both Australia and elsewhere in a variety of contexts. They include in banking and financial services,[7] sport (e.g., with Cricket Australia and the infamous ball-tampering scandal in South Africa in March 2018),[8] aged care,[9] the entertainment industry (e.g., with sexual harassment claims at Fox News, popularised in the mini-series, "The Loudest Voice'")[10] and most recently, the casino business, with revelations of "corporate arrogance" at Crown Resorts.[11]

As far as the banks are concerned, analyses of the problems manifested in the Global Financial Crisis (GFC) and post-GFC scandals, such as the banking scandals that led to the Hayne Royal Commission, have found that the misconduct identified was directly linked to the poor 'culture' within those corporations.[12] Certainly, Commissioner Hayne identified that 'culture' is a key driver of conduct,[13] with almost all instances of misconduct considered being products of poor culture.[14] He found that culture to be one of unbridled "greed – the pursuit of short-term profit at the expense of basic standards of honesty", which existed at both the individual and organisational level.[15] The Commissioner also made the point that it cannot be suggested that when the banks, for instance, charged fees for no service or failed to adhere to money-laundering rules they did not know their behaviour was wrongful. Such conduct occurred *in spite* of the rules because cultural factors

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6 These terms are used interchangeably in the regulatory literature. This paper will use the term 'corporate culture'.
7 See in particular, discussion below, nn 12- 14.
8 The Ethics Centre, *Australian Cricket: A Matter of Balance* (Report commissioned by the Board of Cricket Australia, October 2018), 5.
9 See, e.g., The Royal Commission into Aged Care Quality and Safety, *Neglect* (Interim Report, 31 October 2019).
10 "The Loudest Voice", *Showtime*, June 2019 (starring Russell Crowe as Roger Ailes, the controversial founder of Fox News and the network's CEO, who was fired over the 2016 sexual harassment scandal.
11 Independent Liquor and Gaming Authority, *Inquiry under s 143 of the Casino Control Act 1992 (NSW)* (Special Report, 1 February 2021), vol 2, ch 4.1 (the *Bergin Report*) It found that the "core problems' which made Crown unsuitable to hold the gaming licence for a new Sydney casino at Barangaroo were the operator's "poor corporate governance" and "deficient risk-management structures".
12 For this view regarding wrongful conduct exhibited in GFC scandals: see, e.g., David Campbell and Joan Loughrey, "The Regulation of Self-interest in Financial Markets" in Justin O'Brien and George Gilligan (eds) *Integrity, Risk and Accountability in Capital Markets – Regulating Culture* (Hart Publishing, 2013), 65; and on post-GFC scandals, such as LIBOR (the London Interbank Offered Rate): see, e.g., House of Commons Treasury Committee (UK), *Fixing LIBOR: Some Preliminary Findings* (Report of Session 2012–13 No 2, 18 August 2012), 19.
13 *Hayne Royal Commission Final Report* (n 3), 334.
14 Ibid, 1-2. See also 335.
15 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018), vol 1, xix. See also 74 (*Hayne Royal Commission Interim Report*).

within these organisations (including an inexorable focus on maximising returns to shareholders, incentive systems that rewarded sales to the detriment of everything else and an attitude of complacency throughout the organisation that discouraged proper monitoring of risks and identifying any problems in the business) legitimised it.[16]

The **lesson** that regulators took from this analysis regarding corporations in the banking and financial services sector was that regulatory reform without a changed culture in these organisations will be ineffective.[17] **Regulators could not just command these corporations to have a sense of honesty and propriety. The answer lay in the need to address the culture of the corporation**.[18] **Similarly, with regulating for a culture of high reliability.**

The difficulties of using 'corporate culture' as a regulatory tool

Despite a wealth of scholarship and commentary on 'corporate culture',[19] with legal and management consultancies lining up to offer new integrity audits, products and services, its use as a regulatory tool in promoting a healthy culture in corporations continues to face difficulties. This is so, even though 'culture' is also increasingly figuring as a crucial item of interest in some important regulatory initiatives[20] and corporate governance codes.[21] Not least of these problems is the argument that the nebulous nature of 'corporate culture' and its definitional elusiveness make it difficult to regulate.[22] For instance, 'corporate culture' has been variously defined as '[t]he collective programming of the mind which distinguishes the members of one organization from another',[23] 'a system of shared values (that define what is important) and norms that define appropriate attitudes and behaviors for organizational members (how to feel and behave)',[24] and, authoritatively by Edgar Schein, a distinguished organisational theorist, as the 'pattern of shared basic assumptions learned by a group as it solved its problems of external adaptation and internal integration, which has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems'.[25] In other words, as Schein explains, 'organisational culture' is 'a broad concept capturing shared values and beliefs', though he has also made the point that it is 'not necessarily one that employees can easily articulate or researchers measure'.[26]

Furthermore, if seeking to use 'corporate culture' as a regulatory tool, regard must be had that regulators and the regulated community (corporations and the individuals within them) may, and often do, have very different ideas of what constitutes a healthy 'corporate culture', exacerbated in seeking to regulate for a culture of high

16 Ibid, 439, 442. See also Ross Grantham, *The Law and Practice of Corporate Governance* (LexisNexis, 2020), 460-61.
17 See Vicky Comino, "'Corporate Culture' is the 'New Black' – Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?" (2021) 44(1) *University of New South Wales Law Journal* (forthcoming) citing the example of Hector Sants, 'UK Financial Regulation: After the Crisis' (Speech, London, 12 March 2010). Hector Sants was Chief Executive of the now defunct UK Financial Services Authority (FSA).
18 See also Grantham (n 16), 461.
19 There is a considerable body of scholarship in business-related fields, such as in the organisational literature. However, apart from the pioneering work of Brent Fisse and John Braithwaite: see Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993), research by socio-legal scholars and lawyers on 'corporate culture' is relatively new. For recent examples, see John HC Colvin and James Argent, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34(1) *Company and Securities Law Journal* 30; David Wishart, Ann Wardrop and Marilyn McMahon, 'The Internal Autonomy of the Firm' (2018) 27(1) *Griffith Law Review* 131; Comino (n 17).
20 In the area of financial regulation, this includes the 'Close and Continuous Monitoring Program' and the Banking Executive and Accountability Regime (BEAR). These are discussed below, nn 43-61.
21 See, e.g., ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019), Principle 3. It recommends that a listed entity should 'articulate and disclose its values' and 'instil a culture of acting lawfully, ethically and responsibly'.
22 See, e.g., Colvin and Argent, 'Corporate and Personal Liability' (n 19), 36.
23 Geert Hofstede, 'Identifying Organizational Subcultures: An Empirical Approach' (1998) 35(1) *Journal of Management Studies* 1, 2.
24 Jesper B Sørensen, 'The Strength of Corporate Culture and the Reliability of Firm Performance' (2002) 47(1) *Administrative Science Quarterly* 70, 72.
25 Edgar H Schein, *Organizational Culture and Leadership* (Jossey-Bass, 4th ed, 2010) 18.
26 Elizabeth A Sheedy, Barbara Griffin and Jennifer P Barbour, 'A Framework and Measure for Examining Risk Climate in Financial Institutions' (2017) 32(1) *Journal of Business and Psychology* 101, 102.

reliability given the level of uncertainty that still persists surrounding what constitutes HROs.[27] Other problems include the lack of a clear dividing line between 'criminal' and what are sometimes regarded as the 'routine' or 'normal' ways of doing business, with the result that wrongdoers (organisations and/or the individuals working for them) and the relevant industry of which they are a part, may consider wrongful conduct 'legitimate'. A clear illustration of this in the finance industry is provided in the LIBOR case of *R v Hayes*.[28] Even though Tom Hayes, a former trader of LIBOR, who was charged with eight counts of conspiracy to defraud admitted to engaging in rate-rigging,[29] he pleaded not guilty on the ground that he had not acted dishonestly. The defence submitted that not only were others in the market engaging in the same practices, but, also, that his employers were aware of his actions. Hayes argued that his actions were 'standard market practice'.[30] As such, "[t]he routine practice of banks at the time 'repeatedly attempt[ing] to manipulate and ma[k]e false, misleading or knowingly inaccurate submissions concerning … global benchmark interest rates' demonstrates how deviant behaviours can become entrenched and even encouraged within an industry's culture and operational practices".[31]

Yet another problem is 'decoupling', a term employed by organisational studies, which occurs when an organisations' practices do not align with the official systems they have in place and/or their espoused policies.[32] 'Decoupling' and the possibility of a disconnect between a corporation's actual culture and that expressed in its formal governance structures may mean that there is box-ticking of regulatory requirements, but substantive compliance is wanting.[33] This scenario remains one of the most common difficulties faced generally by regulators in seeking to use 'corporate culture' as a regulatory mechanism.

The range of corporations in terms of size and the fact that corporate cultures may differ significantly not only between different corporations, but within those corporations themselves, are among other challenges faced by regulators in attempts to foster a superior culture consistently throughout a formerly wrongdoing organisation or in the case of regulating for a culture of high reliability from reliability. Finally, regulating for a 'culture' of high reliability will not be easy, despite the resources sector demonstrating a genuinely significant interest in how to become a HRO. With behaviour and culture being deep-rooted, recognition that the process of changing them (and then sustaining that change) will take many years is inescapable.[34]

The role of regulation

Definition of 'regulation'

In order to explore the role of regulation, it is first necessary to examine the definition of the term 'regulation' in the regulatory literature, which impacts on the role that a regulator can or should play here in regulating for a culture of high reliability. Like 'corporate culture', there is no settled, all-purpose definition of regulation. Definitions range from the narrowest and simplest approach of a specific set of commands, to state influence, to wider and more complex conceptions, such as all forms of social control.[35] A useful definition of regulation in the current context is that offered by Julia Black, a noted legal regulatory scholar, as:

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27 See, e.g., Rangaraj Ramanujam, 'The Multiple Meanings and Models of Reliability in Organizational Research' in Rangaraj Ramanujam and Karlene H. Cantu, *Organizing for Reliability: A Guide For Research and Practice* (Stanford University Press, 2018), 18, quoted in Susan Johnston, 'What Do We Really Know About HROs?' (Paper, HRO Forum, March 2021).

28 [2015] EWCA Crim 1944.

29 Although Hayes was also convicted and sentenced to 14 years' imprisonment, this sentence was reduced on appeal to 11 years: *R v Hayes* [2016] 1 Cr App R (S) 63. However, it remains one of the harshest penalties for a white-collar defendant in the UK.

30 *R v Hayes* [2015] EWCA Crim 1944, [8].

31 See Simon Bronitt and Zoe Brereton, Submission to the Attorney-General's Department, *Combatting Bribery of Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (Cth) (10 May 2017) 4.

32 This problem is discussed at length in Comino (n 17).

33 This problem is also discussed at length in Comino (n 17). In other words, there is a mismatch between 'stated' and 'lived' values.

34 See, e.g., Thomas Kell and Gregory T Carrott, 'Culture Matters Most' (2005) 83(5) *Harvard Business Review* 22, 24, who make this point generally regarding cultural transformation in organisations.

35 Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford Handbook of Regulation* (Oxford University Press, 2010), 11-12.

> the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes.[36]

Role regulators can or should play?

If this is the role of regulation which is undeniably complex, what can regulators do to engender a culture of high reliability that organisations importantly *want* to embrace, as opposed to simply having to? This is an issue which is underexplored in the literature and when it has been tackled, no consensus has been reached.

As Susan Johnston has pointed out, Andrew Hopkins has argued that "a factor conducive to the emergence of HROs is the presence of 'aggressive, knowledgeable watchers'".[37] By contrast, Mark Chassin and Jerod Loeb have stated that 'regulation had only a modest and supportive role ' in improvements to reliability and safety in high risk industries (e.g., commercial aviation and car manufacturing); and suggested that regulators' primary role in any drive to reliability should be limited to removing any unnecessary 'requirements that obstruct progress towards high reliability'; and 'publicly reporting reliable and valid measures of quality.'[38]

These views largely relate to how a regulator presents itself externally (2 above), though the need for 'knowledgeable watchers' is also relevant to how it operates internally (1 above).[39]

Looking at ASIC, elements of both an aggressive and supportive regulatory approach are evident. On the one hand, as a result of the strident criticisms made of ASIC's approach by the Hayne Royal Commission,[40] the regulator has recalibrated its enforcement strategy to adopt a new get tough 'Why not litigate?' enforcement-centred approach,[41] with a focus on deterrence (and punishment).[42] Yet, on the other hand, ASIC has also enhanced its surveillance and expanded its tool-kit by adopting new and more intensive supervisory measures, such as what became known as the 'Close and Continuous Monitoring Program' (CCM Program), where ASIC staff were embedded in Australia's 'Big Four' banks and AMP to monitor their culture, governance and compliance practices.[43]

As we have seen, the reason for ASIC's adoption of the latter approach is most recently, the Hayne Royal Commission's recognition of the vital supervisory role that ASIC can play in pursuing initiatives that focus attention on the culture, governance and remuneration practices of the banks and financial services entities, and where the aim of such initiatives is to identify factors that create risks *before* they become breaches of the law, rather than reacting and sanctioning breaches after they occur.

Accordingly, with this same approach evident in the scholarship on HROs, with the primary drivers for change and high reliability residing with organisations themselves and their leaders, this paper argues that **regulators in this space should have a secondary yet vital supportive role, where crucially they must work with industry in the drive to encourage a culture of high reliability**.

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36 Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 26.

37 Andrew Hopkins, *Learning from HROs* (CCH Australia, 2009), 17, quoted in Johnston (n 27).

38 Mark Chassin & Jerod Loeb, 'High-reliability Health Care: Getting There From Here' (2013) 91(3) *The Millbank Quarterly* 477, 484, also quoted in Johnston, ibid.

39 In the regulatory literature, a closely associated idea is that of a "knowledge-management company", which is tied up with responsiveness namely, that a company must be well informed, but at the same time, it needs to adapt to changes in its environment: see Brendon Young, 'Leadership and High-reliability Organisations: Why Banks Fail' (2011/2012) 6 (4) *The Journal of Operational Risk* 67-87.

40 These culminated in the recommendation that when it comes to enforcement, ASIC should take as its 'starting point' the question of 'whether a court should determine the consequences of a contravention': *Hayne Royal Commission Final Report* (n 3), 446.

41 Australian Securities and Investments Commission, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *ASIC Response to Interim Report* (2 November 2018) 9. It is beyond the scope of this paper to examine this strategy or its implementation, but it should be noted that ASIC leadership has repeatedly said that 'Why not litigate?' is not a 'litigate first' or 'litigate everything' strategy: see, e.g., Shipton, 'The Fairness Imperative' (n 5), [4].

42 For a recent article on whether deterrence really works with corporate as opposed to individual wrongdoers: see Vicky Comino, 'Life after the Banking Royal Commission: Is the Royal Commission a 'game-changer' for the financial services in Australia?' (2020) 35 *Australian Journal of Corporate Law* 381, 400-405.

43 This Program, which commenced in October 2018 and concluded in February 2020 is discussed in detail in Vicky Comino, '"Culture" is Key – an analysis of culture-focused techniques and tools in the regulation of corporations and financial institutions' (2021) 49 (1) *Australian Business Law Review* (forthcoming).

Working with industry

Of significance is the example Chassin and Loeb gave of the regulator's role to remove any unnecessary 'requirements that obstruct progress towards high reliability',[44] namely 'requirements that impose unproductive work on regulated organisations that distract them from dealing more effectively with their challenges'.[45] This example emphasises the importance that regulators need to be seen as able to work with industry, an essential component of how they present themselves to the regulated community and that their requirements not be regarded as just another regulatory burden imposed on organisations from outside. This is not a simple task for any regulator when regulators have often been viewed as 'outsiders'.[46]

Overcoming this problem for regulators of being perceived as "outsiders" and often also as 'bureaucratic' and 'remote' is made even harder by the nature of their work, particularly in situations where the regulated need to respond to enquiries from the regulator, such that there is a tendency for the relationship that the regulator has with the individuals and entities it regulates to be confrontationalist,[47] which plays into the significant 'them and us' dynamic in the regulatory space. Again, using the example of ASIC, it has been noted that at various times this has meant that the response of firms when ASIC asks for information has been to 'call their lawyers',[48] rather than engage with the regulator. The result is that the conversation that might have been had to afford both ASIC and regulated parties the opportunity to achieve a better understanding of deeper problems and potentially to work through them has been lost.

The importance of regulators, therefore, being able to work with industry and to build a relationship with the regulated community so as to be seen as approachable and reasonable, open to listening and being sensitive to real world operations, experiences and the views of the organisations and individuals they regulate cannot be overstated. However, regulators also need to tread carefully lest they be accused of falling victim to 'regulatory capture', that is, being co-opted by the industry they are supposed to regulate,[49] a criticism also made of ASIC most recently, by the Hayne Royal Commission.[50]

What is "effective regulation"?

At this point, it is also instructive to highlight the definition of 'effective' regulation put forward by Michael Mann, a former director of the highly regarded US regulator, the Securities and Exchange Commission. He argued:

> There are two aspects of any effective regulatory regime: its legal and structural framework (the rules), and the implementation of that framework (the regulation).[51]

Further, the rules must be "easily understandable" and "the application of the rules must be done in a predictable manner".[52]

Importantly, therefore, regulators need to be **consistent, clear and transparent** in the way they deal with organisations and exercise their discretion. The impact of individualised decision-making and the issue of "discretion" has been and continues to be a subject of particular significance for legal scholars.[53] The

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44 Discussed above, n 38.
45 Chassin and Loeb (n 38), 484.
46 Most recently, some commentators argued that this was the manner in which ASIC was regarded in relation to the CCM Program: see David Ross, "ASIC faces challenge getting monitoring right - In the tent or on the outer: regulators tread fine line in bid to change culture", *The New Daily*, 17 December 2018, 2. Ross referenced, e.g., Michael Duffy, a former ASIC lawyer and currently, a legal academic at Monash University.
47 See Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32 *University of Denver Law & Policy* 181, 199.
48 Ibid, 199, quoting an Australian lawyer (Note on file with authors) as saying this in regard to ASIC.
49 There is an established canon of scholarship on the phenomenon and the risk of regulatory capture is well acknowledged: see, e.g., Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (Brookings Institution Press, 2000), 63.
50 See *Hayne Royal Commission Final Report* (n 3), 424.
51 See Michael Mann, "What Constitutes A Successful Securities Regulatory Regime?" (1993) 3 *Australian Journal of Corporate Law* 178, 180.
52 Ibid.
53 See, e.g., Keith Hawkins (ed), The Uses of Discretion (Clarendon Press, 1992).

implementation stage of regulation, especially the enforcement activities of field-level officials charged with interpreting and applying the law (i.e., how government regulation is to be translated into action - what is referred to in the regulation literature as the 'law in action') has also enjoyed a long tradition of research.[54] The research recognises that these officials (who are the 'front-line of regulatory enforcement' and 'gatekeepers' to the regulatory process) do not operate in a vacuum or free from external influences or constraints. They are constrained, to varying degrees, by the organisations within which they work, as well as, by political, economic, social and, of course, legal factors.[55]

That said, problems arise for regulators when their decision-making is not transparent or consistent, as illustrated once again for ASIC when it came under heavy criticism by the Hayne Royal Commission, which identified inconsistency in the way that ASIC dealt with the banks. It observed that ASIC 'rarely' sought to initiate court proceedings against large financial institutions that broke the law, relying instead on negotiated settlements.[56] In contrast, the *only* criminal actions that were pursued were all directed against small operators that were easier and cheaper to prosecute.[57] This differential treatment by ASIC and the lack of transparency around decision-making also raises concerns about the rule of law, especially the application of the principle of 'equality before the law'.[58]

Further, just as organisations and board members risk reputational damage when scandals are exposed and ventilated in the public arena, such as the Hayne Royal Commission, which saw the fall of major reputations (e.g., Ken Henry (NAB's chair)),[59] regulators and executives in leadership positions within the regulator may risk reputational damage.

How regulators should operate internally?

Turning now to concerns raised about regulators in other areas that bear careful consideration in regulating for a culture of high reliability in regard to how they might operate internally, those concerns relate to such matters as **governance (including accountability and risk management systems) and the culture of those regulators.** These concerns are plain from the recommendations made in the Final Report of the Hayne Royal Commission and more recently, the findings of the Thom Report.

Drawing on the 2003 Review of Corporate Governance of Statutory Authorities and Office Holders (the Uhrig Report), which noted that 'accountability frameworks are an essential part of governance',[60] the recommendations made by the Hayne Royal Commission include that ASIC (and Australia's prudential regulator, the Australian Prudential and Regulatory Authority (APRA)) should each internally formulate and apply to its own management accountability principles of the kind established by the BEAR.[61] Other significant recommendations include that ASIC (and APRA) should each be subject to regular capability reviews;[62] and for "additional oversight" in the form of a permanent oversight body, a sort of "regulator of regulators".[63]

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54 See, e.g., Bridget Hutter, *The Reasonable Arm of the Law? The Enforcement Procedures of Environmental Health Officers* (Clarendon Press, 1998).

55 Ibid, 9-14.

56 Similar concerns that ASIC is 'too close' or 'soft' on the 'big end of town', e.g., also featured in evidence and submissions to the *Senate Inquiry into the Performance of ASIC* (n 7), 266-69.

57 See *Hayne Royal Commission Interim Report* (n 15), 271. Others have also identified that ASIC has a track record of prosecuting 'small fry': see Dimity Kingsford Smith, 'A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector' (2011) 44 *University of British Columbia Law Review* 695, 697.

58 Concerns regarding the differential treatment of large and small corporations and of their directors who break the law in regard to the choice of enforcement sanctions by regulators, challenging the rule of law and 'equality before the law' are not unique to ASIC. They have been raised by scholars in other jurisdictions: see, e.g., Brandan Garrett, *Too Big to Jail – How Prosecutors Compromise with Corporations* (Harvard University Press, 2014), 14, in relation to US regulators.

59 Henry was forced to resign after the release of the Final Report, where according to Commissioner Hayne Henry's behaviour and evidence in the face of questioning at the hearings showed an "[u]nwillingness to recognise and to accept responsibility for misconduct": see *Hayne Royal Commission Final Report* (n 3), 409.

60 John Urhig, *Review of Corporate Governance of Statutory Authorities and Office Holders* (June 2003), 52.

61 *Hayne Royal Commission Final Report* (n 3), 470. It is beyond the scope of this paper to explore the BEAR. Suffice it to state that an essential element is the requirement of clearer roadmaps of responsibilities within organisations via 'responsibility maps' for senior executives and directors.

62 Ibid, 471.

63 Ibid, 480.

The governance concerns raised by the Thom Report, which followed a review of ASIC prompted by the recent personal scandals in which ASIC chair, Shipton, and former Deputy Commissioner and Head of Enforcement, Daniel Crennan QC, were embroiled[64] are also illuminating. In addition to finding that ASIC took 13 months to respond to the recommendation made by the Australian National Audit Office (ANAO) regarding the payments made to Crennan,[65] which interestingly offends the first of the 'five principles' that form the foundation for the continuous improvement mindset of HROs – 'preoccupation with failure' (i.e., that process failures are addressed immediately and completely)[66] – the report also expressed concerns regarding:

- the proper use and management of public resources;
- systems of risk oversight and management for the entity;
- the system of internal control for the entity; and
- co-operation between ASIC officials.[67]

Furthermore, in the same way that regulated entities, e.g., which say they adhere to the law and have structures and policies in place to ensure regulatory compliance need to act in accordance with those systems and policies, regulators should also give serious consideration to whether their 'actual' culture is attuned to that found in their official governance and accountability frameworks and vision statements. For instance, if regulators state that they are 'open' and 'transparent' in their dealings not only with the regulated community, but also their own staff, regulatory staff should be able to raise problems with management with the knowledge that they will not be marginalised or punished and their concerns ignored.

Conclusions – Where to from here?

This paper has sought to provide answers to the essential questions it has posed supported by the regulation literature and examples regarding ASIC. It has argued that while primary responsibility for change and high reliability in the resources sector remains with organisations themselves and their leaders, regulators also have a significant role.

As to what this role entails in practice and what regulators should not do, the paper has raised some important issues for regulators to consider. Among them are regulators thinking about the purpose of regulating in this space. In short, are they regulating for the industry *or* imposing and enforcing the rules? It is such questions that are behind this papers' discussion of issues, such as regulators being seen as able to work with industry (as opposed to being perceived as 'outsiders', 'bureaucratic' and/or 'remote') and yet able to tread carefully so as not to be 'captured' by industry. The paper has also highlighted issues, such as regulators being consistent, clear and transparent in their dealings with the regulated community, especially in the exercise of their "discretion" and decision-making; and to strive to ensure their own governance (including accountability and risk management systems) and culture are conducive to the achievement of a culture of HROs. The issues raised, however, are by no means exhaustive and it is clear that further research is required, especially in view of the fact that research by legal and socio-legal scholarship exploring 'corporate culture' is relatively new and as such underdeveloped.

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64 ASIC paid around $120,000 to cover Shipton's tax advice upon his relocation to Australia while Crennan resigned when it was revealed that he was incorrectly paid $70,000 in rental assistance when he relocated from Melbourne to Sydney.

65 See Vivienne Thom, *Abridged Report on the Review of ASIC's Governance Arrangements* (Report to Secretary to the Treasury, 28 January 2021), 4 (*Thom Report*). Even though in early August 2019 the ANAO's 2018-19 Closing Report recommended that ASIC seek advice from the Remuneration Tribunal on the classification of these payments to Crennan and whether they fell within the Remuneration Tribunal Determination, ASIC only decided in September 2020 not to pursue a ruling or determination from the Remuneration Tribunal. The Auditor-General on 22 October 2020 then raised concerns with the Treasurer in relation to payments made to both Crennan and Shipton, which led to the appointment of Dr Vivienne Thom on 25 October 2020 to conduct a review into the findings of the ANAO financial statements audit in relation to these payments and related governance issues.

66 Karl Weick and Kathleen Sutcliffe, *Managing the Unexpected, Resilient Performance in an Age of Uncertainty* (2nd ed) (John Wiley & Sons, 2011), 2.

67 Thom Report (n 65), p 7.

References

Books & Articles

Baldwin, R., Cave, M. and Lodge, M, *The Oxford Handbook of Regulation* (Oxford University Press, 2010).

Black, J, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

Black, J. and Baldwin, R, 'Really Responsive Risk-Based Regulation' (2010) 32 *University of Denver Law & Policy* 181.

Campbell, D. and Loughrey, J, "The Regulation of Self-interest in Financial Markets" in Justin O'Brien and George Gilligan (eds) *Integrity, Risk and Accountability in Capital Markets – Regulating Culture* (Hart Publishing, 2013).

Colvin, J. and Argent, J, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34(1) *Company and Securities Law Journal* 30.

Comino, V, 'Life after the Banking Royal Commission: Is the Royal Commission a 'game-changer' for the financial services in Australia?' (2020) 35 *Australian Journal of Corporate Law* 381.

Comino, V, "'Corporate Culture' is the 'New Black' – Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?" (2021) 44(1) *University of New South Wales Law Journal* (forthcoming).

Comino, V, '"Culture" is Key – an analysis of culture-focused techniques and tools in the regulation of corporations and financial institutions' (2021) 49 (1) *Australian Business Law Review* (forthcoming).

Financial Conduct Authority (FCA), *FCA Mission: Approach to Enforcement* (Paper, April 2019).

Fisse, B. and Braithwaite, J, *Corporations, Crime and Accountability* (Cambridge University Press, 1993).

Garrett, B, *Too Big to Jail – How Prosecutors Compromise with Corporations* (Harvard University Press, 2014).

Grantham, R, *The Law and Practice of Corporate Governance* (LexisNexis, 2020).

Hawkins, K (ed), The Uses of Discretion (Clarendon Press, 1992).

Hofstede, G, 'Identifying Organizational Subcultures: An Empirical Approach' (1998) 35(1) *Journal of Management Studies* 1.

Hutter, B, *The Reasonable Arm of the Law? The Enforcement Procedures of Environmental Health Officers* (Clarendon Press, 1998).

Johnston, S, 'What Do We Really Know About HROs?' (Paper, HRO Forum, March 2021).

Kell, T. and Carrott, G, 'Culture Matters Most' (2005) 83(5) *Harvard Business Review* 22.

Kingsford Smith, D, 'A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector' (2011) 44 *University of British Columbia Law Review* 695.

Mann, M, 'What Constitutes A Successful Securities Regulatory Regime?' (1993) 3 *Australian Journal of Corporate Law* 178.

Martinez-Corcoles, M, 'High Reliability Leadership: A Conceptual Framework' (2018) 26 *Contingencies and Crisis Management* 237.

Ross, D, "ASIC faces challenge getting monitoring right - In the tent or on the outer: regulators tread fine line in bid to change culture", *The New Daily*, 17 December 2018.

Schein, E, *Organizational Culture and Leadership* (Jossey-Bass, 4th ed, 2010).

Sheedy, E, Griffin, B. and Barbour, J, 'A Framework and Measure for Examining Risk Climate in Financial Institutions' (2017) 32(1) *Journal of Business and Psychology* 101.

Shipton, J, 'The Fairness Imperative' (Speech, AFR Banking and Wealth Summit, 27 March 2019).

Sorensen, J, 'The Strength of Corporate Culture and the Reliability of Firm Performance' (2002) 47(1) *Administrative Science Quarterly* 70.

Sparrow, M, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (Brookings Institution Press, 2000)

Weick, K. and Sutcliffe, K, *Managing the Unexpected, Resilient Performance in an Age of Uncertainty* (2nd ed) (John Wiley & Sons, 2011).

Wishart, D, Wardrop, A. and McMahon, M, 'The Internal Autonomy of the Firm' (2018) 27(1) *Griffith Law Review* 131.

Young, B, 'Leadership and High-reliability Organisations: Why Banks Fail' (2011/2012) 6 (4) *The Journal of Operational Risk* 67.

Reports, Cases & Other

ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019).

Australian Securities and Investments Commission, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *ASIC Response to Interim Report* (2 November 2018).

Bronitt, S. and Brereton, Z, Submission to the Attorney-General's Department, *Combatting Bribery of Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (Cth) (10 May 2017).

House of Commons Treasury Committee (UK), *Fixing LIBOR: Some Preliminary Findings* (Report of Session 2012–13 No 2, 18 August 2012).

Independent Liquor and Gaming Authority, *Inquiry under s 143 of the Casino Control Act 1992 (NSW)* (Special Report, 1 February 2021).

R v Hayes [2015] EWCA Crim 1944.

R v Hayes [2016] 1 Cr App R (S) 63.

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Interim Report, September 2018).

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, 1 February 2019).

Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (Report, June 2014).

The Ethics Centre, *Australian Cricket: A Matter of Balance* (Report commissioned by the Board of Cricket Australia, October 2018).

"The Loudest Voice", *Showtime*, June 2019.

The Royal Commission into Aged Care Quality and Safety, *Neglect* (Interim Report, 31 October 2019).

Thom, V, *Abridged Report on the Review of ASIC's Governance Arrangements* (Report to Secretary to the Treasury, 28 January 2021).

Urhig, J, *Review of Corporate Governance of Statutory Authorities and Office Holders* (June 200

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