Australian Bar Association Conference 2018

The Regulators Panel

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Chair: Dominique Hogan-Doran SC

Speakers: Mark Bielecki, the Registered Organisations Commissioner

Sarah Court, Commissioner, Australian Competition & Consumer Commission

David Locke, Chief Ombudsman & CEO, Australian Financial Complaints Authority

Hogan-Doran SC: This afternoon's panel is our Regulators Panel; we are going to have a mix of the regulators. Two of them are quite new regulators, or represent two new regulatory bodies. And we're also going to end with what tips do they have for counsel acting for regulators, or against regulators. What are their pet peeves? What are their hot tips? And hopefully you'll leave ready and primed for what is looking like a great future for those who do regulatory enforcement litigation.

First we have Mark Bielecki. Mark was appointed the Registered Organizations Commissioner in May last year. That's a new role. And, it's a body and I'm going to be asking Mark to say something about it. He is a former South Australian Regional Commissioner for ASIC. And he's prepared to say something about that as well. Mark hails from Adelaide where, he was a Managing Partner of one of the great law firms in Adelaide, Finlaysons.

We also have Sarah Court. Sarah is a Commissioner of the ACCC, which she is now into her third term of appointment, having first been appointed in April 2008. Sarah is also an Associate Commissioner of the New Zealand Commerce Commission; we have a number of practitioners from New Zealand here at the conference this week.

Sarah oversees the ACCC's Enforcement and Litigation Program, and she chairs, importantly, the Commission's Enforcement Committee.

And, as a late ring in, for which we are grateful, is David Locke. David is the new, that is, as of since about the first of November this year, Chief Ombudsman and CEO of the recently established Australian Financial Complaints Authority. This is the new one stop shop of complaints resolutions service for the financial sector. He expects to be very busy.

: David was previously the assistant commissioner of another new commission, the Australian Charities and Not-for-profits Commission. He took a key role in establishing that commission and managing its key functions from its establishment in 2012. And, for a little bit of overseas perspective, David hails from the UK, where he was formerly the Executive Director of Charity Services at the Charity Regulator of England and Wales.

So, our advertised other speaker, Daniel Crennan QC is unable to attend, because next week the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Commission recommences. In amongst the CEOs and Chairs being called is the leadership of APRA and ASIC.

Yesterday, in Melbourne at the professional standards body FINSIA's Regulators Forum, a competing forum to this, APRA and ASIC admitted on the record that they are not perfect; they've promised to get tougher with their constituents; and they have flagged additional interventions and further enforcement action throughout the next year. Of course, that may be good news for the Bar, but not for some of our clients.

So, over to our panel. What's a Royal Commission ever done for you? Mark.

Mark Bielecki: Thanks Dominique. I suppose the first thing the Royal Commission into Trade Union Corruption and Governance did was to encourage the Government to proceed with the bill that created the ROC. That's a very big helping hand. Also, the Royal Commission referred to the predecessor regulator, which was the General Manager of the Fair Work Commission, about 30 matters to investigate and deal with. On the commencement of the ROC, on the 1st of May 2017, 24 of those were transferred to us. So, the other contribution if you like, that the Commission's made was to very much inform our early investigations work and our program around more heavy duty compliance work.

Out of those I have to say that we finished, or are in the process of dealing with, all but one. One of the specific provisions in our Act, is that we can't deal with any civil penalty issues until criminal matters have been resolved and dealt with. And, so one of those is still in the criminal courts.

The legislative changes that the Royal Commission dealt with have also had an impact of us. The Royal Commission dealt with recommendations around the corrupting benefits legislations, which has now been passed. Which, is of, I think, particular interest to organisations.

We've also had a number of changes to what the Field Work Commission used to do. Like ASIC now, auditors who audit registered organisations need to be registered with us. And so, for the first time we've got access to the auditor cohort. And, as my former chairman at ASIC used to say, "*Auditors are financial gate keepers*". And, we are going to leverage from the work that they do.

Also, there were recommendations around the *Ensuring Integrity Bill*. Which most of you all knows just standing still, not doing very much in Parliament.

Mark Bielecki: Should I mention a little bit about the ROC?

Hogan-Doran SC: Perhaps you just explain what you are, who you are.

Mark Bielecki: I don't know if you know who they are, it's quite a niche jurisdiction. We regulate Federal Employer Associations, and Federal Trade Unions. In that respect we're like a mini ASIC. They lodge their financials with us, we review those, their auditors are registered with us. And the officers of those organisations need to meet duties like directors do under the Corporations Act. So they have to act with due care and diligence, and for proper purpose and so on.

So, we're very much actually a conduct regulator, which term has seemed to come into vogue a bit more in Australia ever since the current Royal Commission. We have a very strong guidance and education role, and in fact most of our resources are devoted to doing that. And what we've done in the area hasn't been done before.

So, we've published national education strategies, so organisations can plan ahead on what areas they'd like to upskill on. We're a small agency, I should say, up until recently, there have only been 18 staff in the agency. So, well the numbers may not sound so impressive on their own, when you look at the number of resources we had, I think they are very good.

We've issued 140 separate education products. Some interactive, come static. And, they're all available on the website of course. And, we've run a number of workshops, which is quite an unusual feature because these have run all around the country and we've invited officers from organisations to attend. So far we've had about 300 people attend, there's another one coming up in Brisbane next week.

We were very happy to have support of the Bar. We had three junior counsel to support us in Sydney on a panel session dealing with corrupting benefits, which is one of the hot topics in the area. And, they were very well received. I don't quite want to say it, but they got one of the highest approval ratings in feedback that we got. We were grateful for that.

And in Melbourne, we had three Senior Counsel actually, which we were very lucky to have. In some respects they all disagreed with each other, which probably isn't surprising. But, what they did do was underscore what a difficult area it is. From that point of view it delivered a good message. So, we're very happy to have done that.

Hogan-Doran SC: And just before I pass from you as a conduct regulator - how many matters have you now got on foot in the Federal Court and elsewhere?

Mark Bielecki: I think there are now six matters in the Federal Court. One against us and five that we're bringing. And, there are more coming actually. Well the numbers are not to be compared to a regulator like the FWO, for example. The cases are all Federal Court cases. And in fact actually if you could strip away all the passion that exists in this industrial relations area, they're really, basically complex pieces of commercial litigation. So, they have a regulator flavour of course, but at the end of the day they're items of commercial litigation. And they have fought hard for that reason, very interesting.

Hogan-Doran SC: Thank you Mark.

David, you've come from a kind of a conduct regulator - a 'start up' conduct regulator, the Charities Regulator. I don't know how familiar people in the room are. I now know that it's a burgeoning area and itself has been the kicked to prominence by a public inquiry.

David Locke: Indeed, and it's unusual to be involved in one startup, let alone two in a row. So, it's quite fascinating.

But, the Australian Charities Not-for-profits Commission, ACNC was established in 2012. Unlike may regulators, it wasn't established actually as result of a scandal or following the Royal Commission. It really was a result of the Productivity Commission report and long standing lobbying from the sector for ... not for more or less regulation actually, but for better regulation in a national framework as well.

But, of course since the ACNC's been established many charities have been subject to a Royal Commission - very particularly the Royal Commission into Institutional Responses to Child Sexual Abuse. And, if you look at the matters before the Commission, and the organisations before the Commission, 70 percent of those were charities and, 60 percent were actually religious faith based organisations and, 10 percent were secular charities.

Now, that is fascinating. And, if you hear Robert Fitzgerald - the Productivity Commissioner, who is also commissioner on the Royal Commission into Institutional Abuse - talk. It's fascinating. How can you have organisations that are established for the public benefit, that are for purpose organisations, that are really there for the most vulnerable in society, get into the situation that they got into? It's not just a case of bad people doing wicked, wicked things. What you actually saw there was real massive failure of governance and oversight - on a catastrophic level, the impact on people's lives is devastating.

I was actually in Parliament House when the National Apology was going on - you see these people whose lives have been blighted, coming there with their

husbands, their wives ... for this really a significant event. But, you know that nothing can actually provide the sort of redress.

If you hear Robert talk, and this is somebody who's done thousands of hours and days of interviews with people, somebody who believes passionately in the charity sector and is also a person of faith, he says, "*fundamentally what you've got is a failure, an absolute failure of governance, but also a failure of leadership. And, fundamentally this is about culture, this is about cultural failure*." And, of course that's right.

Then, we look at the Banking Royal Commission. And I was actually having a very nice lunch with a number of senior executives from the Financial Services Council the other day. And when I started drawing analogies with the Royal Commission into Institutional Child Abuse, they did seem a little taken aback - they're not terribly keen on that.

But, fundamentally, how has some of this happened, within these organisations as well. You know, I think there's something ... I've been reflecting on this. I think there's something basically in human nature, that as an organisation if you feel under threat, if you feel under attack from outside, that people hunker down; they're trying to protect the organisation.

You can say, "*Well, we didn't know and we didn't believe*" and all of this. But, there is something, there's got to be something I think in human dynamics that actually means this. They go into protecting the organisation, and they lose sight of the big picture here. They lose sight of what it's all really about. So. I think that, that's fascinating. And I think there's elements that are applicable across the piece.

At the moment, as you say Dominique, I've just established the Australian Financial Complaints Authority. We haven't got much work, as you can imagine. We were anticipating we would get about 55,000 complaints in the first year of operation. I think we got 1500 in the first two days. We're gonna be very busy.

But, actually what we see is that the Royal Commission generates a lot of attention, and a lot of focus. And, inevitably every second person is contacting us, is referencing the Royal Commission. And you can see even with the predecessor schemes, very much the theme of that.

I mean what the Royal Commission does is shine a very bright and forensic spotlight on issues of abuse and systemic failures. And, that's got to be a good thing. That's go to be a positive thing.

But, it's really how you move beyond that. How do you go from the show trial and the media publicity now? What happens in six months? In 12 months? Corporate attention and same in the Not-for-profit sector don't tend to be that long. You have a bit of a window I think, to shift. But, fundamentally what needs

to happen is leaders and boards not only need to pay attention. And, nothing concentrates a board chair's attention as much as sitting there waiting and seeing if you're getting a summons from Commissioner Hayne. I've actually been waiting to see when I get summoned over the next two weeks. I tell you it's just concentrating the mind.

But, actually when all this is over, in 12 months time - what then happens, really? Unless you've actually shifted the culture in organisations, and, put in place measures so there's proper oversight and engagement. But, unless you shift the culture, this will happen again. It's not just about the incentives. It's not just about whether the board are paying attention or focused on this. It's not just about resources. It's about ... a lot of this is about culture.

Hogan-Doran SC: So, one of the things that this Royal Commission has done, is focus attention not just on the culture of the institutions that are being directly investigated. But, also the culture and the capacity of the regulators, who need to both supervise and enforce the regulations.

Sarah Court you come from a conduct regulator. But, you've just been appointed to an Advisory Panel for an APRA review of its Enforcement Strategy. APRA is a prudential regulator. It has historically not seen itself as a conduct regulator, but it has just taken a substantial jurisdiction in relation to banking executive accountability.

Dominique: That review has only just been announced this week and I think if you could just sort of tell us a little bit about it or as much as you know

Sarah Court: Good afternoon everyone. Unfortunately Dominique I have the press announcement here in Terms of Reference. I've been asked to participate in this and I'm delighted to do that and as I understand it as you say there's two issues that we're going to have a look at. One is about this new regime that APRA has in relation to the Banking Executive Accountability Regime. I think the second issue is that both APRA and ASIC have come in for some criticism through the Royal Commission. I don't know what the Final Report's going to say but I think APRA are wanting to take a look at the way that they do enforcement and to have a think about whether they want to do that differently is my understanding. That, as I say, this is very recent and that panel has not met at all yet so I look forward to getting involved.

Would it be helpful just to give a bit of the ACCC's perspective on enforcement and I guess what we can ... perhaps that different perspective that we might be able to bring?

Hogan-Doran SC: I think so, because Commissioner Hayne said in his interim report, "*that a willingness to negotiate cannot be the starting point and a regulator who speaks softly is only effective when they carry a big stick*." Do you agree, or does the

ACCC agree, with Justice Hayne's idea of an inverted enforcement pyramid? Are enforceable undertakings just a soft option for regulators?

Sarah Court: At the ACCC we like to consider ourselves to be a robust enforcement body and that effectively includes litigation and we unapologetically see litigation as our core business. I think our Chairman Rod Simms, who you will read frequently in the media, talks about us as being as a Litigation Factory and that's very much I think what we are. Over decades we've built up a very strong enforcement capacity. The reason that we do that ... so we go to court somewhere between 40 and 50 times a year in the Federal Court. The reason that we do that is because in our view the big stick, I don't like using that phrase but obviously that's what the Commissioner used, having your regulated community, and for the ACCC this is Australia wide, economy wide, we deal across the board.

We deal with Royal Commissions like the Trade Union Royal Commission - the CDDP just instituted criminal cartel proceedings against the CFMEU which the ACCC was involved in. We're involved in financial services. We're involved in a range of things. Our view is that companies will only take us seriously if they know that we are completely comfortable about going to court and that the willingness to go to court and the willingness to tell everybody that we're going to court and when we get a good outcome the willingness to tell everybody about that outcome is what makes us more effective across the board of the other work that we do.

We find for example, part of what we're trying to do is to encourage compliance with the Competition Act. We find that when we announce a set of priorities for sectors or particular issues that we're going to look at for the following year, then we remarkedly find significant improved compliance in those areas as a result of our announcement that these are the areas that we're going to look at in a significant way. We take a very strategic approach to our enforcement.

We have a process whereby we work out what our priorities are going to be every year. We're right in the middle of doing that. We're getting together in the middle of December, the Commissioners and all the senior staff. We work out where do we think the consumer and competition problems are in the economy at the moment, where are they are coming over the horizon. We work out our priorities. We announce them in a blaze of publicity in February when Rod does a CEDA speech and we follow that up by putting all of those sectors on notice and then we enforce, investigate, educate, do market studies, a whole range of enforcement and compliance activities in relation to those sectors. Then we report about them at the end of the year and we tell everybody. We said we were going to deal with energy retailers, we've taken these 3 to court, these are the penalties, these are the people that have exited door-to-door selling and here's the work that we've done with the second tier. It's quite a strategic approach.

I'll just wrap up very quickly by saying that the other thing that we do is that we're very strongly of the view that you should not, as a regulator, only be

taking the cases that you know that you are going to win. We want to test the boundaries of the Competition Consumer Act. We want to make sure that we as the regulator as the publicly funded tax payer body that is charged with protecting consumers and looking after competition, are using those provisions to the full extent that they can possibly be interpreted. That means we win some, that means we lose some. Hopefully we win more than we lose but when we lose, as we did time after time in relation to Section 46, for example, then we use those losses and said, "*Okay, look parliament, we can't possibly do anything with this hopeless provision, we need a new one*." We use a loss in quite strategic way to say to the Government or to small businesses if you want us to be able to take this stuff on then you need to give up, you need to change the law to enable us to do it.

David: But that's such a smart way to regulate. Signalling what you're going to be looking at, and then what you know is that the organisations that want to be compliant will be compliant and then choosing big targets, significant targets. Very easy for regulators to slip into actually taking on the little guys because they don't lawyer-up, they don't challenge in the same way. I've seen it where you almost become a bully of the little guys but actually once you get the big players whether it's the big charities or the big banks or whatever, straight away they lawyer-up, they negotiate, and you get into a negotiation even though you think you're in enforcement territory, because actually they're leading and managing you rather than you actually managing and leading that. It's very easy to slip into that and actually choosing the right targets is really important.

I think also Sarah the point you make about your risk appetite and not just taking cases where you can win. Sometimes as regulators you need to be on the side of the angels. It may be that you don't always win but you need to challenge things and you need to test it a bit really. Where I think regulators get into real difficulty is where there is a disconnect between the regulatory action and public expectation of what the regulatory action is. I understand when ASIC and regulators say well actually if we'd gone to court we wouldn't have got more than $3.5 million, that's not the point. The point is that the message you're sending out there is being lost because you're not actually willing to take action and willing to enforce in that way.

I think that regulatory messaging is so important if you want to shape behaviour. Actually sometimes you have to take them on don't you really.

Sorry, it was a bit of a sermon but I was applauding effectively what Sarah said.

Mark Bielecki: I would echo that in the work that we're doing. What's important is to raise issues and from time to time we get a sense that some of the participants in our area think the law in this area is lesser than it is in other places, because of the history and the background to the organisations that are in place.

Part of what we need to do and the action that we take is to strategically achieve some judgments that will say, well, the number of members in a

register might sound like a mundane thing that no-one's going to get too excited about. The reality is that those numbers determine and underscore the democratic principles for the running of organisations. In some cases we've had tens of thousands of members remaining on the register and they're unfinancial and they shouldn't be there. In other cases we've had hundreds of people being added to a membership register with them not knowing, consenting or having any idea that they've been added to the register, and in each case it distorts the democratic principles that underlie the organisation. We need to take cases that might deal ... and in fact under our old legislation the penalties aren't very high but we've got to get the principles established so that organisations can see that, yes, it does matter.

Hogan-Doran: Mark, the ROC does not have the power to negotiate and enter into an enforceable undertaking, unlike other similar situated conduct regulators. Has that proven a hindrance so far?

Mark Bielecki: No, not so far. You're quite right. We don't have that power. We have a Compliance Policy and what we will do is negotiate outcomes in appropriate cases. If an organisation raises something with us that we didn't know about, offers to do everything that can be done to remediate it given that some time may have passed, works openly with us to demonstrate the steps they're taking and actually remediate it. We might take a view that we won't take any enforcement action in relation to that and there are examples of those. In other cases, people have been in breach of the provisions for a decade and then they say they fixed them a year ago and everything's hunky dory, why are we interested? Those people forget that over that decade their members either didn't know who was running the organisation from time to time or what the financial position of the organisation was. We take a view where we will negotiate when it's appropriate. It's not an EU, but it's a resolution that is, I guess, designed to encourage people in our area to come forward.

Hogan-Doran SC: Sarah?

Sarah Court: I was just going to say that I didn't answer one of your questions which was *"are undertakings a soft option?*" I don't think that they are. I think that's an unfair statement. I think in an enforcement regime you have a spectrum of options. You have criminal prosecution at the pointy end, you have civil litigation, you have infringement notices, you have statutory undertakings, you've got the power and you've got other administrative outcomes. I think undertakings very much have their place in an enforcement regime.

I was just thinking - we've done a whole lot of work in private health insurance and we've taken litigation action against Medibank and NIB. We've issued some infringement notices in a few other matters. We also negotiated with Australian Unity an 87B the statutory undertaking. We could have gone to court on that matter but that gave us quickly, I think it was about $680,000 in revenues for consumers; it was issued very promptly; they had a small percentage of the

market and it was a really sensible quick outcome, when we already had a number of matters in court.

Even in that Coles unconscionable conduct case back in 2014, where we had court proceedings which got the then highest consumer law penalties that had been awarded by consent which were $10 million, we negotiated an undertaking in conjunction with that court outcome which gave a whole lot of smaller suppliers compensation that we never would have got through the court outcome if we hadn't have negotiated that. They got over $12 million, again very promptly and distributed very quickly through negotiating and undertaking.

I think if you use undertakings too much that can be a problem and I don't think undertakings provide the same deterrent effect that David was talking about when you go to court. But in a sophisticated enforcement regime, regulators have a range of tools at their disposal, and part of the judgement and skill of a regulator is working out "*which tool do I use against which particular company and individual and in which circumstance?".*

David Locke: Just very quickly come in on the undertaking point. I think Dominique, you and I got to know each other really through the RSL and obviously everybody in this room will be familiar with some of the evidence with regards to what had happened with RSL New South Wales. That was a case where we [the ACNC] publicly did enter into an Enforceable Undertaking with the new board. We felt that that was appropriate because we had a new board in place, who were working with us to address the issues, and by using an undertaking we were able to agree a comprehensive road map of reform for the organisation and we were able to hold the organisation for compliance in that. That's not something we could ever really have really prescribed in other directions or other way.

To enable us to do much more, and it was right in that case I believe because we had a new board and because they were doing the right thing. If we'd had some of the previous board members remaining on the board it would have absolutely not been the right thing to do and I believe it would have sent absolutely the wrong message. It is a useful tool, but it's the right tool for the right circumstances and there is something about how does this resonate externally with the general community and all of us who are regulators regulate for the public and we need to be conscious of that, I think, in all that we do.

AFCA is an independent ombudsman scheme, despite the fact we're called an authority, we are of course not a Government agency, so it's a little confusing. Our remit - we can consider financial disputes whether they relate to banking, credit, finance, investments, financial advice, life insurance, general insurance matters and superannuation. We've replaced the Financial Ombudsman Service, the Credit & Investment Ombudsman and also the Superannuation Complaints Tribunal.

In terms of the compensation there are significantly increased limits. In respect of superannuation our jurisdiction is entirely unlimited. In respect of other

matters, then we can consider other matters if the financial loss of a particular dispute is up to a $1 million and we can award compensation of up to half a million dollars. With regard to small business we can consider matters of up to $5 million and make awards of up to $1 million. The definition of a small business is now any business that employs less than 100 people, so it is quite wide.

The increased jurisdiction is significant. I think it is important for counsel to be aware if you do have people with issues that it is a free service for complainants and small business owners. It's funded through levies and fees on industry.

Obviously it's an option that is available to people, and the test that we have to apply in most matters is what is fair and reasonable in all the circumstances of the case. So of course we look at, well, "*what is the contractual liability here?",* but we can go beyond that and do go beyond that. So we will look at *what does good business practice look like in this space? What do the self-regulatory codes say with regard to this?* And even if a matter is not inconsistent with the contractual obligations, even if it isn't in breach of the industry codes, if we think that it is unfair then we can still make an adverse determination, and those determinations are binding on the members and have to fund the compensation.

So it's optional for you as a complainant as to whether you accept the determination or walk away and go to court. You surrender none of your rights in terms of doing that, but on the financial services provider if the consumer accepts the determination, then it's binding on them. So it's a good model and it is available quite broadly now in a way that wasn't before.

Hogan-Doran SC: So, two follow-up questions from that. The first is: is there an avenue of review to the Federal Court from part or some of your jurisdiction? There certainly was before from the SCT.

David Locke: Yeah. It's quite difficult, to be honest, and you can judicially review determinations but that is pretty much it.

Hogan-Doran SC: All right. And what about the processes? Is it a formal hearing process or written submissions?

David Locke: So, what we will do is we apply a fairly flexible approach, so with many issues we will start by negotiating, we'll consider undertaking conciliation hearings between the parties and see where the matters can be resolved. The experience of the previous schemes was that a lot of matters, particularly lower-level matters and less complex matters, can be resolved. And if they can be resolved at an early opportunity, then we do that in a pretty informal way. If they can't be resolved in that way, then we will make a formal determination. I have 22 ombudsmen, 14 adjudicators and a number of panel members, so we can do

panel hearings as well. But it is much more informal than the Court process, but of course, we have to look at what evidence there is in all the circumstances.

Hogan-Doran SC: And am I right in understanding that there's not, as there is in some industrial tribunals, a requirement for leave for representation or anything in that?

David Locke: Absolutely.

Hogan-Doran SC: Nothing like that?

David Locke: No.

Hogan-Doran SC: All right. So talking then about the role of counsel, because I'm conscious of the time that we have, each of you in your both current roles and previous roles would have had occasion to brief counsel and instruct counsel or have to deal with opposing counsel, perhaps in the course of negotiations or indeed in court. Could we start perhaps with your pet peeves. What are the things for counsel to watch out for and not to draw the ire of the regulator?

David: Go for it, Sarah.

Sarah Court: I've got a really long list!

Dominique: Sarah prepared that earlier!

Sarah Court: And I scrawled it on the plane this morning.

Okay. So if you're dealing with a regulator against us, I would say personally just to recognise that most regulators and at least the ACCC, if I can speak for us, are generally pretty sophisticated purchasers of legal services and we do know our legislation reasonably well and we have very professional and expert in-house lawyers that give us advice. So, if you're coming up against us, please don't try to explain the law to us or explain what section 18 or section 21 or what a cartel is because we've got that. We're right with that.

Don't accuse us in the negotiating of breaching a Model Litigant Policy, there is nothing that is more irritating - if you had to go through the bureaucracy that I have to go through to deal with anything, and the checks and balances in the General Counsel and commission decisions and then going to external counsel to get their advice that we have reasonable grounds to start a case; we get the Model Litigant Policy - we take it very seriously.

Unduly technical points, I find extremely irritating. Like I think if a respondent is not confident enough to just argue on the substance of what is going on here; what is the harm that the regulator – the ACCC - has identified? Let's have battle on that issue. Don't muck around with interlocutories and fights about discovery

categories and those sort of issues. For me, that's a sign of a respondent that is not confident in its case.

And I guess, Dominique, just sort of concluding, when a regulator takes action our client is the taxpayer, it's the public. There's nothing for us to personally gain. We don't get a bonus if we win this case. We take action, whether rightly or wrongly, because a group of commissioners have sat around a table and acted on the advice of our staff and on legal advice, both internal and external, that there is an issue here that needs to be put before a court; there is an issue that needs that needs to be tried. The judge may agree with us. Here or she might disagree with us. That's completely fine, if the judge doesn't accept the ACCC's view - that is the process working. We bear no grudges, obviously, in relation to companies and individuals that test us, but recognise that the regulator has its own job to do. This is not a commercial negotiation. There is no point before we say we want a penalty of five million dollars and you say you want a penalty of a hundred thousand dollars thinking we're going to agree in the middle. That's not how it works from the ACCC's perspective.

And finally, if you're acting for us, and many people in the room do and have, I implore lawyers both in-house and external, just don't be unduly conservative. Think about that framework that I've just put about, we've got a job to do, we're trying to protect competition and consumers. We're testing the boundaries of the law. We don't want to be cowboys, we don't want to just sort of go in if there's no case to be made - absolutely.

But you would be staggered if I was able to tell you some of the advice that we've had on penalties. Counsel just refusing to submit a penalty to the court saying that it's just improper for us to do that. And then the ACCC subsequently being criticised – the ACCC, of course not the counsel, for not putting in or agreeing a penalty position.

On unconscionable conduct, the conservativism of counsel on that particular provision to this day staggers me. We've had some good wins in unconscionable conduct over the years, but in many of those cases our initial advice was "there's no case here and you should walk away from it." So obviously counsel has a ... they're the ones on their feet in the court. They're the ones that deal with the judge, but when you're acting for a regulator you are really wanting to engage with lawyers and counsel that are on your side. They want to fight the good fight. We don't just want to get advice that we want to hear. I'm not suggesting that for a moment, but we do want answers and solutions and, look, you might not [inaudible 00:42:03] on this point but it's worth a run.

Hogan-Doran SC: Pet peeves? Or on to the good stuff now? Mark?

Mark Bielecki: Well I adopt all of those submissions from Sarah. All very good. I'd make just a couple of quick additional points. One thing that I often come across is advice about why we can't do something, and in appropriate instances, of course, that's the right thing to do. But on very few occasions does the advice extend to

well "*here are some options that you can think about and here's how we can facilitate what you're trying to achieve as a regulatory outcome*." So those options aren't improper, they just involve thinking laterally a bit about another way of achieving the outcome. Obviously prolix advices and advices that don't answer the question are frustrating. We need an answer. We understand that you might be wrong, or indeed you might be right, but the court might not agree. So we get that, but we need to get an answer and that's very important for us.

And also, from our perspective, working with counsel to facilitate outcomes is very important. So we work with a lot of counsel, and we're very happy, but there are areas where we can see some suboptimal performances in terms of things that matter to us. And we're not shy at all, we raise it up with counsel. But effectively, the final thing is some counsel very reluctant to give recommendations. I've sat there and I've said "*Well the law is this and you can do this, that, or that*" and when asked for a recommendation ... well no that's your decision. I understand that there are some things other to decide about. But when counsel has read four boxes of documents and analysed every case in the area, I think they could give us a recommendation: *"up to you commissioner, but if it were me I would do this, or I would do that*". Again it may be right or wrong, or it may not be agreed to by the court, but ultimately that's very helpful for me.

David Locke: I've sometimes found recommendations extremely irritating, not necessarily what I would want!

But I think what I would say is risk aversion is really the number one crime. So a failure to understand the risk appetite of the organisation, what you're trying to achieve. As a regulator you don't race to litigation recklessly. You've obviously given it quite a lot of thought before you get to this stage and I think understanding the risk appetite and understanding the bigger picture, that what you were trying to achieve as a regulator in this space, I think, is important. Clearly, of course, sometimes you need to be told what you really don't want to hear, and that may well be that it would be reckless or you chances of success are extremely poor in this.

But you do normally, at least, want the counsel to understand what your rationale is behind wishing to do this, and actually, if this isn't the best way, then are there other mechanisms to achieve that. So I don't want just all the reasons why this would be a bad idea, I do. If there are alternatives, which there may not be, but if there are alternatives I do want smart and clever ideas about how you might be able to achieve the same sort of regulatory impact, or provide the same sorts of redress.

So those are some of the things for me, but it's normally about the risk appetite and understanding that regulators don't have a zero risk appetite. But we are using public funds as well which, again, is a point that's been made. So we're not going to be reckless with it, but we do want to take action if we've come to ...

Sarah Court: Dominique, there is just one other quick one that I've been thinking a lot about over recent years and we've had ... in quite a lot of conversations with Federal Court judges over the years. And that is the issue about the complexity of a pleading. So we know use Concise Statements almost universally in our matters in the Federal Court, which many counsel find very challenging and don't like at all, whether they're acting for us or against us. So that's a continuing battle, but whether it's a Concise Statement or whether it's a Statement of Claim, what I'm going to be talking about is just the number of potential contraventions that are included.

So one piece of conduct under our Act could raise a whole range of issues. It could be misleading and deceptive conduct, it could be false and misleading representations, it could be unconscionable conduct, it could be an unfair contract term, and so what we frequently get is sort of an advice that there's been this suite of provisions that we are recommended to take action in relation to. And I think we like that and I think our advisors like it too because it means that if we get it wrong on section 29, maybe we'll get up on section 33, if we fail on that then we'll get up on 21, but I think litigation is prohibitively expensive. It's taxpayer money, and I think including that broad range of contraventions is making things unnecessarily complicated, and that's the feedback we're certainly getting from the Court. Probably more informally than in decisions, but why do you throw the kitchen sink at this?

Why don't you just ... let's nail it. Is it unconscionable? Plead it as an unconscionable case. Is it misleading? Plead it as that case. And we may lose, and that'll be a lesson for us, but I think it goes with the risk aversion. We're so worried about losing that we throw the kitchen sink. So that's another practical thing I think.

Dominique: So our time has gone very very fast and I know David has to return to Melbourne, Sarah has flown over from Adelaide, and Mark you're heading back-

Mark Bielecki: To Melbourne.

Dominique: To Melbourne.

Newlinds SC: Well I just came for the mystery prize. So yes, can we thank Dominique and the panellists for a very interesting panel.

Dominique: Thanks very much everyone.