

Strategies of denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Abstract

The recently concluded Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry presented evidence of malfeasance, malpractice, and unethical and criminal behaviour by the banks. This article analyses the narratives proffered by the banks that were reported on the front pages of Australian media during the Royal Commission. This article analyses the strategies of denial and neutralisation used by the banks, including literal denial (nothing happened), interpretive denial (something happened but it's not what you think) and implicative denial (it happened but action is not needed and/or possible), and provides insight into the ways powerful institutions and individuals intervene in, construct, and support moral and legal codes.

Keywords: white collar crime, denial, banking malfeasance, Royal Commission

Introduction

This article explores the strategies of neutralisation and denial used by the banks to disavow and evade responsibility for findings of criminality and malfeasance in the Australian Banking Royal Commission. It analyses the banks' strategies of literal denial (nothing happened), interpretive denial (something happened but it's not what you think) and implicative denial (it happened but action is not needed and/or possible). As such, the article extends Stanley Cohen's theory about denial beyond its original context of terrorism, war and

genocide¹ (and other applications of this theory such as to state crimes,² torture,³ automobile industry crime,⁴ and climate denial)⁵ to apply the concept of denial to banking responses to findings of criminality and malfeasance.

The systemic malfeasance and criminality unearthed in the recent Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is part of a broader recognition internationally of the continuation of bad banking practices.⁶ The Global Financial Crisis (GFC) and its aftershocks are widely regarded as constituting the greatest global economic calamity since the Great Depression.⁷ Although the causes of the GFC are complex, criminal and unethical practices within the global financial sector, including reckless and predatory lending, selling toxic financial products and massive frauds, have been identified as among the primary causes of the crisis.⁸ These practices were accompanied and aided by deregulation of the global financial sector and a political commitment to a *laissez faire* approach to the financial markets.⁹ Post-GFC the financial institutions appear to have been largely insulated from the consequences of their behaviour,¹⁰ and the bad banking practices which contributed to the original crisis appear to have continued unabated.¹¹

The Royal Commission held seven rounds of public hearings over 68 days, hearing from more than 100 witnesses and accepting over 10,000 public submissions. The Royal Commission unearthed a great deal of criminality and malfeasance, including fees for no

¹ Cohen (2001).

² Welch (2007), p 92.

³ Del Rosso, p 53; Hamm (2007), p 259.

⁴ Whyte (2016), p 165.

⁵ Norgaard (2011); Rayner (2012) p 107.

⁶ Henceforth the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry will be referred to in text as the Banking Royal Commission.

⁷ Hogg (2013), p 113; Miller (2018), p 248.

⁸ Dempsey and Sorrell (2018) 7; Hogg (2013), p 113.

⁹ Dempsey and Sorrell (2018), pp 7-20.

¹⁰ Sorrell (2018), p 20.

¹¹ Rose and Sesia (2013).

service, charging fees to people who had died, allowing gambling addicts to increase their credit limits despite maxing out their cards, approving home loans that people could not afford, sale of worthless insurance, failure to update medical definitions in some life insurance policies, misuse of members' funds, applying default interest rate hikes to farmers, excessive commissions, and bribery. The Royal Commission conducted public hearings of executives and employees in the banking sector and their 'victims,' and also required institutions to submit their own reports on malfeasance. These reports were later released by the Royal Commission, revealing malfeasance beyond what was detailed in the public hearings. To give some idea of the extent of the malfeasance, in 2018 it was estimated that banks owed at least \$850 million compensation for fees for no service, however at the Royal Commission the Deputy Chair of the Australian Securities and Investments Commission (ASIC) stated that he would not be surprised if it 'ended up being in excess of a billion dollars.'¹²

Despite recognition of the ongoing problem of malfeasance and criminality in the financial sector, there appears to be an absence of governmental will to address it.¹³ The banks have been insulated from the consequences of their behaviour and post-GFC it has been difficult to ascribe and justify culpability.¹⁴ A variety of reasons have been proffered for the relative absence of a criminal legal response, particularly aimed at the corporate level. For example, legal scholars have long asserted that although the economic costs of corporate crime far exceed the costs of other forms of crime there remains a longstanding, common sense understanding that corporate crime is not 'real crime'.¹⁵ This perception is aided and exacerbated by the position of power, influence and trust of the violator.¹⁶ This common

¹² Royal Commission (2019).

¹³ Clarke et al (2003); Krugman (2009); MacAvoy and Millstein (2004).

¹⁴ Dempsey (2018), p 73; Hogg (2013) p 113.

¹⁵ Benson et al (2016) 1.

¹⁶ Sutherland (1949).

sense understanding is in turn reflected and reinforced by a history and architecture of criminal procedure and law, legal agencies and regulators that effect and enforce rules and practices that have the effect of radically reducing if not excluding corporations from ascriptions of criminal responsibility.¹⁷ One aspect of this is so-called ‘regulatory capture’, the successful lobbying by the banking industry to influence government and regulators to reflect banks’ interests and fail to ignore the causes of the GFC.¹⁸ Stanley Cohen’s concept of denial adds depth to arguments about common sense understandings of crime and regulatory capture by teasing out the kinds of narratives the banks offer governments, regulators, and the public to neutralise and disavow evidence of wrongdoing.¹⁹

Stanley Cohen developed his ideas from Sykes and Matza’s original arguments around ‘techniques of neutralisation’ used by individual actors who engage in morally questionable or illegal activities to justify their role in those activities.²⁰ Whilst Sykes and Matza focused on juveniles, Cohen developed these ideas to apply to states and how they justify to themselves and others the harmful effects of their actions. Cohen analysed the ways in which these acts and omissions, and their impacts and consequences, are routinely ignored, overlooked, excused or denied, not only by the individuals and states committing atrocities, but also more broadly by bystanders and cultures of denial. Cohen’s theory considers the ways in which powerful individuals and/or organisations have the capacity to construct meaning through stealthy misdirection and misinformation, accompanied by the power to pay for legal harassment and media control. In his recent application of techniques of neutralisation by the automobile industry, Whyte argued that techniques of neutralisation must take into account the huge social, economic and political power held by corporations in

¹⁷ Tombs and Whyte (2015); Bakan (2004).

¹⁸ Dempsey and Sorrell (2018), pp 7-20.

¹⁹ Cohen (2001).

²⁰ Sykes and Matza (1957), p 664.

shaping ‘common sense’ understandings of the world.²¹ Corporations, and their senior managers, enjoy power which provides their denials with a legal and social credibility and authority that is not available to ‘common’ criminals and juveniles. This power can be used to shape, repackage and claim the law not only by those who administer it, but also by those to whom it is applied.²²

This article highlights the need to be aware of these strategies of neutralisation and the ways in which they attempt to perpetuate long-term social problems and maintain legal and social worlds in which banking malfeasance is ‘unrecognised, ignored or made to seem normal.’²³ Throughout the article I refer interchangeably to criminality, malfeasance and wrongdoing in order to highlight the ways in which powerful institutions such as banks shape conceptions of culpability such that behaviour (like imposing fees for no service) which would otherwise be regarded as criminal (theft/fraud) is instead claimed to be at worst unethical. I highlight the ways in which the legal structure of corporations contribute to disavowals of criminal responsibility and/or the absence of any consideration of attributions of criminality at all.

Section one outlines the methodology I will use to analyse front-page news representations of the Royal Commission. Section two provides an overview of the findings, comparing reporting by different media publications. Section three analyses reporting of interrelated strategies of denial and neutralisation.

Methodology

The aim of this article is to analyse the strategies of denial and neutralisation offered by the banks and reported by the media. This article documents and applies a qualitative analysis to

²¹ Whyte (2016), p 165.

²² McBarnet (2006), p 1091.

²³ Cohen (2001), p 51.

a range of rhetorical strategies, a methodology Del Rosso used in his analysis of denials of torture at Guantanamo Bay.²⁴ Likewise, in his analysis of denials of criminality by the automobile industry, Whyte analysed the key messages disseminated by corporations in newspaper reports, automobile publications and press releases by the companies themselves.²⁵ I adopt a front-page newspaper qualitative analysis methodology to analyse the denial strategies that were present in Australian media from the time the Royal Commission was called to the end of hearings, as well as during the four weeks around the tabling of the Final Report (December 2017 to December 2018, and February 2019). The newspapers considered were those with the widest readership in Australia: *The Australian*, *Australian Financial Review*, *Herald Sun*, *Sydney Morning Herald* and the *Daily Telegraph*. *The Australian* is the highest selling nationally distributed newspaper in Australia with the *Australian Financial Review* the second highest.²⁶ The *Herald Sun*, published in Victoria, is the biggest state-based publication, followed by the *Sydney Morning Herald* and the *Daily Telegraph* which have the largest readership in New South Wales.²⁷

Although this method covers the most widely read media in Australia during the period of the Royal Commission, it is not intended to form the basis for an exhaustive quantitative analysis. A larger project would have analysed *all* media stories about the Royal Commission, the bulk of which were in the Business or Finance sections of the newspapers. A still larger project would have compared news reporting with the hundreds upon hundreds of pages of transcripts generated in the public hearings of the Royal Commission. However, the chosen method aims to provide the foundation for a qualitative discourse analysis of the

²⁴ Del Rosso (n 19).

²⁵ Whyte (2016), p 165.

²⁶ Roy Morgan, 'Australian Newspaper Readership,' <http://www.roymorgan.com/industries/media/readership/newspaper-readership>.

²⁷ The *Sydney Morning Herald* has increased cross-platform readership in the past six months and is now the top read news in Australia; Sydney Morning Herald, 'Sydney Morning Herald readership hits 5 million, 1 million ahead of rivals,' <https://www.smh.com.au/business/companies/sydney-morning-herald-readership-hits-5-million-1-million-ahead-of-rivals-20181001-p5071a.html>, October 2019.

strategies of denial and disavowal by the banks reported by the media, with the approach yielding plenty of articles for analysis (n = 52).

This article analyses which Banking Royal Commission stories made it to the front page of newspapers and the kinds of stories that made front page news (which then continued in later pages of the newspaper). Front-page news analysis, whether quantitative or qualitative, is a recognised methodology. Although the media landscape is rapidly transforming due to the growth of digital media and social media, as well as globalisation, communication scholars argue that daily print newspapers continue to be a core mechanism for organising public and elite attention.²⁸ The front page of print media remains a key site of communicative power, a highly contested political space which shapes attention and contributes to setting the news agenda. Journalists and editors make normative judgments as to what constitutes ‘news’ and what is sufficiently newsworthy to make it to the front page.²⁹ Analysts of news reporting have long pointed to sex and violence as providing mass appeal, as they can be more easily presented as dramatic than most white collar crime offences.³⁰ In the absence of sex and violence, and the perceived dryness and technicality of business issues,³¹ reports on the hearings and findings from the Royal Commission needed to be carefully shaped to make it to the highly contested space of the front page of newspapers.

To analyse the articles, front-page stories were loosely divided into those that reported bank malfeasance, and those which reported bank denials and strategies of neutralisation. A thematic analysis based on Cohen’s categories of denial was then undertaken with a focus on the types of stories told and how they were reported. Articles reporting banking malfeasance and denial were included in the category of denial and neutralisation. The category of denial

²⁸ Costanza-Chock (2016), p 2321.

²⁹ Greer (2010), p 490.

³⁰ Greer (2005), p 157; Jewkes (2015); Levi (2006), p 1037; Martin (2019).

³¹ Levi (2006), pp 1037-1057.

and neutralisation could not be further subdivided, as articles reporting denials tended to include multiple forms of denial. The theory of denial was operationalised through a close textual analysis of stories that reported denial, disavowal or neutralisation of bank malfeasance.

Findings: Reports of Banking Malfeasance and Denials

This section provides an overview of the number of front-page articles published by each newspaper and a breakdown of reports of malfeasance and denials, in order to provide a background to the analysis of reports of denial and neutralisation strategies in the remainder of the article. The overall number of front-page stories about the Royal Commission totalled 132. Of those, 80 articles (60.6%) reported findings of wrongdoing by the banks. The remaining 52 articles (39.4%) reported bank denials and disavowals of responsibility, and concerns about the need to protect the economy. As argued below, reporting of bank denials or neutralisation strategies did not mean that the article necessarily portrayed the bank in a positive light or fully accepted the denials. At times, in order to present denials, the news report would detail the malfeasance that the bank was seeking to deny. In addition, at times straightforward reporting of denials was undermined in the same article and made to seem ridiculous.

Australia has some of the most concentrated media ownership in the Western world, with two main owners of print media: NewsCorp and, until recently, Fairfax.³² *The Australian*, *Herald Sun* and *Daily Telegraph* are owned by NewsCorp and are on the conservative

³² News Corporation owns newspapers in the United States, United Kingdom and Australasia and has substantial interests in television, broadcast satellite, cable, film, children's books and the internet; Winseck (2008), pp 34-39; Pusey and McCutcheon (2010), p 211; Allan (2009); Compton (2009).

spectrum, tending to support the Australian Liberal Party.³³ At the time of the Royal Commission, the *Sydney Morning Herald* (SMH) and the *Australian Financial Review* (AFR) were owned by Fairfax media, but are now owned by Nine Entertainment Co. A loose hypothesis upon undertaking this research was that newspaper reporting would reflect the interests of newspaper owners, with newspapers owned by NewsCorp providing more conservative reporting than newspapers owned by Fairfax, in order to protect the banks from stories of malfeasance and criminality, and providing greater reporting of denials and neutralisations.

However, leaving aside the relative absence of reporting by *The Herald Sun* and the *Daily Telegraph*, which will be considered below, reporting did not obviously reflect ownership bias with reporting arguably reflecting liberal norms of journalism such as accountability. Stories were geared to reflect and reinforce perceived audience interest and knowledge.³⁴ For example, the *AFR* is pitched at an audience that is interested in finance, and accordingly provided the most front-page articles about the Royal Commission at a total of 53. These articles were fairly evenly split, with 27 reporting banking malfeasance and 26 reporting banking denials and apologies. Reporting focused mainly on the institution of banks, with CEOs and chief executives as the main actors.³⁵ The *AFR* had very few human-interest stories focused on the victims of the banks, reflecting the assumption that its readership was already interested in finance stories and thus did not require personalisation. The *AFR* published the most articles presenting denials and apologies from the banks (49%), and also a large number of articles warning about the negative impact of the Royal Commission on credit lending in the future.

³³ Support for the Australian Liberal Party was shown in the recent national election; The Daily Telegraph, 'Sob-story Bill sells mother short,' <https://www.dailytelegraph.com.au/blogs/tim-blair/sobstory-bill-sells-mother-short/news-story/382054a7d67489d39c440d10fcc926bd>, 9 October 2019.

³⁴ David et al (2011), p 215.

³⁵ 'New CBA Chief Executive Purge of the Narev Executive Old Guard,' *Australian Financial Review*, 27 March 2018.

Although *The Australian* is owned by NewsCorp it also had a high front-page count of 35 articles, 26 of which reported banking malfeasance and nine reported denials and apologies. The reporting primarily focused on banking reactions to the Royal Commission, covering executive scalps, apologies, falling share prices and commentary by regulatory bodies. As with the *AFR*, interest in financial stories by its readership was assumed, and thus only a small number (n = 4) of human-interest stories featured people who had suffered at the hands of the banks. Victim stories were included in some institutional response stories, but these were often reduced to a sentence or two and positioned in the latter half of the article, suggesting the content was less important.³⁶

The *SMH* had been instrumental in calling for the Royal Commission into banks, and front-page news reporting was consistent with these concerns. The *SMH* published a total of 33 front page articles, with 18 reporting malfeasance and 15 reporting denials and apologies by the banks. The *SMH* featured emotive human-interest stories with sensational headlines such as ‘Heartbreak at the Hands of the Banks’,³⁷ perhaps based on the assumption that the *SMH* readership was not automatically interested in business stories. The *SMH* also reported the banks from an institutional perspective such as potential penalties, stricter ASIC regulation and executive scalps.

The only reflection of ownership was the relative absence of reporting by the two remaining NewsCorp publications. *The Herald Sun* had a total of six front-page stories about the Royal Commission, with four stories about banking malfeasance published prior to the Final Report, and two stories reporting bank denials published in response to it. Although expressing support for calling the Royal Commission, the *Daily Telegraph* rarely put the

³⁶ The Australian, ‘We were wrong: Big Four chiefs,’ <https://www.theaustralian.com.au/business/banking-royal-commission-we-were-wrong-say-the-big-four-chiefs/news-story/51210b169a9d49c426d49ce547931b82>, April 21 2018.

³⁷ Sydney Morning Herald, ‘Heartbreak at the hands of the banks’, April 4 2018.

Royal Commission on its front page, publishing only five front-page stories. Those articles tended to be brief (only about 200 words) and merely listed scandalous acts committed by banks without identifying which bank had perpetrated them and with an absence of human-interest stories. It could be argued that, as tabloid newspapers, the small number of front-page articles by the *Daily Telegraph* and *The Herald Sun* reflected and reinforced assumptions that their readerships were primarily interested in sex and violence. However, the fact that they are tabloid newspapers in itself reflects a normalisation and reinforcement of the conservative world view of NewsCorp.³⁸

Strategies of neutralisation and denial

I will now analyse the various strategies of denial and neutralisation reported in the 52 front-page news stories applying Cohen's typology of literal denial (nothing happened), interpretive denial (something happened but it's not what you think) and implicatory denial (it happened but nothing needs to, and/or can, be done about it).

Literal Denial

The first type of denial proposed by Cohen is literal – the alleged facts are untrue (fake news) and did not happen. This strategy is surprisingly effective, especially when used by large organisations which have (some) control over the information available to outsiders.

No Need for a Royal Commission Literal denial was exemplified in arguments used by the banks against calls for a Royal Commission by the Australian Labor Party, the Greens, whistle-blowers and financial planning victims. Banks denied the wrongdoing and also

³⁸ Martin (2019); Jewkes (2015).

denied that a Royal Commission was necessary. These denials were supported by the conservative Australian Coalition government.

The government only called for a Royal Commission after receiving a letter to the Treasurer signed by the chairpersons and chief executives of the major banks ANZ, CBA, NAB and Westpac (the Big Four) calling for a ‘properly constituted inquiry’ into the financial services sector.³⁹ The letter by the Big Four was framed in terms consistent with those of the government, noting firstly that the sector had long campaigned against the need for a Royal Commission:

‘Our banks have consistently argued the view that further inquiries into the sector, including a Royal Commission, are unwarranted. They are costly and unnecessary distractions at a time when the financial sector faces significant challenges and disruption from technology and growing global macroeconomic uncertainty. However, it is now in the national interest for the political uncertainty to end.’⁴⁰

The Big Four stated, ‘it is hurting confidence in our financial services system, including in offshore markets, and has diminished trust and respect for our sector and people. It also risks undermining the critical perception that our banks are unquestionably strong.’⁴¹ The letter acknowledged:

³⁹ News.com.au, ‘Australia’s major banks call for ‘properly constituted inquiry’ into the financial services sector,’ <https://www.news.com.au/finance/business/banking/australias-major-banks-call-for-properly-constituted-inquiry-into-the-financial-services-sector/news-story/ebac85c6474c092e629744a31d22aa5a>, November 30 2017.

⁴⁰ News.com.au, ‘Australia’s major banks call for ‘properly constituted inquiry’ into the financial services sector,’ <https://www.news.com.au/finance/business/banking/australias-major-banks-call-for-properly-constituted-inquiry-into-the-financial-services-sector/news-story/ebac85c6474c092e629744a31d22aa5a>, November 30 2017.

⁴¹ News.com.au, ‘Australia’s major banks call for ‘properly constituted inquiry’ into the financial services sector,’ <https://www.news.com.au/finance/business/banking/australias-major-banks-call-for-properly-constituted-inquiry-into-the-financial-services-sector/news-story/ebac85c6474c092e629744a31d22aa5a>, November 30 2017.

‘We have not always got it right, and have made mistakes. Together with the Government and regulators, since 2014 we have been taking action to fix issues, and improve what we do and how we do it. We have collectively appeared before, or taken part in 51 substantial reviews, investigations and inquiries since the global financial crisis, 12 of which are ongoing. We continue to demonstrate our commitment to doing the right thing by our customers and seeking to ensure those genuinely affected by these mistakes are appropriately compensated.’⁴²

Even this recognition of past malfeasance was tempered. First, although the Big Four noted that they have ‘not always got it right’, they were careful to frame these as ‘mistakes’, rather than as anything more serious. Second, the Big Four asserted that the Royal Commission was unnecessary by highlighting the thorough and repetitive nature of ‘reviews, investigations and inquiries’ since 2014 (a form of implicative denial). The choice by the banks to call for a Royal Commission may have been influenced by the perception that the banks were powerful enough to control the information yielded from the Royal Commission and/or reflected a complete loss of contact with reality as to their legality and ethics after so many years of operating without constraint. As Klan and Butler write, ‘after opposing the idea for years, the banks called for the commission in November, believing it would act as a political circuit-breaker rather than uncovering serious misconduct.’⁴³

⁴² News.com.au, ‘Australia’s major banks call for ‘properly constituted inquiry’ into the financial services sector,’ <https://www.news.com.au/finance/business/banking/australias-major-banks-call-for-properly-constituted-inquiry-into-the-financial-services-sector/news-story/ebac85c6474c092e629744a31d22aa5a>, November 30 2017.

⁴³ The Australian, ‘We were wrong: Big Four chiefs,’ <https://www.theaustralian.com.au/business/banking-royal-commission-we-were-wrong-say-the-big-four-chiefs/news-story/51210b169a9d49c426d49ce547931b82>, April 21 2018.

The power of the banks was demonstrated in the capacity to dictate terms, including the radically short time period for the Royal Commission of only 12 months to complete its inquiry, with a final report to be delivered by February 1, 2019.⁴⁴

Literal Denial in Response to Royal Commission Findings Despite belated recognition by the banks that the Royal Commission was necessary, resulting in headlines such as ‘We were wrong: Big Four chiefs’,⁴⁵ the banks maintained literal denials in response to Royal Commission findings. An excellent example of a newspaper reporting such denial is the article ‘Big banks deny criminal conduct’.⁴⁶ The front page article contains the word ‘deny’ in its heading. Most of the paragraphs of the article begin with the reporting of denial, ‘National Australia Bank has hit back...’ (para 1), Banks ‘rejected the royal commission preliminary findings that they engaged in criminal conduct ...’ (para 2), ‘CBA denied ...’ (para 5), ‘It denied ...’ (para 6) etc. To avoid gross repetition, the authors of the article provided various similes for denial including ‘defended’, ‘rejected’, ‘failed’, ‘did not concede’, and ‘dismissed’. In total, 17 forms of denial are reported in a 640-word article with an example of each. It provides an ostensibly straightforward reporting of denial by the banks, but it also criticises the banks. For example, the article notes, ‘CBA added that Colonial First State’s executive general manager, Linda Elkins, did not concede its communications to advisers about its MySuper product were misleading, even though Ms

⁴⁴ ABC News, ‘Malcolm Turnbull backflips on banking royal commission after big four call for inquiry to restore public faith,’ <https://www.abc.net.au/news/2017-11-30/banking-royal-commission-announced-by-pm-after-big-four-letter/9209926>, 30 November 2017.

⁴⁵ The Australian, ‘We were wrong: Big Four chiefs,’ <https://www.theaustralian.com.au/business/banking-royal-commission-we-were-wrong-say-the-big-four-chiefs/news-story/51210b169a9d49c426d49ce547931b82>, April 21 2018.

⁴⁶ ‘Big banks deny criminal conduct,’ Sydney Morning Herald, September 2018, pp 1, 3.

Elkins appeared during the hearing to admit that some of its communications had been misleading.’⁴⁷ The denial is reported but immediately undermined within the same sentence.

Denial as a successful strategy prior to the Royal Commission The Royal Commission highlighted that literal denial had served as an effective strategy by the banks in response to malfeasance in the past. The banks had a practice of failing to inform regulators, despite this being in breach of statutory requirements. For example, in the article with the headline ‘CBA discovered to have kept information from ASIC’, not only had CBA kept information from ASIC in breach of statutory requirements, it had then contacted a client who was going to give evidence to the Royal Commission in an attempt to influence the client’s evidence.⁴⁸ CBA had also not communicated money-laundering suspicions to AUSTRAC, repeatedly breaching reporting and regulatory requirements.⁴⁹ Similarly, AMP did not accurately report fees for no service to ASIC, resulting in headlines in the *AFR*: ‘AMP admits lying to ASIC’.⁵⁰ According to *The Australian*, ‘AMP reported the breach to ASIC in May 2015, after publicity about ANZ perpetrating a similar scam. However, in its report it told the regulator a raft of falsehoods, including that none of the customers affected had paid for periodic reviews of their position, when in fact they had.’ The Head of AMP’s Financial Advice Division, agreed that ‘AMP’s claim to ASIC that the issue had first been identified a month earlier was

⁴⁷ Australian Financial Review, ‘Hayne Royal Commission: NAB staff took cash bribes to ‘smash targets,’ <https://www.afr.com/companies/financial-services/hayne-royal-commission-nab-staff-took-cash-bribes-to-smash-targets-20180312-h0xdfx>, 12 March 2018.

⁴⁸ Australian Financial Review, ‘Hayne Royal Commission: NAB staff took cash bribes to ‘smash targets,’ <https://www.afr.com/companies/financial-services/hayne-royal-commission-nab-staff-took-cash-bribes-to-smash-targets-20180312-h0xdfx>, 12 March 2018.

⁴⁹ ‘Australian Financial Review, ‘CBA “knew” of illegal activities,’ *Australian Financial Review*, 2018.

⁵⁰ Australian Financial Review, ‘Banking royal commission: AMP under attack,’ <https://www.afr.com/companies/financial-services/banking-royal-commission-amp-under-attack-20180416-h0y9th>, 16 April 2018.

“completely false”.⁵¹ The Royal Commission highlighted a successful history of literal denial of wrongdoing.

The banks then denied that they had poor or false procedures for reporting to regulators. For example, ‘CBA denied a range of legal breaches relating to its super business Colonial First State, including that it had potentially criminally violated the Corporations Act for tardy breach reporting.’⁵² CBA also stated that it was ‘not correct: that APRA had wanted it to transfer customers to MySuper earlier.’⁵³ NAB blamed the regulators:

‘He would have revealed the full extent of NAB’s fees-for-no-service issues if the regulator had asked “the right questions”. NAB said Mr Hagger had a “willingness to engage in proactive and transparent communications with the regulator.”’⁵⁴

Accordingly, the banks denied that they had previously denied wrongdoing. As the Royal Commission demonstrated, it is unsurprising that the banks adopted a practice of literal denial, as it had proven to be an effective strategy in their dealings (or lack thereof) with regulators. Although the original breaches *and* the failure to report those breaches is (potentially) criminal under the *Corporations Act*, literal denial was effective in keeping information from regulators that rely heavily upon voluntary compliance.

⁵¹ The Australian, ‘AMP admits to misleading ASIC 10 times,’ <https://www.theaustralian.com.au/business/financial-services/amp-admits-to-misleading-asic-10-times/news-story/9a43474bd076f0b2cc444f799d71f252>, 9 October 2019.

⁵² Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

⁵³ Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

⁵⁴ Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

Interpretive Denial

Whilst literal denial is a claim that allegations did not happen – interpretive and implicative denial are aimed at absolving responsibility, and reordering and recoding narratives. Cohen defines interpretive denial as giving a different meaning to an event than one which seems apparent to others. The fact is accepted but the meaning or conventional interpretation is contested; a different spin is given. This strategy is very common, and is an attempt to socially and morally frame an event or harm in such a way as to deny responsibility or culpability. Cohen asserts that interpretive denial relies on legalism and euphemism:

‘The function of euphemism labels and jargon is to mask, sanitise, and confer responsibility. Palliative terms deny or misrepresent cruelty or harm, giving them neutral or respectable status.’⁵⁵

Whilst literal denials can be undermined by pointing to facts, interpretive denials are more difficult. As Cohen asserts, ‘interpretive denials are not fully-fledged lies; they create an opaque moat between rhetoric and reality.’⁵⁶

In response to increasingly negative findings by the Royal Commission, the banks proffered a variety of interpretive denials. One form of denial drew upon legal technicalities and semantics, particularly in response to being labelled criminal. The aforementioned article, ‘Big banks deny criminal conduct’,⁵⁷ reports on a series of bank denials of criminality including interpretive denial. In that article, AMP argued that it is within its legal rights to charge dead people life insurance premiums and CommSec asserted that it ‘might be true in fact, but not in law’ that the insurance group ‘did not act in the utmost good faith’ with

⁵⁵ Cohen (2001), p 107.

⁵⁶ Cohen (2001), p 108.

⁵⁷ ‘Big banks deny criminal conduct,’ Sydney Morning Herald, September 2018, pp 1, 3.

customers. This amounted to admitting that the banks might have been unethical but their actions were not technically prohibited in criminal law. CommSec denied that its charging of financial advice fees to dead people amounted to a potentially criminal breach of the *Superannuation Industry (Supervision) Act 1993* (Cth), but did admit that this did constitute other breaches of the law. This is a particularly lovely example of a legalistic quibble – the bank had not committed the offence suggested by the Royal Commission but if it had committed an offence, it could be categorised as a different offence.

The banks' response to the accusation that they had charged fees for no service was to admit (reluctantly, belatedly and gradually) that it had occurred, but to argue that it was not 'criminal'. In fact, even the label 'fees for no service' is an example of the power to define and shape the law. This euphemistic label is a way of dressing up the idea that taking money for no service is essentially theft.⁵⁸ Even in the Final Report, rather than labelling it theft or fraud, Commissioner Kenneth Hayne downplayed its criminality stating, 'on its face, taking money for nothing is dishonest conduct.'⁵⁹ This downplaying of wrongdoing is consistent with Del Rosso's insights regarding 'magical legalism', that is, the renaming of harms using less potent terms. Del Rosso noted that torture deniers relabel interrogation as 'harsh' or 'coerced'.⁶⁰ Likewise, the banks were particularly concerned to disavow labels of criminality, rebutting with alacrity stories such as 'NAB may face 100 criminal charges'.⁶¹ This led to

⁵⁸ 'Four Corners Program - Money for Nothing,' <https://www.abc.net.au/4corners/money-for-nothing/10026944> 23 July 2018, 23 July 2018.

⁵⁹ 'Watchdog boss call for purge of bank executives,' Sydney Morning Herald, 2019; Under section 1041G of the *Corporations Act* it is a civil and criminal offence to a company to 'engage in dishonest conduct in relation to a financial product or financial service'. Post the Royal Commission the definition of 'dishonest' was changed to remove the subjective requirement that the 'person' must know that the conduct was dishonest. It is now sufficient that conduct is dishonest if it is 'dishonest according to the standards of ordinary people;' Section 9 *Corporations Act 2001* (Cth).

⁶⁰ Del Rosso (2018), p 53.

⁶¹ The Australian, 'Banks enjoy Hayne bounce,' <https://www.theaustralian.com.au/news/banking-royal-commission-banks-enjoy-posthayne-bounce-on-sharemarket/news-story/f87d5d0c95489cee56b55f578ed202d2>, 9 October 2018.

headlines such as ‘NAB Chief insists acts not a crime’: in which the NAB CEO Thorburn stated:

“‘We do not believe they are criminal acts,” Mr Thorburn said. “ASIC has made some claims against us that they suspect we have had some breaches and those are unresolved. They are suspected and not proven ... The point we are making is that we do not believe they are criminal breaches and we certainly do not believe they are criminal acts.””⁶²

Thorburn was prepared to admit that the behaviour of the bank had been dishonourable and unethical but not criminal. This is a form of neutralisation by corporations to use technical legal arguments to package, structure and define practices so that they can claim to fall on the right side of the boundary between lawfulness and illegality, even whilst breaching the spirit of the law.⁶³

A legal claim made to undermine the label of criminality was to argue lack of criminal intent. For example, ‘there was no evidence the bank had intended to break the law when it failed to report a breach within 10 days to the corporate regulator and so it could not be found guilty of any crime.’⁶⁴ NAB used the argument that fees for no service were not intentional but careless as a way to explain that they were neither criminal nor dishonest. Mr Thorburn conceded NAB had suffered from ‘carelessness’, ‘poor systems’, ‘competency issues’, and it had been too slow to fix problems.⁶⁵ But he stood firm in his view it had not been dishonest:

⁶² The Australian Financial Review, ‘NAB CEO Andrew Thorburn: ‘We do not believe they are criminal,’’ <https://www.afr.com/companies/financial-services/nab-ceo-andrew-thorburn-we-do-not-believe-they-are-criminal-20180809-h13rfr>, 9 October 2019.

⁶³ McBarnet (2006), p 1091.

⁶⁴ Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

⁶⁵ ‘Watchdog boss call for purge of bank executives,’ Sydney Morning Herald, 2019.

‘I was asked about dishonesty [at the commission in December], and to me, dishonesty is deliberately doing something you know to be wrong ... When we implemented fees-for-no service, we didn’t do that. We implemented something we thought was right, and it wasn’t implemented properly. So there’s carelessness, there’s poor systems, and there’s competency issues.’⁶⁶

The banks were willing to admit to ‘mistakes’ or ‘carelessness’ but not to criminality. They were assisted in these claims by the structures of criminal law. The dominant approach for ascribing criminal liability in Australia is identification theory, which holds a company liable only when a ‘directing mind’ has acted with requisite fault.⁶⁷ The larger the corporation, the more difficult it is to identify the directing mind *and* that the directing mind had the necessary *mens rea*. Entrenched ignorance or wilful blindness about malfeasance asserted by the banks in the Royal Commission may be a practical result of the diffusion of responsibility in large organisations and/or an entrenched ignorance by design in order to avoid culpability under existing criminal law doctrine.⁶⁸

The varied attempts by the banks to dispute the label ‘criminal’ highlight the power of the label. In the media, the criminal label is a clear communication of legal as well as moral wrongdoing.⁶⁹ In their denials of criminality the banks seek to shape and escape the expressive power and role of the criminal law.⁷⁰ The criminal law routinely classifies conduct, defines action, interprets events and evaluates worth. It then sanctions these judgments with the force and authority of law.⁷¹ The failure to label corporate wrongdoing

⁶⁶ ‘Watchdog boss call for purge of bank executives,’ Sydney Morning Herald, 2019.

⁶⁷ *Tesco v Nattrass* [1972] AC 153.

⁶⁸ Diamantis (2019), p 319.

⁶⁹ Hogg (2013), p 113.

⁷⁰ Gilchrist (2012), p 1.

⁷¹ Crofts (2013).

communicates a certain level of tolerance,⁷² and relegating corporate wrongdoing to the civil sphere suggests that banks can violate the law if they are willing to pay for it.⁷³ The banks proffered a myriad of interpretive denials in order to evade the legal and moral opprobrium of the label of ‘criminal’ and they were aided in these denials by the structure of the criminal law and its lack of enforcement.

Implicatory Denial

Implicatory denial involves an acceptance of a set of facts but the failure to recognise and acknowledge the significance of their implications. Implicatory denial does not refute the facts or their conventional meaning but denies, minimises or mutes the psychological, political or moral consequences. An *AFR* article about the Royal Commission neatly provides a summary of implicatory denial as an attempt to ‘contain the impact of the damaging revelations of the banking royal commission.’⁷⁴ Cohen argues that implicatory denial covers the multitude of vocabularies, justifications, rationalisations, and evasions that we use to deal with our awareness of so many images of suffering. Whilst we might know that something bad or wrong is happening, implicatory denial is the failure to incorporate or translate that knowledge or understanding into social or legal action. This form of denial provides a means of understanding public passivity in the face of knowledge which requires change, and has been applied powerfully to climate change.⁷⁵ Cohen describes three techniques of partial acknowledgment that simultaneously neutralise political and legal ramifications – spatial limits, temporal limits, and the argument that the harm has already been addressed. Del Rosso has argued that denial of responsibility and appeal to higher loyalties should be added to this

⁷² Kahan (1998), p 1621.

⁷³ Gilchrist (2012), p 1.

⁷⁴ Australian Financial Review, ‘AMP CEO Craig Meller apologies to advisers: ‘This isn’t the AMP you know,’ <https://www.afr.com/opinion/amp-ceo-craig-meller-apologies-to-advisers-this-isnt-the-amp-you-know-20180419-h0yzyt>, 9 October 2019.

⁷⁵ Norgaard (2011).

form of denial.⁷⁶ I add an additional form of implicatory denial – that the problem is too big to be addressed. These different ways of constructing implicatory denials will be considered in turn below.

Spatially and temporally limited The banks tended to combine spatial and temporal limits in their strategy of implicatory denial. Spatial limits were claimed by arguing that malfeasance was not systemic – but rather limited to a ‘bad apple’ or an individual executive’s failure.⁷⁷ In terms of moral panic theory, this approach is similar to the banks selecting their own folk devil, and attempting to restrict attributions of blameworthiness to a particular person rather than recognising broader institutional culpability.⁷⁸ This approach is aided by the tendency of the media to personalise reporting,⁷⁹ and to therefore individualize and simplify culpability.⁸⁰ This focus on individual culpability is reflected and reinforced by common law approaches to corporate crime that were constructed in the 19th century based on the classic legal subject. That is, the human being.⁸¹ The banks also combined spatial implicatory denial with assertions of temporal limits. This took the form of accepting that whilst the problem had existed in the past, it was no longer a problem that needed to be addressed in the present. As noted above, this was argued by the banks when denying that a Royal Commission was necessary. The banks accepted that they had made mistakes in the past but claimed that the problems had since been fixed.

The CBA was particularly effective in asserting spatial and temporal limits by blaming specific executives, who had since left CBA, for negative findings in the Royal Commission.

⁷⁶ Del Rosso (2018), p 53.

⁷⁷ For an analysis of the preference for a ‘bad apple’ over recognition of systemic criminality see Hamm (2007), p 259

⁷⁸ For an analysis of whether or not bankers can be folk devils see David et al (2011), p 215.

⁷⁹ Jewkes (2015).

⁸⁰ Greer (2005), pp 157-182.

⁸¹ Lacey (2001), p 350.

Under interrogation at the Royal Commission, CBA CEO Matt Comyn and CBA Chair Catherine Livingstone blamed previous management for CBA malfeasance. Although Comyn took personal responsibility for the failings of the CBA he then indicated blame lay on his former boss Ian Narev. In a phrase that was memorable and shocking, Comyn stated that when he had urged Narev to stop selling junk insurance policies, Narev had told him to ‘temper your sense of justice’.⁸² ‘We should have and we did not,’ Mr Comyn said of CBA’s failure to make changes when he was leading the retail bank. ‘We should not be having to be asked by a regulator to improve some of those under-lying controls.’ But he also said he warned predecessor Mr Narev three times about the products and the trouble they had caused banks in Britain, but no action was taken.⁸³ The media later reported under the headline, ‘Staff at CBA fired’, that the ‘Narev executive old guard’ had been fired⁸⁴ and another headline ‘CBA: no more heads will roll’.⁸⁵ These stories reported the bank argument that the bad apples had been rooted out and no more change was necessary. These assertions were not accepted fully by the media, one story pointing out that Comyn continued selling the products that he had expressed concerns about and refused to stop selling the products due to feared loss of profits.⁸⁶ The CBA effectively took advantage of the individualisation of responsibility within a corporate structure to dilute the implications of the findings of the Royal Commission. Specific individuals who had departed were held responsible, whilst the

⁸² Sydney Morning Herald, “‘Temper your sense of justice:’ How then-CBA chief Ian Narev shot down Comyn’s plan,” <https://www.smh.com.au/business/banking-and-finance/i-was-insufficiently-persuasive-comyn-s-attempt-to-stop-insurance-sales-rebuffed-by-then-cba-chief-20181120-p50h3c.html>, 12 November 2018.

⁸³ Australian Financial Review, ‘CBA chief first to face public flogging,’ <https://www.theaustralian.com.au/business/cba-chief-matt-comyn-first-to-face-royal-commission-public-flogging/news-story/0180a088bfe4e6503242113c2bd2020c>, 9 October 2019.

⁸⁴ ‘New CBA Chief Executive Purge of the Narev Executive Old Guard,’ *Australian Financial Review*, 27 March 2018.

⁸⁵ Australian Financial Review, ‘Battered CBA leadership pushes back on sacking calls,’ <https://www.afr.com/companies/financial-services/battered-cba-leadership-pushes-back-on-sacking-calls-20180501-h0zhyi>, 1 May 2018.

⁸⁶ Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

remaining staff were not, even though they had been employed and involved in the malfeasance, simply because at the time of the malfeasance they had been lower down the hierarchy.

Already been addressed and a belated but unreserved apology The argument that any malfeasance by banks was in the past and had already been addressed was considered above in the category of literal denial. Banks combined the different forms of denial: asserting a denial that any wrongdoing had occurred; if it was established that it had occurred, that it was not as bad as seemed; and, even if it was bad, the problem had been addressed in the past and no longer required any action. This strategy also tended to be accompanied by belated but heartfelt apologies. There were abject apologies from the banks, including from the CBA CEO Comyn who conceded there had been a string of cultural failings within the country's biggest bank, which he said had been too 'complacent', 'legalistic', 'defensive', and 'insular'.⁸⁷ This is almost a summary of the different techniques of denial and neutralisation.

The Banking Royal Commission led to reluctant and tardy apologies by (some) officials, but these apologies did not appear to be accompanied by a commitment to change and were carefully framed to avoid any criminal legal responsibility. The offer of a late but unreserved apology for malfeasance which occurred in the past is consistent with the theorist Torpey's arguments that rather than organise to change we now 'organise to mourn'.⁸⁸ Theorists regard the 21st century as a culture of regret in which governments have turned away from focusing on future policy to address the errors of the past.⁸⁹ Veitch has also noted a recent habit by politicians of empty apologies, accepting full responsibility as a way of denying

⁸⁷ 'CBA: We put profits ahead of people,' *Sydney Morning Herald*, 2018.

⁸⁸ Torpey (2003), pp 1-34.

⁸⁹ Olick (2007).

responsibility for future action.⁹⁰ The banks apologised for past wrongs but made no effort to change. This approach was greeted with some skepticism, for example, in the Final Report. Hayne stated ‘saying sorry and promising not to do it again has not prevented recurrence.’⁹¹ The offer of abject apologies is itself a form of implicatory denial, attempting to placate critics by apologising in the absence of translating this into real action.

Whilst abject apologies were not regarded by the Royal Commission as sufficient, the failure to acknowledge and apologise for wrongdoing was greeted very critically. Hayne was particularly scathing of NAB and its bosses – stating that there is a ‘wide gap between the public face the NAB seeks to show and what it does in practice.’⁹² Hayne was not sure the CEO Andrew Thorburn and chairman Ken Henry had ‘learned lessons’.⁹³ Unlike the other banks, the CEO and chairman had not accepted their wrongdoing. The scathing assessment by Hayne in the Final Report on NAB resulted in the resignation of both men, reported with headlines such as ‘Arrogance sinks fortune of Henry and Thorburn’.⁹⁴ The reporting here is reminiscent of studies of hamartia (fatal flaw) in Shakespearean tragedies:

‘Arrogance and an unwillingness to take the bank’s misconduct seriously: these were the fatal flaws that set NAB on a pathway that seems likely to claim the jobs of its chairman, Ken Henry, and chief executive, Andrew Thorburn.’⁹⁵

⁹⁰ Veitch (2007).

⁹¹ Royal Commission (2019).

⁹² The Sydney Morning Herald, ‘Hayne unleashes on NAB boss and chairman’ <https://www.smh.com.au/business/banking-and-finance/hayne-unleashes-on-nab-boss-and-chairman-20190204-p50vmy.html>, 4 February 2019.

⁹³ The Sydney Morning Herald, ‘Hayne unleashes on NAB boss and chairman’ <https://www.smh.com.au/business/banking-and-finance/hayne-unleashes-on-nab-boss-and-chairman-20190204-p50vmy.html>, 4 February 2019.

⁹⁴ The Australian, ‘Banks enjoy Hayne bounce,’ <https://www.theaustralian.com.au/news/banking-royal-commission-banks-enjoy-posthayne-bounce-on-sharemarket/news-story/f87d5d0c95489cee56b55f578ed202d2>, 9 October 2018.

⁹⁵ The Australian, ‘Banks enjoy Hayne bounce,’ <https://www.theaustralian.com.au/news/banking-royal-commission-banks-enjoy-posthayne-bounce-on-sharemarket/news-story/f87d5d0c95489cee56b55f578ed202d2>, 9 October 2018.

This once again reflects a tendency by the banks, which is then reported in the media, supported by structures of criminal law, to defer to the tactic of individualising and personalise organisational malfeasance.

Denial of responsibility The banks adopted another strategy of implicative denial which was the disavowal of responsibility. One form that this took was to argue that the laws are too complicated and that there are too many of them. This is a common corporate strategy of condemning the law itself, claiming that it is unfair, unnecessary, inflexible, unsuited to modern conditions and too complicated.⁹⁶ For example, the CEO of NAB argued:

‘We didn’t pick things up quickly enough, we didn’t remediate quickly enough. It isn’t because we wanted to be slow. I just think that the complexity of all these cases and the systems and controls that we have make it difficult for us to go fast, but I think we need to improve in these areas.’⁹⁷

This argument of lack of legal responsibility is also linked to the interpretive argument that behaviour was accidental and lacked criminal intention.

Another strategy of denial of responsibility was to argue that all the other banks were also engaging in the same form of wrongdoing. This contextualises the behaviour by the bank as a normal industry practice and is powerful because it invokes ‘normal cultural practice’ as a justification for malfeasance. These claims are powerful because corporations have a social credibility that ‘common’ criminals usually do not have.⁹⁸ If everyone is doing it then how

⁹⁶ Box (1983); Whyte (2016), p 165.

⁹⁷ ‘CBA: We put profits ahead of people,’ *Sydney Morning Herald*, 2018.

⁹⁸ Whyte (2016), p 165.

can it be criminal? For example, the CBA had conveyed concerns to ASIC about mortgage brokers selling loans in 2016:

‘We did a five-year longitudinal study for them [ASIC] which showed that broker incentives were demonstrably leading to poor consumer outcomes, Mr Comyn wrote to former chief executive Narev last year. Yet the commission heard that despite extensive preparations for a move to a flat fee model, CBA chose not to reform mortgage broker commissions because it thought that no other banks would follow the move and that it would lose business as a result.’⁹⁹

The selling of these commissions was in breach of the bank’s duty of care to its customers, but the bank continued sell them in order to maintain profits. Paradoxically, in light of arguments of over regulation, Comyn then argued that this area needed to be more regulated, otherwise consumers would continue to be disadvantaged.

Higher loyalty An additional form of implicatory denial is that of an appeal to a higher loyalty. With regard to the Banking Royal Commission, this involved an appeal to the higher loyalty to the stability and strength of the Australian economy, which was in turn supported and asserted by the Federal Government. Arguments about protecting the economy were made when asserting that there was no need for a Royal Commission, for example (then Treasurer) Scott Morrison stated:

⁹⁹ ‘CBA: We put profits ahead of people,’ *Sydney Morning Herald*, 2018.

‘There is nothing more than crass populism seeking to undermine confidence in the banking financial system, which is key to jobs and growth in this country.’¹⁰⁰

Arguments to protect the Australian economy were made again when the banks called for a Royal Commission. The responses of (then) Treasurer Morrison to negative findings by the Royal Commission reflect an ongoing concern to protect the economy. Morrison stated in April 2018:

‘Despite the very disturbing and, indeed shocking revelations we have seen in the Royal Commission these issues, while as abhorrent as they are, are completely separate from any question about the stability and strength of Australia’s banking and financial system.’ The banking sector was ‘rock solid’ – the Royal Commission was investigating ‘behaviour and culture – which are things we as a government have been seeking to address now for some time.’¹⁰¹

Morrison was thus sustaining his concerns for the Australian economy but had finally been persuaded that there were negative cultural issues in the Australian banking and financial system. Just prior to the release of the Final Report of the Banking Royal Commission, media reported its potential negative economic impacts, relying heavily on the government for these arguments. For example, now Prime Minister Scott Morrison said the economy faced ‘significant consequences’ if the banking royal commission triggered a credit crunch and

¹⁰⁰ Sydney Morning Herald, ‘Scott Morrison slams banking royal commission proposal as nothing more than a ‘populist whinge’<https://www.smh.com.au/politics/federal/scott-morrison-slams-banking-royal-commission-proposal-as-nothing-more-than-a-populist-whinge-20160807-gqms5y.html>, 9 October 2019.

¹⁰¹ Sydney Morning Herald, ‘How Scott Morrison changed his tune on the banking royal commission,’ <https://www.smh.com.au/politics/federal/how-scott-morrison-changed-his-tune-on-the-banking-royal-commission-20180420-p4zaoa.html>, 9 October 2019.

warned that an election contest over which party is tougher on the beleaguered financial services industry risked undermining the system.¹⁰² Morrison's assertions about the findings of the Royal Commission sought to ensure economic viability whilst also engaging in some strange interpretive denial. 'What the royal commission has so far discovered is what they call non-financial misconduct,' Mr Morrison said. 'So there are no issues with the stability of the system, but there are real issues with their conduct and I totally understand that. But we have got to be careful. Be careful what you wish for.' The Prime Minister would then go to the May election framing Opposition Leader Bill Shorten as a risk to the economy.¹⁰³

This argument contained two forms of denial. First, interpretive denial created a category of 'non-financial misconduct' to trivialise the wrongdoing unearthed by the Banking Royal Commission. Then, second, implicatory denial made open-ended threats about the potential negative impacts to the economy if the Royal Commission's recommendations were too radical – 'be careful what you wish for'. These concerns about the stability of the economy reflect the argument by Levi who noted that key state actors managed the problem of white-collar crime with various techniques to calm factors that stoke 'counter-productive' reactions which might harm 'the economy'.¹⁰⁴ The claims by corporations that they are socially beneficial, indeed 'essential' to society and the economy, mark them as a different category of offender from common criminals.

Too big to be fixed The Banking Royal Commission shed uncomfortable light on the structures of the banks. One question raised by the Royal Commission is whether it is possible for the banks to act in a way which is not amoral or criminal, a question that has

¹⁰² Sydney Morning Herald, 'PM urges caution on bank reform,' <https://www.smh.com.au/politics/federal/scott-morrison-warns-against-rash-response-to-banking-royal-commission-20190130-p50uo1.html>, 9 October 2019

¹⁰³ Sydney Morning Herald, 'PM urges caution on bank reform,' <https://www.smh.com.au/politics/federal/scott-morrison-warns-against-rash-response-to-banking-royal-commission-20190130-p50uo1.html>, 9 October 2019.

¹⁰⁴ Levi (2006), p 1037.

been asked about corporations as a whole by theorists.¹⁰⁵ The Royal Commission was critical of the motive of greed, resulting in many front page news reports on the subject: ‘Bank greed “criminal”’,¹⁰⁶ ““Day of Shame for the banks” about bank culture of greed and weak corporate cops’,¹⁰⁷ ‘Hayne critical of the pursuit of short-term profit at the expense of basic standards of honesty’,¹⁰⁸ and ‘The Hayne royal commission has blasted the banking sector as being driven by greed and dishonesty and policed by an ineffective watchdog sparking calls for immediate reform.’¹⁰⁹ However, the notion that banks are motivated by profit (and greed) is not surprising (although see Sorrell for a contra argument¹¹⁰). Although Commissioner Hayne was critical of the banks’ short-term pursuit of profit over the interests of customers and compliance with the law, executives can, and have, pointed to a fiduciary duty to shareholders to justify corporate crimes and malfeasance that enhance the corporation’s market position and profitability.¹¹¹

Arguably the widespread perception of banks as greedy existed before the Royal Commission. This is epitomised by the ‘Mr Money Bags’ cartoon of a banker running away with money.¹¹² Hostility towards the banks is regarded as a truism – for example, this first sentence of a *Forbes* magazine article: ‘Banks are easy to hate, but they remain the largest and most powerful companies on earth.’¹¹³ This shows the ambiguity in portrayals of banks –

¹⁰⁵ Tombs and Whyte (2015).

¹⁰⁶ ‘Bank greed “criminal,”’ *The Australian*, 2019.

¹⁰⁷ ‘A day of shame for banks,’ *Herald Sun*, September 29, 2018.

¹⁰⁸ *The Australian*, ‘Banks enjoy Hayne bounce,’ <https://www.theaustralian.com.au/news/banking-royal-commission-banks-enjoy-posthayne-bounce-on-sharemarket/news-story/f87d5d0c95489cee56b55f578ed202d2>, 9 October 2018.

¹⁰⁹ *Sydney Morning Herald*, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

¹¹⁰ Sorrell (2018), pp 20-36.

¹¹¹ Hiller (2013), p 287; Whyte (2016), p 165; Tombs and Whyte (2015).

¹¹² ABC News, ‘Moneybags,’ <https://www.abc.net.au/news/2016-04-19/moneybags/7340138>, 9 October 2019.

¹¹³ *Forbes*, ‘2015 Global 2000: The World’s Largest Banks,’ <https://www.forbes.com/sites/liyanchen/2015/05/06/2015-global-2000-the-worlds-largest-banks/#c9c36097960f>, May 6 2018; ‘Stop being bastards’: how the royal commission could reform banks,’ <https://www.smh.com.au/business/banking-and-finance/stop-being-bastards-how-the-royal-commission-could-reform-banks-20180921-p50577.html>, 9 October 2019.

however much banks might be loathed, they are powerful and society is dependent upon them. In addition, our expectations of banks are fairly low. We expect banks to be profit driven. This is demonstrated by the response to the *Sydney Morning Herald* front page headline ‘CBA admits to putting profits over customers in historic grilling,’¹¹⁴ which resulted in a letter to the editor sarcastically stating:

‘I was stunned to read your headline (“CBA: We put profits ahead of people,” November 20). Looking forward to tomorrow’s: “Scientists discover that the sun rises in the east”.’¹¹⁵

Similarly, the former chairperson of the Australian Competition and Consumer Commission received a front-page headline for telling bank executives who asked him how to improve their image to simply ‘stop being bastards’.¹¹⁶

There is a perception that capitalism and profit culture is inevitable and impossible to change.¹¹⁷ It is assumed that banking malfeasance and criminality is embedded in legitimate market practices and processes which are assumed to provide an essential foundation of economic life.¹¹⁸ We have banks that are not only too big to fail,¹¹⁹ but too big to be held accountable.¹²⁰ Banks and diversified financials dominate the *Forbes* Global 2000 list of the

¹¹⁴ Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

¹¹⁵ Sydney Morning Herald, ‘CBA admits to putting profits over customers in historic grilling,’ <https://www.smh.com.au/business/banking-and-finance/cba-admits-to-putting-profits-over-customers-in-historic-grilling-20181119-p50h00.html>, 19 November 2018.

¹¹⁶ ‘Stop being bastards’: how the royal commission could reform banks,’ <https://www.smh.com.au/business/banking-and-finance/stop-being-bastards-how-the-royal-commission-could-reform-banks-20180921-p50577.html>, 9 October 2019.

¹¹⁷ Miller (2018), pp 248-269.

¹¹⁸ Hogg (2013), pp 113-131.

¹¹⁹ The idea that institutions are ‘too big to fail’ was demonstrated in the GFC. This was an answer by Attorney-General Eric Holder to the Senate Judiciary Committee; The New York Times, ‘Realities Behind Prosecuting Big Banks,’ <https://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/>, 9 October 2019.

¹²⁰ Miller (2018), p 248.

world's largest, most powerful companies as measured by a composite score of revenues, profits, assets and market value.¹²¹ Australian banks, which are underwritten by the taxpayer, are among the most profitable in the world and those who run them are among the highest-paid employees in the land.¹²² There is a complexity and ambivalence here. It is difficult to imagine alternatives and meanwhile the banks are offering powerful counter narratives excusing, justifying and denying wrongdoing. Our very way of living is imbricated with the current system. There is some ambivalence about the banks – we need them to fulfil our aspirations, and yet we loathe their profit motives, even whilst we ourselves are trying to succeed materialistically. On this account, whilst the Royal Commission has highlighted systemic malfeasance and criminality by the banks, there is a failure of imagination in terms of conceptualising an alternative way of organising legal attributions of organisational culpability and finance (and society), and of imagining an alternative economic system.¹²³

Conclusion

A wealth of excellent literature explores the difficulties the criminal legal system has in grappling with corporate responsibility.¹²⁴ One of the explanations for this is the power of corporations to influence government and regulators to reflect their interests and thus fail to acknowledge and address their actions and omissions as criminal.¹²⁵ This article has contributed to this literature by pointing to the various narratives proffered by banks in

¹²¹ Forbes, '2015 Global 2000: The World's Largest Banks,' <https://www.forbes.com/sites/liyanchen/2015/05/06/2015-global-2000-the-worlds-largest-banks/#c9c36097960f>, May 6 2018; Sydney Morning Herald, 'Stop being bastards': how the royal commission could reform banks,' <https://www.smh.com.au/business/banking-and-finance/stop-being-bastards-how-the-royal-commission-could-reform-banks-20180921-p50577.html>, 9 October 2019.

¹²² ABC News, 'A royal commission into banks could restore our faith,' how the royal commission could reform banks,' : <https://www.abc.net.au/news/2016-04-11/verrender-a-royal-commission-into-banks-could-restore-our-faith/7314842>, 9 October 2019

¹²³ Fisher (2010).

¹²⁴ Fisse and Braithwaite (1993); Gilchrist (2012), pp 1-56; Gunningham (1987), p 59; Wells (2014), p 505.

¹²⁵ Dempsey and Sorrell (2018), p 7.

response to findings by the Banking Royal Commission of malfeasance, malpractice, unethical and criminal behaviour. The banks initially denied the need for a Royal Commission and denied any wrongdoing. The Royal Commission showed that the literal denial of wrongdoing had been an effective strategy by the banks in the past in their relations with regulators. In the face of evidence of wrongdoing, the banks then offered interpretive denials in the form of legalisms and euphemisms, specifically aimed at evading and disavowing criminal culpability. This was supplemented with denials and neutralisations to minimise and reduce the implications of the findings of the Royal Commission. The banks used strategies of spatial and temporal restrictions, proffered abject apologies, asserted a lack of responsibility and pointed to the higher loyalty of the Australian economy in an attempt to avoid any real legislative and enforcement action in response to their ongoing systemic wrongdoing. This article provides insight into the ways in which powerful institutions and individuals (attempt to) intervene, construct and support moral and legal codes. Presumably, much of the lobbying by large institutions to regulators and law makers occurs out of the public eye. Media reporting of banking responses to the Royal Commission provides an example of the types of narratives proffered by powerful institutions (in an attempt) to shape legal and regulatory frameworks to their benefit.

Funding

This work was supported by the Australian Research Council (DE18010057).

Acknowledgments

Many thanks to Benjamin Koh, Tracey Booth and David Carter for their insightful comments. Thank you also to Louisa Luong for her excellent research assistance.

References

PRIMARY LEGAL SOURCES

Corporations Act 2001 (Cth)

Superannuation Industry (Supervision) Act 1993 (Cth)

Tesco v Nattrass [1972] AC 153.

SECONDARY SOURCES

JOURNAL ARTICLES

Sasha Costanza-Chock (2016) 'PageOneX: New Approaches to Newspaper Front Page Analysis,' 10 *International Journal of Communication* 2318-2345.

Mathew David et al (2011) 'The Idea of Moral Panic - Ten Dimensions of Dispute' (2011) 7(3) *Crime Media Culture* 215

Jared Del Rosso (2018) "'It's own kind of torture": Denial, acknowledgment, and the debate about force feeding at Guantanamo Bay' 33 *Sociological Forum* 53-72.

James Dempsey (2018) 'Banking Culture and Moral Responsibility for the Financial Crisis' 42(1) *Midwest Studies in Philosophy: Moral Responsibility and the Financial Crisis* 73-94.

James Dempsey and Tom Sorrell (2018) 'Introduction' 42(1) *Midwest Studies in Philosophy: Moral Responsibility and the Financial Crisis* 7-20.

Mihailis Diamantis (2019) 'Functional Corporate Knowledge' 61 *William and Mary Law Review* 319

Graham Ellison (2017) ‘Criminalizing the payment for sex in Northern Ireland: Sketching the Contours of a Moral Panic’ 57 *British Journal of Criminology* 194-214.

David Garland (2008) ‘On the concept of moral panic’4 *Crime Media Culture* 9-30.

Gregory Gilchrist (2012) ‘The expressive cost of corporate immunity’64 *Hastings Law Journal* 1–56.

Neil Gunningham (1987) ‘Negotiated non-compliance: A case study of regulatory failure’ 9 *Law and Policy* 59–67.

John Hamm (2007) “High Crimes and Misdemeanours”: George W. Bush and the Sins of Abu Ghraib” 3(3) *Crime Media Culture* 259

Janine S Hiller (2013) ‘The Benefit Corporation and Corporate Social Responsibility’ 118(2) *Journal of Business Ethics* 287

Russell Hogg (2013) ‘View of Populism, Law and order, and the crimes of the 1%’ 2 *International Journal for Crime, Justice and Social Democracy* 113–131.

Dan Kahan (1998) ‘The anatomy of disgust in criminal law’96 *Michigan Law Review* 1621–1657.

Nicola Lacey (2001) ‘In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory’ 64 *Modern Law Review* 350

Michael Levi (2006) ‘The media construction of financial white-collar crimes’ 46 *British Journal of Criminology* 1037–1057

Doreen McBarnet (2006) ‘After Enron Will “Whiter than White Collar Crime” Still Wash?’ 46 *British Journal of Criminology* 1091

Seamus Miller (2018) ‘The corruption of financial benchmarks: individual and collective responsibility in the global banking sector: Moral responsibility and the financial crisis’ 42(1) *Midwest Studies in Philosophy: Moral Responsibility and the Financial Crisis* 248–269.

Michael Pusey and Marion McCutcheon (2010) 'The Concentration of Media Ownership in Australia – from the media moguls to the money men?' *Record of Communications Policy and Research Forum* 211-225.

Steve Rayner (2012) 'Uncomfortable knowledge: the social construction of ignorance in science and environmental policy discourses' 31 *Economy and Society* 107–125.

Clayton Rose and Aldington Sesia (2013) 'Barclays and the LIBOR Scandal,' *Harvard Business School Case Collection*

Tom Sorrell (2018) 'Responsibility in the Financial Crisis' 41(1) *Midwest Studies in Philosophy: Moral Responsibility and the Financial Crisis* 20-36.

Graham Sykes and David Matza (1957) 'Techniques of Neutralization: A Theory of Delinquency' 22 *American Sociological Review* 664

Scott Veitch (2009) 'Book Symposium: Author's responses to the commentators' 34 *Australian Journal of Legal Philosophy* 248-256

David Whyte (2016) 'It's Common Sense, Stupid! Corporate Crime and Techniques of Neutralization in the Automobile Industry' 66(2) *Crime, Law and Social Change* 165

Dwayne Winseck (2008) 'The State of Media Ownership and Media Markets: Competition or Concentration and Why Should We Care?' 2 *Sociology Compass* 34

Dwayne Winseck (2008) 'The state of media ownership and media markets: Competition or concentration and why should we care?' 2 *Sociology Compass* 34-47

BOOKS AND BOOK CHAPTERS

Stuart Allan (2009) *The Routledge Companion to News and Journalism*, Routledge.

Joel Bakan, (2004) *The Corporation: The Pathological Pursuit of Profit and Power*, Simon and Schuster.

Michael L Benson et al (2016) 'Core Themes in the Study of White-Collar Crime' in *The Oxford Handbook of White-Collar Crime*, Oxford University Press.

Steven Box (1983) *Power, Crime and Mystification*, Sage.

Franke Clarke, Graeme Dean, K.G. Oliver (2003) *Corporate Collapse: Accounting, Regulatory and Ethical Failure*, Cambridge University Press.

Stanely Cohen (2001) *States of denial: knowing about atrocities and suffering*, Polity.

Stanely Cohen (2002), *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, Routledge.

James R. Compton (2009) *Newspapers, Labor and the Flux of Economic Uncertainty*.
Routledge.

Penny Crofts (2013) *Wickedness and Crime*, Routledge.

Brent Fisse and John Braithwaite (1993) *Corporations, Crime and Accountability*, Cambridge University Press.

Chris Greer (2005) 'Crime and Media: Understanding the Connections' in C Hale et al (eds) *Criminology*, Oxford University Press.

Chris Greer (2010) 'News media criminology', in E. McLaughlin and T. Newburn (eds) *The Sage Handbook of Criminological Theory*, Sage.

Yvonne Jewkes (2015) *Media and Crime (3rd Edition)*, Sage.

Paul Krugman (2009) *The return of depression economics and the crisis of 2008*, W.W. Norton and Company Inc.

Paul MacAvoy and Ira Millstein (2004) *The recurrent crisis in corporate governance*, Stanford University Press.

Greg Martin (2019) *Crime, media and culture*, Routledge.

Kari Marie Norgaard (2011) *Living in Denial: Climate Change, Emotions, and Everyday Life*, MIT Press.

Jeffery Olick (2007) *The Politics of Regret: On Collective Memory and Historical Responsibility*, Routledge.

Edwin Sutherland (1949) *White Collar Crime*, Dryden.

Steve Tombs and David Whyte (2015) *The Corporate Criminal: Why corporations must be abolished*, Taylor and Francis.

John Torpey (2003), 'Introduction: Politics and the Past' in J. Torpey (ed) *Politics and the Past: On repairing historical injustices*, Rowman and Littlefield.

Scott Veitch (2007) *Law and Irresponsibility: On the Legitimation of Human Suffering*, Routledge.

Michael Welch (2006) *September 11th: Hate Crimes and State Crimes in the War on Terror*, Rutgers University Press.

Michael Welch (2007) 'Moral Panic, Denial and Human Rights: Scanning the Spectrum from Overreaction to Underreaction' in D Downes et al (eds) *Crime, Social Control and Human Rights: From Moral Panic to States of Denial. Essays in Honour of Stanley Cohen*, Willan.

Celia Wells (2014) 'Corporate Responsibility and Compliance Programs in the United Kingdom' in Stefano Manacorda et al (eds) *Preventing Corporate Corruption: The Anti Bribery Compliance Model*, Springer.

REPORTS

Financial Services Royal Commission (2019a) *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - Volume 1*, <https://treasury.gov.au/sites/default/files/2019-03/fsrc-volume1.pdf>

Financial Services Royal Commission (2019b), *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - Volume 2: Case Studies*, <https://treasury.gov.au/sites/default/files/2019-03/fsrc-volume-2.pdf>