Rowena Orr exposes Ken Henry at Banks RC

Summary:
Well, well, well - another great bank warrior ... Rowena Orr QC - has had her hands full today at the Royal Commission. She has been dissecting an insider. Ken Henry made it very clear that he doesn't appreciate being questioned. Rowena Orr was not copping the attitude. Here are some key points from James Thomson.

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Banking royal commission puts NAB chairman Ken Henry in the middle of fee scandal

NAB chairman Ken Henry got to have his say at the royal commission on Monday, answering the questions of senior counsel Rowena Orr QC in a way that no one else has done and delivering several lectures on banking and corporate governance.

On Tuesday, it was Orr's turn. As soon as the morning's hearing opened, she took Henry to NAB's fee-for-no-service scandal and made it clear who'd be in control of this portion of evidence.

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It seemed to take Henry a few moments to understand that the dynamic had changed.

Asked whether he'd seen the first document of the day, Henry said he couldn't honestly say he had.

"It doesn't matter really, does it?" he said, before looking up at Orr and hastily adding.

"Maybe it does."

The letter was written by ASIC to NAB in June 2015, after the first problems of fees-for-no-service emerged in NAB's wealth business, MLC.

ASIC told NAB to look at the "licensees that form part of the NAB Group which provide personal financial advice to retail clients to ascertain whether there are issues relating to incorrect charging of advice fees".

Henry wasn't NAB chairman at that time, but he was chairman of the risk committee, which had set itself the high hurdle that NAB had "no appetite for non-compliance with legislation in the jurisdictions in which it operates or the voluntary codes it subscribes".

It wasn't meeting that hurdle then, and it isn't meeting it now. As Henry explained on Monday, there has only been one month during his time as a director, dating back to 2011, that the board's rating for compliance risk hasn't been red (using the traffic light system).

Did Henry, as chairman of the risk committee, find that situation acceptable?

"Well, you know the answer to that question. No. You know I didn't regard it as acceptable and it's reflected in the minutes," Henry replied with clear – and frankly unwarranted – frustration in his voice.

In August 2015, the NAB board received a "summary of material regulatory engagement" that informed directors for the first time of ASIC's concerns about the adviser fee matter.

"In your view did this document sufficiently impress on the board the seriousness of these events relating to adviser service fees and the engagement with ASIC?" Orr asked.

"I would say not," Henry replied.

Another report to the risk committee from the chief risk officer was similarly light on detail – nothing on possible laws being breached, nothing on rectification or investigations, nothing on where the problem was going.

The risk committee meeting minutes suggest the issue wasn't discussed and the committee members didn't ask any questions.

So what should the board have done differently, Orr asked.

Henry said he'd thought long and hard about this but the answer wasn't clear.

"Honestly, I'm not sure exactly what [the board could have done] and when. My feeling is, though…I wish that we had said to management…'Enough is enough. Forget about negotiating with ASIC. Just do it (get on with remediation).'"

Orr had another suggestion as to what the board and Henry's risk committee could have done.

"Can I suggest to you firstly that both the board and the risk committee…should have asked for more information about these problems, the causes of these problems, and what was being done to fix these problems?"

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"Fine," Henry said, his reading-the-room radar still not switched on.

"Well, do you agree with that, Dr Henry?"

"I can understand your view, certainly, in retrospect, and I wish we had. Yes, I do wish we had."

"So you agree that that should have been done?"

"Yes, I do."

Orr asked if today's reports from the chief risk officer's reports had improved.

Henry suggested the question was "hypothetical" was quickly reassured it wasn't.

"Because you still receive those regulatory reports on a monthly basis," Orr pointed out. "But you cannot say to the Commission that this sort of problem with inadequacy of information has been fixed in those reports?"

"I certainly hope it has been fixed, but, you know, there is always a risk that issues are not being elevated to the board at the appropriate time and in the appropriate form," Henry said. "There is always that risk, of course."

Commissioner Ken Hayne then took what Henry admitted was NAB's "habit – and it is a habit" of negotiating outcomes with ASIC rather than just getting on with putting customers right.

Henry agreed, but said another way to speed remediation would be for the bank to fund customers to take it to court under the sort of test case model used by the Commissioner of Taxation.

Orr sprung the trap.

"Why should it come to that, Dr Henry, if management and the board are doing their job, why should you need someone to sue NAB so you can sort these things out?" she asked

"Okay," Henry replied. "So the question is the law sufficiently clear that anybody can come to that view. That's the question. Who knows."

Hayne broke it down even further. If someone goes wrong, doesn't it need to be fixed?

"It seems simple when you say it," Henry replied, slipping back into deep-thinker mode. "Pretty challenging, really, for boards. It is pretty challenging."

Why? Because the board's view of the right answer to what went wrong – which would be informed by all the people it has working in risk, compliance and legal – might be different to ASIC's.

Henry's fear is that NAB's way of fixing a problem might not be enough to stop ASIC taking action down the track. He even suggested the commission could find a way to help the banking sector be somehow protected from retrospective disputes with corporate regulator over remediation roll-outs.

It was hard not to find Henry's views contradictory.

While he agreed that NAB shouldn't be negotiating with ASIC in drawn out legal warfare, he also made it clear that that is exactly this legal warfare that the board fears most, to the point it has considered funding test cases from its own customers.

Someone needs to be prepared to break this vicious cycle, surely.

We wanted this fixed. We were fed up'

UPDATE from SMH's Sarah Danckert

Rowena Orr is now asking about what the NAB board did or said when the bank's argument with ASIC reached its third year and it was still quibbling over which customers to compensate for being charged fees for services they did not receive.

Dr Henry outlines he was "pretty upset".

"We wanted this fixed. We were fed up, both with the damage that had been done to the relationship with the regulator and, of course .. that customer - customer remediation had been deferred for as long as it had been deferred," he said.

Here's an edited version of the exchange. It gets a bit tough towards the end.

Orr: "Well, why didn't the board step in earlier to ensure that that was done?"

Henry: "Yes. I've already answered that he request and I .. And I don't know the answer to that question. You know, at some point, obviously, we should have. Maybe 2015, maybe 2016, maybe 2017. Certainly by this year, 2018, certainly at this point - okay, did - did I use the words "enough is enough", I don't know. I may have. I was certainly pretty upset .. It was inconsistent - quite inconsistent with the discussions that we had been having with management about the purpose of the organisation, the vision of the organisation, the values of the organisation, appropriate behaviours in the organisation. Of course we were upset."

Orr: "Do you accept that the board should have stepped in earlier?"

Henry: "I wish we had, let me put it that way. I wish we had - I still don't know."

Orr: "I would like you to answer my question, Dr Henry. Do you accept that the board should have stepped in earlier?"

Henry: "I have answered the question how I can answer the question."

Orr: "I'm sorry, is it a yes or a no, Dr Henry?"

Henry: "I've answered the question the way I choose to answer the question."

Orr: "Well, I would like you to answer my question. Do you accept that the board should have stepped in earlier?"

Henry: "I wish we had."

Orr: "I'm going to take that as a yes, Dr Henry?"

Henry: "Well, you take that as a yes, all right."

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